



THE DISCIPLINARY BOARD OF THE INTERNATIONAL CRIMINAL COURT

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Date: 09 July 2010

Before:

Ms Aïcha CONDE, Chair

Mr Jose-Maria Davó-Fernandez, alternate member

Mr Mwanza Mbiya, ad hoc member

Case of The Registrar v. Mr Hervé Diakiese

Public Document

Decision of the Disciplinary Board

Counsel for Mr Hervé DIAKIESE

Mr MABANGA MONGA MABANGA

Commissioner:

Mr Nigel Hampton

1. The Disciplinary Board of the International Criminal Court (the Board) hereby issues the following decision in the case of *The Registrar v. Mr Hervé Diakiese*, further to the complaint filed on 3 June 2009 by the Registrar.

Factual and procedural background:

2. On 10 January 2007, Mr Hervé Diakiese, lawyer before the Matadi Court of Appeal in the Democratic Republic of the Congo, applied for inclusion on the List of Counsel at the International Criminal Court, having completed and transmitted to the Registry of the Court a form by which he undertook, inter alia, to inform the Court of any change in relation to his situation. On 20 February 2007, Mr Hervé Diakiese was included on the List of Counsel.

3. On 20 February 2007, Mr Hervé Diakiese was appointed to act as legal representative of the victims in the proceedings between the Prosecutor and Thomas Lubanga Dyilo and Germain Katanga and Mathieu Ngudjolo Chui.

4. On 19 June 2008, Mr Hervé Diakiese gave the solemn undertaking pursuant to article 5 of the Code of Professional Conduct for counsel.

5. On 28 September 2008, the Matadi Bar Council, sitting as a disciplinary body, suspended Mr Diakiese for one year; that decision was upheld on appeal by the National Bar Council of the DRC on 17 February 2009.

6. By letter dated 23 February 2009, the Registrar of the International Criminal Court was informed by the National President of the Bar Associations of the Democratic Republic of the Congo that, in a decision dated 27 September 2008, the Matadi Bar Council had imposed, by way of disciplinary sanction, a one-year suspension, which was upheld by the National Bar Council of the Democratic Republic of the Congo on 17 February 2009.

7. By letter dated 3 June 2009, the Registrar of the International Criminal Court, acting pursuant to article 34(4) of the Code of Professional Conduct for counsel (the Code) submitted a complaint against Mr Hervé Diakiese to Mr Nigel Hampton in his capacity as Disciplinary Commissioner.

8. In that complaint, the Registrar considered that the fact that Mr Hervé Diakiese had not immediately informed her of the disciplinary sanction imposed on him by the Matadi Bar Council, and upheld by the National Bar Council of the Democratic Republic of the Congo, constituted misconduct within the meaning of article 31(a) of the Code.

9. Mr Nigel Hampton submitted his report on 18 August 2009.

10. In his report, he stated that the matter should be referred to the Disciplinary Board pursuant to article 41 of the Code, in order to determine whether Mr Diakiese had committed misconduct within the terms of article 31(a) by violating regulation 69(3) of the Regulations of the Court and/or by breaching an undertaking he had given to the Court.

11. Such were the circumstances of the referral of the matter to the Disciplinary Board, which decided to summon Mr Diakiese to appear before it at a hearing held on 12 March 2010.

12. According to the summons, Mr Hervé Diakiese is accused of having violated the provisions of regulation 69(3) of the Regulations of the Court by having failed (whether intentionally or not) to immediately inform the Registrar of the Court of a change to the information that he had previously provided, namely that he had never been the subject of a disciplinary sanction by the bar associations to which he belongs or by the supervisory administrative body under whose authority he falls, whereas on 27 September 2008 he had been suspended for one year by the Matadi Bar Council, which suspension was upheld on appeal by the National Bar Council of the Democratic Republic of the Congo.

And/or

13. Of having committed misconduct, as defined in article 31(a) of the Code of Professional Conduct for counsel, by breaching his undertaking to the Registrar on 10 January 2007 that he would inform the Court in the event of a change in his circumstances, in that he had failed to inform the Registrar that on 27 September 2008 he had been suspended from practice for one year by the Matadi Bar Council, thereby violating articles 5, 24(1) and 24(3) of the Code.

14. Mr Ghislain MABANGA, Counsel for Monsieur Hervé Diakiese, filed his submissions on 1 February 2010.

Parties' submissions:

15. As Commissioner, Mr Nigel Hampton first emphasises that the Board is not convened as, or sitting as, a superior appellate tribunal, to oversee and pass judgment upon the rights and wrongs of the decisions of the Matadi Bar Council or the National Bar Council of the DRC.

16. He recalls that an essential prerequisite for inclusion on the List of Counsel is to be the holder of a valid “domestic” practising certificate, failing which a person would not be included on the list.

17. He states that to determine an appropriate sanction, such sanction must:

- a) hold Mr Diakiese accountable for his misconduct;
- b) properly denounce, publicly, his conduct;
- c) deter him from like conduct in the future and, by the example made, deter others;
- d) prevent recurrence by him of any further misconduct by incapacitating him, i.e. by suspending him, so that he has pause to reflect on what he has done;
- e) if possible, also assist in his rehabilitation and redemption.

18. With respect to Mr Diakiese’s claim that these proceedings are a nullity, the Commissioner states that the allegations are clear and unequivocal. There is no scope for confusion. They concern an allegation of misconduct based on a failure to inform the Registrar of disciplinary proceedings initiated against him and his suspension, in breach of both regulation 69(3) and his undertaking to inform the Registrar of any change in his circumstances, amounting to two separate transgressions.

19. As regards the “and/or” formula, the Commissioner states that both sets of particulars have been established, the conjunctions “and/or” giving the Board the option to find that both sets of particulars have been proven but to determine that the first set is the most significant breach and choose to just act on that. Accordingly, there is no duplicate allegation of misconduct but just a single instance of misconduct supported by two sets of particulars.

20. The misapprehension argued by Mr Diakiese in his submissions is contradicted by the fact that in his letter of 19 March 2009 (exhibit A 3), he claimed that he intended to inform the

Registrar upon completion of the appeal that he had entered against the decision of his bar association, once a final decision had been issued in his case.

21. As regards the argument raised by Mr Diakiese concerning the fact that the Registrar did not strike him from the List of Counsel despite his suspension, the Commissioner emphasises that article 39(8) of the Code provides for this option only in exceptional cases, where the alleged misconduct is of such a nature as to seriously prejudice the interests of justice.

22. Lastly, the Commissioner points out that the Board was not established and empowered to regulate and standardise disciplinary procedures, standards and sanctions around the world.

23. Accordingly, the Commissioner requests a one-year suspension from practice to be imposed on Mr Diakiese.

24. Mr Diakiese first contends that the summons is null as it would violate the rights of the defence since “[TRANSLATION] The Commissioner’s simultaneous use of the conjunctions *and* and *or* obfuscates the wording of the allegations against Mr Diakiese, thereby preventing him from organising his defence. Therefore, in relying, as regards the same offences, on purported breaches of a number of regulatory provisions solely on account of the applicant’s failure to inform the Registrar of the existence of disciplinary proceedings against him, the document initiating the procedure becomes so unclear as to necessarily violate the rights of the defence.”

25. In the event that his claim of nullity does not succeed, he states that he must respond before the Board to a single allegation, namely a breach of the obligation to inform under regulation 69(3) of the Regulations of the Court, on the ground that the other provisions referred to in the summons are only of a general nature and not applicable in this case by virtue of the principle derived from the maxim *specialis generalibus derogant*.

26. In his submissions, he concedes that he failed to meet his obligation to inform under regulation 69(3) of the Regulations of the Court. In his view, that omission was due to a mistake on his part, since he erroneously believed that only criminal proceedings had to be brought to the Registrar’s attention. He further admits that such a breach constitutes misconduct within the meaning of article 31(a) of the Code of Professional Conduct for counsel.

27. However, he considers that based on the principle of proportionality, which requires a sanction to accord with the seriousness of the misconduct alleged against counsel, such a breach ought not to incur a major sanction. That in the instant case, the Registrar did not consider this breach sufficiently serious, since she did not strike him off the List of Counsel. Nor did the Disciplinary Commissioner consider it necessary to request the Court to temporarily suspend him, as he is entitled to do under article 39(4) of the Code. He further contends that the Board should refuse to endorse arbitrary conduct. Through its decisions, the Board encourages the various bar associations and professional bodies represented at the Court to standardise their respective disciplinary regimes so that all counsel receive equal treatment.

28. Mr Diakiese therefore requests the Board to impose on him a sanction of admonishment.

Analysis and conclusions

Mr Diakiese's claim that these proceedings are a nullity:

29. The Board is not bound by any national laws. It must take into account the various applicable legal systems, provided that they accord with the general principles of law, a fair determination of the case and the rights of the defence.

30. As stated by the Commissioner at the hearing,¹ in the Common Law system to which he belongs, he may legitimately put forward two proposals, leaving it to the Board to accept both offences, to accept one and dismiss the other or to dismiss them both.

31. The Board notes that Mr Diakiese had no difficulty in understanding the allegations against him and responding thereto, as evidenced by the submissions filed by his Counsel, particularly at paragraph 23.

32. Therefore, Mr Diakiese does not have good cause for arguing that, in using both conjunctions *and* and *or*, the Commissioner obfuscated the wording of the allegations against him, thereby violating the rights of the defence.

33. The Board considers the impugned wording to be clear and unambiguous and that there was no resulting violation of the rights of the defence. It considers that use of the conjunctions

¹ Transcript of the hearing of 12 March 2010, page 9.

“and” and “or” simply means that the allegations against Mr Diakiese are alternative or cumulative.

34. Accordingly, the Board unanimously rejects the claim of nullity raised by Mr Diakiese as without merit.

The obligation to inform Mr Diakiese of his rights at the time of the investigation:

35. In his observations in response to Mr Diakiese’s submissions, the Commissioner states that the letter of 19 March 2009 (exhibit A 3) contradicts his argument that it was only upon receiving the Registrar’s letter of 13 March 2009 that he learned of his suspension.

36. The Board unanimously considers that it cannot base its decision on Mr Diakiese’s letter to the Registrar of 19 March 2009, in which he explained the background to the allegations against him.

37. Article 40(1) and (2) of the Code on the rights of counsel subject to disciplinary procedure provides that counsel may be assisted by other counsel and that he or she has the right to remain silent. Yet, nothing in proceedings establishes that he was duly informed that the explanations that he was to provide could subsequently be used against him.

38. However, the Board notes that at the hearing Mr Diakiese explained himself on this point and provided clarification. Thus, he maintained that, upon receipt of the Registrar’s letter of 13 March 2009, he learned that the National Bar Council of the DRC had upheld the sanction imposed on him by the Matadi Bar Council,² while at the same time stating that he went to his Bar Association for notification of the decision against him in order to appeal.³ However, the decision of the Matadi Bar Council was issued on 27 September 2008, while that of the National Bar Council of the DRC was issued on 17 February 2009.

39. Mr Diakiese therefore has no basis for claiming that it was only upon receiving the Registrar’s letter that he learned of his suspension, since he was notified in person of the decision of the Matadi Bar Council, which he subsequently appealed.

² Transcript of the hearing of 12 March 2010, page 12.

³ Transcript of the hearing of 12 March 2010, page 12.

40. At the hearing, Mr Diakiese also conceded that decisions of the Bar Council were enforceable notwithstanding any appeal.⁴ Thus, as of notification of the decision of 27 September 2008, Mr Diakiese could not have been unaware that he was prohibited from practising and had the duty to inform the Registry of the change in his circumstances.

Do the alleged offences constitute misconduct?

41. Before taking office, counsel gives the following solemn undertaking set out in article 5 of the Code: “I solemnly declare that I will perform my duties and exercise my mission before the International Criminal Court with integrity and diligence, honourably, freely, independently, expeditiously and conscientiously, and that I will scrupulously respect professional secrecy and the other duties imposed by the Code of Professional Conduct for Counsel before the International Criminal Court”.

42. Under article 31(a) of the Code: “Counsel commits misconduct when he or she violates or attempts to violate any provisions of this Code, the Statute, the Rules of Procedure and Evidence and the Regulations of the Court or of the Registry in force imposing a substantial ethical or professional duty on him or her”.

43. Under regulation 69(3) of the Regulations of the Court: “A person referred to in sub-regulation 1 or counsel already included in the List of Counsel shall immediately inform the Registrar of any changes to the information he or she has provided that are more than *de minimis*, including the initiation of any criminal or disciplinary proceedings against the person.”

44. It is apparent from the material in the case file that on 28 September 2008 the Matadi Bar Council, sitting as a disciplinary body, suspended Mr Diakiese for one year, a decision which was enforceable notwithstanding any appeal and was upheld on appeal by the National Bar Council of the DRC on 17 February 2009.

45. It is not disputed that Mr Diakiese failed to inform the Registrar of that sanction and that it was only through the letter of 23 February 2009 from the National President of the Bar Associations of the Democratic Republic of the Congo that the Registrar was informed of Mr Diakiese’s suspension.

⁴ Transcript of the hearing of 12 March 2010, page 10.

46. Mr Diakiese maintains that he misunderstood the nature of his obligations, erroneously believing that only criminal proceedings had to be brought to the Registrar's attention.

47. The Board finds this explanation unacceptable. Mr Diakiese is an experienced lawyer with over ten years of practice. He could not be unaware of the fact that, to practise before the International Criminal Court, counsel must be admitted to practise in his or her own country. Yet, he continued to practise before the International Criminal Court, despite being suspended and without informing the Registrar of the sanction imposed on him. The argument based on ignorance of the texts in force is all the more unacceptable in that it was for Mr Diakiese to familiarise himself with the extent of his obligations, at latest at the time of his appointment as legal representative of the victims.

48. Accordingly, the Board unanimously finds that Mr Diakiese has committed misconduct by failing to provide information to the Registrar, on the proceedings initiated against and subsequent sanctions imposed on him. Moreover, Mr Diakiese expressly acknowledged in his submissions the truth of the facts alleged against him. Thus, at paragraph 23 of his submissions, he states: "[TRANSLATION] Mr Diakiese has therefore admitted that he failed in his obligation to inform under regulation 69(3) of the Regulations of the Court. This breach does indeed constitute misconduct within the meaning of article 31(a) of the Code of Professional Conduct for counsel."

The nature of the sanction:

49. The Board considers the facts alleged against Mr Diakiese to be sufficiently serious to justify the imposition of a sanction on him.

50. In giving the solemn undertaking, Mr Diakiese undertook to scrupulously respect professional secrecy and the other duties imposed by the Code of Professional Conduct for counsel before the International Criminal Court. By signing the application for inclusion on the List of Counsel, Mr Diakiese undertook, inter alia, to inform the Court of any change in his situation.

51. Mr Diakiese has failed to comply with any of his undertakings.

52. The Board unanimously decides to impose a public reprimand, to be entered in counsel's personal file.

FOR THESE REASONS:

53. Having deliberated, the Board unanimously decides to impose the following sanction on Mr Diakiese: a public reprimand, to be entered in counsel's personal file.

Aïcha Condé

Jose Maria Fernandez

Mwanza Mbiya