

1 International Criminal Court

2 Pre-Trial Courtroom 1

3 Disciplinary Organ - Disciplinary Board

4 President of the Disciplinary Board, Aicha Condé,

5 Alternate Member Jose-Maria Davó Fernandez,

6 Ad Hoc Member Mwanza Mbiya

7 Commissioner Nigel Hampton

8 In the matter of Complaint 01/09 -

9 The Registrar v Hervé Diakiese

10 Friday, 12 March 2010

11 (The hearing commences at 1:32 p.m.)

12 PRESIDENT CONDÉ: (Interpretation) Good morning, everybody.

13 Thank you very much for having made yourself available to having  
14 joined us today. The Disciplinary Commissioner heads -- within  
15 the framework of Mr Diakiese. This has been referred to us.

16 Is that your name, sir?

17 MR DIAKIESE: (Interpretation) Perfectly.

18 PRESIDENT CONDÉ: (Interpretation) So, we are now in the  
19 presence of Mr Nigel Hampton, who is for the committee in this  
20 case, decided on the hearing for this day from 29 January with  
21 ruling with regards to an application made by the Prosecutor  
22 against you -- and you. It has been said that you did not  
23 inform the Registrar -- and I'm talking too fast -- of the  
24 disciplinary sanctions that were made against you which were  
25 confirmed in April.

1        So, the facts are as follows. I'm going to go quite  
2 quickly through because everybody does have these remarks before  
3 them; we don't have to repeat everything. In January 2007, you  
4 asked to be registered on the list. This registration was  
5 carried out in February 2007. Afterwards, you were made a  
6 representative of victims, and it would appear that it is your  
7 council who informed the Registrar of this, and without this  
8 information he would not have known that you were subject to  
9 disciplinary proceedings. So he seized the commissioner, who  
10 considered that the case should be followed, and it is said that  
11 you deliberately did not -- or, did not inform the Registrar of  
12 the Court with regards to the change in your situation or having  
13 broken the oath which you took, which was to keep the Court  
14 informed of any change in your situation.

15        Your counsel answered within the time frame, and there were  
16 two arguments, the first argument with regards to the nullity of  
17 the proceedings and irregularity of them, which comes from  
18 confusion of the citation, but when you make your arguments, you  
19 don't develop this.

20        So, I would like to ask your counsel to tell us how this  
21 citation would be regular and should be therefore declared null  
22 and void, and also whilst supporting the regularity with regards  
23 to the grounds that there was confusion and that you didn't --  
24 or that you weren't able to understand what you were accused of.  
25 You would be -- we would have to be very clear with regards to

1 what we're going to discuss today, and there'll be three  
2 different levels of answers in this regard to say what the most  
3 appropriate sanction would be.

4 We are therefore going to hear Mr Nigel Hampton for his  
5 observations and afterwards I am going to give the floor to  
6 Mr Davó-Fernandez in his capacity as former chairman of the Bar,  
7 to be able to ask questions with a view to clarification to the  
8 persons concerned. Thank you very much.

9 Mr Nigel.

10 MR HAMPTON: Madam Chair, thank you. Madam President and  
11 members, we are breaking new ground today in terms of this  
12 hearing and in terms of the Disciplinary Board, and I'm acutely  
13 aware of that and I hope not to sound in any way presumptuous or  
14 arrogant in the remarks I make because I want to take this Board  
15 to some fundamental matters that I submit are appropriately  
16 raised in any disciplinary forum.

17 I address those fundamental things about this particular  
18 case and I'll touch on the nullity items as well and about  
19 general principles under four headings. And I hope not to take  
20 very long.

21 First is the role of this Board; second is the claim that  
22 the proceedings are a nullity; third, is there in fact  
23 misconduct here; and fourthly, the question of sanction.

24 First then the role of the Board, and I should say I've  
25 provided -- I made some notes yesterday that the -- Ms Hamzic

1 kindly had engrossed for me, or typed for me, and I think they  
2 are with the translators so they are warned in advance, I think,  
3 of what I'm to say.

4       The role of the Board: First, then, this Board is not  
5 convened as, or sitting as, some superior appellate tribunal to  
6 oversee and give some judgment on the rights and wrongs of the  
7 decisions of the Matadi - Matadi, I'm not sure I pronounce it  
8 right - Matadi Bar Association Council or the National Bar  
9 Association Council of the DRC. This Board is not established  
10 and empowered to somehow regulate and standardise disciplinary  
11 procedures, standards and sanctions around the world, and so my  
12 learned friend, when he mentions the Parisian lawyer's case in a  
13 footnote to, and indeed an annexure to his submissions, I  
14 suggest that that case is entirely irrelevant to your  
15 considerations.

16       Irrelevant as well is what is in Mr Mabanga's argument,  
17 namely, that this argument can and should go behind, as it were,  
18 the suspension of one year imposed on the -- imposed by the  
19 Matadi Bar and upheld by the national Bar and see those  
20 decisions as (a) flawed, and (b) somewhat too harsh.

21       The short point I submit too is that this Board cannot go  
22 behind those decisions. This is not a forum for that. And, of  
23 course, you receive only one view in any event of what has taken  
24 place, and that is Mr Diakiese's. Likewise, it's wrong, I  
25 submit, for Mr Diakiese to come along and say, in effect, that

1 he thought the decisions -- he thought himself that the  
2 decisions were flawed and were wrong, and he would have  
3 notified - and I add, I suggest, a somewhat skeptic comment  
4 myself, perhaps he would have notified - the ICC Registrar once  
5 the appeals were over and he had matters sorted out. Yet that  
6 is what he tends to indicate in his two letters that are of  
7 significance: one, the letter to the Registrar which is Exhibit  
8 A3; the second, the letter to myself as the commissioner,  
9 Exhibit D.

10 As an aside, I add that the claim of his that he would have  
11 eventually told the Registrar does not sit well, I submit, with  
12 his other claim that he somehow mistook his obligations and he  
13 thought that he only had to report to the Registrar if criminal  
14 proceedings were taken against him. They don't quite sit very  
15 well together. Either he thought he had to report, or he was  
16 going to wait. If he thought he didn't have to report on  
17 disciplinary proceedings, only had to report on criminal  
18 proceedings, why then would he say that he was going to wait  
19 until the end of the domestic disciplinary proceedings and  
20 appeals?

21 It is not for counsel, I submit, subjectively to say that  
22 the domestic, and I mean that the Matadi Bar and then the  
23 national Bar, disciplinary bodies got things wrong and so he did  
24 not have to report it. It's not for counsel to be judged in  
25 their own courts. Objective standards are required and that's

1    what this case is all about, I suggest. And what is really  
2    important and I think is at the heart of this is that it is for  
3    a fully-informed Registrar of the International Criminal Court  
4    to decide who should be, or should be retained, on the list of  
5    counsel. And I stress the words "fully informed". And that was  
6    the obligation that Mr Diakiese failed here.

7           So, secondly, the claim that these proceedings are a  
8    nullity, I suggest they are not. I submit that as a general  
9    principle it ill-behoves a lawyer the subject of professional  
10   disciplinary proceedings to try and call in aid fine pleading  
11   points. At issue must always be whether the lawyer has  
12   transgressed proper standards. Such proceedings as these are,  
13   are not in the nature of a criminal trial, they are an inquiry  
14   into conduct.

15          In any event, I submit that the allegations here are quite  
16   clear and unequivocal and not confusing. They're easily able to  
17   be pleaded to and there is no scope for confusion, in my  
18   submission.

19          There is one allegation of misconduct and it is supported  
20   by two sets of particulars. In failing to inform the Registrar  
21   of the ICC of the disciplinary proceedings which had been taken  
22   against him and then his suspension for one year, Mr. Diakiese  
23   clearly breached the provisions of Regulation 69(3) of the  
24   regulations of the Court and, as well, his undertaking to inform  
25   of any change in his circumstances, his oath to do so.

1       That failure to inform results therefore, in my submission,  
2 in two separate transgressions.

3       As to the "and/or" complained of by Mr Diakiese's counsel,  
4 well, it's over -- it was pleaded in that way to leave it over  
5 to the Board. The Board could find, as I suggest have been  
6 established, both sets of particulars, but could take the view  
7 merciful, if you wanted to, that the first set, the breach of  
8 Regulation 69, is the most serious and the most fundamental.  
9 It's the regulations of this Court and all lawyers that go on  
10 the list, in effect, sign up to understand and obey those  
11 regulations.

12       They are not true alternatives; I suggest they are both  
13 discrete transgressions. Both would support a charge of  
14 misconduct.

15       I note that there seems to be no difficulty in Mr Diakiese  
16 understanding his transgression or in pleading to it, and one  
17 only has to look at his letters - and I won't go to the detail;  
18 you've seen them - his letters first to the Registrar are  
19 Exhibit A3 and then to me, Exhibit D, it's quite clear that he  
20 knew -- he understood now what he had failed to do.

21       And his counsel, when we get to it at paragraph 23 of his  
22 observations, seems to be -- seems not to have any great  
23 difficulty in pleading -- in understanding and pleading to what  
24 it is. When you look at paragraph 23, it's quite clear that  
25 there's an admission of the failure and his duty to inform under

1 69(3), and goes on to say that naturally that misconduct - and  
2 he uses the term "misconduct" - constitutes a disciplinary  
3 offence within the meaning of 31(a) of the Code. So it doesn't  
4 seem to be, in my respectful submission to this Board, any  
5 confusion there and any difficulty as to pleading.

6 The third heading then: "Is this Misconduct?" with a  
7 question mark after it. Prima facie, it is. One only needs to  
8 look at 69(3) of the Regulations and then Article 31(a) of the  
9 Code. And I suggest and go on to say that factually, this is a  
10 significant and a serious matter, and that's why the report has  
11 been made by the Commissioner to this Board, and in that regard  
12 I ask you to look at the report of the Commissioner from paras  
13 24 to 28 in particular, that summarise the Commissioner's view  
14 of it. I don't -- I won't refer to or read from them but there,  
15 again, I know that you will have seen them and seen those  
16 paragraphs of the report.

17 What I suggest is that an essential prerequisite for a  
18 lawyer to be put on the ICC list of counsel is for that person  
19 to be the holder of a valid domestic - whatever Bar he or she is  
20 a member of - a domestic practicing certificate, as well as a  
21 certificate of good standing with that domestic Bar. They are  
22 preliminary matters. They are essential matters before someone  
23 is admitted to the list. The obverse of that, I suggest,  
24 self-evident, is that if counsel applying to be put on the list  
25 was under suspension from his or her own Bar, then he or she



1 would be -- I was going say it would be impossible for that  
2 person to be put on the list; it would be highly unlikely. I  
3 would suggest it's higher than that, it's impossible. They  
4 wouldn't meet the qualifying criteria.

5 And that, I suggest, is one of the reasons for the  
6 existence of the provisions that are in Regulation 69(3) and,  
7 again, the reason for the existence of that oath or undertaking  
8 that counsel take. If the status and the standing of counsel on  
9 the ICC list changes with his or her domestic Bar, then the ICC  
10 Registrar should be told, and that comes to that fully-informed  
11 point that I came to earlier. It is the duty of any counsel on  
12 the list to keep the Registrar fully informed of the position if  
13 any disciplinary proceedings are taken against him or her. It  
14 maintains -- it enables the Registrar to maintain the integrity  
15 of that list of counsel. Otherwise, how can she?

16 We are an honourable profession. We expect our members to  
17 obey the regulations that apply to them, to know those  
18 regulations and obey them, and to fulfil the duty that they owe  
19 to others such as the Registrar. We expect them to act  
20 honourably.

21 Mr Diakiese claims a misunderstanding by him which again,  
22 as I say, doesn't fit well with his alternative claim that he  
23 would have told the Registrar once his appeals were over. But  
24 he's a lawyer - or he was at the time of his being put on the  
25 list - a lawyer of some ten years' standing, and he had an

1 obligation, as I've already said, a duty to know and obey the  
2 regulations and his undertaking.

3       So I say that is his failing. That, I suggest, is serious.  
4 It goes to the heart of the right of counsel to be on the list  
5 and to appear in the ICC. And it is, I suggest, a breach of  
6 trust by counsel.

7       The fourth heading then, and I won't weary you longer,  
8 Sanction: It may well be that Mr Diakiese was fortunate that  
9 the Registrar didn't there and then remove him from the list,  
10 and you'll have seen the Registrar's letter, Exhibit A4, where  
11 she goes through the various reasons why she might or might not  
12 remove him from the list. I suggest she acted in a quite  
13 lenient way.

14       My friend makes a point about -- my learned friend makes a  
15 point about that and about the fact that I, as Commissioner, did  
16 not apply for temporary suspension. I gave some thought to that  
17 but, in the circumstances, the Registrar having taken the steps  
18 she had, I took the view that it was not necessary or  
19 appropriate to apply, and particularly when one refers to the  
20 terms of Article 39(8) which I suggest sets a very high  
21 threshold for such an application. Its terminology in the  
22 English certainly would indicate a high threshold of "... in  
23 exceptional cases where the alleged misconduct is of such a  
24 nature as to seriously prejudice the interests of justice." And  
25 that to me seemed to be a very high standard indeed and might

1 indicate only the most urgent of matters, and exceptional  
2 matters might qualify.

3 The Board has a difficult task as to sanction. You, I  
4 suggest, decide -- must decide amongst yourselves how much trust  
5 can be reposed now in Mr Diakiese as a result of his failures.  
6 It's an invidious task that you have. It's a fine balancing  
7 exercise.

8 And can I suggest from my perspective three -- five guiding  
9 principles for use in assessing and in weighing penalty or  
10 sanction and in coming to what might be an appropriate sanction.

11 Such a sanction must, I suggest, first hold the lawyer  
12 here, Mr Diakiese, accountable for his misconduct. So,  
13 accountability.

14 Secondly, it's that sanction should properly denounce,  
15 publicly, his conduct. So, accountability; secondly,  
16 denunciation.

17 Thirdly, it should deter him from like conduct in the  
18 future and, by the example made of him, deter others from  
19 similar behaviour. Others need to know that breaches of their  
20 obligations to the Registrar will not be countenanced, will not  
21 be allowed. So, accountability, denunciation, deterrence, both  
22 specific and general.

23 Fourthly, to prevent recurrence by Mr Diakiese of any  
24 further misconduct by incapacitating him; that is, by what I  
25 suggest might be seen as appropriate here, suspending him for a

1 short time so he might reflect on what he has done and;

2 Fifthly, if possible, also assisting in his rehabilitation,  
3 redemption, keeping him involved in the Bar.

4 So, those are the five, I suggest, guiding principles that  
5 might, it's my submission anyway, that might assist you in  
6 determining sanction. And having gone through that process and  
7 having stood back from it, if you thought it appropriate - and,  
8 again, I don't try to be presumptuous here - I suggest that a  
9 comparatively short term of suspension under Article 42(1)(d)  
10 would achieve all those principles and objectives that I have  
11 spoken of.

12 So, those are my remarks. Thank you, Madam President and  
13 members of the Board. I would answer any questions or queries  
14 that you might have at this stage or subsequent, whatever best  
15 suits.

16 PRESIDENT CONDÉ: (Interpretation) Thank you very much.

17 Mr Fernandez, I would like to give you the floor.

18 MR DAVÓ-FERNANDEZ: (Interpretation) Thank you, Chair.

19 (In English) Mr Hampton, I would like just to clarify, if  
20 possible, when you wrote in your report at point 28, you wrote  
21 "and/or". So I presume you did it according to your own  
22 knowledge of the law or the procedural law. And I would like to  
23 clarify whether does it mean an alternative, that is to say  
24 either the conduct, the misconduct that you are showing there,  
25 is either one or the other? Or does it mean then on top of that

1 maybe another possibility, and it's both of them at the same  
2 time?

3 MR HAMPTON: It may be a difference in terms of the way we  
4 plead things in different jurisdictions, sir. And the English  
5 Common Law, rightly or wrongly, has a habit of saying "and/or,"  
6 saying that, as I attempted to say here, that both propositions  
7 are made out and both can stand together. He has failed with  
8 both. Alternatively, if you were of a mind to just treat one as  
9 being more significant than the other, then you could put the  
10 second one aside. That's all I was saying, really, sir. And  
11 it's out of an abundance of a pleader's caution, bad habits  
12 learned 45 years ago, I suppose, sir.

13 MR DAVÓ-FERNANDEZ: Thank you very much. (Interpretation)  
14 Thank you, Madam President. No further questions.

15 MR HAMPTON: Thank you, sir.

16 MS CONDÉ: (Interpretation) The Chairman of the Bar  
17 reminded me that, Mr Diakiese, you have the right to remain  
18 silent. As mentioned on this citation, you can exercise that  
19 right or not, but we do have a certain number of questions which  
20 we would like to put to you, and you will appreciate the  
21 position which is adopted.

22 MR DAVÓ-FERNANDEZ: (Interpretation) Thank you, President.

23 In your opinion, the sanction which has been put by the Bar  
24 in Matadi, is that directly executable; that is to say, was it  
25 not necessary to wait for the result of the appeal that you had

1 put before the National Council, or not?

2 MR. DIAKIESE: (Interpretation) Thank you very much, your  
3 Honour. Effectively, the disciplinary procedure in the Congo,  
4 in a regular procedure of a decision which is issued by the  
5 *conseil de l'ordre* which is executable, *nonobstant tout recours*.

6 Now, the context in which I was prosecuted is -- or,  
7 basically, I never appeared before the *conseil de l'ordre*. The  
8 *conseil* wanted an application and I was already before the  
9 National Council which had notified to my counsel that at the  
10 time when they had envisaged that I would be heard, I had  
11 already been asked to be at the seat of the *conseil de l'ordre*,  
12 which was at 360 metres (sic) from my local Bar seat. And  
13 despite this decision, my local Bar sanctioned me by default,  
14 and I never appeared before the bar in Matadi.

15 Now, I had to appeal this decision before the national  
16 *conseil de l'ordre* because it was, in my opinion, a flagrant  
17 violation of the decision of the *conseil de l'ordre*.

18 PRESIDENT CONDÉ: (Interpretation) Excuse me, you haven't  
19 replied to the question. The question was very clear: Was it  
20 suspensive or not? That's something you didn't reply to.

21 MR DIAKIESE: (Interpretation) Your Honour, I did say that  
22 a decision issued in disciplinary matters is not suspensive.

23 MR DAVÓ-FERNANDEZ: (Interpretation) Thank you. So they  
24 spoke about the National Council, Congolese council, which made  
25 the notification to the Registrar of this Court. So, when --

1 when did they know that you were authorised to act here before  
2 the Court, the International Criminal Court?

3 MR. DIAKIESE: (Interpretation) Thank you very much,  
4 firstly for me to be admitted to the list of counsel for the  
5 International Criminal Court. I addressed myself to the local  
6 Bar in order to have a certificate of good conduct from the  
7 chairman of the Bar. Now, at the time of the proceedings which  
8 were initiated against myself, I highlighted my position of  
9 counsel at the International Criminal Court even when I  
10 exercised all my functions before the National Council, and I  
11 also stated that I was a counsel registered with the  
12 International Criminal Court. And I suppose that this  
13 application does figure in the dossier with this clarification.  
14 I've never tried to hide this element.

15 Furthermore, the members of the Disciplinary Committee,  
16 furthermore, when a confirmation of this decision was notified,  
17 then it was not only notified to myself, it came to the  
18 International Criminal Court, and that's why I knew that the  
19 *conseil de l'ordre* had confirmed the decision of the *conseil de*  
20 *l'ordre* of Matadi. It was, in fact, the Registrar that informed  
21 me that there was a decision, and I also responded to that.

22 MR DAVÓ-FERNANDEZ: (Interpretation) So you didn't receive  
23 notification of the result of the proceedings even from the  
24 National Council or the Matadi Bar? Only from one and not the  
25 other?

1 MR DIAKIESE: (No interpretation)

2 (Interpretation) Can you hear me now? For the Matadi Bar  
3 Council, I personally went to the Bar Council to be notified  
4 about the decision.

5 MR DAVÓ-FERNANDEZ: (Interpretation) No, I'm sorry, that  
6 was not the question. The question is as follows: Either the  
7 Matadi Bar Council or the National Bar Association Council must  
8 have notified you that they were going to report this sanction  
9 to the ICC?

10 MR DIAKIESE: (Interpretation) No, Mr Chairman, I did not  
11 appear in Matadi. It was at the National Bar Council in  
12 Kinshasa that I was called to appear, and at that time no  
13 decision had been taken, I believe. I heard that the sanction  
14 had been upheld only through the Registry. However, in Matadi,  
15 I personally appeared to receive notification of that decision;  
16 otherwise, I would not have been able to appeal to the National  
17 Bar Council.

18 MR DAVÓ-FERNANDEZ: (Interpretation) My last question:  
19 When did you send a letter in answer to the one that you had  
20 received from the Registrar of the ICC? Were you advised that  
21 you would have the right to have the assistance of a lawyer?  
22 Or, before you provided your answer, were you told that it could  
23 be used against you?

24 MR DIAKIESE: (Interpretation) I do not remember that this  
25 was pointed out to me, but I found that it was legitimate for



1 the Registrar to wish to know the details about those serious  
2 allegations against me, and it was also an opportunity for me to  
3 inform the Registrar that I was being harassed in the practice  
4 of my profession in my country. So I understood that the  
5 Registrar had the right to ask information from me regarding  
6 what had happened.

7       Unfortunately, we did not have the same understanding of  
8 the type of information that I needed to provide and, in my  
9 correspondences, if you allow me to elaborate on what the  
10 Commissioner has said, that is, if you allow, Madam Chair. When  
11 the Registrar wrote to me, I was informed that the National Bar  
12 Association Council had upheld that decision.

13       The Disciplinary Commissioner felt that it is paradoxical  
14 that I told the Registrar that I would inform her in -- of any  
15 notable change in my situation and, at the same time, I told her  
16 that I did not understand that I had to inform her about the  
17 disciplinary procedure against me. And, indeed, this may seem  
18 paradoxical, but I had a misunderstanding in the beginning. I  
19 understood that if there were criminal proceedings against me, I  
20 would have the obligation to inform the Registrar. I did not  
21 know that disciplinary sanctions were always to -- also to be  
22 reported.

23       However, when I saw the letter of the Registrar on this  
24 issue, I was compelled to conclude that the Registrar was  
25 legitimate in stating that disciplinary proceedings were also

1 included. So I admitted and I accepted that that was the case  
2 and that my action had not been deliberate.

3 What I felt that I was going to provide as additional  
4 information regarded the changes in my situation and, as far as  
5 I'm concerned, these changes involved my change of the Bar  
6 Council. And, as you can see in my file, those proceedings were  
7 instituted against me after I reported to the National Council  
8 that I had left the Matadi Bar and was already registered with  
9 another Bar Council. So I was waiting for the decision of the  
10 National Bar Association Council to inform the Registrar that I  
11 was changing Bar Council. But I should, of course, have  
12 understood the changes also involve disciplinary proceedings and  
13 not just criminal proceedings.

14 So, that is the paradox that seemed to have been pointed  
15 out by the Disciplinary Commissioner, and that is regrettable on  
16 my part, and I admitted that I had not fully understood the  
17 situation. It was not intentional but, indeed, that is what  
18 appears to be a paradox.

19 PRESIDENT CONDÉ: (Interpretation) Thank you very much. I  
20 have questions for you. You listened to Commissioner Nigel  
21 Hampton and he explained that, in order to be registered with  
22 the ICC, you have to belong to a Bar Council. Do you agree with  
23 that?

24 MR DIAKIESE: (Interpretation) Perfectly, Madam Chair.

25 PRESIDENT CONDÉ: (Interpretation) Now, in a letter to the

1 Registrar dated 19 March, and in paragraph 2 you said, and I  
2 paraphrase -- you said that you intended to inform her of the  
3 final decision taken in your case. That is what you say in your  
4 letter. "On the other hand, regarding any changes in my  
5 situation, I had thought that in light of the appeals that I had  
6 lodged, it would be the outcome that would enable me to provide  
7 any final information to you."

8         So, you were informed of the decision of the Matadi Bar  
9 Council. You appealed that decision and you are telling us  
10 today that it was the Registrar who informed you of a sanction  
11 by your national Bar. You were aware that you had lodged an  
12 appeal. Were you never interested in knowing what decision had  
13 taken -- had been taken against you?

14         And there is another question based on my own experience.  
15 When we sit in a disciplinary matter, we tell the person  
16 concerned that a decision will be handed down on such-and-such a  
17 date. If there is a delay, we will inform that person. And if  
18 that is not the case in Congo, what happens? How do you know  
19 when a decision has been taken in your case? So I am slightly  
20 surprised that you are telling us that it was the Registrar of  
21 the ICC who informed you of that decision.

22         MR DIAKIESE: (Interpretation) To paraphrase you, Madam  
23 Chair, it is a bit of a disorder. It may seem a bit easy for me  
24 to apportion the blame on others because I'm the one being  
25 targeted here. But I must tell you that I was never informed

1 about the date on which the decision of the National Bar Council  
2 would be taken. I can tell you that categorically, and anybody  
3 who can dispute that should do so.

4 PRESIDENT CONDÉ: (No interpretation)

5 MR MABANGA: (Interpretation) Apparently, there was a lack  
6 of understanding here. The Chair was talking about the Matadi  
7 decision, not the National Bar Council decision.

8 PRESIDENT CONDÉ: (Interpretation) My issue was broader.  
9 You were informed of the decision of the Matadi Bar Council  
10 because you are concerned and you lodged an appeal. But in your  
11 letter of 19 March, you told the Registrar that "I was waiting  
12 for the final decision to inform you."

13 First of all, you say, "I did not know" and, secondly, you  
14 say, "I was waiting for the final decision." The question is  
15 this: What did you do to know what that final decision would be  
16 to begin with? Were you given the date of the ruling?

17 Secondly, if you were not given the date of that ruling,  
18 was it not incumbent on you to find out what the ruling would  
19 be?

20 MR DIAKIESE: (Interpretation) Thank you, Madam Chair.  
21 Indeed, when this matter was being considered, if I remember  
22 correctly -- well, I do not want to take a risk about dates that  
23 I'm not sure about, but you will remember that between the time  
24 of the deliberations and the time at which I was informed by the  
25 Registry, I do not know whether that period was up to one month.

1           In any case, however, I was not in Congo during that  
2   period; I was here at the Court, and it was here at the Court  
3   that I was notified. And so it is possible that if I had  
4   returned to Congo, if that decision had not yet been handed  
5   down, I should have tried to find out.

6           PRESIDENT CONDÉ: (Interpretation) In your first letter,  
7   and in your conclusions, you questioned the impartiality of your  
8   Bar Council. Is there a means of remedy that you can take  
9   against your National Bar Council? And in this particular case,  
10  did you examine that possibility?

11          MR DIAKIESE: (Interpretation) Thank you, Madam Chair.  
12  That appears in the transcript. Regarding the National Bar  
13  Council of my country, it is very disturbing for me to say  
14  certain things. Unfortunately, there is no recourse procedure  
15  and, if that had been possible, we would never have had that  
16  problem here today.

17          Our National Bar Association Council had a hearing that was  
18  irregular, simply because they knew that, beyond them, there was  
19  no other authority that could take a final decision. The  
20  decision itself was a violation of the laws of our country and  
21  the jurisprudence of our country at all levels, but they did  
22  that deliberately because they felt that there was no other  
23  authority that would have to confirm that decision.

24          In my country, the disciplinary decisions can only appeal  
25  at the National Bar Council, and when a decision is given at

1 that level, nothing else can be done. So people can destroy  
2 your career at that level, and that has already happened.

3 PRESIDENT CONDÉ: (Interpretation) Two more questions:  
4 You explained to us that you were here when all that happened.  
5 Your office must be a structured office for someone who is quite  
6 frequently absent from your headquarters, so how is it that your  
7 practice, your office, did not inform you that a decision had  
8 been taken? How do you manage your absences?

9 MR DIAKIESE: (Interpretation) Thank you very much, Madam  
10 Chair. My firm, my law firm, is quite structured. It is not a  
11 big law firm. But my colleagues were present and yet I was  
12 never informed. I do not want to make long speeches here but,  
13 in my answer to the Registrar, I explained the context that  
14 prompted me to change the local Bar Council because there was a  
15 certain hostility already against me ever since I was registered  
16 at the ICC. And in the instant case, I would have expected a  
17 notification.

18 I believe that the disciplinary council, during his  
19 investigations, must have contacted the National Bar Council to  
20 ask them who they notified in my law firm. I was never notified  
21 and my law firm was never notified. So, at this moment that I'm  
22 speaking to you, I never received any information apart from the  
23 notification forwarded to me by the Registrar.

24 PRESIDENT CONDÉ: (Interpretation) Last question: What is  
25 your situation vis-à-vis the ICC? What are the consequences

1 that these proceedings have had on your activities here?

2 MR DIAKIESE: (Interpretation) At the time that the  
3 Registrar wrote to me, she wanted to be aware of the reasons why  
4 I had not informed her and whether I was a certified and  
5 practising lawyer. And I proved to her services that I was a  
6 member of the Kananga Bar Council and I was also admitted to the  
7 Bandudu Bar Council. So, I informed her that I was no longer a  
8 member of the Matadi Bar Association Council, based on my own  
9 decision.

10 The Registrar noted that information. She said that I had  
11 continued to practise but that my omission to inform her of the  
12 sanction taken against me had compelled her to refer the matter  
13 to the Disciplinary Commissioner. But, ever since, I'm still  
14 practising as a legal representative of the victims in the  
15 Lubanga case.

16 PRESIDENT CONDÉ: (Interpretation) I'm sorry, I still have  
17 one last question. At the national level, have the 12 months of  
18 suspension been exhausted?

19 MR DIAKIESE: (Interpretation) Yes. I have already served  
20 those 12 months, Madam Chair, so those two months ended in the  
21 last quarter of 2009.

22 PRESIDENT CONDÉ: (Interpretation) Thank you very much.  
23 Mr Mwanza, if you have any questions?

24 MR MBIYA: (Interpretation) Thank you very much, Madam  
25 Chair.

1           In his letter of 19 March 2009, and in his oral submission,  
2 Mr Diakiese has talked about the hostility of his Bar  
3 association council against him. However, at the National Bar  
4 Council, there is no lawyer from your Bar. Do you think that  
5 what happened to you at the Matadi Bar, 300 kilometres away, was  
6 reflected in the National Council when there is no member from  
7 your Bar Council?

8           MR DIAKIESE: (Interpretation) Unfortunately, that is what  
9 I thought. I believed that at the National Bar Council my own  
10 local council could not have contaminated that high authority.  
11 But given what has happened, you will be able to see that Mr  
12 Fula Matingu, a member of the National Bar Association Council,  
13 was an opposing party in a case in which I represented interests  
14 that were contrary to his. He was a member of the National  
15 Association Bar Council.

16           I do not wish to go into details but the fact is, when I  
17 appeared in front of the National Bar Council, we asked Mr  
18 Fuller to recuse himself, and he recused himself and that is how  
19 I was able to make my submissions before that authority. And  
20 you will see in the file against (sic) you that Mr Fula Matingu  
21 actually took part in the decision making, without having  
22 participated in the submissions, without the proceedings having  
23 been reopened, even though he had recused himself for personal  
24 matters because of a conflict of interest. And it was because  
25 of my appearance in that case that I was prosecuted by the



1 Matadi Bar Association Council and by the National Bar  
2 Association Council.

3 And you will also see that the reasons justifying the  
4 presence of Mr Fula Matingu in those sanctions against me are  
5 obvious because on that day the quorum of the National Bar  
6 Council was not met. It was by admitting Mr Fula Matingu that  
7 they managed to have a quorum. And this is a person who had  
8 been recused, and he was taking part in a Board to take a  
9 decision, whereas it was known why he had not been a member of  
10 that Board. And since the National Bar Council knew that such a  
11 violation would not be sanctioned anywhere, they wanted the ICC  
12 to sanction us, and that is at the highest levels of our  
13 profession.

14 MR MBIYA: (Interpretation) Can you tell me the  
15 understanding of -- that you have of proceedings?

16 MR DIAKIESE: (Interpretation) I'm sorry, Mr President, my  
17 understanding of that term is very broad.

18 MR MBIYA: (Interpretation) Because in the written  
19 submissions presented by your counsel, and presented orally by  
20 yourself, there is an expression, because there is supposed to  
21 be *obscur libeli*, that is, there is a bit of obscurity regarding  
22 the use of the words "and/or" by the Commissioner, whereas in  
23 the understanding of this term as used in the documents  
24 submitted to the Disciplinary Board, there is a first element  
25 based on the form signed by yourself on 10 January 2007,

1 applying for admission to the ICC.

2       There is also the undertaking that you gave and which  
3 obliges you to provide to the Registrar any new developments in  
4 your situation. But when you read Regulation 69(3), that  
5 obligation is much clearer and much broader. Do you think that  
6 you should really have waited for the outcome of the appeal  
7 lodged with the National Bar Council to inform the Registrar, or  
8 should you have informed her as soon as you received a summons  
9 to appear from the Matadi Bar Association Council?

10       MR DIAKIESE: (Interpretation) Thank you. Regarding the  
11 technical aspects related to the understanding, I think my  
12 counsel will be better placed to elaborate on that.

13       As far as I am concerned, I have not denied the fact that I  
14 misunderstood certain things, but what I will not admit is that  
15 I wanted to conceal the proceedings against me from the  
16 Registrar, such that I would have failed in my obligations  
17 towards the Court. I would like to reassure you personally and  
18 solemnly, I have admitted that.

19       Furthermore, I did not have any reason to conceal this  
20 because in all my submissions to the National Bar Council I had  
21 pointed out that I was a practising counsel before the ICC. I  
22 know that even our national Bar president has been suspended for  
23 one year at some point in his career, and that did not prevent  
24 him from being registered with the ICC. So, I was not  
25 concealing anything. I knew that justice would be done at the

1 highest level of the organisation of the profession in my  
2 country but, in my country, that profession has betrayed me.

3 But, as the Registrar told me, and as you have said, I  
4 should have had a broader understanding, and I admitted that the  
5 Registrar was right and I had misunderstood. I simply wanted to  
6 point out to her that I had no reason to conceal anything  
7 because, on the contrary, when I have problems in my country,  
8 the only resort that I would have would be this Court, so I  
9 could not have concealed anything from them.

10 MR HAMPTON: Madam President, with your leave, would I be  
11 permitted to ask -- Madam President, with your leave?

12 PRESIDENT CONDÉ: (Interpretation) Mr Nigel, we wondered  
13 whether you would be able to ask additional questions. What is  
14 your understanding of Article 15, and particularly the relevant  
15 paragraphs, that is, 7 and 8? Given the way things are going,  
16 we were wondering what we should do if you actually wished to  
17 ask additional questions in this case, given that this is a  
18 really first case.

19 MR HAMPTON: Sorry, Madam Chair, which article, please?

20 PRESIDENT CONDÉ: (Interpretation) Article 15.

21 MR HAMPTON: Of the draft rules?

22 PRESIDENT CONDÉ: (Interpretation) Yes.

23 MR HAMPTON: Thank you.

24 PRESIDENT CONDÉ: (Interpretation) Article 15, paragraphs  
25 7 and 8, draft internal rules.

1 MR DIAKIESE: (No interpretation)

2 PRESIDENT CONDÉ: (Interpretation) The Board is -- has  
3 deliberated and Mr Nigel has the floor.

4 You can ask questions, Mr Nigel. You are authorised to ask  
5 questions. I think that has been resolved. You can ask  
6 questions.

7 MR HAMPTON: Thank you very much. The relevant page was  
8 missing from my copy; sorry. That's why I couldn't find it.

9 I don't wish to, and I won't be trying to cross-examine.  
10 What I want to ask is, though, Mr Diakiese, prior to the  
11 Registrar of this Court writing to you in March of 2009,  
12 pointing out your difficulties, had you ever read the  
13 regulations of the Court?

14 MR DIAKIESE: (Interpretation) No. At that time I did not  
15 really read in detail the rules of the Court.

16 MR HAMPTON: So, until the Registrar wrote to you in March,  
17 are you telling the Board that you did not know of the existence  
18 of Regulation 69(3) and the clear obligations that fell on you  
19 to notify as soon as any disciplinary proceedings were taken  
20 against you?

21 MR DIAKIESE: (Interpretation) As has been said, I had a  
22 misunderstanding of the rules of the Court. I believe that you  
23 and the Registrar had the correct understanding of those texts.  
24 I cannot justify it in any other way. I simply can say that I  
25 did not read it thoroughly.

1           MR HAMPTON: Well, had you read it at all, Regulation  
2 69(3)? Because you've just told me that you hadn't. So, how  
3 could you have a misunderstanding of it, please?

4           MR DIAKIESE: (Interpretation) No, I did not say that I  
5 read 69(3). I said that I had a misunderstanding of 69(3) when  
6 notified to me by the Registrar. Because, in my understanding,  
7 the obligations concerned criminal proceedings. It is when the  
8 Registrar told me that there are other provisions that involved  
9 those elements that I saw I had had a misunderstanding.

10          MR HAMPTON: As counsel put on the list of ICC counsel in  
11 2007, are you telling this Board that for two years when you  
12 were practising in front of the ICC, representing victims, that  
13 you didn't bother to make yourself familiar with and read the  
14 regulations of the Court? Is that what you say? Yes or no,  
15 please.

16          MR DIAKIESE: (Interpretation) The Court has various texts  
17 regarding the representation of victims and appearances before  
18 the Court. I did not feel that I specifically had to read  
19 Article 69(3), given all the other obligations that I have. Of  
20 course, I suppose that all lawyers have to read all the texts  
21 applicable in his country, and particularly if something arises  
22 concerning those. I think that was an omission on my part. I  
23 did not imagine that a disciplinary procedure would be initiated  
24 in -- against me. And in this particular case, I admit that  
25 this was applicable to me, even though I had thought that it was

1   only criminal proceedings.

2           MR HAMPTON:   Do you not feel, as an experienced counsel,  
3   that you have an obligation to be familiar with the regulation  
4   and rules of the Court before which you practice?

5           MR DIAKIESE:   (Interpretation)   Yes, I do recognise that.  
6   That is why I admit that it was an error on my part.

7           MR HAMPTON:   The undertaking or oath that you signed in  
8   January 2007 has in it a section where you were asked whether  
9   you had been the subject of disciplinary proceedings -- subject  
10   of a disciplinary sanction by the Bar Association of your  
11   country, didn't it?

12          MR DIAKIESE:   (Interpretation)   Yes.

13          MR HAMPTON:   You answered "no" to that?

14          MR DIAKIESE:   (Interpretation)   Yes, with a certificate  
15   from the chairman of the Bar.

16          MR HAMPTON:   Then, a few pages on, at the end of the form  
17   there are three paragraphs, and it's the third last paragraph  
18   that I would like you to look at, please.   Have you got a copy  
19   of that undertaking or oath there before you?   10 January 2007.

20          MR DIAKIESE:   (Interpretation)   Yes, I do have it.

21          MR HAMPTON:   Do you see the third last paragraph?   And  
22   could you read it to me, please?

23          MR DIAKIESE:   (Interpretation)   I have the French version  
24   of it.   "I commit myself to informing the Court of any criminal  
25   proceedings which I am the subject.   I commit myself also to not

1 carry out any act with regards to fees with any person who needs  
2 representation with a friends -- friends or associates or  
3 relatives."

4 MR HAMPTON: Sorry, the third last paragraph. I think the  
5 one that starts "*Je certifie sur l'honneur ...*" Do you see that  
6 paragraph?

7 MR DIAKIESE: (Interpretation) Yes. "I hereby certify  
8 having verified the information concerned in the form and I  
9 declare that they are complete and exact. I commit myself to  
10 notify the Court in the case that there is any change in my  
11 situation."

12 MR HAMPTON: That's quite clear, isn't it?

13 MR DIAKIESE: (Interpretation) It was, unless I was  
14 subject to proceedings in this regard.

15 MR HAMPTON: If you were suspended by the Matadi Bar  
16 Association, no matter whether you thought they were right or  
17 wrong, that is surely a change in your circumstances, isn't it?

18 MR DIAKIESE: (Interpretation) No. For me, I considered  
19 that a change of situation, the fact of changing Bar. But  
20 afterwards, as the Registrar -- when the Registrar wrote to me,  
21 and when she made a link with all these different provisions,  
22 then I understood that, in fact, I didn't have the correct  
23 reading of it. And that's why in the letter which I wrote to  
24 the Registrar, when you mentioned the contradictions that there  
25 were between, on the one hand, the fact that I committed myself

1 to inform the Registrar and, on the other hand, the fact that I  
2 said that I hadn't understood that I had an obligation to inform  
3 the Disciplinary Board, it is here that for me the  
4 misunderstanding is to be found, and I wouldn't deny that.

5 I would like to state that I understood as change of  
6 situation the fact that I would change Bar, but I have to admit  
7 that later that also I understood that it included disciplinary  
8 procedures, whereas I thought it was criminal proceedings  
9 against me.

10 MR HAMPTON: Do you think you would have been put on the  
11 list of ICC counsel in January 2007 if at the time you had been  
12 suspended by the Matadi Bar and the ICC were told about it? You  
13 wouldn't get admitted, would you?

14 MR DIAKIESE: (Interpretation) No. The Court, at its  
15 level, it applies the principle of proportionality and taking  
16 into account the nature of sanctions taken against a person. If  
17 not, there would be -- this would be an open path to  
18 arbitrariness. Anybody would be -- have proceedings against  
19 them in an irregular way just because of their dossier and then  
20 they would be put aside by colleagues who violate the  
21 legislation in the exercise of the profession of a lawyer.

22 Our chairman of the Bar at national level had a suspension  
23 of one year. The court had registered that person. Taking into  
24 account the context under which that person was suspended to be  
25 able to see -- so you have to look at nature as to whether you



1 can interfere in this regard where it concerns the counsel.

2 MR HAMPTON: How is the Registrar to know of the nature of  
3 this suspension and, as you claim, the problems that lie behind  
4 it unless you tell the Registrar? Isn't that your duty?

5 MR DIAKIESE: (Interpretation) Yes. Yes, I assure you  
6 that I misunderstood that this information concerned questions  
7 other than a criminal one, and when that was shown to me I had  
8 to recognise this, that it is another type of proceedings,  
9 because I didn't have a good reading of it.

10 MR HAMPTON: All right. Thank you, Madam President. Thank  
11 you.

12 Thank you, Mr Diakiese.

13 PRESIDENT CONDÉ: (Interpretation) Yes, Mr Diakiese,  
14 please excuse me, but I do have another question. Were you  
15 helped within the appeals procedure?

16 MR DIAKIESE: (Interpretation) Yes. There was the  
17 chairman of the Marsiela (phon) Bar, the chairman of the Bandudu  
18 Bar and also the chairman of the Matadi Bar. The new chairman,  
19 he didn't help me. He represented the Bar and he wanted the --  
20 he wanted the decision to be annulled.

21 PRESIDENT CONDÉ: (Interpretation) Yes, because I have  
22 this document in front of me with the name of your counsel at  
23 the time, and I'm still concerned by this statement according to  
24 which you learn of your conviction on the part of the Registrar  
25 of the ICC because, as far as I can see, within the appeals

1 procedure you were assisted.

2 So, your counsel should have informed you of this decision  
3 that your Bar is biased, or whatever. Okay, whether your  
4 counsel or your colleague, that person that had your *cabinet*, or  
5 should have kept you informed with regards to the decisions  
6 taken in your *cabinet*. That's fine, but your counsel, the  
7 chairman of the Bar, he couldn't not know about this decision.  
8 This is what confuses me.

9 MR DIAKIESE: (Interpretation) I do understand, Madam  
10 President. There are certain things you have to understand.  
11 You have to live in a certain context to see how things happen  
12 when you're in that given context. Now, it wasn't -- I wasn't  
13 informed. I don't know why I wasn't informed. I was here in  
14 The Hague. If my counsel had notified me -- they didn't inform  
15 me, sincerely, as Hervé Diakiese. I was here in The Hague. I  
16 never was informed of this. It was the Registrar who informed  
17 me of this. You know, if -- well, when I developed certain  
18 aspects of my argument, you will see that there were other  
19 actions.

20 PRESIDENT CONDÉ: (Interpretation) No. No. It's almost  
21 an admission or a violation or a breach on your part not to have  
22 concerns with regards to a disciplinary procedure. You are  
23 appealing. You were the person who was appealing. You have  
24 lawyers. You are exercising; you know that your exercise  
25 depends on your registration. And you were never curious enough

1 to say, well, in fact, what happened to the sanctions?

2 MR DIAKIESE: (Interpretation) Oh, I do understand your  
3 question better now. Madam President, we are here in The Hague.  
4 We are here in the month of February, and I think that I  
5 appeared before the National Board in January, I think, if I am  
6 right. So, as soon as I appeared before them and the case was  
7 discussed, we weren't notified of the date. So, we know that  
8 the national *conseil* does sit in sessions.

9 PRESIDENT CONDÉ: (Interpretation) Yes, I am listening to  
10 you.

11 MR DIAKIESE: (Interpretation) We know that the *conseil*  
12 *national de l'ordre* sits in sessions, but I would repeat to you  
13 that I was here abroad. If this decision hadn't been issued  
14 until I came back, certainly I would have had concerns in this  
15 regard because I had trust in the -- my colleague but,  
16 otherwise, I was going back to the country, but I was here in  
17 The Hague. It was here in The Hague that I was notified of  
18 this. I was never notified before and, until the moment when I  
19 left the Congo, I had not been notified that a decision had been  
20 issued.

21 PRESIDENT CONDÉ: (Interpretation) Well, we're going to  
22 listen to your counsel and your counsel's explanations in this  
23 regard.

24 MR DIAKIESE: (Interpretation) If you would allow me,  
25 Madam President, my counsel is going to take the floor. I would

1 just like to tell your august Bench that I have greatly  
2 appreciated the way in which you have conducted these  
3 proceedings, and it's the first time since this case has started  
4 that I have appeared before an institution which has ensured  
5 that my rights really be exercised and I be given the  
6 opportunity to express myself.

7 I would also say to the Disciplinary Commissioner,  
8 Mr Hampton, that I really greatly appreciated the impartiality  
9 and the elegance with which he conducted his investigations.  
10 And, of course, I don't share his conclusions but I can but  
11 welcome the seriousness with which he has conducted his work  
12 and, if this had been done so in my country, I would have never  
13 had to appeal before a Disciplinary Board.

14 Whatever the decision you take, the most important thing is  
15 to be able to appear as a lawyer and be able to explain myself.  
16 I have always defended people all my life and I've always made  
17 sure that they could explain themselves but, when it was my  
18 turn, my profession accused me and here I have been afforded  
19 that opportunity, and I would like to thank you for that.

20 MR MBIYA: (Interpretation) Madam President, members of  
21 the Disciplinary Committee. I would like to thank you for  
22 having given us the opportunity to express ourselves before you  
23 today. Honestly, I would have liked that we be informed of the  
24 programme which was communicated to us that the Commissioner  
25 would also intervene within the framework of an examination.

1 That would have made it possible for us to perhaps prepare  
2 ourselves differently. In the program that we received, it was  
3 said to us that the questions and the answers would exclusively  
4 be put by the members of your committee.

5 Having said that, Madam President, members of the  
6 committee, I am not of the opinion, as was confirmed by the  
7 Commissioner, and this is something that we all know, that it  
8 would be a type of a -- or that it would be a new type of  
9 appeals court with regards to decisions issued by Congolese  
10 authorities. Because if -- and it is rightly you have come back  
11 with regards to the proceedings, the disciplinary proceedings  
12 which took place in the Congo, if we speak about these  
13 proceedings, then that makes it possible for you to better  
14 assess the person that you have before you.

15 Here, it is not about just looking at the facts on paper  
16 but it is also about understanding why Mr Diakiese, who is  
17 before you today, why he was sanctioned, under what conditions  
18 he was sanctioned, and under what conditions he was not able to  
19 inform the Registrar of these different proceedings which took  
20 place before these bodies.

21 Now, before going into the heart of the matter this  
22 afternoon, I would like to mention something, and that's that he  
23 says the truth when he says that it was at the International  
24 Criminal Court where he was by -- or through the letter of the  
25 Registrar that he learnt that the National Council of the Order

1 of Lawyers had confirmed the sentence issued by the Matadi Bar.  
2 There was no reason to lie on that subject because as he -- the  
3 chairman of the Bar, Mwanza, mentioned, he had already from the  
4 summons which had been given him in Matadi, he had the  
5 obligation to inform the Registrar. He said he didn't do it.  
6 Also with regards to the sentence issued by the Bar of Matadi  
7 against him, 12 months of suspension. This is something that he  
8 recognised, if not only for that. That also shows that there  
9 was this proceedings. So, if you say he only learnt of the  
10 decision of the National Council here, that's -- if he says  
11 that, that's because it's true.

12 All these comments and preliminary remarks having been  
13 made, I, Madam President, would like to say that now you know,  
14 because this is a case which has been looked at for a long time  
15 here, you know that with regards to the truth, everything  
16 started with a letter dated 18 August 2008. On that date,  
17 Mr Diakiese addressed a letter to the *conseil de l'ordre* in  
18 Matadi, and on that date Mr Diakiese said to his Council that,  
19 "I am going to leave Council, I'm going to -- for the reason  
20 that I have just been admitted to another Bar, namely, Kananga  
21 Bar."

22 Now, in this letter there are a certain number of  
23 paragraphs which were considered by the *conseil de l'ordre* in  
24 Matadi as ironic, and it is therefore under these conditions  
25 that the *conseil de l'ordre* decided to act against Mr -- or to

1 institute proceedings against Mr Diakiese. And it was also said  
2 why Mr Diakiese, who was in his Bar, why would he decide  
3 suddenly to change Bar and to go to Matadi in Bandudu, or to go  
4 to Kananga through a Bar which is more than 300 kilometres from  
5 his normal residence where he has wife, children and where he  
6 has his personal interests? It's quite simply because, as I  
7 said in my submissions, that he noted that he already had -- at  
8 that time there was a climate between him and the members of the  
9 council at the time. Because he had had a reprimand for having  
10 given his agreement to the general secretariat of the Bar while  
11 at the same time, within the *conseil de l'ordre*, Matadi, a good  
12 number of members of lawyers who were in that council were the  
13 same -- or they're offering the same services to the government,  
14 the provincial government, while Mr Hervé Diakiese, who was  
15 permanent at the International Criminal Court, he was  
16 communicating with his chairman of the Bar, who said to him,  
17 "Well, look, there's the *conseil de l'ordre* who is going to ask  
18 you to appear, summonsed you to appear, but, as you're there, we  
19 will look at what we're going to do." You knew that he was here  
20 and he was more than 8,000 kilometres from Matadi and, as such,  
21 it was materially impossible for him to be able to answer the  
22 summons to appear which had been made against him in order to  
23 appear on 15 July 2008. And this is why he said, "Well, as it  
24 has started like that, I would prefer to leave at ease and to  
25 avoid this type of situation where at any time I can be

1 sanctioned by people who are against me."

2       And so when he wrote this letter, they seized that letter  
3 and they summonsed him to appear in order to sanction him, but  
4 Mr Diakiese said, under these conditions, as you think you -- as  
5 the council in Matadi, that you are offended by the remarks that  
6 I wrote in my letter, I think that you wouldn't be impartial  
7 when it comes to judging me and that is the reason why I am  
8 going to go - and this is what the Congolese procedure allows  
9 for - I'm going to ask -- because I have legitimate suggestions  
10 in this regard because I don't think that you will judge me with  
11 impartiality, and he makes his application to the national  
12 *conseil de l'ordre*, which sets the date for the hearing on which  
13 this case will be heard.

14       Without waiting for the national *conseil de l'ordre* to take  
15 up this application, he writes to the secretary of his  
16 association to say, "So, I have made an application and this  
17 will happen on such-and-such a date," and despite that,  
18 Madam President, they did sit and they sanctioned him to  
19 12 months of suspension.

20       When I speak about the Parisian lawyer to which Mr Nigel  
21 Hampton referred to just now, it wasn't to tell you that the  
22 Parisian lawyer was responsible for blame -- therefore asked you  
23 to reduce the sentence. No, you're not competent to do that.  
24 All we have said, and we will come back to this at the end, we  
25 just wanted to talk about the proportionality of this sentence.



1 And it goes to the *conseil national de l'ordre*. So this  
2 application no longer has an object because this Bar did sit in  
3 the end.

4 So, he therefore had a sanction of 12 months and he was  
5 informed also that he -- well, he appeals to the National  
6 Council which then issues the decision which you have which  
7 dates from 17 February 2009. He made several complaints with  
8 regards to the proceedings, to the extent that -- and this, in  
9 his view, he has just said to you, when he said that in order to  
10 pronounce the confirmation of this Matadi decision, a member of  
11 the *conseil de l'ordre* who did not sit -- who did not sit during  
12 the investigation nor during the hearing when this case was  
13 discussed, comes at the end in order to sign a decision  
14 sanctioning -- because the decision does confirm the Matadi  
15 decision. And he said to you that under Article 16, I think it  
16 is, paragraph 7, of the DRC regulations, the decisions of the  
17 *conseil national de l'ordre* are not or cannot be annulled before  
18 the Supreme Court of Justice when this organ sits in  
19 disciplinary matters. In other matters, you can attack this  
20 decision before the Supreme Court, but when it concerns  
21 disciplinary matters, you can't.

22 Now, we know this. He didn't know it yet the -- he didn't  
23 know that. So the Registrar wrote to him and he was informed by  
24 the International Criminal Court that the decision had been  
25 confirmed and then the Registrar asked him for his explanations.

1 He explained that, he came back to that. He didn't try to make  
2 false remarks. He recognised his responsibility in that regard  
3 and such that today the problem that is put before your  
4 committee is not the problem of knowing whether he has committed  
5 a fault at Bar. That is not the issue, because he has said that  
6 "I recognise that I should have informed you. I didn't do it."

7 The problem that we have today before you is the problem  
8 relating to the determination of the seriousness of the facts  
9 which he is accused of and from there, from this determination,  
10 the determination of the sanctions which will result therefore  
11 which would be appropriate to apply thereto.

12 And I have been following with a lot of interest the report  
13 of Mr Nigel Hampton, the Disciplinary Commissioner, who proposes  
14 a sanction. When I look at the range of sanctions that are  
15 provided for by the Code, then I can see that in the scale of  
16 seriousness, it's the second last one. After this sanction, you  
17 are excluded from the list. So, it is a sanction which is very  
18 serious which he proposed, and I would like to try to see with  
19 you if the Commissioner, as he says, proposes this sanction in  
20 relation to the facts that Mr Diakiese is accused of.

21 My observations contain two points. I'm going to come back  
22 to this because this problem was raised before. The first  
23 problem relates to the proceedings. And I would like to thank  
24 the Chairman of the Bar, Mr Davó-Fernandez, who also asked this  
25 question for clarification to the Disciplinary Commissioner.

1 When you take the report of the Commissioner, when you also take  
2 the call which was addressed to Mr Diakiese, you will see that,  
3 overall, two series of facts are put against him.

4 The first one is the breach of his duty to inform the  
5 Registrar under 69(3) of the regulations of the Court.

6 The second fact is perjury. It is said that he did not  
7 respect the oath. And what oath are we talking about? The  
8 written one which can be found at the bottom of the form,  
9 requesting registration, which says that "I commit myself to  
10 informing the Court when there is a change in my professional  
11 life."

12 This is not a problem for us, that there are these  
13 two points. What does concern us, however, is the joining of  
14 them and why? Because the most simple of rights before a  
15 chamber for a person who is subject to proceedings is to know  
16 with precision and with exactness, in order to prepare of the  
17 Defence, what he has to answer. When you say firstly either -  
18 either one or the other - or you say both at the same time. And  
19 that's where things become confusing, when you say "and/or".  
20 And I read the report that was given to you by the Commissioner,  
21 and he says that ultimately, for him, it is about two distinct  
22 transgressions.

23 He therefore had to be precise. He shouldn't put "and/or"  
24 because when you say "or" it means one can choose the first or  
25 the second. And to be even more specific, in answer to the

1 question asked by the Board, he said that, in reality, it was  
2 just simply a cautionary measure. So, I thought that there was  
3 this first allegation and then, in the alternative, then there  
4 would be a second allegation. This seems to us to be unusual.  
5 So, there is a main allegation and an alternative allegation,  
6 and it is usually the defence that presents such arguments. So,  
7 the way that the text was produced seems to be obscure, and that  
8 is why we are just having clarifications here in front of your  
9 Board, whereas we should not have had those clarifications here  
10 but in the notification itself. That is why we requested you to  
11 take into consideration that the way in which it was presented,  
12 this text violates the rights of the defence, and that  
13 preliminary text should have been admissible. But, in any case,  
14 we also dealt with the substance of the case, and as we have  
15 told you, the problem today is not to know whether Mr Diakiese  
16 committed a fault or not, but to determine the seriousness of  
17 that misconduct.

18 Mr Commissioner is proposing two criteria of seriousness or  
19 gravity, and he's proposing the following in paragraph 27 of his  
20 report, which is part of the file: Mr Diakiese's omission or  
21 failure to inform the Court is a fundamental omission,  
22 deliberately or not.

23 The first criteria of seriousness for the Disciplinary  
24 Commissioner is the fact that there is a difference between a  
25 deliberate failure and a non-deliberate failure; that is, an

1 involuntary failure. And here we would like to point out that  
2 you cannot consider a person who does not respect an obligation,  
3 either by imprudence or misunderstanding, as he said, with  
4 another person who deliberately commits a misconduct. He has  
5 said, "I was sanctioned. I knew that I had the obligation to  
6 inform the Registrar, but I am not doing so because of reasons  
7 that are personal to me." So, those two people cannot be  
8 treated as equal.

9 If the text that you are applying today gives you a broad  
10 range of sanctions from a warning right up to dismissal, it  
11 makes it possible for you to assess the responsibility or  
12 liability of each person in light of the allegations made  
13 against that person. You cannot say that the fact that the  
14 person did it deliberately or not makes it gross misconduct.  
15 This is something that was raised by the Commissioner that we  
16 would like to ask you to set aside.

17 The second criterion for the seriousness of the misconduct  
18 that he has proposed to you is that of trust, and this is in  
19 paragraph 28 in his report in which he states, "As such, Mr  
20 Diakiese's breach of his undertaking and/or his violation of the  
21 Regulations of the Court, must be seen as significant failings  
22 by him, bringing with/it them, it is submitted, a consequent  
23 loss of confidence by the Court in Mr Diakiese, such that a  
24 finding of misconduct by him, as alleged in the particulars  
25 above set out, must follow, with a serious sanction then being

1 imposed as the necessary consequences."

2         So, in this case, the question that you will ask yourself  
3 would be whether there was absence of trust on the part of the  
4 ICC towards Mr. Hervé Diakiese, and there I would point out -  
5 and I mentioned that in my submissions - that the Registrar,  
6 when she came to know of that letter of the National Bar  
7 President and she received the answer of Mr Diakiese, she became  
8 aware of the reasons for the proceedings against Mr Diakiese.  
9 But she said that "In spite of that, I consider that given the  
10 specific circumstances in this case, there is no reason to apply  
11 the measure of removal from the list."

12         The Disciplinary Commissioner has just told you that, in  
13 reality, the Registrar was very lenient and that Mr Diakiese was  
14 very lucky, but I consider for my part that the Registrar was  
15 not lenient and that Mr Diakiese was not lucky, but that in this  
16 particular case it was simply a case of applying the law, of  
17 applying the texts governing the International Criminal Court.  
18 That is why I'm going to come back to this after talking to you  
19 about the two criteria. After having asked you to set them  
20 aside, I will propose three to you.

21         The first one - and I will not dwell too long on it - is  
22 the mens rea of the disciplinary misconduct, that is, the  
23 intentional fact, because it has not been demonstrated to you,  
24 members of the Board, that Mr Diakiese wilfully intended to  
25 conceal anything to you. He spontaneously admitted to the

1 Registrar and to the Disciplinary Board that he had made a  
2 mistake with regard to the understanding of the text. That was  
3 part of his good faith. It can be said that he is a lawyer in  
4 the ICC and he is supposed to have known the texts, and so on  
5 and so forth. Yes, one can say that, but you cannot say that he  
6 had bad faith. So it is not normal to consider two people as  
7 equal, that is, if one of them acts in bad faith while the other  
8 acts in good faith. You cannot consider that both people have  
9 committed serious misconduct.

10 Our second criterion is the criteria that is derived from  
11 the *raison d'être* itself of Regulation 69(3). That regulation  
12 is important because when you are registered on the list of  
13 counsel, you provide some information, and it is on the basis of  
14 that information that your name is included on the list of  
15 counsel. As from the moment that substantial information  
16 changes, that is information that is of a nature to compromise  
17 your maintenance on that list, in light of the information that  
18 you have given, that is if there is new information that you  
19 have not provided, then you are committing a disciplinary fault.  
20 So, the *raison d'être* of this text is to prevent somebody who no  
21 longer meets the requirements to continue to practise before the  
22 International Criminal Court.

23 In this particular case, Madam Chair, distinguished members  
24 of the Board, the issue that you may wish to raise is what would  
25 have happened, that is, in order to determine the seriousness of

1 the facts, what would have happened if Mr Diakiese had revealed  
2 to the Registrar his two disciplinary proceedings? That  
3 question was asked to him a short while ago by the Disciplinary  
4 Commissioner when he said, "If the Registrar were aware of these  
5 sanctions, would the Registry have registered you?" And he  
6 said, "Yes." And that is quite correct, the result would have  
7 been the same.

8 If he himself would have revealed those facts, would he  
9 have been maintained on the list? The answer has already been  
10 given. Because in fact it was not him that revealed those  
11 facts, the Registrar learned about the facts through another  
12 source. But in spite of that, she considered that he could be  
13 maintained on the list of counsel.

14 Why is it that I said that it was not a matter of leniency  
15 or luck? Madam Chair, it was simply because the misconduct that  
16 would cause you to be removed from the list would be of such  
17 seriousness that actually concerned the property or integrity of  
18 the council. It would have reached a stage where no one would  
19 trust the council. If the counsel is guilty of swindle, of drug  
20 trafficking or dishonesty in the exercise of his functions, that  
21 would be crimes against property as a lawyer. And it would not  
22 be the same case when other cases of misconduct are alleged  
23 against him such as the allegations made by his local Bar  
24 Council. That is why I gave you the example of the Paris Bar.  
25 Because what Mr Diakiese was told is that, "You are



1   undisciplined, you are a rebel, you do not respect us." This is  
2   not something that concerns his property.

3           And when I look at the history of Bar councils, many  
4   lawyers were more undisciplined than that, considered by their  
5   peers as undisciplined. And because of that so-called  
6   indiscipline, they actually achieved progress for their Bar  
7   Council. And I will mention the Bar to which I belong.  
8   Twenty-four years ago the Bar Council decided that the lawyer  
9   should no longer ask for the authorisation of the president of  
10  the Bar Council before expressing himself in public. This was  
11  24 years ago. And at that time those lawyers were considered by  
12  their peers as undisciplined. They struggled for many years,  
13  and finally they were heard and internal rules and regulations  
14  were changed.

15          So, if the Registrar did not deem it appropriate to remove  
16  Mr Diakiese's name from the list of counsel, it is because he  
17  was not being prosecuted for reasons that could have compromised  
18  his probity. And I am telling you that, even if that  
19  information was given, he would still be on that list. The  
20  Matadi Bar took disproportionate measures.

21          I was mentioning to you the case of this Paris Bar. There  
22  was a lawyer who went to assist a client in custody. He was not  
23  well received when he went to the police post. He was answered  
24  rudely and he spent a lot of time before he could see his  
25  client. He became irritated, because we are all humans. He

1 exaggerated. There was an exchange of words and then he  
2 insulted the policemen were there. There was an investigation  
3 that was opened against him, and the judge was seized of the  
4 matter and the lawyer was convicted. But the disciplinary  
5 procedure continued also and he was found -- it was found that  
6 there were also disciplinary allegations against him. This  
7 colleague who has a criminal record was sanctioned to a  
8 punishment of a serious warning. So this is proportional to the  
9 misconduct committed.

10 In Matadi, our colleague was given 12 months of suspension  
11 without any possibility of this decision being quashed by an  
12 impartial jurisdiction. And why did this happen? Because he  
13 wrote a letter and in that letter he said, "I hope that my  
14 pleasure of leaving this Bar Council is shared." And because of  
15 that, he was suspended for 12 months. And when Mr Diakiese  
16 contacted the National Bar Council and appeared before them, he  
17 had absolutely no doubt about the outcome of that procedure.  
18 But as he has elaborated in his filings and in his submissions,  
19 he had a clear impression that the people in Matadi simply  
20 wanted to settle accounts. He felt that he was simply not  
21 protected. And this is where he placed his good faith.

22 He was already a lawyer in the Kananga Bar, but the  
23 Registrar was not yet informed here. But since he said that,  
24 okay, we have all these procedures, as soon as I'm informed  
25 about the decision of the national Bar Council, then I will

1 inform the Registrar, I will tell her, "I was sanctioned but  
2 this sanction was illegal and I was finally found to be  
3 correct." And then he would say that "I transferred to the  
4 Kananga Bar and I would therefore ask you, Madam Registrar, to  
5 change my local Bar Council to the Kananga Bar Council." That  
6 is what he told himself, and he thought that this is what he  
7 would say at the end. But then today he realises that he should  
8 not have done that. But, as he has said, this was not a case of  
9 bad faith.

10 I will conclude by saying the following. Since this is a  
11 first at the ICC, and the decision that you are going to hand  
12 down will be the point of departure for jurisprudence before  
13 this Court, so today we are looking for ways and means of  
14 helping you to set out the law. We have found a text that I can  
15 submit to you. It is actually Article 58 of the Rules of  
16 Evidence and Procedure of the Special Tribunal for Lebanon. And  
17 that article states, and I summarise, "The head of the Defence  
18 office may accept to register a lawyer on the list of counsel  
19 when he is convinced that the lawyer did not communicate  
20 incorrect information on his qualifications and capacity to  
21 practise."

22 Even if in some cases there is a deliberate omission, it is  
23 stated, "... or did not deliberately try to conceal relevant  
24 information unless the head of the Defence office feels that,  
25 under the circumstances, it would be disproportionate to exclude

1 him for those reasons." This is a text that I will hand over  
2 for tendering into the case file. It says that, even in the  
3 event that it is felt that a lawyer deliberately concealed  
4 information for the purpose of registering him or her on the  
5 list, he or she can still be included in that list if there is  
6 reason to believe that excluding that person would be  
7 disproportionate. That is why I started by protesting from the  
8 very beginning regarding the regrettable distinction that was  
9 made between a deliberate and non-deliberate fault, because I  
10 believe that that would not have been made it possible for you  
11 to hand down the sanction that is commensurate to the misconduct  
12 alleged against Mr Diakiese.

13 So, to summarise, Madam Chair, if you are judging or trying  
14 Mr Diakiese today, it is because he took upon himself one day to  
15 make utterances that were judged to have been out of place. But  
16 you must have understood beyond everything that has happened  
17 today that it was neither deliberate on his part, nor was it  
18 something that was wilfully done. So I believe that the  
19 sanction that is appropriate would only be a warning.

20 And at this point I would like to close my submission by  
21 quoting the president of a Bar Council who said - and his name  
22 is Christian Charrière-Bournazel. "I will be by your side as  
23 long as I will be in this position to defend the right of the  
24 lawyer to free speech - free, loud and disturbing speech."

25 I rest my case, Madam Chair, and I ask you to assess the

1 liability of the lawyer who is here before you today.

2 Thank you.

3 PRESIDENT CONDÉ: (Interpretation) Thank you very much,  
4 Mr Mabanga. I have two questions to ask you.

5 To begin with, do you believe that to initiate proceedings  
6 against someone cumulatively or alternatively will constitute  
7 something that is null and void? Why is it that obscure to you?

8 MR MABANGA: (Interpretation) Madam Chair, I would like  
9 allow you to assess that submission because, in our view, given  
10 that this is the very first case of its nature in this Court, I  
11 made a few observations, including the fact that it is important  
12 to make a strong point for things to be very clear for the cases  
13 that will come afterwards. The lawyers who will appear before  
14 you, before this Board, should have a precise understanding of  
15 the text. They should not ask questions whether this should be  
16 the main charge or a charge in the alternative.

17 So, that said, I will leave it up to you to assess the  
18 submission that I made before you.

19 PRESIDENT CONDÉ: (Interpretation) Thank you very much.  
20 My question is as follows: You said that the sanction of the  
21 Congolese Bar was disproportionate, but that sanction does not  
22 actually concern us. What is of interest to us here is the  
23 obligation to inform. How will you answer to that? How can you  
24 react to that?

25 MR MABANGA: (Interpretation) Madam Chair, let me thank

1    you.  If we mentioned the sanctions that were taken by the  
2    Congolese Bar Council, and Mr Diakiese pointed that out, it is  
3    for two reasons:  The first reason is that, in his Defence, in  
4    the correspondence that he sent to the Registrar, he said that,  
5    considering the flagrant violations surrounding this  
6    disciplinary procedure, particularly the procedure at Matadi, he  
7    had absolutely no doubt that the decision would be quashed and  
8    that he would inform the Registry in due time.  It was in light  
9    of his Defence strategy that he said this.  He had no doubt that  
10   he was going to inform, but he knew that his appeal would lead  
11   to the quashing of that decision, which was obviously  
12   disproportionate.

13       The second point, Madam Chair, is that in the appreciation  
14   of the seriousness - and we are happy that you are trying to  
15   understand everything that happened - if, in the Registrar's  
16   letter she talks about the current circumstances, even in the  
17   Article 58 that I've just read to you, it is mentioned  
18   "considering the circumstances," previous circumstances might  
19   make it possible to you to appreciate the sanction that you are  
20   called upon to adopt against that person.

21       Insofar as you believe that the sanction was legitimate and  
22   that there was no problem, it might enable you to assess the  
23   misconduct alleged before you today.  But if you are convinced  
24   that there were defects in the procedure adopted by the Bar  
25   authorities such that you know that the basic rights of my

1 client were violated, given those circumstances, you could  
2 correctly appreciate the sanction to impose on the client.

3 PRESIDENT CONDÉ: (Interpretation) Now I will turn to my  
4 colleagues. I do not know whether they have any questions to  
5 ask.

6 MR MBIYA: (Interpretation) I would like to be reassured.  
7 I think that you seem to be saying something, and it's opposite.  
8 At the same time when you say that Mr Hervé Diakiese did not  
9 deliberately conceal information regarding the change in  
10 situation from the Registrar of the ICC, and then you talk about  
11 the fact that he was waiting for the outcome of his appeal to  
12 inform the Court, don't you think that he would have had to  
13 inform the Court of the sanction? Why would he have waited  
14 simply for the outcome of the appeal before informing the Court?

15 MR MABANGA: (Interpretation) Thank you. I believe that  
16 Mr Diakiese answered the question because that question was  
17 asked him by the Disciplinary Commissioner during his  
18 investigation, and he has repeated it here today. And, in  
19 summary, he said that, frankly, the issue of informing at the  
20 end mainly concerned his change, his transfer to the Kananga  
21 Bar. He had not yet informed the ICC of that. Even the  
22 National Bar Council states that Mr Diakiese is a lawyer in the  
23 Kananga Bar Association, but the ICC was not even yet informed  
24 about that. So, in his mind, he was thinking more of that  
25 aspect of a transfer to a different Bar Association.

1 But with regard to the issue of the sanction, he has told  
2 you that, naturally, when he was going to inform the Registrar  
3 about the Kananga Bar Association, he would also inform her that  
4 there was a disciplinary procedure and he has admitted to you  
5 that he had thought only criminal proceedings would require  
6 information, and not disciplinary procedures. He has regretted  
7 that and he has informed you about. So, he wanted to wait to  
8 inform the Registrar that he was now in the Kananga Bar  
9 Association, as well as telling her about the disciplinary  
10 measures.

11 PRESIDENT CONDÉ: (Interpretation) Thank you. You will be  
12 informed in writing of the date of the decision. Are you  
13 handing over some documents to us, or is it simply your  
14 conclusions -- the report of the President, your conclusions and  
15 Article 58? We have all of that. Thank you.

16 MR HAMPTON: Madam President.

17 PRESIDENT CONDÉ: (Interpretation) *Oui, monsieur.*

18 MR HAMPTON: If I might seek your leave to, through you,  
19 ask of Mr Mabanga what his view would be on a particular matter,  
20 and see if he would respond. It's a matter of law or  
21 submissions. I'm in your hands.

22 PRESIDENT CONDÉ: (Interpretation) Mr Nigel, I'm sorry, I'm  
23 sorry, I missed the beginning of your question so, please, could  
24 you repeat it.

25 MR HAMPTON: I wanted to inquire of you, Madam Chair,



1 whether, through you, I might put a proposition to Mr Mabanga -  
2 a proposition of law - to see what his response might be to that  
3 proposition on the question of good or bad faith.

4 PRESIDENT CONDÉ: (Interpretation) I'm sorry that the  
5 debate is closed. I've already -- I should have given you the  
6 floor before stating that the proceedings were over, but I had  
7 already stated that the proceedings were over. However, I do  
8 authorise you to submit the issue to us, and we will see within  
9 the framework of the deliberations; we can ask the party to  
10 explain a particular point. But at this point, no, I'm afraid.

11 MR HAMPTON: Thank you, Madam President. I'm grateful for  
12 your consideration of the point. I'm grateful for your  
13 listening to the arguments today.

14 PRESIDENT CONDÉ: (Interpretation) Thank you. Yes, the  
15 hearing is now adjourned. We would like to thank the  
16 interpreters for the quality of the interpretation. I hope that  
17 we weren't too difficult to interpret.

18 Thank you very much.

19 (The hearing ends at 3.40 p.m.)  
20  
21