

Annex II

Registrar's Decision of 19 August 2011 removing
Mr Hervé Diakiese from the list of counsel



**Registrar's decision removing Mr Hervé Diakiese from the list of counsel
authorised to act before the International Criminal Court**

THE REGISTRAR of the International Criminal Court ("the Court");

PURSUANT TO rules 21(2) and 22 of the Rules of Procedure and Evidence;

PURSUANT TO regulations 67 to 72 of the Regulations of the Court;

PURSUANT TO the Code of Professional Conduct for counsel (resolution ICC-ASP/4/Res.1);

NOTING the decision of 20 February 2007 (DSS/2007/57/DDP/sl) including Mr Hervé Diakiese in the list of counsel established in accordance with rule 21(2) of the Rules of Procedure and Evidence, and noting all of the documentation submitted by the applicant in support of his application to be included in the said list;

NOTING the letter from the President of the National Bar of the Democratic Republic of the Congo dated 25 July 2011, accompanied by an excerpt from the Official Journal of the Democratic Republic of the Congo, No. 13, Part 1, of 1 July 2011;

NOTING the e-mail from the Chief of the Counsel Support Section and the related observations from Mr Hervé Diakiese, both dated 19 August 2011;

CONSIDERING that Mr Hervé Diakiese was included in the list of counsel on the basis of an application which he submitted in his capacity as a lawyer at the Bar of Bas-Congo;

CONSIDERING that, under regulation 67(2) of the Regulations of the Court, the inclusion of all counsel in the list of counsel is subject to the condition that the person concerned has not been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court;

CONSIDERING that, by its decision no. CNO/RDA/320 of 10 March 2011, the National Bar Council of the Democratic Republic of the Congo ordered the penalty of disbarment against Mr Hervé Diakiese;

CONSIDERING that, in order to reach its decision no. CNO/RDA/320 of 10 March 2011, the National Bar Council of the Democratic Republic of the Congo relied on complaints that Mr Hervé Diakiese had intentionally violated article 101 of the

Ordonnance-Loi of 28 September 1979 which imposes an obligation on any lawyer who has been banned or suspended to refrain from exercising any professional duties, including donning the robes of the profession, receiving clients, providing legal advice, assisting or representing parties before the courts, and to desist from stating under any circumstances that he is a lawyer;

CONSIDERING that that same Council faults Mr Hervé Diakiese with failing in his obligation to “[TRANSLATION] comply with the decisions of the organs of the Bar Council and to refrain from any activity likely to undermine their authority”;¹

CONSIDERING that compliance by all lawyers with decisions of the national or international disciplinary bodies to which they are affiliated is a fundamental obligation, with which non-compliance is necessarily prejudicial to the functioning of justice, the smooth conduct of judicial proceedings, the defence of persons represented and the image of the legal profession itself;

CONSIDERING that the same applies to the provisions of article 7(4) of the Code of Professional Conduct for counsel, since it requires counsel to comply at all times with the applicable texts, including such rulings as to conduct as may be made by the Court;

CONSIDERING that article 7(3) of the Code of Professional Conduct for counsel is in the same spirit, since it prescribes that counsel must comply at all times with the applicable texts, including such rulings as to conduct as may be made by the Court;

CONSIDERING that, more broadly, the Code of Professional Conduct for counsel sets a high standard in respect of rules of ethics and professional conduct and that counsel included in the list are expected to fulfil their duty and exercise their mandate before the Court in strict compliance with the provisions of the said Code;

CONSIDERING that the nature of the office of counsel before the Court must be assessed in light of the aforementioned rules of ethics and professional conduct, and in such a way as to ensure the defence of those persons involved in the proceedings with full and strict adherence to the provisions of the applicable legal documents, including the Code of Professional Conduct for counsel;

CONSIDERING that the nature of the office of counsel, with respect to ethics and professional conduct, is identical in most national legal systems in democratic societies;

¹ Obligation established by article 63(5) of Decision No. CNO/8/87 of 19 August 1987 of the National Bar Council governing the framework by-laws of the Bars of the Democratic Republic of the Congo, as amended by Decision No. 04/CNO of 24 February 2001.

CONSIDERING that, in matters of ethics and professional conduct, disbarment on the grounds of a breach of professional ethics is generally the most serious disciplinary measure which may be imposed on a lawyer, and that in this regard, for example, the Bar Council of the Democratic Republic of the Congo² confirms this fact, which is also recognised in the national legislation of several other democratic countries;³

CONSIDERING that a disbarment decision is made after due consideration of the intrinsic and extreme gravity of the said breach and that the assessment of such gravity is the responsibility of the organ or body which took the measure, which, in order to be credible and justified, must be viewed by any sensible person assessing the matter as being founded at least on concrete facts, devoid of obvious errors or flaws, and issued pursuant to legal provisions generally accepted in democratic societies or within a legal system affording minimum safeguards of compliance with fair-trial principles such as are found, for example, in the relevant international or regional legal instruments;

CONSIDERING, similarly, that article 42(1)(e) of the Code of Professional Conduct for counsel which was adopted within the Court to govern professional discipline of counsel authorised to act in its proceedings, includes striking off the list of counsel as the heaviest principal sanction which may be ordered by the Disciplinary Board against a counsel;

CONSIDERING that it is well established that, in determining the hierarchy of disciplinary sanctions, the Code of Professional Conduct for counsel also ranks disbarment for breach of the rules of ethics and professional conduct at approximately the same level as Congolese national law, amongst others;

CONSIDERING that regulation 67(2) of the Regulations of the Court defines a mandatory criterion for inclusion in the list, and that Mr Diakiese was admitted to the list of counsel on the basis of his status as a lawyer at the Bar of Bas-Congo at that time, and that, accordingly, his disbarment fundamentally changes his status as a lawyer at that Bar to such an extent that the Registrar's determination would necessarily have been different in the circumstances pertaining to this matter if his application for inclusion in the list had been considered after the aforementioned disbarment decision had been issued;

CONSIDERING all of the foregoing, and reiterating the requirement that all counsel included in the list, and in particular those assigned a mandate before the Court, must comply with the very high standard of ethics and professional conduct required by the Code of Professional Conduct for counsel, the Registrar finds that

² Article 87 of the aforementioned Legislative Ordinance.

³ See, for example, in the case of France, Chapter III of Law No. 71-1130 of 31 December 1971 governing reform of certain legal professions, and Chapter II of Decree No. 91-1197 of 27 November 1991 governing the organisation of the lawyers' profession.

the disbarment penalty against Mr Hervé Diakiese is incompatible with the nature of the office of counsel before the Court;

CONSIDERING that, pursuant to regulation 71(1)(a) of the Regulations of the Court, the Registrar shall remove a counsel from the list of counsel where he or she “[n]o longer meets the criteria required for inclusion in the list of counsel”;

CONSIDERING that, in light of the aforementioned finding, it has been established that Mr Hervé Diakiese no longer meets one of the mandatory conditions for inclusion in the list of counsel, that is, the criterion set forth in regulation 67(2) of the Regulations of the Court prescribing that counsel should not have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court;

FOR THESE REASONS,

DECIDES:

TO REMOVE MR HERVÉ DIAKIESE FROM THE LIST OF COUNSEL;

TO INFORM Mr Diakiese that he may make an application to the Presidency for review of this decision in accordance with regulation 72 of the Regulations of the Court.

Done in both French and English, the French version being authoritative.

[signed]

Silvana Arbia
Registrar

Dated this 19 August 2011

At The Hague, The Netherlands