DISCIPLINARY BOARD OF THE INTERNATIONAL CRIMINAL COURT

Original: **French**

Reference: **DO/2012/003/MMT/JK**
Date: **18 June 2012**

Before: **Ms Aïcha Condé,** Chair
Ms Marie Pierre Poulain, permanent member
Mr Mbuy-Mbiye Tanayi, ad hoc member

IN THE CASE OF
TRIAL CHAMBER I v. MR JOSEPH KETA

Public Document

Decision of the Disciplinary Board

Counsel for Mr Joseph Keta:
Jean-Louis Gilissen

Commissioner:
Mr Nigel Hampton

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Factual Background:

1. Trial Chamber I of the International Criminal Court ("the Chamber") found that there was *prima facie* evidence that Mr Keta had breached his duty of confidentiality, by providing unauthorised individuals with access to sensitive and confidential material in a confidential case before the International Criminal Court, from 30 November to 12 December 2009.

2. Accordingly, on 29 March 2010, the Chamber referred the matter to the Registrar of the International Criminal Court pursuant to articles 8, 31 and 34(1)(a) of the Code of Professional Conduct for counsel registered at the International Criminal Court.[1] In its submission, the Chamber stated:

> [TRANSLATION] that it had received, during the *ex parte* hearing held on 10 February 2010 and in a number of written submissions prior to and following that hearing, allegations that a legal representative of victims had breached his duty of confidentiality and that several printouts of e-mail correspondence were provided to the Chamber in order to substantiate those allegations.

3. The correspondence provided included e-mails, sent by Mr Keta to the VPRS Database Administrator on 24 November 2009, contained the last password and the new password for use by Mr Keta to access Citrix. This e-mail was also sent to Gaëlle Carayon, from Redress. It requested help as regards a problem accessing Citrix; Mr Keta stated that Ms Gaëlle Carayon was a member of his team and that she could be contacted if more information is needed. An exchange of 10 e-mails between Ms Carayon (Redress) and the VPRS Database Administrator followed, during which a description was given as to how to fill in the password; how to access Citrix; and how to overcome problems accessing the ICC transcripts.

4. Citrix is the route by which members of the legal teams have "remote access" to the information systems of the Court. The software is installed on the computer

[1] *Submission by Trial Chamber I to the Registry pursuant to article 34(1)(a) of the Code of Professional Conduct for counsel*, 29 March 2010.

used by each team member, and access is protected by an individual account password. Counsel gain remote access via Citrix to confidential information in the case.

5. Mr Keta requested "personal" Citrix access for two external collaborators, namely Redress and the law firm Freshfields, but since only team members are allowed access to Citrix, the Registry limited access to Mr Keta, Ms Bapita, Mr Kabongo and their case manager. Under the approved Court procedures, Citrix access may be granted to "external collaborators", but only provided that they are included in the team as *pro bono* members. Such inclusion would require authorisation by the head of the team, in this case Ms Bapita. Although Mr Keta had requested their inclusion, Ms Bapita had not given her consent.

6. According to the Registry, between 30 November and 12 December 2009, Ms Carayon could have gained access to Citrix and the confidential "Court records" and transcripts relating to the *Lubanga* case.

7. Mr Keta suggested that he had intended to enter into *pro bono* partnerships with Redress and Freshfields, but this course was unsuccessful because the team of legal representatives unanimously agreed that the organisations should be denied access to Citrix. Mr Keta further submitted that it was not the organizations as a whole for which he requested access to confidential information, but only for individual members of those organisations. He confirmed, however, that Ms Carayon had been his *pro bono* collaborator since August 2009, and moreover that she worked as his *pro bono* case manager. He submitted that the Registry was aware of this situation, and indeed, the Registry confirmed it was aware of this collaboration.

8. Despite Mr Keta's explanations that he shared his password with Ms Carayon in order to find a solution to a technical problems in accessing Citrix, access to confidential information appears to have been more wide-ranging than to a

single representative from Redress who was merely assisting in a problem with the connection to Citrix. After the Registry requested clarification from Redress, its director indicated that Citrix access codes were given to Redress in the context of the services that Redress had provided to Mr Keta as *pro bono* case manager since 2007. Redress explained that access to Citrix was granted to ensure effective case management, in particular for the purposes of assisting Mr Keta by providing translations of filings into English; advice on victims' rights; assistance in drafting submissions; and updating Mr Keta as to developments concerning his clients' interests, such as the need for redactions. This occurred particularly during the months of the trial when he was not in Court.

9. The Chamber noted that the IT investigation was hence unable to corroborate the detail of Ms Carayon's suggested access to Mr Keta's Citrix account.

10. Nonetheless, Redress has informed the Registry that Ms Carayon gained access to confidential information on at least a weekly basis in order properly to assist Mr Keta with the representation of his three clients.

11. Mr Keta has suggested that he took appropriate measures in order to comply with his obligations regarding confidentiality, in accordance with article 8 of the Code of Conduct. He submitted that the collaboration with Redress did not extend to the whole organisation but only to Ms Carayon, who is bound vis-à-vis himself in terms of confidentiality.

12. In contrast to Mr Keta's representations, the director of Redress informed the Registry that she, together with Ms Carayon's direct supervisor, who is Mr Keta's previous case manager, were occasionally provided with parts of documents containing confidential information. Furthermore, Redress shared confidential documents with the law firm Freshfields, based on the ongoing client relationship Redress has with that firm. Redress indicated that they

implemented confidentiality measures between Redress and Freshfields, such as letters of engagement addressing the issue of confidentiality; private undertakings on confidentiality were given; passwords protecting CDs containing information were delivered by courier to Freshfields' London office; they used locked cabinets and encrypted e-mails, etc.

13. Beyond the four members of the team of legal representatives, headed by Ms Bapita, access to the systems of the Court via Citrix was never endorsed by the Registry. The Chief of VPRS indicated that although it was the responsibility of individual counsel (in this instance, Mr Keta) to ensure that the confidentiality of documents is not put at risk, Citrix access rights may not be granted to anyone without the authorisation of the relevant head of the legal representative's team.

14. The Chamber was of the view that if remote access to confidential material is given to counsel, it is necessary that this is not shared with others who have not been approved and accepted by the Registrar, and who have not entered into binding confidentiality undertakings. These strict, internal protective measures have been established to enable the Court to exercise tight control over access to confidential information. They must not be suborned by private arrangements.

15. The Chamber stressed in its submission that counsel's confidentiality responsibilities are of the utmost importance to the work of this Court, particularly when investigations are undertaken in countries where there are significant security concerns. Individuals who have had contact with the Court, whether as victims or witnesses, may be at risk of harm if their involvement and identities are made known. For this reason, the Court has established protection programmes and mechanisms to limit and rigorously control the extent to which information is disseminated, in order to protect victims, witnesses and other persons at risk on account of the activities of the Court. Although the Chamber does not doubt the potential importance of the

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contribution provided by Redress and Freshfields, or their good faith, disclosing confidential information to any unauthorised organisation or institution endangers the proper functioning of the Court, and the safety and well-being of individuals involved in the trial proceedings.

16. In light of the information before it, the Chamber considered that there was *prima facie* evidence that Mr Keta had disregarded his duty of confidentiality, by providing unauthorised individuals access to sensitive and confidential material in the present case, from 30 November through to 12 December. Accordingly, the Chamber considered it necessary to refer the matter to the Registrar pursuant to articles 8, 31 and 34(1)(a) of the Code of Conduct.

Procedural Background:

17. Upon receipt of the Chamber's submission, the Registrar referred the facts alleged by the Chamber to the Commissioner responsible for investigating complaints of misconduct by letter of 30 March 2010.

18. By letter of 20 April 2010, the Commissioner informed Mr Joseph Keta that disciplinary proceedings were being instituted against him, providing him with a copy of the Registrar's letter and the Chamber's decision containing the complaint, inviting him to submit his version of events within 60 days, and informing him of the procedures and powers associated with his role as Commissioner as well as of the provision of article 40 of the Code of Conduct setting out his rights.

19. Mr Joseph Keta was further invited to state whether the misconduct alleged against him was already the subject of any disciplinary proceedings before his national bar association.

20. By written reply of 13 June 2010, Mr Joseph Keta informed the Commissioner that he acknowledged that Ms Carayon had had access to his Citrix

environment intermittently on the basis of a confidentiality agreement which he had signed together with her in August and notified to the Registry, which, in his view, had committed the error of accepting said document as it was without informing him that standard templates existed.

21. He further affirmed that he was not the subject of any proceedings before his national bar association.

22. Mr Joseph Keta concluded the letter by stating that it was incumbent upon the Commissioner to apply article 39(1) of the Code of Professional Conduct by dismissing the complaint without further investigation.

23. Meanwhile, in response to a request from the Commissioner for further information dated 24 June 2010, the Registry provided him with further details regarding the case of Mr Joseph Keta in a letter dated 22 June 2010.

24. Further to the Registry's 22 July 2010 letter, Mr Joseph Keta also wrote to the Commissioner, providing remarks in addition to his 13 June 2010 account of events, to which the Registry responded in a note on 14 October 2010.

25. On 25 October 2010, the Commissioner submitted a report to the Disciplinary Board, in which he found that misconduct might have been committed by Mr Keta and sought an appropriate sanction against him should the misconduct be shown to have existed.

26. Accordingly, on 15 March 2011 Mr Joseph Orwinyo Keta was summonsed to appear before the Disciplinary Board at a hearing on 13 May 2011 in order for it to decide on the Chamber's complaint of 29 March 2010. Mr Keta was invited to file his written submissions, observations or explanations to the Disciplinary Board by 15 April 2011.

27. Mr Keta's brief was transmitted to the Commissioner and the Disciplinary Board.

28. On 18 April 2011, the Commissioner submitted a memorandum in reply to the Defence brief to Mr Keta and the Disciplinary Board.

29. On 27 April 2011, the Chair of the Disciplinary Board provided all parties concerned and the Commissioner with a list of possible questions to be addressed at the hearing.

30. On 29 April 2011 the Commissioner provided all parties with a document addressing the various questions raised.

31. At the 13 May 2011 hearing, Mr Keta was assisted by Mr Gilissen.

32. Elaborating on his brief, Mr Keta and his counsel objected that the Commissioner had exceeded his powers and competence, thereby irremediably violating the rights of the Defence and infringing the fairness of the proceedings.

33. In the alternative, Mr Keta submitted that such violation of the rights of the Defence may be countervailed and remedied in a manner to be determined by the Disciplinary Board, to allow the proceedings to continue with safeguards for the rights of the Defence and the fairness of proceedings.

34. Mr Keta further maintained that since the Commissioner was not his opponent, he lacked standing to reply to his brief.

35. The Commissioner was invited to speak in response to the various arguments advanced, and the Disciplinary Board then closed the proceedings and deliberated on the challenge to competence, before rendering the following decision:

> For these reasons:
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> The Disciplinary Board rejects the preliminary submissions entered by the Defence and invites the Defence to submit its substantive pleadings. It instructs the Registry to notify the decision to parties.[2]

36. Accordingly, Disciplinary Board called Mr Keta to a disciplinary hearing to be held on 3 October 2011.

37. Since one of the members of the Disciplinary Board was unavailable, the matter was postponed until the hearing of 18 October 2011.

38. Meanwhile, in an application dated 12 September 2011, Mr Keta requested that Ms Gaëlle Carayon and [REDACTED] [REDACTED] be called to appear as witnesses before the Disciplinary Board.

39. In respect of Ms Gaëlle Carayon, the Defence for Mr Keta indicated that it wished for her to explain during her evidence the conditions in which she accessed the Citrix program and to state the period(s) in which access to Citrix was available to her.

40. In respect of [REDACTED], the Defence for Mr Keta stated that it wished to obtain from him all technical information which would enable the particulars of this matter to be comprehended.

41. Mr Nigel Hampton, the Commissioner, was unable to attend the hearing on 18 October 2011 and, in order not to delay consideration of the matter further, submitted to the Board a memorandum dated 25 September 2011 in response to Mr Keta's observations.

42. In his memorandum, the Commissioner stated that, in his view, three options were open to the Disciplinary Board:

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[2] Decision of the Disciplinary Board of 13 May 2011, in the case of *The Registrar v. Mr Keta*.

Firstly, if, on the basis of the material in the submission on behalf of Mr Keta, the Board is of the view that either or both these persons should be called and heard, then the Board as presently advised might consider issuing a summons for one or both to be called and heard at the next sitting of the Board in this matter, when the disciplinary proceedings should be substantively decided.

Secondly, if, on the basis of the material in the submission, the Board is not of the view that the two persons should be summonsed to be heard, and were to take account of the fact that Mr Keta's counsel had interviewed the two proposed witnesses and then provided further information to the Board for the Board thereafter to make an informed decision as to whether these persons rightly can be "deemed useful" to be called and heard "for the establishment of the truth", then the Board should issue appropriate directions accompanied by an appropriate timetable for Mr Keta to comply with.

Thirdly, if, on the basis of all the materials presently before it, including the recent submission made on behalf of Mr Keta, the Board takes the view that the substantive hearing should proceed, then either:

The matter should be decided by the Board based on documents and facts available so far (articles 41 and 42), which the Commissioner suggests might be appropriate; or

The Board should set a fresh date for the substantive hearing, accompanied by appropriate directions and timetabling, for Mr Keta to comply with.

43. During the hearing on 18 October 2011, Mr Gilissen, Mr Keta's counsel, prayed the Disciplinary Board, before deciding whether to hear the proposed witnesses, to grant his client a closed session to enable him to speak freely and fully about the matter and, especially, avoid any difficulties for himself arising from the resultant publicity.

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44. After deliberation, the Disciplinary Board decided to hear Mr Keta in closed session.

45. Mr Keta and his counsel were thus able to speak entirely freely about the circumstances of the matter.

46. The Disciplinary Board subsequently deliberated on the request to hear witnesses, rendering the following decision on 28 November 2011:[3]

> FOR THESE REASONS
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> Orders that Ms Gaëlle Carayon and [redacted] be called to give evidence;
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> Decides that Ms Gaëlle Carayon and [redacted] will be informed by summons of the date of their appearance to give evidence before the Disciplinary Board; and
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> Instructs Mr Keta to submit his lines of defence not later than 6 January 2012.

47. On 20 February 2012, Ms Gaëlle Carayon was summonsed to appear before the Disciplinary Board at 11 a.m. on 15 March 2012 to testify and speak the truth about what she knew in the case between the Court and Mr Joseph Keta.

48. Likewise and in the same terms, on 20 February 2012, [redacted] was summonsed to appear before the Disciplinary Board at 10 a.m. on 15 March 2012.

49. Both summonses were duly received by those called to testify.

50. At the Disciplinary Board session on 15 March 2012, only one of the witnesses, [redacted], was in attendance.

51. Having placed the witness in a separate room, the Chair of the Disciplinary Board informed both Mr Keta and his counsel and the Commissioner responsible for disciplinary matters that Ms Gaëlle Carayon had informed the Disciplinary Board in a letter dated 23 February 2012 that she was unable to

[3] Decision of the Disciplinary Board of 28 November 2011, in the case of *The Registrar v. Mr Keta*.

attend the Board on the specified date for professional reasons and requested it to refer to the two letters of 26 February and 15 April 2010 which Redress director Ms Carla Ferstman had written to the Registry.

52. The Disciplinary Board thus decided to hear the sole witness present, who was examined by the Defence for Mr Keta and cross-examined by the Commissioner. The members of the Disciplinary Board also questioned the witness, who had pledged under oath to tell the truth, the whole truth and nothing but the truth.

53. After the hearing, during which the witness presented several documents in his possession, providing photocopies to Mr Keta and the Commissioner, the Chair of the Disciplinary Board thanked the witness and invited him to step down.

54. Mr Keta's Defence was subsequently invited to make its submissions.

THE PARTIES' SUBMISSIONS

55. Mr Gilissen first argued that Mr Keta's conduct was either justifiable or merely in error, and that he had acted in good faith because he was unaware and did not know that he was in breach of confidentiality, notwithstanding the fact that such breach had been materially established. He submitted firstly that the situation in Mr Keta's team appeared to be proper, and secondly that the Registry itself – which, he contended, has an obligation to provide assistance and support to the legal representatives and victims – had approved, albeit tacitly, the practice adopted in Mr Keta's team; since nobody had ever indicated disapproval of the team's practice, it appeared to be reasonable.

56. Mr Gilissen then raised the objections on the grounds of abuse of law and equitable estoppel which he alleged against the Registrar. He argued that the Registrar had contradicted her previous, established position by initiating a disciplinary procedure against Mr Joseph Keta, despite her having previously

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tolerated on his part a practice which was considered to be proper, in which Mr Keta engaged in good faith and in which he acted in all honesty, since no one had ever informed him that he was acting improperly.

57. Consequently, he concluded by requesting that the Disciplinary Board make an exceptional allowance by permitting Mr Keta to continue to support his victims in the reparations phase of the *Lubanga* case, especially since, he argued, the procedure initiated against Mr Keta was merely the result of Ms Bapita's conspiring against him.

58. The floor was then given to the Disciplinary Commissioner, who stated that he would address three points: firstly, to recall the definition of misconduct under article 31(a) of the Code of Conduct, which does not require the element of knowledge provided for in paragraph (b) of the same article; secondly, to challenge the theory of estoppel, which in his view does not apply in criminal law or, as an indirect result, in disciplinary law, since it is an element of contract law governed by civil law; and thirdly, to protest against the Defence allegation that Ms Bapita had conspired against Mr Keta, which should have been made only if Ms Bapita had also been called as a witness and could have defended herself against the allegation.

59. The floor was then given in turn to Mr Gilissen for his reply, in the course of which he undertook to provide the Board with a note setting out his submissions and the case law pertaining to the objections he had raised, and lastly to Mr Keta himself for his final words.

60. The Disciplinary Board subsequently adjourned the hearing and retired to deliberate.

Ms Carayon's failure to appear:

61. In respect of the witness Gaëlle Carayon's failure to appear, the Disciplinary Board notes that in response to the summons to appear to testify, Ms Carayon informed the Chair of the Disciplinary Board by letter that she would be unavailable during the time period of the hearing owing to professional obligations; a copy of the letter was addressed to Ms Carla Ferstman.

62. The Board regrets that Ms Carayon made so light of its invitation to appear as a witness in order to elucidate the facts at issue. The fact that she had professional obligations is insufficient justification for her failure to attend the hearing.

63. In acting as she did, Ms Carayon showed a lack of consideration for both the Disciplinary Board and Trial Chamber I, which originally submitted the complaint.

64. While it is standard practice before the ordinary courts for recalcitrant witnesses to face criminal charges, the Disciplinary Board can merely severely reprimand both Ms Gaëlle Carayon for her careless and disrespectful conduct towards the institutions of the International Criminal Court, and the NGO Redress, which should have released her from her professional obligations in order to enable her to attend the hearing. In failing to do so, it condoned her misconduct, whereas its status as an organisation working with the International Criminal Court should have prompted it to prioritise a summons of an employee in the interests of proper justice.

Abuse of law:

65. As to the objection of abuse of law made against the case due to the fact that the Registrar had initiated the procedure against Mr Keta, the Disciplinary Board notes that the source of the action taken against Mr Keta was the

complaint made by Trial Chamber I by way of its decision of 29 March 2010, in which the Chamber considered that there was *prima facie* evidence to establish that Mr Keta had disregarded his duty of confidentiality by providing unauthorised individuals access to sensitive and confidential material of the International Criminal Court.

66. In its decision, the Chamber relied on article 34 of the Code of Professional Conduct for counsel, which provides that a chamber may submit to the Registrar complaints against counsel regarding misconduct; that upon receiving such a complaint, the Registrar shall transmit the complaint to the Commissioner for investigation; and also that the Registrar may, on his or her own initiative, make complaints to the Commissioner regarding facts which he or she considers constitute misconduct, with a view to initiating a disciplinary investigation of that counsel.

67. Accordingly, the Code of Conduct makes a clear distinction between situations where, on the one hand, the Registrar acts *proprio motu* to report a counsel to the Commissioner with a view to potentially initiating a disciplinary procedure by virtue of the Registrar's power to oversee the activity of counsel included on the list of the International Criminal Court, and on the other hand, where the Registrar serves merely as a communication channel for a complaint emanating either from a chamber of the International Criminal Court or the Prosecutor or from any individual or group of individuals who feels wronged by the misconduct of a counsel on the list.

68. In the present case, by transmitting to the Disciplinary Commissioner a complaint lodged by Trial Chamber I, the Registrar of the International Criminal Court instituted no proceedings whatsoever against Mr Keta. Besides, in any event, the authority to proceed against counsel remains vested in the Disciplinary Commissioner, who may dismiss a complaint or decide to take

action against the person responsible for the acts brought before the Disciplinary Board.

69. Consequently, the objection that the disciplinary procedure constitutes an abuse of law is inadmissible.

Estoppel

70. As to the objection of estoppel raised in respect of the procedure initiated against Mr Keta, whereby it is argued that in acting as she did, the Registrar contradicted her previous, established position of tolerating the practice in Mr Keta's team of allowing external individuals to access confidential documents of the International Criminal Court, the Disciplinary Board notes that estoppel, which precludes a person from contradicting him- or herself to the detriment of another person, is founded on the requirement for consistent conduct, which prohibits one co-contractor from contradicting him- or herself to the detriment of the other co-contractor.[4]

71. In the present case, it can be inferred from the evidence available to the Disciplinary Board – be it correspondence between the Registry and the NGO Redress, the testimony of [REDACTED] or evidence submitted by Mr Keta's Defence – that certain services of the Registry had long been aware of the fact that Mr Keta was allowing third parties to access confidential information of the International Criminal Court, but were unable to intervene to put an end to the situation and merely encouraged him to sign a confidentiality agreement in August 2009, without calling into question the collaboration to which the agreement related.

72. The Disciplinary Board is nevertheless of the opinion that whilst the estoppel rule is applicable when one party contradicts itself to the detriment of the other

[4] Denis Mazaud, *la confiance légitime et l'estoppel, rapport français, société de législation comparée*, 2007, pp. 247 and 266.

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party, both must also be parties to the same case, and the party contradicting itself must be doing so in its own interests, after implying that the opposing party had a right.

73. In the present case, there is no evidence that the Registrar – still less the Registry – is a party to the disciplinary procedure against Mr Keta, or that either the Registrar or the Registry draw any personal benefit from the procedure.

74. In actual fact, the party pursuing the action against Mr Joseph Keta is the Disciplinary Commissioner, by virtue of his power to dismiss complaints or to refer them to the Disciplinary Board in accordance with article 39 of the Code of Professional Conduct for counsel, which states the following:

75. "The Commissioner conducting the investigation may dismiss a complaint without any further investigation if he or she considers on the basis of the information at his or her disposal that the allegation of misconduct is unfounded in fact or in law. He or she shall notify the complainant accordingly."

76. "Should the Commissioner consider otherwise, he or she shall promptly investigate the counsel's alleged misconduct and decide either to submit a report to the Disciplinary Board or to bring the procedure to an end."

77. Consequently, certain decisions issued in the case were erroneously entitled *The Registrar v. Mr Keta* instead of *Trial Chamber I v. Mr Keta*.

    Furthermore, whilst it is true that the Registry services were indeed aware that Mr Keta had allowed third parties to access confidential information of the International Criminal Court, there is no evidence that those services engaged in any initiative, enterprise or action which encouraged Mr Keta in his conduct or which would have given him a legitimate expectation to exercise a right.

78. Finally, in the Disciplinary Board's opinion, the estoppel rule is not applicable in disciplinary law, which does not involve two co-contractors who are parties to an agreement, but instead examines a member of a given profession in light of the rules of conduct by which he or she is bound.

79. This is notwithstanding the fact that estoppel has been applied, *inter alia* by the International Court of Justice, in matters other than contract law, in particular in private international law and public international law.

80. Consequently, the objection on the grounds of estoppel is inadmissible because it is irrelevant.

Justification:

81. The Board now turns to the justification on which Mr Keta relies, based on the fact that he had no awareness or knowledge that he was violating a professional obligation.

82. The Disciplinary Board notes that justification is a principle of criminal law under which a perpetrator may be entirely absolved of responsibility for a crime if he or she acted out of necessity or self-defence or under the orders of an authority at the time when the crime was committed.

83. The justification on which Mr Keta's Defence relies – his lack of awareness or knowledge that he was violating a professional obligation – does not, therefore, fall under the grounds for justification for professional breaches and misconduct.

84. On the contrary, in the Disciplinary Board's view it is only the *mens rea* or element of intent necessary for the realisation of certain breaches or misconduct.

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85. However, the Disciplinary Board notes that misconduct under article 31(a) of the Code of Conduct does not require that the person concerned have any knowledge or awareness that he or she was violating the rules of the profession. Consequently, the fact alone that the code was breached – even in good faith – means that misconduct exists, with good faith applying in such a case only as a mitigating factor.

86. Accordingly, the justification invoked is irrelevant and will therefore be dismissed.

87. Concerning Mr Keta's ignorance of the rule of confidentiality, the Disciplinary Board is of the opinion that it cannot take this into consideration: since knowledge of international criminal law is one of the prerequisites for lawyers to be included on the list of counsel at the International Criminal Court, it is presumed that Mr Keta is fully conversant with all relevant rules of conduct, including those pertaining to the confidentiality of documents and proceedings before the Court.

88. As to the substance, the Disciplinary Board is of the opinion that it should consider reliable the Director of Redress's statements, made *inter alia* in her letter of 26 February 2010 to the Deputy Registrar after she had consulted the organisation's correspondence file and spoken with the staff concerned.

89. It is apparent from pages 8 and 9 of that letter that from early 2007, without prejudice to a specific date, Mr Keta had granted not only Redress but also the [redacted] access to documents which he had received as legal representative of victims, including confidential documents. Through Mr Keta, Ms Carayon herself had direct access to the Citrix system from June 2009 until January 2010.

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90. Such access enabled those individuals not only to be privy to confidential Court documents themselves, but also to share the knowledge thus gained with others, such as members of the Redress board or the Freshfields law firm, and even to retain the documents.

91. Consequently, the Disciplinary Board finds that Mr Keta deliberately concealed the truth by alleging that he had given Citrix access to Ms Carayon alone and for a very short period in exceptional circumstances when he was having difficulties in using the software, whereas well before that date several individuals could and did obtain confidential documents and information on account of his actions.

92. Furthermore, by providing his password to Ms Carayon – and even to the witness [REDACTED], to the latter's surprise – Mr Keta exceeded the scope of authorisation provided for under article 8(3) for counsel to reveal information to co-counsel, assistants and other staff working on the particular case for which they are responsible before the International Criminal Court.

93. Accordingly, the Disciplinary Board is of the view that by having allowed individuals, institutions and unauthorised organisations to access confidential information of the International Criminal Court, directly or via others, Mr Keta may jeopardise the Court's functioning and the safety of persons participating in the trial. Accordingly, the Board is of the opinion that this constitutes a serious breach equivalent to prejudicial disclosure of facts or information acquired in the course of his duties, as provided for under rule 24 of the Rules of Procedure and Evidence, with the aggravating factor that in the present case, Mr Keta effected disclosure by providing his password to third parties; and that in so doing, he jeopardised confidentiality, with no means of controlling the quantity of documents and information consulted unlawfully, how they would be used and to what end, or ultimately the number of persons who may access them.

94. It should be noted that before the common legal representation team was formed in January 2009, Mr Keta had, in September 2007, appointed a representative from Redress as case manager for the victims he was representing. That person was therefore authorised to view confidential documents until January 2009, since working on confidential documents is part of a case manager's duties. The Disciplinary Board considers that a properly appointed member of a team may have access to confidential documents. That does not authorise counsel, the only team members bound by a professional confidentiality obligation under their code of conduct, to provide that person with their confidential passwords. As stated in the preceding paragraph, controlling the disclosure of confidential data is difficult once passwords have been shared.

95. However, the fact that the Registry services indulged Mr Keta or allowed him to continue this practice in no way absolves him of responsibility, nor can it constitute a mitigating factor in view of the oath of office taken by counsel such as he strictly to respect professional secrecy, of which confidentiality is only one element.

96. In the practice of law, it is for the lawyer alone to regulate his conduct in the exercise of his mandate and to apply free will in all situations to make the requisite choices in order to comply with the duties and obligations incumbent upon him, without relying on any other person or appealing to any guide whatsoever.

97. This holds true to such an extent that, as to the substance, both the Defence for Mr Keta and Mr Keta himself agree with the Disciplinary Commissioner on the existence of misconduct.

For these reasons,

THE DISCIPLINARY BOARD

(i) Ruling after deliberating *in camera*,

(ii) Notes Ms Gaëlle Carayon's reprehensible refusal to appear to testify before the Disciplinary Board;

(iii) Notes that, by condoning her conduct, the NGO Redress did not show willing to cooperate with the Disciplinary Board and that such conduct is also reprehensible;

(iv) Ruling on the misconduct on the grounds of a breach of confidentiality alleged against Mr Joseph Keta, finds that it has been established;

(v) Orders a penalty of a three-month suspension;

(vi) So decided by the Disciplinary Board.

Dated this 18 June 2012, at The Hague

[signed]
Ms Aïcha Condé

Ms Marie Pierre Poulain

[signed]
Mr Tanayi Mbuy-Mbiye

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