

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-01/06

Date: 29 March 2010

**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

***SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE  
OF THE PROSECUTOR v. THOMAS LUBANGA DYILO***

**Confidential, *ex-parte* Victims' Legal Representatives, VPRS (Registry) and OPCV**

**Submission by Trial Chamber I to the Registry pursuant to Article 34(1)(a) of the  
Code of Professional Conduct for counsel**

**Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Joseph Keta Orwinyo

Mr Jean Chrysostome Mulamba Nsokoloni

Mr Paul Kabongo Tshibangu

Mr Hervé Diakiese

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

Ms Paolina Massida

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

**Defence Support Section**

Ms Silvana Arbia

**Deputy Registrar**

**Detention Section**

Mr Didier Preira

**Victims Participation and Reparations Other  
Section**

Ms Fiona McKay

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of The Prosecutor v. Thomas Lubanga Dyilo ("*Lubanga case*"), issues the following "Submission by Trial Chamber I to the Registry pursuant to Article 34(1)(a) of the Code of Professional Conduct for counsel".

## **I. Background and Submissions**

### ***Me Bapita's Request***

1. On 9 February 2010, Me Carine Bapita filed a request for an *ex parte* hearing to address a potential breach of Me Joseph Keta's confidentiality obligations, on the basis that he had provided his passwords enabling access to Citrix and Webmail to at least one unauthorised individual.<sup>1</sup>
2. In summary, upon discovering that Me Keta may have provided his password to Ms Gaelle Carayon from the NGO Redress, Me Bapita immediately wrote to the Victims Participation and Reparation Section ("VPRS") on 29 January 2010, indicating that the group of legal representatives of which she is a member comprises four people (*viz.* Me Keta, Me Kabongo, Ms Glodjinon and herself) and that the team's position is that there should be no third-party access to the computer systems of the ICC.<sup>2</sup> According to Me Bapita, the VPRS acknowledged receipt of this correspondence but did not respond substantively. Me Bapita argued that the successive emails from the VPRS have led her to believe that the position of the VPRS as regards confidentiality obligations differs from her own position as team leader.<sup>3</sup>

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<sup>1</sup> Requête aux fins d'obtenir une audience *ex-parte*, 9 February 2010, ICC-01/04-01/06-2289-Conf-Exp, paragraphs 1-3.

<sup>2</sup> ICC-01/04-01/06-2289-Conf-Exp, paragraphs 4-5.

<sup>3</sup> ICC-01/04-01/06-2289-Conf-Exp, paragraphs 6-8.

3. Me Bapita expressed her fear that individuals not bound by the Code of Professional Conduct for counsel ("Code of Conduct") have had access to confidential records and the programs of the Court via Citrix, and that this was done on behalf of her legal team and in violation of the rules of confidentiality.<sup>4</sup> In addition, Me Bapita is concerned that her clients have been left in the position where they must choose between their personal safety and continuing to be represented under the present arrangements.<sup>5</sup> Accordingly, Me Bapita requested an *ex parte* hearing; an investigation into the issue; identification of the individual or individuals responsible for the alleged breach of confidentiality; and the implementation of measures that will secure proper working methods and the security of the witnesses and victims.<sup>6</sup>

*The response from the VPRS*

4. The VPRS responded to Me Bapita's submission on 10 February 2010.<sup>7</sup> The VPRS indicated that it wanted to discuss these matters with Me Bapita, as her decision to reject any *pro bono* assistance from external collaborators (namely, the NGO Redress and the law firm Freshfields) may have consequences for the team's capacity to represent and assist its clients. The VPRS noted that, because the legal aid budget for victims is limited, the Registrar encourages external *pro bono* assistance in the interests of victims.<sup>8</sup>
5. The VPRS further explained that it had not given any authorisation for access to third parties. As such, only Me Keta, Me Bapita, Me Kabongo and their case manager Ms Glodjinon had received the access codes for the Citrix system.<sup>9</sup> Upon a request from Me Keta to grant access to external collaborators, in this case for Redress and the law firm Freshfields, the VPRS informed Me Keta

<sup>4</sup> ICC-01/04-01/06-2289-Conf-Exp, paragraph 9.

<sup>5</sup> ICC-01/04-01/06-2289-Conf-Exp, paragraph 9.

<sup>6</sup> ICC-01/04-01/06-2289-Conf-Exp, paragraph 9.

<sup>7</sup> Clarifications du Greffe suite à la requête de Me Bapita du 9 février 2010, 10 February 2010, ICC-01/04-01/06-2290-Conf-Exp.

<sup>8</sup> ICC-01/04-01/06-2290-Conf-Exp, paragraphs 7-9.

<sup>9</sup> ICC-01/04-01/06-2290-Conf-Exp, paragraph 10.

that only team members are allowed access to Citrix.<sup>10</sup> If these external collaborators were included in the team as *pro bono* members, access could be granted to them, whilst respecting any necessary security conditions and obligations.<sup>11</sup> However, since the team of legal representatives of victims did not wish to designate Redress or Freshfields as *pro bono* members of their team, access had not been granted.<sup>12</sup>

6. The VPRS further indicated that it had received a declaration from Me Keta on 3 December 2009, in which he officially set out his partnership with the NGO Redress and the law firm Freshfields, vis-à-vis his clients.<sup>13</sup>
7. The VPRS concluded that it does not have reason to believe that Me Keta failed to respect his obligations regarding confidentiality.<sup>14</sup>

#### *Ex parte hearing*

8. On 10 February 2010, an *ex parte* hearing was held with Me Bapita, Me Diakiese, a representative of the VPRS, and a representative from the Office of Public Counsel of Victims ("OPCV").<sup>15</sup>
9. During the hearing, Me Bapita presented several documents for the Chamber's consideration.<sup>16</sup>
10. The first set of documents contains a series of emails between Me Bapita and the Chief of the VPRS, dated between 29 January and 5 February 2010, addressing (1) the access granted to Ms Gaelle Carayon, (2) the potential

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<sup>10</sup> ICC-01/04-01/06-2290-Conf-Exp, paragraph 11.

<sup>11</sup> ICC-01/04-01/06-2290-Conf-Exp, paragraph 11.

<sup>12</sup> ICC-01/04-01/06-2290-Conf-Exp, paragraph 12.

<sup>13</sup> ICC-01/04-01/06-2290-Conf-Exp, paragraph 13.

<sup>14</sup> ICC-01/04-01/06-2290-Conf-Exp, paragraph 14.

<sup>15</sup> Transcript of hearing on 10 February 2010, ICC-01/04-01/06-T-244-CONF-EXP-ENG ET.

<sup>16</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 2, line 1 *et seq.*; The documents presented during the hearing were later filed: Transmission des documents produits par Me Bapita lors de l'audience ex parte du 10 février 2010, 11 February 2010, ICC-01/04-01/06-2295-Conf-Exp.

involvement of a VPRS staff member, (3) the legal team's view that access should be restricted to the members of the team, and (4) the issue of the lack of resources available to legal representatives and the potential assistance that an NGO can give to participating victims.<sup>17</sup>

11. The second set of documents includes a series of emails between Me Bapita and Me Keta on 2 February 2010, clarifying that as head of the legal representative team, Me Bapita opposes the communication of confidential information to third parties.<sup>18</sup>

12. Attached to these messages are a series of emails between Ms Gaelle Carayon and the Documentation and Database Administrator of the VPRS (dated November and December 2009), suggesting that Ms Carayon was trying to obtain access to Citrix, that Me Keta had given her the passwords, and that the VPRS Database Administrator had knowledge of this.<sup>19</sup>

13. Thereafter, an exchange of 10 emails between Ms Carayon (Redress) and the VPRS Database Administrator took place, addressing password and CITRIX access modalities, including problems associated with accessing Court transcripts through Citrix.<sup>20</sup> During the hearing, Me Bapita submitted that when she "clicked" on the link contained in a relevant email, she could access a wide range of information in the case, including confidential material.<sup>21</sup>

14. The Chamber was also shown an email from Ms Carayon dated 18 January 2010, containing a declaration that was sent by Ms Carayon to Me Keta for his signature.<sup>22</sup> In this declaration Me Keta confirmed that Redress and the law

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<sup>17</sup> ICC-01/04-01/06-2295-Conf-Exp-Anx2.

<sup>18</sup> ICC-01/04-01/06-2295-Conf-Exp-Anx2, page 4.

<sup>19</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 3, line 20 *et seq.*; ICC-01/04-01/06-2295-Conf-Exp-Anx3, page 6.

<sup>20</sup> ICC-01/04-01/06-2295-Conf-Exp-Anx3, pages 3 to 6.

<sup>21</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 4, lines 4-5.

<sup>22</sup> ICC-01/04-01/06-2295-Conf-Exp-Anx4, page 1.

firm Freshfields have assisted him since 2007 and were to be regarded as *pro bono* collaborators, who should be given access to the files of his clients and all the documents relating to the cases in which he acts as legal representative, in accordance with the Code of Conduct.<sup>23</sup> During the hearing, Me Bapita explained that she was wholly unaware of this agreement.<sup>24</sup>

15. The Chamber also reviewed an email from Ms Carayon dated 20 January 2010 in which she asked Me Keta whether victim a/0060/09 was represented by Me Keta, Me Bapita or Me Kabongo.<sup>25</sup>

16. Finally, the Chamber reviewed a series of emails exchanged between Me Bapita, Ms Carayon and others, in which Ms Carayon apparently indicated her intention to organise medical examinations for victims represented by the team Bapita-Kabongo-Keta.<sup>26</sup> In these emails, Me Bapita expressly stated that she did not wish to reveal the contact details of her clients since she had not, for the time being, ordered their medical examination.<sup>27</sup> There is also a series of emails between Me Keta and Me Bapita in which Me Keta invites Me Bapita to have a tripartite meeting between their legal team, Redress and Freshfields in order to discuss the *pro bono* intervention of these two organizations.<sup>28</sup>

17. The OPCV indicated that it shared the concern of Me Bapita, particularly since there could be third party access to extremely sensitive information relating to the legal representatives' clients.<sup>29</sup>

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<sup>23</sup> ICC-01/04-01/06-2295-Conf-Exp-Anx4.

<sup>24</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 4, line 20 *et seq.*

<sup>25</sup> ICC-01/04-01/06-2295-Conf-Exp-Anx5, page 1.

<sup>26</sup> ICC-01/04-01/06-2295-Conf-Exp-Anx6.

<sup>27</sup> ICC-01/04-01/06-2295-Conf-Exp-Anx6, page 9.

<sup>28</sup> ICC-01/04-01/06-2295-Conf-Exp-Anx6, page 4.

<sup>29</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 9, line 2-10.

18. The VPRS confirmed that the Registry has not granted access to the systems of the Court beyond the four members of the team headed by Me Bapita, and that it was the responsibility of counsel (referring particularly to Me Keta) to ensure the confidentiality of documents.<sup>30</sup> It also indicated that no access rights can be granted without the authorization of the head of each team. Me Keta's request, that access should be granted to Freshfields and Redress, had not been endorsed by Me Bapita (the head of the team), and thus no third party access was authorised.<sup>31</sup>

19. The VPRS, however, suggested that legal teams are entitled to request assistance from individuals acting *pro bono* for up to 6 months, and it considers there is value in a legal team receiving such support.<sup>32</sup> At the same time, it was acknowledged that any request to add a large number of people to the team (given the size of some NGOs and law firms) would raise "a lot of questions" regarding the provisions of the Code of Conduct and particularly Article 8 (Professional secrecy and confidentiality).<sup>33</sup>

20. The OPCV noted that among the documents presented to the Chamber there were several emails between Ms Carayon and the IT member of VPRS, in which the latter used his official ICC email address. In view of this exchange, the OPCV requested clarification as to whether or not Ms Carayon had been formally appointed a member of Me Keta's team.<sup>34</sup>

21. In response, the VPRS representative indicated that a formal appointment had never been made.<sup>35</sup> However, the VPRS underlined that *pro bono* assistance from law firms or academic institutions is especially important given the

<sup>30</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 10, line 7 *et seq.*

<sup>31</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 11, line 7-14.

<sup>32</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 12, line 5 and page 15, line 9 *et seq.*

<sup>33</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, pages 11-12.

<sup>34</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 13 lines 18 -25.

<sup>35</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 14 lines 13 - 20.

limited resources available for the ICC legal aid scheme, in comparison with the resources of a large law firm or academic institution.<sup>36</sup>

*The submissions by the Registry*

22. On 12 February 2010, the Deputy Registrar filed certain clarifications regarding the role of the Registrar in providing access to information on the part of the legal representatives.<sup>37</sup>

23. The Registry rehearsed that access to the information systems of the Court was restricted, in this context, to Me Keta, Me Bapita, Me Kabango and the case manager Ms Sylviane Glodjinon.<sup>38</sup>

24. The Registry submits that it can exercise only very limited control over the access an authorized team member may give to an unauthorized third party, by sharing his or her Citrix password.<sup>39</sup> The Registry submits that it is the responsibility of counsel to uphold the Code of Conduct as regards confidentiality.<sup>40</sup>

25. After reviewing the documents and correspondence, the Registry submits that it is possible that Ms Carayon had access to transcripts via Citrix between 30 November and 12 December 2009, and it is also possible that she could have gained access to confidential "Court records".<sup>41</sup>

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<sup>36</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 15 lines 6 - 12.

<sup>37</sup> Clarifications du Greffe suite à la demande de la Chambre lors de l'audience ex parte du 10 février 2010, 12 February 2010, ICC-01/04-01/06-2302-Conf-Exp.

<sup>38</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 2.

<sup>39</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 6.

<sup>40</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 6.

<sup>41</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 8.

26. The Registry notes that the VPRS Database Administrator undertakes to provide help in solving the IT problems experienced by counsel.<sup>42</sup> Although this is not an official part of its role, it assists in order to promote efficiency.<sup>43</sup>

27. The Registry notes that the email exchange was limited to technical questions, and as far as the VPRS Database Administrator was concerned, the request to assist Me Keta (expressed via an external party) did not appear inappropriate, since many legal representatives require assistance on IT issues. The VPRS was informed that Ms Carayon was helping Me Keta, and there were language difficulties between Me Keta and the VPRS Database Administrator.<sup>44</sup>

28. Regarding the status of the NGO Redress and the law firm Freshfields vis-à-vis the ICC, the Registry notes that it has contact with Redress, along with many other organizations, in relation to various issues concerning victims appearing before the Court.<sup>45</sup> In this capacity, the Registry notes that Redress is considered to be an intermediary between the victims and the Court, and that this role began in July 2007, and is continuing.<sup>46</sup> The Registry also notes that Me Keta has informed the VPRS on several occasions of his work with Redress, and that the Registry has regularly reminded Me Keta of his confidentiality obligations.<sup>47</sup> The Registry submits that Me Keta appointed a member of Redress as "case manager" in September 2007, but that this role formally ceased when the common legal representation team was organized.<sup>48</sup>

29. With regards to the law firm Freshfields, the VPRS was informed at the end of 2009 that Freshfields had offered their assistance, especially for the

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<sup>42</sup> ICC-01/04-01/06-2302-Conf-Exp paragraph 15.

<sup>43</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 15.

<sup>44</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 16.

<sup>45</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraphs 18-19.

<sup>46</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 19.

<sup>47</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 20.

<sup>48</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 21.

reparations stage of the present case.<sup>49</sup> The Registry submits that on 12 January 2010 Me Keta informed the VPRS of the possibility of designating a member of Redress and a member of Freshfields as *pro bono* members of his team, providing them with access to the Court systems.<sup>50</sup> The Registry advised Me Keta to discuss the issue with the team of legal representatives.<sup>51</sup> It was later decided that this *pro bono* appointment would not be pursued and thus access to the Court systems was not granted.<sup>52</sup> The Registry again notes that it encourages *pro bono* collaboration, because of the resource and budgetary restrictions, but not at the expense of confidentiality.<sup>53</sup> The Registry highlights that only employees properly identified and registered by the Registry will be given access to confidential information,<sup>54</sup> and that access is for individuals and not organizations.<sup>55</sup>

### *Me Keta's response*

30. During the *ex parte* hearing the Chamber ordered the Registry to provide a copy of the transcript of the hearing to Me Keta, to enable him particularly to address the suggestion to suspend him from this particular team.<sup>56</sup>

31. On 15 February 2010, the Chamber received the "clarifications" from Me Keta following Me Bapita's request of 9 February 2010.<sup>57</sup> Me Keta submitted that on 1 February 2010 he sent an email to Me Bapita clarifying that the passwords were given to the VPRS Database Administrator by email dated 23 November 2009, in order to find solutions to the technical problems he was experiencing with Citrix,<sup>58</sup> and that passwords had been given to the VPRS

<sup>49</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 22.

<sup>50</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 24.

<sup>51</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 24.

<sup>52</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 24.

<sup>53</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 25.

<sup>54</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 25.

<sup>55</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 34.

<sup>56</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 17, line 5 *et seq.*

<sup>57</sup> Clarifications de Me Keta suite à la Requête de Me Bapita du 9 février 2010, 15 February 2010, ICC-01/04-01/06-2303-Conf-Exp.

<sup>58</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 2.

Database Administrator only.<sup>59</sup> Me Keta submitted that the language difficulties between himself and the VPRS Database Administrator required the intervention of Ms Carayon, his *pro bono* collaborator from Redress.<sup>60</sup> Me Keta noted that Ms Carayon clarified that she was working "on behalf of" Me Keta in the emails to the VPRS Database Administrator.<sup>61</sup> It should be noted that Me Keta submits that Ms Carayon has been a *pro bono* collaborator of his since August of 2009, and that the Registry is aware of this fact.<sup>62</sup>

32. Me Keta submitted that he never gave his Citrix passwords to anyone other than the VPRS Database Administrator and further that he, Me Keta, has changed his passwords since December 2009.<sup>63</sup>

33. Me Keta submitted that, in reviewing the transcripts from the *ex parte* hearing, Me Bapita has not produced evidence as to whether confidential records were accessed, and that she is simply working on the basis of assumptions.<sup>64</sup>

34. Me Keta also submitted that although he endeavoured to enter into *pro bono* partnerships with Redress and Freshfields, this process stopped at the negotiation stage as the team of legal representatives unanimously agreed that the organizations should not have access to Citrix.<sup>65</sup> Thus, Me Keta submitted that there never was any formal partnership with these organizations,<sup>66</sup> nor has there been an agreement giving them personalized access codes to Citrix.<sup>67</sup> Me Keta further set out the scope of his *pro bono* collaboration with Redress: that the relationship began in 2007 when he

<sup>59</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 7.

<sup>60</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 2.

<sup>61</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 12.

<sup>62</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 4.

<sup>63</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 7.

<sup>64</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 3.

<sup>65</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 4.

<sup>66</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 4.

<sup>67</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 4.

worked with Ms Mariana Goetz, the case manager, and it is continuing with Ms Carayon.<sup>68</sup>

35. Me Keta submitted that on 3 December 2009 he informed the Court of his intention to collaborate with Redress and Freshfields as *pro bono* team members through a document entitled "Declaration".<sup>69</sup> Me Keta indicated that collaboration (and the corresponding confidentiality obligations) was only contemplated with an individual member of Redress and not the entire organization.<sup>70</sup>

36. Me Keta submitted that when Redress and Freshfields contacted him regarding the possibility of *pro bono* collaboration, that would include personalized access to Citrix, he enthusiastically submitted this possibility to his team for their consideration.<sup>71</sup> Thereafter, as previously noted, the team decided not to give any personalized access to Citrix. Me Keta also notes that this decision was communicated to an Assistant Legal Officer of VPRS in a meeting.<sup>72</sup>

37. In addition, Me Keta has asked the Chamber to request the Registry to appoint a different case manager for the team of legal representatives.<sup>73</sup> Me Keta cited recurring difficulties with the competence and availability of the current case manager, this being the suggested reason for his reliance on Ms Carayon.<sup>74</sup> Contrary to Me Bapita's position, Me Keta submits that a capable new case manager who is available to all team members would enable the legal representative team to continue their work together.<sup>75</sup>

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<sup>68</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 12.

<sup>69</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 6.

<sup>70</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 12.

<sup>71</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 5.

<sup>72</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 5.

<sup>73</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraphs 8-10.

<sup>74</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 8.

<sup>75</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 14.

*Me Bapita's reply to the responses by the Registry and Me Keta*

38. On 18 February 2010, Me Bapita filed a reply to the clarifications by the Registry and Me Keta.<sup>76</sup> Her filing comprised a confidential annex, containing further email exchanges.

*Me Keta's reply and second clarifications to Me Bapita's reply*

39. On 23 February 2010 Me Keta filed a response to Me Bapita's reply.<sup>77</sup> His filing included five confidential *ex parte* annexes.

*The Report of the Registry on investigations regarding access to Citrix by an external person*

40. On 2 March 2010, the Registry filed the "Report of the Registry on investigations regarding access to Citrix by an external person".<sup>78</sup> In the course of its investigation the Registry sought clarification from Redress, which was received on 1 March 2010, and from Me Keta, received on 24 February 2010. The Registry also sought information from the IT department in order to clarify the scope of Citrix access.

41. The Registry submitted that, following its investigation, it appears that Ms Carayon had access to all the documents in the Court Records, including confidential documents, to which Me Keta had access, from June 2009 to January 2010.<sup>79</sup> The Registry noted that both Me Keta and Redress, in their submissions, have maintained that only documents relating to Me Keta's three clients were researched.<sup>80</sup> Nonetheless, in the Registry's submission, it

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<sup>76</sup> Réplique de la représentante légale de victimes aux clarifications du Greffe en date des 10 et 12 février 2010 et de Me Joseph Keta en date du 15 février 2010, 18 February 2010 (notified on 19 February 2010), ICC-01/04-01/06-2306-Conf-Exp.

<sup>77</sup> Réponse et seconde clarification par rapport à la réplique de Me Bapita en Date du 18 février 2010, 23 February 2010, ICC-01/04-01/06-2311-Conf-Exp.

<sup>78</sup> Report of the Registry on investigations regarding access to Citrix by an external person, 2 March 2010, ICC-01/04-01/06-2316-Conf-Exp.

<sup>79</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraphs 23, 38.

<sup>80</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraphs 9, 12, 19, 27.

was possible for Ms Carayon to access all the documentation available to Me Keta.<sup>81</sup>

42. The Registry submitted that Me Keta had confirmed that Ms Carayon was authorized to access documents relating to his three clients "since 29 August 2009 and possibly since 2 April 2009".<sup>82</sup> Redress indicated that Ms Carayon had access codes to Citrix since June 2009 when she "resumed the function of *pro bono* case manager",<sup>83</sup> and that this access ceased in January 2010.<sup>84</sup>

43. Redress indicated to the Registry that it had been provided with the Citrix access codes since 2007 within the context of services provided to Me Keta of "*pro bono* case manager".<sup>85</sup> Redress further indicated that Ms Carayon had regular access to the "Citrix space" of Me Keta on a "weekly/bi-weekly basis" in order to assist Me Keta with his three clients.<sup>86</sup> Redress informed the Registry that the documents they had accessed were transcripts of the *Lubanga* hearings, application forms of Me Keta's three clients, and decisions or filings that Me Keta had access to.<sup>87</sup>

44. As regards the number of those who have had access to confidential documents, the Registry submitted that Redress had indicated that documents or their content were shared with the Director of Redress, the individual who originally acted as case manager from Redress and particular lawyers from Freshfields.<sup>88</sup> The Registry noted that both organizations have submitted information regarding their approach to the protection of confidential material. Redress further indicated that the transmission of

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<sup>81</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 38.

<sup>82</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraphs 12, 19.

<sup>83</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 14.

<sup>84</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 15.

<sup>85</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 7.

<sup>86</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 20.

<sup>87</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 26.

<sup>88</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 30.

documents to Freshfields was only effected after a formal letter of engagement and agreements as to confidentiality were in place.<sup>89</sup>

45. The Registry noted that its IT investigations were able to identify the time and length of access, but not the files accessed via Citrix.<sup>90</sup> Therefore they are unable to conclude from the records whether or not Ms Carayon had access to Me Keta's account.<sup>91</sup> It should be noted, however, that the director of Redress confirmed that Ms Carayon had access of this kind.<sup>92</sup>

46. The Registry noted that Redress and Me Keta viewed the sharing of information between Me Keta and individuals at Redress and Freshfields as part of their normal collaboration, with the latter acting as members of his "personal representation team" and as "co-counsel, assistants and staff",<sup>93</sup> and, further, that Redress and Me Keta believed they had undertaken all necessary steps to formalize this collaboration, including by way of confidentiality agreements.<sup>94</sup>

47. The Registry clarified that it was aware that Redress had been supporting Me Keta since 2007, but it was not aware that Redress had been provided with access to Citrix.<sup>95</sup>

48. Finally, the Registry noted the need to clarify with counsel the extent of their confidentiality obligations in the context of external collaboration, and acknowledged that undertaking this exercise earlier would have helped in the present situation. The Registry suggested that further consideration of the

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<sup>89</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraphs 31-32.

<sup>90</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 16.

<sup>91</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraphs 16, 24.

<sup>92</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraphs 8, 20.

<sup>93</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraphs 21, 40.

<sup>94</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 40.

<sup>95</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 37.

issue was necessary as a matter of urgency, including any discussions with, and recommendations to, counsel.<sup>96</sup>

### ***OPVC observations on the Registry's report***

49. With the authorization of the Chamber,<sup>97</sup> on 5 March 2010 the OPCV requested the Chamber (1) to order Redress and Freshfields to provide the Chamber with the list of the individuals who had been provided with access to confidential documents and material, specifying the documents and the period of time over which they had been afforded access; (2) to order the destruction of any paper, electronic or digital version of the documents and materials relating to victims not represented by Me Keta (to be accompanied by a signed and filed written statement from Redress and Freshfields, undertaking not to use in any way, or to disclose in the future, the content of any documents and material in this category); and (3) to order that an exhaustive list of individuals who may have access to confidential documents and material pertaining to the *Lubanga* case is provided by each legal representatives' team to the court management and the Chamber.<sup>98</sup>

### ***Me Bapita's observations on the Registry's Report***

50. On 8 March 2010 Me Bapita filed observations on the Registry's Report in which she requested the Chamber, *inter alia*, to instruct the Registry to take steps to ensure that this situation does not arise again; to refer Me Keta to the Disciplinary Board; to order the Registry to develop clear guidelines regarding the dissemination of confidential information; to order Redress and Freshfields to destroy any confidential information they improperly obtained; and to require Redress and Freshfields to sign documents acknowledging

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<sup>96</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 42.

<sup>97</sup> Transcript of hearing of 3 March, ICC-01/04-01/06-T-251-CONF-ENG ET, page 8, line 17 – page 9, line 4.

<sup>98</sup> Email communication from the OPCV to the Trial Chamber through the Legal Adviser to the Trial Division on 5 March 2010.

their obligations before the Court.<sup>99</sup> Me Bapita also indicated that, on the basis of the report of the Registry and other information submitted, she concludes that the team of legal representatives can no longer work together as currently constituted.<sup>100</sup> She suggested that her colleague Me Kabongo and herself would no longer be able to apply the work plan established between the team of legal representatives and the Registry, whereby the legal representatives rotate on a periodic basis in court, providing representation for this extended group of victims.<sup>101</sup> Thus, Me Bapita and Me Kabongo submit that Me Keta hereafter should not represent the interests of their clients.<sup>102</sup>

*Email Submitted by Me Keta to the Chamber*

51. On 8 March 2010 Me Keta sent an email to a Legal Officer of the Chamber, requesting clarification on who would represent the interests of his clients if Me Kabongo does not fulfil this role during his period at the Court, commencing on 15 March 2010.<sup>103</sup> Me Keta indicated that Me Bapita should not represent the interests of his clients, and he requested that the Chamber provides a solution to this situation.<sup>104</sup>

*Transmission of documents by the Registry*

52. On 11 March 2010 the Registry transmitted to the Chamber, in the form of two annexes, a letter from Mr Didier Preira, Deputy Registrar, to Me Keta and Me Keta's subsequent response.<sup>105</sup> In the letter to Me Keta, the Deputy Registrar indicated that the rotation of the members of the team of legal representatives

<sup>99</sup> Observations de la représentante légale de victimes suite au rapport du Greffe soumis à la Chambre le 02 mars 2010, 8 March 2010, ICC-01/04-01/06-2321-Conf-Exp.

<sup>100</sup> ICC-01/04-01/06-2321-Conf-Exp, paragraph 23.

<sup>101</sup> ICC-01/04-01/06-2321-Conf-Exp, paragraph 23.

<sup>102</sup> ICC-01/04-01/06-2321-Conf-Exp, paragraph 23.

<sup>103</sup> Email communication from Me Keta to the Trial Chamber through a Legal Officer of the Trial Chamber on 8 March 2010.

<sup>104</sup> Email communication from Me Keta to the Trial Chamber through a Legal Officer of the Trial Chamber on 8 March 2010.

<sup>105</sup> Enregistrement de la lettre du Greffier adjoint du 10 mars 2010 et de la réponse de Maître Joseph Keta, 11 March 2010, ICC-01/04-01/06-2339-Conf-Exp with annexes.

would not be disturbed, subject to any contrary decision by the Chamber.<sup>106</sup> Mr Pereira set out that on 22 February 2010 he met with Me Keta and Me Bapita and that, to him, it seemed as though the parties were able and willing to continue to discharge their professional obligations as a team, despite personal differences.<sup>107</sup> In the letter the Deputy Registrar further noted that counsel has an obligation to put the interests of the victims above counsel's own personal interests, and that the established work plan is necessary to ensure continuity of the effective representation of victims.<sup>108</sup>

53. Thereafter, Me Keta confirmed that Me Bapita will represent his clients on 15 March 2010 as planned.<sup>109</sup>

## II. The relevant law

### *The Framework of Disciplinary Proceedings Concerning a Legal Representative*

54. Article 7 of the Code of Conduct governs the professional conduct of counsel and Article 8 of the Code of Conduct addresses professional secrecy and confidentiality.<sup>110</sup> Misconduct is covered by Article 31 of the Code of Conduct, for instance when counsel violates or attempts to violate any part of the Code of Conduct, Statute, Rules of Procedure and Evidence or Regulations of the Court or Registry.<sup>111</sup>

55. Complaints of misconduct alleged against counsel may be submitted to the Registry by, *inter alia*, the Chamber dealing with the case or any person or group of persons whose rights or interests may have been affected by the

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<sup>106</sup> ICC-01/04-01/06-2339-Conf-Exp-Anx1.

<sup>107</sup> ICC-01/04-01/06-2339-Conf-Exp-Anx1.

<sup>108</sup> ICC-01/04-01/06-2339-Conf-Exp-Anx1.

<sup>109</sup> ICC-01/04-01/06-2339-Conf-Exp-Anx2.

<sup>110</sup> Code of Professional Conduct for counsel ("Code of Conduct"), Res. ICC-ASP/4/Res.1, 3 December 2005, Article 8(3).

<sup>111</sup> Code of Conduct, Article 31.

alleged misconduct.<sup>112</sup> It is for the Registry subsequently to transmit the complaint to a Commissioner (appointed by the Presidency),<sup>113</sup> who is responsible for investigating complaints of misconduct arising out of Article 31 of the Code of Conduct.<sup>114</sup>

56. The Commissioner may dismiss the complaint, investigate the complaint, or attempt to find an amicable settlement, and thereafter it is to report any settlement to the Disciplinary Board for consideration.<sup>115</sup> After any investigation, a hearing will be conducted by the Disciplinary Board,<sup>116</sup> which is comprised of three members – two permanent members elected by all counsel entitled to practice before the Court, and one *ad hoc* member appointed by the relevant national authority.<sup>117</sup>

57. Following a hearing, where both counsel and the Commissioner are heard,<sup>118</sup> the Board shall decide whether misconduct has been established. Possible sanctions include: admonishment, public reprimand, payment of a fine, suspension of the right to practice before the Court (not exceeding 2 years), or permanent ban on practicing before the Court.<sup>119</sup> The decision may be subject to appeal before the Disciplinary Appeals Board, consisting of 5 members: three Judges of the Court and two elected members.<sup>120</sup>

58. Once a decision in accordance with Article 42 of the Code of Conduct has been taken, Regulation 71 of the Regulations of the Court provides for the subsequent proceedings to be undertaken by the Registrar and Regulation 72

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<sup>112</sup> Code of Conduct, Article 34.

<sup>113</sup> Code of Conduct, Article 34(3).

<sup>114</sup> Code of Conduct, Article 33 (1).

<sup>115</sup> Code of Conduct, Article 39(1), (2), (4), (5).

<sup>116</sup> Code of Conduct, Article 39(6).

<sup>117</sup> Code of Conduct, Article 36 (1), (4), (5).

<sup>118</sup> Code of Conduct, Article 39 (7).

<sup>119</sup> Code of Conduct, Article 42.

<sup>120</sup> Code of Conduct, Article 44.

of the Regulations of the Court provides for an application, made to the Presidency, for review.

### ***The Rome Statute***

#### **Article 64**

##### **Functions and powers of the Trial Chamber**

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(c) Provide for the protection of confidential information;

[...]

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

[...]

#### **Article 68**

##### **Protection of the victims and witnesses and their participation in the proceedings**

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

[...]

### **III. Analysis**

#### ***The main issue***

59. The Chamber has 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 has breached his duty of confidentiality. As extensively rehearsed above, several printouts of email correspondence involving Me Keta, the Documentation and Database Administrator from the VPRS and Ms Gaelle Carayon (from the NGO Redress) were provided to the Chamber during the hearing in order to substantiate those allegations.

60. One of the emails, sent by Me Keta to the VPRS Database Administrator on 24 November 2009, contains the last password and the new password for use by Me Keta to access Citrix. This email was also sent to Gaelle Carayon, from Redress. It requests help as regards a problem accessing Citrix; Me Keta stated that Ms Gaelle Carayon is a member of his team and that she could be contacted if more information is needed.<sup>121</sup> An exchange of 10 emails 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.<sup>122</sup>

61. As set out above, 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 used by each team member, and access is protected by an individual account password.<sup>123</sup> Counsel gain remote access via Citrix, to confidential information in the case.

62. Me 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 Me Keta, Me Bapita,

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<sup>121</sup> ICC-01/04-01/06-2295-Conf-Exp-Anx3, page 6.

<sup>122</sup> ICC-01/04-01/06-2295-Conf-Exp-Anx3, pages 3 to 5.

<sup>123</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraph 4.

Me Kabongo and their case manager.<sup>124</sup> 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.<sup>125</sup> Such inclusion would require authorization by the head of the team, in this case Me Bapita. Although Me Keta has requested their inclusion, Me Bapita has not given her consent.<sup>126</sup>

63. 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.<sup>127</sup>

64. Me Keta has suggested that he 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 organizations should be denied access to Citrix. Me 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 organizations.<sup>128</sup> He confirmed, however, that Ms Carayon has been his *pro bono* collaborator since August 2009,<sup>129</sup> and moreover that she works as his *pro bono* case manager.<sup>130</sup> He submitted that the Registry was aware of this situation, and indeed, the Registry has confirmed it was aware of this collaboration.<sup>131</sup>

65. Despite Me Keta’s explanations that he shared his password with Ms Carayon in order to find a solution to a technical problems in accessing Citrix (because, he suggests, he is unable to communicate effectively in English and the VPRS Database Administrator is unable to communicate in French), access to

<sup>124</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraphs 2-3, 35.

<sup>125</sup> ICC-01/04-01/06-2302-Conf-Exp, paragraphs 30-32.

<sup>126</sup> ICC-01/04-01/06-2289-Conf-Exp, paragraphs 4-5.

<sup>127</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraphs 26, 38.

<sup>128</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 12.

<sup>129</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 12.

<sup>130</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 12.

<sup>131</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 37.

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 has provided to Me Keta’ as ‘*pro bono* case manager’ since 2007”.<sup>132</sup> Redress explained that access to Citrix was granted to ensure effective case management, in particular for the purposes of assisting Me Keta by providing translations of filings into English; advice on victims’ rights; assistance in drafting submissions; and updating Me 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.<sup>133</sup>

66. The Chamber notes that the Registry’s investigation to determine the location from which any particular Citrix connection was made was unsuccessful, and instead only the time and duration of a Citrix connection could be discovered.<sup>134</sup> Hence, the IT investigation was unable to corroborate the detail of Ms Carayon’s suggested access to Me Keta’s Citrix account.

67. Nonetheless, Redress has informed the Registry that Ms Carayon gained access to confidential information on at least a weekly basis in order to properly assist Me Keta with the representation of his three clients.<sup>135</sup>

68. Me 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.<sup>136</sup> He submitted that the collaboration with Redress did

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<sup>132</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 7.

<sup>133</sup> ICC-01/04-01/06-2316-Conf-Exp-Anx4 page 5.

<sup>134</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 16.

<sup>135</sup> ICC-01/04-01/06-2316-Conf-Exp-Anx4 pages 6 and 7.

<sup>136</sup> ICC-01/04-01/06-2303-Conf-Exp, paragraph 6.

not extend to the whole organization but only to Ms Carayon, who is bound vis-à-vis himself in terms of confidentiality.<sup>137</sup>

69. In contrast to Me Keta's representations, the director of Redress informed the Registry that she, together with Ms Carayon's direct supervisor, who is Me Keta's previous case manager, were occasionally provided with parts of documents containing confidential information.<sup>138</sup> Furthermore, Redress shared confidential documents with the law firm Freshfields, based on the "ongoing client relationship"<sup>139</sup> 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 Freshfield's London office; they used locked cabinets and encrypted emails, etc.<sup>140</sup>

70. Beyond the four members of the team of legal representatives, headed by Me 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, Me Keta) to ensure that the confidentiality of documents is not put at risk,<sup>141</sup> Citrix access rights may not be granted to anyone without the authorization of the relevant head of the legal representative's team.<sup>142</sup>

71. The Chamber is 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

<sup>137</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 29.

<sup>138</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 30.

<sup>139</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraph 32.

<sup>140</sup> ICC-01/04-01/06-2316-Conf-Exp, paragraphs 31-34.

<sup>141</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 10, line 7 *et seq.*

<sup>142</sup> ICC-01/04-01/06-T-244-CONF-EXP-ENG ET, page 11, lines 7-14.

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.

72. There is *prima facie* evidence that Me Keta has 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 2009. Accordingly, the Chamber considers it necessary to refer the matter to the Registrar, pursuant to Articles 8, 31 and 34(1)(a) of the Code of Conduct.

73. The Chamber stresses 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 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.

### *Unauthorized replies*

74. Me Bapita's filing of 19 February 2010 purports to be a reply to the responses of the Registry and the Legal Representative Keta.<sup>143</sup> By Regulation 24(5) of the Regulations of the Court, a reply in these circumstances requires the leave of the Chamber, which was not requested. In the absence of a request for leave, the Chamber has not taken this filing into account, or the subsequent filing by Me Keta<sup>144</sup> (which also was submitted without an application for the Chamber's leave).

### **IV. Conclusions**

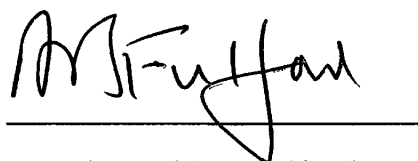
75. For the above reasons, the Chamber submits this potential breach of confidentiality on the part of Me Keta by way of a complaint to the Registry, pursuant to Article 34(1)(a) of the Code of Conduct.

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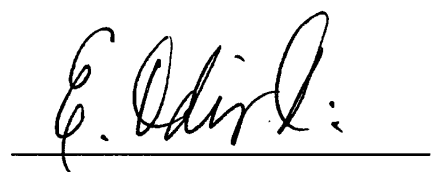
<sup>143</sup> ICC-01/04-01/06-2306-Conf-Exp.

<sup>144</sup> ICC-01/04-01/06-2311-Conf-Exp.

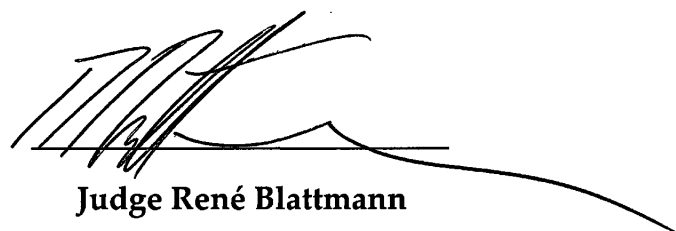
Done in both English and French, the English version being authoritative.



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge René Blattmann**

Dated this 29 March 2010

At The Hague, The Netherlands