

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 October 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***

Public

**Redacted 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:

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Ms Fatou Bensouda

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Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
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REGISTRY

Registrar

Ms Silvana Arbia

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**Victims Participation and Reparations
Section Other**

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

REDACTED Request

1. On 9 February 2010, REDACTED filed a request for an *ex parte* hearing to address a potential breach of REDACTED confidentiality obligations, on the basis that he had provided his passwords enabling access to Citrix and Webmail to at least one unauthorised individual.¹

2. In summary, upon discovering that REDACTED may have provided his password to REDACTED from the NGO REDACTED, REDACTED 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.* REDACTED, REDACTED, REDACTED and REDACTED) and that the team’s position is that there should be no third-party access to the computer systems of the ICC.² According to REDACTED, the VPRS acknowledged receipt of this correspondence but did not respond substantively. REDACTED 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 REDACTED own position as team leader.³

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

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

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

3. REDACTED expressed REDACTED 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.⁴ In addition, REDACTED is concerned that REDACTED clients have been left in the position where they must choose between their personal safety and continuing to be represented under the present arrangements.⁵ Accordingly, REDACTED 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.⁶

The response from the VPRS

4. The VPRS responded to REDACTED submission on 10 February 2010.⁷ The VPRS indicated that it wanted to discuss these matters with REDACTED, as REDACTED decision to reject any *pro bono* assistance from external collaborators (namely, the NGO REDACTED and the law firm REDACTED) 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.⁸
5. The VPRS further explained that it had not given any authorisation for access to third parties. As such, only REDACTED, REDACTED, REDACTED and their case manager REDACTED had received the access codes for the Citrix

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

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

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

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

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

system.⁹ Upon a request from REDACTED to grant access to external collaborators, in this case for REDACTED and the law firm REDACTED, the VPRS informed REDACTED that only team members are allowed access to Citrix.¹⁰ 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.¹¹ However, since the team of legal representatives of victims did not wish to designate REDACTED or REDACTED as *pro bono* members of their team, access had not been granted.¹²

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

Ex parte hearing

8. On 10 February 2010, an *ex parte* hearing was held with REDACTED, REDACTED, a representative of the VPRS, and a representative from the Office of Public Counsel of Victims (“OPCV”).¹⁵
9. During the hearing, REDACTED presented several documents for the Chamber’s consideration.¹⁶

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

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

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

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

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

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

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

¹⁶ 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: REDACTED lors de l’audience ex parte du 10 février 2010, 11 February 2010, ICC-01/04-01/06-2295-Conf-Exp.

10. The first set of documents contains a series of emails between REDACTED and the Chief of the VPRS, dated between 29 January and 5 February 2010, addressing (1) the access granted to REDACTED, (2) the potential 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.¹⁷

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

12. Attached to these messages are a series of emails between REDACTED and the Documentation and Database Administrator of the VPRS (dated November and December 2009), suggesting that REDACTED was trying to obtain access to Citrix, that REDACTED had given her the passwords, and that the VPRS Database Administrator had knowledge of this.¹⁹

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

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

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

¹⁹ 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.

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

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

14. The Chamber was also shown an email from REDACTED dated 18 January 2010, containing a declaration that was sent by REDACTED to REDACTED for his signature.²² In this declaration REDACTED confirmed that REDACTED and the law firm REDACTED 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.²³ During the hearing, REDACTED explained that REDACTED was wholly unaware of this agreement.²⁴
15. The Chamber also reviewed an email from REDACTED dated 20 January 2010 in which she asked REDACTED whether victim a/0060/09 was represented by REDACTED, REDACTED or REDACTED.²⁵
16. Finally, the Chamber reviewed a series of emails exchanged between REDACTED, REDACTED and others, in which REDACTED apparently indicated her intention to organise medical examinations for victims represented by the team REDACTED.²⁶ In these emails, REDACTED expressly stated that REDACTED did not wish to reveal the contact details of REDACTED clients since REDACTED had not, for the time being, ordered their medical examination.²⁷ There is also a series of emails between REDACTED and REDACTED in which REDACTED invites REDACTED to have a tripartite meeting between their legal team, REDACTED and REDACTED in order to discuss the *pro bono* intervention of these two organizations.²⁸

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

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

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

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

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

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

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

17. The OPCV indicated that it shared the concern of REDACTED, particularly since there could be third party access to extremely sensitive information relating to the legal representatives' clients.²⁹
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 REDACTED, and that it was the responsibility of counsel (referring particularly to REDACTED) to ensure the confidentiality of documents.³⁰ It also indicated that no access rights can be granted without the authorization of the head of each team. REDACTED request, that access should be granted to REDACTED and REDACTED, had not been endorsed by REDACTED (the head of the team), and thus no third party access was authorised.³¹
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.³² 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).³³
20. The OPCV noted that among the documents presented to the Chamber there were several emails between REDACTED 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 REDACTED had been formally appointed a member of REDACTED team.³⁴

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

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

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

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

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

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

21. In response, the VPRS representative indicated that a formal appointment had never been made.³⁵ However, the VPRS underlined that *pro bono* assistance from law firms or academic institutions is especially important given the limited resources available for the ICC legal aid scheme, in comparison with the resources of a large law firm or academic institution.³⁶

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.³⁷

23. The Registry rehearsed that access to the information systems of the Court was restricted, in this context, to REDACTED, REDACTED, REDACTED and the case manager REDACTED.³⁸

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.³⁹ The Registry submits that it is the responsibility of counsel to uphold the Code of Conduct as regards confidentiality.⁴⁰

25. After reviewing the documents and correspondence, the Registry submits that it is possible that REDACTED 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".⁴¹

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

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

³⁷ 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.

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

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

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

⁴¹ 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.⁴² Although this is not an official part of its role, it assists in order to promote efficiency.⁴³
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 REDACTED (expressed via an external party) did not appear inappropriate, since many legal representatives require assistance on IT issues. The VPRS was informed that REDACTED was helping REDACTED, and there were language difficulties between REDACTED and the VPRS Database Administrator.⁴⁴
28. Regarding the status of the NGO REDACTED and the law firm REDACTED vis-à-vis the ICC, the Registry notes that it has contact with REDACTED, along with many other organizations, in relation to various issues concerning victims appearing before the Court.⁴⁵ In this capacity, the Registry notes that REDACTED is considered to be an intermediary between the victims and the Court, and that this role began in July 2007, and is continuing.⁴⁶ The Registry also notes that REDACTED has informed the VPRS on several occasions of his work with REDACTED, and that the Registry has regularly reminded REDACTED of his confidentiality obligations.⁴⁷ The Registry submits that REDACTED appointed a member of REDACTED as “case manager” in September 2007, but that this role formally ceased when the common legal representation team was organized.⁴⁸

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

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

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

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

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

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

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

29. With regards to the law firm REDACTED, the VPRS was informed at the end of 2009 that REDACTED had offered their assistance, especially for the reparations stage of the present case.⁴⁹ The Registry submits that on 12 January 2010 REDACTED informed the VPRS of the possibility of designating a member of REDACTED and a member of REDACTED as *pro bono* members of his team, providing them with access to the Court systems.⁵⁰ The Registry advised REDACTED to discuss the issue with the team of legal representatives.⁵¹ It was later decided that this *pro bono* appointment would not be pursued and thus access to the Court systems was not granted.⁵² The Registry again notes that it encourages *pro bono* collaboration, because of the resource and budgetary restrictions, but not at the expense of confidentiality.⁵³ The Registry highlights that only employees properly identified and registered by the Registry will be given access to confidential information,⁵⁴ and that access is for individuals and not organizations.⁵⁵

REDACTED *response*

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

31. On 15 February 2010, the Chamber received the “clarifications” from REDACTED following REDACTED request of 9 February 2010.⁵⁷ REDACTED submitted that on 1 February 2010 he sent an email to

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

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

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

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

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

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

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

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

⁵⁷ Clarifications de REDACTED suite à la Requête de REDACTED du 9 février 2010, 15 February 2010, ICC-01/04-01/06-2303-Conf-Exp.

REDACTED 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,⁵⁸ and that passwords had been given to the VPRS Database Administrator only.⁵⁹ REDACTED submitted that the language difficulties between himself and the VPRS Database Administrator required the intervention of REDACTED, his *pro bono* collaborator from REDACTED.⁶⁰ REDACTED noted that REDACTED clarified that she was working “on behalf of” REDACTED in the emails to the VPRS Database Administrator.⁶¹ It should be noted that REDACTED submits that REDACTED has been a *pro bono* collaborator of his since August of 2009, and that the Registry is aware of this fact.⁶²

32. REDACTED submitted that he never gave his Citrix passwords to anyone other than the VPRS Database Administrator and further that he, REDACTED, has changed his passwords since December 2009.⁶³

33. REDACTED submitted that, in reviewing the transcripts from the *ex parte* hearing, REDACTED has not produced evidence as to whether confidential records were accessed, and that REDACTED is simply working on the basis of assumptions.⁶⁴

34. REDACTED also submitted that although he endeavoured to enter into *pro bono* partnerships with REDACTED and REDACTED, this process stopped at the negotiation stage as the team of legal representatives unanimously agreed that the organizations should not have access to Citrix.⁶⁵ Thus, REDACTED submitted that there never was any formal partnership with these

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

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

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

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

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

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

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

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

organizations,⁶⁶ nor has there been an agreement giving them personalized access codes to Citrix.⁶⁷ REDACTED further set out the scope of his *pro bono* collaboration with REDACTED: that the relationship began in 2007 when he worked with REDACTED, the case manager, and it is continuing with REDACTED.⁶⁸

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

36. REDACTED submitted that when REDACTED and REDACTED 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.⁷¹ Thereafter, as previously noted, the team decided not to give any personalized access to Citrix. REDACTED also notes that this decision was communicated to an Assistant Legal Officer of VPRS in a meeting.⁷²

37. In addition, REDACTED has asked the Chamber to request the Registry to appoint a different case manager for the team of legal representatives.⁷³ REDACTED cited recurring difficulties with the competence and availability of the current case manager, this being the suggested reason for his reliance

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

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

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

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

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

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

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

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

on REDACTED.⁷⁴ Contrary to REDACTED position, REDACTED 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.⁷⁵

REDACTED reply to the responses by the Registry and REDACTED

38. On 18 February 2010, REDACTED filed a reply to the clarifications by the Registry and REDACTED.⁷⁶ REDACTED filing comprised a confidential annex, containing further email exchanges.

REDACTED reply and second clarifications to REDACTED reply

39. On 23 February 2010 REDACTED filed a response to REDACTED reply.⁷⁷ 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".⁷⁸ In the course of its investigation the Registry sought clarification from REDACTED, which was received on 1 March 2010, and from REDACTED, 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 REDACTED had access to all the documents in the Court Records, including confidential documents, to which REDACTED had access, from June 2009 to

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

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

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

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

⁷⁸ 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.

January 2010.⁷⁹ The Registry noted that both REDACTED and REDACTED, in their submissions, have maintained that only documents relating to REDACTED's three clients were researched.⁸⁰ Nonetheless, in the Registry's submission, it was possible for REDACTED to access all the documentation available to REDACTED.⁸¹

42. The Registry submitted that REDACTED had confirmed that REDACTED was authorized to access documents relating to his three clients "since 29 August 2009 and possibly since 2 April 2009".⁸² REDACTED indicated that REDACTED had access codes to Citrix since June 2009 when she "resumed the function of *pro bono* case manager",⁸³ and that this access ceased in January 2010.⁸⁴

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

44. As regards the number of those who have had access to confidential documents, the Registry submitted that REDACTED had indicated that documents or their content were shared with the Director of REDACTED, the

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

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

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

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

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

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

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

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

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

individual who originally acted as case manager from REDACTED and particular lawyers from REDACTED.⁸⁸ The Registry noted that both organizations have submitted information regarding their approach to the protection of confidential material. REDACTED further indicated that the transmission of documents to REDACTED was only effected after a formal letter of engagement and agreements as to confidentiality were in place.⁸⁹

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.⁹⁰ Therefore they are unable to conclude from the records whether or not REDACTED had access to REDACTED's account.⁹¹ It should be noted, however, that the director of REDACTED confirmed that REDACTED had access of this kind.⁹²

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

47. The Registry clarified that it was aware that REDACTED had been supporting REDACTED since 2007, but it was not aware that REDACTED had been provided with access to Citrix.⁹⁵

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

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

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

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

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

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

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

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

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

OPVC observations on the Registry's report

49. With the authorization of the Chamber,⁹⁷ on 5 March 2010 the OPCV requested the Chamber (1) to order REDACTED and REDACTED 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 REDACTED (to be accompanied by a signed and filed written statement from REDACTED and REDACTED, 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.⁹⁸

REDACTED observations on the Registry's Report

50. On 8 March 2010 REDACTED 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 REDACTED to the Disciplinary Board; to order the Registry to develop clear guidelines

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

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

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

regarding the dissemination of confidential information; to order REDACTED and REDACTED to destroy any confidential information they improperly obtained; and to require REDACTED and REDACTED to sign documents acknowledging their obligations before the Court.⁹⁹ REDACTED also indicated that, on the basis of the report of the Registry and other information submitted, REDACTED concludes that the team of legal representatives can no longer work together as currently constituted.¹⁰⁰ REDACTED suggested that REDACTED colleague REDACTED 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.¹⁰¹ Thus, REDACTED and REDACTED submit that REDACTED hereafter should not represent the interests of their clients.¹⁰²

Email Submitted by REDACTED to the Chamber

51. On 8 March 2010 REDACTED sent an email to a Legal Officer of the Chamber, requesting clarification on who would represent the interests of his clients if REDACTED does not fulfil this role during his period at the Court, commencing on 15 March 2010.¹⁰³ REDACTED indicated that REDACTED should not represent the interests of his clients, and he requested that the Chamber provides a solution to this situation.¹⁰⁴

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 REDACTED and

⁹⁹ 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.

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

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

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

¹⁰³ Email communication from REDACTED to the Trial Chamber through a Legal Officer of the Trial Chamber on 8 March 2010.

¹⁰⁴ Email communication from REDACTED to the Trial Chamber through a Legal Officer of the Trial Chamber on 8 March 2010.

REDACTED subsequent response.¹⁰⁵ In the letter to REDACTED, the Deputy Registrar indicated that the rotation of the members of the team of legal representatives would not be disturbed, subject to any contrary decision by the Chamber.¹⁰⁶ Mr Pereira set out that on 22 February 2010 he met with REDACTED and REDACTED 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.¹⁰⁷ 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.¹⁰⁸

53. Thereafter, REDACTED confirmed that REDACTED will represent his clients on 15 March 2010 as planned.¹⁰⁹

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.¹¹⁰ 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.¹¹¹

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

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

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

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

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

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

¹¹¹ Code of Conduct, Article 31.

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

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.¹¹⁵ After any investigation, a hearing will be conducted by the Disciplinary Board,¹¹⁶ 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.¹¹⁷

57. Following a hearing, where both counsel and the Commissioner are heard,¹¹⁸ 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.¹¹⁹ 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.¹²⁰

¹¹² Code of Conduct, Article 34.

¹¹³ Code of Conduct, Article 34(3).

¹¹⁴ Code of Conduct, Article 33 (1).

¹¹⁵ Code of Conduct, Article 39(1), (2), (4), (5).

¹¹⁶ Code of Conduct, Article 39(6).

¹¹⁷ Code of Conduct, Article 36 (1), (4), (5).

¹¹⁸ Code of Conduct, Article 39 (7).

¹¹⁹ Code of Conduct, Article 42.

¹²⁰ Code of Conduct, Article 44.

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 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 REDACTED, the Documentation and Database Administrator from the VPRS and REDACTED (from the NGO REDACTED) were provided to the Chamber during the hearing in order to substantiate those allegations.

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

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.¹²³ Counsel gain remote access via Citrix, to confidential information in the case.

62. REDACTED requested “personal” Citrix access for two external collaborators, namely REDACTED and the law firm REDACTED, but since only team

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

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

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

members are allowed access to Citrix, the Registry limited access to REDACTED.¹²⁴ 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.¹²⁵ Such inclusion would require authorization by the head of the team, in this case REDACTED. Although REDACTED has requested their inclusion, REDACTED has not given her consent.¹²⁶

63. According to the Registry, between 30 November and 12 December 2009, REDACTED could have gained access to Citrix, and the confidential “Court records” and transcripts relating to the *Lubanga* case.¹²⁷

64. REDACTED has suggested that he intended to enter into *pro bono* partnerships with REDACTED and REDACTED, but this course was unsuccessful because the team of legal representatives unanimously agreed that the organizations should be denied access to Citrix. REDACTED 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.¹²⁸ He confirmed, however, that REDACTED has been his *pro bono* collaborator since August 2009,¹²⁹ and moreover that she works as his *pro bono* case manager.¹³⁰ He submitted that the Registry was aware of this situation, and indeed, the Registry has confirmed it was aware of this collaboration.¹³¹

65. Despite REDACTED’s explanations that he shared his password with REDACTED in order to find a solution to a technical problems in accessing

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

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

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

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

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

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

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

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

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 confidential information appears to have been more wide-ranging than to a single representative from REDACTED who was merely assisting in a problem with the connection to Citrix. After the Registry requested clarification from REDACTED, its director indicated that Citrix access codes were given to REDACTED in “the context of the services that REDACTED has provided to REDACTED as ‘*pro bono* case manager’ since 2007”.¹³² REDACTED explained that access to Citrix was granted to ensure effective case management, in particular for the purposes of assisting REDACTED by providing translations of filings into English; advice on victims' rights; assistance in drafting submissions; and updating REDACTED 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.¹³³

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.¹³⁴ Hence, the IT investigation was unable to corroborate the detail of REDACTED suggested access to REDACTED Citrix account.

67. Nonetheless, REDACTED has informed the Registry that REDACTED gained access to confidential information on at least a weekly basis in order to properly assist REDACTED with the representation of his REDACTED clients.¹³⁵

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

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

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

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

68. REDACTED 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.¹³⁶ He submitted that the collaboration with REDACTED did not extend to the whole organization but only to REDACTED, who is bound vis-à-vis himself in terms of confidentiality.¹³⁷

69. In contrast to REDACTED representations, the director of REDACTED informed the Registry that she, together with REDACTED direct supervisor, who is REDACTED previous case manager, were occasionally provided with parts of documents containing confidential information.¹³⁸ Furthermore, REDACTED shared confidential documents with the law firm REDACTED, based on the “ongoing client relationship”¹³⁹ REDACTED has with that firm. REDACTED indicated that they implemented confidentiality measures between REDACTED and REDACTED, 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 REDACTED London office; they used locked cabinets and encrypted emails, etc.¹⁴⁰

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

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

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

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

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

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

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

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

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 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 REDACTED 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 REDACTED and REDACTED, 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. REDACTED filing of 19 February 2010 purports to be a reply to the responses of the Registry and the Legal Representative REDACTED.¹⁴³ 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 REDACTED¹⁴⁴ (which also was submitted without an application for the Chamber's leave).

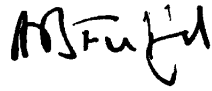
IV. Conclusions

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

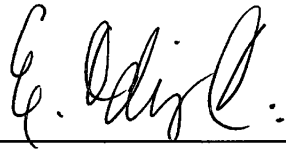
¹⁴³ ICC-01/04-01/06-2306-Conf-Exp.

¹⁴⁴ 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 11 October 2010

At The Hague, The Netherlands