



**THE DISCIPLINARY BOARD OF THE INTERNATIONAL CRIMINAL COURT**

**Original: French**

**Reference: DO/2011/015/DAB/ac**

**Date: 13 May 2011**

**Before:**

**Ms Aïcha Condé, Chair**

**Ms Marie Pierre Poulain, alternate member**

**Mr Mbuy-Mbiye Tanayi, ad hoc member**

***Case of The Registrar v. Mr Joseph Keta***

Public document

Decision of the Disciplinary Board

Counsel for Mr Joseph Keta

Mr Jean-Louis Gilissen

The Commissioner:

Mr Nigel Hampton

The Disciplinary Board of the International Criminal Court (the Board) hereby issues a decision in the case of *The Registrar v. Mr Joseph Keta*, further to the complaint filed on 29 March 2010 by Trial Chamber I.

By decision of 29 March 2010, Trial Chamber I (the Chamber) of the International Criminal Court considered that there was prima facie evidence to establish that Mr Joseph Keta disregarded the duty of confidentiality which binds him as Counsel for Victims, by providing unauthorised individuals with access to sensitive and confidential material from 30 November to 12 December 2009. Accordingly, the Chamber considered it necessary to refer the matter to the Registrar, pursuant to articles 8, 31 and 34(1)(a) of the Code of Professional Conduct for counsel (the Code of Conduct).

Such were the circumstances of the Chamber's submission to the Registry of a complaint of a potential breach of Mr Joseph Keta's confidentiality obligations. Upon referral of the complaint by the Registry, the Commissioner initiated investigations in accordance with article 33(1) of the Code of Conduct and then prepared a report which he submitted on 25 October 2010 to the Disciplinary Board pursuant to article 39 of said Code.

Having satisfied itself that the adversarial principle was respected, the Disciplinary Board summoned Mr Joseph Keta and his Counsel to a disciplinary hearing on 13 May 2011.

Mr Keta was invited to file his written submissions, observations or explanations by 15 April 2011. His brief was transmitted to the Commissioner and the Disciplinary Board.

On 18 April 2011, the Commissioner submitted a memorandum in response to the Defence brief.

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

On 29 April 2011, the Commissioner responded in writing.

The hearing was held on 13 May 2011, with Mr Keta, assisted by Mr Gilissen, appearing in the presence of the Commissioner.

In his brief, Mr Keta contends that the Commissioner exceeded his powers and competence, thereby irremediably violating the rights of the Defence and infringing the fairness of the proceedings.

In the alternative, Mr Keta submits that such violation of the rights of the Defence may be countervailed and remedied in a manner to be determined by the Disciplinary

Board, to allow the proceedings to continue with safeguards for the rights of the Defence and the fairness of proceedings.

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

Mr Gilissen addressed the hearing, followed by the Commissioner. The hearing concluded with the argument of vitiated proceedings advanced by Mr Keta in his preliminary brief. Having deliberated *in camera*, the Disciplinary Board issues the following decision.

I – The competence and powers of the Commissioner:

Mr Keta argues that by not considering the material period circumscribed by the Chamber in its complaint, the Commissioner exceeded his competence and powers, usurping the authority of the Chamber.

He further submits that the potential misconduct investigated by the Commissioner differed from that complained of by the Chamber.

The Commissioner responded that article 39 of the Code of Conduct attaches no condition to the Commissioner's investigation, other than expeditiousness. He stated that it is for the Board to decide, on the evidence and submissions, whether Mr Keta did actually commit misconduct, and, if so, to determine the scope and gravity thereof. Should it make a finding of misconduct, the Board must establish, on the evidence and submissions, whether that offending occurred during the period alleged at paragraph 3 of the report or a lesser period, as suggested at paragraph 72 of the complaint.

In other words, the misconduct alleged against Mr Keta is a breach of his confidentiality obligations under article 8 of the Code. The period of the breach is immaterial: the decision hinges on ascertaining whether misconduct is established.

The Disciplinary Board considers that article 39 of the Code of Professional Conduct for counsel mandates the Commissioner to investigate the alleged misconduct by Counsel. Article 31 of the Code provides: "*Counsel commits misconduct when he or she: (a) Violates or attempts to violate any provisions of this Code, the Statute, the Rules of Procedure and Evidence and the Regulations of the Court or of the Registry in force imposing a substantial ethical or professional duty on him or her*".

If proven, the breach of confidentiality described by the Chamber does indeed constitute misconduct within the meaning of article 31.

The Commissioner's investigation into the breach of confidentiality did not enquire into a discrete or different type of misconduct, particularly since it was the

information provided by Mr Keta himself that led the Commissioner to conclude that it was necessary to consider a greater period than that contemplated by the complaint.

The Board finds that the Commissioner did not investigate a fresh offence or an offence other than breach of confidentiality. He has therefore remained within the ambit of the initial complaint.

- The violation of the rights of the Defence:

Mr Keta considers that by extending the investigation beyond the period circumscribed by the Chamber's complaint, the Commissioner compelled Mr Keta – against his wishes – to address very delicate matters which the Chamber had excluded from its complaint and from the referral to the Board. In reply to that allegation, the Commissioner, for his part, argues that his request for an explanation from Mr Keta was couched in neutral terms, and that he had moreover drawn Mr Keta's attention to his rights under article 40, in particular the right to be assisted by counsel and to remain silent. At no time did he ask Mr Keta specific questions.

The Board considers that it cannot be credibly argued that the Commissioner violated the rights of the Defence, when his letter of 20 April 2010 explicitly refers to article 40 and does not pose any specific question.

- The Commissioner's memorandum in response:

The Board is of the opinion that no provision of the Rules and Procedures precludes the Commissioner from replying to the Defence, particularly since the Commissioner alone is responsible for proving misconduct by Counsel to the Disciplinary Board with clear and convincing evidence, so that it may rule pursuant to article 16 of the Rules and Procedures.

For these reasons:

The Disciplinary Board rejects the preliminary submissions entered by the Defence and invites the Defence to submit its substantive pleadings. It instructs the Registry to notify the decision to parties.

Dated this 13 May 2011, at The Hague

**Ms Aïcha Condé**

**Ms Marie Pierre Poulain**

**Mr Mbuy-Mbiye Tanayi, President of the Bar**