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TRIAL CHAMBER II

Before: Judge Marc Perrin de Brichambaut, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Péter Kovács

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA***

PUBLIC REDACTED VERSION

**Decision on the Application by the Legal Representative for Victims regarding
Compliance with Ethical Rules by the Parties and the Trust Fund for Victims in
the Reparations Proceedings**

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

Legal Representatives of Victims

Mr Fidel Nsita Luvengika

Counsel for Germain Katanga

Mr David Hooper

Ms Caroline Buisman

Office of Public Counsel for Victims

Ms Paolina Massidda

Trust Fund for Victims

Mr Pieter de Baan

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER II (“Chamber”) of the International Criminal Court (“Court”), pursuant to articles 6(1), 7(1), 8(1), 27(1) and 28 of the Code of Professional Conduct for counsel (“Code of Conduct”),¹ decides as follows.

I. PROCEDURAL HISTORY

1. On 23 November 2010, the previous bench of the Chamber handed down the “Decision on the arrangements for contact between represented victims and the parties” (“Decision of 23 November 2010”).²

2. On 24 March 2017, the Chamber issued its “Order for Reparations pursuant to article 75 of the Statute”, according 297 applicants victim status for the purposes of reparations and awarding both individual and targeted collective reparations (“Order for Reparations”).³

3. On 8 March 2018, the Appeals Chamber delivered its judgment on the appeals⁴ against the Order for Reparations.⁵

4. On 19 March 2018, the Legal Representative of Victims (“Legal Representative”) filed an application requesting the Chamber: (i) to direct the Office of Public Counsel for Victims (“OPCV”) to comply strictly with the Code of Conduct and with the Decision of 23 November 2010 and to provide explanations as to the purpose of its meetings with the Legal Representative’s clients and any other information that may have been gathered on those occasions; and (ii) to find that the Trust Fund for Victims

¹ Code of Professional Conduct for counsel, Resolution ICC-ASP/4/Res., adopted at the 3rd plenary meeting on 2 December 2005, by consensus.

² “Decision on the arrangements for contact between represented victims and the parties”, 23 November 2010, ICC-01/04-01/07-2571-tENG.

³ “Order for Reparations pursuant to Article 75 of the Statute”, 2017, ICC-01/04-01/07-3728-t-ENG, with a public annex and a confidential annex *ex parte*, Legal Representative of Victims, Office of Public Counsel for Victims and Defence team for Germain Katanga, p. 118.

⁴ “Defence Notice of Appeal against the ‘Ordonnance de réparation en vertu de l’article 75 du Statut’”, 26 April 2017, ICC-01/04-01/07-3738; “Notice of Appeal against the Reparations Order and its Annex II issued in accordance with article 75 of the Statute on 24 March 2017”, ICC-01/04-01/07-3739, 26 April 2017, ICC-01/04-01/07-3739; “Notice of Appeal against the ‘Ordonnance de réparation en vertu de l’article 75 du Statut’ and its Annex II”, 25 April, ICC-01/04-01/07-3737-tENG.

⁵ “Confidential Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled ‘Order for Reparations pursuant to Article 75 of the Statute’”, 8 March 2018, ICC-01/04-01/07-3778-Conf. On 9 March 2018, a public redacted version of the judgment was filed.

("Trust Fund") is bound by the requirement to contact the Legal Representative in advance when it wishes to consult his clients ("Application").⁶

5. On 22 March 2018, the OPCV filed a response to the Application in which it argued for the Application to be rejected ("OPCV's Response").⁷

6. On 23 March 2018, the Trust Fund informed the Chamber that it did not object to the aspects of the Application pertaining to it.⁸

7. On 28 March 2018, the Chamber rejected an application from the Legal Representative⁹ seeking leave from the Chamber to file a reply to the OPCV's Response.¹⁰

II. ANALYSIS

A. Submissions of the parties

8. The Legal Representative submits that, [REDACTED], some of his clients informed him that at least two of them had been called to meetings by the OPCV and that meetings were held with the OPCV on the subject of preparing new documents for some of the OPCV's clients with the aim of resubmitting their dossiers to the Chamber so that they might be considered for reparations.¹¹

⁶ "Soumission du Représentant légal relative à l'observation des règles de déontologie par les parties et par le Fonds au profit des victimes dans la procédure en réparation", 19 March 2018, ICC-01/04-01/07-3780-Conf and a confidential annex. A public redacted version was filed on 20 March 2018.

⁷ "Réponse du BCPV à la soumission du Représentant légal relative à l'observation des règles de déontologie par les parties et par le Fonds au profit des victimes dans la procédure en réparation", 22 March 2018, ICC-01/04-01/07-3783-Conf and two confidential annexes *ex parte*, OPCV and Legal Representative.

⁸ Email sent from Trust Fund on 23 March 2018 at 14.05.

⁹ "Demande de réplique au document en réponse à la Soumission du Représentant légal relative à l'observation des règles de déontologie par les parties et par le Fonds au profit des victimes dans la procédure en réparation (ICC-01/04-01/07-3780-Red)", 23 March 2018, ICC-01/04-01/07-3784-Conf. See also "Réponse du BCPV à la 'Demande de répliquer au document en réponse à la soumission du Représentant légal relative à l'observation des règles de déontologie par les parties et par le Fonds au profit des victimes dans la procédure en réparation'", 26 March 2018, ICC-01/04-01/07-3785-Conf.

¹⁰ "Decision on the Legal Representative of Victims' Request for Leave to Reply to the Response of the Office of Public Counsel for Victims of 22 March 2018", 28 March 2018, ICC-01/04-01/07-3786-Conf-tENG.

¹¹ Application, paras. 18-21, 32-33.

9. The Legal Representative submits that the OPCV's actions constitute a clear infringement of the ethical rules, in particular of article 28 of the Code of Conduct. The Legal Representative also submits that these actions contravene the arrangements for contact between a party and a represented victim as defined in the Decision of 23 November 2010 ("Arrangements for Contact"), in particular the requirement for the party concerned to inform the victim's legal representative in advance if that party wishes to meet with the victim in question.¹²

10. The Legal Representative points out, moreover, that he withdrew from representing the clients who are now represented by the OPCV and therefore submits that asking his own clients to testify in favour of clients from whose representation he withdrew would put his own clients in a particularly awkward position.¹³

11. The Legal Representative therefore asks the Chamber to direct the OPCV to cease these actions immediately and to comply with the ethical rules of the Code of Conduct.¹⁴ He also requests the Chamber to direct the OPCV to indicate the purpose of the consultations that the OPCV held with the Legal Representative's clients and any statement that may have been taken during those consultations ("Request in relation to the OPCV").¹⁵

12. Lastly, the Legal Representative requests that the ethical rules of the Code of Conduct – in particular article 28 – and the Arrangements for Contact, apply to the Trust Fund,¹⁶ in order, among other things, to safeguard the interests of the victims concerned during the implementation of the reparations.¹⁷

¹² Application, paras. 26-31.

¹³ Application, para. 34.

¹⁴ Application, para. 31.

¹⁵ Application, para. 36.

¹⁶ Application, paras. 44-49.

¹⁷ Application, paras. 2, 48.

13. The OPCV submits that the Legal Representative's allegations are baseless and represent a direct attack on its professional integrity.¹⁸

14. The OPCV submits that it met with the persons mentioned by the Legal Representative [REDACTED] and that they were never called to meetings as victims.¹⁹ It asserts that, consequently, there had been no reason to raise the issue of their representation²⁰ and that the consultations were fully compliant with the OPCV's professional obligations.²¹ The OPCV maintains that neither article 28 of the Code of Conduct nor the Decision of 23 November 2010 were infringed.²²

15. Moreover, the OPCV contends that the Legal Representative infringed his own professional obligations by asking his client about the substance of a meeting of whose confidentiality the Legal Representative cannot have been unaware²³ and states that the Annex to the Application contains privileged information about that meeting and therefore should never have been appended to the Application.²⁴

16. The OPCV further submits that, before referring the matter to the Chamber, the Legal Representative should have asked the OPCV for its version of events, pursuant to article 27 of the Code of Conduct, which lays down an obligation to act fairly and in good faith when dealing with other counsel and their clients.²⁵

17. The OPCV adds that it is unacceptable for the Legal Representative to request the Chamber to direct the OPCV to indicate the purpose of the consultations that it had with the Legal Representative's clients, which, the OPCV maintains, were privileged.²⁶

¹⁸ OPCV's Response, para. 12.

¹⁹ OPCV's Response, paras. 18-19.

²⁰ OPCV's Response, para. 19.

²¹ OPCV's Response, para. 19.

²² OPCV's Response, para. 19.

²³ OPCV's Response, para. 20.

²⁴ OPCV's Response, para. 21.

²⁵ OPCV's Response, para. 24.

²⁶ OPCV's Response, para. 24.

18. The OPCV therefore asks the Chamber to reject the Application and to remind the Legal Representative to comply with his own professional obligations.²⁷

B. Chamber's finding

19. The Chamber will address the two aspects of the Application in turn.

1. Whether the Code of Conduct should apply to the Trust Fund

20. The Chamber notes the Legal Representative's request for the ethical rules of the Code of Conduct – in particular article 28 – and the Arrangements for Contact to apply also to the Trust Fund.

21. The Chamber notes in this regard that the Trust Fund has no objection to being subject to those rules.

22. The Chamber notes that article 28 of the Code of Conduct, governing relations with persons already represented by counsel, provides that “[c]ounsel shall not address directly the client of another counsel except through or with the permission of that counsel”. The Chamber highlights the fact that the Arrangements for Contact set out the requirement for a party that wishes to meet with a victim to inform the victim's Legal Representative in advance.²⁸

23. Although both article 28 of the Code of Conduct and the Arrangements for Contact apply to counsel mandated to represent the rights and interests of victims before the Court – which is not the role of the Trust Fund – the Chamber considers that the Legal Representative's request is reasonable given that the Trust Fund's regular contact with the victims in this case relates to their right to reparations. The Chamber reiterates that the Trust Fund has no objection to being subject to those rules.

²⁷ OPCV's Response, para. 25.

²⁸ See, in particular, Decision of 23 November 2010, para. 29.

24. Accordingly, the Chamber grants this aspect of the Application and decides that the ethical rules of the Code of Conduct, in particular article 28, and the Arrangements for Contact shall apply *mutatis mutandis* to the Trust Fund.

2. Aspect pertaining to the OPCV

25. The Chamber takes note of the Legal Representative's submissions that the OPCV allegedly infringed its ethical obligations, and the OPCV's submissions in response to those submissions.

26. At the outset, the Chamber stresses that allegations as serious as these should not be made lightly. The Chamber notes, however, that, although the Legal Representative submits that the OPCV's conduct towards some of his clients constitutes a clear infringement of the ethical rules, he does not ask the Chamber to find such an infringement,²⁹ but only to direct the OPCV to cease the alleged conduct immediately, to remind it to comply with its professional obligations pursuant to the Code of Conduct and the Arrangements for Contact, and to direct it to indicate the purpose of the consultations that it held with the Legal Representative's clients.

27. In any event, having examined the submissions and the documents produced by the OPCV, the Chamber is satisfied with the explanations provided by the OPCV regarding its meetings with the Legal Representative's clients.

²⁹ Regarding the procedure to be followed in the event of misconduct, the Chamber notes that article 34 of the Code of Conduct provides that complaints against counsel for "[having] violate[d] or attempt[ed] 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" may be submitted to the Registrar, who shall transmit them to the Commissioner. The Chamber also notes that, in another case, Trial Chamber I pointed out that article 34 of the Code of Conduct "establishes a clear procedure to follow whenever it appears that counsel has committed misconduct. Although the Chamber dealing with a case may file a complaint, it does not make a decision on the merits of the alleged misconduct. Accordingly, any complaint must be submitted to the Registrar, who shall then transmit the complaint to the Commissioner. It is ultimately the Commissioner and the Disciplinary Board that analyse the merits of the case and decide whether there was misconduct." (*The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber I, "Decision on the 'Prosecution Notification of Conduct by Blé Goudé Defence Team Member'", 5 June 2018, ICC-02/11-01/15-1176, para. 6).

28. The Chamber considers it important, however, given the work that remains to be accomplished during the implementation of the reparations in this case, to remind the Legal Representative and the OPCV that they have been entrusted with a mission of the utmost importance and that the Chamber expects of them nothing but impeccable and respectful conduct.

29. In that regard, the Chamber notes that, pursuant to article 6(1) of the Code of Conduct, “[c]ounsel shall act honourably”³⁰ and that, pursuant to article 7(1) of the Code of Conduct, “[c]ounsel shall be respectful and courteous in his or her relations with the Chamber [...] [and] opposing counsel”. Similarly, article 27(1) of the Code of Conduct provides that “counsel shall act fairly, in good faith and courteously” in dealing with other counsel and their clients.³¹ Lastly, the Chamber notes article 8 of the Code of Conduct, pursuant to which counsel shall be bound by professional secrecy and confidentiality. The Chamber therefore directs the Legal Representative and the OPCV in future to settle disputes between them, by themselves, in a respectful and professional manner and, as far as possible, to be willing to put aside any disputes in the interests of the mission entrusted to them, of the victims and of justice. The reparations will be implemented only if the Legal Representative, the OPCV and the Trust Fund demonstrate flexibility, a willingness to compromise and an openness to accommodation, in a spirit of mutual respect and trust.

30. In this respect, the Chamber would like to underscore, once again, the contribution that the parties have made to this procedure. The Chamber recalls how, at the hearing for the issuance of the Order for Reparations, it emphasized

³⁰ See also the solemn undertaking given by counsel before the Court pursuant to article 5 of the Code of Conduct, namely: “I solemnly declare that I will perform my duties and exercise my mission before the International Criminal Court with integrity and diligence, honourably, freely, independently, expeditiously and conscientiously, and that I will scrupulously respect professional secrecy and the other duties imposed by the Code of Professional Conduct for Counsel before the International Criminal Court”.

³¹ The Chamber also notes in this context article 19(A) of the *Common Code of Professional Conduct for all Counsel appearing before the International Criminal Tribunals*, adopted at Nuremberg in 2017, which sets forth that “Counsel shall maintain good relationships with other counsel and work to preserve the interests of his or her client”.

the crucial role of the Legal Representative, without whom the Order for Reparations would not have seen the light of day. Furthermore, the Chamber would like to express its appreciation of the work already accomplished by the Trust Fund, the Legal Representative and the OPCV within the framework of the implementation of the reparations.

C. Proposals for redactions

31. The Chamber notes that this decision is filed as “confidential”. In order to ensure that the proceedings are public, however, the Chamber deems it appropriate to issue a public version of this decision. It therefore directs the OPCV and the Legal Representative to submit their proposals for redactions.

FOR THESE REASONS, the Chamber

GRANTS the Application in part;

DECIDES that the ethical rules of the Code of Conduct, in particular article 28, and the Arrangements for Contact shall apply *mutatis mutandis* to the Trust Fund;

REMINDS the Legal Representative and the OPCV to comply with the Code of Conduct and the Arrangements for Contact;

DIRECTS the Legal Representative and the OPCV to submit proposals for redactions within 10 days of the notification of this decision; and

REJECTS the other aspects of the Application.

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

[signed]

Judge Marc Perrin de Brichambaut
Presiding Judge

[signed]

Judge Olga Herrera Carbuccia

[signed]

Judge Péter Kovács

Dated this 7 September 2018

At The Hague, Netherlands