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No.: ICC-01/04-01/07

Date: 16 July 2008

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

SITUATION THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR**

v. Germain Katanga and Mathieu Ngudjolo Chui

Public Document

**Decision on the Apparent Conflict of Interest in relation to the Legal
Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08,
a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Éric Macdonald, Senior Trial Lawyer

Counsel for the Defence

of Germain Katanga
Mr David Hooper
Ms Caroline Buisman

**Counsel for the Defence of Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of the Victims

Ms Carine Bapita Buyagandu
Mr Joseph Keta
Mr J.L. Gilissen
Mr Hervé Diakèse
Mr Jean-Christophe Mulamba
Nsokoloni

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court” respectively);

NOTING the second day of the confirmation hearing held in public session on Monday 30 June 2008 (“the 30 June 2008 Hearing”), in which the Defence for Mathieu Ngudjolo Chui raised the issue of an apparent conflict of interest in relation to Mr Jean-Christophe Mulamba Nsokoloni and submitted that:

We have a concern related to the fact... that when [my client] went before the Tribunal Grande Instance in Bunia his file was in Kisangani and that at the time he would have consulted Mr. Jean Chrysostome Mulamba, who up until today is a representative of victims, for him to be his counsel.... I thought it was important to flag this because I believe it's a very important procedural matter, and if my colleague is believed to have actually acted as my client's counsel, that I believe that for the fairness of the trial we will have to take measures, and that's why I wanted to flag this. We are currently verifying this, because apparently a payment was made By Western Union for the fees, and we just wanted to flag this issue, because we do not want to be accused of not having said anything later on as counsel. Now, I don't know what measures your Chamber could take, but perhaps something could be done to shed light on this matter.¹

I would just like to clarify something. Initially Mr. Ngudjolo's file was in Kisangani. That's why he called a colleague who might be able to ensure his defence in Kisangani. Then the file was transferred to Bunia, and that's when Mr. Ngudjolo called counsel in Bunia. So a telephone conversation took place, and as we told your assistants, we haven't been able to cross-check this information. However, a fee would apparently have been paid, and Mr. Ngudjolo explained his case by phone, and if my colleague did carry out the work in Kisangani, well, he would have had access to the files that were Mr. Kisangani. But as Mr. Kilenda underlined, we're not saying that our learned colleague defended him in the Tribunal de Grande Instance in Bunia but just that he might have had access to the file in Kisangani following the fee, the fact that the fee was paid by Mr. Ngudjolo's wife.²

NOTING the oral submissions made by Mr Jean-Christophe Mulamba Nsokoloni during the second day of the confirmation hearing held on 30 June 2008, in which he explained that:

I worked in Kisangani for 20 years. I have defended a number of cases in the area and received a lot of phone calls and I even told my colleagues that it's the first time I meet Mr. Mathieu Ngudjolo here. I have had telephone conversations, but I have never assisted Mr. Ngudjolo in the case he is mentioning today to his counsel. I have never helped Mr. Ngudjolo or defended him before the Tribunal de Grande Instance in Bunia. [...] I never assured any defence [for] Mr. Ngudjolo, unless there was a judgement for which I did provide assistance and pleaded for him. I have never, however, taken the floor for him or assure his defence before any tribunal de grand instance either in Kisangani or in Bunia. There's — the only way

¹ CC-01/04-01/07-T-39-ENG CT WT, p. 19, line 16 to p.20, line 22.

² ICC-01/04-01/07-T-39-ENG CT WT, p.22, lines 12-22.

to settle this question is through a judgement for reasons of - or through a ruling for reasons of professional conduct.³

NOTING that during the 30 June 2008 Hearing, the Presiding Judge gave the parties and the participants until the hearing scheduled for Wednesday, 2 July 2008 to provide any additional information on this issue;⁴

NOTING the third day of the confirmation hearing held in public session on Wednesday 2 July 2008 ("the 2 July 2008 Hearing"), in which the Defence for Mathieu Ngudjolo Chui informed the Chamber that:

I was able to place a telephone call to Bunia, and I had... the clerk at the regional clerk of Bunia on the phone. I explained the situation to him, and he [told] me that he was totally aware of the matter. He said that indeed Mr. Mathieu Ngudjolo had consulted my colleague, Mr. Mulamba. [...] He added that in Kisangani there is only one Mr. Mulamba who appears before the Court of Appeal in Kisangani. He said that he is a large gentleman, and his name is Mr. Mulamba.... My client has — we do not yet have a firm, tangible evidence that a payment was made.... I must want to say that I am not alleging anything about my learned colleague but simply this is information which has become available to us and we would not like to remain silent of it. [...] I think this would be preferable that your Chamber were to take steps in this connection.⁵

NOTING the oral observations made by the Defence for Mathieu Ngudjolo Chui on the 2 July 2008 Hearing when asked to clarify whether it requested the Chamber to take a specific action for the purposes of the confirmation hearing:

There are specific measures which could be taken. For instance, an inquiry as I am suggesting, and also to make a contact with the clerk.... He's the Registrar at the regional court of Bunia. And also interviewing the spouse of my client by services in the field. I'm certainly not asking you to take a sanction vis-a-vis a learned colleague, not at all. We have no proof either that he was paid the sum of \$100. However, this is the which I have received, including from my client. I would say my client is not lying. What he says has been confirmed by other persons, including this Registrar in Bunia. I'm not suggesting at all that Mr. Mulamba be suspended or that any other action be taken against him. I think that that would be unreasonable and not at all fair of me. Rather, I submit this information to the Chamber. This is a — these proceedings are sensitive. The crimes which are alleged against my client are indeed very serious ones, and he must defend himself. If he has consulted a lawyer in connection with related charges, then I think that this should be taken note of by the Chamber and action taken.⁶

³ CC-01/04-01/07-T-39-ENG CT WT, p.21, lines 5-20.

⁴ CC-01/04-01/07-T-39-ENG CT WT, p.23, lines 4-9.

⁵ ICC-01/04-01/07-T-40-ENG RT, p.4, lines 1-24.

⁶ ICC-01/04-01/07-T-40-ENG RT., p.5, lines 3-20.

NOTING the oral submissions made by Mr Jean-Chrisostome Mulamba Nsokoloni during the 2 July 2008 Hearing, in which he explained:

I was just saying that I have listened to the concerns raised by the Defence in connection with this matter and the information which has been received from Bunua, from [the] Registrar.... But as you know, Madam President, even if he does not say it directly, I feel that he wants to - he is saying that I have - I am guilty of misconduct. Article 34 and 37 allow me to respond, respond to all of these allegations. Last time it was said that I received fees or requested fees, but no sum was stated. Today reference is being made to [the Registrar]. I feel that all of this information should be set out in writing and provided to us so that we can respond. [...] Now, if this matter is to be taken any further, I would suggest that it is dealt with under Articles 31, 34, and 37 of the Code of Conduct in order that I might respond efficiently, that is to say if they have evidence of what they allege.⁷

NOTING the oral decision taken by the Chamber during the 2 July 2008 Hearing ("the Oral Decision"), in which it:

- (i) directed the Registry to evaluate the existence and consequences of the apparent conflict of interest concerning Mr Jean-Chrisostome Mulamba Nsokoloni and to inform the Chamber on the aforementioned issue by no later than 7 July 2008;
- (ii) decided that pending the resolution of the issue of an apparent conflict of interest, Mr Jean-Chrisostome Mulamba Nsokoloni would be provisionally separated from his functions as legal representative of the victims, and that the victims he represented would be exceptionally and provisionally represented by the Office of the Public Counsel for Victims ("the OPCV") until the victims appoint a new legal representative or until the issue is resolved; and
- (iii) invited Mr. Jean-Chrisostome Mulamba Nsokoloni to cooperate with the Registry in the clarification of the aforementioned apparent conflict of interest;⁸

⁷ ICC-01/04-01/07-T-40-ENG RT., p.6, lines 1-25.

⁸ ICC-01/04-01/07-T-40-ENG RT., p.8, lines 15-25 and page 9, lines 1-3.

NOTING the “Decision on the provisional separation of Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08” (“the Decision on Provisional Separation”)⁹ issued by the Chamber on 3 July 2008, whereby the Chamber, *inter alia*, ordered the Registry to file a report by Monday 7 July 2008 on the matter of the apparent conflict of interest concerning Mr Jean-Chrisostome Mulamba Nsokoloni;

NOTING the “Report of the Registry on the apparent conflict of interest in relation to the Legal Representative of Victims a/0015/06, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08” (“the Registry’s First Report”)¹⁰ filed by the Registry on 7 July 2008;

NOTING the “Decision authorising the filing of observations on the ‘Report of the Registry on the apparent conflict of interest in relation to the Legal Representative of Victims a/0015/06, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08’”¹¹ issued by the Chamber on 8 July 2008, whereby the Chamber decided that Mr Jean-Chrisostome Mulamba Nsokoloni, the Prosecution and the Defences for Mathieu Ngudjolo Chui and Germain Katanga would have until 9 July 2008 at 13h00 to file any observations on the Report;

NOTING the “*Observations de la Défense sur le cas de Maître Jean-Chrisostome Mulamba Nsokoloni en sa qualité de Représentant légal des Victimes a/0015/06, a/0022/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 et a/0035/08 relativement au conflit apparent d’intérêt que suscite sa désignation au regard de la défense des intérêts de Monsieur Mathieu Ngudjolo*” (“the Defence for Mathieu Ngudjolo Chui’s Observations”)¹² filed by the Defence for Mathieu Ngudjolo Chui on 9 July 2008, in which the Defence requested the Chamber:

⁹ ICC-01/04-01/07-660.

¹⁰ ICC-01/04-01/07-665-Conf and its confidential annex (ICC-01/04-01/07-665-Conf-Anx).

¹¹ ICC-01/04-01/07-666.

¹² ICC-01/04-01/07-669.

- (i) to undertake investigative steps in Bunia and Kisangani with all persons allegedly involved in the alleged consultations between Mathieu Ngudjolo Chui and Mr Jean-Christostome Mulamba Nsokoloni; and
- (ii) to extend in the meanwhile the provisional separation of Mr Jean-Christostome Mulamba Nsokoloni;

NOTING the “*Observations du Représentant Légal des victimes a/0015/06, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 et a/0035/08 sur le Rapport du Greffe au sujet de l’apparent conflit d’intérêts le concernant*” (“the Legal Representative’s Observations”)¹³ filed by the Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08 on 9 July 2008, whereby the Legal Representative requested the Chamber to revoke the provisional separation imposed in the Decision and to reinstate the Legal Representative in order for him to continue to participate in the confirmation hearing;

NOTING the “Second Report of the Registry on the apparent conflict of interest in relation to the Legal Representative of Victims a/0015/06, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08”¹⁴ (“the Registry’s Second Report”) filed by the Registry on 11 July 2008;

NOTING the “Order to File Document DRC-OTP-0039-0299”¹⁵ (“the Order”) issued by the Chamber on 14 July 2008;

NOTING the “*Enregistrement du document DRC.00039.299 + annexe 1 confidentielle*”¹⁶ (“the Pro-Justitia Report”) filed by the Defence for Mathieu Ngudjolo Chui on 15 July 2008;

¹³ ICC-01/04-01/07-671-Conf.

¹⁴ ICC-01/04-01/07-674-Conf.

¹⁵ ICC-01/04-01/07-677.

NOTING rule 90(1) of the *Rules of Procedure and Evidence* ("the Rules"), articles 12, 15, 16 and 31 of the Code of Professional Conduct for counsel;¹⁷

CONSIDERING that the issue raised by the Defence for Mathieu Ngudjolo Chui in relation to the apparent conflict of interest concerning Mr Jean-Christophe Mulamba Nsokoloni appears to relate to an alleged initial consultation held between Mathieu Ngudjolo Chui and Mr Jean-Christophe Mulamba Nsokoloni in relation to the case R.P. 13.336., *Ministère Public et partie civile Monsieur Dhelo Gilbert v. Mathieu Ndudjolo Chui*;¹⁸

CONSIDERING that according to the Registry's First Report, the information given by the Defence for Mathieu Ngudjolo Chui that the case number R.P. 13.336 had been initiated before the *Tribunal de Grande Instance* in Kinsangani and subsequently transferred to the *Tribunal de Grande Instance* in Bunia was denied by the Prosecutor of the *Tribunal de Grande Instance* in Bunia as he stated that:

[...] the case in question had been investigated from the beginning by the *Officiers de Police Judiciaire* in Bunia, and that the investigation file had been opened in Bunia and not in Kinsangani.¹⁹

CONSIDERING that in light of the information provided by the Registrar and the Prosecution of the *Tribunal de Grande Instance* de Bunia, and referred to in the Registry's First Report, it appears that Mr Jean-Christophe Mulamba Nsokoloni has not represented Mathieu Ngudjolo Chui in any proceedings before the *Tribunal de Grande Instance* de Bunia;²⁰

CONSIDERING further that the Defence for Mathieu Ngudjolo Chui submits that on 6 January 2004 Mathieu Ngudjolo Chui's wife paid a \$100 fee to Mr Jean-

¹⁶ ICC-01/04-01/07-681 and ICC-01/04-01/07-681-Conf-Anx.

¹⁷ ICC-ASP/4/Res.I.

¹⁸ ICC-01/04-01/07-665-Conf, paras. 4 to 6.

¹⁹ ICC-01/04-01/07-665-Conf, para. 5.

²⁰ ICC-01/04-01/07-665-Conf, paras. 4 to 6 and 12.

Chrisostome Mulamba Nsokoloni for the alleged consultation; and that the payment took place *via* Western Union with the involvement of some intermediaries;

CONSIDERING that the Registry's First Report explained that Western Union has confirmed that the transfer number provided for by the Defence for Mathieu Ngudjolo Chui does not correspond to any transfer made *via* Western Union;²¹ that the Registry's Second Report explained that the transfer number²² corresponds to a SOFICOM number but that the transfer was made from Beni to Kinshasa and not from Bunia to Kinsangani, as declared by the Defence;²³ and that the accounting records for December 2003 and January 2004 provided by Mr Jean-Chrisostome Mulamba Nsokoloni show no payment made by Ms Ngudjolo or any of the intermediaries referred to by the Defence for Mathieu Ngudjolo Chui;²⁴

CONSIDERING further that the Defence for Mathieu Ngudjolo Chui submits, in its observations, that:

Monsieur Mathieu Ngudjolo a été acquitté depuis dans le cadre du dossier de Lokana Liba, dossier au cours duquel avait été également évoquée l'affaire de Bogoro. Il s'agit des mêmes faits dont la Chambre Préliminaire se trouve présentement saisie afin d'examiner si, au vu des éléments de preuve présentés par le Procureur, il existe des motifs substantiels de croire que Mathieu Ngudjolo a commis, en coactivité criminelle avec Germain Katanga, des crimes relevant de la compétence de la Cour pénale internationale.²⁵

La Défense de Monsieur Ngudjolo Chui considère que c'est de la part de Me Mulamba une indélicatesse que d'assurer aujourd'hui cette représentation légale contre un ancien client qui a eu à se confier à lui et à lui raconter les faits pour lesquels il est notamment poursuivi aujourd'hui devant la Cour pénale internationale.²⁶

CONSIDERING that this submission by the Defence for Mathieu Ngudjolo Chui is supported by the Pro-Justitia Report filed following the Order of the Chamber;

²¹ ICC-01/04-01/07-665-Conf, paras. 7 to 9.

²² A second transfer number, given by the Defence in paragraph 10 of the Defence for Mathieu Ngudjolo Chui's Observations, ICC-01/04-01/07-669.

²³ ICC-01/04-01/07-674-Conf, paras. 4 and 7.

²⁴ ICC-01/04-01-07-617-Conf-Anx5 -31.

²⁵ ICC-01/04-01/07-669, para. 17

²⁶ ICC-01/04-01/07-669, para. 19.

CONSIDERING nevertheless that the Pro-Justitia Report is a report from the *inspecteur judiciaire (Police judiciaire de Bunia)* in which it is stated that Mathieu Ngudjolo Chui is prosecuted for the murder of Mr Lokana on 21 September 2003; that, as part of the report, other events, such as the attacks on the village of Bogoro, Kasenyi and Tchomia, are mentioned; that the murder of Mr Lokana took place on 21 September 2003 and the alleged FNI/FRPI attack on the village of Bogoro took place on or about 24 February 2003, that is six months before;

CONSIDERING that, in the view of the Chamber, the facts of the two cases are different as they took place in a different context and on different dates; and that therefore the present case is not the same as or substantially related to another case of the murder of Mr Lokana in accordance with article 12 of the Code of Professional Conduct for counsel;

CONSIDERING therefore that, in light of the information currently available to the Chamber, the Chamber is of the view that there are no *indicia* of the existence of a conflict of interest concerning Mr Jean-Christostome Mulamba Nsokoloni; and that therefore, the requests of the Defence for Mathieu Ngudjolo Chui that additional investigative steps be taken by the Chamber and that the provisional separation of Mr Jean-Christostome Mulamba Nsokoloni be extended must be rejected;

CONSIDERING that, as provided for in the Oral Decision, the Decision on the Provisional Separation and the Order, during the evidentiary debate of the evidence submitted by the Prosecution and the closing statements, Victim a/0015/08 was represented by Mr Hervé Diakiese and Victims a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08 were represented by Ms Paolina Massidda from the OPCV; and that therefore, in light of the present stage of the confirmation hearing, Mr Jean-Christostome Mulamba Nsokoloni, as joint legal representative of Victim a/0015/08 along with Mr Hervé Diakiese, and as legal representative of Victims a/0022/08, a/0024/08,

a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08, shall be entitled to make final written observations concerning the confirmation hearing by no later than 22 July 2008;

CONSIDERING, finally, that this decision does not prevent the Defence for Mr Mathieu Ngudjolo Chui from resorting to other procedural mechanisms that may be at its disposal according to the Rules, the Regulations of the Registry and the Code of Conduct for Counsel;

FOR THESE REASONS

DECLARES that, in light of the information currently available to the Chamber, there are no *indicia* of the existence of a conflict of interest concerning Mr Jean-Christostome Mulamba Nsokoloni;

DECIDES to revoke the provisional separation of Mr Jean-Christostome Mulamba Nsokoloni;

DECIDES that Mr Jean-Christostome Mulamba Nsokoloni, as joint legal representative of Victim a/0015/08, and as legal representative of Victims a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08, shall be entitled to make final written observations on the confirmation hearing by no later than 22 July 2008.

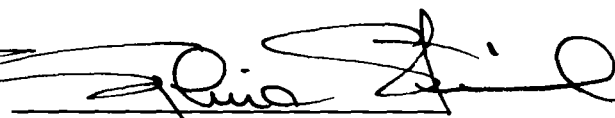
Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge



Judge Anita Ušacka
Judge



Judge Sylvia Steiner
Judge

Dated this Wednesday 16 July 2008

At The Hague, The Netherlands