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Decision on the Apparent Conflict of Interest in relation to the Legal Representative of Victims a/0015/08 ... a/0035/08, Prosecutor v. Katanga and Ngudjolo Chui, Case no ICC-01/04-01/07, Pre-Trial Chamber I, 16 July 2008

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**Decision on the Apparent Conflict of Interest in relation to the Legal Representative of Victims a/0015/08 ... a/0035/08, Prosecutor v. Katanga and Ngudjolo Chui, Case n° ICC-01/04-01/07, Pre-Trial Chamber I, 16 July 2008**

The present decision of Pre-Trial Chamber (PTC) I constitutes the final disposition of a matter that has arisen as a result of a certain assertion by the counsel for the defence in the case against Mathieu Ngudjolo Chui. It was alleged that a legal representative of the victims in this case had previously acted as counsel for the defence, or, in any case, that he had held consultations with the accused. If this were the case, a situation of potential conflict of interests might arise.<sup>1</sup> Initially the defence had not requested the Pre-Trial Chamber to take any specific action. In a later observation, the defence submitted, however, that the forthcoming information “should be taken note of by the Chamber and action taken”,<sup>2</sup> but without making any request for a specific measure. After hearing the impugned representative of the victims, the Pre-Trial Chamber directed the Registry to evaluate the existence and consequences of the apparent conflict of interests, decided that the legal representative of the victims provisionally be separated from his functions and invited the legal representative to cooperate with the Registry in the clarification of the matter.<sup>3</sup> This was followed by a report of the Registry and an observation of the defence in which the defence specifically requested the Pre-Trial Chamber “to undertake investigative steps ... with all persons in the alleged consultations ...” and “to extend in the meanwhile the provisional separation of [the legal representative of the victims]”.<sup>4</sup> At the same time the legal representative of the victims requested his reinstatement in order for him to continue to participate in the proceedings.<sup>5</sup> Having considered the reports of the Registry and submissions of the defence, the PTC found, *firstly*, that there was no evidence of consultations having taken place between the accused and the impugned legal representative of the victims, and, *secondly*, that the alleged conflict of interest pertained, in any event, to conduct that occurred in another place and at another time from that of the conducts being currently being accused of.<sup>6</sup>

Although the ICC Statute envisages the existence of legal representatives of the victims, it does not give a precise definition of their power and functions.<sup>7</sup> Rule 90 and Rule 91 of the Rules of Procedure and Evidence deal with the appointment of legal representatives of

<sup>1</sup> All that was in contention in this case was a *potential* conflict of interests. This may be distinguished from a situation of *apparent* conflict of interests.

<sup>2</sup> See p. 4 of the PTC's decision.

<sup>3</sup> See p. 5 of the PTC's decision.

<sup>4</sup> See pp. 6–7 of the PTC's decision.

<sup>5</sup> See p. 7 of the PTC's decision.

<sup>6</sup> There was no evidence that consultations had taken place at the other event either, so the reasoning of the PTC must be understood as a hypothetical one, *i.e.* even if there had been consultations, the two cases are different.

<sup>7</sup> See Art. 68(3) of the Statute, which states that views of the victims may be presented by the legal representatives of the victim, and Art. 82(4) of the Statute, which provides for the right of appeals by a legal representative of the victims against certain orders for reparation.

the victims and the legal representatives' participation in the proceedings. These rules do not deal with conflict of interests vis-à-vis the Prosecution. The provisions of Rule 90 focus rather on the conflict of interests that may arise when a common legal representative is (or common legal representatives are) chosen for different victims.<sup>8</sup> Pursuant to Rule 90(1), a victim shall be free to choose a legal representative and the only constraint on this choice, as set out in Rule 90(6), is that the legal representative shall have the same legal qualifications as that required for appointment as defence counsel at the ICC. It is thus clear that the legal representatives of victims are not part of the Court and are not subject to the disciplinary measures and procedure governing the staff of the Court. Instead, legal representatives of victims are subject to – on the equal basis as the defence counsel and other counsels – the Code of Professional Conduct for counsel (hereafter ‘the Code’).<sup>9</sup> Of particular relevance in this case is Article 12 of the Code on impediments to representation.

According to Article 12(1)(a) of the Code, counsel – *i.e.* including a legal representative of the victims – shall not represent a client in a case if “the case is the same as or substantially related to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are incompatible with the interests of the former client ...”. This is the relevant provision for the present case as the legal representative of the victims is alleged to have acted, previously, as counsel for the defence. However, this is not a conclusive ground of impediment as the Article 12(1)(a) also requires that the interests of the present and former clients are incompatible. This will most certainly be the case if a counsel has been privy to confidential information about a former client,<sup>10</sup> but mere representation as a counsel in the proceedings does not automatically entail an impediment since the representation of the former client could have related to an issue that are not incompatible with the interests of the current clients. It is not necessary, however, for the PTC to determine the issue of incompatibility of interest as there is no evidence that the legal representative of the victims has ever acted as counsel for the defence.

Article 16 of the Code addresses specifically the issue of conflict of interests. Article 16(1) states that counsel “shall exercise all care to ensure that no conflict of interest arises” and that counsel “shall put the client's interests before counsel's own interests or those of any other person, organization or State”. Although this provision imposes upon all counsels a duty of care, its application is, for a legal representative of the victims, mainly limited to situations where there is a common legal representative for victims or particular groups of victims. A genuine conflict exists in such situations as the legal representative is simultaneously representing different clients with incompatible interests *inter se*. A solution to a situation of conflict of interests among a counsel's clients is, according to Article 16(3)(a) of the Code, to “withdraw from the representation of one or more clients with the prior consent of the Chamber”. This provision is clearly not appli-

<sup>8</sup> Cf. Art. 16 of the Code of Professional Conduct for counsel.

<sup>9</sup> Art. 1 of the Code.

<sup>10</sup> It may be argued, on the other hand, that the confidential information may be passed on to the victims even if the former counsel of the defence is not acting as the legal representative of the victims.

cable to the present case as the legal representative of the victims is no longer counsel/representative for his *former* client.

Given the finding of the PTC that there is no conflict of interests in this case, the question is not resolved on what appropriate measures should be taken if there in fact had been a conflict of interest. As an interim measure, the PTC had separated the legal representative of the victims from his functions. This step may be justified as a precautionary measure against potentially irreparable damages to the proceedings, but it is not clear that a positive finding of conflict of interests must invariably entail the removal of counsel from the case. Article 18 of the Code of Conduct provides for different grounds for termination of representation, but these provisions, although applicable to all counsels, are formulated with the defence counsel in mind.<sup>11</sup> As mentioned above, victims may freely choose their legal representative(s), so ultimately it is for the victims, *i.e.* the clients, to decide whether to discharge their representative(s).<sup>12</sup> Discharge by the client is thus not a feasible means for removing the legal representative of the victims when it is the defence which asserts a conflict of interests. If the legal representative for the victims wishes voluntarily to withdraw from his representation, the Court is most likely to give its consent. But Article 18 of the Code of Conduct does not provide expressly for the situation when the legal representative, and his/her clients, insist on continued representation. However, if such representation of the client is in breach of Article 12 of the Code, counsel acts in violation of a provision of the Code of Conduct and commits therefore misconduct<sup>13</sup> and is liable to undergo disciplinary procedure and sanctions.<sup>14</sup> There appears to be no immediately applicable rule that the Court may resort to in order to terminate the representation by a legal representative of the victims. The Pre-Trial Chamber<sup>15</sup> must however ensure that the defence's rights are not compromised; the provisional separation of the legal representative of the victims from the case and the order to the Registry to carry out initial investigations are undoubtedly correct steps to take in the interest of a fair trial. In the present case, given the way that the factual circumstances have turned out, the PTC does not need to decide on the issue of representation incompatible with former clients and the issue of termination of representation; clarification of these matters will however be welcome.

<sup>11</sup> Cf. Gideon Boas, James L. Bischoff, Natalie L. Reid & B. Don Taylor III, *International Criminal Law Practitioner Library, Vol. 3, International Criminal Procedure*, Cambridge University Press, Cambridge 2011, p. 154.

<sup>12</sup> Cf. the reverse situation: *i.e.* when counsel now represents the defence after having previously been counsel for the victims.

<sup>13</sup> Art. 31 of the Code.

<sup>14</sup> See, generally, Ch. 4 of the Code on the disciplinary regime of the Court.

<sup>15</sup> It may incidentally be discussed what role the Registry should play in these situations.