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Date: 17 August 2009

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 Document

***Defence Observations on the Prosecution's Request Pursuant to Regulation 42 in
Relation to Protective Measures Sought Before Trial Chamber II (Witnesses 33, 169,
175, 178/253, 179, 243, 271, 282, 288) (ICC-01/04-01/06-2047)***

Source: Defence for Mr Germain Katanga

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

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber II
Counsels for the Defence for Mr Thomas
Lubanga Dyilo

1. On 14 July 2009, the Prosecution filed, in the *Lubanga* case, before Trial Chamber I, the *Prosecution's Request Pursuant to Regulation 42 in Relation to Protective Measures Sought Before Trial Chamber II (Witnesses 33, 169, 175, 178/253, 179, 243, 271, 282, 288)* (the "Prosecution's Request").¹
2. It indicated that on 9 April 2009 and 12 June 2009, Trial Chamber I ordered protective measures to protect the identity of Witnesses 33, 169, 175, 178/253, 179, 243, 271, 282, and 288, who are also Prosecution witnesses in the *Katanga* and *Ngudjolo* case before Trial Chamber II. The Prosecution noted that on 8 July 2009, in a closed session hearing, Trial Chamber II requested it to seek permission from Trial Chamber I pursuant to Regulation 42 of the Regulation of the Court, for the variation of the redactions to the statements of the above-mentioned witnesses.²
3. By this Request, the Prosecution seeks, pursuant to Regulation 42, an order to vary the redactions to the statement of witnesses 33, 271, 282 and 288. It informs Trial Chamber I that it is requesting from Trial Chamber II additional redactions to the statements of witnesses 33, 178/253, 179, 243, 282 and 288, beyond those previously ordered by Trial Chamber I. It also informs Trial Chamber I that it intends to disclose, in the *Katanga* case, the statement of witness 169 with the redactions as ordered by Trial Chamber I. It is seeking to disclose, in the *Katanga* case, the statement of witness 90 with the redactions as filed in its pending request before Trial Chamber I.
4. On 27 July 2009, Trial Chamber I issued, in the *Lubanga* case, an *Order on the prosecution's applications to vary protective measures under Regulation 42*,³ by which it invited the defence teams in the two trials (viz. the *Lubanga* and the *Katanga & Ngudjolo* cases) to file written submissions on the Prosecution's Request by 17 August 2009.
5. The Defence for Germain Katanga ("Defence") is grateful for being given the opportunity to reply to the Prosecution's Request filed in the *Lubanga* case.
6. The Defence has already submitted before Trial Chamber I the *Defence Observations on the Interpretation of Regulation 42 of the Regulations of the Court*⁴ and maintains these observations before Trial Chamber II, in particular the following paragraphs:

9. It is submitted that Regulation 42 does not justify non-disclosure to the Defence in subsequent proceedings of material it is entitled to receive in accordance with the

¹ ICC-01/04-01/06-2047, notified to the Defence for Germain Katanga on 28 July 2009.

² ICC-01/04-01/06-2047, paras 1-2.

³ ICC-01/04-01/06-2068, notified to the Defence for Germain Katanga on 27 July 2009.

⁴ ICC-01/04-01/07-1221, 19 June 2009.

statutory rights of the accused to disclosure. Regulation 42 must be read in light of the Prosecution's statutory disclosure obligations vis-à-vis the Defence. As the Appeals Chamber has held, full disclosure of incriminating and exonerating material to the Defence is the rule and non-disclosure the exception.⁵ The exceptional measure of non-disclosure can only be imposed after a case-to-case evaluation and can, therefore, not be pre-determined by a Chamber in other proceedings which did not assess the impact on the Defence, other than in their own proceedings.

10. As the Appeals Chamber clearly stated, any request for non-disclosure to the Defence in order to protect victims and or witnesses must be considered on the basis of the individual circumstances of each application, and has rejected a category approach. Indeed, it held that "a careful assessment will need to be made, in each case, to ensure that any measures restricting the rights of the Defence that are taken to protect individuals at risk are strictly necessary and sufficiently counterbalanced by the procedures taken by the Pre-Trial Chamber."⁶ [...]

13. Whilst the risk assessment may be the same in different trials, other considerations may vary. If, in principle, a Chamber considers that disclosure of a victim's or witness's identity to the Defence involves a risk for his or her safety, needs protection, the relevance of the information in question to the Defence must be carefully assessed. If, having carried out that assessment, the Chamber concludes that the information concerned is not relevant to the Defence, "that is likely to be a significant factor in determining whether the interests of the person potentially placed at risk outweigh those of the Defence. If, on the other hand, the information may be of assistance to the case of the suspect or may affect the credibility of the case of the Prosecutor, the Pre-Trial Chamber will need to take particular care when balancing the interests at stake."⁷

14. Following this approach from the Appeals Chamber, which has also been adopted by the present Chamber,⁸ can only lead to the conclusion that the Prosecution cannot withhold information from the Defence on the ground that such would be in accordance with a protective measures order issued by another Chamber in other circumstances. Indeed, a Chamber can only authorise protective measures after carefully balancing the need for the protective measure on the one hand, and the need to protect the rights of the accused on the other hand.⁹

15. The existence of Regulation 42 does not alter these principles, even where the victim or witness does not consent to disclosure of his or her identity to the Defence in the second proceedings. The views of the victim or witness concerned may be considered in determining whether protective measures should be adopted together with all other interests, but cannot override the rights of the accused.¹⁰ Accordingly, Regulation 42 merely applies to the public, but not to the parties and participants in other proceedings where the information is being used, provided they are entitled to disclosure of the material concerned in accordance with the principles of disclosure set out in the Statute and the Rules. A Regulation can, in any event, not set aside principles set out in the Statute and or the Rules. [...]

21. In accordance with the above observations, the Defence submits that the Prosecution cannot rely on a protective measures order from another Trial Chamber to

⁵ Public Document Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-475, 13 May 2008, paras. 61 & 70.

⁶ Ibid, para. 59. Also see para. 62, citing the Defence Response to the Document in Support of the Appeal, paras 12 and 14, referring to the case of Prosecutor v Bagosora et al, Decision On Disclosure Of Identity Of Prosecution Informant, 24 May, 2006, para 8.

⁷ Ibid, para. 72.

⁸ See, inter alia, ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, paras. 7, 9.

⁹ Ibid.

¹⁰ As previously argued in: ICC-01/04-01/07-1016, 1 April 2009, para. 10.

justify non-disclosure to the Defence in the present case. Regulation 42 applies to protective orders only to the extent that they protect the victims and or witnesses involved from the public at large. It is respectfully submitted that Regulation 42 does not cover protective measures to the extent that they include non-disclosure to the Defence of information it is entitled to receive. Any other interpretation would violate the principles set out by the ICC Appeals Chamber and would be contrary to the interpretation of similar provisions in the *ad hoc* international criminal tribunals.

7. The Defence does not object *a priori* to the protective measures sought in the Prosecution's Request - which are defined in such a general way that the Defence cannot make detailed observations. Nevertheless, it respectfully prays Trial Chamber I to carefully appreciate, on a case by case basis, to what extent the disclosure of the identity or identifying information of a witness to the Defence for Mr Katanga, for whom protective measures have been granted in the *Lubanga* case, would put this witness at risk. The risk assessment in the *Lubanga* case and in the *Katanga* case may be different in light of the different circumstances of the cases (in terms of locations, period, people involved, charges, etc...). The Defence also respectfully requests Trial Chamber I to take into account, when deciding upon protective measures, the relevance of the information for the Defence of Mr Katanga – information not relevant for the Defence for Mr Lubanga may be extremely relevant for the Defence for Mr Katanga. In case of doubt, Trial Chamber II can be solicited to give its advice.¹¹
8. Given that the trial against Mr Katanga should start on the 24th of September 2009, the Defence is very anxious to receive all the transcripts and/or statements of the witnesses in the *Lubanga* case, which may be necessary for the preparation of the defence, potentially exculpatory or incriminating. The Defence takes this opportunity to emphasize that it particularly needs the transcripts of interview at trial of the witnesses who are also incriminating in the *Katanga* case to be provided now, because it needs to work on them immediately, in particular to prepare their cross-examination.¹²

¹¹ Cf. *Prosecution v. Katanga*, ICC-01/04-01/07-1332, *Décision sur la protection de 21 témoins relevant de l'article 67-2 du Statut et/ou de la règle 77 du Règlement de procédure et de preuve*, 24 July 2009, by which Trial Chamber II solicited Trial Chamber I's advice on the opportunity to disclose to the Defence the identity of some witnesses.

¹² These transcripts are the object of the Prosecution's Request ICC-01/04-01/07-1285-Conf-Exp, filed before Trial Chamber II on 10 July 2009.

Respectfully submitted,



David HOOPER

Dated this 17 August 2009

At The Hague