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Date: **14 October 2009**

TRIAL CHAMBER I

Before: Judge Adrian Fulford, President
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. THOMAS LUBANGA DYILO***

Public Redacted Version

**Prosecution's Response to the Request of the Defence of Mathieu Ngudjolo and
Germain Katanga for the Disclosure of the Identity of the Intermediary in
Documents related to Witness 267**

Source: Office of the Prosecutor

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

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**Other
Trial Chamber II**

The Prosecution opposes the request of Germain Katanga and Mathieu Ngudjolo that this Chamber lift the redactions to the identity of intermediary DRC-OTP-WWWW-0143 (Intermediary 143¹). The Prosecution submits that Intermediary 143 would be at risk if his identity were disclosed to the Defence; the disclosure of his identity would also [REDACTED]²³; the Defence has not provided any compelling reasons in support of the request seeking the disclosure of the identity of Intermediary 143; and the redactions do not infringe upon the rights of the accused.

Ex Parte Filing

1. The Prosecution submits that the classification of this filing as Confidential - *Ex Parte* – Prosecution Only is necessary as it seeks relief on the basis of protective measures.⁴ The information discussed must be treated confidentially, and cannot be disclosed to the Defence teams.⁵
2. The Prosecution submits that no alternative procedures exist to deal with this request. The rights of the Accused are maintained as the Prosecution will file a public redacted version.

Background

3. On 4 August 2009, the Prosecution requested the authorisation of Trial Chamber II to disclose, amongst others, document DRC-OTP-0149-0011 to the Defence teams in the Katanga-Ngudjolo case. Document DRC-OTP-0149-0011 is an investigator's note

¹ The name of this intermediary is [REDACTED].

² [REDACTED]

³ [REDACTED]

⁴ In the Trial Chamber's 'Decision on the procedures to be adopted for *ex parte* proceedings', of 6 December 2007, the Trial Chamber determined that *ex parte* procedures are only to be used exceptionally when other procedures are not available, and that the Chamber must ensure that the use of the *ex parte* procedure is proportionate given the potential prejudice to the Accused (ICC-01/04-01/06-1058, para. 12).

⁵ See the Decision of the Appeals Chamber, "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence", ICC-01/04-01/06-568, 13 October 2006, at paras. 37, 65-67.

of a meeting with Witness 267. The Prosecution requested to disclose the document with redactions, including to the identity of Intermediary 143.⁶ It noted that the redactions it sought had previously been authorised by Trial Chamber I ("this Chamber").

4. On 10 September 2009, Trial Chamber II requested additional information on the matter⁷, which was provided by the Prosecution on 15 September 2009.⁸
5. On 19 September 2009, Trial Chamber II authorised the redaction to the identity of Intermediary 143 in document DRC-OTP-0149-0011. Trial Chamber II indicated that the redaction had been authorised by Trial Chamber I, and directed the Defence teams to seek lifting it before Trial Chamber I.⁹
6. On 24 September 2009, in a closed session hearing, Trial Chamber II reiterated this direction.¹⁰ On 5 and 6 October 2009, both Defence teams in the Katanga-Ngudjolo case, pursuant to Regulation 42, asked this Chamber to lift the redaction to the identity of Intermediary 143 in document DRC-OTP-0149-0011.¹¹

Submissions

7. The Prosecution recalls that the Appeals Chamber has established that Rule 81(4) of the Rules of Procedure and Evidence ("Rules") should be read to include the words "persons at risk on account of the activities of the Court" so as to reflect the intention of the States that adopted the Statute and the Rules, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect people at

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ ICC-01/04-01/06-2149 (Defence of Mathieu Ngudjolo) and ICC-01/04-01/06-2150 (Defence of Germain Katanga).

risk.¹² This Chamber has consistently authorised redactions to the identity of Intermediary 143, on the basis that the information is irrelevant to any known or live issue in the case; the redactions do not render the document unintelligible; no lesser measures appear to be feasible to ensure the continued safety and security of both the intermediary and witnesses and [REDACTED] and there is no identifiable prejudice to the Defence.¹³ Trial Chamber II, in a number of decisions, also granted redactions to his identity for the same reasons.¹⁴

8. The Prosecution respectfully submits that this Chamber should uphold its prior decisions and maintain redactions to the identity of Intermediary 143, as the Chamber's conclusions continue to apply. Intermediary 143 [REDACTED]. If his name were to be disclosed, it would compromise the safety and security [REDACTED]. Moreover, the Prosecution submits that the Defence teams have not advanced any compelling reasons or actual prejudice that would warrant the disclosure of his identity.

Intermediary 143 [REDACTED]

9. [REDACTED].¹⁵

10. Intermediary 143 (like all intermediaries) [REDACTED].

11. It is necessary for the Prosecution [REDACTED]. For example, [REDACTED].

12. The disclosure of the identity of Intermediary 143 would be [REDACTED]. He could not easily be replaced, moreover; the recruitment of intermediaries takes time, given the relationship of trust and confidence needed. The Prosecution also

¹² ICC-01/04-01/07-475, at para. 1.

¹³ [REDACTED].

¹⁴ [REDACTED] ICC-01/04-01/07-1034, para. 10.

¹⁵ [REDACTED].

purposely [REDACTED] highest level of confidentiality, but also the safety and security of the intermediaries themselves. If – as a rule - the Chamber were to order the disclosure of the identity of intermediaries, it would become even more difficult to work with intermediaries, because the security risks would be considered too high.¹⁶

13. The disclosure of the identity of Intermediary 143 also puts him at risk. Should his identity be about to be disclosed, he would be a person at risk on account of the court activities under the terms of the Court jurisprudence and alternative protective measures will be necessary.

The Defence has not advanced any compelling reasons or prejudice

14. The Prosecution respectfully submits that the disclosure of the identity of Intermediary 143 is not warranted, as no factual justifications are being advanced by the Defence teams. The Defence teams state that disclosure is necessary to verify whether the intermediary influenced witnesses. The Prosecution submits that such a statement is not sufficient to justify disclosure of his identity. Moreover, if that becomes the standard, that will seriously impair the Prosecution's ability to recruit and use intermediaries as a practice, and thereby severely prejudice its ability to investigate these cases.

15. In the Lubanga case, [REDACTED].¹⁷ [REDACTED].¹⁸

16. [REDACTED]¹⁹

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

17. Consequently, the Prosecution respectfully submits that the request of the Defence teams of Katanga and Ngudjolo should be rejected. The Defence can very well explore the possibility of influence during the cross-examination of Prosecution witnesses. Should good cause be shown, the Chamber can subsequently order the disclosure of the identity of any intermediary involved or impose any other measure that would assist the Defence teams.

Request

18. For the reasons set out above, the Prosecution opposes any variation of the protective measures in respect of Intermediary 143, and reiterates its previous requests for redactions to his identity.



Luis Moreno-Ocampo
Prosecutor

Dated this 14th day of October 2009
At The Hague, The Netherlands