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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO
CHUI***

PUBLIC

**Prosecution's Submission Pursuant to Trial Chamber II's Order Regarding the
Disclosure of the Identity of Intermediary P-143**

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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1. During the hearing held on 9 July 2010 the Defence for Germain Katanga renewed its application for the disclosure of the identity of P-143, an intermediary.¹ The Defence based this application on Trial Chamber I's confidential decision dated 8 July 2010 to stay the proceedings in the *Lubanga* case because of the Prosecution's non-compliance with its order to disclose P-143's identity to the Defence team in that case, before protective measures could be implemented.² The Defence for Mathieu Ngudjolo joined this application.³
2. On 12 July, Trial Chamber II ordered the Defence teams to submit their written observations to clarify the need to have access to such information in order to conduct their cross-examination.⁴ Trial Chamber II also ordered the Prosecution to respond to the Defence's application, in particular when such disclosure could be limited to Defence teams present in The Hague and not be used for investigatory purposes.⁵ The Prosecution hereby submits its response pursuant to this day's order.

Discussion

3. The Prosecution notes that the Accused previously requested, and the Chamber previously denied, disclosure of P-143's identity. In an Order entered on 1 February ("1 February Order"),⁶ the Chamber rejected the Defence's request to have P-143's identity communicated to it, on the basis that it had not provided sufficiently specific and substantiated reasons for such a request.⁷ It additionally determined that the Defence does not necessarily require the communication of P-

¹ ICC-01/04-01/07-T-167-ENG ET WT 09-07-2010, pp. 33-37 and pp. 38-40.

² ICC-01/04-01/06-2517-Conf.

³ ICC-01/04-01/07-T-167-ENG ET WT 09-07-2010, pp. 40 and 41.

⁴ Electronic mail from Trial Chamber II dated 12 July 2010 titled: "Ordonnance Urgente de la Chambre II"

⁵ Electronic mail from Trial Chamber II dated 12 July 2010 titled: "Ordonnance Urgente de la Chambre II" referring to ICC-01/04-01/07-T-167-FRA ET WT 09-07-2010, p. 39, lines 15-21.

⁶ ICC-01/04-01/07-1817.

⁷ ICC-01/04-01/07-1817, para. 23.

143's identity to carry out its analysis.⁸ It considered its obligation to balance the concrete risk for the personal security of P-143 against the needs of the Defence.⁹ And, because Trial Chamber I had originally ordered that the identity of the intermediary not be disclosed, this Chamber deferred to that Chamber's determination: "the Chamber who originally ordered protective measures remains the competent Chamber for making the first review. Only after it has done so, can the second Chamber consider the need for varying the measures imposed by the first Chamber."¹⁰

4. Subsequently, Trial Chamber I directed that the intermediary's identity be disclosed and denied the Prosecution's application for leave to appeal. The Victim and Witness Unit (VWU) determined that substantial protective measures had to be implemented to protect the intermediary and his family from harm on account of the disclosure and Trial Chamber I agreed that disclosure would not occur until the measures were in place. However, subsequently Trial Chamber I ordered the disclosure "under strict embargo" immediately to the Defence and the accused, because circumstances were delaying the relocation.¹¹
5. The Defence argument in the instant case is predicated upon the Trial Chamber I's order that the Prosecution disclose the intermediary's identity even before protective measures are in place. The Prosecution renews its objection to disclosure as unnecessary in this case and relies on the Chamber's analysis in its 1 February Order. Indeed, the Defence's renewed application to obtain communication of P-143's identity is as vague and unsubstantiated as its earlier requests.¹² The Katanga Defence's current application is based on the fact that the witness "is yet another product of the efforts of intermediary 143". The Ngudjolo

⁸ ICC-01/04-01/07-1817, para. 21

⁹ ICC-01/04-01/07-1817, para. 19.

¹⁰ ICC-01/04-01/07-1817, para. 17.

¹¹ When the Prosecution requested a variance of the time limit to permit interim emergency protective measures to be implemented, the Trial Chamber suspended the criminal trial (see ICC-01/04-01/06-2517-Conf, paras 13-16 and para. 31). The Prosecution will seek leave to appeal that order.

¹² ICC-01/04-01/07-1817, para. 20.

Defence argues that P-143 “is turning out to be an important factor in the investigations carried out in the field by the Prosecutor”¹³ and that the disclosure of his identity would provide essential information to conduct their cross-examination.¹⁴ However, as noted by the Chamber, P-143’s involvement with P-267, for the purposes of the current proceedings, was minimal.¹⁵

6. The Prosecution has not objected to the Defence’s questioning of witnesses regarding their contact with P-143.¹⁶ The Defence has also been allowed to question witnesses regarding his appearance and his ethnicity.¹⁷ Therefore, the Prosecution posits that the Defence does not need to obtain disclosure of P-143’s identity to conduct an effective cross-examination of P-267.

7. Moreover, because the Prosecution will be seeking leave to appeal the suspension of the trial, disclosure of P-143’s identity effectively remains a live issue. Consequently, the second review of the “two-tier” review, as imposed by 1 February Order, cannot proceed.

¹³ ICC-01/04-01/07-T-167-ENG ET WT 09-07-2010, p. 41, lines 4-6.

¹⁴ ICC-01/04-01/07-T-167-ENG ET WT 09-07-2010, p. 41, lines 6-8.

¹⁵ ICC-01/04-01/07-2204-Conf-Anx A, p. 6.

¹⁶ ICC-01/04-01/07-T-151-CONF-FRA CT 08-06-2010, pp. 44-45 (P-279) ; (ICC-01/04-01/07-T-161-CONF-FRA CT 28-06-2010 , pp. 26-28) (P280) and (ICC-01/04-01/07-T-130-CONF-FRA CT 20-04-2010, pp. 52-56) (P-287).

¹⁷ See, for instance, cross-examination of P-279 (ICC-01/04-01/07-T-151-CONF-FRA CT 08-06-2010, pp. 46 and 47); P280 (ICC-01/04-01/07-T-161-CONF-FRA CT 28-06-2010 , pp. 26-28) and P-287 (ICC-01/04-01/07-T-130-CONF-FRA CT 20-04-2010, p. 56).

Conclusion

8. Based on the foregoing the Prosecution requests that the Defence's application be rejected.



Luis Moreno-Ocampo, Prosecutor

Dated this 13th day of July 2010
At The Hague, The Netherlands