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No.: **ICC-01/04-01/06**
Date: **10 December 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

Redacted Decision on the application to disclose the identity of intermediary 143

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

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Other
Trial Chamber II

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the cases of The Prosecutor v. Thomas Lubanga Dyilo (the "Lubanga case/trial") and The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (the "Katanga case/trial") on the joint application from the defence teams in the Katanga and Ngudjolo trial before Trial Chamber II for disclosure of the identity of an "intermediary" who has assisted in that case and in the Lubanga trial.

I. Background

1. This Decision follows the joint application from the defence teams in the Katanga and Ngudjolo trial before Trial Chamber II for disclosure of the identity of an "intermediary" who has assisted in that case as well as in the Lubanga trial.[1] This individual (known as 143) [REDACTED] for the Office of the Prosecutor ("prosecution" or "OTP") [REDACTED], and [REDACTED].[2] [REDACTED]. In addition to 143, this task is undertaken [REDACTED] called "321",[3] and [REDACTED].[4]

2. By way of elaboration, on 10 January 2008, the prosecution set out the following:

> So in relation to the first group I can say that [143] is an intermediary for the Office of the Prosecutor. [REDACTED].[5]

[1] Requête de la Défense de Mathieu Ngudjolo aux fins d'obtenir la levée d'expurgation de l'identité de l'intermédiaire du Bureau du Procureur dans les éléments de preuve liés au témoin 267, 5 October 2009, ICC-01/04-01/06-2149; Defence Observations following the "Décision complémentaire sur la situation du témoin 267" (ICC-01/04-01/07-1483-Red2), 6 October 2009, ICC-01/04-01/06-2150.
[2] Transcript of hearing on 10 January 2008, ICC-01/04-01/06-T-70-CONF-EXP-ENG-ET, page 17, lines 21 – 25.
[3] See the prosecution's chart (dated 6 March 2009), disclosed by the prosecution to the defence by email on 6 March 2009.
[4] Transcript of hearing on 14 October 2009, ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 5, line 23 to page 6, line 10.
[5] ICC-01/04-01/06-T-70-CONF-EXP-ENG-ET, page 17, line 21 to page 18, line 2.

3. On 18 January 2008, Trial Chamber I ordered the redaction of the name of 143 because "[...] his name is irrelevant to the known issues in the case [...]."[6]

4. In a written Decision on 31 January 2008, Trial Chamber I elaborated on its reasoning for permitting this redaction: "At present, there is no known issue that relates to the intermediary, [143], in his role as an intermediary of the Office of the Prosecutor, [REDACTED]. Although the presumption is that evidence will be served in a non-redacted form, the Chamber accepts that if particular material requires protection (for instance, if people or organisations may be placed at risk if their identities become known) and if the statement or document, in its redacted form, is sufficiently comprehensible for the purposes of dealing with trial issues, then identities may be disguised."[7] At paragraph 9, the Chamber continued, "On the basis of Article 54(3)(f) of the Statute, in the absence of any known issue relating to [143] [REDACTED] and consistent with the previous decisions of the Chamber, the proposed redactions are justified and the prosecution have leave to implement them."

5. The prosecution, during the status conference on 14 October 2009, relied on a decision of Trial Chamber I of 18 December 2008,[8] suggesting (as the bench understood the submission) that the Chamber had authorised non-disclosure of the name of 143 on the basis of concerns as to his security.[9] On a careful review of that Decision, and particularly paragraph 13 which was

[6] Transcript of hearing on 18 January 2008, ICC-01/04-01/06-T-72-CONF-EXP-ENG-ET, page 2, lines 8 – 17.
[7] Order granting prosecution's application for non-disclosure of information provided by a witness, 31 January 2008, ICC-01/04-01/06-1146-Conf-Exp, paragraph 8.
[8] Decision on "Prosecution's Application for Non-disclosure of Information" filed on 14 May 2008, 17 December 2008, ICC-01/04-01/06-1561.
[9] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 13, lines 17 – 23.

highlighted by the prosecution, the position of 143 was not addressed in that document.[10]

6. On 16 February 2009, the Chamber returned to the issue of 143 in the context of an application to redact his name [REDACTED], as follows:

> By way of detail, the Prosecution seeks to redact:
>
> a) The name and any identifying information for [143] who serves as an intermediary to the Prosecution and to the Court, [REDACTED]. The Chamber has previously authorised the redaction of his identity in another context. (See oral decision 18 January 2009, T-72, page 2, lines 8 to 17).[11]

7. On 5 March 2009, Trial Chamber I held an *ex parte* status conference at which the position of 143 and all those [REDACTED] was addressed.[12] The Chamber indicated that it had been informed during a separate *ex parte* status conference with the defence that an issue had arisen as regards the role of 143.[13] The prosecution submitted that if his identity was revealed, it would be "quite difficult" for the OTP to continue its investigations, [REDACTED]. It would necessitate a request for protective measures and it would be very difficult to find a replacement [REDACTED]. They had established a relationship of confidence with 143, which has worked well.[14] The prosecution therefore put its arguments on the basis of the importance of 143 for their continued operations.

8. The Chamber asked the prosecution to create a simple chart in which the witness numbers for each former child soldier are listed against those who assisted them, using letters ("A, B, C," etc) or other codes instead of real

[10] Prosecution's Application for Non-Disclosure of Information, 14 May 2008, ICC-01/04-01/06-1330-Conf-Exp-Anx1, page 2.
[11] Transcript of hearing on 16 February 2009, ICC-01/04-01/06-T-127-CONF-EXP-ENG-ET, page 3, lines 5 – 11.
[12] Transcript of hearing on 5 March 2009, ICC-01/04-01/06-T-143-CONF-EXP-ENG-ET, page 1, lines 13 – 17.
[13] ICC-01/04-01/06-T-143-CONF-EXP-ENG-ET, page 1, lines 18 – 24.
[14] ICC-01/04-01/06-T-143-CONF-EXP-ENG-ET, page 2, lines 4 – 22.

names. The possibility was raised of including a short description of their role: intermediary, social worker, psychologist etc. [15] This chart was provided to the defence by way of an email from the prosecution [REDACTED].

9. On 13 March 2009, the Chamber ruled on whether 143's identity should be disclosed since he had, or may have, [REDACTED].[16] As revealed in the discussions in that hearing, the role of this and other intermediaries had been raised as an issue in the Lubanga trial. The situation was summarised by the Chamber thus:

> [REDACTED][17]

10. The Chamber concluded:

> In all the circumstances, no evidential basis has been put before the court to support [REDACTED]. On the material given to the Chamber during counsel's submissions, this remains an insufficiently founded allegation which the Defence has indicated it wishes to explore further having been given this person's identity.
>
> The Chamber has a clear duty to protect those at risk on account of the activities of the court (see Article 68(1)). And the Bench would need to be provided with a sustainable basis justifying this line of questioning before contemplating issuing an order that the Prosecution is to reveal the identity of someone who may be exposed to risk once their name is revealed. A desire to pursue a speculative line of questioning is insufficient. Instead, the Chamber needs to be shown that the questions have a proper foundation. Therefore, the rights of the accused are not infringed if disclosure is withheld of material that would put [143] at risk of harm if the information is sought solely for the purposes of developing a line of questions that are based on mere supposition. Given the risks to this individual, in our judgement this conclusion is proportionate and necessary.[18]

11. The prosecution, during the hearing on 14 October 2009, relied on a decision of Trial Chamber I of 9 April 2009, entitled "Decision on the 'Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals

[15] ICC-01/04-01/06-T-143-CONF-EXP-ENG-ET, page 8, line 4 to page 9, line 16.
[16] Transcript of hearing on 13 March 2009, ICC-01/04-01/06-T-146-CONF-EXP-ENG-ET.
[17] ICC-01/04-01/06-T-146-CONF-EXP-ENG-ET, page 3, lines 11 – 18.
[18] ICC-01/04-01/06-T-146-CONF-EXP-ENG-ET, page 6, line 19 to page 7, line 13.

providing *Tu Quoque* Information' of 5 December 2008", at paragraph 34.[19] This Decision addressed the possibility of maintaining redactions to exculpatory or Rule 77 material.[20] However, paragraph 34 is of only general relevance to the present issue. The Chamber introduced the issue, as follows:

> 33. Since investigations are still ongoing as regards [REDACTED], and given at least one location referred to by these witnesses [REDACTED], the Chamber is satisfied that disclosure of this information may impede current investigations. Critically, this material is wholly irrelevant to the issues in the case. The Chamber, therefore, has authorized these redactions following a case-by-case examination.

Thereafter, in the paragraph relied on by the prosecution, the Chamber stated:

> 34. The same approach applies to intermediaries, anyone present during interviews, and prosecution sources. If their identities are disclosed, ongoing investigations may be prejudiced, not least because the prosecution may have difficulty securing qualified personnel to assist in these various ways in the future, and it may experience problems identifying and contacting potential and current witnesses. Moreover, the Appeals Chamber (once again in the context of pre-trial proceedings) decided that the protective umbrella of Rule 81(4) of the Rules extends to anyone who is put at risk on account of the activities of the Court. In the Chamber's assessment, the decision of the Appeals Chamber extending protection for the groups expressly provided for in Rule 81(4) - i.e. witnesses, victims and members of their families - to the "other persons at risk on account of the activities of the Court" is to be applied during trial proceedings. Therefore, the Trial Chamber's responsibility under Article 64(6)(e) to "[p]rovide for the protection of the accused, witnesses and victims" includes providing for the protection of other persons at risk on account of the activities of the Court. For instance, any individual still living or working in the DRC who assists during interviews, or who acts as an intermediary or a source, may well be affected if his or her cooperation with, or assistance to, the Court is revealed, and such people would therefore be at risk on account of the activities of the Court. For the purposes of the present application, in each instance this information was not relevant to any issue in the case, and the intelligibility and usability of the relevant documents was not affected. Therefore, implementing these redactions does not impact adversely on the rights of the accused.

In this paragraph the Chamber only identified the possible risk to those who are still living and working in the Democratic Republic of the Congo ("DRC") who have assisted, *inter alia*, as intermediaries. The Decision did not concern

[19] Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information of 5 December 2008", 9 April 2009, ICC-01/04-01/06-1814-Conf.
[20] ICC-01/04-01/06-1814-Conf, paragraph 1.

143, and these issues have to be resolved on a fact-specific basis: whether or not people in this position are at risk requires individual consideration and evaluation.

12. It is important to note, therefore, that although on 13 March 2009, the Chamber made reference to the need to protect those at risk on account of the activities of the Court, the applications to withhold 143's identity have been made, essentially, on the basis that revealing his identity would prejudice ongoing and future investigations, and that the suggested line of questioning was purely speculative, without any identified foundation. The prosecution first addressed the Chamber on the basis of the individual security risks faced by 143 on 13 October 2009 (see paragraph 16 below) as opposed to the general risk that intermediaries potentially face, and the Chamber has not made any specific findings as regards the personal security of 143. Instead, the Chamber has granted these applications on the basis of the potential prejudice to further or ongoing investigations (which include the inherent consequential risks for an intermediary if his or her role is revealed) and most particularly because to date no basis has been identified for concluding that his identity is relevant to any issue in the case.

13. The position appears to be that the prosecution continues to use 143 [REDACTED].

14. Both defence teams before Trial Chamber II request disclosure of his identity.[21] The essence of the issue, in their combined submission, is whether or not this intermediary influenced witnesses, and the defence wish to investigate if there is a similarity in the way questions were answered and whether other patterns in the interviews reveal improper influence. It is said that the work of the intermediary was essential in building the prosecution

[21] ICC-01/04-01/06-2149; ICC-01/04-01/06-2150.

case in the Katanga proceedings. In order to investigate his involvement properly, the defence teams maintain they need to know his identity. The point is made that although the prosecution may understandably wish to preserve the confidentiality of its investigations, that cannot provide a justification for maintaining redactions when the interests of justice otherwise require disclosure. In all the circumstances, it is suggested that this information falls to be disclosed under Article 67(2) of the Rome Statute ("Statute").

15. Trial Chamber II, on 18 September 2009, delivered a written Decision on this issue.[22] The judges noted the defence submission that the prosecution had not established any objective basis for arguing that the security of 143 is at risk. Additionally, they noted that the defence insists on disclosure of the intermediaries in order to carry out a full investigation. The judges observed that 143 had acted as intermediary for several prosecution witnesses in the trial before Trial Chamber II. Given the defence submissions and the important role of 143 (as confirmed by the prosecution), the judges stated that they understand the interests of the defence in that case in disclosure of his name, at this advanced stage in the proceedings. Trial Chamber II indicated its view that there may be a need to secure equality of arms, given that the prosecution in the Katanga case is aware of the identities of the defence "resource persons" of both defence teams. Finally, the judges wondered whether the denial of the name to the defence may cause prejudice to the defence investigation given the trial is to commence within the next few weeks.

[22] Décision complémentaire sur la situation du témoin 267, 18 September 2009, ICC-01/04-01/07-1483-Conf-Exp; Décision complémentaire sur la situation du témoin 267, 23 September 2009, ICC-01/04-01/06-1483-Red2.

16. On 13 October 2009 the prosecution set out its arguments resisting this application.[23] In essence, the Office of the Prosecutor maintains that the defence before Trial Chamber II has not substantiated its suggestion that the identity of 143 is relevant or that there is any basis for suggesting that he has adversely influenced any witness. This allegation, it is submitted, should be made on a proper basis and none has been identified. Moreover, the prosecution contends that if the name of the intermediary is disclosed the safety and security [REDACTED]- along with his own security – would be compromised.[24]

17. During the status conference on 14 October 2009, the prosecution made clear that "the security of intermediaries is essential to the Prosecution's ability to conduct its investigations in the field".[25] The importance of the role of 143 as an intermediary was emphasised, [REDACTED]. [26] [REDACTED], [27] [REDACTED] [28] [REDACTED] [29] [REDACTED]. [30] [REDACTED]. [31] [REDACTED].[32] [REDACTED]

18. [REDACTED].[33]

19. Finally, the prosecution submitted that [REDACTED], and that there was no basis for suggesting that 143's name was relevant to any issue in that case.[34]

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[23] 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, 13 October 2009, ICC-01/04-01/06-2157-Conf-Exp.
[24] ICC-01/04-01/06-2157-Conf-Exp, paragraph 8.
[25] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 3, lines 23 – 25.
[26] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 5, lines 18 – 22.
[27] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 6, lines 16 – 20.
[28] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 6, line 24 to page 7, line 2.
[29] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 7, lines 3 – 6.
[30] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 7, lines 9 – 22. At the status conference the VWU also referred to events of this kind that occurred in December 2007. However, this appeared to relate to the person contacted by 143 (rather than 143 himself): *ibid.* page 11, lines 18 – 22.
[31] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 15, line 8 – 17.
[32] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 12, lines 15 – 17.
[33] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 8, lines 24 – 25 and page 9, lines 6 – 8.
[34] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 9, lines 20 – 25.

II. Analysis and Conclusions

20. The right to apply for redactions in these circumstances is contained in Rule 81 of the Rules of Procedure and Evidence ("Rules"):

> **Rule 81**
> **Restrictions on disclosure**
> 1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.
>
> 2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

21. The relationship between the Chambers in these circumstances is governed by Regulation 42 of the Regulations of the Court:

> **Regulation 42**
> **Application and variation of protective measures**
> 1. Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.
>
> 2. When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.
>
> 3. Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.
>
> 4. Before making a determination under sub-regulation 3, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.

22. This matter has been brought before the Chamber under Regulation 42(3) of the Regulations of the Court because Trial Chamber I originally issued the orders redacting 143's identity. Although Regulation 42 expressly encompasses only victims and witnesses, the Chamber is of the view that the approach to Rule 81(4) of the Rules taken by the Appeals Chamber in the Katanga case should equally apply to this situation. The Appeals Chamber held that "persons other than witnesses, victims and members of their families, may, at this stage of the proceedings, be protected through the non-disclosure of their identities by analogy with other provisions of the Statute and the Rules. The aim is to secure protection of individuals at risk. Thus, by necessary implication, Rule 81(4) 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 of Procedure and Evidence, as expressed in Article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect people at risk."[35] The Appeals Chamber emphasised that non-disclosure of information for the protection of persons at risk on account of the activities of the Court requires "a careful assessment [...] on a case by case basis, with specific regard to the rights of the [accused]."[36] Although these principles were established by the Appeals Chamber in the context of a hearing on the Confirmation of Charges when it was necessary to protect the safety of individuals, they are highly relevant to the present issue, and will be applied, *mutatis mutandis*, in this Decision, in the sense that Regulation 42 will be applied to all those who are the subject of protective measures, whether or not they are victims or witnesses, if those measures result from the activities of the Court.

[35] 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", 13 May 2008, ICC-01/04-01/07-475, paragraph 56.
[36] ICC-01/04-01/07-475, paragraph 2.

23. The underlying approach, therefore, is relatively straightforward. Under Rule 81(2) of the Rules, if material which under the Statute ordinarily must be disclosed relates to ongoing or future investigations, it can be withheld on an application to the Chamber unless the judges conclude that it "must be disclosed to the defence."

24. By way of Regulation 42(3) of the Regulations of the Court "Any application to vary a protective measure shall **first** be made to the Chamber which issued the order" (emphasis added). For reasons elaborated below, the inclusion of the word "first" is potentially of importance.

25. It is clear that Trial Chambers I and II diverge in their current approach to the identity of 143. Although Trial Chamber I may invite submissions in due course on whether the evidence concerning the role of intermediaries in the Lubanga trial has developed since it reached the various decisions rehearsed herein, currently Trial Chamber I has ruled that the identity of 143 is irrelevant to any known issue in the case, and, as set out above, disclosure of his name may damage ongoing and future investigations. Trial Chamber II, on the other hand, has explained that it understands the interests of the defence (in the Katanga case) in disclosure of his name, particularly at this advanced stage in the proceedings, and it has referred to the possible need to secure equality of arms. The judges have questioned whether the denial of the name to the defence may cause prejudice to the defence investigation given the trial is to commence within the next few weeks.

26. Although Trial Chamber I is clearly able to make a decision on whether it is necessary and appropriate to disclose the identity of 143, in the context of the Lubanga trial, it is realistically unable to undertake the same exercise of judgment for Trial Chamber II. For instance, do the matters described by Trial Chamber II (summarised in the preceding paragraph) result in the

conclusion that his identity must be disclosed to the defence, or are there other, lesser measures which would secure fairness for the accused? This requires a detailed understanding of the facts and issues in the Katanga trial, leading to a nuanced decision, which Trial Chamber I is ill-equipped to make. And does a decision on disclosure need to be made at this stage, or can it be delayed to see how the evidence and issues evolve? Only the judges of Trial Chamber II can sensibly answer these questions, and in those circumstances the words of Regulation 42(3) of the Regulations of the Court take on real significance: "Any application to vary a protective measure shall first be made to the Chamber which issued the order." Certainly in situations such as the present, in order for this provision to operate in a way which ensures that justice will be done in both cases, the two Chambers must arrive at their own separate conclusions as to whether the protective measures shall be varied, depending on the issues which need to be balanced in the different cases.

27. In these circumstances, the Chamber which originally issued the non-disclosure order, logically should first deal with the issue, providing an analysis to assist the second Chamber, and the latter Chamber will undoubtedly take into account any security concerns that are indicated.

28. If it had been envisaged that the Chamber which issued the order should, in all cases, exclusively deal with these issues, it was unnecessary to include the word "first" in Regulation 42(3): it is wholly redundant if there is to be a global decision by one Chamber alone. There would be no "second" stage, which the use of the word "first" clearly contemplates.

29. It is interesting to note in this regard that in Regulation 42(1) of the Regulations of the Court, when the possibility of revision is addressed, the words used are:

> Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision **by a Chamber** (emphasis added).

It is not suggested by this wording that the only Chamber with authority is the original Chamber (assuming it is still seized of the proceedings). Instead the Chamber that may ultimately revise the order is left open and unspecific.

30. The procedure, therefore, that should be followed in situations such as the present, is that on an application to vary protective measures ordered by another Chamber, the matter should be referred "first" for consideration by the original Chamber. Thereafter, the application may be considered by the second Chamber, who will have the benefit of the Decision of the Chamber which was first seized of these issues. The second Chamber will then make its own independent decision, reflecting the needs of the case before it and it will no doubt focus on any security concerns that are indicated. Finally, if the second Chamber reaches a different conclusion to the first Chamber, then the latter may need to review its own orders in order to make such consequential amendments as are necessary (*e.g.* to ensure that in implementing the second Chamber's decision the prosecution is not put in a position in which it will necessarily breach an order of the first Chamber).

31. Turning to the facts of this application, it is submitted that 143 plays a very important role for the prosecution, as described above, and it may be difficult to find a replacement for this or future investigations. Additionally, the Chamber has been told that disclosing his identity will have very considerable consequences for him: [REDACTED].[37] [REDACTED] [38] [REDACTED]. For the purposes of the Lubanga trial it is not necessary to

[37] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 8, line 24 to page 9, line 9.
[38] ICC-01/04-01/06-T-215-CONF-EXP-ENG-ET, page 16, lines 19 – 25.

disclose his identity at present: no basis has been identified for concluding that his identity is relevant to any issue in the case, and, moreover, disclosure will prejudice the prosecution's further and ongoing investigations. It has been unnecessary in those circumstances for the Chamber to make a decision on the security risks to 143 if his identity is disclosed (see paragraph 12 above). Therefore, the Chamber does not propose to vary its original orders.

32. It is for Trial Chamber II to decide, *inter alia,* whether, within the context of the circumstances of the Katanga trial, it must order the prosecution to disclose his identity (given the use of the word "must" in Rule 81(2) of the Rules). If that is the result, Trial Chamber I will review its existing orders, as necessary. It is imperative that any relevant order by Trial Chamber II is brought immediately to the attention of Trial Chamber I by the prosecution, and *vice-versa.*

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 10 December 2009

At The Hague, The Netherlands