

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-01/07  
Date: 1 February 2010

**TRIAL CHAMBER II**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO**  
**IN THE CASE OF**  
***THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO***  
***CHUI***

**Public**

**Order in relation to the disclosure of the identity of P-143**

Order to be notified in accordance with regulation 31 of the *Regulations of the Court* to:  
**The Office of the Prosecutor**  
 Mr Luis Moreno Ocampo  
 Ms Fatou Bensouda  
 Mr Eric MacDonald

**Counsel for Germain Katanga**  
 Mr David Hooper  
 Mr Andreas O'Shea

**Counsel for Mathieu Ngudjolo Chui**  
 Mr Jean-Pierre Kilenda Kakengi Basila  
 Mr Jean-Pierre Fofé Djofia Malewa  
**Legal Representatives of the Applicants**

**Legal Representatives of the Victims**  
 Mr Fidel Nsita Luvengika  
 Mr Jean-Louis Gilissen

**Unrepresented Victims**

**Unrepresented Applicants for  
 Participation/Reparation**

**The Office of Public Counsel for  
 Victims**

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

## REGISTRY

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Ms Maria Luisa Martinod Jacome

**Detention Section**

**Victims Participation and Reparations  
 Section**

**Other**  
 Trial Chamber I

Trial Chamber II (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (“*Katanga/Ngudjolo case*”), having regard to articles 64 and 68 of the Rome Statute of the International Criminal Court (“Statute”), rule 81(2) of the Rules of Procedure and Evidence (“Rules”) and regulation 42(1) and (3) of the Regulations of the Court (“Regulations”), issues the following decision:

## I. BACKGROUND

1. On 18 January 2008, Trial Chamber I ordered the redaction of the name of intermediary P-143 (“P-143”) on the basis of article 54(3)(f) of the Statute.<sup>1</sup> P-143 is an individual acting as an intermediary for the Office of the Prosecutor (“Prosecution”) in both the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“*Lubanga case*”) and the *Katanga/Ngudjolo*<sup>2</sup> case. When authorising the redaction, Trial Chamber I considered that for the purposes of the *Lubanga* trial, “[P-143’s] name is not relevant to the known issues in [the] case [...]”,<sup>3</sup> and that “[...] there is no known issue that relates to the intermediary [...] in his role as an intermediary of the Office of the Prosecutor”.<sup>4</sup> Trial Chamber I further stated that “[a]lthough the presumption is that evidence will be served in 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 became known) and if the statement or document, in its redacted form, is sufficiently

<sup>1</sup> Trial Chamber I ordered the redaction of P-143’s name within the context of the proceedings in *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-70-CONF-EXP ENG ET, p. 17, line 21-25 and p. 18, lines 1-2

<sup>2</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*

<sup>3</sup> ICC-01/04-01/06-T-70-CONF-EXP END ET, p. 17, line 21-25 and p. 18, lines 1-2

<sup>4</sup> “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, par. 8

comprehensible for the purposes of dealing with the trial issues, then identities may be disguised.”<sup>5</sup>

2. During an *ex parte* status conference with the defence in the *Lubanga* case, Trial Chamber I was informed of the fact that an issue regarding the role of P-143 had arisen.<sup>6</sup> The Prosecution, during a separate *ex parte* hearing, submitted that if the identity of P-143 were to be revealed, it would face real difficulties in its investigations in Ituri, especially within the context of the *Katanga/Ngudjolo* case.<sup>7</sup>

3. On 13 March 2009, Trial Chamber I ruled on the continued redaction of P-143’s identity. It emphasised that “[t]he 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 reveal the identity of someone who may be exposed to risk once their name is revealed.”<sup>8</sup>

4. On 14 and 18 August 2009, both Defence teams in the *Katanga/Ngudjolo* case requested the disclosure of material relating to witness P-267 in an unredacted form. These applications effectively constituted a request for the disclosure of the identity of intermediary P-143.<sup>9</sup>

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<sup>5</sup> *Idem*

<sup>6</sup> Trial Chamber I indicated that this was the case in a separate *ex parte* hearing: ICC-01/04-01/06-T-143-CONF-EXP ENG ET, p. 1, lines 18-24

<sup>7</sup> ICC-01/04-01/06-T-143-CONF-EXP ENG ET, p. 2, lines 4-22

<sup>8</sup> ICC-01/04-01/06-T-146-CONF-EXP-ENG ET

<sup>9</sup> Defence for Mathieu Ngudjolo “Observations consolidées de la Défence de Mathieu Ngudjolo relatives aux requêtes du Procureur référencées sous les numéros ICC-01/04-01/07-1356 et ICC-01/04-01/07-1358”, 14 August 2009, ICC-01/04-01/07-1376; Defence for Germain Katanga “Defence Observations on the Prosecution’s Application relative to Witness 267”, 18 August 2009, ICC-01/04-01/07-1402

5. In response to the Defence submissions, Trial Chamber II observed that intermediary P-143 was protected by measures ordered by Trial Chamber I in the *Lubanga* case on the basis of the risks he faced. It further observed that Trial Chamber I was the first Chamber to rule on protective measures for intermediary P-143. The Chamber therefore decided that protective measures ordered by one Chamber in a case before the Court, applied *mutatis mutandis* in all other cases before the Court by virtue of regulation 42 of the Regulations.<sup>10</sup> It was, however, also considered that the Prosecution had not invoked the existence of an objectively justifiable risk to the security of that person in support of its request for the maintenance of the protective measure put in place by Trial Chamber I.<sup>11</sup> The Chamber further observed that the Prosecution did not rely on rule 81(4) of the Rules in its submissions on the issue.<sup>12</sup>

6. Trial Chamber II equally noted that P-143 had acted as an intermediary for a number of Prosecution witnesses in the *Katanga/Ngudjolo* case.<sup>13</sup> In response to the Defence submissions, the Chamber stated that it understood the Defences' interests in the disclosure of P-143's name at this advanced stage in the proceedings.<sup>14</sup> It therefore invited both Defence teams to seize Trial Chamber I with a request for the lifting of the redaction of P-143's identity, on the basis of regulation 42(3) of the Regulations.<sup>15</sup>

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<sup>10</sup> "Décision complémentaire sur la situation du témoin 267", 18 September 2009, ICC-01/04-01/07-1483-Conf-Exp

<sup>11</sup> *Ibid.*, par. 21

<sup>12</sup> *Idem*

<sup>13</sup> *Idem*

<sup>14</sup> *Idem*

<sup>15</sup> *Ibid.*, par. 22

7. Both the Defence for Mathieu Ngudjolo and the Defence for Germain Katanga formally seized Trial Chamber I with such a request, on 5 and 6 October 2009, respectively.<sup>16</sup>

8. The Defence for Mathieu Ngudjolo argued that (i) no objectively justifiable risk to the security of the intermediary had been identified; (ii) the respect for the rights of the Defence and a fair and impartial trial required full disclosure and (iii) the important role played by the said intermediary should be a significant factor in deciding whether to lift the protective measures.<sup>17</sup> The Defence further submitted that protecting ongoing and future investigations was insufficient grounds to justify withholding P-143's identity from the Defence.<sup>18</sup>

9. The Defence for Germain Katanga stated that it "fully supports all legal and factual arguments set out [in the request filed by the Defence for Mathieu Ngudjolo]."<sup>19</sup> It further argued that it was important for the Defence to know who among the Prosecution witnesses had been approached by P-143 in order to analyse their interviews for any similarities or patterns from which it could conclude that the intermediary may have influenced them.<sup>20</sup> It also stated that as part of its own investigation, the Defence may wish to contact P-143.<sup>21</sup>

10. It was not until filing a response to the submissions of the Katanga and Ngudjolo Defence teams' requests that the Prosecution addressed Trial

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<sup>16</sup> Defence for Mathieu Ngudjolo "Requête de la Défence 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 for Germain Katanga "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

<sup>17</sup> ICC-01/04-01/06-2149, par. 15 and 16

<sup>18</sup> Ibid., par. 16

<sup>19</sup> ICC-01/04-01/07-2150, par. 3

<sup>20</sup> Ibid., par. 2

<sup>21</sup> Idem

Chamber I on the individual security risks faced by P-143.<sup>22</sup> In this response of 13 October 2009, the Prosecution argued that the Defence in the *Katanga/Ngudjolo* case did not advance any compelling reasons or actual prejudice that would warrant the disclosure of P-143's identity.<sup>23</sup>

11. During a subsequent status conference in the *Lubanga* case, held on 14 October 2009, the Prosecution once again stressed the importance of P-143 with regards to its field operations, including the facilitation of contact with potentially exonerating witnesses in both cases.<sup>24</sup> Due to the instability in the Ituri district and the particular security risks P-143 faces in case of the disclosure of his identity, he would have to seize the performance of his functions as an intermediary and be relocated.<sup>25</sup>

12. In its decision of 19 November 2009,<sup>26</sup> Trial Chamber I stated that it "was 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."<sup>27</sup> It relied on the decision of the Appeals Chamber of 13 May 2008, in which it was held that "persons other than witnesses, victims and members of their families, may [...] be protected through the non-disclosure of their identities by analogy with other provisions of the Statute and the Rules."<sup>28</sup> The Appeals Chamber went on to state that "[t]he aim is the protection of individuals at risk. Thus, by necessary implication Rule 81(4) should be read to include the

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<sup>22</sup> "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

<sup>23</sup> *Ibid.*, par. 8

<sup>24</sup> ICC-01/04-01/06-T-215-CONF-EXP ENG ET, p. 5, lines 18-22

<sup>25</sup> *Ibid.*, p. 8, lines 24-25 and p. 9, lines 6-8

<sup>26</sup> "Decision on the application to disclose the identity of intermediary 143", 18 November 2009, ICC-01/04-01/06-2190-Conf-Exp

<sup>27</sup> *Ibid.*, par. 22

<sup>28</sup> "Judgement 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, par. 56

words 'persons at risk on account of activities of the Court.'"<sup>29</sup> Trial Chamber I concluded that the reasoning of the Appeals Chamber, although handed down in the context of pre-trial proceedings, applied *mutatis mutandis* to the trial phase.<sup>30</sup> In its view, "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."<sup>31</sup>

13. Noting that it had been seized of this matter by the Defence teams in a different case before another Chamber of this Court on the basis of regulation 42(3) of the Regulations, Trial Chamber I held that "[a]lthough [it] is clearly able to make a decision on whether it is necessary and appropriate to disclose the identity of [P-143], in the context of the Lubanga trial, it is realistically unable to undertake the same exercise of judgment for Trial Chamber II."<sup>32</sup> It concluded that in a situation as the one at hand, the two Chambers must reach their own separate conclusions as to whether the protective measures should be varied, depending on the issues that need to be balanced in the different cases.<sup>33</sup> In these circumstances, Trial Chamber I held, the Chamber which originally issued the non-disclosure order, should logically first deal with the issue, providing an analysis to assist the second Chamber.<sup>34</sup> It considered that the specific language of regulation 42(3) of the Regulations did not envisage that the Chamber which issued the order should, in all cases, exclusively deal with these issues. The word "first" included within the provision would otherwise be rendered redundant.<sup>35</sup>

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<sup>29</sup> *Idem*

<sup>30</sup> ICC-01/04-01/06-2190, par. 22

<sup>31</sup> *Ibid.*, par. 22

<sup>32</sup> *Ibid.*, par. 26

<sup>33</sup> *Idem*

<sup>34</sup> *Ibid.*, par. 27

<sup>35</sup> *Ibid.*, par. 28



14. According to Trial Chamber I, the procedure to be followed in cases such as the present, is that the party in a case before one Chamber, who wishes to obtain information which is protected by a previous order of another Chamber, should make an application to vary these protective measures to the Chamber which originally ordered the measures in question. This first Chamber will then consider whether there are grounds to vary its original order. After that, the second Chamber should make its own, independent assessment of the issue, on the basis of the specific circumstances of the case before it. If the second Chamber were to reach a different conclusion from that of the first Chamber, the latter might have to review its order. If necessary, it may then issue amendments in order to ensure the implementation of the second Chamber's order.<sup>36</sup>

15. Applying this procedure to the case at hand, Trial Chamber I concluded that, for the purposes of the *Lubanga* trial, it was not necessary to disclose the identity of P-143, whereas there remained cogent reasons to continue protecting this person by continuing to redact his identity.<sup>37</sup> It therefore referred the issue back to Trial Chamber II for its assessment of whether it is imperative for the purposes of a fair trial that the identity of P-143 should be disclosed to the Defence of Mr. Katanga and Mr. Ngudjolo.<sup>38</sup>

## II. ANALYSIS

16. As stated in its decision of 18 September 2009, the Chamber recognised that the Defence has a general interest in knowing the names of the Prosecution's intermediaries and that it would seem to be a matter of fairness that the Defence be informed of the identity of the intermediaries of the Office of the Prosecutor, given that the latter already knows the identity of the

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<sup>36</sup> Ibid., par. 30

<sup>37</sup> Ibid., par. 31

<sup>38</sup> Ibid., par. 32

resource persons of the Defence.<sup>39</sup> The Chamber further recognised that the fact that P-143 acted as an intermediary for a large number of Prosecution witnesses increases the interest of the Defence in knowing which witnesses P-143 has been in contact with.<sup>40</sup>

17. However, this evaluation was made before Trial Chamber I had been seized by the Katanga and Ngudjolo Defence with a request for a variation of the protective measures. The Chamber therefore opined without having the benefit of the updated views of Trial Chamber I, which originally ordered the protection of P-143's identity. As explained above, under the regime of regulation 42 (3), as interpreted by Trial Chamber I, 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.

18. In the event, Trial Chamber I decided that there are still convincing reasons to protect P-143 and that there are no elements in the *Lubanga* case that could justify varying the protective measures that are in place. It is therefore incumbent on this Chamber to determine whether the circumstances in the *Katanga and Ngudjolo* case are such that it is imperative to disclose P-143's identity.<sup>41</sup>

19. The Chamber stands by its initial analysis of the general right of the Defence to have access to the identity of the Prosecution's intermediary, for the reasons explained in its decision of 18 September 2009.<sup>42</sup> However, it must now consider the developments since that decision and especially the fact there is now a clear finding by Trial Chamber I that P-143 would face a real

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<sup>39</sup> ICC-01/04-01/07-1483-Red2, par. 21

<sup>40</sup> *Idem*

<sup>41</sup> ICC-01/04-01/06-2190-Conf-Exp, par. 32

<sup>42</sup> See par. 16

risk if his identity were to be disclosed. This is a new element, which places the redactions within the ambit of rule 81(4) of the Rules, which in turn implies that the Chamber must now balance the concrete risk for the personal security of P-143 against the needs of the Defence.

20. The Defence's main argument as to why it requires the identity of P-143 is the important role played by this person as an intermediary for several incriminating witnesses.<sup>43</sup> It is submitted that this fact makes it important for the Defence "to know who among the various Prosecution witnesses was contacted through this intermediary in order to see whether there is a similarity in answering questions or other patterns in the interviews to indicate whether the intermediary influenced witnesses".<sup>44</sup>

21. The Chamber observes, in this regard, that the Defence does not necessarily require the communication of P-143's identity to carry out the above-mentioned analysis. It suffices for the Defence to know which of the witnesses has been in touch with P-143; information which the Prosecution can provide without revealing P-143's identity.

22. The Defence also argues that it may wish to contact the intermediary.<sup>45</sup> However, the Defence does not claim to have any specific reasons for interviewing P-143, other than the fact that P-143 has been in "close contact" with various Prosecution witnesses; nor does it demonstrate why it would be absolutely necessary to do so for the preparation of its defence.

23. Under these circumstances, and until the Defence advances more specific and substantiated reasons for why it needs to know P-143's identity or to interview P-143 in person, the Chamber is of the view that the necessity to

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<sup>43</sup> ICC-01/04-01/06-2149, par. 21

<sup>44</sup> ICC-01/04-01/06-2150, par. 2

<sup>45</sup> ICC-01/04-01/06-2150, par. 2

protect P-143's security preponderates. It would therefore be premature to order the disclosure of P-143's identity.

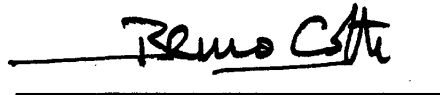
**FOR THESE REASONS,**

**THE CHAMBER,**

**ORDERS** the Prosecution to inform the Defence of the names of all the persons who appear on the Prosecution Witness List who have, to its knowledge, been in contact with P-143; and

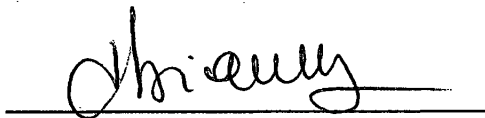
**INVITES** the Defence to seize the Chamber again of this matter if, after having analysed the information provided by the Prosecution, it considers there is still a need to disclose the identity of P-143, indicating its reasons for this as precisely as possible.

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



**Judge Bruno Cotte**

**Presiding Judge**



**Judge Fatoumata Dembele Diarra**



**Judge Christine Van den Wyngaert**

Dated this 1 February 2010

At The Hague, the Netherlands