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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. Callixte MBARUSHIMANA***

Public redacted version of

**Prosecution's second application for redactions to witness statements
pursuant to Rule 81 (4)**

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I. Introduction

1. The Prosecution submits its second application (“Application”) for the Pre-Trial Chamber’s authorisation to redact information contained in statements from thirteen demobilised FDLR combatants who are Prosecution witnesses (“Prosecution Witnesses”).¹ It also seeks authorisation to redact statements from nine other persons interviewed by the German Federal Criminal Police Office, *Bundeskriminalamt* (“BKA”) (“BKA Witnesses”), whose statements the Prosecution is unlikely to rely on at the confirmation hearing but intends to disclose pursuant to Article 67(2) of the Statute.²
2. Pursuant to Articles 54(3)(f), 57(3)(c) and 68(1) of the Rome Statute (“Statute”) and Rule 81(4) of the Rules of Procedure and Evidence (“Rules”), the Prosecution seeks authorisation to redact (a) the location of ten Prosecution witnesses; (b) identifying information and/or the current location of family members of six Prosecution Witnesses; (c) identifying information, and contact or other information pertaining to the location of innocent third parties contained in the statement of one Prosecution Witness and nine BKA Witnesses.

II. Request for confidentiality

3. The Prosecution submits this Application and its annexes confidential, *ex parte*, available to the Prosecution and the Victims and Witnesses Unit only because

¹ DRC-OTP-WWW-0526 (Annexes 1 and A), DRC-OTP-WWW-0527 (Annexes 2 and B), DRC-OTP-WWW-0528 (Annexes 3 and C), DRC-OTP-WWW-0529 (Annexes 4 and D), DRC-OTP-WWW-0530 (Annexes 5 and E), DRC-OTP-WWW-0542 (Annexes 6 and F), DRC-OTP-WWW-0544 (Annexes 7 and G), DRC-OTP-WWW-0557 (Annexes 8 and H), DRC-OTP-WWW-0559 (Annexes 9 and I), DRC-OTP-WWW-0562 (Annexes 10 and J), DRC-OTP-WWW-0564 (Annexes 11 and K), DRC-OTP-WWW-0587 (Annexes 12 and L) and DRC-OTP-WWW-0632 (Annexes 13 and M).

For witness DRC-OTP-WWW-0562 (Annexes 10 and J), one section of his second interview has not been transcribed (the corresponding section to the audio file DRC-OTP-2030-0111). The Prosecution has listened to the audio tape of this section and informs the Chamber that it does not require any redactions.

² DRC-OTP-2024-0189 (Annexes 14 and N), DRC-OTP-2028-0174 (Annexes 15 and N), DRC-OTP-2028-0105 (Annexes 16 and N), DRC-OTP-2028-0888 (Annexes 17 and N), DRC-OTP-2028-0958 (Annexes 18 and N), and DRC-OTP-2028-0982 (Annexes 19 and N), DRC-OTP-2031-0003 (Annexes 20 and N), DRC-OTP-2031-0029 (Annexes 21 and N) and DRC-OTP-2031-0050 (Annexes 22 and N).

they relate to information that is currently confidential and *ex parte*, the communication of which would defeat the purpose of the Application. No alternative procedures exist to deal with this request. The Defence will be informed of the Application and its legal basis through a public redacted version or a public note which will be filed as soon as practicable.

III. Legal basis for redactions

4. According to the Appeals Chamber, Rule 81(4) requires that:

- (i) There is an objectively justifiable risk that the disclosure to the Defence of the information sought to be redacted could: (i) affect the confidential character of the information under Articles 54, 72 and 93 of the Statute (Rule 81(4)); or (ii) affect the safety of witnesses, victims, or members of their families,³ or persons at risk on account of the activities of the Court⁴ (Rule 81(4));
- (ii) The risk arises from disclosing the particular information to the Defence as opposed to disclosing the information to the public at large;⁵
- (iii) Less restrictive protective measures are not feasible or insufficient;⁶
- (iv) The redactions sought are not prejudicial to or inconsistent with the rights of the Defence and the requirements of a fair and impartial trial.⁷

5. The Appeals Chamber has also explained that a Pre-Trial Chamber seized with the request for redactions “should carefully assess the relevance of the information in question to the Defence”⁸ and clarified that the determination

³ ICC-01/04-01/07-475 [AC], para. 71; ICC-02/05-03/09-58 [PTC I], para. 7.

⁴ ICC-01/04-01/07-475 [AC, pre-trial], paras. 1, 43; ICC-02/05-03/09-58 [PTC I], para. 8.

⁵ ICC-01/04-01/07-475 [AC], para. 71; ICC-01/04-01/07-476 [AC], para. 60.

⁶ ICC-01/04-01/06-568 [AC], para. 37; ICC-01/04-01/06-773 [AC], para. 33; ICC-01/04-01/07-475 [AC], para. 72 (a); ICC-01/04-01/07-476 [AC], para. 61.

⁷ ICC-01/04-01/06-773 [AC], para. 34; ICC-01/04-01/07-476 [AC], para. 63.

⁸ ICC-01/04-01/07-475 [AC], para. 72(c); ICC-01/04-01/07-476 [AC], para. 62.

requires a “careful assessment by the Pre-Trial Chamber on a case-by-case basis, balancing the various interests at stake.”⁹

6. In the *Katanga and Ngudjolo* case, the Appeals Chamber confirmed that information recorded pursuant to Rule 111(1) can also be subject to redactions pursuant to Rule 81 (4): “it will have to be determined on a case-by-case basis whether the non-disclosure of such information may be authorised by a Chamber in light of the conditions stipulated by Rule 81(2) and/or (4)”.¹⁰

IV. Factual basis for redactions

7. [REDACTED],¹¹ [REDACTED].¹² [REDACTED].
8. [REDACTED].¹³ [REDACTED].¹⁴ [REDACTED].
9. The Prosecution thus seeks the redactions referred to at paragraphs 12-14 below in order to protect witnesses, members of their families, or other persons at risk on account of the activities of the Court.
10. According to German authorities consulted by the Prosecution, the statements from BKA Witnesses dealt with in this application are now part of the file in the German proceedings against Ignace MURWANASHYAKA and Straton MUSONI in [REDACTED]. The two accused persons in that case and their counsel thus have access to the [REDACTED] of the statements from BKA Witnesses.¹⁵ The Prosecution has reasons to believe that the Suspect has had access to some of the information contained in that file, including the names of witnesses.¹⁶ The Prosecution maintains, nonetheless, that regardless of the Suspect’s access to the

⁹ ICC-01/04-01/07-475 [AC], para. 66, para. 72(c).

¹⁰ ICC-01/04-01/07-475 [AC, pre-trial], para. 93. The judgment concerned redactions of the location of witness interviews and identifying information of current and former staff members of the OTP and the VWU in the context of the pre-trial confirmation of charges.

¹¹ [REDACTED]

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ [REDACTED]

¹⁵ See ICC-01/04-01/10-40, footnote 4, and ICC-01/04-01/10-40-Anx2, pages 3-4 and 5-9.

¹⁶ ICC-01/04-01/10-101, para. 35.

contents of the German file, the redactions sought to the statements of those BKA Witnesses are necessary in the proceedings before this Court because of the protection obligations imposed on the Prosecution by the Rome Statute.

11. The Prosecution attaches the statements it proposes to redact as Annexes 1-13 (Prosecution Witnesses¹⁷) and 14-22 (BKA Witnesses¹⁸). The proposed Rule 81(4) redactions are highlighted in yellow in these Annexes. For each Prosecution Witness, it also attaches a chart identifying the proposed redactions and their legal and factual justifications.¹⁹ It attaches a single chart presenting the redactions proposed to the statements of all BKA Witnesses.²⁰

Location and contact details of Prosecution Witnesses

12. The Prosecution requests the Chamber's authorisation, pursuant to Rule 81(4), to redact the name and contact or other details pertaining to the current or intended location of Prosecution Witnesses DRC-OTP-WWW-0526, DRC-OTP-WWW-0527, DRC-OTP-WWW-0528, DRC-OTP-WWW-0530, DRC-OTP-WWW-0542, DRC-OTP-WWW-0559, DRC-OTP-WWW-0562, DRC-OTP-WWW-0564, DRC-OTP-

¹⁷ The statements from Prosecution Witnesses – and where applicable annexes – are attached as confidential, *ex parte*, Prosecution and VWU only Annexes 1-13. Only annexes to which redactions have been proposed are annexed to the present application.

The Prosecution had already sought redactions to the statement it took from witness DRC-OTP-WWW-0564 in the Prosecution's first application for redactions pursuant to Rule 81(2) and Rule 81(4). See ICC-01/04-01/10-112-Conf-Exp-Anx3 and ICC-01/04-01/10-112-Conf-Exp-AnxC. The Prosecution now seeks to redact [REDACTED]. The redaction chart for this witness is reattached in the present filing (Annex K). For the Chamber's convenience, it contains the redactions sought in the Prosecution's initial application (suitably identified) as well as the new redactions requested in the present one.

The interviews with the thirteen Prosecution Witnesses were conducted in English and Kinyarwanda. The Prosecution relies, in the present application, on draft transcripts of the English portions of those interviews. Should the Chamber approve the proposed redactions to the English portions, the Prosecution will apply the redactions to the corresponding Kinyarwanda portions and, if so required, submit those Kinyarwanda portions for the Chamber's information as soon as they are available.

¹⁸ The statements from BKA Witnesses – and where applicable annexes – are attached as confidential, *ex parte*, Prosecution and VWU only Annexes 14-22.

¹⁹ The charts are attached as confidential, *ex parte*, Prosecution and VWU only Annexes A-L.

²⁰ The chart is attached as confidential, *ex parte*, Prosecution and VWU only Annex N.

WWW-0587 and DRC-OTP-WWW-0632.²¹ The disclosure of this information would pose an unjustifiable risk to the safety²² and/or physical and psychological well-being and privacy of the witnesses. The Prosecution is of the view that there is no less restrictive protective measure that can be taken to avoid the risk. Additionally, the redactions are not prejudicial to or inconsistent with the rights of the Defence and the requirements of a fair and impartial trial because the information is irrelevant to any issue in this case and the redactions do not affect the intelligibility of the statements. On numerous occasions various Chambers have authorised or ordered redactions to this category of information.²³

Identifying information and/or current location of family members of Prosecution Witnesses

13. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact the identifying information and/or the current location of family members of Prosecution Witnesses DRC-OTP-WWW-0529, DRC-OTP-WWW-0530, DRC-OTP-WWW-0544, DRC-OTP-WWW-0559, DRC-OTP-WWW-0562 and DRC-OTP-WWW-0632.²⁴ The disclosure of this information would pose an unjustifiable risk to the safety of the witnesses and/or of their family members. The Prosecution is of the view that there is no less restrictive protective measure that can be taken to avoid the risk. The redactions are not prejudicial to or inconsistent with the rights of the Defence and the requirements of a fair and impartial trial because the identities of and/or current locations of these individuals are irrelevant to the issues in this case and the redactions do not affect the intelligibility of the

²¹ See the annexes relevant to each of the witnesses: DRC-OTP-WWW-0526 (Annexes 1 and A), DRC-OTP-WWW-0527 (Annexes 2 and B), DRC-OTP-WWW-0528 (Annexes 3 and C), DRC-OTP-WWW-0530 (Annexes 5 and E), DRC-OTP-WWW-0542 (Annexes 6 and F), DRC-OTP-WWW-0559 (Annexes 9 and I), DRC-OTP-WWW-0562 (Annexes 10 and J), DRC-OTP-WWW-0564 (Annexes 11 and K), DRC-OTP-WWW-0587 (Annexes 12 and L) and DRC-OTP-WWW-0632 (Annexes 13 and M).

²² See para. 8 above.

²³ See, for example, ICC-02/05-03/09-58 [PTCI], para. 7; and ICC-01/05-01/08-816 [TC III], para. 10.

²⁴ See the annexes relevant to each of the witnesses: DRC-OTP-WWW-0529 (Annexes 4 and D), DRC-OTP-WWW-0530 (Annexes 5 and E), DRC-OTP-WWW-0544 (Annexes 7 and G), DRC-OTP-WWW-0559 (Annexes 9 and I), DRC-OTP-WWW-0562 (Annexes 10 and J) and DRC-OTP-WWW-0632 (Annexes 13 and M).

statements. On numerous occasions various Chambers have authorised redactions to this category of information.²⁵

Innocent third parties and other persons at risk on account of the activities of the Court

14. The Prosecution requests the Chamber's authorisation, pursuant to Article 54(3)(f) and Rule 81(4), to redact identifying information of persons who are not witnesses or otherwise related to the case in the statement of Prosecution Witness DRC-OTP-WWW-0557 and in BKA Witness statement DRC-OTP-2028-0174.²⁶ If their identity is disclosed, they might be wrongly perceived as cooperating with the Prosecution and/or the Court directly or through their contact with a Prosecution Witness, creating an unjustifiable risk to their safety.²⁷ The Prosecution also seeks authorisation to redact the name and contact or other details pertaining to the current or intended location of BKA Witnesses or their family where they appear in statements DRC-OTP-2024-0189, DRC-OTP-2028-0105, DRC-OTP-2028-0174, DRC-OTP-2028-0888, DRC-OTP-2028-0958, DRC-OTP-2028-0982, DRC-OTP-2031-0003, DRC-OTP-2031-0029 and DRC-OTP-2031-0050.²⁸ Disclosure of this information would pose an unjustifiable risk to the safety²⁹ and/or physical and psychological well-being and privacy of the BKA Witnesses, who are innocent third parties. The Prosecution is of the view that there is no less restrictive protective measure that can be taken to avoid the risk. Additionally, the redactions are not prejudicial to or inconsistent with the rights of the Defence and the requirements of a fair and impartial trial because the identities of these individuals are irrelevant to any issue in this case and the redactions do not affect

²⁵ [REDACTED]

²⁶ See DRC-OTP-WWW-0557 (Annexes 8 and H) and DRC-OTP-2028-0174 (Annexes 15 and N)..

²⁷ [REDACTED]

²⁸ See DRC-OTP-2024-0189 (Annexes 14 and N), DRC-OTP-2028-0174 (Annexes 15 and N), DRC-OTP-2028-0105 (Annexes 16 and N), DRC-OTP-2028-0888 (Annexes 17 and N), DRC-OTP-2028-0982 (Annexes 19 and N), DRC-OTP-2031-0003 (Annexes 20 and N), DRC-OTP-2031-0029 (Annexes 21 and N), DRC-OTP-2031-0050 (Annexes 22 and N) and DRC-OTP-2028-0958 (Annexes 18 and N).

²⁹ See para. 8 above.

the intelligibility of the statements. On numerous occasions various Chambers have authorised redactions to this category of information.³⁰

Temporary nature of certain redactions

15. The redactions to the identity of innocent third parties identifiable from the statement of Prosecution Witness DRC-OTP-WWWW-0557 and in BKA Witness statement DRC-OTP-2028-0174 are sought temporarily. At the appropriate time (either as stipulated in the Rules or once the circumstances change, whichever comes earlier), the Prosecution will make the necessary requests to the appropriate Chamber for authorisation to lift some or all of these redactions, once adequate protective measures are in place, if the information becomes relevant to the case.

V. Notice of further application for redactions

16. The Prosecution has taken a further statement from a crime-base witness and will seek a request for extension of the time limit for applications for redactions for this statement as soon as the interview is back from mission and a signed copy of the statement is available.

³⁰ See for example, [REDACTED]; ICC-02/05-03/09-58 [PTCI], para. 8; ICC-01/04-01/07-521 [AC], para. 34.

VI. Conclusion

17. For the foregoing reasons, the Prosecution requests the Single Judge to authorise the proposed redactions as submitted in this Application and accompanying Annexes.



Luis Moreno-Ocampo
Prosecutor

Dated this 4th day of May 2011
At The Hague, The Netherlands