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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
Corrigendum**

**Prosecution's request for variation of time limit and
fourth application for redactions to witness statements
pursuant to Rule 81(2) and Rule 81 (4)**

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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I. Introduction

1. The Prosecution seeks an extension of the time limit pursuant to Regulation 35(2) of the Regulations of the Court for the filing of a request for redactions in respect of the statement of Witness W-677, which it intends to rely upon at the confirmation of charges hearing ("the Confirmation Hearing"). The witness statement was transcribed only recently, and after the expiry of the time limit for applications for redactions. It was thus impossible for the Prosecution to comply with the time limit. Provided the latter extension is granted, the Prosecution seeks the approval of the proposed redactions to the statement.
2. The Prosecution also seeks authorisation to redact handwritten notes taken by Witness W-0655 during the witness' interview. The notes were overlooked during the redaction application process in relation to Witness W-0655, but were spotted in pre-disclosure checks carried out by the Prosecution. The Prosecution does not intend to rely on the notes at the Confirmation Hearing, but they may be relevant to the Defence's assessment of this witness' evidence. The Chamber has previously authorised redaction of exactly the same information, where contained in the witness' statement.
3. The Prosecution seeks the approval of redactions proposed to the statement of Witness W-672, which it intends to disclose pursuant to Article 67(2) as soon as practicable.
4. The Prosecution submits this fourth application ("Application") for the Pre-Trial Chamber's authorisation pursuant to Articles 54(3)(f), 57(3)(c) and 68(1) of the Rome Statute ("Statute") and Rules 81(2) and 81(4) of the Rules of Procedure and Evidence ("Rules"). It seeks to redact names and locations in order to protect one

of the witnesses and his family,¹ as well as innocent third parties mentioned in both witnesses' statements.²

II. Request for confidentiality

5. The Prosecution submits this Application and its annexes as confidential, *ex parte*, available to the Prosecution and the Victims and Witnesses Unit only because 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. Request for extension of time limit to seek redactions

6. Witness W-0677, [REDACTED]. The Prosecution received information about his demobilisation and whereabouts in March 2011. Witness W-0672 [REDACTED].
7. The interviews of Witnesses W-0677 and W-0672 were conducted in Kinyarwanda and English and [REDACTED]. They were completed on 16 and 17 April 2011 respectively, as soon as practicable once the Prosecution learnt about their whereabouts and could make logistical arrangements to interview them [REDACTED]. The interview team returned from mission on 18 April, whereupon the witnesses' statements were registered in evidence and sent for transcription. The transcripts of the approximately 17 and 14 hours of recorded interviews with Witnesses W-0677 and W-0672, respectively, were completed on 23 May.

¹ In respect of W-672 only.

² In respect of both witnesses.

8. The Prosecution's protection obligations, pursuant to Articles 54(3)(f) and 68(1), require it to review witness statements carefully to determine whether any redactions are necessary prior to disclosure. For lengthy interviews such as those concerned in this application, such a review can only be conducted properly on the basis of transcripts. In the circumstances, Witness W-0677's statement, which the Prosecution proposes to rely on at the Confirmation Hearing, could not be reviewed for redactions prior to the expiry of the redaction application time limit.
9. The Prosecution submits that, in the circumstances, it was impossible to comply with the time limit imposed. The Prosecution therefore submits that it has shown good cause, in respect of the statement of Witness W-0677, for the variation of the time limit for applications for redactions under Rule 81.³

IV. Legal basis for redactions

10. According to the Appeals Chamber, Rules 81(2) and (4) require that:

- (i) There is an objectively justifiable risk that the disclosure to the Defence of the information sought to be redacted could: (i) prejudice ongoing or further investigations (Rule 81(2)); (ii) affect the confidential character of the information under Articles 54, 72 and 93 of the Statute (Rule 81(4)); or (iii) affect the safety of witnesses, victims, or members of their families⁴ or persons at risk on account of the activities of the Court⁵ (Rule 81(4));

³ In respect to Witness W-0672, since the Prosecution is under a statutory duty to disclose potentially exculpatory evidence as soon as practicable regardless of when it is obtained, and since the Chamber did not set time limits for the disclosure of such evidence, it is presumed that the time limit set by the Chamber for requests for redactions was not intended to apply to such evidence.

⁴ ICC-01/04-01/07-475 [AC], paras. 71 and 97; ICC-01/04-01/07-476 [AC], para. 60; ICC-01/04-01/07-561-Conf-Exp [PTC I], paras. 15-24; ICC-02/05-03/09-58 [PTC I], para. 7..

⁵ ICC-01/04-01/07-475 [AC, pre-trial], paras. 1, 43; ICC-02/05-03/09-58 [PTC I], para. 7; ICC-01/04-01/07-561-Conf-Exp [PTC I], paras. 15-24.

- (ii) The risk arises from disclosing the particular information to the Defence as opposed to disclosing the information to the public at large;⁶
- (iii) Less restrictive protective measures are not feasible or insufficient;⁷
- (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.⁸

11. 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”⁹ and clarified that the determination requires a “careful assessment by the Pre-Trial Chamber on a case-by-case basis, balancing the various interests at stake.”¹⁰

12. 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)”.¹¹

V. Factual basis for redactions

⁶ ICC-01/04-01/07-475 [AC], para. 71; ICC-01/04-01/07-476 [AC], para. 60.

⁷ 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.

⁸ ICC-01/04-01/06-773 [AC], para. 34; ICC-01/04-01/07-476 [AC], para. 63.

⁹ ICC-01/04-01/07-475 [AC], para. 72(c); ICC-01/04-01/07-476 [AC], para. 62.

¹⁰ ICC-01/04-01/07-475 [AC], para. 66, para. 72(c).

¹¹ 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.

13. The Prosecution's investigation into crimes committed in North and South Kivu Provinces in 2009 and 2010 is ongoing. [REDACTED]. Disclosure of the information referred to at paragraph 17 below would prejudice the investigation.
14. [REDACTED]. [REDACTED],¹² [REDACTED].¹³ [REDACTED].
15. [REDACTED].¹⁴ [REDACTED].
16. For each witness, the Prosecution attaches a copy of their statement(s) or annexes thereto on which the proposed Rule 81(2) redactions are highlighted in blue and Rule 81(4) redactions are highlighted in yellow.¹⁵ For each witness the Prosecution also attaches a chart on which each redaction is identified and its legal and factual justifications set out.¹⁶

Prosecution sources

17. The Prosecution requests the Chamber's authorisation, pursuant to Rule 81(2), to redact the name and other identifying details of Prosecution sources where they appear on the statement of Witnesses DRC-OTP-WWW-0672 and DRC-OTP-WWW-0677¹⁷ to protect the ongoing investigation. [REDACTED]. [REDACTED].¹⁸ [REDACTED]. The Prosecution is of the view that there is no less restrictive protective measure that can be taken to avoid the prejudice to the investigation. 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 identity of these sources is irrelevant to any issue in this case and the redactions

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ The statements or their annexes are attached as confidential, *ex parte*, Prosecution and VWU only annexes 1-3.

¹⁶ The charts are attached as confidential, *ex parte*, Prosecution and VWU only annexes A - C.

¹⁷ See annexes 1 and 2.

¹⁸ [REDACTED].

do not affect the intelligibility of the statements. On numerous occasions various Chambers have authorised or ordered redactions to this category of information.¹⁹

Location of witnesses

18. The Prosecution requests the Chamber's authorisation, pursuant to Rule 81(4), to redact the name of the birthplace and location²⁰ of witness DRC-OTP-WWW-672 where it appears in his statements.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 witness. 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 witnesses

19. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact the identifying information and/or the current location of family members of Witness DRC-OTP-WWW-672 where they appear in his statements.²⁴ The disclosure of this information would pose an unjustifiable risk to the safety of the witness and/or of his 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

¹⁹ See, for example, ICC-01/04-01/06-455, p. 9; ICC-01/04-01/06-774, para. 62.

²⁰ [REDACTED].

²¹ See annexes A and B.

²² See paras. 13-14 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 annexes A-C.

locations of these individuals are irrelevant to the issues in this case and the redactions do not affect the intelligibility of the 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

20. The Prosecution requests the Chamber's authorisation, pursuant to Article 54(3)(f) and Rule 81(4), to redact the names and identifying information of a person who is not a witness or otherwise related to the case in the statements of Witnesses DRC-OTP-WWW-672.²⁶ If the person's identity is disclosed, he might be wrongly perceived as cooperating with the Prosecution and/or the Court, creating an unjustifiable risk to their safety. 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 identity of this individual 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 redactions to this category of information.²⁷

Extension of redactions applied to Witness W-0655's statement

21. The Prosecution seeks authorisation to extend, to Witness W-0655's handwritten notes,²⁸ the redactions previously authorised by the Chamber in relation to the witness' statement. The information the Prosecution seeks to redact is exactly the same as was already contained in the witness's statement.²⁹

²⁵ ICC-01/04-01/06-2208-Conf-Exp [TCI], paras. 28, 39, 42, 58–59, 63, 69, 74, 77 and 80; ICC-01/04-01/07-1214-Conf-Exp [TCII], paras. 35-37; ICC-02/05-03/09-58 [PTCI], para. 7.

²⁶ See annex A.

²⁷ See for example, ICC-01/04-01/07-1551-Conf-Exp-tENG [TCII], paras. 67-72; ICC-02/05-03/09-58 [PTCI], para. 8.

²⁸ See annex 3.

²⁹ ICC-01/04/01/10-167-Conf-Exp-AnxII, pp. 10, 13 and 14.

Temporary nature of certain redactions

22. The redactions to the identity of the family members of witnesses DRC-OTP-WWW-0672 and of innocent third parties identifiable from the two witnesses' statements 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.

VI. Conclusion

23. For the foregoing reasons, the Prosecution seeks an extension of the time limit for the request for the redaction of the statement of W-677. It also requests the Single Judge to authorise the proposed redactions as submitted in this Application and accompanying Annexes.



Luis Moreno-Ocampo
Prosecutor

Dated this 3rd day of June 2011

At The Hague, The Netherlands