

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/10

Date: 3 August 2011

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public redacted version of ICC-01/04-01/10-325

**Prosecution's application for authorisation to disclose a document received
pursuant to article 54(3)(e) in redacted form**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Counsel for the Defence

Nicholas Kaufman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Prosecution requests authorisation to disclose a redacted version of a document, on the basis of articles 54(3)(e), 54(3)(f) and 68(1) of the Rome Statute ("Statute") and rules 81(4) of the Rules of Procedure and Evidence ("Rules"), as required by its provider.

I. Statement of facts

2. At the first status conference in this case, the Defence raised the issue of the possible existence of potentially exculpatory material contained in items of evidence collected under condition of confidentiality in terms of article 54(3)(e) of the Statute.¹
3. In conducting its review of all protected materials in all of the Prosecution's evidence collections, the Prosecution identified one item received under article 54(3)(e) which it has assessed as containing information of a potentially exculpatory nature, pursuant to article 67(2) of the Statute.²
4. The document in question is a [REDACTED]³ ("the document") emanating from [REDACTED] or "the Provider"). The contents of the document are subject to confidentiality restrictions, pursuant to article 54(3)(e) of the Statute.
5. On 27 April 2011, the Prosecution requested the Provider to lift the confidentiality restrictions. On 12 July 2011 the Provider authorized the disclosure of the document with certain conditions, being that:
 - (a) the document be disclosed to the Defence only and not be made public;
 - (b) the document be entirely redacted save the paragraphs identified as potentially exculpatory; and

¹ Transcript, ICC-01/04-01/10-T-2-ENG, 14 February 2011, p.15 line 16 – p.16 line 5.

² Prosecution's report on protected materials relevant to the case, ICC-01/04-01/10-91, 4 April 2011, para. 2.

³ [REDACTED]

(c) the identity of the Provider should remain redacted and not be disclosed to the Defence.

6. The Prosecution hereby seeks authority to disclose the document with the redactions specified by the Provider. The document is attached as Annex A, with the proposed redactions highlighted. The Prosecution further requests that the document remain confidential and *inter partes*.

II. Submissions

7. The Prosecution has identified only one portion of the document as potentially exculpatory, quoted verbatim as follows:

[REDACTED]⁴ [REDACTED]⁵

8. The Prosecution submits that the remaining portions of the document are wholly irrelevant to the present case, as they do not pertain to the Suspect, the FDLR or the events in the Kivus.
9. The Provider has agreed to the disclosure of the document subject to the conditions specified in paragraphs 5(a) - (c) above. The Prosecution submits that the redaction of the remainder [REDACTED] is reasonable, since the information it contains is not material to this case. The redaction will therefore not be prejudicial to the Defence.

⁴ This evidence could be deemed to be potentially exculpatory because it may impeach the credibility of another item of Prosecution evidence. [REDACTED]

⁵ The Prosecution assesses this information as potentially exculpatory, since it may tend to show that the Suspect could not influence the events in the field.

10. The redaction is also necessary, as unredacted disclosure of the document would reveal the identity of [REDACTED] and the Provider, which the Provider believes may pose a security risk for it, its staff or its partner organisations and their staff on the ground. [REDACTED] The Prosecution submits that there are no less restrictive measures available.

11. Such redactions to the names of the source have been accepted in previous cases before other Chambers of this Court.⁶ [REDACTED]

12. The Appeals Chamber has recognised that reliance on article 54(3)(e) of the Statute may lead to tensions with Prosecutorial disclosure obligations under article 67(2) of the Statute.⁷ It has further recognised that there may be circumstances in which this tension can be resolved by reverting to other measures.⁸ The Prosecution submits that the redactions as proposed by the Provider represent a reasonable solution which resolves this tension, while respecting the requirements of a fair trial.⁹

13. The Prosecution submits that the Suspect's rights would not be affected by the proposed redactions. The proposals do not render the document in question unintelligible, unreadable or unusable by the Defence, thereby they do not

⁶ See for example, *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution's Request for Non-Disclosure of Information in Six Documents, ICC-01/04-01/06-2763, para. 34; *Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui*, Decision on the Prosecutor's Application to Redact Information under Article 67(2) of the Statute or Rule 77 of the *Rules of Procedure and Evidence* (ICC-01/04-01/07-902), ICC-01/04-01/07-1099-tENG, 4 May 2009, para. 20 and Decision on the Lifting, Maintenance and Ordering of Redactions, ICC-01/04-01/07-1551-Conf-Exp-tENG, 22 October 2009, paras. 55-63.

⁷ ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 43.

⁸ ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 44.

⁹ ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 44.

interfere with the requirements of a fair trial.¹⁰ The redacted portion has no bearing on the present case or the guilt or innocence of the Suspect.

14. Finally, taking note of the fact that the Defence already filed its List of Evidence¹¹ without having received this redacted document, the Prosecution will not object if the Defence wishes to add this document to the evidence upon which it intends to rely at confirmation.

III. Request for confidentiality

15. The Prosecution submits this Application and its annex as confidential, *ex parte*, Prosecution only because it relates 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.

¹⁰ *Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui*, Reasons for the Oral Decision of 3 February 2009 on the Procedure for the Redaction of Documents Obtained by the Prosecutor Under Article 54(3)(e) of the Statute and Order Instructing the Prosecutor to Submit Documents to the Chamber, ICC-01/04-01/07-931-tENG, 26 February 2009, para. 5.

¹¹ ICC-01/04-01/10-322.

IV. Relief

16. The Prosecution requests the Chamber to approve disclosure of the screening note with redactions required by the Provider as highlighted in the attached annex and requests that the document to remain confidential and *inter partes*.



Luis Moreno-Ocampo,
Prosecutor

Dated this 3rd day of August 2011

At The Hague, Netherlands