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No.: **ICC-02/05-03/09**
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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernández de Gurmendi

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

PUBLIC DOCUMENT

**Public Redacted Version of Prosecution's Application for Redactions Pursuant to
Rule 81(4) of the Rules of Procedure and Evidence and
Request for the Lifting of Certain Redactions Authorised Pursuant to Rule 81(4),
filed on 21 December 2011**

Sources: Office of the Prosecutor

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

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Introduction

The Office of the Prosecutor (“Prosecution”) respectfully submits its application for redactions to 85 photographs provided by Witness DAR-OTP-WWWW-0315 (“W-0315”) and the relevant metadata (“the Application”) pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence (“Rules”).

The Prosecution also requests the Trial Chamber IV (“Trial Chamber”) to authorise the lifting of redactions previously granted pursuant to Rule 81(4) of the Rules, to the images of two individuals, who are now believed to be [REDACTED].

I. Background

1. On 19 July 2011, the Defence requested the Prosecution to disclose certain items of evidence that it considered material for the preparation of the defence (“Defence Request”), including 332 photographs provided by W-0315 during his first interview. The Prosecution thereafter disclosed a redacted version of this witness’s statement¹ and 247 of its annexed photographs in unredacted form.² As for the remaining 85 photographs, the Prosecution concluded that protective measures - redactions - would be required for certain individuals depicted therein prior to their disclosure to the Defence. Pending a decision by the Trial Chamber, the Prosecution also has already temporarily disclosed these 85 pictures to the Defence in their redacted form.³ Should the Trial Chamber determine that any of the proposed redactions are not justified, the Prosecution will proceed to re-disclose them with the relevant redactions lifted.

II. Prosecution’s Request for Redactions Pursuant to Rule 81(4)

(A) Prosecution’s Request

2. The Prosecution’s request relates to 85 of the photographs provided by W-0315. The Prosecution did not rely upon the photographs at the pre-trial stage and does not intend to rely on them at trial. Nor were these photographs disclosed in the *Abu Garda case*. This request for redactions is prompted by the Defence Request.

¹ Disclosed on 8 July 2010 (re-disclosed on 22 October 2010 and 5 September 2011).

² Disclosed on 15 and 27 September 2011 (Trial INCRIM Packages 14 and 16).

³ Disclosed on 21 October 2011 through Trial Rule 77 Package 3.

i. Scope of Redactions Sought, and the Legal and Factual Basis.

3. The scope of the redactions sought relates, *inter alia*, to:
 - i. Information specifically relating to the personal security, dignity and privacy of witnesses or other persons who may be at risk on account of the activities of the Court, pursuant to Articles 54(3)(f) and 68(1) of the Statute and Rule 81(4) of the Rules, specifically:
 - (a) images of certain individuals who, although not specifically identified by any of the Prosecution witnesses, are believed to be [REDACTED];
 - (b) images of the [REDACTED];
 - (c) images of individuals [REDACTED]^{4 5}

(B) Organization of the Materials being Submitted and Justification

4. The Prosecution herewith submits to the Trial Chamber the 85 photographs provided by W-0315, for which redactions are being sought, together with an accompanying chart setting out both the specific information sought to be redacted and the justification for each of the redactions sought. To assist the Trial Chamber in considering this request, the Prosecution also submits the redacted version that it disclosed to the Defence of W-0315's statement. All of these documents are annexed to this Application as **Confidential ex parte Annex "A"**.

5. To further assist the Trial Chamber in its review of the proposed redactions, the Chart attached to the photographs contains (i) each proposed redaction – referred to by ERN

⁴ [REDACTED].

⁵ On 31 August 2009, Pre-Trial Chamber I in the *Abu Garda* Case authorised the redaction of the names of certain investigators in the chain of custody field in the metadata of the material to be disclosed to the Defence. [REDACTED] [see ICC-02/05-02/09-76 [REDACTED]], [REDACTED]. In light of the Pre-Trial Chamber's authorisation, when the Prosecution disclosed the 85 photographs (the subject of this Application), as well as the earlier 247 photographs (on 15 and 27 September and on 21 October 2011, respectively) to the Defence, [REDACTED] name was also redacted in the chain of custody metadata field. The Prosecution continues to evaluate the circumstances of all OTP investigators and whether the concerns that caused the Pre-Trial Chamber to authorise redactions to their names pursuant to Rule 81(2) still subsist. If not, it will proceed to lift them and re-disclose the relevant material to the Defence. For instance, the Prosecution has already disclosed the name of [REDACTED] which also appears in the relevant metadata in some photographs, and intends to re-disclose the remaining ones in which [REDACTED] name was redacted.

reference of the photograph; and (ii) the corresponding rule justifying the redaction proposed.

6. The Prosecution has also coloured in red the redactions sought to each photograph - to protect the safety of witnesses and other persons at risk on account of activities of the Court, pursuant to Rule 81(4) of the Rules and Articles 54(3)(f) and/or 68(1) of the Statute.

(C) Necessity for Redactions and Impact on Rights of the Accused

7. It is the Prosecution's responsibility to take appropriate measures to ensure effective investigations, and in doing so, take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.⁶ Against this background, the Prosecution assessed the general and particular security situation of each of the individuals whose images appear in the photographs subject of this Application. The persons whose level of risk would be adversely impacted if the photographs were to be disclosed unredacted fall under two main categories: (i) [REDACTED]; and (ii) those who are third parties [REDACTED]. The Prosecution concluded that the risks can be mitigated and managed only if their identities, including their images, are withheld from the Accused Persons at this stage. The Prosecution will continue to monitor the security situation of each individual and promptly inform the Trial Chamber of any change in their security status.

8. The Prosecution submits that these redactions are necessary to protect the safety and security and, where appropriate, the privacy of the persons in respect of whom they are being sought. There are no less intrusive measures that can be taken to avoid the risks mentioned in the confidential *ex parte* Annex "A" appended to this Application. Additionally the Prosecution submits that at this stage of the proceedings, and in light of the nature of most of the redactions sought, the requested redactions are not prejudicial to, or inconsistent with, the rights of the Accused Persons.

⁶ Article 54(1)(b) of the Statute read in conjunction with Article 68(1) of the Statute.

III. Request for the Lifting of Certain Redactions Authorised Pursuant to Rule 81(4)

9. On 7 September 2009, the Pre-Trial Chamber I (“PTC I”), in its “Second Decision on the Prosecutor's Requests for Redactions”, rendered in the *Abu Garda* Case (“Second Decision on Redactions”), authorised redaction of the images of certain individuals [REDACTED] pursuant to Rule 81(4).⁷ This order extended to the image of the person [REDACTED].⁸ PTC I authorised this category of redactions, [REDACTED].⁹

10. The Prosecution further reviewed the photographs provided by W-0315 with a view to disclosing some of the photographs requested by the Defence, especially against the descriptions provided by various other witnesses who were shown these photographs in the course of their interviews. The Prosecution now determines that the individual appearing [REDACTED], in photographs DAR-OTP-0164-1009, DAR-OTP-0164-1087, and DAR-OTP-0164-1088, originally believed to be [REDACTED]¹⁰ (whose image was redacted by order of PTC I under Rule 81(4)),¹¹ is actually the individual identified by Witness DAR-OTP-WWW-0446 in his statement as [REDACTED]¹². Indeed, the image of this person was subsequently shown to Witness DAR-OTP-WWW-0439 when he was interviewed by the Prosecution and was disclosed to the Defence in unredacted form when this witness's statement was disclosed.¹³ Similarly, the Prosecution recently disclosed the photographs DAR-OTP-0164-1003 and DAR-OTP-0164-1092 with the image of this person unredacted.¹⁴

11. The Prosecution also now concludes that an individual originally believed to be [REDACTED]¹⁵ whose image was sought to be redacted in photographs DAR-OTP-0164-1087, DAR-OTP-0164-1094, and DAR-OTP-0164-1095, is actually the individual who appears in photograph DAR-OTP-0164-1015 identified by Witness 0446 as

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ Second Decision on the Prosecutor's Requests for Redactions, ICC-02/05-02/09-85 [REDACTED], [REDACTED].

¹² Statement of Witness DAR-OTP-WWW-0446, DAR-OTP-0164-0808 at 0829, para. 197.

¹³ Photograph DAR-OTP-0164-1009 has been attached to the statement of Witness 0439 as “ANNEX 4” at DAR-OTP-0175-0002, page 0052, disclosed on 6 August 2010.

¹⁴ Disclosed on 27 September 2011 through INCRIM Trial Package 16.

¹⁵ [REDACTED].

[REDACTED].¹⁶ On the basis of this identification, the Prosecution disclosed photograph DAR-OTP-0164-1015 and other related photographs, with the image of this individual unredacted.¹⁷

12. The Prosecution has further assessed that there are no security risks to any of these individuals if their identities were to be disclosed to the Defence, and thus that it is no longer necessary to redact their images from the relevant photographs.

13. Accordingly, the Prosecution now requests that the Trial Chamber authorise the lifting of redactions -- previously authorised pursuant to the Second Decision on Redactions -- to the images of these two individuals in the photographs provided by W-0315.

14. The Prosecution annexes to this Application, in Confidential *ex parte* **Annex “B”**, two sets of the relevant photographs provided by W-0315. One set contains the photographs in their redacted form, while the other set contains the photographs with these redactions lifted.

IV. Request for Confidentiality

15. The Prosecution submits this request and its annexes “Confidential, Ex Parte, available to the Prosecutor and the Victims and Witnesses Unit Only” because they relate to material that is currently classified as confidential and *ex parte* and depict information relating to the identities of witnesses. A public redacted version of this Application or a public note will be filed as soon as practicable.

Relief Sought

16. For the reasons set forth above, the Prosecution respectfully requests the Trial Chamber:

- (i) to authorise the redactions proposed to the 85 photographs provided by W-0315 during his first interview, submitted with this Application, as well as to the relevant meta-data, where applicable;

¹⁶ Statement of DAR-OTP-WWW-0446, DAR-OTP-0169-0808 at 0830, para. 201.

¹⁷ Photographs at DAR-OTP-0164-1015 and DAR-OTP-0164-1017 [disclosed on 8 July 2010]; DAR-OTP-0164-1089 [disclosed on 8 July 2010 and re-disclosed on 22 October 2010]; DAR-OTP-0164-1019; DAR-OTP-0164-1044; DAR-OTP-0164-1102 [disclosed on 15 Sep 2011].

(ii) to authorise the lifting of redactions previously authorised by PTC I pursuant to Rule 81(4) to the images of two individuals [REDACTED].



Luis Moreno – Ocampo
Prosecutor

Dated this 11th Day of January 2012
At The Hague, The Netherlands