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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Silvia Fernandez de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN DARFUR, THE SUDAN

IN THE CASE OF THE PROSECUTOR

V.

***ABDALLAH BANDA ABAKAER NOURAIN AND SALEH MOHAMMED JERBO
JAMUS***

Public Document
with Confidential *Ex Parte* Prosecution and VWU Only “Annex A”

**Prosecution’s Response to the “Defence Request to Lift Redactions to Prosecution
Witness Statements and Related Documents” filed on 9 March 2012**

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

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Introduction

The Prosecution opposes the Defence Request to Lift Redactions to Prosecution Witness Statements and Related Documents¹ (“Defence Request”).

In deciding whether to authorise the redactions pursuant to Rule 81(2) and Rule 81(4) which are the subject-matter of the Defence Request, Pre-Trial Chamber I - in both *Abu Garda* and *Banda and Jerbo* - took into account certain factual circumstances (both individual and general) before concluding that these were the least intrusive measures available to protect the witnesses and other persons at risk without infringing upon the rights of the suspects.² This notwithstanding, the Office of the Prosecutor (“Prosecutor” or “Prosecution”) has continued to evaluate whether the concerns that had led it to request the necessary redactions pursuant to Rules 81(2) and 81(4) still subsist. Where such redactions are no longer justified, the Prosecution has either sought the Chamber’s authorization to lift them (in the case of Rule 81(4) redactions)³ or unilaterally lifted them itself (in the case of Rule 81(2) redactions).⁴

The Prosecution has again assessed the individual circumstances of those individuals affected by the Defence Request and concluded that with one exception, the factual circumstances that led the Pre-Trial Chamber to authorise the redactions cited by the Defence have not changed. The Prosecution notes that a trial date has not yet been set in this case, and many issues, some of which impact on the very issue of redactions or

¹ ICC-02/05-03/09-306.

² The Prosecution understands that the Trial Chamber has had access to the confidential and *ex parte* filings made on redactions, as well as the decisions and related annexes rendered by the PTC in *Abu Garda*, since 2 September 2011.

³ See for example ICC-02/05-03/09-157-Red, paras 4-6, 13 and ICC-02/05-03/09-222 (the Prosecution re-disclosed the statements); see also ICC-02/05-03/09-198-Red, paras 13-17; and ICC-02/05-03/09-269-Red, paras 9-16.

⁴ See for example, ICC-02/05-03/09-157-Red, paras 7-12 and ICC-02/05-03/09-222.

relate to the timelines of proceedings in the case, are yet to be resolved by the Trial Chamber. Therefore at this stage of the proceedings, the redactions currently in force continue to remain the least intrusive measures to protect the individuals concerned and do not violate the right of the accused persons to a fair trial.

Procedural Background

1. In the *Prosecutor v. Bahar Idriss Abu Garda* (“*Abu Garda*”), the Prosecution requested certain redactions to the statements of, *inter alia*, witnesses 0315, 0326, 0355, 0416, 0419, 0420, 0446 and 0447, whose statements are subject of the Defence Request.⁵
2. On 14 August 2009⁶ and 7 September 2009⁷, the Single Judges of Pre-Trial Chamber I in *Abu Garda* authorized redactions to the witness statements of witnesses 0315, 0326, 0355, 0416, 0419, 0420, 0446, and 0447, among others.
3. On 29 June 2010, Pre-Trial Chamber I affirmed in the Decision on issues relating to disclosure, in reference to Regulation 42 of the Regulations of the Court, that the redactions applied in *Abu Garda* continue to have full force in relation to these proceedings.⁸ Materials that were disclosed in redacted form in *Abu Garda*, including the above witness statements, were, therefore, disclosed to the Defence in the same redacted form.

⁵ The Prosecution has omitted the prefix “DAR-OTP-WWWW” when it refers to all of the witnesses, and referred to them by their numbers only. ICC-02/05-02/09-44-Conf; ICC-02/05-02/09-66-Conf and ICC-02/05-02/09-73-Conf.

⁶ ICC-02/05-02/09-51-Conf.

⁷ ICC-02/05-02/09-85.

⁸ ICC-02/05-03/09-49, paras 11-12.

4. On 20 July 2010 the Prosecution requested certain redactions to, *inter alia*, the second/supplementary statements of witnesses 0355, 0315 and 0446, and the statement of Witness 0439.⁹
5. On 29 July 2010, the Single Judge of Pre-Trial Chamber I authorised redactions to the second/supplementary statements of witnesses 0315, 0355, 0446 and the statement of Witness 0439, among others, pursuant to Rules 81(2) and 81(4).¹⁰
6. On 9 March 2012, the Defence in *Prosecutor v. Banda and Jerbo* (“*Banda and Jerbo*”) requested the Trial Chamber to lift certain redactions applied to statements and photographs disclosed to the Defence, and to order the Office of the Prosecution to immediately disclose this material unredacted to the Defence.¹¹

Prosecution’s Submissions

7. When Pre-Trial Chamber I authorised the redactions pursuant to Rule 81(2) and Rule 81(4) in *Abu Garda* and *Banda and Jerbo* that are the subject-matter of the Defence Request, it took certain factual circumstances (both individual and general) into account before concluding that the redactions were the least intrusive protective measures that did not infringe upon the rights of the accused persons. This notwithstanding, the Prosecution has continued to evaluate whether the concerns that had led it to request the said redactions still subsist. Where such redactions are no longer justified, the Prosecution has either sought

⁹ ICC-02/05-03/09-54-Conf-Exp.

¹⁰ ICC-02/05-03/09-58.

¹¹ ICC-02/05-03/09-306.

the Chamber's authorisation to lift them (in the case of Rule 81(4)), or unilaterally lifted them itself (in the case of Rule 81(2)).

8. In particular, on 6 June 2011, the Prosecution requested that the Trial Chamber authorise the lifting of Rule 81(4) redactions to the statements of witnesses 0355 and 0326.¹² On 27 September 2011 the Prosecution re-disclosed those statements with the relevant redactions lifted.¹³ On 12 August 2011, the Prosecution requested the Trial Chamber to authorise the lifting of further redactions in the two statements of Witness 0355 and related annexes.¹⁴ Also, on 21 December 2011, the Prosecution requested the Trial Chamber to authorise the lifting of Rule 81(4) redactions to the images of two individuals in several photographs provided by Witness 0315 already disclosed to the Defence.¹⁵ These two requests are still pending with the Trial Chamber.

9. The Prosecution has also been continuously evaluating whether it needs to retain redactions authorised pursuant to Rule 81(2) in respect of further or ongoing investigations and whether the concerns that underlay such redactions still subsist. Accordingly, on 22 October 2010, the Prosecution re-disclosed certain witness statements with the Rule 81(2) redactions lifted.¹⁶ Similarly, on 6 and 27 September 2011, the Prosecution re-disclosed several witness statements with redactions pursuant to Rule 81(2) to the identities of OTP staff members lifted.¹⁷

¹² ICC-02/05-03/09-157-Red, paras 4-6, 13 and ICC-02/05-03/09-222.

¹³ Trial INCRIM Package 15.

¹⁴ ICC-02/05-03/09-198-Red, paras 13-17.

¹⁵ ICC-02/05-03/09-269-Red, paras 9-16.

¹⁶ This included the statements of witnesses 0315 (first statement), 0419 (two statements), 0446 (first statement), 0447, as well as nine photographs provided by Witness 0315 [Pre-Trial INCRIM Package 8].

¹⁷ This included the statements of witnesses 0315 (two statements), 0416, 0417, 0419 (first statement), 0420 [INCRIM Package 13] and Witness 0326 [Trial INCRIM Package 15].

The Prosecution also envisages that in the coming days it will be in a position to re-disclose other witness statements with similar information having been lifted.

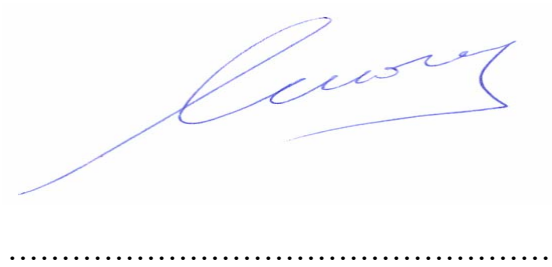
10. The Prosecution has assessed the individual circumstances of those individuals affected by the Defence Request and concluded that with one exception, which is currently the subject matter of an application pending before the Trial Chamber,¹⁸ the factual circumstances that led to Single Judges of Pre-Trial Chamber I authorising the relevant redactions have not changed. The Prosecution also notes that a trial date has not yet been set in this case, and many issues, some of which impact on the issue of redactions or on the timelines of the proceedings, are yet to be resolved by the Trial Chamber. At this stage of the proceedings therefore, the redactions currently in force remain the least intrusive measures to protect these individuals and also do not violate the right of the accused to a fair trial.

11. For the Trial Chamber's ease of reference, in Annex "A" to this filing the Prosecution has categorized the information that the Defence seeks to have unredacted into thematic groups and explained the nature of the redactions currently in force. Annex "A" is filed as "Confidential *ex parte* available to the Prosecution and Victims and Witnesses Unit only", because the discussion contained therein relates to sensitive information concerning the protection of witnesses and other persons at risk. The annex also discusses Prosecution filings, Decisions of the Pre-Trial Chamber, and annexes thereto, all of which bear the same classification.

¹⁸ ICC-02/05-03/09-198-Red, paras 13-17.

Conclusion

12. In light of the above, the Prosecution requests that the Defence Request be rejected except insofar as it relates to the request currently pending before the Chamber referred to in paragraph 8 above.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is positioned above a horizontal dotted line.

Luis Moreno-Ocampo
Prosecutor

Dated this 2nd day of April 2012

At The Hague, The Netherlands