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

Date: **18 April 2011**

**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 first 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 submits its 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 Rule 81(2) and Rule 81(4) of the Rules of Procedure and Evidence (“Rules”), to redact information contained in statements taken from three demobilised FDLR combatants<sup>1</sup> and five crime-base witnesses.<sup>2</sup>
2. Pursuant to Rule 81(2), the Prosecution seeks authorisation to redact information relating to the location at which interviews with five crime-base witnesses were conducted.
3. Pursuant to Rule 81(4), it seeks authorisation to redact (a) names and identifying information of five crime-base witnesses to be relied on at the confirmation hearing; (b) the location of two demobilised FDLR combatants and five crime-base witnesses; (c) identifying information and/or the current location of family members of one demobilised FDLR combatant and of five crime-base witnesses; and (d) names and identifying information of innocent third parties contained in these statements.

## II. Request for confidentiality

4. The Prosecution submits this Application and its annexes 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.

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<sup>1</sup> DRC-OTP-WWW-0552 (Annexes 1 and A), DRC-OTP-WWW-0562 (Annexes 2 and B) and DRC-OTP-WWW-0564 (Annexes 3 and C).

<sup>2</sup> DRC-OTP-WWW-0650 (Annexes 4 and D), DRC-OTP-WWW-0655 (Annexes 5 and E), DRC-OTP-WWW-0656 (Annexes 6 and F), DRC-OTP-WWW-0673 (Annexes 7 and G) and DRC-OTP-WWWW-0674 (Annexes 8 and H).

### III. Legal basis for redactions

5. 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 families,<sup>3</sup> or persons at risk on account of the activities of the Court<sup>4</sup> (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;<sup>5</sup>
  - (iii) Less restrictive protective measures are not feasible or insufficient;<sup>6</sup>
  - (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.<sup>7</sup>
6. 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”<sup>8</sup> 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.”<sup>9</sup>
7. 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(2) or (4): “it will have to be determined on a case-by-case

<sup>3</sup> ICC-01/04-01/07-475 [AC], paras. 71 and 97; ICC-01/04-01/07-476 [AC], para. 60.

<sup>4</sup> ICC-01/04-01/07-475 [AC, pre-trial], paras. 1, 43; ICC-02/05-03/09-58 [PTC I], para. 7; [REDACTED].

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

<sup>6</sup> 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.

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

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

<sup>9</sup> ICC-01/04-01/07-475 [AC], para. 66, para. 72(c); ICC-01/04-01/07-476 [AC], para. 52 (balancing interests on the facts of a specific application for non-disclosure under rule 81(2)).

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)".<sup>10</sup>

#### IV. Factual basis for redactions

8. The Prosecution's investigation into crimes committed in North and South Kivu Provinces in 2009 and 2010 is ongoing. [REDACTED].
9. [REDACTED].<sup>11 12</sup> The Prosecution thus seeks the redactions referred to at paragraphs 13-18 below in order to protect witnesses, victims, or members of their families, or other persons at risk on account of the activities of the Court.
10. [REDACTED].<sup>13 14</sup>
11. For each witness, the Prosecution attaches a copy of their statement(s) on which the proposed Rule 81(2) redactions are highlighted in blue and the proposed Rule 81(4) redactions are highlighted in yellow.<sup>15</sup> For each witness the Prosecution also attaches a chart on which each redaction is identified and its legal and factual justifications set out.<sup>16</sup>

#### *Location of witness interviews*

12. The Prosecution requests authorisation, pursuant to Rule 81(2), to redact references to [REDACTED] in the statements of witnesses DRC-OTP-WWW-0650, DRC-OTP-WWW-0655, DRC-OTP-WWW-0656, DRC-OTP-WWW-0673 and DRC-OTP-WWW-0674, to protect further or ongoing investigations and to preserve the

<sup>10</sup> 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.

<sup>11</sup> [REDACTED].

<sup>12</sup> [REDACTED].

<sup>13</sup> [REDACTED].

<sup>14</sup> [REDACTED].

<sup>15</sup> The statements – and where applicable annexes – are attached as confidential, *ex parte*, Prosecution and VWU only annexes A-H.

<sup>16</sup> The charts are attached as confidential, *ex parte*, Prosecution and VWU only annexes 1-8.

ability of the Office of the Prosecutor (OTP) to operate on the field. [REDACTED]  
 The Prosecution is of the view that there is no less restrictive protective measure that can be taken to avoid the risk. Moreover, 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 location at which the interviews were conducted is irrelevant to the issues in this case and does not affect the intelligibility of the statement document/the information. On numerous occasions various Chambers have authorised redactions to this category of information.<sup>17</sup>

*Names and identifying information of witnesses*

13. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references to the identity and other identifying information of witnesses DRC-OTP-WWW-0650, DRC-OTP-WWW-0655, DRC-OTP-WWW-0656, DRC-OTP-WWW-0673 and DRC-OTP-WWW-0674, where they appear in their statements.<sup>18</sup> The disclosure of their identities would pose an unjustifiable risk to their safety. [REDACTED].<sup>19 20</sup>

14. [REDACTED]. The Prosecution is of the view that there is no less restrictive protective measure that can be taken to avoid the risk to their safety. The redactions are not prejudicial to or inconsistent with the rights of the Defence and the requirements of a fair and impartial trial. The redactions do not affect the intelligibility of the statements. The Prosecution aims to disclose their identities prior to the trial, once an adequate protective strategy can be put in place in coordination with the Registry's Victims and Witnesses Unit (VWU). Various Chambers have authorised redactions to the identity of witnesses before.<sup>21</sup>

15. [REDACTED].

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<sup>17</sup> [REDACTED] ICC-02/05-03/09-58 [PTCI], para. 5.

<sup>18</sup> See annexes 4-8 and D-H.

<sup>19</sup> [REDACTED]

<sup>20</sup> [REDACTED].

<sup>21</sup> ICC-02/05-03/09-58 [PTCI], para. 7; [REDACTED].

*Location of witnesses*

16. The Prosecution requests the Chamber's authorisation, pursuant to Rule 81(4), to redact the name and other details pertaining to the current location of witnesses DRC-OTP-WWW-0552, DRC-OTP-WWW-0562, DRC-OTP-WWW-0564, DRC-OTP-WWW-0650, DRC-OTP-WWW-0655, DRC-OTP-WWW-0656, DRC-OTP-WWW-0673 and DRC-OTP-WWW-0674, where they appear in their statements.<sup>22</sup> The disclosure of this information would pose an unjustifiable risk to the safety<sup>23</sup> 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.<sup>24</sup>

*Identifying information and/or current location of family members of witnesses*

17. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact the identifying information and/or the current location of family members of witnesses DRC-OTP-WWW-0552, DRC-OTP-WWW-0650, DRC-OTP-WWW-0655, DRC-OTP-WWW-0656, DRC-OTP-WWW-0673 and DRC-OTP-WWW-0674.<sup>25</sup> 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

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<sup>22</sup> See annexes 1-8 and A-H.

<sup>23</sup> See paras. 10-11 above.

<sup>24</sup> See, for example, ICC-02/05-03/09-58 [PTCI], para. 7; and ICC-01/05-01/08-816 [TC III], para. 10.

<sup>25</sup> See annexes 1, 4-8, A and D-H.

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 statements. On numerous occasions various Chambers have authorised redactions to this category of information.<sup>26</sup>

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

18. 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 persons who are not witnesses or otherwise related to the case in the statements of DRC-OTP-WWW-0650, DRC-OTP-WWW-0655, DRC-OTP-WWW-0673 and DRC-OTP-WWW-0674.<sup>27</sup> If their identity is disclosed, they might be wrongly perceived as cooperating with the Prosecution and/or the Court, creating an unjustifiable risk to their safety. [REDACTED] 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 the intelligibility of the statements. On numerous occasions various Chambers have authorised redactions to this category of information.<sup>28</sup>

*Temporary nature of certain redactions*

19. The redactions to the identity of witnesses DRC-OTP-WWW-0650, DRC-OTP-WWW-0655, DRC-OTP-WWW-0656, DRC-OTP-WWW-0673 and DRC-OTP-WWW-0674, their family members and of innocent third parties identifiable from the witnesses' statements are sought temporarily. At the appropriate time (either as stipulated in the Rules or once the circumstances change, whichever comes

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<sup>26</sup> [REDACTED].

<sup>27</sup> See annexes 4, 5, 7, 8, D, E, G and H.

<sup>28</sup> [REDACTED].



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.

## V. Conclusion

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



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Luis Moreno-Ocampo  
Prosecutor

Dated this 18<sup>th</sup> day of April 2011

At The Hague, The Netherlands