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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 Rules 81(2) and 81(4) of the Rules of Procedure and Evidence
filed on 6 June 2011**

Sources: 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**

Mr. Luis Moreno-Ocampo

Ms. Fatou Bensouda

Mr. Ade Omofade

Counsel for the Defence

Mr Karim A.A. Khan QC

Mr Nicholas Koumjian

Legal Representatives of the Victims

Mr Brahim Kone

Ms Hélène Cissé

Mr Akin Akinbote

Mr Frank Adaka

Sir Geoffrey Nice QC & Mr Rodney
Dixon**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
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States' Representatives**Amicus Curiae****REGISTRY**

Registrar

Ms. Silvana Arbia

Counsel Support Section**Deputy Registrar****Victims and Witnesses Unit**

Ms. Maria Luisa Martinod-Jacome

Detention Section**Victims Participation and Reparations
Section Other**

I. Introduction

1. During the Status Conference on 19 April 2011, the Trial Chamber IV (“Trial Chamber”) ordered the Prosecution to apply for redactions to the statements of the nine witnesses for whom protective measures were not yet in place and whose full statements had not yet been disclosed to the Defence.¹ The Chamber suggested that the Prosecution need not wait for protective measures to be put in place, but rather, “apply immediately for two types of redactions. If necessary, temporary redactions to remain until protective measures have been fully effected and other redactions. This course of action will enable the disclosure of the full witness statements to these nine individuals without further delay, and once protective measures are in place the Prosecution may request the lifting of the temporary redactions.”² The Chamber ordered that these redactions be sought by 6 June 2011.³

II. Prosecution’s Request

2. Accordingly, the Prosecution’s request relates to the statements and transcripts⁴ of nine witnesses interviewed pursuant to Article 55(2) of the Rome Statute (“Statute”), [REDACTED] as described in the confidential ex-parte Annex A to the “Prosecution’s Consolidated Filing, Pursuant to the Chamber’s Oral Decisions dated 19 April 2011”).⁵
3. [REDACTED]⁶ [REDACTED]⁷. Also, the Pre-Trial Chamber in the *Abu Garda* case acknowledged the need for protective measures to be implemented for

¹ ICC-02/05-03/09-T-10-ENG CT WT 19-04-2011, page 28 line 21 to page 29 line 24.

² ICC-02/05-03/09-T-10-ENG CT WT 19-04-2011, page 29 line 3 to 10.

³ ICC-02/05-03/09-T-10-ENG CT WT 19-04-2011, page 29 line 21.

⁴ Of these, the statements of 7 witnesses (DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312, DAR-OTP-WWWW-0314 and DAR-OTP-WWWW-0433) were audio-recorded and are therefore in transcript form, while those of 2 witness (OTP-WWWW-0441 and DAR-OTP-WWWW-0466) are in the usual form. The Prosecution informs the Trial Chamber that a further statement was obtained from witness DAR-OTP-WWWW-0314 and this statement is also in the usual form.

⁵ ICC-02/05-03/09-142+Conf-Exp-AnxA.

⁶ [REDACTED]

⁷ [REDACTED]

the seven of these witnesses whose interviews were audio-recorded⁸, and therefore ordered the non-disclosure of their identities. There have been no specific decisions in either case regarding the non-disclosure of the identities of the other two witnesses (witnesses DAR-OTP-WWWW-0441 and DAR-OTP-WWWW-0466), both of whose statements were not audio-recorded.

4. Therefore, while these witnesses have already been relied upon in the past, this is the first occasion that the Prosecution is requesting redactions to their statements. The Prosecution clarifies that, by this filing, it seeks redactions both to the content of the documents as well as to the metadata accompanying the electronic versions of the documents in E-Court.

III. Request for Confidentiality

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

IV. Submissions on the Legal Basis and the Scope of Redactions Sought

Legal basis for the requested redactions

6. The Prosecution must balance its selection of the evidence on which it intends to rely, and the conditions under which it proposes that this evidence be

⁸ See the First and Second Anonymity Orders issued in the Abu Garda Case on 31 August 2009 “Decision on the Prosecutor’s Requests for Authorisation for Non-disclosure of Identities of Witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312 and DAR-OTP-WWWW-0314” ICC-02/05-02/09-74 (see page 9 and 10) as well as the “Decision on the Prosecutor’s Request for Authorization for Non-disclosure of Witnesses DAR-OTP-WWWW-0433 Identity” ICC-02/05-02/09-77 (see page 6 and 7). Pursuant to this order, prior to disclosing the annexes which accompanied the summaries of these 7 witnesses at the pre-trial stage, the Prosecution applied discreet redactions to all information that could identify these witnesses. Accordingly, the Prosecution does not seek a further order for redaction of this information in the instant filing.

disclosed, against its obligations pursuant to Articles 54(1)(b) and 68 to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. To that end, where it is necessary to protect the safety of witnesses and victims and members of their families, Rule 81(4) of the Rules of Procedure and Evidence (“the Rules”) permits the Prosecutor to seek the non-disclosure of their identities prior to the commencement of trial.

7. The Prosecution may also request redactions to material being disclosed to: (i) protect further and/or ongoing investigations, pursuant to Rule 81(2); or (ii) portions of documents which constitute reports, memoranda or other internal documents that have been prepared by the Prosecution in connection with the investigation or preparation of the case, pursuant to Rule 81(1).
8. The proposed redactions and their factual and legal basis justifications are set forth in the annexes to this Application. Justifications which require further explanation are discussed below.

Legal basis for redactions pursuant to Rule 81(4)

9. The non-disclosure of information for the protection of persons at risk is permissible pursuant to Rule 81(4) and applies to witnesses, members of witnesses’ families and others at risk on account of the activities of the Court.⁹ The aim is to protect the security of individuals at risk.¹⁰ Any such non-disclosure should be authorized on the facts of an individual case and will require a careful assessment by the Chamber on a case-by-case basis, balancing the various interests at stake.¹¹
10. The Appeals Chamber has held that three of the most important considerations for authorising non-disclosure of the identity of a witness pursuant to Rule 81(4) are: the endangerment of the witness or of members of

⁹ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA 5, 14 December 2006, para. 21

¹⁰ *Prosecutor v. Katanga*, Judgment on Prosecution’s Appeal against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, para 56

¹¹ *Prosecutor v. Katanga*, Judgment on Prosecution’s Appeal against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, para. 66.

his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and whether the non-disclosure will be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹²

11. When evaluating requests for non-disclosure, the Chamber should consider the following factors in relation to the alleged risk of danger:

- a) The alleged danger must involve an objectively justifiable risk to the safety of the person concerned.
- b) The risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large. The Chamber should consider, *inter alia*, whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including whether there are factors indicating that he or she may pass the information to others or otherwise put an individual at risk by his or her own actions.¹³
- c) If the Pre-Trial Chamber concludes that it has been demonstrated that the risk addressed above in fact exists, it should assess whether the proposed redactions could overcome or reduce the risk.¹⁴

Legal basis for redactions pursuant to Rule 81(2)

12. The Prosecution also proposes redactions to protect information related to its ongoing investigations pursuant to Rule 81(2). The provision of subsequent protective measures with respect to persons will not affect the redactions

¹² *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14. December 2006, para. 21; see also *Prosecutor v. Katanga*, Judgment on Prosecution's Appeal against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, para. 67.

¹³ Given that this "specific guidance" was provided "in absence of any specific factual application before it, what is said below is only by way of guidance which must be understood to be capable of being interpreted flexibly depending upon the specific circumstances of the particular application." *Prosecutor v. Katanga*, "Judgment on Prosecution's Appeal against the First Redaction Decision", ICC-01/04-01/07-475 OA, 13 May 2008, para 68.

¹⁴ *Prosecutor v. Katanga*, Judgment on Prosecution's Appeal Against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, paras. 71-72.

sought in this category. The Appeals Chamber has held that the same general factors used to analyze proposals for non-disclosure pursuant to Rule 81(4) apply *mutatis mutandis* to proposals pursuant to Rule 81(2), namely: “a thorough consideration of the danger that the disclosure of the information may cause; the necessity of the non-disclosure, including whether it is the least intrusive measure necessary to avoid prejudice to the investigations of the Prosecutor; and the fact that any measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”¹⁵

Factual Basis and Scope of the all the Redactions Requested

13. [REDACTED]. Therefore, while the redactions may seem extensive in the case of the statements of certain witnesses, the Prosecution submits that there is no less restrictive means for protection of the witnesses at this stage until they are successfully relocated, incorporated into a witness protection program, or other protective measure commensurable to the risk associated to the disclosure of their identities are put in place.
14. As suggested by the Trial Chamber, the Prosecution has requested redactions, pursuant to Rule 81(4) of the Rules, to certain parts of their statements on a temporary basis to protect the identities of the witnesses only until protective measures have been fully effected. The redactions that fall into this category (i.e. those highlighted in pink), are the more extensive ones.
15. The Prosecution has also sought other redactions pursuant to Rule 81(4) of the Rules. This category concerns family members of the witnesses or names of places that could give away their current locations. [REDACTED].
16. In this category, the Prosecution seeks redactions to the following information: the identity of family members of witnesses and the locations of the residence of witnesses and their family members.
17. Furthermore, the Prosecution seeks temporary redactions to the names as well as any identifying information of these nine witnesses in their respective

¹⁵ *Prosecutor v. Katanga*, Judgment on Katanga’s Appeal against the First Redaction Decision, ICC-01/04-01/07-476 OA2, 13 May 2008, para. 59.

statements and their related exhibits/annexes/photographs, taken by the Prosecution. [REDACTED].

18. Regarding particularly the statement of witness [REDACTED], the Prosecution has attempted as far as practicable to apply “temporary” redactions. [REDACTED].
19. Finally, the Prosecution requests certain redactions pursuant to Rule 81(2) of the Rules, relating to information specifically affecting ongoing or further investigations. [REDACTED]¹⁶ [REDACTED]. The requested redactions are to this information on the face of evidence and also found in its metadata. It excludes OTP staff whose names have already or subsequently been revealed to the public (e.g. by their presence at public hearings). [REDACTED].
20. Specific information justifying redactions as to each of the Prosecution’s witnesses is discussed separately in annexes attached to this Application.

Organisation of the Materials being Submitted

21. The Prosecution herewith submits to the Trial Chamber the following witness statements (and their annexes) for which redactions are being sought. The Prosecution also appends the summaries disclosed for all witnesses, to assist the Chamber with the review the redactions. The summaries encapsulate the principal information already disclosed to the Defence. Each statement is accompanied by a chart setting out both the specific information sought to be redacted and the justification for the redaction sought:

- i. [REDACTED];
- ii. [REDACTED];
- iii. [REDACTED];
- iv. [REDACTED];
- v. [REDACTED];
- vi. [REDACTED];
- vii. [REDACTED];

¹⁶ [REDACTED]

viii.[REDACTED];

ix. [REDACTED];

22. To assist the Trial Chamber in its review of the proposed redactions, the Chart attached to each statement contains: (i) each proposed redaction by page number; and (ii) the corresponding rule justifying the proposed redaction.

23. The Prosecution has also colour-coded each proposed redaction as follows:

- (i) Blue represents proposed redactions pursuant to Rule 81(2) of the Rules that relate exclusively to further and/or ongoing investigation;
- (ii) Pink represents the proposed temporary redactions pursuant to Rule 81(4) of the Rules and Articles 54(3)(f) of the Statute to protect the identity of the witness, which the Prosecution seeks to uphold until such time as the witness is protected; and
- (iii) Red represents proposed redactions pursuant to Rule 81(4) of the Rules and Articles 54(3)(f) of the Statute, to protect the safety of witnesses and victims, members of their families and other persons at risk on account of activities of the Court.

Necessity for Redactions and Impact on Rights of the Accused

24. 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. Without adequate protection of the witnesses being in place, there is no less intrusive alternative measure that can be taken to avoid the risks mentioned in the table. Additionally, the Prosecution submits that at this stage of the proceedings and in light of the temporary nature of most of the redactions sought, the requested redactions are not prejudicial to or inconsistent with the rights of the Accused Persons.

Request

25. For the reasons set forth above, the Prosecution respectfully requests the Trial Chamber to authorise the redactions proposed in the transcripts and witness

statements and accompanying annexes submitted with this Application as well as the relevant meta-data where applicable.



Luis Moreno - Ocampo

Dated this 24th Day of June 2011

At The Hague, The Netherlands