

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 July 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

**With Confidential *Ex parte* Annex – Prosecutor and Victims and Witnesses Unit
only**

**Decision on the Prosecution's request for variation of time limit and fourth and
fifth applications for authorisation to redactions pursuant to Rules 81(2) and (4)**

Decision 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

Legal Representatives of Victims

Counsel for the Defence

Mr. Nicholas Kaufman

Ms. Yaël Vias-Gvirsman

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Mr. Didier Preira

Victims and Witnesses Unit

Ms. Maria Luisa Martinod-Jacome

Detention Section

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

I, **Judge Cuno Tarfusser**, the Single Judge of Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively) responsible for carrying out the functions of the Chamber in relation to the case of *The Prosecutor v. Callixte Mbarushimana* in the absence of Judge Sanji Mmasenono Monageng;¹

NOTING that, at the hearing of the first appearance of Mr. Callixte Mbarushimana, held on 28 January 2011, the Chamber scheduled the commencement of the confirmation of the charges hearing for 4 July 2011;

NOTING the “Decision on issues relating to disclosure”² filed on 30 March 2011, (“Decision on Disclosure”), wherein the Chamber ordered the Prosecutor to submit to the Chamber as soon as practicable and no later than 18 April 2011 (“Deadline”) requests for redactions under rule 81 of the Rules of Procedure and Evidence (“Rules”);

NOTING the “Decision on the “Prosecution’s request for extension of time limit for redaction applications””³ issued by the Single Judge on 18 April 2011, wherein the Prosecutor was *inter alia* granted an extension of the Deadline until 4 May 2011 (“Revised Deadline”) for applications for redactions to the transcripts of interviews with any other witnesses on which he intends to rely at the confirmation hearing;

NOTING the “Decision on the Prosecution’s applications for redactions pursuant to Rule 81(2) and Rule 81(4)”⁴ issued by the Single Judge on 20 May 2011 (“First Decision on Redactions”);

NOTING the “Decision on the Prosecution’s request for the postponement of the confirmation hearing”⁵ issued by the Chamber on 31 May 2011, whereby the Chamber postponed the commencement of the confirmation hearing to 17 August 2011;

NOTING the “Prosecution’s request for variation of time limit and fourth application for redactions to witness statements pursuant to Rule 81(2) and Rule 81(4)”⁶ filed on 31 May

¹ ICC-01/04-583.

² ICC-01/04-01/10-87.

³ ICC-01/04-01/10-110.

⁴ ICC-01/04-01/10-167.

⁵ ICC-01/04-01/10-207.

2011, and the corrigendum⁷ and addendum⁸ thereto filed on 3 June 2011 (“Fourth Prosecution Request”), whereby the Prosecutor (i) seeks an extension of the Deadline for the filing of an application for redactions in relation to the statement of witness W-0677,⁹ on which the Prosecutor intends to rely at the hearing on the confirmation of charges and (ii) seeks authorisation to redact (a) handwritten notes of witness W-0655,¹⁰ which were made by the witness during his interview with the Office of the Prosecutor and were overlooked during the redaction application process but may be relevant to the Defence’s assessment of the witness’s evidence, and (b) statement of witness W-0672,¹¹ which the Prosecutor intends to disclose under article 67(2) of the Rome Statute (“Statute”);

NOTING the “Defence response to Prosecution filing: ICC-01/04-01/10-208-Conf”¹² filed on 7 June 2011, wherein the Defence submits that (i) good cause for an extension of the Deadline has not been shown and (ii) the same considerations should not apply to materials, the ongoing disclosure of which the Prosecutor is obliged to facilitate pursuant to rule 77 of the Rules and article 67(2) of the Statute;

NOTING the “Prosecution’s request for variation of time limit and Fifth application for redactions to witness statements pursuant to Rule 81(2) and Rule 81(4)”¹³ filed on 24 June 2011 and the corrigendum thereof¹⁴ filed on 24 June 2011 (“Fifth Prosecution Request”), wherein the Prosecutor seeks an extension of the Deadline for the filing of an application for redactions in relation to the statements of witnesses DRC-OTP-WWWW-0687, DRC-OTP-WWWW-0692, DRC-OTP-WWWW-0693 and DRC-OTP-WWWW-0694 on which the Prosecutor intends to rely at the hearing on the confirmation of charges;

NOTING articles 57(3)(c), 61, 67 and 68 of the Statute, rules 76 to 83 and 121 of the Rules and Regulation 35 of the Regulations of the Court;

⁶ ICC-01/04-01/10-208-Conf-Exp.

⁷ ICC-01/04-01/10-208-Corr-Red.

⁸ ICC-01/04-01/10-210.

⁹ ICC-01/04-01/10-210-Conf-Exp-AnxB.

¹⁰ ICC-01/04-01/10-208-Conf-Exp-AnxC.

¹¹ ICC-01/04-01/10-210-Conf-Exp-AnxA.

¹² ICC-01/04-01/10-218-Conf.

¹³ ICC-01/04-01/10-249-Conf-Exp.

¹⁴ ICC-01/04-01/10-249-Conf-Corr-Red.

CONSIDERING that the Fourth Prosecution Request indicated that the Prosecutor became aware of the whereabouts and completed the interview of witness DRC-OTP-WWWW-0677 before the expiration of the Deadline but was unable to file the application for redactions to the transcripts of the interviews with the witness until 3 June 2011;

CONSIDERING that the Fifth Prosecution Request indicated that the Prosecutor became aware of the identity and relevance of witnesses DRC-OTP-WWWW-0692, DRC-OTP-WWWW-0693 and DRC-OTP-WWWW-0694 in June 2011 and of witness DRC-OTP-WWWW-0687 in early May 2011, after the expiry of the Deadline;

CONSIDERING that, although it postponed the confirmation hearing, the Chamber did not make provision for any further applications for redactions under rule 81 of the Rules as the postponement was for a limited and specific purpose;

CONSIDERING therefore that the requested extension of the deadline must be rejected;

CONSIDERING that, in accordance with article 61(5) of the Statute, the Prosecutor may rely on summaries of the statements of witnesses DRC-OTP-WWWW-0677, DRC-OTP-WWWW-0687, DRC-OTP-WWWW-0692, DRC-OTP-WWWW-0693 and DRC-OTP-WWWW-0694 at the hearing on the confirmation of charges, provided that such summaries are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial;

CONSIDERING that, if the Prosecutor chooses to rely on summaries, such summaries must be prepared with due regard to and respect for the safety of the witnesses concerned and their family members, as well as other persons who may be at risk on account of the activities of the Court, and must contain any information that could be potentially exculpatory or material for the preparation of the Defence for the confirmation hearing;

CONSIDERING that the Prosecutor, in the Fifth Prosecution Request, has requested anonymity for four witnesses, namely Witnesses DRC-OTP-WWWW-0687; DRC-OTP-WWWW-0692, DRC-OTP-WWWW-0693 and DRC-OTP-WWWW-0694 as disclosure of

their identities would pose an unjustifiable risk to their safety and there are no less restrictive measures that can be taken to avoid this risk;

CONSIDERING that the Prosecutor also indicated that he aims to disclose the identities of Witnesses DRC-OTP-WWWW-0687; DRC-OTP-WWWW-0692, DRC-OTP-WWWW-0693 and DRC-OTP-WWWW-0694 prior to trial, once an adequate protective strategy can be put in place in coordination with the Victims and Witnesses Unit;

CONSIDERING the particular circumstances of Witnesses DRC-OTP-WWWW-0687; DRC-OTP-WWWW-0692, DRC-OTP-WWWW-0693 and DRC-OTP-WWWW-0694, the relevant security situation in the areas where they reside and the protective measures currently available to them, the Single Judge is of the view, which will be further developed in the annex to the present decision, that disclosure of their identities would pose an unjustifiable risk to their safety and that authorization for the redaction of their identities should be granted;

CONSIDERING that the Prosecutor deems himself obliged to disclose to the Defence (i) the handwritten notes of witness W-0655 ("Handwritten Notes"), as they "may be relevant to the Defence's assessment of this witness' evidence", and (ii) the statement of witness W-0672 ("Witness Statement"), under article 67(2) of the Statute, although the Prosecutor himself does not intend to rely on either of these documents at the hearing of the confirmation of charges;

CONSIDERING that the Prosecutor seeks authorization to extend to the Handwritten Notes, redactions previously authorized by the Chamber in relation to the statement of witness W-0655;

CONSIDERING that the authorization for redactions granted in the First Decision on Redactions should be extended, to the degree necessary, to the Handwritten Notes, as outlined in further detail in the annex to the present decision;

CONSIDERING that the redactions requested by the Prosecutor in relation to the Witness Statement fall within three of the categories addressed in the First Decision on Redactions,

namely (i) the location of the witness (Sub-category B), (ii) identifying information and/or current location of family members of witnesses (Sub-category C), and (iii) identifying information of other persons at risk on account of the activities of the Court (Sub-category D);

CONSIDERING that the reasoning and principles set out in relation to the abovementioned categories of redactions in the First Decision on Redactions are applicable to the Prosecutor's request for authorization to redact the Witness Statement;

CONSIDERING that the Prosecutor also seeks authorization, pursuant to rule 81(2) of the Rules, to redact from the Witness Statement the names and identifying details of Prosecution sources, being persons who have been or are about to be interviewed by the Prosecutor (Sub-category F);

CONSIDERING that the Appeals Chamber has held that "redactions relating to the identities and identifying information of potential prosecution witnesses, to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the hearing to confirm the charges, can, in principle, be made so as to avoid prejudicing further or ongoing investigations pursuant to rule 81(2)";¹⁵

CONSIDERING that both persons to whom the Prosecutor refers as "Prosecution sources" fall within the category of 'potential prosecution witnesses', whose names and identifying information may be redacted pursuant to rule 81(2) of the Rules;

CONSIDERING that (i) disclosure of the identities and identifying information of the two individuals concerned may prejudice further and ongoing investigations, (ii) the redactions sought would overcome this risk and at this stage there are no less intrusive alternative measures available, and (iii) the redactions sought would not be prejudicial to or inconsistent with the rights of the suspect, including the right to a fair and impartial trial;

¹⁵ ICC-01/04-01/07-476 at para. 66.

CONSIDERING that, in compliance with the procedure set out by the Appeals Chamber, an explanation of the detailed reasons for the grant or rejection of each request for redaction of information made by the Prosecutor will be provided in an *ex parte*, available only to the Prosecutor and the Victims and Witnesses Unit, annex to the present decision;

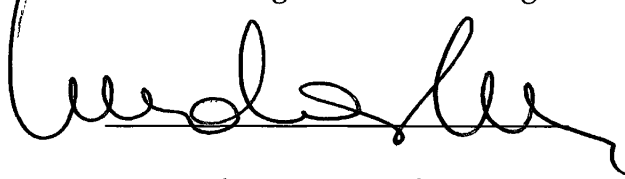
FOR THESE REASONS,

REJECT the Prosecutor's requests for an extension of the time limit for the filing of applications for authorisation of redactions to the statements of Witnesses DRC-OTP-WWWW-0677, DRC-OTP-WWWW-0687, DRC-OTP-WWWW-0692, DRC-OTP-WWWW-0693 and DRC-OTP-WWWW-0694;

AUTHORISE the non-disclosure of the identities of Witnesses DRC-OTP-WWWW-0687, DRC-OTP-WWWW-0692, DRC-OTP-WWWW-0693 and DRC-OTP-WWWW-0694 and the use of the respective foregoing numbers in reference to the relevant witnesses for all subsequent proceedings, including during the Confirmation Hearing; and

PARTIALLY GRANT, as outlined in greater detail in the annex to the present decision, the Prosecutor's request for authorisation of redactions to the handwritten notes of witness W-0655 (ICC-01/04-01-10-208-Conf-Exp-Anx3) and the statement of witness W-0672 (ICC-01/04-01/10-210-Conf-Exp-Anx1).

Done in English and French, the English version being authoritative.



Judge Cuno Tarfusser

Single Judge

Dated this Wednesday, 6 July 2011

At The Hague, The Netherlands

No. ICC-01/04-01/10

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6 July 2011