

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09

Date: 13 July 2012

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.* ABDALLAH BANDA ABAKAER NOURAIN
AND SALEH MOHAMMED JERBO JAMUS**

Public document

Decision on the “Prosecution’s Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court by Lifting Certain Redactions Authorised Pursuant to Rule 81(4) of the Rules of Procedure and Evidence”

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

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for the Defence

Mr Karim A.A. Khan QC

Mr Nicholas Koumjian

Legal Representatives of Victims

Ms Hélène Cissé

Mr Jens Dieckmann

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**

Others

Trial Chamber IV (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (“Banda and Jerbo case”), acting pursuant to Regulation 42 of the Regulations of the Court (“Regulations”), issues the following Decision on the “Prosecution’s Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court by Lifting Certain Redactions Authorised Pursuant to Rule 81(4) of the Rules of Procedure and Evidence”.

I. Background and submissions

1. In August and September of 2009 Pre-Trial Chamber I in *The Prosecutor v. Bahar Idriss Abu Garda* (“Abu Garda case”) issued its first and second redaction decisions, authorising redactions pursuant to Rule 81(4) of the Rules of Procedure and Evidence (“Rules”) to the statements of, *inter alia*, Witnesses P-0315, P-0355, P-0416, P-0419, P-0446, and P-0447.¹
2. On 29 June 2010 Pre-Trial Chamber I in the *Banda and Jerbo* case affirmed that, pursuant to Regulation 42 of the Regulations, the redactions authorised in the *Abu Garda* case continued to be in effect in the *Banda and Jerbo* case.²
3. On 12 August 2011 the Office of the Prosecutor (“prosecution”) applied to the Chamber for, *inter alia*, redactions in line with the Pre-Trial Chamber’s prior authorisation under Rule 81(4) to the newly-obtained statement of Witness P-0486 (“Redaction Application”).³ On 5 September 2011 the defence submitted

¹ Public Redacted Version of the “First Decision on the Prosecution’s Request for Redactions” issued on 14 August 2009, 20 August 2009, ICC-02/05-02/09-58; Second Decision on the Prosecution’s Request for Redactions, 7 September 2009, ICC-02/05-02/09-85.

² Decision on issues relating to disclosure, 29 June 2010, ICC-02/05-03/09-49, paragraphs 11 to 12.

³ Prosecution’s Application for Redactions Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence and Request for the Lifting of Certain Redactions Authorised Pursuant to Rule 81(4), 12 August 2011, ICC-02/05-03/09-198-Conf-Exp; Public Redacted Version of “Prosecution’s Application for Redactions Pursuant to Rules 81(2)

observations on the Redaction Application.⁴

4. On 2 May 2012 the Chamber issued its decision on the Redaction Application, asking the prosecution for updated information about third parties mentioned in Witness P-0486's statement.⁵ On 4 June 2012 the prosecution responded with new information concerning these third parties.⁶
5. On 19 June 2012 the prosecution applied to the Chamber for the variation of protective measures pursuant to Regulation 42 by lifting redactions authorised under Rule 81(4) of the Rules ("Application").⁷ A public redacted version of this application was filed on 25 June 2012.⁸ The prosecution certified that the security risk of lifting these redactions to the identifying information is low and that the redactions are thus no longer justified.⁹

II. Analysis and conclusions

6. The Chamber is seised of a request pursuant to Regulation 42(1) of the Regulations for lifting redactions previously authorised under Rule 81(4) of the Rules.
7. Regulation 42(1) of the Regulations states that protective measures in respect of

and 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 12 August 2011, 19 August 2011, ICC-02/05-03/09-198-Red.

⁴ Defence Observations on the Redactions Sought by the Prosecution for Witnesses DAR-OTP-WWWW-0484, DAR-OTP-WWWW-0485, DAR-OTP-WWWW-0486, and DAR-OTP-WWWW-0487, 5 September 2011, ICC-02/05-03/09-207-Conf.

⁵ Decision on the prosecution's applications for redactions and request for the lifting of redactions to material relating to Witnesses 307, 485, 486 and 487, 2 May 2012, ICC-02/05-03/09-329-Conf-Exp, paragraph 47(d).

⁶ Prosecution's Provision of Security Related Information Regarding Third Parties in Witness DAR-OTP-P-0486's Statement, 4 June 2012, ICC-02/05-03/09-341-Conf-Exp.

⁷ Prosecution's Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court by Lifting Certain Redactions Authorised Pursuant to Rule 81(4) of the Rules of Procedure and Evidence, 19 June 2012, ICC-02/05-03/09-350-Conf-Exp.

⁸ Public Redacted Version of "Prosecution's Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court by Lifting Certain Redactions Authorised Pursuant to Rule 81(4) of the Rules of Procedure and Evidence", filed on 19 June 2012, 25 June 2012, ICC-02/05-03/09-350-Red.

⁹ ICC-02/05-03/09-350-Red, paragraphs 17 to 20.

a victim or witness shall continue in full force in other proceedings and after proceedings have been concluded, subject to revision by a Chamber. Pursuant to Regulation 42(3) of the Regulations, any application to vary a protective measure shall first be made to the Chamber which issued the order, in this case Pre-Trial Chamber I in *Abu Garda*, unless it is no longer seised of the proceedings in which the protective measure was ordered. As Pre-Trial Chamber I is no longer seised of the *Abu Garda* case, the Chamber can vary the protective measures ordered by Pre-Trial Chamber I in that case.

8. The Chamber has affirmed that "leave [...] is required for the lifting of redactions previously authorised under Rule 81(4) of the Rules."¹⁰ This is due to the Trial Chamber's obligation under Article 68 to protect the safety, physical and psychological well-being, dignity and privacy of victims and witness and, by extension, persons at risk on account of the activities of the Court.¹¹ This Chamber has also noted that in order to grant leave to lift redactions to the identifying information of an individual subject to previous redactions under Rule 81(4), the Chamber needs to be satisfied that "the person in question will not be exposed to an enhanced risk by virtue of the disclosure of this information."¹²
9. In the present case, the prosecution submits that, due to changed circumstances, the redactions to the identifying information of these specified third parties are

¹⁰ Decision on the lifting of redactions, 22 September 2011 (notified on 23 September 2011), ICC-02/05-03/09-222, paragraph 6. Citing *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-T-62-ENG ET WT, page 23, lines 12 to 16 and *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Redacted Decision on the Prosecution's Request to Lift, Maintain and Apply Redactions to Witness statements and Related Documents, 20 July 2010, ICC-01/05-01/08-813-Red, paragraph 77.

¹¹ *The Prosecutor v. Germain Katanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraphs 54 to 56.

¹² ICC-02/05-03/09-222, paragraph 9. See also, ICC-01/05-01/08-813-Red, paragraph 77.

no longer justified.¹³ The Chamber accepts that the underlying reason for the redactions no longer exists and the security risk to these individuals is low, as explained in greater detail in the prosecution's confidential *ex parte* Application. Further, the Chamber affirms the principle set out by the Appeals Chamber that the non-disclosure of information is the exception, and in general full disclosure should be made,¹⁴ with specific regard to the rights of the accused. Therefore, the lifting of these redactions as requested by the prosecution is justified.¹⁵

10. For the foregoing reasons, the Chamber

- a. **grants** the prosecution's request for lifting redactions to the identifying information of third parties, as specified in the prosecution's confidential *ex parte* Annex A; and
- b. **orders** the prosecution to re-disclose immediately the relevant statements and related material of Witnesses P-0315, P-0355, P-0416, P-0419, P-0446 and P-0447 to the defence, with the accompanying explanatory note as described in the Application.

¹³ ICC-02/05-03/09-350-Red, paragraphs 19 to 20.

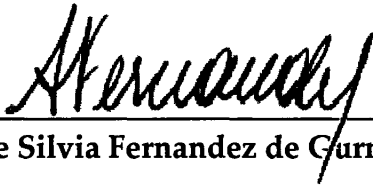
¹⁴ ICC-01/04-01/07-475, paragraph 70.

¹⁵ Indeed, related redactions were already ordered to be lifted by this Chamber in relation to Witness P-0484. Decision on the Prosecution's Application for Redactions to Witness 484's Statement and Related Material, 3 July 2012, ICC-02/05-03/09-363-Conf, paragraphs 23 and 25(b).

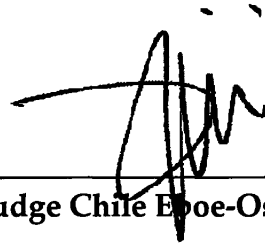
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch
Presiding Judge



Judge Silvia Fernandez de Gurmendi



Judge Chile Eboe-Osuji

Dated this 13 July 2012

At The Hague, The Netherlands