

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 22 September 2011

TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernández de Gurmendi

SITUATION IN DARFUR, SUDAN

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

Public

Decision on the lifting of redactions

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

Counsel for the Defence

Mr Karim A.A. Khan

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

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IV (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), renders the following decision on the lifting of redaction pursuant to Article 68(1) of the Rome Statute (“Statute”), Rules 81(2) and 81(4) of the Rules of Procedure and Evidence (“Rules”) and Regulation 42(3) of the Regulations of the Court (“Regulations”).

I. Background and Submissions

1. During the status conference held on 19 April 2011, the Chamber instructed the Office of the Prosecutor (“prosecution”) to submit any requests for the lifting of redactions by 6 June 2011.¹
2. On 6 June 2011, the prosecution submitted the “Prosecution’s Notification to the Chamber of its Intention to Lift Certain Redactions Authorised Pursuant to Rule 81(2) and the Request for Lifting Certain Redactions Authorised Pursuant to Rule 81(4)” (“prosecution Request”).² A public redacted version of the application was filed on 27 June 2011.³
3. In its application, the prosecution notifies the Chamber of its intention to a) lift the redactions of all references to the identity of the prosecution staff members previously authorised or ordered pursuant to Rule 81(2) of the Rules in the material already disclosed to the defence teams of Messrs. Abdallah Banda and Saleh Jerbo (“defence”); and b) in the absence of any order from the Trial Chamber to the

¹ ICC-02/05-03/09-T-10-19-04-2011, page 28, lines 14-15.

² Prosecution’s Notification to the Chamber of its Intention to Lift Certain Redactions Authorised Pursuant to Rule 81(2) and Request for Redactions Authorised Pursuant to Rule 81(4), 6 June 2011, ICC-02/05-03/09-157-Conf-Exp.

³ Public Redacted Version of Prosecution’s Notification to the Chamber of its Intention to Lift Certain Redactions Authorised Pursuant to Rule 81(2) and Request for Redactions Authorised Pursuant to Rule 81(4) filed on 6 June 2011, 27 June 2011, ICC-02/05-03/09-157-Red.

contrary, to re-disclose the said identified material to the defence teams of Messrs. Abdallah Banda and Saleh Jerbo in its unredacted form.⁴

4. Furthermore, the prosecution requests the Chamber to authorise the lifting of redactions to the identity and identifying information of DAR-OTP-WWWW-0471 ("Witness 471") previously ordered pursuant to Rule 81(4) of the Rules.⁵

II. Analysis

5. As previously held in *The Prosecutor v. Thomas Lubanga Dyilo*, and affirmed in *The Prosecutor v. Jean-Pierre Bemba Gombo*, once redactions imposed under Rule 81(2) of the Rules are no longer necessary, the lifting of redactions does not require the leave of the Chamber.⁶ The Chamber hereby adopts this approach. Consequently, the Chamber will neither authorize nor reject the lifting of redactions but will instead take note of the prosecution's intention to lift redactions previously applied pursuant to Rule 81(2) of the Rules and to re-disclose the material to the defence in non-redacted form.
6. According to the jurisprudence of this Court, leave, however, is required for the lifting of redactions previously authorised under Rule 81(4) of the Rules.⁷
7. The Chamber notes that the redactions were initially granted by Pre-Trial Chamber

⁴ ICC-02/05-03/09-157-Red, paragraph 12.

⁵ ICC-02/05-03/09-157-Red, paragraph 13.

⁶ See *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-T-62-ENG-ET WT, page 23, lines 4-11 and *The Prosecutor v. Jean-Pierre Bemba Gombo* "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 76.

⁷ See *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-T-62-ENG ET WT, page 23, lines 12-16 and *The Prosecutor v. Jean-Pierre Bemba Gombo* "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.

I in *The Prosecutor v. Abu Garda* (“*Abu Garda* case”).⁸ 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, unless it is no longer seized of the proceedings in which the protective measure was ordered. The Chamber can therefore vary the protective measures ordered by Pre-Trial Chamber I in a different case.

8. Pursuant to Article 68 of the Statute, the Trial Chamber is obligated to ensure the safety, physical and psychological well-being of victims and witnesses, and by extension, persons at risk on account of the activities of the Court.⁹ Accordingly, the Chamber shall take all appropriate protective measures to safeguard their privacy and protection, while ensuring that such measures are consistent with the rights of the accused.¹⁰
9. Leave to lift redactions to the identifying information of an individual will therefore be granted in the event the Chamber is satisfied that the person in question will not be exposed to an enhanced risk by virtue of the disclosure of this information.¹¹
10. Initially, redactions were granted in the *Abu Garda* case to the name and other identifying information of Witness 471 on the basis of Rule 81(4) of the Rules. The prosecution informs that the circumstances have changed and, therefore submits

⁸ ICC-02/05-03/09-157-Red, paragraph 4.

⁹ The Appeals Chamber held that “persons other than witnesses, victims and members of their families, may, at [the pre-trial] stage of the proceedings, be protected through the non-disclosure of their identities by analogy with other provision of the Statute and the Rules. The aim is the protection of individuals at risk. Thus, by necessary implication, rule 81(4) should be read to include the words ‘persons at risk on account of the activities of the Court’ so as to reflect the intention of the States that adopted the Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect people at risk.”, “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. Trial Chamber III, in *The Prosecutor v. Jean-Pierre Bemba Gombo* held that “Although the decisions of the Appeals Chamber on restrictions on disclosure have been issued in the context of proceedings before the Pre-Trial Chamber – and therefore they are not strictly binding on the Trial Chamber – the principles that have been identified are of high relevance to trial proceedings”, Redacted Decision on the Prosecution’s Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, ICC-01/05-01/08-813-Red, paragraph 62.

¹⁰ Article 68(1) of the Statute.

¹¹ See ICC-01/05-01/08-813-Red, paragraph 77 for a discussion of the Chamber’s responsibility to protect persons at risk on account of activities if the Court.

that the redactions to Witness 471's name and identifying information, contained in the statements of DAR-OTP-WWWW-0326 ("Witness 326") and DAR-OTP-WWWW-355 ("Witness 355"), are no longer justified.¹²

11. The Chamber accepts that the underlying reason for the redactions to Witness 471's name and identifying information, as contained in the statements of two witnesses previously disclosed to the defence,¹³ no longer exist and that, accordingly, the lifting of the redactions is justified. In addition, no new reasons for protecting the relevant identifying information have been put forward by the prosecution.

III. Conclusion

12. For the above reasons, the Chamber:

- a. Takes note of the prosecution Request with regard to the lifting of redactions previously ordered pursuant to Rule 81(2) of the Rules at the confirmation of charges stage;
- b. Orders the lifting of redactions to the identity and identifying information of Witness 471 previously ordered pursuant to Rule 81(4) of the Rules;
- c. Orders the prosecution to disclose the relevant materials to the defence in non redacted form no later than 16.00 on 27 September 2011.

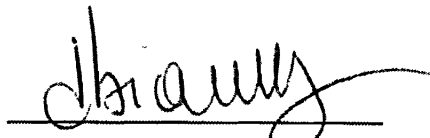
¹² ICC-02/05-03/09-157-Conf-Exp, paragraph 5.

¹³ The Chamber also notes that Witness 471 is not a witness to be relied upon at trial as he is not included in the Annex A to Prosecution's Updated List of Witnesses, 5 August 2011, ICC-02/05-03/09-189-AnxA.

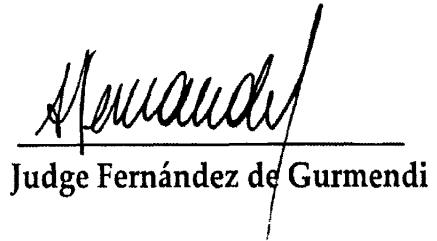
Done in both English and French, the English version being authoritative.

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Judge Joyce Aluoch

A handwritten signature in black ink, appearing to read 'Diarra', written over a horizontal line.

Judge Fatoumata Dembele Diarra

A handwritten signature in black ink, appearing to read 'Fernández de Gurmendi', written over a horizontal line.

Dated this 22 September 2011

At The Hague, The Netherlands