

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 12 September 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 applications for lifting redactions on material
related to Witnesses 315, 442 and 486 pursuant to Regulation 42 of the
Regulations of the Court**

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Ade Omofade

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 applications for lifting redactions on material related to Witnesses 315, 442 and 486 pursuant to Regulation 42 of the Regulations of the Court.

I. Background and submissions

1. In August and September 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 Rules 81(2) and (4) of the Rules of Procedure and Evidence (“Rules”) in various witness related materials, including the first statement of Witness P-0315 (“Witness 315”).¹
2. On 29 June 2010, Pre-Trial Chamber I in the *Banda and Jerbo* case ruled that, pursuant to Regulation 42 of the Regulations, the redactions authorised in the *Abu Garda* case should continue to be in effect in the *Banda and Jerbo* case.² On the same day, the Pre-Trial Chamber issued its first decision on redactions, which included redactions to the first interview transcript of Witness P-0442 (“Witness 442”) and the second statement of Witness 315.³
3. On 2 May 2012, the Trial Chamber issued its decision on an Office of the Prosecutor (“prosecution”) application for redactions to, *inter alia*, the statement of Witness P-0486 (“Witness 486”), asking the prosecution to submit updated

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 First Decision on the Prosecutor’s Requests for Redactions, 29 July 2010, ICC-02/05-03/09-58, page 9.

information on third parties referred to in the statement.⁴ On 4 June 2012, the prosecution responded with new information concerning third parties mentioned in said statement (“Witness 486 Lifting Redactions Application”).⁵ A public redacted version of this application was filed on 8 June 2012.⁶

4. On 21 June 2012, the Chamber issued its decisions on the prosecution applications for redactions to photographs provided by Witness 315 and the re-interview transcript of Witness 442, asking the prosecution to submit updated information on third party individuals in each.⁷ On 5 July 2012, the prosecution provided the Chamber, in one filing related to Witness 315 and another related to Witness 442, with new information concerning third parties and applied for the lifting of certain redactions (“Witness 315 Lifting Redactions Application”⁸ and “Witness 442 Lifting Redactions Application”⁹).
5. On 2 August 2012, the prosecution filed public notes of the Witness 315 Lifting Redactions Application¹⁰ and of the Witness 442 Lifting Redactions Application.¹¹
6. On 10 August 2012, the defence filed a request for a confidential redacted version of the Witness 315 Lifting Redactions Application and Witness 442

⁴ 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.

⁵ 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.

⁶ Public Redacted Version of the Prosecution’s Provision of Security Related Information Regarding Third Parties in Witness DAR-OTP-P-0486’s Statement, 2 August 2012, ICC-02/05-03/09-341-Red.

⁷ Decision on the Prosecution’s Application for Redactions and Request for the Lifting of Redactions to Photographs Annexed to Witness 315’s Statements, 21 June 2012, ICC-02/05-03/09-353-Conf-Exp, paragraph 25(d); Decision on the Prosecution’s Application for Redactions to Witness 442’s Re-interview Transcripts, 21 June 2012, ICC-02/05-03/09-354-Conf, page 10.

⁸ Prosecution’s Provision of Security Related Information Regarding Third Parties in Photographs Annexed to Witness DAR-OTP-P-0315’s Statement and Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court, 5 July 2012, ICC-02/05-03/09-365-Conf-Exp.

⁹ Prosecution’s Provision of Security Related Information Regarding Third Parties in Witness DAR-OTP-P-0442’s Re-interview Transcripts and Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court, 5 July 2012, ICC-02/05-03/09-364-Conf-Exp.

¹⁰ Public Note on Prosecution Filing ICC-02/05-03/09-365-Conf-Exp, 2 August 2012, ICC-02/05-03/09-372.

¹¹ Public Note on Prosecution Filing ICC-02/05-03/09-364-Conf-Exp, 2 August 2012, ICC-02/05-03/09-371.

Lifting Redactions Application.¹²

II. Analysis and conclusions

7. The Chamber is seised of requests pursuant to Regulation 42 of the Regulations for lifting redactions previously authorised under Rule 81(4) of the Rules.
8. The Chamber has affirmed that “leave [...] is required for the lifting of redactions previously authorised under Rule 81(4) of the Rules.”¹³ 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.¹⁴ 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.”¹⁵
9. In the present case, the prosecution submits that, due to changed circumstances, the specific category of redactions common to the three applications for lifting of redactions concerning Witnesses 315, 442 and 486, namely redactions to the identifying information of given third parties, are no longer justified (“First

¹² Defence Response to the “Public Note on Prosecution Filing ICC-02/05-03/09-364-Conf-Exp” and the “Public Note on Prosecution Filing ICC-02/05-03/09-365-Conf-Exp”, 10 August 2012, ICC-02/05-03/09-380-Conf.

¹³ Decision on the lifting of redactions, 22 September 2011 (reported 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.

¹⁴ *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.

¹⁵ ICC-02/05-03/09-222, paragraph 9. See also, ICC-01/05-01/08-813-Red, paragraph 77.

Category of Redactions").¹⁶

10. The Chamber accepts that the underlying reasons for the redactions no longer exist as the security risks to these individuals have diminished. Further, the Chamber emphasises the principle set out by the Appeals Chamber that non-disclosure of information is the exception, and in general full disclosure should be made,¹⁷ with specific regard to the rights of the accused. Therefore, the lifting of these redactions as requested by the prosecution is justified.¹⁸ The Chamber notes that, in complying with the present Decision, the prosecution may disclose said information to the defence together with an explanatory note.¹⁹ In addition with regard to Witness 486, the Chamber agrees that in order to mitigate any risk, disclosure of identifying information of individuals under the First Category of Redactions should be restricted to the defence and both accused only.²⁰

11. As regards other individuals identified on photographs annexed to Witness 315's statement and for whom the prosecution asserts redactions remain necessary ("Second Category of Redactions"),²¹ the Chamber is of the view that, *at this stage*, the security of these individuals is still endangered if their respective identities are revealed to the defence. The Chamber therefore authorises the Second Category of Redactions to be maintained on a temporary

¹⁶ ICC-02/05-03/09-365-Conf-Exp, paragraphs 5 to 6 and 12 to 17; ICC-02/05-03/09-364-Conf-Exp, paragraph 8; ICC-02/05-03/09-341-Conf-Exp, paragraphs 3 to 14.

¹⁷ ICC-01/04-01/07-475, paragraph 70.

¹⁸ Indeed, related redactions were already ordered to be lifted by this Chamber in relation to material related to Witness P-0484 and to another category of third party individuals. 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); 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", 13 July 2012, ICC-02/05-03/09-368.

¹⁹ ICC-02/05-03/09-364-Conf-Exp, paragraph 7; ICC-02/05-03/09-365-Conf-Exp, paragraphs 6, 14 and 17; ICC-02/05-03/09-341-Conf-Exp, paragraph 13.

²⁰ For Witness 486: ICC-02/05-03/09-341-Conf-Exp, paragraph 14.

²¹ ICC-02/05-03/09-365-Conf-Exp, paragraphs 7 to 11.

basis and until security concerns can be alleviated.²²

12. In relation to redactions applied in accordance with Rule 81(2) of the Rules, the Chamber authorised the prosecution to lift redactions ordered under Rule 81(2) of the Rules without prior leave of the Chamber.²³ It therefore takes note of the prosecution's lifting of redactions to the name of a former prosecution investigator in various witness statements and transcripts, as stated in the Witness 486 Lifting Redactions Application.²⁴

13. For the foregoing reasons, the Chamber

- a. **grants** the prosecution's request to maintain on a temporary basis redactions as prescribed in paragraph 11 above (Second Category of Redactions) and orders the prosecution to revert back to the Chamber on the security situation of the individuals concerned by 24 September 2012;
- b. **grants** the prosecution's request for lifting redactions to the identifying information or images of third parties, as specified in the prosecution's applications concerning Witnesses 315, 442 and 486 (First Category of Redactions);
- c. **orders** the prosecution to immediately re-disclose the relevant photographs, statements or transcripts relating to Witnesses 315, 442 and 486 to the defence, with the accompanying explanatory note as described in the various

²² As set out in more detail in the Chamber's confidential *ex parte* decision of 21 June 2012 and the accompanying confidential *ex parte* Annex A: ICC-02/05-03/09-353-Conf-Exp and Annex A.

²³ ICC-02/05-03/09-222, paragraph 5.

²⁴ ICC-02/05-03/09-341-Red, paragraphs 16 to 17. See also, Prosecution's Notification of Disclosure to the Defence of Incriminating, Potentially Exonerating and Rule 77 Material on 18 July 2012, 2 August 2012, ICC-02/05-03/09-373, paragraph 1; ICC-02/05-03/09-354-Conf, paragraph 15 and Annex A, paragraph 3; Prosecution's Notification of Disclosure to the Defence of Rule 77 and Potentially Exonerating Material, 26 April 2012, ICC-02/05-03/09-327, page 3.

applications and, in regard to the particular category outlined in the applications, confidentially to the defence and both accused only; and

- d. **orders** the prosecution to file in the record of the case confidential redacted versions of the Witness 315 Lifting Redactions Application and Witness 442 Lifting Redactions Application, once disclosure has been effected and no later than 24 September 2012.

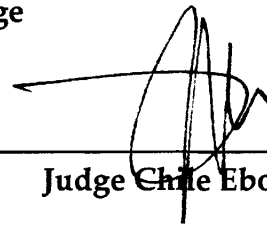
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch
Presiding Judge



Judge Silvia Fernandez de Gurmendi



Judge Chile Eboe-Osuji

Dated this 12 September 2012

At The Hague, The Netherlands