

**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
relating to Witnesses 307 and 484 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 307 and 484 pursuant to Regulation 42 of the Regulations of the Court.

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”) authorised redactions pursuant to Rule 81(4) of the Rules of Procedure and Evidence (“Rules”) in various witness related materials.¹ Pre-Trial Chamber I also authorised the non-disclosure of, *inter alia*, the identifying information of Witness P-0307 (“Witness 307”) on 31 August 2009.²
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.³ On the same day, the Pre-Trial Chamber issued its first decision on redactions.⁴
3. On 2 May 2012, the Trial Chamber temporarily authorised the Office of the Prosecutor’s (“prosecution”) requested redactions to, *inter alia*, the name and

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, affecting, *inter alia*, witnesses 326, 416 and 419; Second Decision on the Prosecution’s Request for Redactions, 7 September 2009, ICC-02/05-02/09-85, affecting, *inter alia*, witnesses 315, 419, 446 and 447.

² 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, 31 August 2009, ICC-02/05-02/09-74, page 9.

³ Decision on issues relating to disclosure, 29 June 2010, ICC-02/05-03/09-49, paragraphs 11 to 12.

⁴ First Decision on the Prosecutor’s Requests for Redactions, 29 July 2010, ICC-02/05-03/09-58, page 9, affecting, *inter alia*, witnesses 315, 439 and 446.

identifying information of Witness 307, while maintaining the need for the Chamber to be updated on the ongoing security issues surrounding this witness,⁵ particularly as the prosecution intends to call Witness 307 at trial.⁶ The Chamber emphasised the necessity of lifting redactions to Witness 307's identity as soon as practicable.⁷

4. On 3 July 2012, the Chamber issued its decision on the prosecution's application for redactions to the statement and related material of Witness P-0484 ("Witness 484"), in which it, *inter alia*, asked the prosecution to submit updated information on third parties.⁸ On 16 August 2012, the prosecution provided the Chamber with new information on the third parties referred to in Witness 484's statement and related material, requesting the lifting of redactions not only to statements and photographs related to Witness 484, but also to numerous other witnesses ("Witness 484 Lifting Redaction Application").⁹
5. Between May and August 2012, the Chamber received various updates on the measures to be taken to resolve the security concerns relating to Witness 307.¹⁰ On 27 August 2012, the Chamber received what is presumably the last of these security updates on Witness 307, which includes a request for the lifting of redactions to Witness 307's name and identifying information ("Witness 307

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.

⁶ Prosecution's Updated List of Witnesses, 5 August 2011, ICC-02/05-03/09-189-AnxA.

⁷ ICC-02/05-03/09-329-Conf-Exp, paragraph 36.

⁸ 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, paragraph 26.

⁹ In the statements of witnesses P-0315, P-0326, P-0416, P-0419, P-0446 and P-0447; and the photographs of witnesses P-0315, P-0416, P-0419, P-0439 and P-0446. Prosecution's Provision of Security Related Information Regarding Third Parties in Photograph Annexed to Witness DAR-OTP-P-0484's Statement and Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court, 16 August 2012, ICC-02/05-03/09-381-Conf-Exp, paragraph 22 and Annex A (public redacted version filed on 31 August 2012, ICC-02/05-03/09-381-Red).

¹⁰ Prosecution's Third Update on the Security Situation of Witness DAR-OTP-WWW-0307, 16 May 2012, ICC-02/05-03/09-334-Conf-Exp; Transcript of hearing on 12 July 2012, ICC-02/05-03/09-T-19-Conf-Exp ENG, page 3, line 9 to page 8, line 11; Update on the Protection of Witness P-0307, 6 August 2012, ICC-02/05-03/09-376-Conf-Exp (public redacted version filed on 30 August 2012, ICC-02/05-03/09-376-Red).

Lifting Redaction Application”) as the witness finally consented to disclose his identity to the defence.¹¹

II. Analysis and conclusions

6. 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.
7. Regulation 42(1) of the Regulations states that protective measures in respect of a victim or witness shall continue in full force in other proceedings and after proceedings have been concluded, subject to revision by the Chamber. In the present decision, some of the affected redactions were originally authorised by Pre-Trial Chamber I in the *Abu Garda* case and the *Banda and Jerbo* case. 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 seised of the proceedings in which the protective measure was ordered. As Pre-Trial Chamber I is no longer seised of the proceedings, the Trial Chamber can vary the protective measures ordered by Pre-Trial Chamber I.
8. The Chamber has affirmed that “leave [...] is required for the lifting of redactions previously authorised under Rule 81(4) of the Rules.”¹² This is due to the Chamber’s obligation under Article 68 of the Statute to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses and, by extension, persons at risk on account of the activities of the

¹¹ Prosecution’s Further Update on the Protection of Witness P-0307 and Request for Variation of Protective Measures Related to Witness P-0307 Pursuant to Regulation 42 of the Regulations of the Court, 27 August 2012, ICC-02/05-03/09-386-Conf-Exp (public redacted version filed on 30 August 2012, ICC-02/05-03/09-386-Red).

¹² 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.

Court.¹³ 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) of the Rules, it 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.”¹⁴

9. In the present case, the prosecution submits that, due to changed circumstances, the redactions to the identifying information of the specified third parties and to the identity of Witness 307 are no longer justified.¹⁵ In addition, Witness 307 consents to his identity being disclosed to the defence. The Chamber therefore 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* applications for lifting redactions. Further, the lifting of the redactions is consistent with 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,¹⁶ with specific regard to the rights of the accused. Therefore, the lifting of these redactions as requested by the prosecution is justified.¹⁷

10. For the foregoing reasons, the Chamber

- a. **grants** the prosecution’s request to lift redactions to the name and identifying information of Witness 307 in the transcript of the interview of the witness and related annex, as well as wherever mentioned in the statements of other

¹³ *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.

¹⁴ ICC-02/05-03/09-222, paragraph 9. See also, ICC-01/05-01/08-813-Red, paragraph 77.

¹⁵ ICC-02/05-03/09-381-Conf-Exp, paragraphs 13 to 20 and 22; ICC-02/05-03/09-386-Conf-Exp, paragraphs 7 and 9.

¹⁶ ICC-01/04-01/07-475, paragraph 70.

¹⁷ The Chamber recalls that it granted leave to lift similar redactions to some of these third party categories in relation to statements of and other material relating to Witnesses 315 and 486. ICC-02/05-03/09-392.

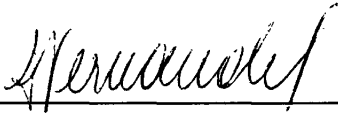
prosecution witnesses, provided that the lifting of redactions would not lead to revealing the identity of a witness still subject to protective measures;

- b. **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 to the Witness 484 Lifting Redaction Application; and
- c. **orders** the prosecution to re-disclose immediately all relevant statements, transcripts and related material affected by this decision, including the transcript of the interview of Witness 307 and annex, as well as the statements of witnesses P-0315, P-0326, P-0416, P-0446 and P-0447, and the annexed photographs of witnesses P-0315, P-0416, P-0419, P-0439, P-0446 and P-0484, with the accompanying explanatory note in relation to the third parties as indicated in the Witness 484 Lifting Redaction Application.

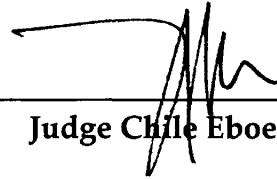
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch
Presiding Judge



Judge Silvia Fernandez de Gurmendi



Judge Chile Eboe-Osuji

Dated this 12 September 2012

At The Hague, The Netherlands