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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 &

SALEH MOHAMMED JERBOA JAMUS

Public

Prosecution's Application for Leave to Appeal the "Reasons for the Order on translation of witness statements (ICC-02/0503/09-199) and additional instructions on translation"

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Introduction

1. The Prosecution seeks leave to appeal Trial Chamber's IV "Reasons for the Order on translation of witness statements (ICC-02/0503/09-199) and additional instructions on translation" ("Decision").¹ The Chamber granted the Defence request and required the Prosecution to produce signed witness statements in narrative form for all witnesses, including those whose interviews were recorded and transcribed pursuant to article 55(2) and rule 112.²
2. The Chamber has therefore created an extra-statutory requirement. It directs the Prosecution to obtain and disclose to the Defence additional written "record[s] of formal statements," pursuant to rule 111, from persons who are covered by article 55 (2) ("article 55(2) witnesses") and accordingly whose interviews have already been fully recorded by audio- or video-tape pursuant to rule 112. The Chamber has thus read rule 112 as imposing a cumulative recording process, not an alternative one.
3. The Decision affects the fairness and expeditiousness of the proceedings. It requires the Prosecution to comply with this burdensome and time-consuming duty. In turn, this requirement will produce an additional series of disclosable statements. The redirection of prosecutorial resources to satisfy this requirement and the production of additional witness statements will also affect the outcome of the trial. And the required production of additional sources of impeachment has the potential to affect the Chamber's consideration of the credibility of the witnesses.
4. As a result, the Prosecution seeks leave to appeal the following issue: "whether rule 111 requires the Prosecution to take formal statements from witnesses to whom article 55(2) applies." This issue arises from the Decision and meets all the criteria for appealability under article 82(1)(d).

¹ ICC-02/05-03/09-214.

² Decision, para.23.

Background

5. At a status conference on 12 July 2011, Trial Chamber IV ordered the parties to submit a joint filing proposing practical solutions on how to address the issue of translating into Zaghawa, which is not a written language, the statements of witnesses on whom the Prosecution intends to rely.³
6. In the ensuing attempts to reach a common position for a joint filing, the Defence proposed that the Prosecution should produce “fair, accurate and well-organized statements” for all its witnesses, including the article 55(2) witnesses.⁴ Since the goal was to attempt to shorten and simplify the translation process, and producing statements in lieu of translating the entirety of the article 55(2) witnesses’ interviews did not serve that goal, the Prosecution proposed alternatively to produce unsigned summaries of all the witnesses’ statements and summaries of the article 55(2) witness interviews.⁵
7. The parties ultimately did not make a joint filing. On 8 August 2011, the Prosecution filed its proposals regarding the translation of incriminatory evidence.⁶ It reiterated the practical difficulties involved in translating written material into the spoken Zaghawa language, and proposed that the Chamber follow the same procedure that was done prior to the confirmation hearing, whereby summaries would be produced for all the witnesses – including the article 55(2) witnesses – and those summaries would be read aloud in Zaghawa.⁷
8. The Defence submission urged that in accordance with rule 76(3) the Prosecution is obligated to provide and translate witness statements of all witnesses it intends to call at trial. It therefore requested complete and accurate signed witness

³ ICC-02/05-03/09-T-12-ENG ET, 12 July 2011.

⁴ It proposed, specifically, that the Prosecution “produce fair, accurate and well-organized statements of all witnesses it intends to call at trial based on all prior interviews, statements and transcripts of the interviews held with these witnesses. It is suggested that, subsequently, the witnesses are given the opportunity to review and agree or amend their statements. Once the witnesses agree to the finalized content of the statements, the statements should be signed by the witnesses with the usual acknowledgment that it is true to the best of the witness’s knowledge and recollection, and if an interpreter is used, the usual interpreter certification.” See Defence’s email dated 14 July 2011- ICC-02/05-03/09-195-AnxB.

⁵ See Prosecution’s email dated 4 August 2011 - ICC-02/05-03/09-195-AnxC.

⁶ ICC-02/05-03/09-192.

⁷ ICC-02/05-03/09-192, paras.8-12.

statements and their translation for all witnesses, including the only two witnesses whose statements were provided in transcript form.⁸

9. On 16 August 2011, the Chamber instructed the Prosecution immediately to start translating into Zaghawa the witness statements on which it intends to rely upon for the purposes of the trial indicating that its reasoned analysis would follow.⁹
10. On 1 September 2011, the Prosecution updated the Trial Chamber on language related issues and on the status of its re-interviews of the two article 55(2) witnesses. The Prosecution indicated, *inter alia*, that with respect to those witnesses, it would submit summaries of the transcripts.¹⁰
11. On 7 September 2011 the Defence responded. In its submission it expressed its concerns about the Prosecution's intentions to only produce Zaghawa translations of summaries of the interview transcripts in lieu of witness statements. The Defence reiterated that rule 76(3) obliges the Prosecution to provide witness statements of all witnesses the Prosecution intends to call trial in both the original language and a language that the accused fully understands.¹¹
12. On 12 September 2011 the Chamber issued the "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation" ("the Decision").¹² Mistakenly concluding that the Prosecution had agreed to provide written statements for all the witness, including the two article 55(2) witnesses,¹³ the Chamber granted the Defence request for "comprehensive and well-organized witness statements in narrative form on all available material relating to these witnesses".¹⁴ The Chamber also relied on a decision of Trial Chamber II that the Prosecution must take a signed witness statement from any person it questions in connection with an investigation, including persons questioned under article 55(2) and rule 112 for

⁸ ICC-02/05-03/09-195.

⁹ ICC-02/05-03/09-199 ("the Order").

¹⁰ ICC-02/05-03/09-205.

¹¹ ICC-02/05-03/09-210.

¹² ICC-02/05-03/09-214.

¹³ Decision, para.24.

¹⁴ Decision, para.25.

whom full transcripts of the interviews had been provided. The Chamber found that rules 111 and 112 set out cumulative – not alternative – procedures.¹⁵

Issue presented

13. The Prosecution seeks leave to appeal the following issue:

“Whether rule 111 requires the Prosecution to take formal and ‘well-organized’ signed statements from witnesses to whom article 55(2) applies.”

Submissions

14. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under article 82(1)(d). The sole question is whether the issue involved in the Decision meets the criteria set out in that provision.¹⁶ Reference to any errors contained in the Decision will only be made when necessary to demonstrate the appealability of the Decision.

(i) The Issue arises from the Decision

15. The issue arises from the Decision. The Prosecution proposed the procedure implemented at the confirmation hearing, namely that it would disclose Zaghawa summaries of (a) witness statements taken pursuant to rule 111 and (b) transcripts of the two article 55(2) witnesses who had been interviewed under rule 112.¹⁷ The Defence objected and requested written statements from all witnesses, pursuant to rule 76(3), including from the two article 55(2) witnesses whose lengthy and full interview transcripts had already been disclosed.

¹⁵ Decision, para.20 quoting ICC-01/04-01/07-1553, para.35. Trial Chamber I also noted the advantages of being provided with witness statements in a narrative form: Decision, para.22 quoting ICC-01/04-01/06-T-113, p.12, lns.16-23

¹⁶ ICC-02/04-01/05-20-US-Exp, para. 22.

¹⁷ ICC-02/05-03/09-192, paras.8-12.

16. The Chamber agreed with the Defence and ordered the Prosecution to produce “comprehensive and well-organised witness statements in narrative form based on all the available material relating to [all the] witnesses”.¹⁸ It thus effectively imposed a duty upon the Prosecution that, in the Prosecution’s view, is not required by the Statute or Rules and exceeds the provisions regulating the recording of article 55(2) witnesses. In order to meet its disclosure obligations under rule 76(3), the Prosecution will have to produce two separate documents reflecting each article 55(2) witness interview: a recorded and transcribed interview, in compliance with the requirement in rule 112, and an additional “comprehensive and well-organized” statement signed by the witness, in compliance with (though requiring more than) rule 111.

(ii) *The issue is an appealable issue pursuant to Article 82(1)(d)*

17. The issue constitutes an “identifiable subject or topic requiring a decision for its resolution”.¹⁹ Its resolution is “essential for the determination of matters arising under the judicial cause under examination,”²⁰ namely the question whether the Prosecution has to produce written witness statements pursuant to rule 111 in addition to transcripts of recorded witness interview pursuant to rule 112.

18. The issue concerns the procedure to follow when article 55(2) witnesses are interviewed in connection with an investigation. In particular, it raises the question whether the Prosecution must take signed written statements under rule 111 in addition to the audio and video- recording and the ensuing transcripts that are required under rule 112. If leave to appeal is granted, the Prosecution will demonstrate before the Appeals Chamber that the drafters intended that rule 112 be *lex specialis* vis-à-vis rule 111 in the case of article 55(2) witnesses. Otherwise, the last sentence of rule 112(1)(a) as well as the scenario foreseen in rule 112(2) - namely that a written statement under rule 111 shall be taken if the person *refuses*

¹⁸ Decision, para.23.

¹⁹ ICC-01/04-168 OA3, para. 9.

²⁰ ICC-01/04-168 OA3, para. 9.

to be audio or video recorded, or if the circumstances prevent the recording from taking place - would be redundant or meaningless, since under the Chamber's analysis the Prosecution is in any event obliged to provide a written statement.

19. The resolution of this issue is therefore essential to clarify the interpretation of rules 111 and 112. If the issue is unresolved, Chambers may continue to impose a practice that, the Prosecution submits, disregards the drafters' intention and exceeds the requirements of the relevant provisions.

(iii) The Issue affects the fair conduct of the proceedings

20. The issue affects the fairness of the proceedings in that the Prosecution is mandated to comply with an extra-statutory requirement, presumably based on the Statute and Rules but nowhere provided in them. This imposition can be unfairly burdensome and is even more so when ordered retrospectively as it has been here.²¹ The Chamber's requirement substantially taxes time and resources of the Prosecution, diminishing its ability to allocate its time and resources as it deems appropriate for investigation and prosecution purposes.
21. In addition, the issue can also affect the Prosecution's presentation of its case: it is often the case that when a person is asked to recall again the same events, there will be differences in emphasis or expression, or even remembered or forgotten details. As a result, apparent contradictions can be expected to emerge between the different written records. The imposed requirement of an additional written statement of article 55(2) witnesses is likely to produce this consequence and in addition, unfairly impact on the credibility of that witness and the fair assessment of his/ her evidence by the Trial Chamber.²² Indeed, the witnesses' credibility and the reliability and weight of their evidence are tested at trial by confronting them

²¹ The Prosecution is now obliged to compile and provide to the Defence additional signed statements from witnesses whose interviews have already been recorded and transcribed. It had planned to re-interview the two article 55(2) witnesses on very limited topics, and indeed had already re-interviewed one of them before the Decision was issued. As a consequence of the Decision, the Prosecution will have to re-interview that witness again, as well as the other article 55(2) witness, and both interviews will be longer and more complex, since the purpose will not be to clarify discrete points but to obtain comprehensive written statements from each.

²² Article 69(4).

with inconsistencies, or apparent consistencies, with respect to their prior statements. In this case, contradictions will most likely arise in the instant case between the already recorded interviews of the two article 55(2) witnesses and the now required statements yet to be taken.

22. Moreover, contradictions would equally arise if the Prosecution were to interview a new article 55(2) witness and, applying the Chamber's approach, produce two different records of the same interview, a "well-organized" rule 111 statement and a rule 112 recording. There will necessarily be inconsistencies, at least apparent contradictions or differences, between the two records; although a rule 111 statement can accurately summarize a witness's testimony, it cannot capture every word said during the interview, and the requirement that the rule 111 statement be organized will affect the presentation of that statement. Any apparent differences between the two records will undermine the authoritative value of each record, could lead to unfair confusion at trial when the witness is confronted with one or both records, and could ultimately interfere with the Chamber's ability to assess credibility.
23. For its part, the Defence might claim that the issue affects fairness because it implicates the Defence right to have a copy of a written statement by the witness, in addition to the actual recorded interview, before the witness testifies. While the Prosecution might disagree with such a position,²³ the argument nonetheless would confirm that the issue -- however it is resolved on appeal -- implicates fairness and potentially the outcome of the trial. Thus, the requirement that there be both recordings and written statements to protect the rights of the Defence meets that article 82 criteria for appealability

²³ The Prosecution reminds the Chamber, however, that the Defence has the best version of a "statement" from each article 55(2) witness -- it has their unfiltered and spontaneous audio-recorded interviews. By comparison, written witness statements lack the spontaneity and are filtered by the requirement that they be "well-organized". At the same time, they provide no particular benefit, since they will contain only that information that the recorded interviews themselves contained..

(iv) *The Issue affects the expeditious conduct of the proceedings*

24. The expeditious conduct means the timely and efficient conduct of proceedings.²⁴

This principle requires that decisions at all stages do not unnecessarily delay the overall determination of responsibility. Any decision that compromises the efficient conduct of the ongoing proceedings in the case or situation at hand or delays the investigation and prompt determination of criminal responsibility affects the expeditious conduct of the proceedings.²⁵

25. The Prosecution had intended to re-interview the two article 55(2) witnesses for limited purposes, namely to explore new areas not covered in their prior interviews. As a result of the Decision, the Prosecution will now have to take written statements from both witnesses that will capture all areas covered by the prior recorded interview and the new one. The process will take weeks and will require extended or repeated trips.²⁶ The anticipated statements, moreover, will themselves be lengthy and take time to prepare, if the length of their prior transcribed interviews is taken as a guide – namely, 236 pages for DAR-OTP-WWWW-0307 and 479 pages for DAR-OTP-WWWW-0442. Indeed, the process of taking a “comprehensive and well-organized” statement is cumbersome and requires additional and distinctive steps not required in a recorded interview. In particular, the interviewer will have to engage the witness in the process of transforming his notes or pages of transcribed interviews into a written statement. That may take place over several extra days at the site and shortly following the interview, or the interviewer may return to The Hague, wait for the

²⁴ Expeditious proceedings are intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003 (“Norman Decision on Application for Stay”): “the Court’s obligation to do justice expeditiously and effectively, as well as fairly.” (para. 6); “we can only do justice that is expeditious, fair and efficient” (para. 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue “will significantly affect the efficient and expeditious conduct of the proceedings”.

²⁵ The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. Norman Decision on Application for Stay, para. 8; and Terrier, Powers of the Trial Chamber in Cassese, Gaeta and Jones (ed) (2002) 1259 at 1264-65.

²⁶ The Prosecution had already conducted its second interview of one of the witnesses. Hence it will have to organize a new mission to re-interview him again. In addition, it will have to extend the time that it had originally foreseen that it would take to interview the other witness.

transcripts, sketch a well-organized account in anticipation of the written statement, and then go back to the witness to discuss and prepare the final written statement. Either way, once the statement is finalised the interviewer and witness will have to review the statement, a process that itself must be audio or videotaped and that can take days to complete. If substantive matters are discussed during the statement-finalization process, that will itself become a recordable interview, which then perhaps may give rise to the requirement of a second written statement. Thus, as these examples show, the ruling has clear consequences for the expeditiousness of the proceedings.

(v) The Issue affects the outcome of the trial

26. An issue only needs to impact the fair and expeditious conduct of the proceedings or the outcome of the trial.²⁷ Nevertheless, the Prosecution stresses that the issue does also affect the outcome of the trial. According to the Appeals Chamber, under this limb the Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence.”²⁸

27. Thus, as one Chamber noted: “it will usually suffice simply to analyse the potential impact of the disputed evidence and [...] introducing [certain] particular pieces of incriminating evidence into the trial may have an impact on its outcome”.²⁹

28. If the Appeals Chamber does not consider the issue, the Prosecution will be required to divert resources from its investigative or preparatory plan to the task of taking new duplicative statements. It is impossible to establish what would have been made of these undetermined lost opportunities or to measure the effect that uncollected evidence would have had on the outcome of the trial. All that can be said with confidence is that any significant impediment on a party’s ability

²⁷ ICC-01/05-01/08-75, para. 8; ICC-02/04-112, para. 17; ICC-01/04-01/06-1417, paras.17-18; ICC-01/04-01/06-1473, paras. 21-22.

²⁸ ICC-01/04-168 OA3, para.13.

²⁹ ICC-01/04-01/06-2404, para.30.

to use its resources will necessarily affect the case it presents at trial and thus potentially its outcome.

29. Second, the forced creation of additional impeachment opportunities for the Defence will have another potential yet immeasurable effect on the outcome of the trial.³⁰ Inevitable differences, real or apparent, between the recorded statement, the written statement, and the trial testimony become fodder for a Defence argument that the witness has fabricated or embellished his evidence or that his memory is unreliable. Such differences, moreover, will be accentuated by the requirement that the written statement be “well-organized”; as the cases quoted in footnote 33 above, indicate, even the “different order” of facts becomes a discrepancy for impeachment. Hence the taking of new statements “directly relates with the amount and type of evidence that the Chamber will have to consider when making its final determination in accordance with article 74”.³¹

(vi) The immediate resolution of the issue will materially advance the proceedings

30. As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “‘move forward’ by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”³² Otherwise, a wrong decision on an issue in the context of Article 82(1)(d), unless remedied on appeal, will entail a setback to the

³⁰ The United States Supreme Court has several times expressly noted that “a witness' prior statements are essential to any effort at impeachment”. For example, “Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.” *Jencks v. United States*, 353 U.S. 357, 667 (1957); *Pennsylvania v. Ritchie*, 480 U.S. 39, 71 (1987).

³¹ ICC-01/05-01/08-1169, para. 35.

³² ICC-01/04-168, paras. 14-15, 18.

proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.³³

31. As noted previously, the decision will require the Prosecution to redirect at least some of its resources and efforts to obtain new comprehensive statements from its article 55(2) witnesses. It is impossible to measure the harm to the Prosecution in lost opportunities or otherwise their effect on the trial, but clearly some effect will result.
32. In addition, the inevitable discrepancies between the recorded interviews and the written statements will be subsequently raised at trial by the Defence. Moreover, the Prosecution will need to address and clarify these discrepancies either in its examination in chief or re-examination. Thus, the issue has a direct impact on the conduct of the trial proceedings, in particular, the questioning of witnesses by parties and participants.³⁴
33. It would be wrong, however, to assume that because these consequences – the diversion of prosecutorial resources resulting in lost opportunities, the effect of the evidence on the trial proceedings -- cannot be predicted in advance or possibly even measured after the fact, this issue is thus insignificant to the progress of the trial or can be left for a final appeal. All that can be said is that the issue will necessarily affect the trial in ways that cannot be predicted or easily measured and remediable after a final judgment.
34. In addition, the Prosecution notes that this is the third chamber to read rules 111 and 112 to impose multiple cumulative obligations. There is a need for the Appeals Chamber to rule on this matter to provide the necessary guidance and settle the matter, in order to avoid the consolidation of a jurisprudence that, if the Prosecution is correct, is based in a flawed understanding of the applicable procedural provisions.
35. Finally, the impact of immediate resolution of the issue on other proceedings is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II

³³ ICC-01/04-168 OA3, para. 16.

³⁴ ICC-01/05-01/08-1169, para. 36.

previously recognised that, in certain circumstances, the potential impact on other proceedings may be invoked “as an additional argument in support of the alleged significant impact on the current proceedings”.³⁵ Prompt resolution of this issue will assist to advance other proceedings before this Court.

Relief sought

36. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the three Issues pursuant to Article 82(1)(d).



Luis Moreno-Ocampo
Prosecutor

Dated this 19th day of September 2011

At The Hague, The Netherlands

³⁵ ICC-01/05-20-US-Exp, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.