



Original: **English**

No.: ICC-02/05-03/09
Date: 14 November 2011

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN DARFUR, SUDAN

IN THE CASE OF THE PROSECUTOR

v.

***ABDALLAH BANDA ABAKAER NOURAIN &
SALEH MOHAMMED JERBOA JAMUS***

Public

**Prosecution's Document in Support of Appeal against Trial Chamber IV's
"Decision on the Prosecution's Application for Leave to Appeal the 'Reasons for
the Order on translation of witness statements (ICC-02/05-03/09-199) and
additional instructions on translation'"**

Source: Office of the Prosecutor

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Introduction

1. Rule 76 requires the Prosecution to provide the defence, in advance of trial, with “copies of any prior statements made by” its anticipated witnesses, in the original language and a language that the accused fully understands and speaks. Rule 111 requires that “[a] record” shall be made of formal statements by any person who is questioned, which record must also be signed by the persons present. Neither rule specifies the format of the statements or requires specifically that the Prosecution obtain and disclose “signed and well-organized statements”. Rule 112 requires that interviews of Article 55(2) witnesses (and, at the option of the Prosecution, other witnesses) be audio- or video-recorded and thereafter transcribed pursuant to a specifically defined procedure. Thus, rule 112 specifies a more comprehensive format – verbatim recording and transcription -- for discrete classes of statements.
2. In its Decision,¹ Trial Chamber IV interpreted rule 76 to require, with respect to a witness whose interview is recorded under rule 112 and provided in full to the Defence, that the Prosecution additionally obtain a separate rule 111 “written” statement that is “comprehensive and well-organized [...] in narrative form based on all the available material relating to the[] witness[.]”² The requirement of a second written and signed statement (and, further, that it be “well-organized and in narrative form”) in addition to the rule 112 recorded statement finds no support in the Court’s basic texts. Rather, the Chamber erroneously interpreted rule 111 and ignored that rule 112 recorded interviews are statements that may be disclosed under rule 76 and that, indeed, provide the most complete and accurate record of the witness’s own words.
3. Production and disclosure of a separate comprehensive organized narrative signed statement of a witness who has given a taped and transcribed interview is not required by the literal language of the rules, a reasonable interpretation of those provisions, or their drafting history. While an additional well-organized comprehensive written and signed narrative may be helpful to the Defence (though any competent Defence

¹ “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation” (the “Decision”, ICC-02/05-03/09-214.

² Decision, paras.21,23,37.

counsel would study the full witness interview as well), that cannot suffice to impose such a requirement on the Prosecution in the absence of any statutory or rule provision. By finding a prosecutorial duty to obtain these statements, the Chamber committed a legal error.

Procedural Background

4. On 12 September 2011 Trial Chamber IV issued its “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation” (“Decision”), instructing the Prosecution to produce well-organised and signed witness statements in narrative form of all witnesses, including those whose interviews had been recorded and transcribed pursuant to rule 112.³ The Trial Chamber concluded that the drafters of the Rules intended the Prosecution to provide signed witness statements for all the witnesses that it intended to rely on during trial regardless of the fact that their evidence had been audio or video-recorded and transcribed pursuant to rule 112.⁴
5. The Chamber referred to a prior decision in the *Katanga* case, where Trial Chamber II adopted a similar interpretation of the relevant provisions and found that the specific procedure laid down in rule 112 was not an alternative to the procedure set out in rule 111 but rather an “*additional* measure of protection for persons questioned under article 55(2)”.⁵ It also referred to certain remarks made by the Presiding Judge of Trial Chamber I on the advantages of being provided with witness statements in addition to transcripts⁶ and relied on those comments to support its ruling that the statements to be produced by the Prosecution – for *all* witnesses – had to be “comprehensive and well-organized witness statements in narrative form based on all the available material relating to those witnesses”.⁷

³ ICC-02/05-03/09-214, paras.21,23,37.

⁴ Decision, paras.21, 37.

⁵ ICC-01/04-01/07-1553, para.35 - quoted in Decision, para.20.

⁶ ICC-01/04-01/06-T-113-Red ENG, p.12, lns.16-23 – quoted in Decision, para.22.

⁷ Decision, para.23. Note that the Chamber erroneously believed that the Prosecution had agreed to this procedure (para.24). In its application, the Prosecution explained that it proposed to provide summaries of the

6. On 1 November 2011 the Chamber granted the Prosecution's application to appeal "whether the prosecution is under an obligation to take and disclose to the defence formal and 'well-organized' signed statements from all witnesses, including those falling under article 55(2)".⁸

Standard of Review

7. This case turns on the interpretation of rules of procedure and evidence. The interpretation of a statute or rule is a question of law.⁹ The Appeals Chamber has not yet articulated a standard, but the Prosecution submits that legal issues should be subject to plenary, *de novo* review.¹⁰

Submissions

The Prosecution's Ground of Appeal: the Trial Chamber erred in law when it imposed a duty on the Prosecution to take well-organized written statements for all witnesses

8. The Trial Chamber mistakenly read rules 76 and 111, which relate to the taking and thereafter the disclosure of witness statements, to (a) exclude from permissible disclosure those witness statements that were taped and transcribed verbatim, and (b) require that disclosed statements be "well-organized", "signed," "written" and "in narrative form", and specifically that witnesses whose statements were taped and transcribed must give additional written, signed, and organized narrative statements. This requirement is not found in the Statute or Rules. Specifically, rule 111 does not direct the Prosecution to re-organize the witness's account into a "well-organized" statement: it is a prerogative of the Prosecution, as the organ responsible for the

existing transcripts but not to return to the witnesses to obtain additional statements. ICC-02/05-03/09-218-Corr, paras.5-8.

⁸ Decision, para.15 (emphasis added)

⁹ "The Appeals Chamber has previously held that it may justifiably interfere with a sub judice decision 'if the findings of the [Chamber] are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues'". ICC-01/05-01/08-962OA3, para.63.

¹⁰ *Prosecutor v Dragomir Milosevic*, Appeals Judgment, IT-98-29/1-A, 12 November 2009, para.14 and footnotes cited therein. See also *Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009) ("The interpretation of a statute is a purely legal matter and therefore subject to the de novo standard of review."); same, *Plata v. Schwarzenegger*, 603 F.3d 1088, 1093 (9th Cir. 2010). The Chamber's error materially affected the Decision: had the Chamber read rule 111 together with rule 112 it would have found that the latter is *lex specialis* to the former. Hence, should the Appeals Chamber consider that the error is procedural, it would not impact on the Prosecution's appeal.

investigation of the cases before this Court, to collect the witnesses' testimony in an adequate and comprehensive manner that in its view best reflects the evidence of the witness. The Trial Chamber's requirement also does not correspond with the ordinary meaning of statement, and there is no contextual or historical suggestion that the Statute and Rules compel the Prosecution to take and disclose well organized written and signed narrative statements.

9. This case thus turns on the interpretation of "statement" subject to disclosure pursuant to rule 76. Consistent with the Vienna Convention on the Law of Treaties, the ordinary meaning given to the term "statement" in rule 76 must be interpreted in light of the Statute as a whole as well as its object and purpose. In examining what the Rules mean to include in the term "statement" in rule 76, it is necessary to consider the use of the term in rule 111, which sets out a process for taking witness statements, and rule 112, which provides a special process for certain witnesses. In interpreting these provisions, the Court must further construe them in a manner which results in a coherent, rather than an internally inconsistent, system.¹¹

(a) Meaning of the term "statement"

10. Rule 76(1) requires the Prosecution to provide to the Defence the names of the witnesses whom the Prosecution intends to call to testify and "copies of any prior statements made by them". It does not further define, much less restrict, the term "statement".
11. The Prosecution submits that the ordinary meaning of the term "statement" in the context of judicial proceedings refers simply to an account of facts presented by a witness. It does not specify a "written vs. a taped oral" account or a transcribed account. This definition of a statement as an account of facts by the witness is consistent with definitions in ordinary usage and specialized legal contexts. It is also consistent with the definitions recognized by other ad hoc tribunals construing similar statutory provisions.

¹¹ ICC-01/04-01/06-803-Ten, para. 284; ICC-01/05-01/08-388, paras.34-36.

12. The Oxford English Dictionary defines “statement” as “a written or oral communication setting forth facts, arguments, demands, or the like”.¹² Black’s Law Dictionary defines statement as “a verbal assertion or nonverbal conduct intended as an assertion”.¹³ The French text of rule 76 uses the term “*declarations*”, which is defined as an “action to declare; discourse or written document through which a person declares”.¹⁴ Similarly, the Spanish text of rule 76 uses the term “*declaraciones*”, which means an “oral or written declaration that a person makes in a proceedings before a judge or tribunal”.¹⁵ The Arabic text of the rule uses “بَيِّنَات” which can be translated as data, information, facts¹⁶ or declaration, account and report.¹⁷ In short, the ordinary and legal use of the term does not differentiate between a written and oral recording of a witness’ words, or between a narrative of events and a question-and-answer transcription of an interview.

13. This concept of statement as no more than the witness’s prior account is also consistent with decisions of the ad hoc tribunals. As the ICTY Appeals Chamber explained, like this Court’s rules, the rules of that tribunal “do not define what constitutes a witness statement. The usual meaning of a witness statement in trial proceedings is an account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime.”¹⁸ The ICTR, moreover, recognized that “the ideal standard of a record of witness interview” is “composed of all the questions to a witness and of all the answers given by the witness”.¹⁹ And commentators addressing ICC rules refer to ICTY jurisprudence on

¹² Oxford English Dictionary

<http://www.oed.com/view/Entry/189259?rskey=IPoFc4&result=1&isAdvanced=false#eid>.

¹³ Black’s Law Dictionary, 8th ed. (St. Paul, Minnesota: West Group, 2004), p. 1444.

¹⁴ “Action de déclarer; discours ou écrit par lequel on declare”. Le Petit Robert de la langue française: <http://pr.bydep.com/pr1.asp>.

¹⁵ “Manifestación que oralmente o por escrito hace una persona en un proceso, ante un Juez o Tribunal”. See Diccionario jurídico: <http://www.uned-derecho.com/diccionario/>

¹⁶ <http://qamoos.sakhr.com/SearchResults.aspx>. See also The Hans Wehr Dictionary of Modern Written Arabic, ed. By JM.Cowan (spoken Language Services, Inc., Urbana, IL), p.106.

¹⁷ Elias Modern Dictionary Arabic-English (Modern Publishing House 1994,2008, Egypt), p.86.

¹⁸ *Prosecutor v. Blaskic*, IT-95-14-A, Decision 26 September 2000, para. 15, at 2000 WL 33705569,

¹⁹ *Prosecutor v. Niyitegeka*, NO. ICTR-96-14-A, Judgement, 9 July 2004, para. 31, see also *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, 14 July 2005, para. 1..

- the meaning and forms of witness statements.²⁰ In particular, Tochilovsky makes reference to an ICTY Appeals Chamber decision that emphasises that “the usual meaning of a witness statement in trial proceedings is an account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime”.²¹
14. Hence, a witness statement under rule 76, particularly in the context of a witness’s anticipated evidence, can include the taped and transcribed interview and does not require that the statement be presented in the form of an organized written narrative.
15. Rule 111, in the section “Collection of Evidence”, requires, without elaboration, that a “record shall be made of formal statements” – though it does not necessarily define record or formal statement -- while rule 112 provides or requires in certain instances that a statement be “taped”.
16. The Prosecution submits that rule 111 provides generally an obligation to record witness evidence in any manner that permits the statement to accurately reflect what the witness wishes to say. The requirement that the “record” be signed does not require that this will be a written statement, since as rule 112 demonstrates, a recording can be sealed and signed as well. Further, the “signature” requirement is rather only a means of ensuring that the witness agrees that the statement – in whatever format – reflects his version of the facts. The Prosecution however notes that the use of the terms “*procès-verbal*”²² and “*acta*”²³, in the French and Spanish version of the provision suggests that the record should be a written one. In any event, neither version of the provision includes any additional requirements. Therefore, even if this court concludes that a written statement is required under rule 111, there is no basis to conclude that it

²⁰ V.Tochilovsky, “Prosecution Disclosure Obligations in the ICC and Relevant Jurisprudence of the *Ad Hoc* Tribunals” in J.Doria, H.-P. Gasser and M.C. Bassiouni (ed.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Blishchenko*, Leiden, Martinus Nijhoff Publishers, 2009, pp. 852-853; Brady H., in Lee, R.S., “Disclosure of Evidence” in *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Inc.), p.409.

²¹ *Prosecutor v. Blaškić*, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch., 26 September 2000, para.15, cited in Tochilovsky, cit. fn. 26

²² “Acte dressé par une autorité compétente, et qui constate un fait entraînant des conséquences juridiques”. : <http://pr.bvdep.com/>.

²³ “Relación escrita de lo sucedido, tratado o acordado en una junta. Certificación, testimonio, asiento o constancia oficial de un hecho”: <http://www.lexjuridica.com/diccionario.php>.

must be in a particular format or that a written statement is *also* required under rule 112.

17. Rule 112 is *lex specialis*²⁴-- as opposed to the general process in rule 111, rule 112's particular process applies in certain exceptional cases prescribed by the rule. If, however, the person refuses to be recorded or "when circumstances prevent such recording taking place",²⁵ rule 112(2) invokes the process for taking a statement set out in rule 111. In other words, by its language rule 112 overrides rule 111 in limited circumstances *unless* in those instances the rule 112 provisions cannot be met; then, and presumptively only then, rule 111 is triggered for taking statements in the situations spelled out in rule 112. The reliance on rule 111 -- which does not require a taped interview and verbatim transcript -- when the procedure prescribed by rule 112 cannot be followed would be superfluous if rule 111 statements are mandatory in all cases as the Trial Chamber found. The plain language of the two rules, therefore, establishes that they are separate and not cumulative obligations.
18. The need to record -- by written narrative, question and answer narrative, or tape recording -- the questioning of persons under rules 111 and 112 is imposed to protect the rights of suspects, potential suspects, and witnesses under the Statute and the Rules.²⁶ It is also a method to ensure the efficiency of the investigation and the reliability of the information obtained. The fact that taping and transcribing a verbatim interview is required under rule 112 for interviews of particular sensitivity, but not for all witness interviews, signifies an intent to require the best and most accurate record for categories of interviews in which issues would most easily be raised about the process by which the statement was taken. Because the procedure in rule 112 is more cumbersome and burdensome, however, it is not required for interviews of lesser sensitivity.

²⁴ There are two ways in which law takes account of the relationship of a particular rule to general rule (often termed a principle or a standard). A particular rule may be considered an application of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand. Alternatively, a particular rule may be conceived as an exception to the general rule. In this case, the particular derogates from the general rule. The maxim *lex specialis derogat lex generali* is usually dealt with as a conflict rule. However, it need not be limited to conflict. Koskeniemi M., International Law Commission Study Group on Fragmentation, Fragmentation of International Law: Topic (a): The Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes": An Outline, [paragraph] 2.2: http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf.

²⁵ See rule 112(1)(a), 112(2).

²⁶ Article 54(1)(c).

19. Relevant ICTY jurisprudence supports this interpretation of the rules. The ICTY Rules of Procedure and Evidence include provisions similar to rules 76 and 112: ICTY rules 43 and 63 regulate the recording of suspect interviews, which must be audio or video-recorded and subsequently transcribed. The Chambers in the ICTY have held that when the Prosecution interviews suspects (which interviews must be audio or video-recorded), it must disclose the *transcribed interviews* in a language that the accused understands.²⁷ At no point have ICTY Chambers required that the Prosecution produce additional written and signed statements of suspects that have been interviewed pursuant to the specific procedure enshrined in the rules.

20. The wording used by the drafters in the headings of rules 111 (record) and 112 (recording) further supports the *lex specialis* nature of rule 112: while rule 111 requires the Prosecution to compile the evidence of witnesses in some format that will constitute a record of the witness's evidence, rule 112 goes further and imposes a concrete procedure ("recording") to compile the evidence of particular witnesses. The ordinary meaning of the term "record" is much broader than the "recording" required in rule 112. This is supported by the use of the terms "*enregistrement*"²⁸ and "*grabación*"²⁹ in the French and Spanish versions of rule 112.

21. Accordingly, the drafters intended that the words of a witness collected, disclosed and tendered into evidence could be recorded in forms other than a narrative written and well-organized statement in the terms of Trial Chamber IV's ruling. In fact, Trial Chamber I appears to have endorsed this broader interpretation when it stated that rule 68 "is directed at the 'testimony of a witness' in a *broad sense*, given that the *various forms of testimony that are specifically included in the rule* are audio- or video-records, transcripts or other documented evidence of 'such' testimony (namely, the

²⁷ *Prosecutor v. Jadranko Prlic et al*, Decision on the request of the accused Prlic to obtain a BCS transcription of his statement, IT-04-74-T, 6 December 2007; *Prosecutor v. Momcilo Perisic*, Decision regarding defence request for BCS transcript of the accused's statement, IT-04-81-PT, 27 September 2007, paras.6-7.

²⁸ "Transcription ou mention sur registre public, moyennant le paiement d'un droit fiscal, d'actes, de contrats, de déclarations, en vue d'en constater l'existence et de leur conférer date certaine": <http://pr.bvdep.com/>

²⁹ "Acción y efecto de grabar (registrar sonidos o imágenes en disco, cinta, etc.)": <http://buscon.rae.es/draei/>

testimony of a witness).” The Chamber then noted that written statements are “clear examples” of “other documented evidence (of the testimony of the witness)”.³⁰ There is no reason why a far more restrictive approach to the recorded words of a witness should be followed for the purposes of disclosure under rule 76.

(b) The drafting history of the rules regarding taking and disclosing statements

22. As noted above, the plain language of the rules does not require the result imposed by the Chamber and in fact compels the conclusion that rules 111 and 112 apply separately and not cumulatively. The Prosecution further notes that nothing in the drafting history of these provisions supports the conclusion that only written and well-organized statements of witnesses will satisfy the Prosecution’s duty of disclosure.
23. The drafting history of rules 111 and 11 sheds little light on the reasons behind their wording. Between 1993 and 1998, several proposals addressed a prosecutorial duty to record interviews.³¹ These proposals however were limited to suspect interviews. Then, during the Rome Conference, article 55 emerged as the protection of rights for all persons, including but not limited to suspects.³² Ultimately, however, none of the proposals to record interviews were incorporated in the Statute.³³
24. During the subsequent Preparatory Commission meetings, Australia proposed an obligation to record the questioning of persons³⁴ that was almost identical to ICTY rules 43 and 63, which required audio- or video- recording of the questioning of suspects and accused persons. The French delegation proposed an obligation to record

³⁰ ICC-01/04-01/06-1603, para.18; ICC-01/04-01/06-2702-Red, para.16.

³¹ Draft Statute for an International Criminal Court: Alternative to the ILC-Draft-(Siracusa-Draft); U.S. Non.Paper on Rules of Investigation, Procedure and Evidence for the International Criminal Court, UNOFFICIAL DOCUMENT, 21 August 1995, rule 33; 1994 ILC Draft Statute for an International Criminal Court with Suggested Modifications (Updated Siracusa-Draft); Draft Set of Rules of Procedure and Evidence for the International Criminal Court: Working Paper, submitted by Australia and The Netherlands, UN Doc. A/AC.249/L.2, 26 July 1996, rule 59; A/51/22[VOL.II](SUPP), 13 September 1996, art.26(g).

³² See A/CONF.183/C.1/WGPM/L.1, 18 June 1998, art.54 *ter*; A/CONF.183/C.1/WGPM/L.2, 24 June 1998, art. 54*ter*; A/CONF.183/C.1/WGPM/L.6, 24 June 1998; A/CONF.183/C.1/WGPM/L.11, 24 June 1998; A/CONF.183/C.1/WGPM/L.2/ADD.1, 29 June 1998, art.54 *ter*; A/CONF.183/C.1/WGPM/L.2/CORR.1, 29 June 1998, art. 54 *ter*, paragraph 2(c).

³³ H. Friman, “The Rules of procedure and Evidence in the Investigative Stage”, in H.Fischer *et al.* (eds.), *International and National Prosecution of Crimes under International law: Current Developments* (Verlag: Berlin, 2001), p.197.

³⁴ PCNICC/1999/DP.1, 26 January 1999, rule 59.

- the questioning of “any person”³⁵, and distinguished between requiring recorded statements “in every case” (proposed rule 57.1; current rule 111) and recording statements “in certain cases” (proposed rule 57.2, current rule 112). The French proposal was incorporated in almost literal terms in the coordinator’s discussion paper on 5 August 1999.³⁶
25. In 2000,³⁷, a fresh discussion paper introduced two changes: it changed the title of the rule from “Record of questioning in every case” to “Record of questioning in general”, and it restricted the recording obligation to only “formal” statements. However, neither the paper nor other coetaneous documents explained the changes. This version was adopted by the Assembly of States Parties as the current rule 111 in September 2002.³⁸
26. In short, the drafting history does not reflect an intent that there be a written signed statement from all witnesses, even those from whom verbatim taped and transcribed interviews were required. Commentators to the Statute and Rules also do not support the Trial Chamber: they agree instead that rule 112 sets out the applicable process for interviews of a suspect under article 55(2) or a person against whom a warrant of arrest or summons to appear has been issued, but if -- and only if -- the person refuses to be recorded or when circumstances prevent the recording, the Prosecution should follow the procedure prescribed by rule 111.³⁹

(c) *The decisions of other chambers*

27. As support for its ruling, Trial Chamber IV considered an oral decision in the *Lubanga* case and a written decision in the *Katanga* case. In the Prosecution’s view, both decisions departed from the requirements of the Rules; and neither decision was

³⁵ PCNICC/1999/DP.7/ADD.2, 23 February 1999, rule 57.1.

³⁶ PCNICC/1999/WGRPE/RT.6, 5 August 1999, rule 5.9.

³⁷ PCNICC/2000/WGRPE(5)/RT.3, 23 June 2000, rule 5.9.

³⁸ PCNICC/2000/WGRPE/L.5, 27 June 2000, rule 5.9; PCNICC/2000/INF/3/ADD.1, 12 July 2000, rule 111; PCNICC/2000/1/ ADD. 1, 2 November 2000, rule 111.

³⁹ H.Friman, “Investigation and Prosecution” in R.S.Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, p. 513. C.K.Hall, “Article 55” in O.Triffterer(ed.), *Commentary on the Rome Statute of the International Criminal Court: observers’ notes, article by article*, Munchen, Beck, 2008, p.1104; G.Pikis, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary instruments*, Leiden, Martinus Nijhoff Publishers, 2010, p.256; H.Friman, “Investigation and Prosecution” in R.S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, p.514

grounded on a theory of statutory interpretation that required this result in all instances. In addition, the *Lubanga* ruling must be examined in the light of the specific facts of that case.

28. In the *Lubanga* case, the Trial Chamber noted that when the Prosecution decided to call a person to whom article 55(2) applied as a witness at trial, it should produce a statement grouping “all the facts and matters which the Prosecution are suggesting are true and which are to be relied upon during the course of his evidence before this court”.⁴⁰ This requirement was designed to reduce “the workload that needs to be done by way of preparation” and was made in the particular context of that investigation, including the critical fact that most of the suspect interviews were conducted before the Prosecution had focused on a narrow set of charges; the rule 112 interviews accordingly extended over hundreds of pages and covered many areas that were not relevant for the trial.
29. Trial Chamber I’s oral ruling cannot thus be used to support the interpretation that additional “well-organized” statements in narrative form must be provided in *all instances* where suspect interviews had been audio or video-recorded and transcribed. Moreover, though the Chamber recommended that process for future interviews – which it deemed to be “more helpful” – it did not order additional narrative witness statements when suspect interviews had been recorded and transcribed.⁴¹
30. Trial Chamber II in the *Katanga* case took an unprecedented approach which, in the Prosecution’s view, lacks support in the Court’s basic documents. The Chamber read rules 76 and 111 to require the production and disclosure of written statements in all instances. Having reached that conclusion – though nothing in either provision provides such a requirement – it then considered that the audio- or video-taping procedure set out in rule 112 was an additional process designed solely to protect the rights or sensitivities of the persons questioned (or as a means to preserve evidence in instances involving a unique investigative opportunity)⁴² and could not be viewed as

⁴⁰ ICC-01/04-01/06-T-113-Red-ENG, p.12, lns.12-23.

⁴¹ ICC-01/04-01/06-T-171-Red-ENG, p.48, lns.15-25 to p.49, lns.1-3. See also ICC-01/04-01/06-T-154-Red-ENG, pp.1-5.

⁴² Ibid.

an alternative to the assumption that a written statement is required under rule 111. The Chamber concluded that “rule 111 applies regardless of whether the statements of a witness are being audio/video recorded”.⁴³

31. In subsequent decisions in the same case, Trial Chamber II reiterated and further explained the reasons underpinning its first decision. According to the Chamber, when the Prosecution discloses any statement in accordance with rule 76, “it must necessarily do so in the form of a record signed by the person questioned, even if the Office has had recourse to other forms of records”.⁴⁴ Trial Chamber II thus read rule 76 as referring exclusively to signed statements in narrative form, discounting that the rule contains no such requirement and that there may be other means of recording of evidence, such as audio and video-recording or transcripts of recorded interviews. That Chamber also distinguished between recording the evidence of a witness for the purpose of disclosure (a category governed by rule 76’s purported requirement of signed and written statements) and recording an interview to protect the rights of the person interviewed (a category governed by rule 112),⁴⁵ and concluded additionally that production of the recorded interview – i.e., the verbatim statements of the witness - taken pursuant to rule 112 cannot satisfy the rule 76 obligation to disclose a witness statement. This effectively means that for the cases of witnesses interviewed under rule 112, two different and cumulative records must be made: a rule 111 written and signed statement for disclosure (pursuant to rule 76), as well as a video- or audio-recording of the interview, coupled with the accompanying transcript, pursuant to rule 112.

32. The Prosecution notes that, aside from Trial Chambers II and IV, no other Chamber has interpreted rules 76, 111 and 112 to impose on the Prosecution the taxing obligation to obtain “well-organized” and written witness statements in addition to the transcripts of the audio or video-recorded interviews when persons to whom rule 112 applies are being questioned. In the *Bemba* case, for example, the Prosecution

⁴³ ICC-01/04-01/07-1553, para.35. The Prosecution notes that this ruling was triggered by the particular circumstances that case, including the length of the recordings and the ensuing transcripts disclosed less than three months prior to the start of the trial.

⁴⁴ ICC-01/04-01/07-2309-Red, para.3.

⁴⁵ ICC-01/04-01/07-1728-Red, para.19.

disclosed the transcript of the recorded suspect interview of a prospective prosecution witness; the Chamber did not demand that it obtain a new written statement from the witness.⁴⁶ In the *Mbarushimana* case, the Prosecution disclosed audio-taped rule 112 statements (in English and Kinyarwanda, with English transcripts) to the Defence without taking additional rule 111 statements.⁴⁷ In the Kenya cases, the Prosecution disclosed the tapes of witness interviews taken pursuant to rule 112 without providing additional written witness statements under rule 111. Nor have the intervening Chambers in any of the *Kenya* cases suggested that the Prosecution had an obligation to produce additional statements when persons to whom rule 112 applies are interviewed and the produced tapes and transcripts disclosed.⁴⁸

(d) The rule imposed by the Chamber does not provide more reliable statements and also unduly burdens the Prosecution

33. Statements taken under rule 112 are more reliably accurate as a reflection of the witness's actual statements, and their fairness and completeness less open to dispute, than statements taken under rule 111. Recording and transcribing the interview provides a fuller record by which to assess the integrity and accessibility of the evidence collected.⁴⁹ The resulting statement, exclusively in the language of the witness, is less open to misstatement or misinterpretation. And because seemingly extrinsic matters are not edited out of the tape, as they might be in a final "well-organized narrative", the taped and transcribed statement itself is fuller and more comprehensive.

⁴⁶ Note that the Prosecution decided not to call that witness once the trial proceedings started.

⁴⁷ Because the suspect is fluent in French and Kinyarwanda, the Pre-Trial Chamber concluded that it would facilitate the Defence preparation to have either Kinyarwanda written transcripts of the rule 112 interviews or French summaries. Its requirement of a written document in a language the suspect can read, however, was not a rejection of the rule 112 transcripts as a legitimate witness statement; it was merely a rejection of the English transcript as sufficient for a Suspect who lacks fluency in English.

⁴⁸ In some instances, and due to the lack of time to transcribe and translate the interviews the Prosecution provided *proprio motu* and in lieu of the transcripts summaries or statements.

⁴⁹ H.Friman, "Investigation and Prosecution", in R. Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers: Ardsley, 2002), pp.514-515. H.Friman, "The Rules of procedure and Evidence in the Investigative Stage", in H. Fischer et al. (eds.), *International and National Prosecution of Crimes Under International law: Current Developments* (Verlag: Berlin, 2001), p.197.

34. Here, the Prosecution offered to provide additional summaries of the statements, solely for reasons peculiar to the translation issues in this case. There is, however, a vast difference between (a) preparing a summary of a fully disclosed transcribed interview as an aid but not to supplement the recorded/transcribed statement independently disclosed, and (b) requiring a new, possibly reorganized, signed witness statement, which supplements the previously disclosed statement.
35. If the goal is to enable the Defence to have an organized version of the witness's version of events, a prosecutor-prepared summary would suffice, though in fact a responsible Defence will prepare for trial by undertaking its own review and organization of the Prosecution's disclosed evidence. Demanding that the Prosecution obtain from the witness a formal second statement that better organizes and edits the witness's evidence would, however, unnecessarily burden prosecution resources. That unnecessary burden may be minimal, but could also be significant, depending on the particular circumstances.
36. More worrisome, however, is that the repeated or prolonged contact to take additional statements risks exposing Article 55(2) witnesses - insiders in the Accused's organization whose locations are not disclosed and with whom the Prosecution must avoid unnecessary personal contact for protection reasons – to additional dangers. Every meeting between the Prosecution and a protected witness poses a new risk and requires advance planning to provide the witness with a cover story and to locate a safe house where the presence of the witness along with prosecution representatives and interpreters will not be detected.
37. Finally, the unnecessary production of *two* authoritative records of the same witness' account risks confusing the evidence and unfairly provides an opportunity for attacks to the credibility of the evidence at the expense of the Prosecution. It is often the case that when a person is asked to recall again the same events, there are differences in emphasis or expression, or even remembered or forgotten details. As a result, apparent inconsistencies can be expected to emerge between the different written records (ie. statement and transcribed interview). The imposed requirement of an additional written statement of certain witnesses is likely to produce this consequence

and in addition, unfairly and unnecessarily raise questions about the credibility of that witness and impact the fair assessment of his/her evidence by the Trial Chamber.⁵⁰

Conclusion

38. For all the aforementioned reasons, the Prosecution requests the Appeals Chamber to reverse the Decision, and find that as a matter of law the Prosecution is under no obligation to obtain an additional well-organized and written statements from persons that the Prosecution has interviewed under rule 111, and that the manner in which a statement obtained under rule 111 is organized must, as a general rule, be left to the discretion of the Prosecution.



Luis Moreno-Ocampo, Prosecutor

Dated this 14th day of November 2011

At The Hague, The Netherlands

⁵⁰ Article 69(4).