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THE APPEALS CHAMBER

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

Defence Response to the 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'"

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

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I. INTRODUCTION

1. Trial Chamber IV did not err when it ordered the Office of the Prosecutor (“OTP”) “to disclose organised and signed witness statements in narrative form of all witnesses [the OTP] intends to rely on for the purposes of the trial in their original language and in Zaghawa” (“**Impugned Decision**”).¹ Trial Chamber IV made this order pursuant to: (i) a correct determination that Rule 111 of the Rules of Procedure and Evidence (“**Rules**”) applies to all witnesses; (ii) its statutory duty to ensure the fair and efficient conduct of the trial and to safeguard the rights of the accused;² and (iii) its inherent power to regulate the conduct of its proceedings. Consequently, the appeal should be dismissed and the Impugned Decision confirmed.

2. The Appeal raises fundamental questions which go to a Trial Chamber’s power to organise and regulate the conduct of proceedings pending before it. The issue on appeal in the *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’”*³ (“**Appeal**”) calls into question the discretionary powers of the Trial Chamber under Article 64 to regulate the organisation and conduct of its proceedings. The Appeal takes a selective approach in its interpretation of the Impugned Decision. It focuses solely on Rules 76, 111 and 112 to the exclusion of other relevant provisions relied on by the Chamber⁴ as well as the Chamber’s inherent power to organise and regulate the conduct of its proceedings.

3. Properly considered, the Impugned Decision does no more than correctly apply the Trial Chamber’s discretion in how statements are to be organised in

¹ Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation, 12 September 2011, ICC-02/05-03/09-214, para. 37.

² See the obligations imposed on a Trial Chamber under Article 64(2) of the Rome Statute.

³ 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’”, 14 November 2011, ICC-02/05-03/09-253.

⁴ See the impugned decision paragraphs 17 and 37

accordance with Rule 76 read together with Rule 111, Rule 84 and Article 64 of the Statute.⁵ For this reason and for those detailed below, the appeal should be dismissed because it seeks to invite the Appeals Chamber to interfere with the Trial Chamber's exercise of discretion in circumstances where no error of law is identified and in the application of a provision which does not state how a statement should be organised.

II. Preliminary Comments

4. The Issue was never central to the reasoning of the Impugned Decision. At no time in the OTP's pleadings before the Trial Chamber did it mention the procedure to follow in interviews of Article 55(2) witnesses, nor did it advance any argument regarding the relationship between Rules 111 and 112.⁶ Rule 112 was only tangentially referred to in the Impugned Decision.⁷ The references in the Appeal to the Trial Chamber's consideration of Rule 112 in the Impugned Decision are misleading.⁸ Instead these issues are raised for the first time on appeal.

III. Background

5. The Impugned Decision must be understood in the light of the significant ongoing difficulties in translating witness statements into Zaghawa, the language that the Accused fully understand and speak⁹. It was these difficulties that gave rise to the Impugned Decision. During a Status Conference on 12 July 2011, Trial Chamber IV ordered the parties to propose practical solutions regarding the

⁵ The Trial Chamber cited all these legal provisions. See; paras. 17 and 37 of Impugned Decision.

⁶ Instead, the Prosecution's submissions focused on the efficiency of its proposal to translate into Zaghawa summaries of witness statements including those statements obtained in transcript format. Having highlighted the practical difficulties involved in the translation of written material into Zaghawa, the Prosecution argued that its proposal to translate summaries was motivated by a concern to "drastically reduce the amount of time it would take to translate the witness statements and transcripts from English into the Zaghawa language." See Prosecution's Proposals on the Issue of Translation, ICC-02/05-03/09-192, 8 August 2011, para. 5.

⁷ The Impugned Decision only mentions Rule 112 in paragraph 20 and this is in the context of a consideration of a decision issued by Trial Chamber II in *Katanga & Ngudjolo*.

⁸ E.g. Appeal, para. 2.

⁹ These difficulties are evidenced by The First Joint Prosecution's and Registry's Monthly Report on Translation and Interpretation Issues (ICC-02/05-03/09-236) and in the Second Joint Prosecution's and Registry's Monthly Report on Translation and Interpretation Issues (ICC-02/05-03/09-257)

translation of incriminating evidence¹⁰. In order to reduce the translation burden on the OTP, the Defence indicated that they would waive their right under Rule 76(3) to a full translation of the transcripts of interviews with Article 55(2) witnesses, on condition that the OTP provided organised signed witness statements in translation.¹¹ The OTP instead proposed only to translate summaries of the witness materials.¹²

6. In the Impugned Decision, Trial Chamber IV adopted the approach suggested by the Defence. In so doing, Trial Chamber IV expressly held that translating summaries was insufficient in the light of the right guaranteed by Rule 76(3)¹³. The OTP has not sought to appeal this specific finding.
7. This exposes one of the striking features of this Appeal. The OTP seek to overturn a decision which was actually adopted to lessen its burden. If this appeal succeeds, the end result would be that the OTP would have to translate the full interview transcripts of two suspect/witnesses interviewed under Article 55(2) which total 715 pages. At the current rate of progress, this translation is estimated to require 178 working days.¹⁴ If the OTP's position is adopted, the resources of OTP and the Court will be further burdened and the trial will be delayed by months.

IV. STANDARD OF REVIEW

8. The Appeal presents an incomplete analysis of the types of error at issue.¹⁵ Properly considered, the Appeal concerns two decisions of the Trial Chamber. First, the legal determination that Rule 111 applies to all witnesses. This is a legal issue. Second, the Trial Chamber's discretionary decision to order disclosure of

¹⁰ ICC-02/05-03/09-T-12-ENG ET WT, page 10, lines 16 -23

¹¹ ICC-02/05-03/09-195 Defence Submission on the Translation of Incriminatory Evidence para 13

¹² ICC-02/05-03/09-192 Prosecution's Proposals on the Issue of Translation 8 August 2011

¹³ Impugned Decision paragraph 31

¹⁴ The First Joint Prosecution's and Registry's Monthly Report on Translation and Interpretation Issues (ICC-02/05-03/09-236) indicates at paragraphs 23 and 24 that there are currently two language assistants working "half-time" and hence translating 4 pages per day. Nothing in the Second Joint Prosecution's and Registry's Monthly Report on Translation and Interpretation Issues (ICC-02/05-03/09-257) alters this.

¹⁵ Appeal, para. 7.

written, “organised and signed witness statements in narrative form of all witnesses the OTP intends to rely on for the purposes of the trial, including those already interviewed”.¹⁶ The exercise of this power which concerns the organisation and conduct of its proceedings is discretionary. This distinction is significant because the Appeals Chamber will interfere with discretionary decisions only in the following limited circumstances: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.¹⁷

V. GROUNDS & SUBMISSIONS IN RESPONSE TO THE APPEAL

“Statement” should be interpreted broadly

9. The response to the OTP’s extensive submissions on the meaning of the term “statement” can be briefly stated.¹⁸ The Defence agree that the term should be interpreted broadly and so encompass all statements, written and oral, in whatever form, whether generated by the OTP or by a third party. All such statements should, therefore, be disclosed under Rule 76 in a language that the Accused fully understand.¹⁹ However, as the Rule is silent as to the form such statements should take, when dealing with statements prepared by the OTP, the Trial Chamber properly proceeded to consider the term and the OTP’s obligations in the context of the Statute and the Rules including Rule 111.

The Trial Chamber did not err in finding that Rule 111 applies to all witnesses

10. In the Impugned Decision, the Trial Chamber correctly concluded that Rule 111 applies to all witnesses, including, therefore, those who also fall under Rule 112.²⁰ The OTP’s argument that the Chamber’s approach was wrong and that Rule 112

¹⁶ Impugned Decision, para. 37.

¹⁷ *Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408, para. 80.

¹⁸ Appeal, paras. 9-14.

¹⁹ Therefore, transcripts or video / audio tapes produced pursuant to Rule 112 are statements subject to disclosure under Rule 76. Equally, any written statements produced under Rule 111 must also be disclosed.

²⁰ Impugned Decision, para. 20 (see highlighted section of the extract taken from *Katanga & Ngujolo*).

is the *lex specialis* is without merit.²¹ In relation to the issue of *lex specialis*, the OTP identifies that this rule may be applied in two ways - a particular rule may be considered an application of the general rule in a given circumstance or a particular rule may be conceived as an exception to the general rule – and selects the latter interpretation.²² However, the arguments advanced in support of its selection and that Rules 111 and 112 are “separate and not cumulative”²³ are without foundation and run counter to the clear language of both Rules.

11. First, Rule 111 plainly applies to persons questioned under Article 55(2) because Rule 111(2) expressly refers to such persons, a fact which the OTP fail to address in the Appeal. Rule 111(2) provides that “*when a person is informed of his or her rights under article 55 paragraph 2, the fact that this information has been provided shall be noted in the record*”. If, as the Appeal suggests, Rule 111 ordinarily has no relevance to the questioning of persons under Article 55(2), then Rule 111(2) would be entirely redundant. In fact, far from being separate, Rule 111(2) clearly places an obligation on the OTP with regard to interviews of Article 55(2) witnesses. This requirement is additional to, or cumulative to, the requirements in Rule 112.
12. Second, Rule 111 applies to “any person who is questioned”.²⁴ No exceptions are stated. Contrary to the OTP’s position in the Appeal,²⁵ the drafting history of Rule 111 does suggest that the word “any” was included deliberately to ensure that a written statement was taken from all witnesses.²⁶ As the Appeal notes, the Australian proposal²⁷ did not include such a provision. But the French proposal

²¹ Appeal, para. 17.

²² Appeal, para. 17 and fn. 24.

²³ Appeal, para. 17.

²⁴ Emphasis added.

²⁵ Appeal, para. 26.

²⁶ See *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 OA3, para. 40. *Travaux préparatoires* may be used as supplementary means of interpretation designed to provide a) confirmation of the meaning of a statutory provision resulting from the application of article 31 of the Vienna Convention of the Law of Treaties and b) the clarification of ambiguous or obscure provisions and c) the avoidance of manifestly absurd or unreasonable results.

²⁷ PCNICC/1999/DP.1 26 January 1999 rule 59.

included Rule 57.1(a) (the precursor to Rule 111) which stated that *“a record shall be made of statements made by any person who is questioned in connection with an investigation”*.²⁸ Friman notes that *“the French proposal broadened the scope of the provisions by having a general rule on recording of questioning that would apply to all cases, not only to questioning of suspects”*.²⁹ These two proposals were considered during the second session of the preparatory commission. The resulting provision was firmly based on the French proposal: Rule 5.9(1) provided that *“a record shall be made of statements made by any person who is questioned”*. Although further changes were made in the fifth session of the preparatory commission, the phrase *“any person”* remained constant through all subsequent drafts. Thus, the drafting history suggests that a conscious decision was made to adopt a Rule which required that a record be made of the questioning of *“any person”* in preference to a Rule which did not. The combination of the choice of the word *“any”* with the absence of any exceptions can only mean that Rule 111 applies to all witnesses.

13. Third, Rule 112 itself contains references to a written record. Rule 112(1)(a), in relation to information that must be given to the interviewee, reads *“the fact that this information has been provided and the response given by the person concerned shall be noted in the record”*.³⁰ This must be understood as a reference to the written record which must be prepared pursuant to Rule 111 for the following three reasons: (i) the identical phrase *“noted in the record”* is used in Rule 111(2) and identical phrases in the Rules must be interpreted consistently; (ii) as the headings of Rule 111 and Rule 112 refer to *“record”* and *“recording”* respectively, a reference to *“record”* is a reference to Rule 111; (iii) where Rule 112(1) intends that information should be audio/video recorded it says so expressly, e.g. Rule 112(1)(b) reads *“a waiver of the right to be questioned in the presence of counsel shall be recorded in writing and, if possible, be audio- or video-*

²⁸ PNICC/1999/DP.7/ADD.2 23 February 1999 rule 57.1(a).

²⁹ Friman, *Investigation and Prosecution*, p. 513.

³⁰ Emphasis added.

recorded".³¹ The result is that Rule 112 also confirms that the requirements of Rule 111 still apply to Article 55(2) witnesses.

14. The Appeal relies on certain phrases within Rule 112 to suggest that "rule 112 overrides rule 111 in limited circumstances unless in those instances the rule 112 provisions cannot be met".³² But this ignores the purpose of Rule 112. As the OTP acknowledges, the object and purpose of a Rule is relevant to its interpretation pursuant to the Vienna Convention on the Law of Treaties.³³ The purpose of Rule 112 is to give flesh to the rights of persons during an investigation laid down by Article 55. As Trial Chamber II held:

*"the audio/video recording of the interviews of persons suspected of having committed a crime within the jurisdiction of the Court, is first and foremost a measure to safeguard the right of suspects to remain silent and to be presumed innocent."*³⁴

15. Rule 112(1) safeguards the Article 55 rights by laying down the "procedure" to be followed when audio- or video-recording the questioning of such a person. The first stage of this procedure, set down by Rule 112(1)(a), is that the person being questioned must be informed of his right to object to the audio- or video-recording and *"if the person questioned refuses to be audio- or video-recorded, the procedure in rule 111 shall be followed."* Rule 112(2) makes similar provision in cases where "circumstances prevent" the normal audio- or video- recording. But these two provisions do not exclude the application of Rule 111 to interviews that are video/audio recorded. Instead, they simply relate to the procedure which should be followed during the interview to safeguard the suspect's rights and also to ensure the preservation of evidence. They clarify that an interview can proceed even if audio / video-recording cannot be used.

³¹ Emphasis added.

³² Appeal, para. 17.

³³ Appeal, para. 9.

³⁴ ICC-01/04-01/07-1553, Prosecutor v Katanga, Decision on the Prosecution Request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence, para. 35.

16. Rules 111 and 112 must also be interpreted in the light of internationally recognised human rights,³⁵ including the right to a fair trial, and the Trial Chamber's statutory obligation to search for the truth.³⁶ A witness of fact is expected to speak to the truth. In this regard, Rule 111 exists to protect the integrity of the evidence, by requiring a signed statement. A person interviewed as a suspect may have obvious reasons to be less than fully candid; they may wish to protect themselves or to protect others. Thus, it is vital that Rules 111 and 112 are cumulative, because it ensures that former suspects give a solemn declaration. This concern was correctly identified by the Presiding Judge in *Lubanga*:-

*"[...] I think it is probably going to be necessary for us, in the near future, to revisit the area as to whether or not it is appropriate for former suspects, those who have been interviewed when they potentially faced criminal prosecutions themselves, to be re-categorised by the Prosecution as witnesses of truth to be relied upon before a Chamber without taking a witness statement in which what is said to be the truth is set out in narrative form with an appropriate solemn undertaking at the end that the witness declares that everything that they have set out in the statement is true and they understand that there could be penalties if they have wilfully stated in it something which is untrue."*³⁷

17. The OTP's reliance on the jurisprudence of the ICTY to support the argument that Rule 112 operates to Rule 111's exclusion is misplaced.³⁸ The Statute mandates that the Court apply the Rules "in the first place".³⁹ Since the resolution of this issue is clear on the face of the Rules, there is no room for recourse to lesser sources such as the jurisprudence of the *ad hoc* tribunals.⁴⁰ Moreover, the schemes established by the Rules of Procedure and Evidence at the ICTY and at the ICC are markedly different. No guidance can be obtained from decisions on the interpretation of a fundamentally different procedural

³⁵ Article 21(3) of the Statute.

³⁶ Article 69(3) of the Statute.

³⁷ ICC-01/04-01/06-T-113-Red-ENG CT WT, p. 14, lines 13-23.

³⁸ Appeal, para. 19.

³⁹ Article 21(1)(a) of the Statute.

⁴⁰ *Prosecutor v. Lubanga*, Judgment on Jurisdiction Appeal, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 34; referring to the Situation in the Democratic Republic of the Congo, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, paras. 22-24, 33-42.

regime. In this case, whilst the ICTY Rules contain provisions similar, though not the same, as Rules 76 and 112, there is no equivalent to Rule 111. As a result, the comparison is meaningless.⁴¹

18. Should the Appeals Chamber determine that Rule 112 is not additional to Rule 111, then the tenor of the OTP's arguments are that Rule 111 applies to the interview of ordinary witnesses whereas Rule 112 applies to the interview of persons to whom Article 55(2) applies. But Rule 112 is silent on the procedure to be followed if the OTP seeks to rely on a former suspect as a witness of truth. Therefore, where as in the Impugned Decision, the Article 55(2) person moves to acquire the concurrent or alternative status of "witness" because the OTP decides to call them as a witness of truth at trial, it is a simple and logical conclusion that the rule applicable to ordinary witnesses – Rule 111 – should apply. The reason is that it aids the search for the truth to have a signed organised statement that the witness has reviewed. Accordingly, on the basis of this alternative argument, no error was made by Trial Chamber IV when it decided to apply Rule 111 to all witnesses to be called by the OTP to testify at trial.

The Trial Chamber did not err in ordering statements to be signed, written and organised

19. A proper reading of the Impugned Decision shows that the Trial Chamber did not base its order that statements be signed, written, organised and in narrative form on the text of Rule 111. Rather, in the Impugned Decision, Trial Chamber IV began by correctly identifying that Rule 76 "does not elaborate on what format the statements must have".⁴² Since the statements at issue were statements produced by the OTP, the Trial Chamber then properly moved on to consider Rule 111.⁴³ It held that Rule 111 required the provision of "signed witness statements".⁴⁴ This was plainly correct: Rule 111(1) expressly provides

⁴¹ The Defence note that the ICTY jurisprudence cited by the OTP also deals with disclosure to the accused of his own interview transcripts and not those of Prosecution witnesses. The case law, therefore, is not on point.

⁴² Impugned Decision, para. 19.

⁴³ Impugned Decision, para. 19.

⁴⁴ Impugned Decision, para. 21.

that “the record shall be signed by...the person who is questioned”. Each of these stages in the Trial Chamber’s reasoning is entirely unassailable.

20. Having concluded that Rule 111 required signed witness statements, the Trial Chamber then proceeded to consider the “form [such] witness statements” should take in a new paragraph.⁴⁵ The Trial Chamber discussed the advantages of the narrative form;⁴⁶ noted that organised and comprehensive statements benefit the proper preparation of the defence⁴⁷ and noted, correctly, that the OTP had already agreed to provide statements from the relevant witnesses.⁴⁸ None of this discussion was focussed on Rule 111. It is, therefore, inaccurate to criticise the Trial Chamber for finding that Rule 111 required comprehensive and well-organised witness statements in narrative form; it did no such thing.

21. Instead, the decision was expressly based on Articles 64(3)(c) and 67(1) and Rule 84.⁴⁹ In combination, these provisions give a Trial Chamber the discretion to manage the procedures for trial. Article 64(3)(c) obliges the Trial Chamber to “provide for the disclosure of documents or information not previously disclosed”. Rule 84 supplements Article 64(3)(c) by allowing the Trial Chamber to make “any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence”. The Trial Chamber is also obliged to “ensure that a trial is fair and expeditious”.⁵⁰ The requirements of a fair hearing, as set out in Article 67, include a right to “adequate time and facilities for the preparation of the defence”. Read together, these provisions give the Trial Chamber the discretion to order the disclosure of additional documents or evidence, including witness statements, especially where such disclosure is necessary for a fair and expeditious trial.

⁴⁵ Impugned Decision, para. 22.

⁴⁶ Impugned Decision, para. 22.

⁴⁷ Impugned Decision, para. 23.

⁴⁸ Impugned Decision, para. 24. Although the OTP has since retreated from this position, the Defence maintains that the Trial Chamber was correct to rely upon their initial concession as set out in more detail in ICC-02/05-03/09-223, para. 6.

⁴⁹ Ibid paragraph 37, and also paragraph 17.

⁵⁰ Article 64(2) of the Statute.

22. The Trial Chamber did conclude that the order would assist a fair and expeditious trial: it considered that failure to provide witness statements would “deprive the accused of one of the means normally available to an accused to prepare the defence”.⁵¹ The Chamber also considered the advantages of a witness statement in narrative form.⁵² Moreover, the order was necessary to preserve the expeditious conduct of the trial. As noted above, the only alternative requires the OTP to translate 715 pages of transcript, a process which will take months and can in no way be described as expeditious.
23. Other Trial Chambers have also relied on their discretionary trial management powers to impose obligations on both the OTP and the Defence which go beyond those expressly stated in the relevant provisions in order to ensure proper organisation and conduct of proceedings. For example, both Trial Chambers II and III ordered the OTP to provide in-depth analysis charts as part of their presentation of evidence both at pre-trial and trial phases. This is becoming an entrenched practice in this Court. In so doing, Chambers have routinely rejected the OTP’s argument that a detailed analytical chart was not provided for in the Statute and the Rules.⁵³ Further, Chambers have imposed on the Defence an obligation to prepare and disclose summaries to the OTP at trial. This obligation is not expressly stated in the Rules, but has nonetheless been imposed under Regulation 54 of the Regulations of Court⁵⁴. These examples demonstrate that the Trial Chamber has the discretion to make orders which are not expressly provided for in the text of the Statute and the Rules, in order to safeguard a fair and expeditious trial.

⁵¹ Impugned Decision, para. 23.

⁵² Impugned Decision, para. 22.

⁵³ *Prosecutor v. Katanga & Ngudjolo*, Decision on the "Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'" and the "Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'", 1 May 2009, ICC-01/04-01/07-088 and *Prosecutor v. Bemba*, Decision on the "Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth -Analysis Chart", 29 January 2010, ICC-01/05-01/08-682)

⁵⁴ *Prosecutor v. Katanga & Ngudjolo*, Decision on the Public Document "Prosecution's Application Concerning Disclosure Pursuant to Rules 78 and 79(4)", 14 September 2010, ICC-01/04-01/07-2388)

The decisions of other chambers support the Trial Chamber's approach

24. The OTP's criticism of the approach taken by other Pre-trial and Trial Chambers in relation to the same issue is misplaced.⁵⁵ The decisions in *Lubanga* and *Katanga & Ngudjolo* are based on the approach to statutory interpretation advocated by the Appeals Chamber,⁵⁶ supported by the same legal reasoning that underlies the Impugned Decision⁵⁷ and were all made pursuant to the Trial Chambers' statutory powers including those enshrined in Article 64 and their inherent power to control proceedings. Indeed, in *Lubanga*, the Presiding Judge identified the witness' crucial re-categorisation – had “moved...from suspect to witness”⁵⁸ – and was also very evidently motivated by concerns of fairness and expediency.⁵⁹
25. The OTP's reference to the approach taken by Trial Chamber III in *Bemba* is equally unhelpful.⁶⁰ First, no reference or citation to the relevant transcript or filing is provided and, secondly, the example is not on point as it relates to a witness who was ultimately never called to give evidence at trial⁶¹ – thus, it appears the Issue was never raised.
26. Finally, the OTP's reliance on the approach taken by Pre-Trial Chambers during the confirmation stage of proceedings is also misplaced.⁶² The confirmation stage of proceedings is a completely different legal landscape from the trial stage,

⁵⁵ Appeal, paras. 27-32.

⁵⁶ ICC-01/04-01/07-776 OA7, paras. 72-73.

⁵⁷ See paragraphs 10 – 16 above

⁵⁸ ICC-01/04-01/06-T-113-Red-ENG, p. 12, lines 12-15, p. 14, lines 12-23; ICC-01/04-01/06-T-154-Red-ENG, p. 1, line 25 - p. 2, line, 4, p. 3, lines 7-19.

⁵⁹ ICC-01/04-01/06-T-113-Red-ENG, p. 15, lines 2-7 (“it has been incredibly difficult to work out from those interviews...to understand exactly what it is that the Prosecution are going to seek to rely on as regards this witness when he comes to give evidence”); ICC-01/04-01/06-T-113-Red-ENG, p. 2, lines 5-8 (“Because otherwise the Judges and the Defence and any participating victims have to go through a voyage of discovery through these documents, trying to work out what it is that the Prosecution are intending to rely on for the purposes of its positive case”), p. 2, lines 15-19; ICC-01/04-01/06-T-171-Red-ENG, p. 48, line 15 – p. 49, line 3.

⁶⁰ Appeal, para. 32.

⁶¹ Appeal, fn. 46.

⁶² Appeal, para. 32.

hence the OTP can rely on simple summaries at confirmation and is not required to disclose statements in any form.⁶³

The Impugned Decision ensures the fair & expeditious conduct of the trial to all Parties

27. The OTP's final arguments regarding accuracy, burdens, security and fairness do not withstand scrutiny.⁶⁴ As argued above, in relation to Article 55(2) suspects turned witnesses, the production of a written, signed and organised statement will only enhance the fairness of proceedings and assist the Trial Chamber in its truth finding function.⁶⁵ Further, the OTP's concern in paragraph 37 of the Appeal is simply a speculation that the statement will contradict the transcript. The Trial Chamber is, however, composed of professional judges with the experience and ability to make a considered assessment of a witness' credibility. If an issue arises regarding differences between the transcript and the related signed statement, the Chamber will be able to appreciate whether it relates to something fundamental and critical to a witness' credibility or whether the explanation is procedural and lies in the statement making process. Additionally, in terms of inconsistencies, the OTP's concern that the production of a second statement will "risk confusing the evidence and unfairly [provide] an opportunity for attacks to the credibility of the evidence at the expense of the Prosecution" lacks merit.⁶⁶ Unless a witness is being intentionally deceptive, a statement taken after a recorded interview would be expected to clarify ambiguities and confusion and provide a more complete and accurate record of the witness's evidence. The OTP's fear that the witness will only further contradict themselves at trial reflects a lack of confidence in the witness and thus a preference to provide the Defence with as little clarity as possible about the witness's evidence.

⁶³ Article 61(5) of the Statute.

⁶⁴ Appeal, paras. 33-37.

⁶⁵ See paragraphs 16 and 22 above

⁶⁶ Appeal, para. 37.

28. The OTP's argument in paragraph 35 of the Appeal that obtaining signed statements will unnecessarily burden its resources ignores the fact recognized earlier in the Appeal⁶⁷ that there has long existed jurisprudence at the Court requiring witness statements from persons interviewed under Article 55(2) who are now being called as OTP witnesses. The decision in *Katanga* dates from October 2009 and no leave to appeal that decision was sought by the OTP at the time. Further, in the face of the OTP's continued inaction, the Presiding Judge in *Lubanga* noted that he was now at risk of repeating himself in relation to his request that the OTP produce signed, written statements from transcripts.⁶⁸ The Issue raised in this Appeal is, therefore, not new. Moreover the Appeal ignores the reality of this case, which is that if this Appeal succeeds, the OTP will face the considerable burden of translating 715 pages of transcripts. As set out above, this is likely to delay the trial by months and therefore to increase the burden on both the OTP's and the Court's resources.
29. The Defence fail to see the relevance of the OTP's submissions regarding the security of Article 55(2) persons.⁶⁹ The OTP has evidently had no qualms in seeking the re-interview of the two witnesses at issue in the Impugned Decision, namely DAR-OTP-WWWW-0307 and DAR-OTP-WWWW-0442, for their own purposes.⁷⁰ It appears that it is only when meetings are to take place at the request of the Defence that witness security emerges as a prohibitive issue rather than one to be addressed and overcome.
30. Equally, the OTP's submissions on summaries⁷¹ should be ignored as the Trial Chamber held that the translation of summaries of transcripts was insufficient⁷², and that finding has not been appealed.

⁶⁷ Appeal, paras. 27-31.

⁶⁸ ICC-01/04-01/06-T-171-Red-ENG, p. 48, lines 15-16.

⁶⁹ Appeal, para. 36.

⁷⁰ Prosecution's update to the Trial Chamber on language related issues and further information on re-interviews of two Prosecution witnesses, 1 September 2011, ICC-02/05-03/09-205, paras. 7-9.

⁷¹ Appeal, paras. 34-35.

⁷² Impugned Decision paragraph 31

VI. CONCLUSION

31. Trial Chamber IV properly exercised its discretion in accordance with the relevant law in order to reach a decision which was reasonably open to it. Therefore, for all the reasons detailed in the paragraphs above, the Defence request the Appeals Chamber to answer the Issue in the affirmative; dismiss the Appeal on all grounds; and confirm the Impugned Decision.

Respectfully Submitted,



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Dated this 25th Day of November 2011

At Kuala Lumpur, Malaysia

Dated this 25th Day of November 2011

At Phnom Penh, Cambodia