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THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI's *"Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses"*, ICC-01/04-02/06-904

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to the “*Decision on Defence request for leave to appeal the ‘Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses’*” issued by Trial Chamber VI on 27 November 2015 (“*Decision on Leave to Appeal*”)¹ and pursuant to Regulation 65 (4) of the Regulations of the Court, Counsel representing Mr Ntaganda (“*Defence*”) hereby submit this:

Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI’s “*Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses*”, ICC-01/04-02/06-904

(“Document in Support of the Appeal”)²

INTRODUCTION

1. Rule 76(1) of the Rules of Procedure and Evidence (“*Rules*”) provides that the Prosecution must disclose “any prior statements” of witnesses “whom the Prosecutor intends to call to testify.” This obligation, unlike Rule 77 and Article 67(2), requires no evaluation of materiality, relevance or exculpatory character. Trial Chamber VI, however, has determined that Rule 76(1) only requires disclosure of statements generated when a witness is “questioned about their knowledge of the case in the course of its investigation”;³ and does not require disclosure of statements “relating to matters other than their knowledge of the case.”⁴
2. This definition is legally erroneous. “Any prior statement” should be accorded its plain meaning. The Trial Chamber, without conducting its own legal analysis, relied on a decision of a Single Judge addressing a different issue in a different case based on different submissions. That decision gave

¹ ICC-01/04-02/06-1039.

² This Document in Support of the Appeal is filed before the Appeals Chamber as composed pursuant to the “*Decision on the request for excusal from Appeals Chamber in all pending and future appeals in the case of The Prosecutor v. Bosco Ntaganda*” issued by the Presidency on 21 October 2015, ICC-01/04-02/06-925-AnxI.

³ Impugned Decision, para. 29.

⁴ Impugned Decision, para. 30.

undue weight to an *obiter dictum* in an early ICTY case that was never understood and never applied in the manner adopted in the Impugned Decision. The proper remedy is to reverse the Impugned Decision; affirm that Rule 76(1) is not limited in the manner described in the Impugned Decision; and order the Prosecution to immediately disclose “any prior statements” of its witnesses without delay.

PROCEDURAL BACKGROUND

3. On 25 August 2015, in light of indications that the Prosecution is misinterpreting and, hence, violating its disclosure obligations,⁵ the Defence moved the Chamber to instruct the Prosecution to disclose *inter alia* any statements of witnesses pursuant to Rules 76(1) and 77 of the Rules and Article 67(2) of the Statute.⁶
4. On 28 August 2015, on the basis of the apparent violation of the Prosecution’s duty to disclose all material in its possession concerning Witness P-0901, including *inter alia* all statements of Witness P-0901, the Defence submitted its *Request on behalf of Mr Ntaganda seeking disclosure orders in relation to Witness P-901* (“Defence Witness P-0901 Disclosure Request”),⁷ seeking disclosure of, *inter alia*, any statement of Witness P-0901, including any statement pertaining to his security concerns.

⁵ The Defence pointed out to direct indications (as reflected in refusals to provide information) as well as to indirect indications (as reflected by reasonable grounds to believe that information within the aforementioned categories has not been disclosed): Defence Disclosure Request, paras.2, 13 and ss.

⁶ “*Request on behalf of Mr Ntaganda for disclosure orders pursuant to Rule 76 and 77 of the Rules of Procedure and Evidence*”, 25 August 2015, ICC-01/04-02/6-795-Conf-Exp (“Defence Disclosure Request”), paras.1, 25 and 41. A public redacted version of the Defence Disclosure Request was submitted on the same day: ICC-01/04-02/06-795-Red.

⁷ ICC-01/04-02/06-800-Conf-Exp. A public redacted version was filed on 4 September 2015: ICC-01/04-02/06-800-Red.

5. On 7 September 2015, the Prosecution responded to the Defence Witness P-0901 Disclosure Request, submitting that “no such order is needed or justified; and that it has met its disclosure obligations.”⁸
6. On 8 September 2015, the Defence sought leave to reply to the Prosecution response to the Defence Witness P-0901 Disclosure Request⁹ and on 10 September 2015, the Prosecution responded to this Defence application for leave to reply.¹⁰
7. On 14 September 2015, the Prosecution responded to the Defence Disclosure Request, denying the need for any disclosure orders and stating that it has met its obligations in this regard.¹¹
8. On 16 September 2015, the Defence sought leave to reply to the Prosecution response to the Defence Decision Request¹² and on 1 October 2015, the Prosecution responded to this Defence application for leave to reply.¹³
9. On 18 September 2015, the Chamber rendered its decision on the Defence Witness P-0901 Disclosure Request, rejecting the request in its entirety.¹⁴
10. On 16 October 2015, the Chamber rendered the Impugned Decision, rejecting the Defence Disclosure Request in its entirety.¹⁵
11. On 26 October 2015, the Defence requested leave to appeal the Impugned Decision on three discrete issues.¹⁶ On 29 October 2015, the Prosecution opposed the Defence request for leave to appeal.¹⁷

⁸ ICC-01/04-02/06-808-Conf-Exp, para. 1.

⁹ ICC-01/04-02/06-810.

¹⁰ ICC-01/04-02/06-816-Conf-Exp.

¹¹ ICC-01/04-02/06-822-Conf-Exp.

¹² ICC-01/04-02/06-832-Conf-Exp.

¹³ ICC-01/04-02/06-880.

¹⁴ ICC-01/04-02/06-840-Conf-Exp (“Witness P-0901 Disclosure Decision”).

¹⁵ ICC-01/04-02/06-904.

¹⁶ ICC-01/04-02/06-941-Conf-Exp. A public redacted version of the Defence request was filed on 28 October 2015: ICC-01/04-02/06-941-Red.

¹⁷ ICC-01/04-02/06-967.

12. On 27 November 2015, Trial Chamber VI granted the Defence leave to appeal the Impugned Decision on the following issue:

Whether the Trial Chamber erred in law in its definition of ‘statement’ in Rule 76(1) of the Rules of Procedure and Evidence

(“Issue”)

THE ISSUE FOR WHICH LEAVE TO APPEAL WAS GRANTED

13. The Trial Chamber has granted leave for immediate appellate resolution of the following issue: “whether the Chamber erred in law in its definition of ‘statement’ in Rule 76(1) of the Rules.”¹⁸
14. The Trial Chamber accepted, adhering to previous ICC Appeals Chamber jurisprudence,¹⁹ that Rule 76(1) requires disclosure of statements provided by a witness “irrespective of the form in which they are recorded.”²⁰ However, the Trial Chamber determined that Rule 76(1) does not require disclosure of all recorded information provided by a witness:

However, as the Chamber has previously observed, not all items containing information obtained from a witness will necessarily constitute a “statement” within the meaning of Rule 76 of the Rules. As found in the Disclosure Decision, the Chamber concurs with the definition provided by the Single Judge of Trial Chamber VII that statements, within the meaning of Rule 76 of the Rules, are made only when witnesses are “questioned about their knowledge of the case in the course of its investigation.” [...] statements of witnesses, or information provided by them, solely relating to matters other than their knowledge of the case – which may, for example, include information provided relating to security concerns or purely logistical matters – do not come within Rule 76 of the Rules.²¹

¹⁸ See ICC-01/04-02/06-1039, para. 18; ICC-01/04-02/06-941, para. 24.

¹⁹ *Banda & Jerbo case, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2001 entitled “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation”, ICC-02/05-03/09-295, 17 February 2012, para.22.*

²⁰ Impugned Decision, para. 29.

²¹ Impugned Decision, paras. 29-30, *referring to* Witness P-0901 Disclosure Decision, para.53.

15. The Trial Chamber accordingly held that some statements of witnesses do not fall within the scope of “any prior statements” as that expression is used in Rule 76(1). Excluded are statements: (i) which “solely relat[e] to matters other than their knowledge of the case”;²² or (ii) which are not generated through questioning of the witness “about their knowledge of the case in the course of its investigation.” The Impugned Decision does not expressly define the pronoun “its”, but appears to intend to refer to the “Prosecution’s”. The Trial Chamber does not further elaborate on the contours of this definition, but gives two examples of subject-matter of a witness statement that are not subject to disclosure: (i) statements concerning security concerns; and (ii) statements concerning “logistical matters”.
16. In granting leave to appeal, the Trial Chamber explained that, in its view, the Impugned Decision did not exclude statements given to organizations other than the Prosecution from the scope of Rule 76(1).²³ The Single Judge’s decision from the *Bemba et al.* case does indeed expressly extend its definition of “statements” beyond the pronoun “its”, but the Impugned Decision does not. The Trial Chamber did not further elaborate how its interpretation of “its” could encompass investigations conducted by entities other than the Prosecution. In any event, the issue is not central the limitations that are at the core of the present appeal.

SUBMISSIONS

GROUND OF APPEAL: THE TRIAL CHAMBER ERRED IN LAW IN ITS DEFINITION OF ‘STATEMENT’ UNDER RULE 76

I. The Trial Chamber disregarded the plain wording of Rule 76(1)

17. The plain wording of Rule 76(1) of the Rules of Procedure and Evidence requires the Prosecution to disclose “any prior statement” of its witnesses:

²² Impugned Decision, para. 30.

²³ ICC-01/04-02/06-1039, para. 17.

The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of *any* prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.²⁴

18. The wording of this provision is plain and clear. Rule 76(1) has an “ordinary meaning” that should be accorded interpretative primacy.²⁵ This “ordinary meaning” contradicts the introduction of qualifications on the definition of “prior statement”. The Trial Chamber gives no justification for departing from the “ordinary meaning” of the actual words appearing in Rule 76(1).
19. The Trial Chamber’s uncritical reliance on *ad hoc* tribunal jurisprudence²⁶ was methodologically flawed. The Trial Chamber failed to acknowledge or address the different wording of the provisions being applied by the *ad hoc* tribunal chambers;²⁷ failed to acknowledge or address that these pronouncements were *obiter dicta*; and failed to demonstrate that any of this jurisprudence justified usurping the “ordinary meaning” or Rule 76(1). Indeed, for the reasons set out below, there was no such justification.

II. ICTY, ICTR and SCSL jurisprudence does not support the narrow definition of Rule 76(1) adopted in the Impugned Decision

20. The Impugned Decision relies on jurisprudence of the ICTY, ICTR and SCSL in favour of its view that some statements of witnesses are not “statements” under Rule 76(1). The Trial Chamber did not conduct its own analysis of these

²⁴ Italics added.

²⁵ ICC-01/04-01/06-3121-Red, para. 277 (“[a]ccording to article 31 of the Vienna Convention on the Law of Treaties, treaty provisions are to be interpreted according to their ordinary meaning in their context and in light of the object and purpose of the treaty. The ordinary meaning of conscription is the ‘compulsory enlistment of persons into military service’”).

²⁶ Impugned Decision, para. 29, fns.59-60.

²⁷ Rule 66 of the Rules of Procedure and Evidence of the ICTY and ICTR does not use the expression “any prior statement” – a fact that the Trial Chamber neither mentions nor addresses. In fact, the Trial Chamber does not even directly analyze this jurisprudence, but simply relies on the analysis performed by a Judge in a different case, who was addressed a fundamentally different issue. Impugned Decision, para. 29.

decisions, but simply adopted a conclusion reached by a Single Judge in a different ICC case interpreting these precedents in a different context.²⁸

21. The Trial Chamber's second-hand reliance on the Single Judge's conclusion in a decision from a different case decided in a different context and on the basis of different submissions, aside from being inadequately reasoned, is misplaced and unjustified. The Single Judge in the *Bemba et al.* case adopted the following definition of "statement" under Rule 76(1):

Consistent with the way other International Tribunals have defined statements for provisions analogous to Rule 76 of the Rules, the Single Judge considers that "prior statements" within the meaning of Rule 76 are made only when witnesses are questioned about their knowledge of the case in the course of its investigation. On this definition, statements provided by witnesses to entities other than the Prosecution (for example, domestic judicial authorities and certain international organisations) may still qualify as Rule 76 statements, provided such statements involve questioning witnesses "about their knowledge of the case in the course of its investigation."²⁹

22. The Single Judge relies primarily on a decision from the year 2000 in the *Blaškić* case which states that "[t]he 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."³⁰ This definition was offered in the very specific context of a defendant's request for disclosure of *trial* testimony in subsequent cases – which explains the specific reference to "trial proceedings".³¹ ICC

²⁸ Impugned Decision, para. 29. That Single Judge relied exclusively on jurisprudence of the ICTY, ICTR and SCSL: Trial Chamber VII, *Bemba et al.* case, "*Decision on Request for Disclosure or Securing of Prior Statements Given by Prosecution Witnesses to Domestic Judicial Authorities and International Organisations*", 9 September 2015, ICC-01/05-01/13-1227 ("*Bemba et al.* Decision"), para. 9, fn. 9. The citations relied upon by that Single Judge, as discussed below, were incomplete and do not support the particular restriction adopted by the Single Judge.

²⁹ *Bemba et al.* Decision, para. 9.

³⁰ *Prosecutor v. Blaškić*, IT-95-14-A, "*Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings*", 26 September 2000, ("*Blaškić* Decision"), para. 15.

³¹ *Id.*, para. 12 (emphasis added) (the defendant "submits that the Tribunal's case-law has affirmed the principle that a witness's testimony in another Tribunal case constitutes a 'witness statement' under sub-Rule 66 (A)(ii).")

jurisprudence confirms that the “due procedure” requirement – while descriptive of the circumstances of a statement recorded as a transcript – does not limit on the scope of other kinds of statements that are subject to disclosure.³² ICTY Trial Chambers have consistently held that “information reports”,³³ “notes of ... interview” of a witness,³⁴ and “interview notes”,³⁵ including those taken by lawyers,³⁶ fall within Rule 66(A)(ii) and must be disclosed. The prevailing view, in short, is that “a statement can be ‘anything that comes from the mouth of the witness’ regardless of the format.”³⁷ These are clear indications that the *Blaškić* definition was not intended – and has never been understood – as limiting the definition of “statements” taken in other contexts. Indeed, the *Blaškić* Appeals Chamber underscores that its

³² Appeals Chamber, *Banda & Jerbo* case, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2001 entitled ‘Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation’”, ICC-02/05-03/09-295, 17 February 2012, para.22; *Ruto & Sang* case, “Decision on Defence request to be provided with screening notes and Prosecution’s corresponding requests for redactions”, ICC-01/09-01/11-743-Red, 20 May 2013 [“*Ruto & Sang*, Decision on disclosure of screening notes”], para.20 (“[t]he Chamber rejects the Prosecution’s argument that it is not obligated to disclose full screening notes of all its trial witnesses. The Court’s statutory scheme and jurisprudence take particular care to ensure that *prior remarks of witnesses the Prosecution intends to call at trial are disclosed to the defence*. [...] This indication is sufficiently broad, for purposes of disclosure, to include records of information provided by a trial witness during an interview, regardless of the question whether such a record would technically qualify as a “statement” of the witness for purposes of impeachment on the stand or submission under Rule 68 of the Rules”) (italics and emphasis added).

³³ *Prosecutor v. Karadžić*, IT-95-5/18-T, “Decision on Accused’s Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures”, 20 July 2010, para.29 (“the Trial Chamber is of the view that it is a statement which does fall within the scope of Rule 66(A)(ii) and should have been disclosed”).

³⁴ *Prosecutor v. Limaj et al.*, IT-03-66-T, “Decision on Joint Defence Motion on Prosecution’s Late and Incomplete Disclosure”, 7 June 2005, para.10 (“[t]he Prosecution acknowledges that the notes of Hashim Thaçi’s interview ought to have been, but were not, disclosed at an earlier time”).

³⁵ *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, “Decision on Prosecution Urgent Motion Related to Non-Compliance of Stanišić Defence With Rule 65ter(G) and Rule 67 of the Rules”, 12 October 2011, para.27 (“the term ‘statement’ in Rule 66(A)(ii) has been interpreted broadly in the Tribunal’s case law to include interview notes”); *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, “Decision on Milan Lukić’s Motion to Suppress Testimony for Failure of Timely Disclosure With Confidential Annexes A and B”, 3 November 2008, para.17 (“[s]imply placing the interview notes on the EDS was not sufficient for the Prosecution to discharge its positive obligation under Rule 66(A)(ii)”).

³⁶ *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, “Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Respect of Witness 81”, 18 November 2011, para.34 (“the Prosecution’s disclosure, on 19 October 2011, of the attorney’s notes of the interview was not timely and therefore in violation of Rules 66(A)(ii) and 68(i). The attorney’s notes contained statements by Witness 81”).

³⁷ *Prosecutor v. Norman et al.*, SCSL-04-14-PT, “Decision on Disclosure of Witness Statements and Cross-Examination”, 16 July 2004 (“*Norman et al.* Decision”), para. 22.

description is merely the “*usual* meaning of a witness statement,” rather than purporting to provide a limiting definition.³⁸

23. The “account of a person’s knowledge of a crime” description has never been applied as a limitation in the subsequent practice of the ICTY or ICTR in the circumstances addressed in the *Blaškić* decision. Transcripts of witness testimony are disclosed in their entirety under Rule 66(A)(ii) at the ICTY and ICTR. These transcripts include discussions of payments to witnesses, motivations to lie, the basis of alleged witness protection concerns, and non-case-related incidents of lying. Portions of such transcripts are not withheld on the basis that they are not an “account of a person’s knowledge of a crime.”
24. The Single Judge, upon whom the Trial Chamber relied without further analysis, cited three other decisions as well. The first is a Trial Chamber decision from the *Karemera* case at the ICTR which does no more than cite the *Blaškić* decision,³⁹ and whose outcome in no way depended on the issue under discussion. The second precedent is from the *Brima* case at the SCSL, which relied on a previous decision from the *Norman et al.* case, which also cited the *Blaškić* decision. The Single Judge neglected to analyse, however, an important passage from the *Norman et al.* Decision that elaborates on the definition of “statement”:

The fact that a witness statement is not, grammatically or, from the point of view of syntax, [...] in the “first person” but in the “third person” goes more to form than to substance, and does not deprive the materials in question of the core quality of a statement. The Trial Chamber agrees with the assertion given by the Prosecution at the 1 June 2004 Status Conference that a statement can be, “*anything that comes from the mouth of the witness*” regardless of the format.⁴⁰

³⁸ *Blaškić* Decision, para. 15 (italics added).

³⁹ *Bemba et al.* Decision, para. 9, fn. 9, citing *Prosecutor v. Karemera et al.*, ICTR-98-44-T, “Decision on Joseph Nziirorera’s Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and Other Measures”, 29 November 2007, para. 20.

⁴⁰ *Norman et al.* Decision, para. 22 (italics added).

This passage underscores the central importance of disclosing to the Defence all information coming directly from a Prosecution witness, without regard whether the information falls within some formal definition of a “statement.” Likewise, assessments of relevance cannot be used to deprive information from a witness of its quality of being a “statement” for purposes of disclosure.

25. The third decision cited by the Single Judge, appearing after a “see also” signal, contains nothing relevant to the proposed limitation on “statements” as being “an account of a person’s knowledge of a crime.”⁴¹
26. The *Blaškić* pronouncement, which was an *obiter dictum*, must also be counterpoised against numerous other judicial pronouncements that *all* statements, without any test of relevant or materiality, must be disclosed:
 - “the Prosecution is under an obligation to make available to the Defence copies of [...] all prior statements obtained by the Prosecution from the accused [...] it is the Chamber’s understanding that the same criteria as those identified in respect of the accused’s previous statements must apply *mutatis mutandis* to the previous statements of the witnesses indicated in Rule 66(A)(ii)”;⁴²
 - “once the Prosecutor decides to call some witnesses to testify, it goes without saying that she is bound, under Rule 66(A)(ii), to provide the Defence with all their statements in her custody or control regardless of whether such statements were obtained by her or from other sources. It also goes without saying that this requirement applies not only to all the prior statements obtained by the Prosecutor but also to testimonies before the Tribunal in other proceedings. The Defence is entitled to said statements under Rule (66)(A)(ii). *The Defence is not required to*

⁴¹ *Bemba et al.* Decision, para. 9, fn. 9, citing *Prosecutor v. Niyitegeka*, ICTR-96-14-A, Judgement, 9 July 2004, paras.34-35.

⁴² *Prosecutor v. Milutinović et al.*, IT-05-87-T, “Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)”, 29 September 2006, para. 15, fn. 17.

prove that they are material to its preparation of the trial as is the case for other items listed in Rule 66(B)”;⁴³

- “the Chamber reiterates the Prosecutor’s obligation pursuant to Rule 66(A)(ii) of the Rules to disclose all prior statements obtained by her of witnesses whom she intends to call to testify at trial”;⁴⁴
- “Rule 66(A)(ii) provides that the Prosecution shall disclose the copies of all statements and transcripts of interviews or testimonies by the witnesses on its Rule 65 *ter* list”;⁴⁵
- “[t]he purposes of Rule 66 is the disclosure of any prior statements that have been obtained. The Chamber notes that the obligation to disclose witness statements extends to all prior statements in the custody or under the control of the Prosecution”;⁴⁶ and
- “Rule 66(A)(ii) requires the Prosecution to ‘make available to the defence’ (a) copies of all statements of the witnesses whom it intends to call to testify at trial; and (b) copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, 92 *ter*, and Rule 92 *quarter* [...]”⁴⁷

27. These pronouncements demonstrate that the prevailing understanding at the ICTY and ICTR is that all statements of witnesses are subject to disclosure to the Defence. Rule 76(1), unlike Rule 77 of the Rules (and its counterpart Rule 66(B) of the ICTY Rules), contains no “materiality” test. The *Blaškić* statement

⁴³ *Prosecutor v. Mpambara*, ICTR-2001-65-I, “Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures”, 28 February 2002, para. 22 (italics added).

⁴⁴ *Prosecutor v. Ndayambaje*, ICTR-96-8-T, “Decision on the Defence Motion Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses”, 15 November 2001, paras. 24-25.

⁴⁵ *Prosecutor v. Stanišić & Zupljanin*, IT-08-91-T, “Decision on Joint Defence Motion Requesting Preclusion of Prosecution’s new Witnesses and Exhibits”, 31 August 2009, para. 16.

⁴⁶ *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, “Reasons for Decision on Postponement of Cross-examination of the Testimony of Witness Milovanović”, 22 July 2010, para. 8.

⁴⁷ *Prosecutor v. Karadžić*, IT-95-5/18-PT, “Decision on Motion on Modalities of Rule 66(A)(ii) Disclosure”, 27 April 2009, para. 3.

has never been understood or applied as curtailing the broad disclosure required under Rule 66(A)(ii), nor should it be imported into the jurisprudence of the ICC for that purpose.

III. ICC jurisprudence has rejected any “materiality” or “relevance” test in defining the words “any prior statements” under Rule 76(1)

28. The Impugned Decision confers an excessive discretion on the Prosecution to withhold from disclosure information coming directly from its witnesses. Indeed, pursuant to the Impugned Decision, the Prosecution may, for example, take the view that a particular statement by a witness about his security concerns is not relevant to the assessment of his credibility and, hence, not subject to disclosure under Rule 77 of the Rules. The Prosecution may also fail to apprehend that different statements about security are contradictory and, hence, fail to disclose them under Article 67(2) of the Statute. These consequences are likely in light of the wide discretion that the Trial Chamber has conferred upon the Prosecution in making these assessments under Rule 77.⁴⁸
29. Disputes about these matters will often never see the light of day. The Prosecution makes these determinations without any involvement of the Trial Chamber or the Defence. This increases the risk of good faith disclosure violations that severely damage the fairness and integrity of the trial proceedings.
30. Other disputes may arise retrospectively, as when the Defence subsequently learns that witness statements were not disclosed. Applications will then necessarily have to be brought to the Trial Chamber under Rule 77 based on the “materiality” standard, which will then presumably be required to review such statements *in camera*. A narrower scope of Rule 76(1) will necessarily shift disclosure issues into Rule 77 which, in turn, will engender extensive

⁴⁸ See Impugned Decision, para. 30; ICC-01/04-02/06-840-Conf-Exp, paras. 54-57.

litigation about the proper scope of “material to the preparation of the defence.” The litigation of such disputes is time-consuming and inefficient in themselves; their effects on trial efficiency and fairness could be catastrophic if a Trial Chamber determines retrospectively that the Prosecution erred in its assessment of what is material to the Defence.

31. The Prosecution is not in a position to comprehensively assess whether different witness statements raise issues of credibility, reliability and potential bias. On the other hand, the Defence is uniquely able to perform that function. This may be understood as the reason for the prophylactic and categorical rule of disclosure set out in Rule 76(1). The injection of a materiality test into Rule 76(1) runs directly contrary to its purpose, which is to eliminate any subjectivity in determining the scope of disclosure of the information most essential to the accused’s capacity to confront a witness in an adversarial proceeding.
32. ICC jurisprudence has previously rejected any materiality test for the definition of “any prior statement” under Rule 76(1) and has narrowly confined any exceptions to such disclosure even on the purported basis of security concerns. As stated in *Ruto*:

First, the Chamber rejects the Prosecution’s argument that it is not obligated to disclose full screening notes of all its trial witnesses. The Court’s statutory scheme and jurisprudence take particular care to ensure that prior remarks of witnesses the Prosecution intends to call to trial are disclosed to the defence. [...] Rule 76 of the Rules is not qualified in the same way as Rule 77 of the Rules, meaning that Rule 76 Statements must be disclosed even if they are not deemed by the Prosecution to be “material to the preparation of the defence”. The Appeals Chamber has also reasoned that “the ordinary meaning of the term ‘statement’ as used in Rule 76 of the Rules is broad and requires the Prosecution to disclose any prior statements, irrespective of the form in which they are produced. This indication is sufficiently broad, for purposes of disclosure, to include records of information provided by a trial witness during an interview, regardless of the question whether such a record would technically qualify as a

“statement” of the witness for purposes of impeachment on the stand or submission under Rule 68 of the Rules.⁴⁹

These screening notes typically included security information, but the Trial Chamber nevertheless rejected the Prosecution’s request for a broad exemption from disclosure of such material:

As to the Prosecution’s requests for category B.2 and B.3 redactions, the Chamber recalls its recent findings on a similar Prosecution redaction request that: (i) it was generally not convinced by standardised justifications that a person is a family member of a witness was sufficient, without more, to demonstrate the existence of an objectively justifiable risk and (ii) general references to security concerns were insufficient to establish an objectively justifiable risk to a person’s security. The Chamber notes up front that the Prosecution’s argumentation in the present case is similarly problematic, as the Prosecution makes widespread use of standardised justifications and generalised security concerns.⁵⁰

33. This reasoning (i) affirms that “statement” should not be subject to any materiality test, such as the *Blaškić* test; and (ii) confines non-disclosure on security grounds to the purview of the redactions regime. This strikes the appropriate balance between security concerns and disclosure of all statements of witnesses whose impeachment value can only be assessed by the Defence.
34. The Impugned Decision reaches a starkly different conclusion, asserting that disclosure of witness statements: (i) are not categorically subject to disclosure under Rule 76(1); and (ii) that the Prosecution has the discretion to make a “case-by-case assessment” as to whether such security related statements are subject to disclosure.⁵¹ The Trial Chamber accords far more discretion to the Prosecution in respect of witness statement disclosure than is permitted under the Rules or justified by trial fairness.

⁴⁹ *Ruto & Sang case, “Decision on Defence request to be provided with screening notes and Prosecution’s corresponding requests for redactions”, ICC-01/09-01/11-743-Red, 20 May 2013, para. 20.*

⁵⁰ *Id.*, para. 26.

⁵¹ Impugned Decision, para. 30.

IV. The Impugned Decision ignores the particular statutory framework of the ICC

35. Aside from ignoring the clear words of Rule 76(1) of the Rules requiring disclosure of “any prior statements” (as opposed to “statements of all witnesses” in Rule 66(A)(ii) of the ICTY Rules), the Impugned Decision also fails to take acknowledge that the ICC Statute presupposes proceedings that somewhat less adversarial than at the ICTY. Article 54(1) obliges the Prosecution to:

establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.

36. The best way to ensure that exonerating circumstances are fully investigated and adduced before the Judges is to accord generous disclosure to the Defence. Security-related information that is genuinely sensitive can be redacted; withholding statements as a whole serves no purpose other than to make proceedings more adversarial and less expeditious.

RELIEF SOUGHT

37. In light of the above arguments and submissions, the Defence respectfully requests the Appeals Chamber to:

QUASH Trial Chamber VI’s definition of ‘statement’ within the meaning of Rule 76 of the Rules;

DEFINE Rule 76(1) as requiring disclosure of *all* statements given to the Prosecution by its witnesses in the Prosecution’s possession; and

ORDER the Prosecution to immediately disclosure “any prior statements” of its witnesses in accordance with Rule 76(1).

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF DECEMBER 2015

A handwritten signature in black ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands