



Original: English

No.: ICC-01/04-02/06
Date: 18 December 2015

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański
Judge Raul C. Pangalangan

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Document *with* Public Annex

Response to Bosco Ntaganda's appeal against the "Decision on Defence request seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses"

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Helen Brady

Counsel for the Defence

Mr Stéphane Bourgon

Mr Luc Boutin

Legal Representatives of the Victims

Ms Sarah Pellet

Mr Dmytro Suprun

REGISTRY

Registrar

Mr Herman von Hebel

Introduction

1. The Appeal filed by the Defence of Mr Bosco Ntaganda (“Defence”) should be dismissed. Contrary to the Defence’s contention, the Trial Chamber correctly held that “not all items containing information obtained from a witness will necessarily constitute a ‘statement’ within the meaning of Rule 76 of the Rules [of Procedure and Evidence]” and that such statements “are made only when witnesses are questioned about their knowledge of the case in the course of its investigation”.¹
2. None of the four Defence arguments demonstrates that the Decision is wrong in law. The Chamber’s definition of the term “statement” is consistent with the framework of the Rome Statute and the Rules, the plain wording of rule 76 and this Court’s jurisprudence. Not all utterances by a witness are statements within the meaning of rule 76; only those which relate to the witness’ “knowledge of the case” fall within that term. The Chamber’s approach in this respect is further supported by the practice of other international criminal courts and tribunals. The Appeal should therefore be dismissed.
3. In addition, the Appeal is formally defective because it fails to make any express argument as to how the alleged error of law materially affects the Decision. Although the Chamber certified only a legal question for these proceedings, this does not lift the ordinary burden of argumentation which lies upon an appellant.

Submissions

4. To sustain its assertion that the Decision was wrong in law, the Defence articulates four arguments.² To reflect the primacy of this Court’s own legal

¹ Decision, para. 29. For long-form citations of all references, see Annex. According to the Decision, prior statements by witnesses must be disclosed “irrespective of the form in which they are recorded [and] may include screening notes, interview notes or investigators’ notes”,¹ as well as those given to “entities other than the Prosecution” (Decision, para. 29, endorsing *Bemba et al.* Decision, para. 9).

² See Appeal, paras. 17-19 (“First Argument”), 20-27 (“Second Argument”), 28-34 (“Third Argument”), 35-36 (“Fourth Argument”).

framework,³ the Third, Fourth and Second Arguments have been reordered accordingly.

A. The Chamber's definition of the term "statement" within the meaning of rule 76 is consistent with the plain wording of that rule (First Argument)

5. The Defence wrongly suggests that the Chamber "departed from the 'ordinary meaning' of the actual words" of rule 76(1)—which requires the Prosecution to disclose *any* prior statement of its witnesses—by introducing a qualification before the phrase "prior statement".⁴ The Defence's submission is based on the wrong premise that with the word "*any*" the legislator wanted rule 76(1) to be applied to *each and every* one of a witness' utterances and interactions with the Prosecution. Yet to the contrary, the Prosecution is obliged only to disclose all existing *statements* in its possession.
6. Indeed, the Prosecution is under no obligation to obtain a statement or to record every utterance of its witnesses.⁵ Rule 76(1) reflects this reality and requires the Prosecution to provide the Defence with statements *only when any* such statement exists. As explained by Trial Chamber VII: "[b]y use of the word 'any', the provision's plain language indicates that the Prosecution may satisfy its Rule 76(1) obligations *when* there are no prior statements to provide."⁶
7. In other words, when requiring the Prosecution to disclose "any" statement, rule 76(1) does not oblige the Prosecution to disclose each and every utterance of a witness—as the Defence appears to imply—but to disclose statements in existence and in its possession. It would be incongruous to suggest, as the Defence seems to do, that the Prosecution has an obligation to disclose, as a matter of law, each and every utterance when it is not incumbent upon the

³ Article 21; see also ICC-01/04-168 OA3, para. 33.

⁴ *Contra* Appeal, para.18.

⁵ *Banda* Translation AD, para 28. See also *Bemba et al* Witness TD, para.9.

⁶ *Bemba et al* Witness TD, para.9 (emphasis added).

Prosecution to make and keep records of every interaction with (or utterance of) its witnesses.

8. For this reason, far from departing from the ordinary meaning of rule 76(1), the Chamber defined what constitutes *a* statement and reiterated the Prosecution's obligation to disclose them. Finding, as the Chamber did, that Rule 76(1) does not apply to material *not constituting* a "statement" is perfectly consistent with the ordinary meaning of rule 76(1).⁷
9. The Defence further argues that the Chamber's reference to jurisprudence of the *ad hoc* tribunals is "methodologically flawed" because it fails "to acknowledge or address the different wording of the provisions being applied by the *ad hoc* tribunal chambers".⁸ This argument is based on a wrong premise, namely that rule 76(1) (requiring the Prosecution to disclose "*any* statement") imposes broader disclosure obligations than ICTY Rule 66(A)(ii) (requiring the Prosecution to disclose "the statements").⁹ To the contrary, although phrased differently, the two provisions impose upon the Prosecution the same obligation: to disclose to the Defence statements that may exist in the Prosecution's possession—and not to disclose *each and every* one of a witness' recorded utterances or interactions with the Prosecution. In fact, the Australian proposal which formed the basis for rule 76 was derived from ICTY Rule 66(A)(ii).¹⁰ This is further confirmed by the fact that ICTY Trial Chamber I used very similar wording to rule 76(1) to describe the scope of ICTY Rule 66: "The purpose of Rule 66 is the disclosure of *any* prior statements that have been obtained."¹¹
10. The First Argument should therefore be dismissed.

⁷ As for the scope of the meaning "statement" under rule 76 and the resulting disclosure obligation, see submissions in response to the Third Argument below.

⁸ *Contra* Appeal, para. 19. *See further below* paras. 23-35.

⁹ *Contra* Appeal, paras. 18-19.

¹⁰ Rule 67 of the Australian proposal titled "Pre-trial disclosure relating to Prosecution witnesses" formed the basis for Rule 76 and it expressly draws on ICTY Rule 66, *see* Australian Proposal, p. 36. *See also* Brady, pp.408-409.

¹¹ *Stanišić and Simatović* Postponement TD, para.8.

B. Requiring statements under rule 76 to relate to the witness' "knowledge of the case" accords with the context of the rule, and the broader object and purpose of disclosure (Third Argument)

11. The Defence incorrectly submits that the Decision erroneously injects a "materiality" or "relevance" criteria for deciding whether a statement falls within the term "any prior statements" in Rule 76(1), and accordingly gives the Prosecution excessive discretion to withhold from disclosure information coming directly from a witness. According to the Defence, all recorded utterances of a witness constitute a "statement" under rule 76, irrespective of their content or relevance to the case.¹²
12. Contrary to the Defence's claim, identifying an utterance as a "statement" for the purpose of rule 76 is not a matter of discretion but, rather, requires the routine application of law to a question of fact. While imposing some limits, the Decision rightly takes a broad approach to defining a "statement" within the terms of rule 76. Thus, prior statements by witnesses must be disclosed "irrespective of the form in which they are recorded [and] may include screening notes, interview notes or investigators' notes",¹³ as well as those given to "entities other than the Prosecution".¹⁴ The Decision only required "statements" under rule 76 to relate to the witness' "knowledge of the case",¹⁵ and to have been obtained in the context of the investigation of the case.¹⁶ In so doing, the Decision requires a logical link between the subject of the witness' statement and the facts being investigated or prosecuted in the case. Contrary to the Defence's contention, this requirement is both fair and procedurally sound,¹⁷ and accords with the prior

¹² Appeal, paras. 20-27.

¹³ Decision, para. 29. *See also Banda* Translation AD, paras. 23, 27.

¹⁴ The Trial Chamber endorsed the *Bemba et al* Decision, para. 9 (citing also *Lubanga* Disclosure TD, p. 4) (Decision, para. 29).

¹⁵ Decision, para. 29.

¹⁶ The Defence incorrectly assumes that the term "its" in the Decision's reference to the witness' "knowledge of the case in the course of its investigation" (Decision, para.29) refers to the Prosecution's investigation only: Appeal, para. 15. However, the pronoun should be read to refer to the investigation of *the case*. (see ICC-01/04-02/06-1039, para. 17 and footnote 30).

¹⁷ *Contra* Appeal, paras. 28-31.

jurisprudence of the Court.¹⁸ It does not circumvent the regime for restrictions on disclosure on security grounds under rule 81(4).¹⁹

(i) *The Decision ensures that the trial is fair and expeditious*

13. The Defence submits that providing the Prosecution with discretion not to disclose any utterance of a witness affects the fair and expeditious conduct of the proceedings because the Prosecution may be unable to fully assess the existence of a link between the utterance and the facts of the case, and this could impact the Accused's capacity to confront a witness.²⁰
14. These arguments misunderstand the Decision. The Decision excludes from disclosure under rule 76 only those utterances of a witness that are wholly unrelated to his or her "knowledge of the case", and therefore only those utterances with no meaningful link to the facts being investigated or prosecuted in the case. This is quite different from the test under rule 77 (material to the preparation of the defence).²¹ The test articulated in the Decision only excludes utterances that are clearly irrelevant to the case and therefore serve no forensic purpose in the case. Rule 77 provides an independent guarantee that utterances which are material to the preparation of the Defence will in any event be disclosed, whether they constitute a "statement" (in the meaning of rule 76) or not.

¹⁸ *Contra* Appeal, para. 32.

¹⁹ *Contra* Appeal, paras. 28, 33-34.

²⁰ Appeal, para. 28-31.

²¹ It is true that the Appeals Chamber has ruled that the term "'material to the preparation of the defence' must be interpreted broadly". However, it clarified that the term is not unlimited and held that that this includes "objects which, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence": *Lubanga* Oral Decision AD, paras. 77-78; *see also Banda* AD, paras. 28-29; *Lubanga* TD, para. 16; *Lubanga* Disclosure AD, para. 10. In its reasoning, the Appeals Chamber endorsed the ICTY decision in *Delalić*, according to which the "requested evidence must be 'significantly helpful to an understanding of important inculpatory or exculpatory evidence'": *Lubanga* Oral Decision AD, para. 81 (emphasis supplied, quoting *Delalić* TD, para.7. In *Delalić*, the ICTY Trial Chamber further quoted U.S. case law, which held that for information to be material to the preparation of the defence, "more than [an] abstract logical relationship to the issue" must be established: *see Ross*, 762. Information is "material" if there "is a strong indication that [...] it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal'": *see Jackson*, 1503 (quoting *Lloyd*, 351). Reliance on this case law is particularly apposite, as the wording of Rule 77 and the related rule applicable at the ICTY are based on Rule 16(a)(1)(c) of the United States' Federal Rules of Criminal Procedure.

15. The definition of the word “statement” in the Decision does not affect the fair or expeditious conduct of the proceedings or the rights of the Accused. To the contrary, if the Prosecution was required to disclose to the Defence all utterances of a witness, regardless of their content, it could result in the Defence being flooded with irrelevant information. This could impact on the time required by the Defence to analyse the disclosed information and its ability to prepare the defence. In addition, because all statements disclosed under rule 76 must be made available both in their original language and in a language which the accused fully understands and speaks,²² the translation of irrelevant information would not only delay the proceedings, but would also significantly impact on the Court’s resources for no tangible benefit.
16. Contrary to the Defence’s contention, it cannot be assumed that the Prosecution is unable to identify which utterances are “statements” within the meaning of rule 76.²³ In the *Lubanga* case, the Appeals Chamber held that the Prosecution’s disclosure duties “must necessarily be based, *inter alia*, on the Prosecutor’s understanding of the case as a whole, including what is known or anticipated about possible defence(s).”²⁴ The examples adduced by the Defence (issues concerning credibility, reliability or potential bias)²⁵ relate to the Prosecution’s disclosure obligations under rule 77 and article 67(2). As stated by the Decision, “it is important to distinguish between the different legal bases upon which statements of a witness may be disclosable”.²⁶ Therefore, witness’ utterances that do not fall within the scope of rule 76, but contain information regarding credibility, reliability or potential bias of witnesses must be disclosed pursuant to rule 77 or article 67(2). Accordingly, the Trial Chamber’s notion of the term “statement” under rule 76 causes no unfairness to the Accused. The Defence’s arguments to that effect should be dismissed.

²² Rule 76(3).

²³ Appeal, paras. 28, 31.

²⁴ *Lubanga* Oral Decision AD, para. 36.

²⁵ Appeal, paras. 28, 31.

²⁶ Decision, para. 28.

(i) *The Decision is consistent with the prior jurisprudence of the Court*

17. The Trial Chamber's finding that witness statements under rule 76 must relate to the witness' "knowledge of the case"²⁷ is consistent with the jurisprudence of the Court.²⁸ It is based on a finding of Trial Chamber VII,²⁹ as well as on a prior finding of the same *Ntaganda* Trial Chamber.³⁰
18. The one decision of Trial Chamber V in the *Ruto and Sang* case relied on by the Defence³¹ is not inconsistent with those authorities and therefore demonstrates no error in the Decision. First, the scope of the *Ruto* Decision was not to determine whether any information emanating from a witness qualified as a "statement" which therefore had to be disclosed under rule 76,³² but rather whether screening notes of a witness were disclosable.³³ Second, the *Ruto* Decision merely emphasised that the Prosecution's disclosure obligation under rule 76, unlike that under rule 77, is not subject to an assessment whether the statement is "material to the preparation of the defence" and that disclosure under rule 76 is not dependent on the form in which a statement was recorded.³⁴ As noted above, these findings are consistent with the Decision and the Prosecution does not dispute them.³⁵ Third, the Defence's interpretation of the *Ruto* Decision is inconsistent with a prior Decision of Trial Chamber V in the *Ruto and Sang* case, which stressed that the Prosecution's disclosure obligation under rule 76 covers "all *incriminatory* material in the form of witness statements and any *other material to be relied on at trial*".³⁶ The Defence's submissions should therefore be dismissed.

²⁷ Decision, para. 29.

²⁸ *Contra* Appeal, para. 32.

²⁹ *Bemba* Decision, para. 9.

³⁰ *Ntaganda* Postponement Decision, para. 53. Both decisions are referenced in Decision, footnote 59.

³¹ *Ruto* TD, paras. 20, 26.

³² *Ntaganda* First Decision, para. 19.

³³ *Ruto* TD, para. 19.

³⁴ *Ruto* TD, para. 20.

³⁵ See para. 12 above (on the irrelevance of form in which a "statement" is taken) and para. 14 above (on the difference between the scope of rules 76 and 77).

³⁶ *Ruto* Schedule TD, para. 14.

- (ii) *The Decision does not circumvent the regime for restrictions on disclosure on security grounds under rule 81(4)*

19. The Defence incorrectly submits that, under the Decision, the Prosecution has discretion to make a “case-by-case assessment” as to whether security-related statements are subject to disclosure, thereby circumventing the redaction regime under rule 81(4).³⁷ This argument is predicated on an incorrect interpretation of the Decision. Like rule 77,³⁸ an assessment under rule 76 has two stages: First it must be determined whether a witness’ utterance falls within the scope of rule 76, including whether it relates to the witness’ “knowledge of the case” (i.e. whether it constitutes a “witness statement”). If it does, then the Prosecution must disclose the information to the Defence. Second, any restrictions of the Prosecution’s disclosure obligation under rule 76 are subject to a case-by-case assessment and a decision by a Chamber of the Court on whether grounds for restrictions on disclosure under rules 81 or 82 apply,³⁹ while ensuring that the rights of the Accused are fully protected.⁴⁰
20. Therefore, the Decision merely requires the Prosecution to determine whether a witness’ utterance relates to his or her knowledge of the case and therefore falls within the scope of rule 76.⁴¹ The Prosecution has no discretion to withhold disclosure in the event that it determines that the security information relates to the witness’ knowledge of the case. Nor in any event does it have any discretion to withhold disclosure of such information if it falls within the scope of rule 77 or article 67(2).⁴²
21. The Decision is thus fully consistent with the jurisprudence of the Appeals Chamber and the Defence’s Third Argument should therefore be rejected.

³⁷ Appeal, paras. 33-34.

³⁸ *Banda* AD, paras. 1, 35.

³⁹ *Banda* AD, paras. 1, 35.

⁴⁰ *Katanga* First Redaction AD, paras. 62-63, 66; *Katanga* Second Redaction AD, paras. 58, 65; *Lubanga* Non-Disclosure AD, paras. 46-47; *Lubanga* Rule 81 AD, para. 36; *Ngudjolo* AD, paras. 34-35. See also *Gbagbo* TD, para. 29; *Bemba et al* Rule 81 TD, p. 3.

⁴¹ Decision, para. 30.

⁴² Decision, paras. 28, 30; *Banda* AD, para. 35.

C. The Decision is otherwise consistent with the statutory framework of the Court (Fourth Argument)

22. Without providing additional arguments, the Defence further submits that the Decision ignores the statutory framework of the Court.⁴³ As demonstrated above, the Decision is fully consistent with both the ordinary meaning and context of rule 76, and is both fair and procedurally sound. Nor does the Decision violate the scheme for restrictions on disclosure under rule 81. On the contrary, it follows the relevant jurisprudence both of the Trial Chambers and the Appeals Chamber. In such circumstances, the Defence's undeveloped Fourth Argument must simply be rejected.

D. The jurisprudence of other courts also supports the correctness of the Decision (Second Argument)

23. The Defence wrongly suggests that the Chamber erred in its reliance upon the jurisprudence of *ad hoc* tribunals such as the ICTY, ICTR, or the SCSL.⁴⁴ This is incorrect in two respects.
24. First, the Chamber did not apply the *ad hoc* tribunals' jurisprudence uncritically, nor indeed was this material crucial to its conclusion. Rather, the Chamber construed the constituent documents of this Court,⁴⁵ and this Court's jurisprudence,⁴⁶ and then determined that the view evinced by those sources "is also consistent with the jurisprudence of other international courts and tribunals."⁴⁷ This follows the approach of the Appeals Chamber, which considered that it is "appropriate to seek guidance" from such jurisprudence where the tribunal(s) in question apply similar legal criteria to those found in

⁴³ Appeal, paras. 35-36. The Defence makes general references to submissions advanced under the First, Second and Third Arguments.

⁴⁴ *Contra* Appeal, paras. 19-20

⁴⁵ See Decision, paras. 28-29 (referring to rules 76(1) and 77 and article 67(2) of the Statute).

⁴⁶ See Decision, para. 29 (referring to *Ntaganda* First Decision; *Bemba et al* Decision).

⁴⁷ Decision, para. 29 (emphasis added).

“the Court’s legal texts”.⁴⁸ In this context, the Chamber was not required to analyse the jurisprudence of the *ad hoc* tribunals in great detail.⁴⁹

25. Second, in any event and contrary to the Defence’s claim, the *ad hoc* tribunals’ jurisprudence *does* support the conclusion that “not all items containing information obtained from a witness will necessarily constitute a ‘statement’ within the meaning of [r]ule 76” and that such statements “are made only when witnesses are ‘questioned about their knowledge of the case in the course of its investigation’”.⁵⁰ Not only does the Defence misinterpret the definition of “statement” applied at the *ad hoc* tribunals, but it also erroneously confuses disclosure of material as a witness’ prior statement and disclosure of material which is potentially exculpatory or otherwise material for the preparation of the defence.

(iii) *The Blaškić definition is correct*

26. The leading decision of the ICTY Appeals Chamber in *Blaškić* is not merely “a decision from the year 2000” which has “never been understood” as “limiting the definition of ‘statements’”.⁵¹ Nor is it convincing to suggest that the ICTY Appeals Chamber’s express characterisation of its definition as the “usual meaning of a witness statement” in some way means that the definition was not intended to be of general application.⁵²
27. In *Blaškić*, as Trial Chamber VII in the *Bemba et al* Decision correctly recalled,⁵³ the ICTY Appeals Chamber noted that the ICTY’s rules “do not define what constitutes a witness statement”, but proposed the following definition:

[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.⁵⁴

⁴⁸ See *Lubanga* AJ, para. 63. See also para. 53.

⁴⁹ *Contra* Appeal, paras. 19-21.

⁵⁰ Decision, para. 29. *Contra* Appeal, paras. 21, 23-24, 26-27.

⁵¹ *Contra* Appeal, para. 22.

⁵² *Contra* Appeal, para. 22.

⁵³ See *Bemba et al* Decision, para. 9, fn. 9.

⁵⁴ *Blaškić* AD, para. 15.

28. This definition was not confined to its own particular facts.⁵⁵ Rather, it has been consistently followed and applied in ICTY cases including *Milutinović et al* (2006 and 2007),⁵⁶ *Lukić and Lukić* (2008),⁵⁷ and *Haradinaj et al* (2011);⁵⁸ ICTR cases including *Karemera* (2007)⁵⁹ and *Gatete* (2009);⁶⁰ and SCSL cases including *Norman* (2004).⁶¹ It is also consistent with *Black's Law Dictionary*, as quoted by the SCSL Trial Chamber in *Norman*, which defines a statement relevantly as:

[...] 3. *Criminal Procedure*. An account of a person's (usu. a suspect's) knowledge of a crime, taken by the police pursuant to their investigation of the offence.⁶²

29. Likewise, in *Niyitegeka*, although the ICTR Appeals Chamber apparently overlooked the *Blaškić* decision,⁶³ its conclusions were compatible with this consistent jurisprudence. Thus it considered that "[r]ecords of questions put to witnesses by the Prosecution and of the answers given constitute witness statements".⁶⁴

30. The Prosecution agrees with the Defence that the reference to "due procedure" in the *Blaškić* definition has not been read narrowly to impose strictly formal requirements on the manner in which a statement is given.⁶⁵ Rather, what matters in determining whether a document is a disclosable prior statement is the *source* of the utterance (the intended witness) and its *content* (usually,

⁵⁵ *Contra Appeal*, para. 22.

⁵⁶ *Milutinović et al* First TD, para. 14 (citing *Blaškić* AD, para. 15); *Milutinović et al* Second TD, para. 12 (citing *Blaškić* AD, para. 15).

⁵⁷ *Lukić and Lukić* TD, para. 12 (citing *Blaškić* AD, para. 15).

⁵⁸ *Haradinaj et al* TD, para. 26 (citing *Blaškić* AD, para. 15).

⁵⁹ *Karemera et al* TD, para. 20 (citing *Blaškić* AD, para. 15).

⁶⁰ *Gatete* TD, para. 11 (citing *Blaškić* AD, para. 15).

⁶¹ *Norman* TD, para. 10, fn. 5 (citing *Blaškić* AD, paras. 15-16).

⁶² *Norman* TD, para. 9 (citing *Black's Law Dictionary*, 7th Ed., 1999, p. 1416).

⁶³ *Niyitegeka* AJ, para. 30 (stating, without citation, "[t]he Appeals Chamber notes that neither the ICTR nor ICTY has provided a clear definition of the term 'statement'").

⁶⁴ *Niyitegeka* AJ, para. 33. *See also* paras. 29 (rejecting the assertion that a previous Trial Chamber had suggested "the Prosecution has an obligation to obtain, secure or make available to the Defence its own internal material created at the time of the interview"), 31 ("ideally [...] specific events [...] that could have an impact on the statement or its assessment should be recorded as well"), 34 (questions "once put to a witness" do not constitute an internal note protected by work product privilege, but questions or other notes which are not put to the witness are "not subject to disclosure"). In *Karemera*, the Trial Chamber also appeared to ascribe to the *Niyitegeka* Appeals Chamber the view that "any statement or declaration made by a witness in relation to an event he or she witnessed and recorded in any form by an official in the course of investigation, falls within the meaning of a 'witness statement'" but this does not appear to be supported by the citation given: *see Karemera et al* TD, para. 20, fn. 24. *Cf. Appeal*, para. 25.

⁶⁵ *See Appeal*, para. 22.

whether it is an account of a person's knowledge of a crime). This assessment of content is entirely distinct from the assessment of "materiality" for the purpose of that distinct head of disclosure.⁶⁶

31. The following decisions cited by the Defence conform to these principles.⁶⁷ In fact, the imperative to disclose "all statements" in the possession of the Prosecution does not shed any further light on the definition of what a statement actually *is*.⁶⁸

- In *Blaškić*, the ICTY Appeals Chamber considered that "testimony" of a witness in prior proceedings was "a witness statement for [...] subsequent proceedings".⁶⁹
- In *Ndayambaje and Nsabimana*, the ICTR Trial Chamber considered that "statements of Prosecution detained witnesses, including any possible confessions"—apparently pertaining to relevant "judicial proceedings" in Rwanda—were disclosable prior statements.⁷⁰
- In *Mpambara*, the ICTR Trial Chamber referred as examples of disclosable prior statements to "prior statements obtained by the Prosecutor" (without defining them further) and "testimonies before the Tribunal in other proceedings".⁷¹
- In *Norman*, the SCSL Trial Chamber referred as examples of disclosable prior statements to "transcribed trial testimony, radio interviews, unsigned witness declarations and records of questions put to witnesses and answers given".⁷²

It emphasised the "substance" not the "form" of a document in ascertaining

⁶⁶ *Contra* Appeal, para. 27. See *Mpambara* TD, para. 23. In *Ndayambaje and Nsabimana*, an early decision at the ICTR, the Trial Chamber endorsed the view that "the statements of Prosecution witnesses [...] are material to the preparation of the Defence [...] and accordingly [...] should be disclosed to the Defence pursuant to Rule 66(a)(ii) [i.e., as prior statements]". However, subsequently, the same Trial Chamber makes clearer that the duty to disclose prior statements is not contingent upon their "materiality". See *Ndayambaje and Nsabimana* TD, paras. 19, 24.

⁶⁷ *Contra* Appeal, paras. 22-23.

⁶⁸ *Contra* Appeal, para. 27.

⁶⁹ See *Blaškić* AD, paras. 15-16.

⁷⁰ See e.g. *Ndayambaje and Nsabimana* TD, paras. 3, 19.

⁷¹ See *Mpambara* TD, para. 23.

⁷² See *Norman* TD, para 10.

whether it has “the core quality of a statement”.⁷³ It stressed that this core quality relates to any utterance “in relation to an event [...] witnessed and recorded in any form by an official in the course of an investigation”.⁷⁴

- In *Limaj et al*, the ICTY Trial Chamber appeared to accept *arguendo* that “statements of witnesses” to national authorities may constitute disclosable prior statements.⁷⁵
- In *Milutinović et al*, the ICTY Trial Chamber considered that disclosable prior statements include “refugee interview records” collected by “humanitarian organisations for the purpose of recording allegations of human rights abuses, when these are passed to the Prosecution in order to assist it in identifying potential lines of inquiry which then result in the persons who gave the original statements becoming witnesses”.⁷⁶ The ICTY Trial Chamber’s passing remark that disclosure of such documents would also be consistent in that case with the approach to disclosure of statements by the accused person assists the Defence no further.⁷⁷
- In *Karemera et al*, the ICTR Trial Chamber considered that “an e-mail from an OTP investigator [...] concerning [the witness’] complaints against the Defence team” was *not* a disclosable prior statement because it did not deal “with an issue relevant to the charges against the Accused.”⁷⁸ The Defence appears completely to overlook this point.⁷⁹
- In *Lukić and Lukić*, the ICTY Trial Chamber considered that interview notes recording the witness’ “recollections regarding events [...] that relate to

⁷³ Norman TD, para. 22. See also para. 24.

⁷⁴ Norman TD, para. 23. See also para. 25 (explaining further that the relevant duty is “for the Prosecution to diligently disclose witness statements *that identify matters that witnesses will testify about at trial, thereby providing the Defence with essential information for the preparation of its case*”, emphasis added).

⁷⁵ See *Limaj et al* TD, paras. 16-18.

⁷⁶ See *Milutinović et al* First TD, paras. 8, 14, 17-18.

⁷⁷ *Contra* Appeal, para. 26. See *Milutinović et al* First TD, paras. 15-21.

⁷⁸ See *Karemera et al* TD, paras. 26-27. The Trial Chamber thus rejected the Defence position that the e-mail was a prior disclosable statement simply because “the e-mail recounts what [the witness] had told the investigator”.

⁷⁹ See Appeal, para. 24 (dismissing *Karemera* as doing “no more than cit[ing] the *Blaškić* decision” with its “outcome in no way depend[ing] on the issue under discussion”).

charges in the Indictment” clearly “fall within the meaning of ‘witness statement’”.⁸⁰

- In *Stanišić and Župljanin*, the ICTY Trial Chamber considered that “witness declarations or statements” taken by national authorities constituted disclosable prior statements.⁸¹ This material in fact comprised proofing notes or supplemental statements, transcripts of witness testimony, statements or transcripts provided to national courts or investigative authorities, transcripts of interviews with ICTY investigators, and statements to Defence teams.⁸²
- In *Karadžić*, the ICTY Trial Chamber considered that “information report[s]” concerning interviews by investigators with witnesses and proofing notes constituted disclosable prior statements.⁸³
- In *Stanišić and Simatović*, the ICTY Trial Chamber recalled that “interview notes” may constitute disclosable prior statements.⁸⁴
- In *Haradinaj et al*, the ICTY Trial Chamber considered that “[a]nything that a witness says or writes which is relevant to an indictment” may constitute a disclosable prior statement.⁸⁵ Furthermore, it did *not* regard “all records of contacts” or “all communications” between the Prosecution and a witness as constituting disclosable statements.⁸⁶

32. Accordingly, the jurisprudence of the UN *ad hoc* Tribunals is consistent with the *Blaškić* decision by clarifying that the content of a document is (i.e. whether it is an account of a person’s knowledge of a crime) is a relevant consideration to determine whether it is disclosable as a prior statement.

⁸⁰ See *Lukić and Lukić* TD, para. 16.

⁸¹ See *Stanišić and Župljanin* TD, para. 17.

⁸² See *Stanišić and Župljanin* Clarification, paras. 7, 14-22.

⁸³ See *Karadžić* First TD, paras. 29, 39-40, 42.

⁸⁴ See *Stanišić and Simatović* TD, para. 27. *But see further* para. 10 (noting Prosecution submission that documents statements may be redacted to preserve internal work product not put to the witness).

⁸⁵ See *Haradinaj et al* TD, para. 32.

⁸⁶ See *Haradinaj et al* TD, paras. 44-45.

33. The Defence places too much weight on the passing observation in *Norman* that “a statement can be ‘anything that comes from the mouth of the witness’ regardless of the format”.⁸⁷ This dictum does not support the view that “all information coming directly from a Prosecution witness, without regard whether the information falls within some formal definition” or any “assessment[] of relevance”, constitutes a statement.⁸⁸ Rather, when its *dictum* is read in context, the SCSL Trial Chamber supports the *Blaškić* approach. Indeed, as already noted, although the *format* of a disclosable prior statement may be anything coming “from the mouth of the witness”, its *content* must still relate to the “event” he or she “witnessed”, so that it will “identify matters that witnesses will testify about at trial”.⁸⁹ This is, moreover, consistent with the approach in *Karemera* and *Haradinaj*, where Trial Chambers expressly rejected the view that *all* utterances by a witness constitute disclosable statements.⁹⁰

(iv) *Disclosure of material not constituting a “statement” may be done according to other rules*

34. The Defence is also incorrect in its further argument that the requirement in the *Blaškić* definition for a statement to contain an “account of a person’s knowledge of a crime” has “never been applied as a limitation in the subsequent practice of the ICTY or ICTR”.⁹¹ The Defence merely speculates when it contends that “[t]ranscripts of witness testimony” at the ICTY/R are disclosed “in their entirety” as prior statements, and that such transcripts may include unredacted “discussions of payments to witnesses, motivations to lie, the basis of alleged witness protection concerns, and non-case-related incidents of lying”.⁹² The Prosecution at this Court is, for obvious reasons, not in a position to assert whether the Offices of the Prosecutor at the ICTY or ICTR ever exercised their

⁸⁷ *Contra* Appeal, paras. 22, 24 (citing *Norman* TD, para. 22).

⁸⁸ *Contra* Appeal, paras. 24, 27.

⁸⁹ See *Norman* TD, paras. 22-23, 25.

⁹⁰ See *above* fns. 78, 86. *Contra* Appeal, para. 23.

⁹¹ *Contra* Appeal, para. 23.

⁹² Appeal, para. 23.

discretion not to redact information they may have been entitled to redact,⁹³ especially as the Defence claims are advanced without citation to any concrete case. Yet in any event the legal inference which the Defence seeks to make from any such practice is unjustified.

35. Indeed, consistent with the approach in *Karemera* and *Haradinaj* previously described,⁹⁴ other ICTY decisions confirm that utterances by a witness merely relating to security concerns, logistical matters, or similar are *not* disclosable as prior statements. For example, in *Karadžić*, the Trial Chamber ruled that the accused person was not in ordinary circumstances entitled to disclosure of documents concerning witnesses' security concerns or logistical arrangements.⁹⁵ Likewise, it agreed that the accused person was not entitled to access all "material provided by sensitive witnesses".⁹⁶ To the extent that such utterances by a witness were disclosed at the ICTY/R, this occurred if the relevant criteria for separate forms of disclosure were met—specifically, if those utterances were material to the preparation of the defence or if they were potentially exculpatory.
36. For the reasons above, the Second Argument should be dismissed.

⁹³ See e.g. *Ndayambaje and Nsabimana* TD, para. 24 (discussing the duty to disclose prior statements but "emphasis[ing] the Prosecutor's obligation to take all necessary action to facilitate the translation and, if applicable, the redaction of statements").

⁹⁴ See above para. 32; also fns. 78, 86.

⁹⁵ See e.g. *Karadžić* Second TD, paras. 19-20, 23-24, 26. Although these decisions were primarily concerned with the question of the Prosecutions' duty to disclose potentially exculpatory material, the Trial Chamber did not suggest or even consider, as it did in other cases, that the material was otherwise disclosable as a prior statement of the witness.

⁹⁶ See e.g. *Karadžić* Third TD, para. 22.

Conclusion

37. For the reasons set out above, the Prosecution submits that the Appeal should be rejected.

Word count: 5,772⁹⁷



Fatou Bensouda, Prosecutor

Dated this 18th December 2015

At The Hague, The Netherlands

⁹⁷ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.