

Appeals Hearing

(Open Session)

ICC-02/05-03/09

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh
5 Mohammed Jerbo Jamus - ICC-02/05-03/09
6 Presiding Judge Daniel David Ntanda Nsereko
7 Appeals Hearing
8 Friday, 17 February 2012
9 (The hearing starts in open session at 11.00 a.m.)
10 THE COURT USHER: All rise. The International Criminal Court is now in session.
11 Please be seated.
12 JUDGE NSEREKO: Please call the case.
13 THE COURT OFFICER: Thank you, your Honour. Situation in Darfur, Sudan, in
14 the case of The Prosecutor versus Abdallah Banda Abakaer Nourain and Saleh
15 Mohammed Jerbo Jamus, case reference ICC-02/05-03/09.
16 JUDGE NSEREKO: Thank you, court officer. May I ask counsel to introduce
17 themselves for the record, starting with the Defence of Mr Banda and Mr Jamus.
18 MS TAYLOR: Thank you, and good morning, Mr President. Appearing for the
19 Defence of Mr Abdallah Banda and Mr Saleh Jerbo is Mr Lawrence Youssefian, legal
20 intern, Mr Anand Shah, case manager, and myself, Melinda Taylor. Mr Khan and
21 Mr Koumjian sincerely apologise for being unable to attend this morning's hearing.
22 Thank you.
23 JUDGE NSEREKO: Thank you, Counsel. Office of the Prosecutor?
24 MR GUARIGLIA: Good morning, your Honour. It's Fabricio Guariglia, senior
25 appeals counsel in the Office of the Prosecutor and appearing with me today is Ms

1 Carmen Garcia Ramos, the Appeals Section, case manager.

2 JUDGE NSEREKO: Thank you, Counsel. Today the Appeals Chamber is

3 delivering its judgment on the appeal of the Prosecutor against the decision of Trial

4 Chamber IV of 12 September 2011 entitled "Reasons for the order on translation of

5 witness statements and additional instructions on translation."

6 I shall deliver the Appeals judgment, Appeals Chamber's judgment, in summary

7 form. In this summary, I will refer to the Trial Chamber's decision as the "impugned

8 decision." Please note that the judgment, which will be filed and notified to the

9 parties shortly, is the authoritative one, not this summary.

10 I will start with the procedural background and submissions of parties.

11 The proceedings in this case are currently at the stage of trial preparation, that

12 includes the process of disclosure. The appeal arises against the background of

13 difficulties facing the Prosecutor in translating into Zaghawa statements of witnesses.

14 This is specifically the case with respect to two persons whom the Prosecutor intends

15 to call as witnesses. They were questioned as suspects by the Prosecutor. Pursuant

16 to Rule 112 of the Rules of Procedure and Evidence, which governs the recording of

17 the questioning of suspects, the Prosecutor audio-video recorded the questioning of

18 these persons and prepared lengthy transcripts of the recordings.

19 The Trial Chamber requested the Defence and the Prosecutor to agree on a common

20 proposal on the matter of disclosure and translation of the lengthy transcripts. The

21 Defence and the Prosecutor could not agree on a common approach. Instead, with

22 respect to the two witnesses, the Defence requested that "the Prosecution produce fair,

23 accurate and well-organised statements of these witnesses based on all prior

24 interviews, statements and transcripts of the interviews held." These statements

25 would be reviewed and signed by the witnesses and translated into Zaghawa for

1 disclosure to the Defence.

2 The Defence further proposed that the Prosecutor's examination of witnesses at trial

3 should be limited to information contained in these new statements. The Prosecutor

4 proposed instead that he would prepare summaries of the transcripts which could be

5 reviewed by the Defence for accuracy. However, these summaries would not be

6 reviewed and signed by the witnesses.

7 The Prosecutor did not agree that in examining the witnesses at trial he should limit

8 himself only to the information contained in these summaries. So the Defence and

9 the Prosecutor maintained their positions throughout the proceedings.

10 The Trial Chamber addressed the matter of disclosure in two inter-connected

11 decisions. The first was issued on 16 August 2011. The second is the impugned

12 decision issued on 12 September 2011.

13 Now what does the impugned decision say?

14 The Trial Chamber made the following findings in the impugned decision relevant to

15 the issue of the two witness statements that were audio-video recorded.

16 The Trial Chamber stated that Rule 76 of the Rules of Procedure and Evidence

17 requires the Prosecutor to disclose to the Defence copies of any prior statements of

18 witnesses he intends to call to testify. However, it noted that this rule does not

19 specify the format the statements must have. The Trial Chamber found that the

20 format of these statements is defined in Rule 111 of the Rules of Procedure and

21 Evidence. Under this rule, a record must be made of formal statements by any

22 person questioned in connection with an investigation or prosecution. The record

23 must be then be signed by that person.

24 In sport of its conclusion, the Trial Chamber cited a decision of Trial Chamber II.

25 Trial Chamber II had found that such signed, written records had to be prepared even

1 when the questioning of witnesses was audio-visually recorded and transcribed
2 pursuant to the procedure set out in Rule 112 of the Rules of Procedure and Evidence.
3 On the basis of that decision, the Trial Chamber concluded that "According to Rule 76
4 of the Rules of Procedure and Evidence read in conjunction with Rule 111 of the Rules
5 of Procedure and Evidence, the Prosecutor is required to provide signed witness
6 statements for all the witnesses he intends to rely on during the trial." This
7 requirement included the two witnesses whose questioning was only audio or
8 video-recorded and transcribed.
9 Accordingly, the Trial Chamber ordered the Prosecutor to disclose the two witnesses'
10 statements pursuant to Rule 111 of the Rules of Procedure and Evidence to the
11 Defence, even though such statements had not been taken at the time of the
12 questioning.
13 The Prosecutor requested leave to appeal the impugned decision. The Trial
14 Chamber granted leave on the following issue: "Whether Rule 111 requires the
15 Prosecution to take formal and well-organised signed statements from witnesses to
16 whom Article 55(2) applies."
17 Now the arguments of the parties.
18 The Prosecutor argues that there is no provision in the Court's legal instruments that
19 obliges him to produce formal signed statements pursuant to Rule 111 when he has
20 already produced an audio or video record of the questioning of a witness and a
21 transcript thereof pursuant to Rule 112. He argues that Rule 112 is *lex specialis* to
22 Rule 111. The two rules should be seen as creating alternative rather than
23 cumulative obligations.
24 The Prosecutor bases his arguments on a textual interpretation of the relevant rules
25 which he claims is also consistent with their drafting history. The Prosecutor also

1 averts that transcripts prepared under Rule 112 of the Rules of Procedure and
2 Evidence are more "reliably accurate" and that producing an additional summary of
3 the witnesses' statements risks creating delays or undermining unfairly and
4 unnecessarily the credibility of witnesses.

5 The Defence, on the other hand, contend that Rule 111 applies to all witnesses and
6 that Rule 112 applies cumulatively to certain particular witnesses. This
7 interpretation is, in their view, supported by the text of Rules 111 and 112, their
8 respective purposes and their drafting history. The Defence argue that Rule 76 does
9 not specify whether statements must be written. They point to the distinction
10 between the rules governing disclosure of statements and Rules 111 and 112 that
11 govern the record and recording of questioning. The Defence also argue that the
12 jurisprudence of the ad hoc International Criminal Tribunals is not relevant to the
13 issue because those tribunals have different legal schemes.

14 Finally, the Defence argue that the concerns raised by the Prosecutor with respect to
15 the impact of the impugned decision on the fairness of proceedings and its burden on
16 the Office of the Prosecutor do not withstand scrutiny.

17 Now, this is the decision of the Appeals Chamber:

18 The issue before the Appeals Chamber is essentially "whether, in the case of
19 interviews audio-visually recorded and transcribed pursuant to Rule 112, the
20 Prosecutor is required to create and to disclose an additional signed record of the
21 statements of such witnesses under Rule 111."

22 The Trial Chamber concluded that Rule 111 defines the format of statements subject
23 to disclosure under Rule 76. In the Appeals Chamber's view, this conclusion is
24 erroneous. The Appeals Chamber draws attention to the difference between the
25 statement of an individual and the form in which that statement is recorded. Rule

1 111 requires that "[a] record shall be made of formal statements." The rule also
2 imposes certain requirements as to what other information should be included in
3 such a record. However, the Appeals Chamber is of the view that Rule 76 requires
4 the disclosure of copies of any prior statements, irrespective of how they are recorded.
5 The Appeals Chamber finds that this rule also encompasses statements which are
6 audio or video-recorded in accordance with Rule 112 of the Rules of Procedure and
7 Evidence. By limiting "statements" under Rule 76 to only those records of
8 statements prepared pursuant to Rule 111, the Trial Chamber effectively and in our
9 view erroneously limited the Prosecutor's disclosure obligations.

10 Mr Banda and Mr Jerbo argue that, even if the audio-video records of questioning are
11 subject to disclosure, Rule 111 still requires the Prosecutor to produce an additional
12 signed, written statement. The Appeals Chamber is not persuaded by the Defence's
13 arguments. The Appeals Chamber finds that there are convincing textual,
14 contextual and purposive considerations that support the conclusion that the Trial
15 Chamber made error.

16 The Appeals Chamber is also of the view that the purpose of Rules 111 and 112 is to
17 require a record to be made of the questioning of persons. This purpose can be
18 fulfilled through either a written record pursuant to Rule 111, or an audio or
19 video-record pursuant to Rule 112. Indeed, Rule 112 protects the rights of suspects
20 by requiring the Prosecutor to create the best possible record of such persons'
21 statements.

22 The Appeals Chamber further notes that Rule 112, sub-rules 1 (a) and 2, provide that
23 the procedure in Rule 111 shall be followed in certain situations where the
24 questioning is not audio or video-recorded. This confirms its view that the two rules
25 set out alternative and not cumulative procedures.

1 Furthermore, the Appeals Chamber observes that Rule 112(4) provides for audio or
2 video-recording, where this procedure could assist in reducing any subsequent
3 traumatising of victims of sexual or gender violence, children or persons with
4 disabilities in providing their evidence. The Appeals Chamber considers that
5 requiring this category of individuals to review and to sign an additional written
6 record setting out the content of their statements might result in their
7 re-traumatisation and thus defeat the purpose of this sub-rule.

8 This interpretation of the relationship between Rules 111 and 112 is further confirmed
9 when the two rules are viewed not in isolation, but in the context of the overall
10 framework for investigations and judicial proceedings set out in the Rules of
11 Procedure and Evidence and their purpose. The Appeals Chamber finds that a
12 complete audio or video-record of the questioning of a person will provide the fullest
13 and most accurate account of the questioned person's statements. Any additional
14 written record could, at most, only duplicate the statements contained in this audio or
15 video-record and would most likely contain less information. The Appeals
16 Chamber cannot see any concomitant benefit to the investigation or to the judicial
17 proceedings by requiring the Prosecutor to create an additional signed, written record
18 of the statement.

19 In conclusion, the Appeals Chamber finds that the Trial Chamber erred by:

20 (1) Effectively excluding from the scope of the Prosecutor's disclosure obligations
21 under Rule 76 the audio or video-records of questioning and transcripts thereof; and
22 (2) Requiring the Prosecutor, as a matter of law, to create written and signed records
23 of the statements of witnesses in lieu of these audio or video-records and transcripts.

24 The Appeals Chamber finds that these legal errors materially affected the Trial
25 Chamber's order to the Prosecutor to create and to disclose additional written records

1 of the statements of these interviews.

2 The Appeals Chamber is cognisant of the background of the impugned decision and
3 the practical difficulties apparently connected with making available the statements
4 of witnesses in Zaghawa. The Appeals Chamber considers that, if there are
5 intractable, practical difficulties, then it is wholly within the powers of the Trial
6 Chamber, in consultation with the parties, to devise practical solutions and
7 alternatives to these difficulties. In doing so the Trial Chamber ensures the
8 expeditiousness of the proceedings, while it must at the same time safeguard the
9 rights of the accused. The Appeals Chamber considers that it would be
10 inappropriate for it to pronounce itself on this matter.

11 The Appeals Chamber therefore unanimously reverses the Trial Chamber's decision
12 entitled "Reasons for the Order on translation of witness statements and additional
13 instructions on translation" of 12 September 2011, to the extent that it ordered the
14 Prosecutor, pursuant to Rules 76 and 111 of the Rules of Procedure and Evidence, to
15 create and to disclose organised and signed witness statements in narrative form of
16 witnesses on whom he intends to rely for the purposes of trial and whose interviews
17 were recorded only in audio or audio-video form in accordance with Rule 112 of the
18 Rules of Procedure and Evidence.

19 This concludes my summary of the judgment.

20 Thank you, and the session is closed.

21 THE COURT USHER: All rise.

22 (The hearing ends in open session at 11.24 a.m.)