

1 International Criminal Court
2 Appeals Chamber - Courtroom 3
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Bosco Ntaganda - ICC-01/04-02/06
5 Single Judge Sanji Mmasenono Monageng
6 Judgment on Appeal
7 Friday, 20 May 2016
8 (The hearing starts in open session at 4.31 p.m.)
9 THE COURT USHER: All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 SINGLE JUDGE MONAGENG: Good afternoon.
13 Would the court officer please call the case.
14 THE COURT OFFICER: Good afternoon. Yes, Madam President.
15 Situation in the Democratic Republic of the Congo in the case of the Prosecutor versus
16 Bosco Ntaganda, case reference ICC-01/04-02/06.
17 And for the record, we are in open session.
18 SINGLE JUDGE MONAGENG: Thank you.
19 My name is Sanji Mmasenono Monageng, and I am the Presiding Judge on the appeal
20 arising from the case of the Prosecutor against Bosco Ntaganda. The other Judges on
21 the Appeals Chamber of this appeal are Judge Christine Van den Wyngaert, Judge
22 Howard Morrison, Judge Piotr Hofmański and Judge Raúl Pangalangan.
23 May I ask the parties and participants to introduce themselves for the record, starting
24 with the Office of the Prosecutor.
25 MS BRADY: Good afternoon, your Honour. Helen Brady, senior appeals counsel.

1 I'm appearing here today with Mr Matteo Costi and Mr Reinhold Gallmetzer, both
2 appeals counsel. Thank you.

3 SINGLE JUDGE MONAGENG: I thank you so much.

4 The Defence for Mr Ntaganda, please.

5 MR GOSNELL: Good afternoon, Madam President. Christopher Gosnell
6 representing Mr Ntaganda, accompanied by Margaux Portier and Sandrine De Sena.

7 SINGLE JUDGE MONAGENG: Thank you very much.

8 Legal Representatives for Victims.

9 MS PELLET: (Interpretation) Good afternoon, your Honour. The former child
10 soldiers are represented by myself, Sarah Pellet, counsel with Office for Public
11 Counsel for Victims.

12 SINGLE JUDGE MONAGENG: Thank you very much.

13 MS GRABOWSKI: Good afternoon, Madam President. The victims of the attacks
14 are today represented by myself, Ms Anne Grabowski, from the Office of Public
15 Counsel for Victims. Thank you.

16 SINGLE JUDGE MONAGENG: Thank you.

17 Today the Appeals Chamber is delivering its judgment on the appeal of Mr Ntaganda
18 against the decision of Trial Chamber VI entitled, and I quote, "Decision on Defence
19 requests seeking disclosure orders and a declaration of Prosecution obligation to
20 record contacts with witnesses," end of quote, rendered on 16 October 2015. In
21 today's summary I will refer to this decision as the impugned decision.

22 I shall now summarise the Appeal Chamber's judgment, which was taken
23 unanimously. This summary is not part of the written judgment, which is the only
24 authoritative account of the Appeals Chamber's ruling and reasons. The written
25 judgment will be made available to the parties and participants at the conclusion of

1 this hearing.

2 By way of procedural background, the present appeal arose out of a request by
3 Mr Ntaganda filed on 25 August 2015 seeking an order for the Prosecutor to disclose,
4 inter alia, and I'll quote, "any statements, in whatever form, of witnesses whom the
5 Prosecution intends to call." End of quote.

6 Following the response by the Prosecutor, the Trial Chamber rendered, on 16
7 October 2015, the impugned decision rejecting Mr Ntaganda's request.

8 On 27 November 2015, the Trial Chamber granted Mr Ntaganda's request for leave to
9 appeal the impugned decision in relation to one issue, namely, and I quote, "whether
10 the Chamber erred in law in its definition of 'statement' in Rule 76(1) of the Rules."
11 End of quote.

12 On 10 December 2015, Mr Ntaganda filed the document in support of the appeal and,
13 on 18 December 2015, the Prosecutor submitted her response thereto.

14 I shall now turn to the merits of the present appeal.

15 In the impugned decision, the Trial Chamber held that statements within the meaning
16 of Rule 76 of the Rules, and I quote, "are made only when witnesses are 'questioned
17 about their knowledge of the case in the course of its investigation.'" End of quote.

18 Mr Ntaganda argues that the Trial Chamber erred in law in its interpretation of
19 witness statements under Rule 76(1) and more broadly that the interpretation will
20 result in a prosecutorial disclosure regime that does not adequately protect the
21 fairness of the Court proceedings.

22 The Appeals Chamber knows that the impugned decision merely adopts without
23 further explanation a definition of a "statement" of witnesses within the meaning of
24 Rule 76(1) of the Rules provided in a decision in the case of the Prosecutor against
25 Jean-Pierre Bemba et al., which itself primarily referred to the interpretation from

1 other international courts and tribunals to support its finding. As explained in more
2 detail in its judgment, the Appeals Chamber considers that the reasoning for the
3 impugned finding is sparse and proceeds to conduct its own analysis in accordance
4 with the appropriate methods of interpretation.

5 For the following reasons, the Appeals Chamber finds no error in the Trial Chamber's
6 decision that statements, within the meaning of Rule 76 of the Rules, are made only
7 when witnesses are "questioned about their knowledge of the case." Furthermore,
8 the Appeals Chamber finds that Mr Ntaganda's fair trial rights are not prejudiced by
9 this interpretation of Rule 76 of the Rules.

10 The Appeals Chamber considers that the only qualification to be derived from the
11 plain wording of Rule 76(1) of the Rules is that the statement must have come from a
12 witness whom the Prosecutor intends to call to testify. However, regard must also
13 be had to the broader context regulating prosecutorial disclosure to an accused, that is
14 Rule 77 of the Rules and Article 67(2) of the Statute.

15 With regard to a contextual interpretation and in particular the purpose of Rule 76(1)
16 of the Rules, the Appeals Chamber understands Mr Ntaganda to argue essentially
17 that disclosure under Rule 76(1) of the Rules encompasses statements that relate to all
18 aspects of the case and includes witness statements that would, under the Trial
19 Chamber's definition, only be disclosable under Rule 77 of the Rules or Article 67(2) of
20 the Statute.

21 The Prosecutor submits that the test articulated in the impugned decision only
22 excludes statements that are clearly irrelevant to the case as other statements may be
23 disclosable under Rule 77 of the Rules or Article 67(2) of the Statute. As such, in the
24 Prosecutor's view, issues of credibility or possible bias relate to her disclosure
25 obligations under Rule 77 of the Rules and Article 67(2) of the Statute.

1 The Appeals Chamber considers that Rule 76(1) of the Rules serves the purpose of
2 facilitating the accused's effective exercise of his or her right to examine the witnesses
3 against him or her, which is guaranteed by Article 67(1)(b) of the Statute. This is the
4 right to have adequate facilities for the preparation of the Defence. And of course,
5 Article 67(1)(e), that is the right to examine or have examined the witnesses against
6 him or her.

7 The Appeals Chamber emphasizes that in order to examine a Prosecution witness and
8 prepare for that witness's future testimony, the Defence needs to know primarily the
9 scope of the proposed testimony. In that regard, the Appeals Chamber notes that the
10 scope of the proposed testimony shows the witness's knowledge of the case and in
11 particular of the facts alleged by the Prosecutor as incriminating the accused.

12 The Appeals Chamber is not persuaded by Mr Ntaganda's assertion that witness
13 statements under Rule 76(1) of the Rules should extend to statements that are
14 completely unrelated to the witness's knowledge of the case, but potentially relevant
15 to the witness's credibility or other issues that are material to the preparation of the
16 Defence.

17 First, the Appeals Chamber notes that the Prosecutor is obliged to disclose material
18 that puts a witness's credibility in doubt or serves to show potential bias pursuant to
19 Article 67(2) of the Statute if the Prosecutor believes that these materials may affect
20 the credibility of Prosecution evidence, and Rule 77 of the Rules, if they are otherwise
21 "material to the preparation of the Defence."

22 Second, the Appeals Chamber considers that Rule 76(3) of the Rules imposing on the
23 Prosecutor the duty to make the statements of her witnesses available in original and
24 in a language which the accused fully understands and speaks supports the view that
25 witness statements pursuant to Rule 76(1) are statements related to the witness's

1 knowledge of the case. The Appeals Chamber further notes that this duty is not
2 expressly stated with respect to disclosure under other provisions of the Statute and
3 the Rules. This is indicative of the particular significance of the disclosure pursuant
4 to Rule 76(1), as compared to the disclosure of material which is relevant, for instance,
5 solely to credibility.

6 Mr Ntaganda further argues that an interpretation whereby only witness statements
7 linked to the witness's knowledge of the case would fall under Rule 76(1) could lead
8 to situations where information relevant to the credibility of a witness may not be
9 disclosed.

10 The Appeals Chamber finds that the system of disclosure, in which only the
11 disclosure of statements made by witnesses when questioned about their knowledge
12 of the case occurs pursuant to Rule 76(1) of the Rules, and is not prejudicial to an
13 accused's fair trial rights.

14 First, the Appeals Chamber considers that information regarding the witnesses'
15 security concerns or logistical arrangements, which Mr Ntaganda seeks to obtain
16 through disclosure under Rule 76(1) of the Rules, may be disclosed to him under
17 Rule 77 of the Rules if it is material to the preparation of his defence, or under
18 Article 67(2) of the Statute if it affects the credibility of Prosecution evidence.

19 In addition, Mr Ntaganda's argument presupposes that conferring the task of
20 selecting material for disclosure on the basis of a certain criterion to the Prosecutor is
21 prejudicial to the rights of the accused. However, Mr Ntaganda does not argue that
22 such prejudice actually occurred in the case at hand. Upon a general survey of the
23 relevant international and domestic jurisprudence, the Appeals Chamber cannot find
24 support for an approach whereby a disclosure system where the Prosecutor decides
25 which material in his or her possession is relevant to the Defence would be inherently

1 prejudicial to the Defence.

2 Furthermore, the interpretation of Rule 76(1) of the Rules proposed by Mr Ntaganda
3 would extend the Prosecutor's disclosure obligation under this rule to material that is
4 irrelevant to the case.

5 Finally, as the Appeals Chamber finds that Rule 77 of the Rules is not inherently
6 prejudicial, it cannot be argued that an interpretation of Rule 76(1) that excludes some
7 material from the scope of this rule and makes its disclosure dependent on
8 compliance with the criterion set out in Rule 77 is, on its own, prejudicial to the rights
9 of the accused.

10 For these reasons, the Appeals Chamber finds that it is consistent with the purpose of
11 Rule 76(1) of the Rules, read in line with the applicable prosecutorial disclosure
12 regime that disclosure of statements made, and I'll quote, "when witnesses are
13 questioned about their knowledge of the case ..." end of quote, takes place pursuant to
14 Rule 76(1) of the Rules. Conversely, statements provided by witnesses, which relate
15 solely to matters other than facts and circumstances described in the charges, are
16 more appropriately disclosed in accordance with Rule 77 of the Rules or Article 67(2)
17 of the Statute if they meet the criterion set out in these provisions, or the criteria, I'm
18 sorry, which is also fully consistent with the accused's rights guaranteed by the
19 Statute.

20 For these reasons, the Appeals Chamber decides to confirm the impugned decision.

21 And this concludes my summary of the judgment.

22 And at this point I wish to thank the interpreters, court reporters, parties and
23 participants. The session is now closed.

24 THE COURT USHER: All rise.

25 (The hearing ends in open session at 4.53 p.m.)