

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-02/05-03/09 OA 2

Date: 17 February 2012

THE APPEALS CHAMBER

Before:

Judge Daniel David Ntanda Nsereko, Presiding Judge

Judge Sang-Hyun Song

Judge Akua Kuenyehia

Judge Erkki Kourula

Judge Anita Ušacka

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF THE PROSECUTOR v. ABDALLAH BANDA ABAKAER
NOURAIN and SALEH MOHAMMED JERBO JAMUS**

Public document

Judgment

**on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12
September 2011 entitled “Reasons for the Order on translation of witness
statements (ICC-02/05-03/09-199) and additional instructions on translation”**



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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Mr Karim A. A. Khan
Mr Nicholas Koumjian

REGISTRY

Registrar
Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber IV entitled “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation” of 12 September 2011 (ICC-02/05-03/09-214),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation” of 12 September 2011 (ICC-02/05-03/09-214) is reversed to the extent that it ordered the Prosecutor, pursuant to rules 76 and 111 of the Rules of Procedure and Evidence, to create and to disclose organised and signed witness statements in narrative form of witnesses on whom he intends to rely for the purposes of trial and whose interviews were recorded only in audio- or video-form in accordance with rule 112 of the Rules of Procedure and Evidence.

REASONS

I. KEY FINDINGS

1. When the Prosecutor records the questioning of a person in accordance with rule 112 of the Rules of Procedure and Evidence, he or she is not required to create an additional record of the person’s statements under rule 111 of the Rules of Procedure and Evidence.
2. The audio- or video-record of the questioning of a person in accordance with rule 112 of the Rules of Procedure and Evidence and the transcript thereof are records of statements that are potentially subject to disclosure pursuant to rule 76 of the Rules



of Procedure and Evidence where the Prosecutor intends to call the person to testify as a witness.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Background to the appeal

3. The present appeal arises against the background of difficulties facing the Prosecutor in translating into Zaghawa statements of witnesses whom he intends to call to testify at trial for purposes of their disclosure in a language the accused fully understand and speak pursuant to rule 76 of the Rules of Procedure and Evidence.¹ These statements included statements of which a formal record had been made pursuant to rule 111 of the Rules of Procedure and Evidence and, in the case of two witnesses for whom no such formal records had been made, audio-visual recordings of interviews and transcripts thereof made pursuant to rule 112 of the Rules of Procedure and Evidence.

4. Following their inability to agree on a common proposal to address the underlying difficulties, the Prosecutor and Messrs Abdallah Banda Abakaer Nourain (hereinafter: “Mr Banda”) and Saleh Mohammed Jerbo Jamus (hereinafter: “Mr Jerbo”) submitted to Trial Chamber IV (hereinafter: “Trial Chamber”) separate proposals with respect to the preparation, translation and disclosure of witness statements.² With respect to the two witnesses whose interviews had been audio- or video-recorded and transcribed and any witnesses yet to be interviewed or to be re-interviewed, counsel for Messrs Banda and Jerbo requested that “the Prosecut[or] produce fair, accurate and well-organised statements of these witnesses based on all

¹ As noted by the Prosecutor before the Trial Chamber, translating into Zaghawa is made complicated by the facts that Zaghawa is not a written language and its vocabulary is limited to no more than 5,000 words. *See* Trial Chamber IV, “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation”, 12 September 2012, ICC-02/05-03/09-214, para. 4 (quoting “Prosecution’s Response to the Trial Chamber’s Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011”, 14 April 2011, ICC-02/05-03/09-131, para. 10). In addition, the Prosecutor’s difficulty in identifying Zaghawa translators further limits the possible pace of translations. *See* “Prosecution’s update to the Trial Chamber on language related issues and further information on re-interviews of two prosecution witnesses”, 1 September 2011, ICC-02/05-03/09-205.

² “Prosecution’s Proposals on the Issue of Translation” (hereinafter: “Prosecutor’s Proposals on Translation”), 8 August 2011, ICC-02/05-03/09-192; “Defence Submission on the Translation of Incriminatory Evidence” (hereinafter: “Defence Submission on Translation”), 8 August 2011, ICC-02/05-03/09-195.

prior interviews, statements and transcripts of the interviews held”.³ These statements would be reviewed and signed by the witnesses and translated into Zaghawa for disclosure to Mr Banda and Mr Jerbo.⁴ Counsel for Messrs Banda and Jerbo further proposed that the Prosecutor’s examination of witnesses at trial would be limited to information contained in these new statements.⁵ The Prosecutor proposed instead that he would prepare summaries of the transcripts which could be reviewed by counsel for Messrs Banda and Jerbo for accuracy, but which would not be reviewed and signed by the witnesses.⁶ The Prosecutor did not agree that his examination of witnesses would be limited only to information contained in these summaries.⁷

5. On 16 August 2011, the Trial Chamber issued the “Order on translation of witness statements” in which it stated that it “has decided to instruct the [P]rosecut[or] immediately to start translating into Zaghawa the witness statements which [he] intends to rely upon for the purposes of the trial” and that the written reasons for this decision would be “issued in the near future”.⁸

6. On 1 September 2011, the Prosecutor updated the Trial Chamber on his progress in and estimated completion of the translation of witness statements and the conduct of further interviews.⁹ With respect to interviews which had been or would be audio-visually recorded and the recordings thereof transcribed, the Prosecutor stated that he assumed “that only summarised versions of the transcripts would need to be translated”.¹⁰ He indicated that he would therefore prepare and translate summaries of the transcripts rather than translating the transcripts themselves.¹¹

7. On 7 September 2011, Messrs Banda and Jerbo objected to the Prosecutor’s intention to provide Zaghawa translations only of summaries of transcribed

³ Defence Submission on Translation, para. 23.

⁴ Defence Submission on Translation, para. 23.

⁵ Defence Submission on Translation, para. 25.

⁶ Prosecutor’s Proposals on Translation, para. 10.

⁷ Defence Submission on Translation, para. 15. *See also* e-mail from Office of the Prosecutor staff to a member of Mr Banda and Mr Jerbo’s defence teams, 4 August 2011, reproduced as ICC-01/05-03/09-195-AnxC.

⁸ ICC-02/05-03/09-199, p. 3.

⁹ “Prosecution’s update to the Trial Chamber on language related issues and further information on re-interviews of two Prosecution witnesses”, ICC-02/05-03/09-205 (hereinafter: “Prosecutor’s Update of 1 September”).

¹⁰ Prosecutor’s Update of 1 September, para. 5, fn. 5.

¹¹ Prosecutor’s Update of 1 September, paras 5, 8-9.

interviews.¹² They argued that the Prosecutor must provide Zaghawa translations of signed witness statements and not summaries thereof and that the Prosecutor's intention to translate only summaries of witness statements contravened the Trial Chamber's order of 16 August 2011.¹³

B. Impugned Decision

8. On 12 September 2011, the Trial Chamber issued the "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation"¹⁴ (hereinafter: "Impugned Decision"). The Trial Chamber found that rule 76 of the Rules of Procedure and Evidence requires the Prosecutor to disclose to Messrs Banda and Jerbo copies of the statements of witnesses he intends to call to testify, but that this rule does not specify what format the statements must have.¹⁵ The Trial Chamber found that the format of these statements is defined in rule 111 of the Rules of Procedure and Evidence.¹⁶ Under this rule, a record must be made of formal statements by any person questioned in connection with an investigation or with proceedings and must be signed by that person (or the lack of signature must be explained therein). The Trial Chamber cited a decision of Trial Chamber II which had found that rule 111 of the Rules of Procedure and Evidence applied even with respect to witnesses whose statements were audio-visually recorded and transcribed pursuant to the procedure set out in rule 112 of the Rules of Procedure and Evidence.¹⁷ The Trial Chamber therefore concluded that "according to [r]ule 76 of the Rules [of Procedure and Evidence] read in conjunction with [r]ule 111 of the Rules [of Procedure and Evidence], the [P]rosecut[or] is required to provide signed witness statements for all the witnesses [he] intends to rely on during the trial, including those for witnesses DAR-OTP-WWWW-0442 and DAR-OTP-WWWW-0307" (the two witnesses whose interviews were only audio- or video-recorded and transcribed), and

¹² "Defence Response to the Prosecution's update to the Trial Chamber on language related issues and further information on re-interviews of two Prosecution witnesses", ICC-02/05-03/09-210 (hereinafter: "Defence Response to the Prosecutor's Update of 1 September").

¹³ Defence Response to the Prosecutor's Update of 1 September, paras 5-6.

¹⁴ ICC-02/05-03/09-214.

¹⁵ Impugned Decision, para. 19.

¹⁶ Impugned Decision, para. 19.

¹⁷ Impugned Decision, para. 20 (citing Trial Chamber II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence", 23 October 2009, ICC-01/04-01/07-1553, para. 35).

it ordered the Prosecutor to disclose such statements to Mr Banda and Mr Jerbo.¹⁸ With respect to the form that such signed witness statements should take, the Trial Chamber found that “disclosing organized and comprehensive witness statements will be useful to the defence” and therefore “grant[ed] the defence application in the present case to receive comprehensive and well-organised witness statements in narrative form based on all the available material relating to these witnesses”.¹⁹

9. In the Impugned Decision, the Trial Chamber also addressed separately issues concerning the translation of witness statements and of the decision on the confirmation of charges.²⁰ These issues are not before the Appeals Chamber in the present appeal.

C. Proceedings before the Appeals Chamber

10. On 14 November 2011, following the granting of leave by the Trial Chamber to appeal the Impugned Decision,²¹ the Prosecutor filed the “Prosecution’s Document in Support of Appeal against Trial Chamber IV’s ‘Decision on the Prosecution’s Application for Leave to Appeal the “Reasons for the Order on the translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation””²² (hereinafter: “Document in Support of the Appeal”).

11. On 25 November 2011, Messrs Banda and Jerbo filed the “Defence Response to the Prosecution’s Document in Support of Appeal against Trial Chamber IV’s ‘Decision on the Prosecution’s Application for Leave to Appeal the “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation””²³ (hereinafter: “Response to the Document in Support of the Appeal”).

¹⁸ Impugned Decision, paras 21, 37.

¹⁹ Impugned Decision, para. 23.

²⁰ Impugned Decision, paras 25-36.

²¹ “Decision on the Prosecution’s Application for Leave to Appeal the ‘Reasons for the Order on translation of witness statements (ICC-02/0503/09-199) and additional instructions on translation’”, 1 November 2011, ICC-02/05-03/09-243.

²² ICC-02/05-03/09-253 (OA 2).

²³ ICC-02/05-03/09-263 (OA 2).

III. ARGUMENTS OF THE PARTIES

A. Arguments of the Prosecutor

12. The Prosecutor argues that, in directing him to prepare well-organised written statements for all witnesses, the Trial Chamber imposed a duty which is not found in the Statute or the Rules of Procedure and Evidence.²⁴ He argues that rule 76 of the Rules of Procedure and Evidence does not impose a particular form for witness statements and that such statements may also take the form of taped and transcribed interviews.²⁵ With respect to rule 111 of the Rules of Procedure and Evidence, the Prosecutor argues that rule 112 of the Rules of Procedure and Evidence is *lex specialis*, and that the two rules should be seen as creating alternative rather than cumulative obligations.²⁶ In his view, this interpretation is consistent with the drafting history of the Rules of Procedure and Evidence²⁷ and is supported by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: "ICTY").²⁸

13. According to the Prosecutor, aside from the decision of Trial Chamber II cited by the Trial Chamber, the jurisprudence of other Chambers does not support the Trial Chamber's interpretation of the relationship between the two rules in question.²⁹

14. The Prosecutor further argues that "[t]he rule imposed by the [Trial] Chamber does not provide more reliable statements and also unduly burdens the Prosecution".³⁰ He avers that transcripts prepared under rule 112 of the Rules of Procedure and Evidence are more reliably accurate³¹ and that producing an additional summary of witnesses' statements risks creating delays³² or undermining unfairly and unnecessarily the credibility of witnesses.³³ Finally, he argues that summaries of

²⁴ Document in Support of the Appeal, para. 8.

²⁵ Document in Support of the Appeal, paras 9-14.

²⁶ Document in Support of the Appeal, paras 15-21.

²⁷ Document in Support of the Appeal, paras 22-26.

²⁸ Document in Support of the Appeal, para. 19.

²⁹ Document in Support of the Appeal, paras 28-32.

³⁰ Document in Support of the Appeal, p. 15.

³¹ Document in Support of the Appeal, para. 33.

³² Document in Support of the Appeal, para. 36.

³³ Document in Support of the Appeal, para. 37.

witness statements prepared by the Prosecutor would suffice “to enable the Defence to have an organized version of the witness’s version of events”.³⁴

B. Arguments of Messrs Banda and Jerbo

15. Messrs Banda and Jerbo argue that, by focusing on rules 76, 111 and 112 of the Rules of Procedure and Evidence, the Prosecutor takes a “selective approach in [his] interpretation of the Impugned Decision”.³⁵ In their view, the Impugned Decision contained within it two separate decisions.³⁶ First, the Trial Chamber made a “legal determination that [r]ule 111 applies to all witnesses”.³⁷ Second, the Trial Chamber, in exercising its discretion to organise and conduct proceedings, ordered that the statements of witnesses on whom the Prosecutor intends to rely at trial should be organised, signed and in narrative form.³⁸ They contend that the Document in Support of the Appeal focuses on the first question which was only a tangential aspect of the Impugned Decision.³⁹ In their view, the decision that the statements produced by the Prosecutor should be comprehensive, well-organised and in narrative form was “expressly based on [a]rticles 64(3)(c) and 67(1) [of the Statute] and [r]ule 84 [of the Rules of Procedure and Evidence]” which give the Trial Chamber “the discretion to manage the procedures for trial”.⁴⁰ They argue that the Impugned Decision was therefore within the Trial Chamber’s discretion.⁴¹

16. With respect to the legal determination that rule 111 applies to all interviews of witnesses, Messrs Banda and Jerbo argue that the Trial Chamber was correct. They contend that rule 111 applies to all witnesses and that rule 112 applies cumulatively to certain particular witnesses.⁴² This interpretation is, in their view, supported by the text of rules 111 and 112,⁴³ their respective purposes⁴⁴ and their drafting history.⁴⁵ The fact that rule 76 does not specify whether statements must be written is

³⁴ Document in Support of the Appeal, para. 35.

³⁵ Response to the Document in Support of the Appeal, para. 2.

³⁶ Response to the Document in Support of the Appeal, para. 8.

³⁷ Response to the Document in Support of the Appeal, para. 8.

³⁸ Response to the Document in Support of the Appeal, para. 8.

³⁹ Response to the Document in Support of the Appeal, para. 4.

⁴⁰ Response to the Document in Support of the Appeal, para. 21.

⁴¹ Response to the Document in Support of the Appeal, paras 21-23.

⁴² Response to the Document in Support of the Appeal, paras 9-18.

⁴³ Response to the Document in Support of the Appeal, paras 10-13, 15, 18.

⁴⁴ Response to the Document in Support of the Appeal, paras 14, 16, 18.

⁴⁵ Response to the Document in Support of the Appeal, para. 12.

immaterial to the issue on appeal as that provision deals only with disclosure of statements whereas rules 111 and 112 govern the record and recording of questioning.⁴⁶

17. Messrs Banda and Jerbo find the Rules of Procedure and Evidence sufficiently clear to render recourse to the jurisprudence of the ICTY improper.⁴⁷ In any event, they point out that the ICTY Rules of Procedure and Evidence lack any counterpart to rule 111, making the jurisprudence of the ICTY irrelevant to the present appeal.⁴⁸

18. To the extent that the Prosecutor argues that other Chambers have not followed the Impugned Decision, Messrs Banda and Jerbo note that the only reference by the Prosecutor to a Trial Chamber is unsubstantiated and argue that it appears that the same issue was never raised before that Chamber.⁴⁹ The remaining references are to Pre-Trial Chambers and are, in their view, misplaced given the differences between the pre-trial and trial stages of proceedings.⁵⁰ Finally, they argue that the concerns raised by the Prosecutor with respect to the impact of the Impugned Decision on the fairness of proceedings and its burden on the Office of the Prosecutor do not withstand scrutiny.⁵¹

IV. MERITS

A. Standard of review

19. The Prosecutor avers that the issue before the Appeals Chamber is a “question of law”.⁵² He states that the Appeals Chamber has not articulated a standard of review for such issues, and he “submits that legal issues should be subject to plenary, *de novo* review”.⁵³ Messrs Banda and Jerbo argue that the Impugned Decision contains both a legal issue and a discretionary decision by the Trial Chamber and that the Appeals Chamber interferes with discretionary decisions only in limited circumstances.⁵⁴

⁴⁶ Response to the Document in Support of the Appeal, para. 9.

⁴⁷ Response to the Document in Support of the Appeal, para. 17.

⁴⁸ Response to the Document in Support of the Appeal, para. 17.

⁴⁹ Response to the Document in Support of the Appeal, para. 25.

⁵⁰ Response to the Document in Support of the Appeal, para. 26.

⁵¹ Response to the Document in Support of the Appeal, paras 27-30.

⁵² Document in Support of the Appeal, para. 7.

⁵³ Document in Support of the Appeal, para. 7.

⁵⁴ Response to the Document in Support of the Appeal, para. 8.

20. The Appeals Chamber has repeatedly held that its review is corrective in nature and not *de novo*.⁵⁵ On questions of law, the Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.

B. The Issue on Appeal

21. As pointed out by Messrs Banda and Jerbo, the relevant part of the Impugned Decision contained two distinct and cumulative conclusions. First, the Trial Chamber found that rules 76 and 111 of the Rules of Procedure and Evidence require the Prosecutor to create and to disclose signed witness statements of all witnesses on whom he intends to rely at trial, including those witnesses whose questioning was audio- or video-recorded and transcribed pursuant to rule 112 of the Rules of Procedure and Evidence.⁵⁶ Second, the Trial Chamber found that it would be "useful to the defence" if these statements were "comprehensive", "well-organised" and "in narrative form".⁵⁷ The ground of appeal put forward by the Prosecutor in the Document in Support of Appeal is that "the Trial Chamber erred in law when it imposed a duty on the Prosecut[or] to take well-organi[s]ed written statements for all witnesses".⁵⁸ However, it is actually only the first of the Trial Chamber's conclusions which is challenged by the Prosecutor. To the extent that he argues the Trial Chamber erred by requiring him to "take well-organi[s]ed statements", the Prosecutor is in fact challenging the Trial Chamber's finding that he is required as a matter of law to re-organise the transcripts of previously-recorded interviews into statements complying with the requirements of rule 111 of the Rules of Procedure and Evidence. He does not address the Trial Chamber's further conclusion that it would be useful if these statements took a certain form. In addition, the Prosecutor does not take issue with

⁵⁵ See, e.g., *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release'", 14 July 2011, ICC-01/04-01/10-283 (OA), para. 15; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, ICC-01/05-01/08-631-Red (OA 2), para. 62.

⁵⁶ Impugned Decision, paras 20-21.

⁵⁷ Impugned Decision, paras 22-23.

⁵⁸ Document in Support of the Appeal, p. 5.

other parts of the Impugned Decision concerning translation of witness statements and of the decision on the confirmation of charges.⁵⁹ The only issue before the Appeals Chamber is whether, in the case of interviews audio- or video-recorded and transcribed pursuant to rule 112 of the Rules of Procedure and Evidence, the Prosecutor is required to create and to disclose an additional signed record of the statements of such witnesses under rule 111 of the Rules of Procedure.

C. Determination by the Appeals Chamber

22. The Appeals Chamber recalls that the core issue in the Impugned Decision rests on the Trial Chamber's conclusion that rule 111 of the Rules of Procedure and Evidence defines the format of statements subject to disclosure under rule 76. The Appeals Chamber considers this conclusion to be a fundamental error. These two rules are found in different sections of the Rules of Procedure and Evidence and regulate entirely different activities. Rule 76 falls under Section II (Disclosure) of Chapter 4 (Provisions relating to various stages of the proceedings) of the Rules of Procedure and Evidence. It pertains to the Prosecutor's obligations to disclose evidence or other material which he has already collected. Rule 111, on the other hand, falls under Section III (Collection of evidence) of Chapter 5 (Investigation and prosecution) of the Rules of Procedure and Evidence. It pertains to how the Prosecutor should go about collecting evidence during an investigation, at which stage the Prosecutor normally does not know whether or not he will call questioned persons to testify at trial.

23. In interpreting the relevant rules, a distinction must be made between the statement of an individual and the form in which that statement is recorded. Rule 76 requires the Prosecutor to disclose "copies of any prior statements". The Appeals Chamber agrees with the Prosecutor and Messrs Banda and Jerbo that the ordinary meaning of the term "statement" as used in rule 76 is broad and requires the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded.⁶⁰ Rule 111, meanwhile, requires that "[a] record shall be made of formal statements" and imposes certain requirements as to what other information should be included in the record. However, there might be statements that are otherwise

⁵⁹ See Impugned Decision, paras 25-36.

⁶⁰ Document in Support of the Appeal, paras 10-14; Response to the Document in Support of the Appeal, para. 9.

recorded or given which would also be subject to disclosure. In particular, the audio- or video-record of the questioning of a person in accordance with rule 112 of the Rules of Procedure and Evidence and the transcript thereof are records of statements that are potentially subject to disclosure pursuant to rule 76 of the Rules of Procedure and Evidence where the Prosecutor intends to call the person to testify as a witness. By equating “statements” under rule 76 with only those records of statements prepared pursuant to rule 111, the Trial Chamber effectively, and erroneously, limited the Prosecutor’s disclosure obligations, thereby potentially excluding from disclosure other records of statements such as audio- or video-records prepared pursuant to rule 112.

24. Nevertheless, the immediate question before the Appeals Chamber is not whether audio- or video-records of statements are subject to disclosure. Rather, the question is whether the Trial Chamber erred in finding that rule 111 required the Prosecutor to create an additional signed, written record of the statements of questioned persons when the statements had been audio- or video-recorded. Messrs Banda and Jerbo argue that, in addition to disclosing the audio- or video-records of witnesses’ statements (and transcripts thereof), rule 111 on its own terms requires the Prosecutor additionally to create a signed written record of the witnesses’ statements.

25. Messrs Banda and Jerbo advance three reasons why the text of rules 111 and 112 should be read to establish cumulative and not alternative obligations on the Prosecutor. First, they note that rule 111 (2) creates an obligation to note in the record when persons believed to have committed crimes within the jurisdiction of the Court are informed of their rights under article 55 (2) of the Statute.⁶¹ Given that rule 112 pertains specifically to questioning by the Prosecutor of persons to whom article 55 (2) of the Statute applies (*i.e.*, where there are grounds to believe the person has committed a crime within the jurisdiction of the Court), they argue that reference to such persons in rule 111 would be “entirely redundant” unless the two rules apply cumulatively.⁶² Second, they note that rule 111 applies to “any person who is questioned” without providing for any exceptions therein, thereby suggesting that it

⁶¹ Response to the Document in Support of the Appeal, para. 11.

⁶² Response to the Document in Support of the Appeal, para. 11.

applies even when interviews are audio- or video-recorded pursuant to rule 112.⁶³ Third, they argue that rule 112 (1) (a) refers to noting certain information “in the record” and that this should be understood as referring to the written record created pursuant to rule 111.⁶⁴

26. The Appeals Chamber is not persuaded by Messrs Banda and Jerbo’s arguments. For the reasons which follow, the Appeals Chamber considers that an additional signed and written record of a witness’s statements prepared pursuant to rule 111 is not required when such statements are audio- or video-recorded prepared pursuant to rule 112. As reflected in their titles, rule 111 governs the record of questioning “in general” while rule 112 governs the recording of questioning “in particular cases”. The Appeals Chamber is of the view that rule 111 establishes the general rule, but that rule 112 governs exceptions thereto and its application in particular cases.⁶⁵ Rule 112 serves to protect the rights of questioned persons by ensuring that, in the particular circumstance where there are grounds to believe a person committed a crime within the jurisdiction of the Court, the Prosecutor must create the best possible record of that person’s statements, and it permits the Prosecutor to create such a record in other circumstances. The essential purpose of rules 111 and 112 is that a record must be made of the questioning of persons, and this purpose can be fulfilled through either a written record pursuant to rule 111 or an audio- or video-record pursuant to rule 112. The Appeals Chamber notes that rule 112, sub-rules 1 (a) and 2 provide that where questioning is not audio- or video-recorded as would normally be required, the procedure in rule 111 shall be followed. In the view of the Appeals Chamber, these provisions indicate that rules 111 and 112 set out two alternative procedures for the recording of questioning. Furthermore, the Appeals Chamber observes that rule 112 (4) provides for audio- or video-recording where this could assist in reducing any subsequent traumatization of victims of sexual or gender violence, children or persons with disabilities in providing their evidence. The Appeals Chamber considers that requiring such individuals to review and to sign an additional written record setting out the content of their statements might result in their re-traumatization and thus defeat the purpose of this sub-rule.

⁶³ Response to the Document in Support of the Appeal, para. 12.

⁶⁴ Response to the Document in Support of the Appeal, para. 13.

⁶⁵ See Document in Support of the Appeal, paras 15-21.

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27. The Appeals Chamber considers that the proper interpretation of rules 111 and 112 becomes clear when these rules are interpreted not in isolation but rather in the context of the overall framework for investigations and judicial proceedings set out in the Rules of Procedure and Evidence and their purposes. As noted above, rule 76 requires the Prosecutor to disclose, prior to the trial, copies of statements of persons he or she intends to call to testify, irrespective of the form in which such statements are recorded. Disclosure serves to inform the accused person of the prior statements and likely future testimony of the witnesses against him or her, thereby enabling him or her to prepare and to conduct his or her defence. A complete audio- or video-record of the questioning of a person will provide the fullest and most accurate account of the questioned person's statements. Any additional written record could, at most, only duplicate the statements contained in this audio- or video-record and would most likely contain less information. Given that the audio- or video-record would, in principle, be subject to disclosure, interpreting rule 111 to require the Prosecutor always to create an additional signed, written record of the statement would create an additional burden on the Prosecutor without necessarily bringing any concomitant benefit to the investigation or to the judicial proceedings.

28. Accordingly, the Appeals Chamber concludes that, with respect to persons questioned in accordance with rule 112, the Trial Chamber erred by: (1) effectively excluding from the scope of the Prosecutor's disclosure obligations under rule 76 the audio- or video-records of questioning and transcripts thereof and (2) requiring the Prosecutor, as a matter of law, to create written and signed records of the statements of witnesses in lieu of these audio- or video-records and transcripts. These legal errors formed the basis for and thereby materially affected the Trial Chamber's order to the Prosecutor to create and to disclose additional written records of the statements of these interviews. As the Trial Chamber erred in finding that the Prosecutor was obliged to create such additional records as a matter of law pursuant to rules 76 and 111, the Appeals Chamber need not consider the Trial Chamber's further finding that it would be useful to the defence if such records were well-organized, comprehensive and in narrative form.

29. The Appeals Chamber is cognisant that the Impugned Decision arose against the background of the Trial Chamber's efforts to address the practical difficulties facing



the Prosecutor in translating into Zaghawa a significant volume of statements of witnesses on whom he intends to rely at trial. Messrs Banda and Jerbo argue that, in these circumstances, the Impugned Decision “was necessary to preserve the expeditious conduct of the trial”.⁶⁶ The Appeals Chamber is aware that, in certain circumstances, making available the statements of witnesses in a language the accused fully understand and speak as required by rule 76 (3) of the Rules of Procedure and Evidence may create intractable difficulties. The Appeals Chamber generally agrees with Messrs Banda and Jerbo that the resolution of such practical difficulties is, in principle, a matter falling within the Trial Chamber’s “discretionary trial management powers”.⁶⁷ However, as set out above, the Impugned Decision fundamentally was not based on the Trial Chamber’s discretionary trial management powers. Rather, it was premised on an erroneous interpretation of the law. Accordingly, the Impugned Decision must be reversed. In the event that making available the transcripts of statements in Zaghawa does give rise to intractable difficulties, then it is wholly within the powers of the Trial Chamber in consultation with the parties to devise practical solutions to these difficulties, ensuring expeditious proceedings while guaranteeing the rights of the accused. However, it would be inappropriate for the Appeals Chamber to pronounce itself on what solutions may be appropriate in any hypothetical case.

V. APPROPRIATE RELIEF

30. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to reverse the Impugned Decision to the extent that it ordered the Prosecutor, pursuant to rules 76 and 111 of the Rules of Procedure and Evidence, to create and to disclose organised and signed witness statements in narrative form of witnesses on whom he intends to rely for the purposes of trial and whose interviews were recorded only in audio- or video-form in accordance with rule 112 of the Rules of Procedure and Evidence.

Done in both English and French, the English version being authoritative.

⁶⁶ Response to the Document in Support of the Appeal, para. 22.

⁶⁷ *See* Response to the Document in Support of the Appeal, para. 23.



Judge Daniel David Ntanda Nsereko
Presiding Judge

Dated this 17th day of February 2012

At The Hague, The Netherlands