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Date: 20 May 2016

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 IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF THE PROSECUTOR v. BOSCO NTAGANDA

Public document

Judgment

on the appeal of Mr Bosco Ntaganda against the “Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses”

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims
Ms Sarah Pellet
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REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI entitled “Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses” of 16 October 2015 (ICC-01/04-02/06-904),

After deliberation,

Delivers unanimously

JUDGMENT

The “Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses” of 16 October 2015 (ICC-01/04-02/06-904) is confirmed.

REASONS

I. KEY FINDING

1. A system of disclosure, in which only the disclosure of statements made by witnesses when questioned about their knowledge of the case occurs pursuant to rule 76 (1) of the Rules of Procedure and Evidence, is not prejudicial to an accused’s fair trial rights.

II. PROCEDURAL HISTORY

2. On 25 August 2015, Mr Bosco Ntaganda (“Mr Ntaganda”) filed a request before Trial Chamber VI (“Trial Chamber”) seeking an order for the Prosecutor to disclose, *inter alia*, “any statements, in whatever form, of witnesses whom the Prosecution intends to call” pursuant to rules 76 (1) and 77 of the Rules of Procedure and Evidence (“Rules”) and article 67 (2) of the Statute¹ (“Disclosure Request”).

¹ “Request on behalf of Mr Ntaganda for disclosure orders pursuant to Rule 76 and 77 of the Rules of Procedure and Evidence”, ICC-01/04-02/06-795-Conf-Exp, with annexes A-P; a public redacted version was filed on the same date and registered on 26 August 2015 ([ICC-01/04-02/06-795-Red](#)).

3. On 28 August 2015, Mr Ntaganda filed a disclosure request regarding witness P-0901² (“Witness P-0901 Disclosure Request”).
4. The Prosecutor responded³ on 7 August 2015 to the Witness P-0901 Disclosure Request and, on 14 August 2015, to the Disclosure Request,⁴ opposing both.
5. On 18 September 2015, the Trial Chamber issued a decision,⁵ in which it, *inter alia*, rejected the Witness P-0901 Disclosure Request (“Witness P-0901 Disclosure Decision”).
6. On 16 October 2015, the Trial Chamber issued a decision⁶ rejecting, *inter alia*, the Disclosure Request (“Impugned Decision”).
7. On 26 October 2015, Mr Ntaganda requested leave to appeal⁷ three issues that he argued arose from the Impugned Decision.⁸ On 29 October 2015, the Prosecutor responded,⁹ opposing the request.¹⁰
8. On 27 November 2015, the Trial Chamber issued a decision¹¹ (“Decision Granting Leave to Appeal”), in which it granted leave to appeal one of the three issues

² “Request on behalf of Mr Ntaganda seeking disclosure orders in relation to Witness P-0901”, ICC-01/04-02/06-800-Conf-Exp; a public redacted version was filed on 4 September 2015 and registered on 7 September 2015 ([ICC-01/04-02/06-800-Red](#)).

³ “Prosecution response to the Defence request seeking disclosure orders in relation to Witness P-901”, ICC-01/04-02/06-808-Conf-Exp; a public redacted version was filed on 28 September 2015 ([ICC-01/04-02/06-808-Red](#)).

⁴ “Response to the Defence request for disclosure orders pursuant to rules 76 and 77 of the Rules of Procedure and Evidence”, ICC-01/04-02/06-822-Conf-Exp; a public redacted version was filed on 6 October 2015 ([ICC-01/04-02/06-822-Red](#)).

⁵ “Decision on Defence requests seeking disclosure orders in relation to witness P-0901 and seeking the postponement of the witness’s cross-examination”, ICC-01/04-02/06-840-Conf-Exp; a public redacted version was filed on 5 October 2015 ([ICC-01/04-02/06-840-Red](#)).

⁶ “Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses”, 16 October 2015, [ICC-01/04-02/06-904](#).

⁷ “Request on behalf of Mr Ntaganda seeking leave to appeal the ‘Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses’”, ICC-01/04-02/06-941-Conf-Exp with annexes A-D; a public redacted version was filed on 28 October 2015 ([ICC-01/04-02/06-941-Red](#)) (“Request for Leave to Appeal”).

⁸ [Request for Leave to Appeal](#), para. 1.

⁹ “Prosecution’s response to Defence application for leave to appeal the ‘Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses’”, 29 October 2015, [ICC-01/04-02/06-967](#) (“Prosecutor’s Response to Request for Leave to Appeal”).

¹⁰ [Prosecutor’s Response to Request for Leave to Appeal](#), paras 1, 20.

¹¹ “Decision on Defence request for leave to appeal the ‘Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses’”, 27 November 2015, [ICC-01/04-02/06-1039](#).

identified by Mr Ntaganda, namely “[w]hether the Chamber erred in law in its definition of ‘statement’ in Rule 76(1) of the Rules”.¹²

9. On 10 December 2015, Mr Ntaganda filed the document in support of his appeal against the Impugned Decision,¹³ to which, on 18 December 2015, the Prosecutor responded.¹⁴

III. MERITS

A. Background

10. In the Disclosure Request, Mr Ntaganda sought a general order to address the Prosecutor’s “unduly narrow understanding” of her disclosure obligations.¹⁵ In particular, Mr Ntaganda requested that the Trial Chamber instruct the Prosecutor not to withhold any statements on the basis that they only concern security issues, which he argued violated the Prosecutor’s disclosure obligations because such statements fall under rule 76 (1) of the Rules.¹⁶

11. In rejecting the Disclosure Request, the Trial Chamber held, in relevant part:

28. In respect of the Defence’s request for statements of witnesses, in any form, ‘pursuant to Rules 76(1) and 77 of the Rules and Article 67(2) of the Statute’, the Chamber considers it important to distinguish between the different legal bases upon which statements of a witness may be disclosable. All statements falling within Rule 76(1) of the Rules must be disclosed, and must be provided both in the original language of the statement and in a language which the accused fully understand [*sic*] and speaks. By contrast, statements not falling within Rule 76 of the Rules must be disclosed only where they are material to the preparation of the Defence, within the meaning of Rule 77 of the Rules, or are potentially exculpatory in the sense of falling within Article 67(2) of the Statute.

¹² [Decision Granting Leave to Appeal](#), para. 6 and p. 10.

¹³ “Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses’, ICC-01/04-02/06-904”, 10 December 2015, [ICC-01/04-02/06-1051](#) (OA 3) (“Document in Support of the Appeal”).

¹⁴ “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’”, registered on 21 December 2015, [ICC-01/04-02/06-1068](#) (OA 3), with annex ([ICC-01/04-02/06-1068-Anx](#) (OA 3)) (“Response to the Document in Support of the Appeal”).

¹⁵ [Disclosure Request](#), p. 9.

¹⁶ [Disclosure Request](#), para. 19.

29. [...] [A]s the Chamber has previously observed, not all items containing information obtained from a witness will necessarily constitute a ‘statement’ within the meaning of Rule 76 of the Rules. *As found in the [Witness P-0901] Disclosure Decision, the Chamber concurs with the definition provided by the Single Judge of Trial Chamber VII that statements, within the meaning of Rule 76 of the Rules, are made only when witnesses are ‘questioned about their knowledge of the case in the course of its investigation’. This definition is also consistent with the jurisprudence of other international courts and tribunals.*

30. Therefore statements of witnesses, or information provided by them, solely relating to matters other than their knowledge of the case - which may, for example, include information provided relating to security concerns or purely logistical matters - do not come within Rule 76 of the Rules. This does not mean that such information is not subject to disclosure; it may be, or become subject to disclosure, should it fall within the disclosure requirements of either Rule 77 of the Rules of [sic] Article 67(2) of the Statute. [...] [Emphasis added, footnotes omitted.]

12. The definition provided in paragraph 29 of the Impugned Decision is relevant to this appeal. The Trial Chamber noted that it had previously articulated this definition in the Witness P-0901 Disclosure Decision,¹⁷ finding support for its interpretation in a decision of the Single Judge of Trial Chamber VII¹⁸ in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo et al.* (“Single Judge’s Decision”). The Trial Chamber found its definition consistent with the “jurisprudence of other international courts and tribunals”, referring in a footnote to “[...] the jurisprudence of the ICTY Appeals Chamber, International Criminal Tribunal for Rwanda and Special Court for Sierra Leone cited to in the [Single Judge’s Decision], footnote 9”.¹⁹

13. With respect to the Trial Chamber’s reasoning, the Appeals Chamber notes that the Impugned Decision merely adopts without further explanation the Single Judge’s

¹⁷ In the Witness P-0901 Disclosure Decision, the Trial Chamber held at paragraph 53 that: “The Single Judge of Trial Chamber VII recently held that ‘prior statements’ within the meaning of Rule 76 are made only when witnesses are ‘questioned about their knowledge of the case in the course of its investigation’. The Chamber agrees with this definition of prior statements”. The Appeals Chamber notes that paragraph 53 of the Witness P-0901 Disclosure Decision refers to the same paragraph and footnotes of the Single Judge’s Decision (*infra* footnote 18) as the Impugned Decision. Given that (i) in the Impugned Decision the Trial Chamber reaffirmed the identical definition and referred to the same authorities as in the Witness P-0901 Disclosure Decision, and (ii) the Witness P-0901 Disclosure Decision was not appealed and is consequently not before it, the Appeals Chamber will not further address the Witness P-0901 Disclosure Decision in the present judgment and will refer only to the Impugned Decision and Single Judge’s Decision for purposes of reviewing the impugned definition at issue in this appeal.

¹⁸ “Decision on Request for Disclosure or Securing of Prior Statements Given by Prosecution Witnesses to Domestic Judicial Authorities and International Organisations”, 9 September 2015, [ICC-01/05-01/13-1227](#).

¹⁹ [Impugned Decision](#), para. 29.

Decision's definition of a 'statement' of witnesses within the meaning of rule 76 (1) of the Rules, which itself primarily referred to the interpretation from other international courts and tribunals to support its finding. Furthermore, the Appeals Chamber notes that the definition referred to was provided by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the case of *Prosecutor v. Tihomir Blaškić*²⁰ ("*Blaškić Decision*") and that it was based on what that Appeals Chamber called the "usual meaning" of a 'witness statement'.²¹ It did not explain from which sources it derived this "usual meaning".²² The Appeals Chamber also notes that the further jurisprudence referred to by the Trial Chamber simply adopted the definition given in the *Blaškić Decision*.²³ The Trial Chamber did not fully analyse whether the other international courts and tribunals' jurisprudence relevant to defining the term 'witness statement' was an appropriate source of guidance.

B. Determination by the Appeals Chamber

14. The issue for which leave to appeal was granted by the Trial Chamber is "[w]hether the Chamber erred in law in its definition of 'statement' in Rule 76 (1) of the Rules",²⁴ which the Trial Chamber defined as only being made when a witness is "questioned about their knowledge of the case in the course of its investigation".²⁵ Mr Ntaganda argues that the Trial Chamber erred in law in its interpretation of "statements made by [...] witnesses" ('witness statements') under rule 76 (1) of the

²⁰ "[Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings](#)", 26 September 2000, IT-95-14-A.

²¹ [Blaškić Decision](#), para. 15.

²² The international courts and tribunals concerned have held that their respective Rules of Procedure and Evidence do not provide for a definition of the term 'witness statement'. See [Blaškić Decision](#), para. 15; Special Court for Sierra Leone ("SCSL"), *Prosecutor v. Sam Hinga Norman et al.*, "[Decision on Disclosure of Witness Statements and Cross-Examination](#)", 16 July 2004, SCSL-2004-14-T, para. 10.

²³ [Impugned Decision](#), footnote 60. See [Single Judge's Decision](#), footnote 9; International Criminal Tribunal for Rwanda, *Prosecutor v. Édouard Karemera et al.*, "[Decision on Joseph Nzirorera's Sixth, Seventh and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and Other Measures](#)", 29 November 2007, ICTR-98-44-T, para. 20; SCSL, *Prosecutor v. Alex Tamba Brima et al.*, "[Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68](#)", 4 May 2005, SCSL-04-16-T, para. 16.

²⁴ [Decision Granting Leave to Appeal](#), para. 6.

²⁵ [Impugned Decision](#), para. 29.

Rules and more broadly that this interpretation will result in a prosecutorial disclosure regime that does not adequately protect the fairness of the court proceedings.²⁶

15. The Appeals Chamber reiterates that, regarding alleged errors of law, it will arrive at its own conclusion as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.²⁷ In this particular case, the Appeals Chamber considers that the reasoning for the impugned finding as set out above is sparse and proceeds to conduct its own analysis in accordance with the appropriate methods of interpretation.

16. For the following reasons, the Appeals Chamber finds no error in the Trial Chamber's decision that "statements, within the meaning of Rule 76 of the Rules, are made only when witnesses are 'questioned about their knowledge of the case [...]'"²⁸ Furthermore, the Appeals Chamber finds that Mr Ntaganda's fair trial rights are not prejudiced by this interpretation of rule 76 of the Rules.

17. At the outset, the Appeals Chamber notes that the Trial Chamber confined itself to the effect its definition had on statements that were entirely unrelated to the witness's knowledge of the case.²⁹ As such, the Appeals Chamber will not address other issues regarding the definition of statements such as the entity to which a statement was made,³⁰ its form,³¹ and whether statements that contain both

²⁶ [Document in Support of the Appeal](#), paras 29-30, 34.

²⁷ *Prosecutor v. Uhuru Muigai Kenyatta*, "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'", 19 August 2015, [ICC-01/09-02/11-1032 \(OA 5\)](#), para. 23; *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Conf (A 5); a public redacted version was registered on the same date ([ICC-01/04-01/06-3121-Red \(A 5\)](#)), para. 18; *Prosecutor v. Simone Gbagbo*, "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'", 27 May 2015, ICC-02/11-01/12-75-Conf (OA); a public redacted version was registered on the same date ([ICC-02/11-01/12-75-Red](#) (OA)), para. 40.

²⁸ [Impugned Decision](#), para. 29.

²⁹ [Impugned Decision](#), para. 30. In the Impugned Decision, the Trial Chamber did not apply its legal definition of a 'statement' under rule 76 (1) of the Rules to any specific disputed statement. However, the Trial Chamber held that the legal consequence of the articulated definition was, as a general matter, that "statements of witnesses, or information provided by them, solely relating to matters other than their knowledge of the case [...] do not come within Rule 76 of the Rules".

³⁰ As noted in the [Decision Granting Leave to Appeal](#), para. 17, the Impugned Decision does not contain a finding excluding from the scope of rule 76 of the Rules "statements given to organisations other than the Prosecution".

³¹ See *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled

information about the witness's knowledge of the case and information unrelated thereto are still disclosable under rule 76 of the Rules.³² The Appeals Chamber considers these matters to be outside the scope of the current appeal.

18. The Appeals Chamber notes that the qualification given by the Trial Chamber that statements within the meaning of rule 76 (1) of the Rules are only those statements that are based on the witness's knowledge of the case is not apparent from the text of rule 76 (1) of the Rules, which reads:

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

The Appeals Chamber considers that the only qualification to be derived from the plain wording of rule 76 (1) of the Rules is that the statement must have come from a witness whom the Prosecutor intends to call to testify.

19. While this interpretation may be appealing in its simplicity, regard must also be had to the broader context regulating prosecutorial disclosure to an accused, that is rule 77 of the Rules and article 67 (2) of the Statute. Rule 76 of the Rules forms but one part of this inter-related disclosure scheme and, in interpreting this provision, the Appeals Chamber is mindful of the system of disclosure as a whole and whether this is in line with the rights of the accused set out in article 67 (1) of the Statute and with international human rights standards.

20. Rule 76, entitled "Pre-trial disclosure relating to prosecution witnesses", provides in remaining part:³³

[...]

'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, [ICC-02/05-03/09-295](#) (OA 2) ("*Banda and Jerbo* OA 2 Judgment"), para. 23.

³² See [Document in Support of the Appeal](#), para. 23; [Response to the Document in Support of the Appeal](#), para. 34. See also in this context with respect to disclosure, *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Prosecutor's request for non-disclosure in relation to document 'OTP/DRC/COD-190/JCCD-pt'", 27 May 2013, [ICC-01/04-01/06-3031](#) (A 5) (A 6), para. 12.

³³ The Appeals Chamber notes that the French version of rule 76 (1) of the Rules, which reads: "Le Procureur communique à la défense le nom des témoins qu'il entend appeler à déposer et une copie de leurs déclarations", does not include 'any'.

2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.

3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.

4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

21. Rule 77, entitled “Inspection of material in possession or control of the Prosecutor” provides:

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

22. Article 67 (2) of the Statute provides:

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

23. The Appeals Chamber notes that, read together, these disclosure provisions ensure that the Prosecutor discloses to an accused in particular: 1) “the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses”;³⁴ 2) “any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which [...] are intended for use by the Prosecutor as evidence [...] at trial”;³⁵ 3) “any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence”;³⁶ and 4) “evidence in the Prosecutor’s possession or control which [...] she believes shows or tends to

³⁴ Rule 76 (1) of the Rules.

³⁵ Rule 77 of the Rules.

³⁶ Rule 77 of the Rules.

show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence”.³⁷ With respect to disclosure under rule 77 of the Rules, and in particular the question of “which objects are ‘material to the preparation of the defence’”,³⁸ the Appeals Chamber has held that this phrase has to be “understood as referring to all objects that are relevant for the preparation of the defence”.³⁹ The Appeals Chamber notes that the main difference between disclosure in item 1) above (witness statements) and disclosure in items 3) and 4) above (rule 77 of the Rules and article 67 (2) of the Statute), is the nature of the Prosecutor’s assessment of material subject to disclosure. Article 67 (2) of the Statute requires disclosure of evidence which the Prosecutor *believes* meets the criteria set out therein. Similarly, rule 77 of the Rules leaves to the Prosecutor the assessment of whether objects are “material to the preparation of the defence” and their inspection should thus be permitted.

24. With regard to a contextual interpretation and in particular the purpose of rule 76 (1) of the Rules, Mr Ntaganda submits in essence that disclosure of witness statements under this provision is to enable him to effectively cross-examine,⁴⁰ a right enshrined in article 67 (1) (e) of the Statute. He argues in this regard that information regarding “credibility, reliability and potential bias” is “the information most essential to the accused’s capacity to confront a witness in an adversarial proceeding”.⁴¹ Thus, the Appeals Chamber understands Mr Ntaganda to argue essentially that disclosure under rule 76 (1) of the Rules encompasses statements that relate to all aspects of the case and includes witness statements that would, under the Trial Chamber’s

³⁷ Article 67 (2) of the Statute.

³⁸ “Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’”, 28 August 2013, [ICC-02/05-03/09-501](#) (OA 4) (“*Banda and Jerbo OA 4 Judgment*”), para. 39.

³⁹ *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008”, 11 July 2008, [ICC-01/04-01/06-1433](#) (OA 11) (“*Lubanga OA 11 Judgment*”), para. 77; [Banda and Jerbo OA 4 Judgment](#), para. 38. *See also Prosecutor v. Thomas Lubanga Dyilo*, “Decision on Mr Lubanga’s request for disclosure”, 11 April 2013, [ICC-01/04-01/06-3017](#) (A 5) (A 6), para. 10.

⁴⁰ [Document in Support of the Appeal](#), para. 31.

⁴¹ [Document in Support of the Appeal](#), para. 31.

definition, only be disclosable under rule 77 of the Rules or article 67 (2) of the Statute.⁴²

25. Conversely, the Prosecutor argues that the Impugned Decision “requires a logical link between the subject of the witness’ statement and the facts being investigated or prosecuted in the case”.⁴³ In this regard, the Prosecutor submits that the test articulated in the Impugned Decision only excludes statements that are clearly irrelevant to the case as other statements may be disclosable under rule 77 of the Rules or article 67 (2) of the Statute.⁴⁴ She further contends that her “disclosure duties ‘must necessarily be based [...] on [her] understanding of the case as a whole, including what is known or anticipated about possible defence(s)’”.⁴⁵ As such, in the Prosecutor’s view, issues of credibility or possible bias relate to her disclosure obligations under rule 77 of the Rules and article 67 (2) of the Statute.⁴⁶

26. The Appeals Chamber has held, in discussing the form of a ‘witness statement’, that rule 76 of the Rules “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.”⁴⁷ Accordingly, rule 76 (1) of the Rules serves the purpose of facilitating the accused’s effective exercise of his or her right to examine the witnesses against him or her, which is guaranteed by article 67 (1) (b) of the Statute (the right to have adequate facilities for the preparation of the defence) and article 67 (1) (e) (the right to examine, or have examined, the witnesses against him or her). In that regard, the Appeals Chamber emphasises that, in order to examine a prosecution witness and prepare for that witness’s future testimony, the Defence needs to know primarily the scope of the proposed testimony. The Appeals Chamber notes that the scope of the proposed testimony reveals to the Defence the witness’s knowledge of the case and, in particular, of the facts usually alleged by the Prosecutor as incriminating the accused.

⁴² [Document in Support of the Appeal](#), paras 27, 28, 33-34.

⁴³ [Response to the Document in Support of the Appeal](#), para. 12.

⁴⁴ [Response to the Document in Support of the Appeal](#), paras 14, 16.

⁴⁵ [Response to the Document in Support of the Appeal](#), para. 16, citing [Lubanga OA 11 Judgment](#), para. 36.

⁴⁶ [Response to the Document in Support of the Appeal](#), para. 16.

⁴⁷ [Banda and Jerbo OA 2 Judgment](#), para. 27.

27. The Appeals Chamber, however, acknowledges that, in order to adequately prepare for the examination of a prosecution witness, the Defence may also need to prepare questions relevant to the credibility and potential bias of the witness. Such questions need not be based on the witness's knowledge of the case but may encompass other issues, including those relevant to the witness's background. Nevertheless, for the reasons that follow, the Appeals Chamber is not persuaded by Mr Ntaganda's assertion that witness statements under rule 76 (1) of the Rules should extend to statements that are completely unrelated to the witness's knowledge of the case, but potentially relevant to the witness's credibility or other issues that are material to the preparation of the defence.

28. First, the Appeals Chamber notes that material that puts a witness's credibility in doubt or serves to show potential bias is not derived from witness statements alone. This category of material is much broader. The Prosecutor is obliged to disclose such material pursuant to article 67 (2) of the Statute if the Prosecutor believes that it may affect the credibility of Prosecution evidence, or rule 77 of the Rules if it is otherwise "material to the preparation of the defence".⁴⁸

29. Second, the Appeals Chamber considers that the view that witness statements pursuant to rule 76 (1) of the Rules are statements relevant to the witness's knowledge of the case is also supported by the translation requirement contained in rule 76 (3) of the Rules. Under this rule, the Prosecutor has the duty to make the statements of her witnesses "available in original and in a language which the accused *fully* understands and speaks" (emphasis added).⁴⁹

30. The Appeals Chamber further notes that the requirement to make the disclosed material available in a language which the accused fully understands and speaks is not expressly stated with respect to disclosure under other provisions of the Statute and the Rules. Notably, no such requirement is expressly stipulated for the disclosure of

⁴⁸ *Supra* para. 23.

⁴⁹ The language is the same as that in article 67 (1) (a) of the Statute. In addition, the Appeals Chamber recalls that the translation standard applicable at the Court is higher than for example the standard provided for in the European Convention on Human Rights or the International Covenant on Civil and Political Rights. See *Prosecutor v. Germain Katanga*, "Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled 'Decision on the Defence Request Concerning Languages'", 27 May 2008, [ICC-01/04-01/07-522](#) (OA 3), paras 61-62; in regard of translation matters see also [Banda and Jerbo OA 2 Judgment](#), para. 29.

objects which are material to the preparation of the defence (rule 77 of the Rules) and for the disclosure of evidence which may affect the credibility of prosecution evidence (article 67 (2) of the Statute). This is indicative of the particular significance of the disclosure pursuant to rule 76 (1) of the Rules, as compared to the disclosure of material which is relevant, for instance, solely to credibility. The interpretation of the Prosecutor's disclosure obligations under rule 76 (1) of the Rules proposed by Mr Ntaganda would extend the requirement of translation to documents relevant solely to credibility and also to documents of no relevance to the case at all. The Appeals Chamber finds that this interpretation does not conform to the purposes of disclosure identified above and, in addition, imposes a potentially burdensome requirement of translation with respect to documents of no relevance to the Defence.

31. Mr Ntaganda further argues that an interpretation whereby only witness statements linked to the witness's knowledge of the case would fall under rule 76 (1) could lead to situations where information relevant to the credibility of a witness may not be disclosed.⁵⁰ Mr Ntaganda submits that, in light of the materiality test contained in rule 77 of the Rules, the Prosecutor may fail to apprehend the impact of certain information, such as those related to security concerns, which would, however, be relevant to the credibility of the witness.⁵¹ He asserts that the defence is uniquely able to assess issues of credibility, reliability and potential bias and that placing this assessment with the Prosecutor instead will result in disclosure violations, regardless of her good faith efforts in this regard.⁵² Mr Ntaganda accordingly argues that the Prosecutor is unable to determine which statements that do not relate to the witness's knowledge of the case need to be disclosed pursuant to rule 77 of the Rules or article 67 (2) of the Statute.⁵³ The inevitable effect of this, according to Mr Ntaganda, is that such statements will not be disclosed or that these statements will be the subject of litigation, rendering the trial inefficient and lengthier.⁵⁴ Thus, for statements originating from witnesses, Mr Ntaganda requests automatic disclosure under rule 76

⁵⁰ [Document in Support of the Appeal](#), para. 28.

⁵¹ [Document in Support of the Appeal](#), para. 28.

⁵² [Document in Support of the Appeal](#), paras 29, 31.

⁵³ [Document in Support of the Appeal](#), para. 28.

⁵⁴ [Document in Support of the Appeal](#), para. 30.

(1) of the Rules with no assessment of relevance being undertaken by the Prosecutor.⁵⁵

32. In considering Mr Ntaganda's argument, the Appeals Chamber finds for the reasons that follow that the system of disclosure, in which only the disclosure of statements made by witnesses when questioned about their knowledge of the case occurs pursuant to rule 76 (1) of the Rules, is not prejudicial to an accused's fair trial rights.

33. First, the Appeals Chamber considers that information regarding the witness's security concerns or logistical arrangements, which Mr Ntaganda seeks to obtain through disclosure under rule 76 (1) of the Rules, may be disclosed to him under rule 77 of the Rules if it is material to the preparation of his defence, or under article 67 (2) of the Statute if it affects the credibility of prosecution evidence. In cases of dispute, he may seek an order from the Trial Chamber. While such material is not translated into the language which the accused fully understands and speaks, the Appeals Chamber considers that no prejudice arises because article 67 (1) (f) of the Statute ensures that translations that "are necessary to meet the requirements of fairness" may be ordered.

34. In addition, Mr Ntaganda's argument presupposes that conferring the task of selecting material for disclosure on the basis of a certain criterion to the Prosecutor is prejudicial to the rights of the accused. The Appeals Chamber, however, notes that rule 77 of the Rules requires the Prosecutor to carry out this assessment, and that Mr Ntaganda's argument, if accepted, would in effect mean that rule 77 of the Rules is inherently prejudicial to the rights of the accused. The Appeals Chamber notes in this regard that Mr Ntaganda is not arguing that such prejudice actually occurred in the case-at-hand. The Appeals Chamber cannot address this matter in the absence of concrete allegations. The Appeals Chamber also notes that Mr Ntaganda does not support his argument by reference to international, human rights or domestic jurisprudence that would support his view that a disclosure system in which the Prosecutor decides which material in his or her possession is relevant to the defence is inherently prejudicial to the defence. Upon a general survey of the relevant

⁵⁵ [Document in Support of the Appeal](#), para. 33.

international and domestic jurisprudence, the Appeals Chamber cannot find support for such an approach, noting in addition that Mr Ntaganda is not arguing in favour of a stronger role of the Trial Chamber with respect to disclosure but for extending the disclosure obligations of the Prosecutor, where disclosure takes place primarily between the Prosecutor and the Defence. The Appeals Chamber recalls in this context that, under the Statute, the Prosecutor's obligation in the course of the investigation is not merely to focus on eliciting incriminating materials, but, in order to establish the truth, as laid down in article 54 (1) of the Statute, she must "investigate incriminating and exonerating circumstances equally".

35. Furthermore, the interpretation of rule 76 (1) of the Rules proposed by Mr Ntaganda would extend the Prosecutor's disclosure obligation under this rule to material that is irrelevant to the case. The Appeals Chamber notes that it is not aware of such a practice at other international tribunals and that the jurisprudence of the European Court of Human Rights ("ECtHR") also does not extend prosecutorial disclosure to material, which is irrelevant to the defence. In that regard, the ECtHR has held that "it is a requirement of fairness under paragraph 1 of Article 6 [of the European Convention on Human Rights] [...] that the prosecution authorities disclose to the defence all *material* evidence for or against the accused [...]"⁵⁶ (emphasis added).

36. The Appeals Chamber also notes the argument of the Prosecutor made in this context that, if rule 76 (1) of the Rules were interpreted more broadly than in the Impugned Decision, the Defence would be "flooded with irrelevant information".⁵⁷ However, the Appeals Chamber cannot draw conclusions from this assertion as the amount of such irrelevant information, if any, may be different in each case and may not necessarily result in the Defence being "flooded" therewith.

37. Finally, as the Appeals Chamber finds that rule 77 of the Rules is not inherently prejudicial, it cannot be argued that an interpretation of rule 76 (1) that allegedly excludes some material from the scope of this rule and makes its disclosure dependent

⁵⁶ *Edwards v. the United Kingdom*, "[Judgment](#)", 16 December 1992, application no. 13071/87, para. 36.

⁵⁷ [Response to the Document in Support of the Appeal](#), para. 15.


on compliance with the criterion set out in rule 77 is, on its own, prejudicial to the rights of the accused.

38. In sum, the Appeals Chamber finds that it is consistent with the purpose of rule 76 (1) of the Rules, read in line with the applicable prosecutorial disclosure regime, that disclosure of statements made “when witnesses are ‘questioned about their knowledge of the case [...]’”⁵⁸ takes place pursuant to rule 76 (1) of the Rules. Conversely, statements provided by witnesses, which relate solely to matters other than facts and circumstances described in the charges, are more appropriately disclosed in accordance with rule 77 of the Rules or article 67 (2) of the Statute if they meet the criteria set out in those provisions, which is also fully consistent with the accused’s rights guaranteed by the Statute.

IV. APPROPRIATE RELIEF

39. 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). In the present case it is appropriate to confirm the Impugned Decision.

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 20th day of May 2016

At The Hague, The Netherlands

⁵⁸ [Impugned Decision](#), para. 29.