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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Public with Public Annex A

**Request for reconsideration of the order to disclose requests for assistance
(ICC-02/04-01/15-457)**

Source: Office of the Prosecutor

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

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Introduction

1. On 7 June 2016, the Single Judge ordered the Prosecution to disclose requests for assistance (RFAs) which “led to information which the Prosecution relies upon as incriminating evidence against Mr Ongwen”, subject to redactions in accordance with the applicable redaction regime.¹ The Single Judge considered this disclosure to be required by rule 77 of the Rules of Procedure and Evidence.²

2. Although the Prosecution is not opposed to disclosure of RFAs, if they are potentially exonerating or otherwise material to the preparation of the Defence, the reasoning in the Decision does not appear to support the measure ordered. It is inconsistent with the Court’s otherwise consistent practice under rule 77, and would appear to defeat the object of the “case-by-case assessment” which the Decision states that it applies.³ While the Decision adheres to the established law in principle, it would appear to depart from it in practice.

3. For this reason, the Prosecution requests reconsideration of the Decision in relevant part, and vacation of the disclosure order pending further *inter partes* consultations between the Prosecution and Defence.

4. The Prosecution is mindful that reconsideration is an exceptional remedy. But this is an exceptional case. Considering that the investigation phase is largely completed, the Decision does not presently significantly affect the fair and expeditious conduct of this case— thus foreclosing certification for appeal.⁴ However, it may yet have adverse consequences if further investigation in the Defence case is necessary. In addition— and significantly—the legal issue at stake is

¹ ICC-02/04-01/15-457 (“Decision”), para. 14, Disposition.

² Decision, para. 14 (reasoning that the RFAs “must be disclosed as being material to the preparation of the defence”).

³ Decision, paras. 13-14.

⁴ See Statute, art. 82(1)(d).

of general importance for the Office of the Prosecutor and the Court as whole as it may threaten the Prosecution's ability to execute its investigative mandate within a situation,⁵ and the confidence of the States upon whose cooperation it depends.⁶ Furthermore, injecting new uncertainty into the law on disclosure assists neither Party, and risks further burdensome litigation associated with matters whose materiality is no more than speculative.

5. The Prosecution reiterates its continuing intention to disclose all items in its possession which are indeed *prima facie* material to the preparation of the defence, including RFAs as and when necessary. This motion seeks only to maintain the existing law that *prima facie* materiality must be determined on some objective basis.

Submissions

6. The Decision contains a clear error of reasoning, and thus warrants reconsideration.⁷

7. This clear error may be discerned on the basis of:

- the inconsistency between the law stated in the Decision and the law applied in practice;
- the inconsistency of the Decision with prior case law; and
- the inconsistency of the Decision with the consultative approach to disclosure emphasised by the Single Judge and implemented by the Parties.

⁵ See e.g. STL, *Prosecutor v. Ayyash et al*, STL-11-01/T/TC, Decision on Disclosure of List of Student Information, 9 April 2014 ("Ayyash Student List Decision"), para. 13.

⁶ See e.g. Statute, art. 54(2).

⁷ See e.g. ICC-01/05-01/13-1896, para. 8; ICC-01/05-01/13-1812, para. 6; ICC-01/05-01/13-1282, para. 8; ICC-01/04-02/06-611, para. 12; ICC-01/04-02/06-483, para. 13; ICC-01/09-01/11-1813, para. 19.

8. It is axiomatic that the Defence does not have a right, under rule 77, to disclosure of documents or other items which have *not* been shown, *prima facie*, to be material to its preparation. Yet, in all the circumstances, this would seem to be the effect of the reasoning in the Decision.

A. The Decision does not apply the case-by-case assessment which it recognised to be required by law

9. To the extent that the Decision shows an inconsistency between the espoused principle, and its application in practice, this reflects a clear error of reasoning.

10. Rule 77 requires the disclosure, *inter alia*, of documents and other objects in the Prosecutor's possession or control "which are material to the preparation of the defence". However, as the Appeals Chamber has affirmed, "the right to disclosure is not unlimited" and determining "which objects are 'material to the preparation of the defence' will depend upon the specific circumstances of the case."⁸ This requires the Prosecution—or the Chamber, if the adequacy of disclosure is challenged before the Court—to review the materiality of the documents or objects in question through the lens of the facts and circumstances of the case. It does not permit materiality to be determined in the abstract. Indeed, rule 77 does not require the automatic disclosure of any class of documents or objects, with the sole exception of those which were "obtained from or belonged to" the accused person.

11. The Single Judge recognised the case-specific analysis required by the law when he stated that "[t]he materiality of RFAs are assessed on a case-by-case basis".⁹ Likewise, the Single Judge rejected the notion that "all RFAs in the Uganda situation must be disclosed by default."¹⁰

⁸ ICC-02/05-03/09-501 OA4 ("Banda and Jerbo AD"), para. 39.

⁹ Decision, para. 13.

¹⁰ Decision, para. 13.

12. Yet the Single Judge then reasoned that “a case-by-case assessment in the present case *requires* that, *at least to the extent* that RFAs in the Uganda situation investigation led to information which the Prosecution relies upon as incriminating evidence against Ongwen, they must be disclosed”.¹¹

13. The Prosecution agrees that materiality, for the purpose of rule 77, is assessed on a “*prima facie* basis”, which is “a low burden”.¹² However, even this low burden does not permit an automatic inference that, *per se*, RFAs which “led to” the gathering of incriminatory evidence for trial are material to the preparation of the Defence.

14. The Prosecution notes that RFAs serve a variety of purposes. On occasion, they may be used to request States to execute specific investigative measures, such as searches and seizures, the interception of communications, and the like. Such RFAs may bear directly upon the legality of the procedures employed, and hence the admissibility of evidence obtained as a result. In the *CAR Article 70* case, this appears to have been the principal basis upon which RFAs were considered material to the preparation of the defence.¹³ By contrast, in this case, no such investigative measures have been implemented. Although intercepted communications form part of the evidence at trial, these interceptions did not occur at the request of the Prosecution but were carried out independently and for the separate purposes of the intercepting authority.

15. By contrast, other RFAs may be used to facilitate investigations in a broad and general fashion, including for a variety of logistical purposes. These will be genuinely material to the preparation of the Defence only in very rare circumstances,

¹¹ Decision, para. 14 (emphasis added).

¹² *Banda and Jerbo* AD, para. 42.

¹³ *But see* ICC-01/05-01/13-1632 (“*CAR Article 70 Telecommunications Decision*”), para. 14 (noting, without further explanation, that all RFAs were considered disclosable, regardless of their subject matter).

and will indeed tend to be burdensome to the Defence if disclosed when they are *not* material. Conversely, however, such RFAs may often be significant to the operations of the Prosecution, and its relations with the States upon whose cooperation it depends, in accordance with article 54(2) of the Statute.

16. In the terms of the Decision, both types of RFA described above may be considered, technically, to “lead” to the gathering of evidence, in very different ways. The Decision erroneously treats RFAs as a unity, when in fact they are diverse. Indeed, they are likely to vary not only in the types of measures requested, but also in their specificity and the proximity of their causal relationship to evidence subsequently obtained for use at trial.

17. The difficulties of a “one size fits all” approach to disclosure of such materials explains precisely why the Prosecution bears the primary burden of disclosure review,¹⁴ applying the correct criteria and responsive to the well-founded requests of the Defence and the guidance of the Court, in sifting documents and objects which are genuinely “material” from those which are not.

18. Thus, while purporting to uphold the requirement for a “case-by-case” assessment, the Decision may in fact undermine it.

19. Indeed, by requiring the disclosure of RFAs, “at least” to the extent they led to the gathering of incriminatory evidence for trial, it is at least unclear whether the Decision also entertains the view that rule 77 permits, without a threshold showing

¹⁴ See e.g. ICC-01/05-01/08-3336 (“*Bemba* Further Disclosure Decision”), paras. 34 (“Generally, the Prosecution holds responsibility for making such determinations”), 51 (“in line with normal practice, it was for the Prosecution to determine whether the document was disclosable under Rule 77”); ICC-01/05-01/08-632, para. 22 (“it needs to be emphasised that the twin duties of disclosure (Article 67(2) of the Statute) and permitting inspection (Rules 77 of the Rules) rest with the prosecution, and the Chamber will not routinely oversee or review the decisions taken by [the] Office of the Prosecutor in fulfilment of them. [...] The Chamber will only intervene if there are other good reasons for doubting that the duty has been properly fulfilled”). See also *below* fns. 25, 28.

of some degree of good cause,¹⁵ scrutiny of every step of the investigative process.¹⁶ Such an approach could require “open file” disclosure in all but name. Yet this would be inconsistent with the general understanding of rule 77 to date,¹⁷ as the following paragraphs further explain.

B. The Decision is inconsistent with the prior case law of this Court, and other courts

20. The approach of the Decision is also inconsistent with the case law of this Court, including the reasoning underlying the cases upon which it appeared to rely. This too may demonstrate a clear error of reasoning.

21. The Decision states “that it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them”, with reference to one publicly available decision in the *CAR Article 70* case.¹⁸ However, that decision merely refers to a confidential decision, stating in turn that:

The Single Judge also recalls his prior finding that ‘it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them’. The Single Judge repeats that this particularly holds true if the Prosecution, as in the present case, relies to a large extent on intercepted data and communications.¹⁹

22. The Prosecution does not understand anything in the *CAR Article 70* case to establish the proposition that *all* RFAs leading to the gathering of incriminatory

¹⁵ On the speculative nature of the Defence submission, see *below* paras. 29-31.

¹⁶ See also Decision, para. 13. See *below* para. 21.

¹⁷ See e.g. ICC-01/05-01/08-632, para. 26 (“the Chamber rejects the defence submission that the prosecution has an obligation to provide the defence with all the material relating to an issue that is in its possession, to enable the accused to analyse it and to assess for himself whether or not it is relevant to the submissions he wishes to advance. The prosecution does not have the obligation of ‘handing the defence the keys to the warehouse’ in this way”).

¹⁸ Decision, para. 13 (citing ICC-01/05-01/13-1542-Red (“*CAR Article 70* Dutch Authorities Decision”), para. 11). See also *CAR Article 70* Telecommunications Decision, para. 13.

¹⁹ *CAR Article 70* Dutch Authorities Decision, para. 11 (citing ICC-01/05-01/13-1234-Conf (“*CAR Article 70* Confidential Decision”), para. 13). Given the present status of the *CAR Article 70* Confidential Decision, the Prosecution may not directly refer to its reasoning at this time. However, it will shortly request the *CAR Article 70* Trial Chamber to issue a redacted version, to permit argument on this point.

evidence for trial are, *per se*, material to the preparation of the Defence. Rather, consistent with the approach of the Appeals Chamber in *Lubanga*, RFAs and similar materials have been considered as disclosable under rule 77 where there is a sufficient showing of materiality, linked to the circumstances of the case.²⁰ Requests for disclosure based on mere speculation, or mere “fishing expeditions” to review the entirety of the Prosecution’s investigation, are insufficient.²¹

23. Indeed, in a subsequent decision in the *CAR Article 70* case, the Trial Chamber, rejected a request for disclosure of “any other documents relating to the involvement, presence, and participation in the investigation on the Cameroonian territory” because the “Defence’s description [wa]s too vague to substantiate materiality in the sense of Rule 77 of the Rules”.²² The Chamber noted in a footnote that it had previously rejected a similar request in another confidential decision.²³ Likewise, in *Bemba*, the Trial Chamber rejected a request under rule 77 for disclosure of RFAs as “speculative”, and for this reason, among others, concluded that the Defence “failed to demonstrate the *prima facie* materiality of the RFAs”.²⁴

24. The approach in the *CAR Article 70* Cameroonian Authorities Decision is consistent with three other confidential decisions known to the Prosecution concerning the disclosure of RFAs or similar materials. Again, the Prosecution will shortly request the Chambers concerned to issue redacted versions of their decisions, in order to permit argument on this point.

²⁰ See ICC-01/04-01/06-3017 A5 A6, para. 11 (ordering disclosure of an RFA which gave context to a letter, which in turn related to “the determination of the age of D-0040 and D-0041, [...] a key issue in dispute in the pending appeal”).

²¹ See ICC-01/11-01/11-392-Red-Corr, para. 40 (requiring disclosure requests to be “specific enough both in terms of what is sought by the Defence and the reasons why disclosure of the [...] material appears necessary”).

²² ICC-01/05-01/13-1658 (“*CAR Article 70* Cameroonian Authorities Decision”), para. 5.

²³ *CAR Article 70* Cameroonian Authorities Decision, para. 5, fn. 6 (citing ICC-01/05-01/13-1148-Conf, para. 11).

²⁴ *Bemba* Further Disclosure Decision, para. 54.

25. This approach to disclosure is also consistent with the approach of the STL,²⁵ the SCSL,²⁶ the ICTR,²⁷ and the ICTY.²⁸ Indeed, the STL Appeals Chamber has expressly endorsed the analysis of a Trial Chamber of this Court, in *Banda and Jerbo*.²⁹

Rule 110(B) [analogous to rule 77 of this Court] does not invite a fishing expedition. Accordingly, we accept (with deletion of the word ‘necessarily’) a recent ICC Trial Chamber clarification that ‘Rule 77 [...] does not [...] provide for an unfettered ‘right to inspection’, triggered by any unsubstantiated claim of relevance made by the defence’. Rather, Rule 110(B) demands a context-specific application by the

²⁵ See e.g. STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/TC, Decision on Call Data Records and Disclosure to Defence (On Remand from Appeals Chamber), 4 December 2013, para. 18 (“The Prosecution is responsible—before disclosing evidence falling within Rule 110(B)—for determining whether that evidence is material for the Defence. The Defence may seek judicial intervention if it believes the Prosecution has withheld evidence material to its preparation, but may not rely on unspecific and unsubstantiated allegations or a general description of the information. [...] International case law has also consistently held that ‘fishing expeditions’ are not permitted”). See also *Prosecutor v. Ayyash et al*, STL-11-01/T/TC, Decision on Disclosure of Call Data Records and SMS Content for Four Telephones, 20 August 2014 (“Ayyash Four Telephones Decision”), para. 5; *Ayyash Student List Decision*, para. 6.

²⁶ See SCSL, *Prosecutor v. Sesay et al*, SCSL-04-15-T, Decision on Sesay – Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2 May 2005, paras. 51-65 (concluding in the context of a request for disclosure under SCSL rule 68—analogous to article 67(2) of the Statute—that “for the Defence to succeed in this Motion, it is not enough to premise its application either on presumptions, on speculations, or on probabilities. [...] In the same vein, a mere speculative assertion without specifying or advancing concrete proof of the nature and content of the exculpatory evidence which the Defence is alleging to be in the possession of the Prosecution [...] fails to meet the test required to warrant an Order by the Chamber for the Prosecution to disclose under Rule 68 [...] The Chamber recognizes that disclosure procedures are not only intended to ensure and protect the rights of the accused to a fair trial, but also [...] to enable him to have adequate time and facilities for the conduct of his or her defence. We observe however, that where the request to disclose lacks specificity as to the details of facts sought to be disclosed [...] the Chamber cannot, and should not be called upon to grant, a vaguely formulated request [...] In circumstances such as these [...] the Defence, in the absence of concrete elements to substantiate its claims, we contend, has the alternative weapon of cross-examination to establish such facts in evidence and thereafter, to base an application of this nature on the facts so established”, citing *inter alia* *Prosecutor v. Kondewa*, SCSL-04-14-T, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries, and Materials Pursuant to Rule 68, 8 July 2004, paras. 24-26; *Prosecutor v. Sesay et al*, SCSL-04-15-T, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, para. 43).

²⁷ See below para. 26.

²⁸ See e.g. ICTY, *Prosecutor v. Delalić et al*, IT-96-21-T, Decision on the Motion by the Accused Zejnir Delalić for the Disclosure of Evidence, 26 September 1996, para. 9 (“as a threshold matter, the Prosecution is initially the party responsible for deciding what evidence it has in its possession that may be material to the preparation of the Defence, by virtue of the simple fact that it is the party with possession of the evidence. If the Defence believes that the Prosecution has withheld evidence material to its preparation, it can challenge the Prosecution by reasserting its right to the evidence. At that point, there are three alternatives for the Prosecution. The Prosecution can: (1) hand over the requested evidence; (2) deny that it has the requested evidence in its possession; or (3) admit that it has the evidence but refuse to allow the Defence to inspect it. Only if there is a dispute as to materiality should the Trial Chamber become involved and act as a referee between the parties in order to make this determination. When presenting this issue to the Trial Chamber, the Defence should be guided by the above definitions of materiality. The Defence, however, may not rely on conclusory allegations or a general description of the information, but must make a prima facie showing of materiality”).

²⁹ The Prosecution notes that the *Banda* Trial Chamber’s decision was reversed in the *Banda and Jerbo* AD, but on a different point.

chambers of first-instance, which is uniquely situated to determine whether the defence has sufficiently demonstrated materiality by making the requisite showing that items sought are relevant to the preparation of the defence case. We note that this approach is also supported by relevant domestic case-law.³⁰

26. The ICTR Appeals Chamber has likewise described the requisite showing of materiality as a “case-specific assessment” to be made at the “appropriate standard”.³¹

27. The interplay between the right of the Defence to rule 77 disclosure, interpreted broadly,³² and the duty to make requests which are sufficiently specific and which make a sufficient showing of materiality was the very issue which was unresolved between the Parties at the time the Decision was issued, as the following paragraphs explain. Yet it is precisely this issue that the Decision did not expressly address.

C. The subject-matter of the Decision was not yet ripe for the Chamber’s intervention

28. The Decision is inconsistent with the consultative approach which the Single Judge had emphasised to the Parties. Specifically, the Parties had not reached an *impasse* in their consultations concerning the disclosure request of the Defence. Rather, the Prosecution had merely queried the specificity and materiality of the issue raised by the Defence, for the first time, less than a week before.

³⁰ STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.4, Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi against Pre-Trial Judge’s ‘Decision on Issues Related to the Inspection Room and Call Data Records’, 2 October 2013, para. 22 (citing *inter alia* ICC-02/05-03/09-443, para. 15, and domestic case law including: USA, *United States v. Jordan*, 316 F.3d 1215, 1250 (11th Cir. 2003) (“An item [...] need not be disclosed unless the defendant demonstrates that it is material to the preparation of the defense. A general description of the item will not suffice; neither will a conclusory argument that the requested item is material to the defense. [...] Rather, the defendant must make a specific request for the item together with an explanation of how it will be ‘helpful to the defence’”); UK, *R. v. H* [2004] 2 AC 134, para. 35 (“The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good”)). See also *Ayyash* Four Telephones Decision, para. 5; *Ayyash* Student List Decision, para. 6 (summarising the Appeals Chamber’s conclusion that “[r]ules similar to Rule 110(B) do not provide an unfettered right to inspection triggered by unsubstantiated claims of relevance”).

³¹ ICTR, *Prosecutor v. Bagosora et al*, ICTR-98-41-AR73, Decision on Interlocutory Appeal relating to Disclosure under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence, 25 September 2006, para. 9.

³² See ICC-01/04-01/06-1433 OA11, para. 78.

29. The Decision recalls that “the Chamber informed the parties that it expects them to first engage in *inter partes* consultations before seizing the Chamber for relief.”³³ Yet it is apparent that such consultations had not been exhausted with regard to the disclosure of RFAs when the matter was raised at the status conference. In particular:

- In its written submission of 18 May 2016, the Defence first stated its interest in receiving disclosure of “all” RFAs made by the Prosecution in investigating this case, and expressed its intention to address the Prosecution for the purpose of *inter partes* consultations in the next two working days.³⁴
- During the status conference of 23 May 2016, Defence Counsel stated:

[Concerning] the request for assistance, [Y]our Honours, I agree that there have been some discussion between Mr Thomas and the [...] Prosecutor. *He invited us to have further discussion on this, but we [...] feel very strongly that this request for assistance, they open the door to know exactly who provided what material.* In particular, we see that elements of the Ugandan People’s Defence Forces supplied some material and probably some of them have been listed as witnesses, but if they were participants in the war, in Uganda itself, and then the request for assistance that were given to this [...] State become extremely important for us, not only to assist in the legality of the process, but to ascertain the degree of involvement of those participants in the conflict.³⁵

- In response, Prosecution Counsel stated:

The requests themselves the Prosecution views at least in the first instance as not being disclosable. [...] *But the Prosecution doesn’t set its face unilaterally and at this stage against the disclosure of its requests for*

³³ Decision, para. 5.

³⁴ ICC-02/04-01/15-439- Red2, para. 22.

³⁵ ICC-02/04-01/15-T-25-ENG (“Status Conference of 23 May 2016”), p. 9 (emphasis added).

*assistance. Our position is that if the Defence make any specific targeted requests, not a blanket request for all such material, demonstrating how receipt by them of particular material would assist their preparation [...] or possibly provide exculpatory or mitigatory evidence, we will consider that very carefully, and if we think that it is remotely justified, we will make disclosure accordingly. And of course ultimately as [Y]our Honour has said, if the parties can't agree, then the Chamber can rule upon the matter.*³⁶

- Defence Counsel replied, in relevant part:

I believe very, very strongly that if the request for assistance were made to a State whose agents [...] [are] laid out in the charges as participants in the conflict, and there was a request for assistance for them [...] to investigate Mr Ongwen alone in that context, [...] that matters. [...] Maybe from the request for assistance we may conduct further inquiry if the Prosecutor did not, but if the Prosecutor certify that they do not have, they do not have. [...] *So we think, as my learned colleagues say, we will continue to dialogue with them if they can, but if they cannot, I think very, very strong[ly] the request for assistance is extremely important. They did not just move into the territory of Uganda, Central Africa and elsewhere and started requesting material. They asked the measure of someone. Now, who are these individuals? Were they participants in the war? Had they an interest in giving material and withholding others that might actually help Mr Ongwen[?] That is the question here, Your Honours.*³⁷

- The Single Judge, following these remarks, stressed that “as you said, only [if] the parties do not agree, the Chamber will [...] decide on the matter, only then”³⁸ and “in the absence, I want to enforce this, of *inter partes* consultations, the Chamber will not rule on such request[s]. This is in line with what I said initially”.³⁹

³⁶ Status Conference of 23 May 2016, pp. 11-12 (emphasis added). The Prosecution notes and accepts the Single Judge’s guidance concerning rule 81(1).

³⁷ Status Conference of 23 May 2016, pp. 12-13 (emphasis added).

³⁸ Status Conference of 23 May 2016, p. 12.

³⁹ Status Conference of 23 May 2016, p. 14.

30. It is thus apparent that the consultations between the Prosecution and the Defence—which were not yet exhausted, and which both the Prosecution and the Defence had expressly undertaken to continue, and which indeed *have* continued⁴⁰—concerned the materiality of RFAs based on the possibility that their addressees may a) have been active participants in the conflict in Uganda; *and* b) persons whom the Prosecution will call as witnesses. However, in the status conference the Defence made no argument to substantiate this possibility,⁴¹ beyond merely speculating that it might be the case. The Prosecution was reasonably entitled to request more information in this respect, and the Chamber’s intervention would have been justified only on the basis of a sufficient showing of materiality.⁴²

31. Indeed, at this point, the Prosecution had not even given to the Defence a provisional list of witnesses.⁴³ Defence arguments based on the identity of those witnesses were thus manifestly speculative. As the primary subject of the duty to review documents and objects in its possession for the purpose of rule 77 disclosure, the Prosecution was both entitled and required to apply the law, including the prohibition on mere “fishing expeditions”, if it believed that to be the case.

32. Although the Decision does not expressly refer to the Defence arguments, the relief ordered would seem to suggest that the Defence, in the view of the Single Judge, had in this way showed sufficient materiality of the RFAs for the purpose of rule 77. Such a view would seem inconsistent with the prohibition on speculative

⁴⁰ For example, on 6 June 2016, the Defence sent the Prosecution a letter further elaborating upon the nature of their request for disclosure of RFAs.

⁴¹ See also ICC-01/05-01/08-3070, para. 23 (“[a]n item will be considered material to the preparation of the defence if (1) it would undermine the prosecution case or (2) support a line of argument of the defence or (3) significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case. The Chamber considers that items do not necessarily need to be directly linked to exonerating or incriminating evidence, nor have been admitted as evidence in the case, in order to be considered material to the preparation of the defence”).

⁴² See *above* fns. 14, 28.

⁴³ See ICC-02/04-01/15-458-Conf (submitting a provisional list of witnesses on the same day as the Decision was handed down).

disclosure requests or fishing expeditions. Moreover, even if the Defence's assertions were correctly considered by the Single Judge to have made a sufficient showing of materiality, the relief ordered was significantly broader still, and not justified by those assertions. Notably, the Single Judge did not, for example, order the Prosecution to disclose under rule 77 any RFA addressed to persons known to have been active participants in the conflict or potential witnesses.

33. Either way, the reasoning in the Decision on these points is far from clear, especially the basis on which the Single Judge considered that the RFAs to be disclosed met the *prima facie* materiality standard. Even if this does not itself establish a clear error, further clarity on this point would be of assistance, if only to assist the Prosecution more generally in complying with its duty of disclosure.

Conclusion

34. For all the reasons above, the Decision should be reconsidered, and the disclosure order concerning RFAs vacated at this time. In this event, the Prosecution undertakes to consult further with the Defence *inter partes* to attempt to resolve the matter appropriately and expeditiously.



Fatou Bensouda, Prosecutor

Dated this 13th day of June 2016

At The Hague, The Netherlands