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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

Decision on Defence Request for Remedies in Light of Disclosure Violations

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2), (6)(c) and (f), and 67 of the Rome Statute (the ‘Statute’) and Rules 77 and 81 of the Rules of Procedure and Evidence (the ‘Rules’) issues the following ‘Decision on Defence Request for Remedies in Light of Disclosure Violations’.

I. Procedural history and submissions

A. Defence request

1. On 12 February 2020, the Defence filed a request for a number of remedies in light of alleged disclosure violations, as well as for disclosure of certain documents extracts of which had been disclosed previously (the ‘Request’).¹ The alleged disclosure violations concern three databases with material from the Ugandan Amnesty Commission and Ugandan Human Rights Commission which were provided to the Defence on 8 October 2019.²
2. In essence, the Defence requests the Chamber:
 - (i) to confirm that the late disclosure of three databases by the Office of the Prosecutor (the ‘Prosecution’) amounts to a disclosure violation;³
 - (ii) to order disclosure of the databases ‘through the usual eCourt mechanism’ and ‘issue a suitable comment upon the conduct that has led to this point’;⁴
 - (iii) to confirm that the Chamber will not consider incriminatory factual propositions from the Prosecution on the basis of the three databases, and that the Chamber will not rely on the material for any incriminatory factual conclusions;⁵
 - (iv) to order the Prosecution to review all undisclosed material, individually,⁶ and follow-up on any cross-references in that material to assess whether the item exists, has been disclosed, and if not assess whether it should be disclosed;⁷

¹ Defence Request for Remedies in Light of Prosecution Disclosure Violations, ICC-02/04-01/15-1718-Conf, with confidential annexes A-D. A public redacted version was filed on 6 March 2020, see ICC-02/04-01/15-1718-Red.

² Request, ICC-02/04-01/15-1718-Red, para. 15.

³ Request, ICC-02/04-01/15-1718-Red, paras 19, 31, 64.a.

⁴ Request, ICC-02/04-01/15-1718-Red, paras 50, 64.b.

⁵ Request, ICC-02/04-01/15-1718-Red, paras 39, 64.c.

⁶ Request, ICC-02/04-01/15-1718-Red, para. 26.

⁷ Request, ICC-02/04-01/15-1718-Red, paras 24, 64.e.

- (v) to order disclosure of underlying material on the ‘chain of custody’ for the collection of the three databases;⁸
 - (vi) to order disclosure of all material for which P-0038 is listed on the chain of custody including all pre-registration forms (‘PRF’) on which he is listed and all material which he provided to the Prosecution;⁹
 - (vii) to order the Prosecution to examine its internal records and confirm whether it is aware that narrative statements exist at the Amnesty Commission, whether it examined them, whether it asked for them, and, if it did examine such statements without taking them in its possession, order the Prosecution to obtain them;¹⁰
 - (viii) to order a ‘temporary stay of proceedings’ for the Prosecution to disclose all material in its possession and allow the Defence adequate time to review the ‘late disclosed material’ with an option of recalling some Prosecution witnesses for cross-examination;¹¹ or, in the alternative, a ‘disclosure violation order’ and to apply ‘the appropriate remedy’ in the judgment or sentencing in case of conviction;¹²
 - (ix) to order disclosure of 27 documents from which excerpts have been disclosed and to confirm that it was a disclosure violation to withhold them;¹³ and
 - (x) to order any remedies it deems appropriate under the circumstances.¹⁴
3. The Defence argues that it suffered prejudice due to the late disclosure of the databases
- (i) since the material was disclosed under Rule 77 of the Rules and thus by definition ‘material for the preparation of the Defence’;¹⁵ (ii) because it had inadequate time to fully analyse the material before the closing briefs were due¹⁶ and time needed for the analysis of the material impacted negatively on the preparation of witnesses and the drafting the closing brief;¹⁷ (iii) since timely disclosure ‘would have potentially

⁸ Request, ICC-02/04-01/15-1718-Red, paras 25, 64.f.

⁹ Request, ICC-02/04-01/15-1718-Red, paras 29, 64.g., h.

¹⁰ Request, ICC-02/04-01/15-1718-Red, paras 49, 64.j., k.

¹¹ Request, ICC-02/04-01/15-1718-Red, paras 36, 64.d.

¹² Request, ICC-02/04-01/15-1718-Red, paras 38, 64.d.

¹³ Request, ICC-02/04-01/15-1718-Red, paras 59, 61, 64.i.

¹⁴ Request, ICC-02/04-01/15-1718-Red, paras 2, 63, 64.l.

¹⁵ Request, ICC-02/04-01/15-1718-Red, para. 33.

¹⁶ Request, ICC-02/04-01/15-1718-Red, para. 34.

¹⁷ Request, ICC-02/04-01/15-1718-Red, para. 47.

permitted' the Defence to test the credibility and reliability of some witnesses;¹⁸ and (iv) because 'examination of the material may lead to exculpatory information'.¹⁹

B. Prosecution response

4. The Prosecution responded on 28 February 2020.²⁰ It agrees that the late disclosure of the two Amnesty Commission databases amounts to a disclosure violation, and indicates it would disclose them through the E-court system.²¹ At the same time, it submits that in its view the third database (the 'CHARMS database') does not fall under its disclosure obligations pursuant to Rule 77 of the Rules as it has no relevance to the present case, and, accordingly, the Prosecution does not accept that the late disclosure of this database, 'which is provided because it was contained within the same data carrier as the Amnesty material', constitutes a disclosure violation.²²
5. Further, the Prosecution argues that the request for a stay of proceedings and the associated remedies should be rejected as the Defence fails to demonstrate concrete prejudice arising from the violation.²³ According to the Prosecution, just under half of the records are essentially duplicates of previously disclosed material, whereas in the remaining records only 197 are listed with an affiliation to the LRA and the rest is not in any way material to the preparation of the Defence.²⁴
6. The Prosecution also submits that P-0038 was erroneously mentioned in some metadata linked to the databases,²⁵ and in any event that it had conducted a review of undisclosed material related to P-0038 in October 2018.²⁶
7. Finally, in relation to the disclosure of the 27 items from which excerpts have been disclosed, the Prosecution submits that they do not contain information, beyond the extracts already disclosed, which would be material to the preparation of the Defence,

¹⁸ Request, ICC-02/04-01/15-1718-Red, para. 35. *See also* para. 46.

¹⁹ Request, ICC-02/04-01/15-1718-Red, para. 45.

²⁰ Prosecution's Response to the "Defence Request for Remedies in Light of Prosecution Disclosure Violations", ICC-02/04-01/15-1723-Conf, with confidential annexes A-B and confidential, *ex parte* (Prosecution only) annexes 1-29 (the 'Prosecution Response').

²¹ Prosecution Response, ICC-02/04-01/15-1723-Conf, paras 27, 28(a) and (b).

²² Prosecution Response, ICC-02/04-01/15-1723-Conf, paras 18, 27, 28(a).

²³ Prosecution Response, ICC-02/04-01/15-1723-Conf, para. 1.

²⁴ Prosecution Response, ICC-02/04-01/15-1723-Conf, paras 8-9.

²⁵ Prosecution Response, ICC-02/04-01/15-1723-Conf, paras 11-12.

²⁶ Prosecution Response, ICC-02/04-01/15-1723-Conf, para. 14.

and that personal information and internal work product within the items should not be disclosed ‘absent an informed determination by the Trial Chamber that disclosure is required’.²⁷

C. The Legal Representatives of Victims response

8. The Legal Representatives of the Victims (the ‘LRV’) ‘largely oppose’ the Request,²⁸ arguing that the Defence failed to demonstrate any prejudice,²⁹ and that the Request was filed with substantial delay.³⁰ The LRV also submit that when considering a potential stay of proceedings, the Chamber should take into account the impact this would have on the victims.³¹
9. At the same time, the LRV argue that disclosure should be made in compliance with the E-court protocol, including to the victim representatives.³² Further, the LRV request the Chamber to order the filing of a public redacted version of the Request and responses thereto within a short time limit.³³

D. Defence reply

10. Having obtained authorisation from the Chamber,³⁴ the Defence filed a reply on 7 April 2020.³⁵ In its reply, the Defence advances problems with analysing the disclosed databases and identifying which information may have been disclosed on earlier occasions due to human resources, technical and factual challenges. It submits that

²⁷ Prosecution Response, ICC-02/04-01/15-1723-Conf, para. 4. The items were provided to the Chamber in the confidential, *ex parte* annexes to the Prosecution Response.

²⁸ Victims’ Response to “Defence Request for Remedies in Light of Prosecution Disclosure Violations”, 28 February 2020, ICC-02/04-01/15-1724-Conf (the ‘LRV Response’), para. 2.

²⁹ LRV Response, ICC-02/04-01/15-1724-Conf, paras 3, 25-30.

³⁰ LRV Response, ICC-02/04-01/15-1724-Conf, paras 3, 31-37.

³¹ LRV Response, ICC-02/04-01/15-1724-Conf, paras 38-41.

³² LRV Response, ICC-02/04-01/15-1724-Conf, paras 4, 17.

³³ LRV Response, ICC-02/04-01/15-1724-Conf, paras 4, 15.

³⁴ See Defence Request for Leave to Reply to Prosecution filing ICC-02/04-01/15-1723-Conf, ICC-02/04-01/15-1726; Decision on Defence Request for Leave to Reply to the Prosecution Response concerning a Request for Remedies in Light of Disclosure Violations, 13 March 2020, ICC-02/04-01/15-1727. The initial time limit of 20 March 2020 was later extended to 7 April 2020, see Email from Trial Chamber IX Communications, 16 March 2020, at 15:34.

³⁵ Reply to ‘Prosecution’s Response to the “Defence Request for Remedies in Light of Prosecution Disclosure Violations”’, filed 28 February 2020 (ICC-02/04-01/15-1723-Conf), 7 April 2020, ICC-02/04-01/15-1732-Conf (the ‘Reply’). A public redacted version was filed on 8 April 2020, see ICC-02/04-01/15-1732-Red.

between October 2019 and February 2020, identifying duplicate records was not feasible given the Defence resources and an ‘inequality of arms’.³⁶

11. The Defence argues that since it does not have a burden of proof, it is not required to advance positive claims about the degree of non-duplication for the issue of late disclosure to be taken seriously by the Chamber.³⁷ In the Defence’s view, the Chamber should conduct its own assessment of the records.³⁸ It is further submitted that the late disclosure of individuals’ identities is prejudicial.³⁹ The Defence also requests that, since this litigation has been warranted by a disclosure violation by the Prosecution, nothing in its submissions should be used to Mr Ongwen’s detriment.⁴⁰
12. In relation to the determination of how many records in the newly disclosed databases may be duplicative to information in databases disclosed previously, the Defence argues that this is impacted by the fact that different technical solutions result in different numbers of duplicative records.⁴¹ The Defence also describes a number of technical issues which in its submission affected the possibility and capability to identify duplicate records.⁴²
13. The Defence advances difficulties with the factual determination of what is considered a duplicate record.⁴³ According to the Defence, the Chamber’s understanding will impact the assessment of how many new records have been disclosed, and focus should be placed on ‘the extent of new information rather than the number of non-duplicates’.⁴⁴
14. Finally, it is submitted that depending on which methodology is used to determine which records may be (non-)duplicative, different conclusions will be arrived at, with numbers provided varying somewhere between 231 and 146 non-duplicative records.⁴⁵

³⁶ Reply, ICC-02/04-01/15-1732-Red, paras 14-16.

³⁷ Reply, ICC-02/04-01/15-1732-Red, paras 7, 9.

³⁸ Reply, ICC-02/04-01/15-1732-Red, paras 2, 13.

³⁹ Reply, ICC-02/04-01/15-1732-Red, paras 2, 12.

⁴⁰ Reply, ICC-02/04-01/15-1732-Red, para. 6.

⁴¹ Reply, ICC-02/04-01/15-1732-Red, para. 2.

⁴² Reply, ICC-02/04-01/15-1732-Red, paras 17-22.

⁴³ Reply, ICC-02/04-01/15-1732-Red, para. 2.

⁴⁴ Reply, ICC-02/04-01/15-1732-Red, para. 23.

⁴⁵ Reply, ICC-02/04-01/15-1732-Red, paras 24-28.

II. Analysis

A. Preliminaries

15. At the outset, the Chamber notes that the Prosecution requests that its response and annexes A and B be reclassified as ‘public’, whereas the LRV request that a deadline be set for public redacted versions of the submissions to be filed. Bearing this in mind, and considering that the Defence filed a public redacted version of the Request on 6 March 2020, the Chamber orders the Registry to reclassify the Prosecution Response with annexes A and B as ‘public’. Further, the LRV are directed to file a public redacted version of their response within five days of notification of this decision, or to indicate within the same time frame whether it can be reclassified as public.

B. Alleged disclosure violations

16. The Defence requests several remedies on the basis of what it qualifies as ‘disclosure violations’ on the part of the Prosecution. Most of these remedies are contingent on a preliminary determination that (i) certain relevant materials have been disclosed to the Defence in an untimely manner and (ii) certain other materials should in fact have been provided to the Defence pursuant to Rule 77 of the Rules.
17. In relation to the first aspect, the Chamber takes note of the Prosecutor’s own concession that the two databases relating to material from the Ugandan Amnesty Commission should have been disclosed earlier and that their late disclosure indeed constitutes a violation of its disclosure obligations.⁴⁶
18. What remains disputed between the parties is the relevance of the database containing material from the Ugandan Human Rights Commission (the so-called ‘CHARMS database’). The Defence argues that this database should have been disclosed earlier as, at least, its disclosure falls under the Prosecution’s obligations under Rule 77 of the Rules because material from the Human Rights Commission was used by the Defence in cross-examination and was mentioned during witness testimony.⁴⁷ The Defence bases its arguments exclusively on the source of the database, rather than the nature of the information contained therein.

⁴⁶ Prosecution Response, ICC-02/04-01/15-1723-Conf, paras 18, 28(a).

⁴⁷ Request, ICC-02/04-01/15-1718-Red, para. 31.

19. In contrast, the Prosecution refutes that the CHARMS database ‘has any relevance’ to the case, and submits that it was merely provided to the Defence because it was collected by the Prosecution on the same data carrier as the Amnesty material and this was, in turn, copied to the Defence in its totality.⁴⁸
20. Contrary to the argument by the Defence, the Chamber is of the view that the mere fact that material emanating from a body was used by one of the parties or participants and submitted to the Chamber does not, in and of itself, mean that all other material from that same body automatically falls under applicable rules for disclosure. The Chamber has found in the past that even material related to the LRA may not, as such, be considered material to the preparation of the Defence.⁴⁹
21. Examining the examples cited by the Defence in which it used material from the Human Rights Commission in court,⁵⁰ the Chamber notes that the material used in the past was, for example, directly related to the witness concerned or otherwise assessed by the Defence to be connected to the questioning. In the case at hand, the Defence does not argue a similar connection to the charges or evidence presented during trial. Rather, it merely submits that the CHARMS database originates from the same entity as other material used.
22. The Chamber is further of the view that it is not sufficient to indicate that the database ‘may potentially’ include information on alleged human rights violations by Ugandan government forces. Even if the database contained such information, without anything further such as a direct connection to the charges or a live issue in the case, this would not in and of itself amount to information ‘material to the preparation of the Defence’ within the meaning and for the purposes of Rule 77 of the Rules. Bearing in mind the above, the Chamber is not satisfied that the Defence has met the low threshold under Rule 77 of the Rules to show that the database would have been ‘material to the

⁴⁸ Prosecution Response, ICC-02/04-01/15-1723-Conf, paras 18, 27.

⁴⁹ Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items, 1 February 2018, ICC-02/04-01/15-1161, paras 9-10. *See also* Decision in Response to an Article 72(4) Intervention, 26 June 2018, ICC-02/04-01/15-1267-Corr2, paras 21, 23; Decision on Defence Request for Disclosure and Remedy for Late Disclosure, 28 September 2018, ICC-02/04-01/15-1351, paras 18-20, 33.

⁵⁰ *See* Transcript of hearing, 21 September 2017, ICC-02/04-01/15-T-110-Red-ENG; Transcript of hearing, 22 January 2018, ICC-02/04-01/15-T-145-Red2-ENG; Transcript of hearing, 4 May 2019, ICC-02/04-01/15-T-174-ENG.

preparation of the Defence’ in the sense of undermining the Prosecution case or supporting a line of argument of the Defence.⁵¹

23. In light of the above, and bearing in mind in particular the arguments of the Defence, the Chamber is not convinced that the CHARMS database is material to the preparation of the defence within the meaning of Rule 77 of the Rules. Therefore the fact that it was not made available to the Defence before 8 October 2019 does not constitute a violation on the part of the Prosecution of its disclosure obligations.

C. Further requests related to disclosure of databases

24. Turning to the request of the Defence that the databases be disclosed through ‘the usual eCourt mechanism’, the Chamber takes note of the disclosure of the Amnesty Commission material through E-court on 3 March 2020.⁵² Therefore, this part of the Request is moot.
25. With regard to the CHARMS database, the Chamber notes its determination above that it is not material to the preparation of the Defence within the meaning of Rule 77 of the Rules. However, as a matter of fact, this database has been provided to the Defence. While the Prosecution may not have been under an obligation to disclose this particular database, it nevertheless made it available to the Defence. There is no indication that providing the material also via E-court would not be possible for technical reason, since the CHARMS database appears to be in the same electronic format as the Amnesty Commission databases.⁵³ Therefore, and in order to ensure transparency and completeness of the record as well as complete accessibility of material provided *inter partes*, the Chamber considers that the CHARMS database should also be made available

⁵¹ See Appeals Chamber, *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 OA11, paras 76-82; Appeals Chamber, *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, 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 OA4, paras 38-39, 42.

⁵² See Prosecution Response, ICC-02/04-01/15-1723-Conf, para. 28(b), and disclosure notice of that day: Prosecution’s Communication of the Disclosure of Evidence, 3 March 2020, ICC-02/04-01/15-1725, with confidential annex.

⁵³ According to the Defence, the CHARMS database is in .mdb-format, which is specifically supported by the E-court protocol applicable in this case: see Request, para. 15, and ‘E-court Protocol’ as annexed to Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 27 February 2015, ICC-02/04-01/15-203, ICC-02/04-01/15-203-Anx1, para. 17. The protocol was incorporated at trial by Order Scheduling First Status Conference and Other Matters, 4 May 2016, ICC-02/04-01/15-432, para. 4.

via E-court. Consequently, this part of the Request in relation to provision of the CHARMS database through E-court is granted and the Prosecution is ordered to proceed accordingly.

26. Bearing in mind the submissions of the LRV,⁵⁴ it is noted that as the databases from the Amnesty Commission are already available via E-court, and as the CHARMS database will be made so, all concerned material will be accessible also to the victim representatives in line with the general regime applicable to the disclosure of evidence.
27. Further in relation to the databases, the Defence requests the Chamber to confirm that it would not consider any incriminatory factual propositions from the Prosecution on the basis of the databases, and that the Chamber would also not rely on the material for any incriminatory factual conclusions. The Chamber notes in this regard that the databases were never submitted to it as evidence. As the databases are therefore not before it, no need arises for a confirmation as requested by the Defence.
28. A number of further requests arise from the fact that P-0038 seems to have been mentioned in the metadata relating to the material provided by the Amnesty Commission. Albeit not entirely clear, it appears from the submissions that P-0038 is mentioned in the ‘chain of custody’-information in the electronic (E-court) system. From this, the Defence seems to conclude that the Prosecution failed to conduct a thorough review of all its material to disclose information relevant to P-0038, despite some requests made by the Defence in this regard in the past. Based on this conclusion, the Defence asks that all underlying material relating to the chain of custody of the three databases be disclosed,⁵⁵ that all material regarding which P-0038 is connected to the chain of custody and all material that P-0038 provided to the Prosecution be disclosed,⁵⁶ and, more broadly, that the Prosecution conduct an overall review of all undisclosed material and follow-up on cross-references to see if an item exists, has been disclosed or should be disclosed.⁵⁷
29. Of main relevance in relation to these Defence requests is the Prosecution’s assertion that the mention of P-0038 in the metadata for the Amnesty Commission databases was

⁵⁴ LRV Response, ICC-02/04-01/15-1724-Conf, paras 17, 45(a).

⁵⁵ Request, ICC-02/04-01/15-1718-Red, paras 25, 64.f.

⁵⁶ Request, ICC-02/04-01/15-1718-Red, paras 29, 64.g., h.

⁵⁷ Request, ICC-02/04-01/15-1718-Red, paras 24, 26, 64.e.

erroneous.⁵⁸ Further, the Prosecution submits that it already disclosed all material related to the chain of custody of the three databases,⁵⁹ that it reviewed all undisclosed material which may in some manner be connected to P-0038 and determined that what remains undisclosed is in fact not ‘disclosable’,⁶⁰ and, finally, that it already conducted a further review of all undisclosed material and found no material requiring disclosure.⁶¹

30. Examining the pre-registration form for the material,⁶² it indeed appears that P-0038 was not in any way involved in the collection of the material from the Amnesty Commission. The physical records of the collection (the pre-registration form) do not make reference to this individual.⁶³
31. Overall, the matter appears to concern a clerical error in the creation of the metadata. Further there does not seem to be any indication of the Prosecution searches concerning earlier Defence requests on P-0038 not having been comprehensive. In light of the above, the Defence requests in relation to material in some way connected to P-0038, as well as for a comprehensive review and disclosure of to-date undisclosed material by the Prosecution are rejected.
32. Finally, the Defence also asks that the Prosecution be ordered to examine its records to see whether it is aware of ‘narrative statements’ at the Amnesty Commission, whether it ever examined such statements, and if it did, that it should obtain them.⁶⁴ The Prosecution for its part submits that it does not have any records about the existence of ‘narrative statements’ or that it would have examined them.⁶⁵ In light of this, the Chamber considers no order in this regard is necessary. Therefore, this part of the Request is rejected.

⁵⁸ Prosecution Response, ICC-02/04-01/15-1723-Conf, paras 11-12.

⁵⁹ Prosecution Response, ICC-02/04-01/15-1723-Conf, para. 28(f).

⁶⁰ Prosecution Response, ICC-02/04-01/15-1723-Conf, para. 14.

⁶¹ Prosecution Response, ICC-02/04-01/15-1723-Conf, para. 17.

⁶² As annexed to the Prosecution Response, ICC-02/04-01/15-1723-Conf-AnxA.

⁶³ According to the Defence, P-0038 is listed ‘in the PRF’ (see Request, ICC-02/04-01/15-1728, para. 23). However, having examined the documents in question, the Chamber rather understands this to be referring to the electronic metadata, rather than the actual documents in which P-0038’s name does not appear.

⁶⁴ Request, ICC-02/04-01/15-1718-Red, paras 49, 64.j., k.

⁶⁵ Prosecution Response, ICC-02/04-01/15-1723-Conf, para. 28(j).

D. Request for disclosure of 27 documents

33. Further in the Request, the Defence also asks that the Prosecution be ordered to disclose 27 items of which excerpts have been disclosed pursuant to Rule 77 of the Rules, and that the Chamber confirms that it was a disclosure violation to withhold them.⁶⁶ The items include for the most part ‘individual protection assessments’, ‘biographical security questionnaires’, as well as a psycho-social assessment and an email.⁶⁷
34. As the Chamber has previously determined,⁶⁸ documents portions of which are deemed to contain information material to the preparation of the defence within the meaning of Rule 77 of the Rules should be disclosed in their entirety, with any appropriate redactions in accordance with the redaction protocol. Therefore, the Chamber orders the Prosecution to disclose the items in question, applying any appropriate redactions, as necessary, in accordance with the redaction protocol⁶⁹ or, as the case may be, applying to the Chamber for any non-standard redactions. Thus, the part of the Request asking for disclosure of 27 items is granted.

E. Request for temporary stay of proceedings or alternative remedies

35. In its Request, the Defence submits that due to the late disclosure of the material and the alleged need for further disclosure by the Prosecution, prejudice arose which requires a temporary stay of the proceedings, or alternative measures.⁷⁰ In order to be able to assess the Defence Request and whether indeed any remedies are warranted, the Chamber must consider whether, and if so, to what extent, the Defence suffered any prejudice.
36. The Chamber turns first to the issue of the disclosure of the databases not immediately having taken place ‘through the usual eCourt mechanism’. It is indeed of note that the position of the Prosecution as to the feasibility of disclosure of the databases in their specific electronic format through E-court seems to have changed over time, to the extent that now disclosure of two of the databases in fact has taken place through E-court.

⁶⁶ Request, ICC-02/04-01/15-1718-Red, paras 59, 61, 64.i.

⁶⁷ See also Prosecution Response, Annex B, ICC-02/04-01/15-1723-Conf-AnxB.

⁶⁸ Decision on Defence Request in Light of Prosecution Meeting and Interview with D-100, 12 September 2018, ICC-02/04-01/15-1335, para. 5 (with further references).

⁶⁹ See Decision on issues related to disclosure and exceptions thereto, 23 April 2015, ICC-02/04-01/15-224, incorporated at trial by Order Scheduling First Status Conference and Other Matters, 4 May 2016, ICC-02/04-01/15-432, para. 4.

⁷⁰ Request, ICC-02/04-01/15-1718-Red, paras 36, 38, 64.d.

However, even if the databases were not immediately disclosed via E-court, the Defence did receive the material in a format in which it could be analysed. While the Defence submits that this analysis is challenging and requires considerable time, it does not claim that this would have been different if the disclosure had been effected via E-court. Therefore, while the Prosecution's approach of the matter may raise questions, there does not seem to have been any actual impact on the Defence's ability to assess the material.

37. The Defence additionally claims to have suffered prejudice due to the late disclosure of the databases because this made it impossible to fully analyse the material before the filing of the closing brief,⁷¹ and because analysis of the material took time away from preparing for witness questioning as well as the closing brief.⁷² The Defence also argues that the material could potentially have allowed it to test the credibility and reliability of some witness testimony,⁷³ that the material is not as duplicative compared with previously disclosed material as claimed by the Prosecution (thus seemingly creating more prejudice as more new material needs to be analysed),⁷⁴ and that the material may lead to exculpatory information.⁷⁵
38. The Chamber is of the view that the prejudice alleged by the Defence is unspecific and speculative, despite the material having been in the possession of the Defence since early October 2019. The Request points to some records linked to possibly two witnesses presented by the Prosecution, without however specifying what these records contain and to which extent they may be related to the evidence provided by these witnesses. The Chamber notes in this regard also that according to the Prosecution, part of these records contain information already disclosed in 2015, while another record which could, by name, relate to another Prosecution witness, may in fact concern a different individual.⁷⁶
39. It is in the context of the alleged prejudice caused by the amount of non-duplication in the information – meaning newly disclosed information – that the Defence makes further submissions in its Reply. Of particular note is that the Defence claims that since it does not bear a burden of proof, it also does not have to advance any factual claims about the

⁷¹ Request, ICC-02/04-01/15-1718-Red, paras 2, 34.

⁷² Request, ICC-02/04-01/15-1718-Red, para. 47.

⁷³ Request, ICC-02/04-01/15-1718-Red, para. 35.

⁷⁴ Request, ICC-02/04-01/15-1718-Red, paras 41-43.

⁷⁵ Request, ICC-02/04-01/15-1718-Red, para. 45.

⁷⁶ Prosecution Response, ICC-02/04-01/15-1723-Conf, para. 20.

degree of non-duplication⁷⁷ and that indeed it would be unfair for it to have to advance conclusive numbers.⁷⁸

40. In the view of the Chamber, this claim is untenable. While the Defence does not have a burden of proof in relation to the charges, this does not relieve it from having to substantiate its claim of prejudice allegedly suffered by the late disclosure of the databases.
41. The Reply makes a number of arguments trying to illustrate the challenges affecting any determination of how many records in the databases may in fact be newly disclosed and not duplicative to information received by the Defence earlier.⁷⁹ On this basis, the Defence argues that what should matter is the extent of new information, rather than the number of non-duplicates.⁸⁰
42. Yet nowhere in the Reply does the Defence make any attempt to specify what the new information it identified contains or in which way not having this information earlier caused any prejudice. In this regard the Chamber considers that indeed it is not of essence to identify the exact number of non-duplicative records and as such the amount of information contained in the newly disclosed databases which may not have been available to the Defence in the past. Rather of significance is, in the view of the Chamber, that several months of ‘preliminary analysis’ as well as a number of weeks during which, as is apparent from the Reply, the material was clearly analysed in more detail, seem to have failed in generating more concrete details as to the nature of any new information, the extent to which such material could have been useful to the Defence and, hence, the extent to which prejudice may have been suffered.
43. The Defence argues that the late disclosure of names of individuals who might have been with the LRA in an early period was prejudicial because during its case the Defence argued that the length of time an individual spent in the LRA was an important factor in the formation of strong LRA spiritual beliefs.⁸¹ However, no detail is provided as to how many records are relevant or which information is included in those records that would

⁷⁷ Reply, ICC-02/04-01/15-1732-Red, para. 7.

⁷⁸ Reply, ICC-02/04-01/15-1732-Red, para. 9.

⁷⁹ See *supra*, paras 10-14.

⁸⁰ Reply, ICC-02/04-01/15-1732-Red, para. 23.

⁸¹ Reply, ICC-02/04-01/15-1732-Red, paras 2, 11-12.

have been of use to the Defence in crafting its argument. Further, it is speculative to say that individuals who are recorded in the databases as having spent longer periods with the LRA would necessarily state that they formed strong spiritual beliefs. Most importantly, as the Defence specifies in its Request, it already presented a comprehensive case on this issue during the trial. Yet it does not indicate that with an adjournment, this case could be meaningfully supplemented. Therefore, this argument also fails to provide a basis for concluding concrete prejudice caused to the Defence.

44. In light of the above, the Chamber also does not consider it necessary to further discuss the technical and methodological challenges to identifying non-duplicative records advanced by the Defence. The Chamber has already found that the claimed prejudice has not been substantiated.
45. Finally, as already pointed out above,⁸² the alleged prejudice because of the material possibly containing incriminatory information is without basis since the databases have not been submitted to the Chamber and will hence not be considered in its deliberations.
46. Aside from the alleged prejudice, the overall underlying reason for the Defence to request a temporary stay of proceedings seems to be that it would require time to have the Prosecution disclose all material in its possession, whereas the Defence would need time to analyse any material that might be newly disclosed.⁸³ However, the prejudice alleged in the request, as well as the background to the other remedies demanded do not give any concrete information justifying such measure. The disclosure violation in relation to the databases does not seem to be sufficient basis to justify ordering the Prosecution to disclose any other material which it assessed as not falling under its disclosure obligations to date. The Chamber considers that there is no basis to order the Prosecution either to conduct further reviews of all undisclosed material or to simply disclose all undisclosed material in its possession, subject to any applicable restrictions. Accordingly, this part of the Request is rejected.
47. Finally, in relation to the requested – and granted – disclosure of the 27 items,⁸⁴ the Chamber's determination makes clear that the Prosecution should have disclosed the 27

⁸² *Supra*, para. 27.

⁸³ See Request, ICC-02/04-01/15-1718-Red, para. 64.d.

⁸⁴ See *supra*, para. 34.

items in full, potentially applying any appropriate redactions in accordance with the redaction protocol. However, there has been no prejudice to the Defence, in particular bearing in mind that the Prosecution confirmed that the parts of the items which were assessed to be material to the preparation of the Defence have indeed been disclosed.⁸⁵ In this regard, the Chamber also notes that the disclosure of the excerpts took place in August 2018,⁸⁶ the decision of the Chamber regarding disclosure of full documents was issued in September 2018, and the Defence requested the Prosecution to provide the full documents in October 2018.⁸⁷ Yet the Defence did not approach the Chamber with a request for full disclosure of the documents until February 2020.

48. In light of the above, the Defence request for a temporary stay of proceedings is rejected.
49. Alternatively to the request for a temporary stay of proceedings, the Defence asks that the Chamber issue a ‘disclosure violation order’ and applies ‘the appropriate remedy’ in the judgment or sentencing, in case of conviction.⁸⁸
50. This alternative request remains without specifying detail, in particular as concerns the nature and legal basis of the requested remedy. Bearing in mind the Chamber’s determination above in relation to the prejudice alleged by the Defence, the Chamber equally rejects this alternative request.
51. Finally, the Chamber notes that the Defence requests the Chamber to grant any other remedy it may consider appropriate under the circumstances.⁸⁹ This alternative request is equally predicated upon a positive determination of prejudice suffered by the Defence. Since the Chamber, as explained above, found that no concrete prejudice arose to the Defence, the Chamber does not consider that any other remedy is warranted under the circumstances. Therefore, this part of the Request is also rejected.

⁸⁵ The Chamber notes that indeed most of the disclosed excerpts were submitted into evidence in the Defence Bar Table Motion, 15 October 2019, ICC-02/04-01/15-1637, Confidential Annex A, ICC-02/04-01/15-1637-Conf-AnxA, and recognised as submitted by the Chamber in Decision on Defence Request to Submit 470 Items of Evidence, 14 November 2019, ICC-02/04-01/15-1670.

⁸⁶ See Request, ICC-02/04-01/15-1718-Red, para. 61.

⁸⁷ See Request, Annex A, ICC-02/04-01/15-1718-Conf-AnxA.

⁸⁸ Request, ICC-02/04-01/15-1718-Red, paras 38, 64.d.

⁸⁹ Request, ICC-02/04-01/15-1718-Red, paras 63, 64.l.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Registry to reclassify as ‘public’ filing ICC-02/04-01/15-1723-Conf and its annexes ICC-02/04-01/15-1723-Conf-AnxA and ICC-02/04-01/15-1723-Conf-AnxB;

ORDERS the Legal Representatives of Victims to file a public redacted version of filing ICC-02/04-01/15-1724-Conf within five days of notification of this decision, or to indicate that it can be reclassified as public;

GRANTS the request for provision of the CHARMS database through E-court; and

ORDERS the Prosecution to provide the CHARMS database via E-court;

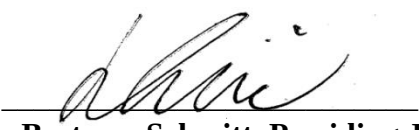
GRANTS the request for disclosure of the 27 items; and

ORDERS the Prosecution to disclose the 27 original items as listed in ICC-02/04-01/15-1723-Conf-AnxB;

DISMISSES as moot the request to order disclosure through E-court of the Amnesty Commission databases;

REJECTS the remainder of the Request.

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


Judge Bertram Schmitt, Presiding Judge


Judge Péter Kovács


Judge Raul C. Pangalangan

Dated 22 April 2020

At The Hague, The Netherlands