

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-01/09-01/11

Date: 12 February 2015

Date of public redacted version: 11 December 2017

**TRIAL CHAMBER V(A)**

**Before:** Judge Chile Eboe-Osuji, Presiding  
Judge Olga Herrera Carbuccion  
Judge Robert Fremr

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

**Public redacted version of**

**Corrected version of  
“Request for Cooperation to the Kingdom of the Netherlands concerning the  
Asylum Application Records of Certain Prosecution Witnesses”  
(12 February 2015, ICC-01/09-01/11 – 1815-Conf)**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Mr Anton Steynberg

**Counsel for William Samoei Ruto**

Mr Karim Khan  
Mr David Hooper  
Mr Essa Faal  
Ms Shyamala Alagendra

**Counsel for Joshua Arap Sang**

Mr Joseph Kipchumba Kigen-Katwa  
Ms Caroline Buisman

**Legal Representatives of Victims**

Mr Wilfred Nderitu

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

Kingdom of the Netherlands

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber V(A)** (the ‘Chamber’) of the International Criminal Court (the ‘Court’ or ‘ICC’), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, considering Articles 64(2), 86, 93(1)(i) and 99(1) of the Rome Statute (the ‘Statute’) renders this Request for cooperation to the Kingdom of the Netherlands for the provision of records and documents (‘the Request’).

## **I. BACKGROUND**

1. The three individuals – [REDACTED] -- whose asylum records are concerned in this request for assistance are Kenyan nationals. They were relocated to the Netherlands for the purpose of testifying in this case as witnesses for the Office of the Prosecutor (the ‘Prosecution’). Having thus been relocated, they later submitted applications with the Dutch Authorities for asylum in the Netherlands.
2. On the application of the Defence for Mr Ruto and the Defence for Mr Sang (together the ‘Defence’), the Chamber, on 17 November 2014, issued the ‘Decision on Joint Defence Application for Further Prosecution Investigation Concerning the Asylum Application Records of Certain Prosecution Witnesses’, ordering the Prosecution to obtain the asylum applications of [REDACTED],<sup>1</sup> [REDACTED]<sup>2</sup> and [REDACTED],<sup>3</sup> as well as other potentially exculpatory information such as, *inter alia*, statements and/or affidavits and all relevant decisions (the ‘Requested Materials’) from the relevant authorities of the Kingdom of the Netherlands and disclose it accordingly.<sup>4</sup>
3. On 21 November 2014, the Prosecution filed the reply from the Dutch Authorities to the request for assistance on the matter (notified on 24 November 2014), informing the Chamber that the Netherlands had declined to provide the

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<sup>1</sup> [REDACTED].

<sup>2</sup> [REDACTED].

<sup>3</sup> [REDACTED].

<sup>4</sup> ICC-01/09-01/11-1655-Conf.

Requested Materials to the Prosecution.<sup>5</sup> More specifically, the Netherlands observed that 'European and Dutch legislation, prevent the Netherlands to submit the requested information to the ICC'<sup>6</sup> and that it cannot 'disclose information regarding individual applications for asylum to the alleged actor(s) of persecution of the applicant for asylum'.<sup>7</sup> It also observed that pursuant to Articles 72 and 93(4) of the Statute, 'rendering this information would prejudice Dutch security interests'.<sup>8</sup>

4. On 27 November 2014, the Defence for Mr Ruto submitted the Ruto Defence Request for Consultation with the Dutch Authorities pursuant to Articles 93(3) and 97 of the Statute (the 'Request for Consultation').<sup>9</sup>
5. On 28 November 2014, the Defence for Mr Sang made an application to join the Request for Consultation.<sup>10</sup>
6. On that same date, the Prosecution filed its observations on the Request for Consultation.<sup>11</sup>
7. On 2 December 2014, the Chamber received the observations from the Dutch Authorities to the Request for Consultation, declining to provide the Requested Materials to the Court.<sup>12</sup> Their position was that – disclosure to third parties of information contained in or pertaining to asylum applications is 'in the absence of written approval of the person concerned – as a rule prohibited'.<sup>13</sup> In their view,

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<sup>5</sup> Prosecution's notification of a Reply from the Kingdom of the Netherlands to a Request for Assistance in compliance with decision No. ICC-01/09-01/11-1655-Conf, ICC-01/09-01/11-1688.

<sup>6</sup> ICC-01/09-01/11-1688-Conf-AnxB, page 2.

<sup>7</sup> ICC-01/09-01/11-1688-Conf-AnxB, page 2.

<sup>8</sup> ICC-01/09-01/11-1688-Conf-AnxB, page 3.

<sup>9</sup> Request for Consultation, ICC-01/09-01/11-1711-Conf.

<sup>10</sup> Sang Defence Application to join the "Ruto Defence Request for Consultation with the Dutch Authorities pursuant to Articles 93(3) and 97", ICC-01/09-01/11-1711-Conf.

<sup>11</sup> Prosecution's Response to Ruto Defence Request for Consultation with the Dutch Authorities pursuant to Articles 93(3) and 97, ICC-01/09-01/11-1711-Conf, ICC-01/09-01/11-1719-Conf.

<sup>12</sup> Registry transmission of observations received from the Kingdom of the Netherlands following document ICC-01/09-01/11-1711-Conf, ICC-01/09-01/11-1726-Conf, with two confidential annexes. See particularly ICC-01/09-01/11-1726-Conf-Anx2, page 14.

<sup>13</sup> ICC-01/09-01/11-1726-Conf-Anx2, page 3.

disclosure by public authorities of personal information to third parties is considered an 'interference' with the right to respect for a person's private life, and that such interference would only be justified 'if it is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.<sup>14</sup> The Dutch authorities submitted that 'such a legal basis does not exist in the current circumstances'.<sup>15</sup> The Dutch Authorities observed that their 'interpretation of applicable international, European and national legal obligations is reasonable in view of the importance of the protection of the interests of asylum seekers and persons who have obtained asylum under these legal instruments'.<sup>16</sup> The Dutch Authorities further noted that disclosure to the Defence in this case would entail disclosure to representatives of the Government of Kenya, namely Mr Ruto, by virtue of his position.<sup>17</sup> It was also noted that the Netherlands 'is not in a position to discharge its own obligations under international and national law with respect to the confidentiality of information in an asylum procedure, by relying on assurances of confidentiality by Counsel for the Defence even if such assurances may be based on the rules of the Court'.<sup>18</sup>

8. On that same date, the Chamber held a status conference in which the representative of the Dutch Authorities and the parties made oral submissions on the Request.<sup>19</sup>
9. On 3 December 2014, the Dutch Authorities submitted their additional observations to the Request for Consultation, reiterating their aforesaid views.<sup>20</sup>

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<sup>14</sup> ICC-01/09-01/11-1726-Conf-Anx2, page 5.

<sup>15</sup> ICC-01/09-01/11-1726-Conf-Anx2, page 6.

<sup>16</sup> ICC-01/09-01/11-1726-Conf-Anx2, page 10.

<sup>17</sup> ICC-01/09-01/11-1726-Conf-Anx2, page 11.

<sup>18</sup> ICC-01/09-01/11-1726-Conf-Anx2, page 11.

<sup>19</sup> ICC-01/09-01/11-T-165-CONF-ENG ET, page 55, line 1 to page 95, line 8.

10. On 5 December 2014, the Chamber heard further oral submissions from the parties in relation to the Request for Consultation.<sup>21</sup> On that same date, the Chamber, via e-mail, rendered further directions on consultation with the Dutch Authorities, proposing an approach for the disclosure of asylum applications to the Chamber.<sup>22</sup> It later recorded those directions in Annex B of its Order on Consultations with the Dutch Authorities (the 'Order').<sup>23</sup>
11. On 10 December 2014, the Prosecution transmitted to the Chamber, via e-mail, the response received from the Dutch Authorities (the 'Response').<sup>24</sup> The Response was later recorded in Annex C to the Order.<sup>25</sup> The Dutch Authorities requested the complete version of the Chamber's directions, as well as the transcripts of the hearings of 2 and 5 December 2014, in order to 'be able to consider further consultations' related to the Request for Consultation.<sup>26</sup>
12. On 11 December 2014, the Chamber issued the Order granting the above mentioned request from the Dutch Authorities' and inviting them to respond to the directions of 5 December 2014 no later than 18 December 2014.<sup>27</sup>
13. On 18 December 2014, the Dutch Authorities submitted further observations following the Order (the 'Further Observations').<sup>28</sup>
14. On 13 January 2015, the Registry submitted observations on the consultation undertaken in furtherance of the Order, seeking approval to transmit a note verbale

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<sup>20</sup> Registry transmission of additional observations received from the Kingdom of the Netherlands following the hearing on 2 December 2014, ICC-01/09-01/11-1737-Conf (notified on 4 December 2014).

<sup>21</sup> ICC-01/09-01/11-T-168-CONF-ENG ET, page 86, line 21 to page 95, line 2.

<sup>22</sup> Email from Trial Chamber V-A Communications to the Prosecution at 19:32.

<sup>23</sup> Annex B to the Order on Consultations with the Kingdom of the Netherlands, 11 December 2014, ICC-01/09-01/11-1751-Conf-AnxB.

<sup>24</sup> Email from the Prosecution to Trial Chamber V-A Communications at 14:44.

<sup>25</sup> Annex C to the Order on Consultations with the Kingdom of the Netherlands, 11 December 2014, ICC-01/09-01/11-1751-Conf-AnxC.

<sup>26</sup> Email from the Prosecution to Trial Chamber V-A Communications at 14:44.

<sup>27</sup> Order, ICC-01/09-01/11-1751-Conf.

<sup>28</sup> Annex 1 to the Registry transmission of further observations submitted by the Dutch Authorities following the "Order on Consultations with the Kingdom of the Netherlands", ICC-01/09-01/11-1765-Conf-AnxI.

to the Dutch Authorities, with whom it had consulted upon the instruction of the Presiding Judge on 19 December 2014.<sup>29</sup>

15. On that same date, after consultations with the Chamber,<sup>30</sup> the Registry transmitted its first note verbale to the Dutch Authorities (the 'Registrar's First Note Verbale').<sup>31</sup> Therein, the Registrar requested the assistance of the Dutch Authorities 'by way of making the information available for perusal by the Trial Chamber on the premises of the Court, rather than on the premises of the Dutch Government'.<sup>32</sup>
16. On 16 January 2015, the Netherlands Ministry of Foreign Affairs transmitted a note verbale (the 'MFA First Note Verbale') to the Registrar in reply to the Registrar's First Note Verbale.<sup>33</sup> Therein, the Dutch Authorities informed the Court that 'it is the position of the Kingdom of the Netherlands that, by way of exception, perusal may take place at the premises of the Court, provided that an officer of the Immigration and Naturalization Service (INS) is present during the perusal'.<sup>34</sup>
17. The Dutch Authorities also informed the Chamber that, according to Dutch law, the Court's request for perusal of the Requested Materials would be communicated to the Dutch Public Prosecutor who then had to obtain permission from a Dutch supervisory judge prior to honouring the cooperation request.<sup>35</sup> The Dutch supervisory judge 'may attach certain conditions to the release of the requested information'.<sup>36</sup> The Dutch Authorities notified the Court that the request for

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<sup>29</sup> Registry observations on the consultation undertaken in furtherance of Order ICC-01/09-01/11-1751-Conf, ICC-01/09-01/11-1779-Conf-Exp, with confidential Annex 1.

<sup>30</sup> Email from Trial Chamber V-A Communications to the Registry at 16:40.

<sup>31</sup> Annex I to the Registry transmission of observations submitted by the Dutch Authorities, ICC-01/09-01/11-1787-Conf-AnxI.

<sup>32</sup> ICC-01/09-01/11-1779-Conf-Exp-AnxI.

<sup>33</sup> The Chamber was notified of the 16 January Letter on 20 January 2015, Annex II to the Registry transmission of observations submitted by the Dutch Authorities, ICC-01/09-01/11-1787-Conf-AnxII.

<sup>34</sup> 16 January Letter, ICC-01/09-01/11-1787-Conf-AnxII.

<sup>35</sup> 16 January Letter, ICC-01/09-01/11-1787-Conf-AnxII.

<sup>36</sup> 16 January Letter, ICC-01/09-01/11-1787-Conf-AnxII.

assistance had been sent to the competent Dutch judicial authorities for further assessment.<sup>37</sup>

18. On 23 January 2015, the Chamber, via e-mail, instructed the Registry to transmit a second note verbale to the Dutch Authorities (the ‘Registrar’s Second Note Verbale’).<sup>38</sup> The Chamber indicated that its earlier readiness to accept conditions to the access of the Requested Materials ‘had resulted from the desire to facilitate an expeditious delivery of the documents’, so as to ensure that perusal could take place prior to the commencement of the testimony of [REDACTED]. Due to the lapse of time, the Chamber considered the original arrangement as less meaningful in the circumstances, particularly because two of the three witnesses concerned would already have testified by the time the Chamber received the relevant documents, and a further witness had also testified in the intervening period. The intervening delay would require the Chamber to re-review the transcripts of the witnesses’ testimonies in order to evaluate the impact that those documents could have on the fairness of the trial. The Chamber thus requested ‘the Dutch Authorities to transmit to the Chamber a copy of the asylum files for their evaluation in the premises of the Court, but not subject to the presence of a Dutch immigration officer’.<sup>39</sup>
19. On 27 January 2015, the Netherlands Ministry of Foreign Affairs transmitted a second Note Verbale (the ‘MFA Second Note Verbale’) to the Registrar, reporting the decision of the Dutch supervisory judge on the request for cooperation that the ICC had communicated to the Dutch Authorities through the Registrar’s First Note Verbale.<sup>40</sup> According to the MFA Second Note Verbale, the Dutch supervisory

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<sup>37</sup> 16 January Letter, ICC-01/09-01/11-1787-Conf-AnxII.

<sup>38</sup> Email from Trial Chamber V-A Communications to the Registry at 10:06.

<sup>39</sup> Email from Trial Chamber V-A Communications to the Registry at 10:06.

<sup>40</sup> E-mail from the Dutch Authorities to the Registry at 13:20. The MFA Second Note Verbale was filed in the record of the case on 30 January 2015. See: Registry transmission of further observations submitted by the Dutch authorities following the “Order on Consultations with the Kingdom of the Netherlands”, ICC-01/09-01/11-1798-Conf-Anx1.



judge, in her decision,<sup>41</sup> authorised the perusal of the following information, if available:

- i. the written report of the asylum seeker's first interview;
- ii. the written report of the asylum seeker's detailed interviews;
- iii. the written submissions;
- iv. the appeal addressed to the Aliens Chamber of the District Court, and the grounds on which it rests; and
- v. the appeal addressed to the Administrative Law Division of the Council of State and the grounds on which it rests.

20. Moreover, the MFA Second Note Verbale communicated the following conditions under which the documents may be viewed:

- i. the requested documents may only be viewed by persons who are ICC judges;
- ii. the persons who view the documents commit to respect the confidentiality of the content of the documents;
- iii. the documents are not copied or transmitted in any other form to anyone, including those who have perusal of the information;
- iv. the current addresses of the three aliens are not made available as a result of the disclosure of the documents for perusal;
- v. the documents remain under Dutch jurisdiction and the perusal must take place in the presence of a civil servant appointed by the Dutch Public Prosecutor; and
- vi. in the event the presence of an interpreter is necessary, the latter is designated by the Dutch Public Prosecutor.

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<sup>41</sup> The English translation of the decision of the Dutch supervisory judge was transmitted to the Chamber on 30 January 2015 via filing ICC-01/09-01/11-1798-Conf-Anx2.

### III. DISCUSSION

#### *A. A Preliminary Matter*

21. Some preliminary observations are necessary in relation to aspects of the role of the Prosecution in this matter. That aspect appears in the Prosecution's implied and expressed inclination to consider that the inspection of the asylum record is a matter that may not engage the central interest of the Prosecution, but rather a matter for the Defence. Submissions to that effect had been made during the oral submissions of the Prosecution at the status conference of 2 December 2014.<sup>42</sup> It is also a matter of concern that in the Prosecution's communication to the Dutch Authorities, dated 18 November 2014, in apparent compliance with the Chamber's order of 17 November 2014, the Prosecution informed the Dutch Authorities that '[t]he Prosecution formally opposed these requests in a 7 November 2014 filing to the Chamber.'<sup>43</sup> The Chamber appreciates that this information appears in the context of a narrative of 'Background to the request and statement of facts'. But it would have been enough simply to inform the Dutch that the Chamber had made an order on 17 November 2014, directing the Prosecution to request the concerned information from the Dutch Authorities. As a matter of law, implicated in requests for assistance, a party's initial opposition to the request of an opposing party merges into the Chamber's eventual order for the request to be made. It was for this reason that it was inappropriate for the Prosecution to inform the Dutch that the Prosecution was never in favour of the request.
22. To be clear, the production of the asylum records became a matter of direct interest for the Prosecution from 17 November 2014, when the Chamber made its order directing the Prosecution to seek the production of the concerned information from the Dutch Authorities.

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<sup>42</sup> ICC-01/09-01/11-T-165 page 83, line 14 to page 90, line 13.

<sup>43</sup> See Prosecution Request for Assistance, dated 18 November 2014.

23. It may be noted that in the case of *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, the Prosecution was faced with a complaint by both Defence teams, about late disclosure of an affidavit made by a key Prosecution witness.<sup>44</sup> An eventual analysis of the inconsistencies in this witness's statements, including that affidavit, caused the Prosecution to withdraw him as a witness,<sup>45</sup> an event that the Prosecution directly linked to its decision to withdraw the charges against Mr Muthaura.<sup>46</sup>
24. This affidavit, which had been obtained directly from the witness, was originally given to support the witness's application for asylum.<sup>47</sup> This experience in the *Muthaura and Kenyatta* case goes to show the potential importance of asylum application records in the evaluation of witness credibility.

### ***B. A General Principle of Law***

25. The Chamber fully recognises and accepts that there is a general rule of international law, as it concerns asylum applications, which requires confidentiality, to protect asylum applicants and those close to them from the risk of further persecution in other countries. However, the indicated general rule of confidentiality of asylum applications must be applied in a manner that accommodates other fundamental principles of international law, including the right to a fair trial enshrined under both the Statute and international human rights law.<sup>48</sup>

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<sup>44</sup> See generally *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, ICC-01/09-02/11-728 [Trial Chamber V].

<sup>45</sup> See *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber, ICC-01/09-02/11-664-Red2, paras 17 and 44 [Prosecution].

<sup>46</sup> *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, 11 March 2013, ICC-01/09-02/11-687, paras 10-11 [Prosecution]; ICC-01/09-02/11-664-Red2, para. 44.

<sup>47</sup> ICC-01/09-02/11-664-Red2, para. 34.

<sup>48</sup> International Covenant on Civil and Political Rights, adopted on 16 December 1966 and entered into force on 23 March 1976, United Nations, Treaty Series, vol. 1155, Article 14; Charter of Fundamental Rights of the European Union, adopted on 2 October 2000 and entered into force on 1 December 2009, Article 47; European Convention on Human Rights, entered into force on 3 September 1953, Article 6; The Universal Declaration of Human Rights, adopted on 10 December 1948, United Nations, article 10.

26. Notably, human rights law does not recognise, in absolute terms, any notion of confidentiality of asylum records. Article 14 and Article 6, respectively of the International Covenant on Civil and Political Rights (the 'ICCPR') and of the European Convention on Human Rights (the 'ECHR'), recognise the right to a fair trial, particularly the right of the Accused to question witnesses who testify against them. That right comprises, as a general principle of law, being afforded a fair opportunity to inspect information which might undermine the credibility of the witnesses in question. And for their parts, Article 17 and Article 8 respectively of the ICCPR and the ECHR do not recognise a non-derogable right to privacy. The former recognises that measures which are not 'arbitrary or unlawful' may be taken in limitation of the right to privacy; and the latter specifically recognises any limitation of the right to privacy that 'is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others'. The Accused who seek the inspection of these asylum records enjoy a right to the fair trial of the very serious charges that the Prosecution has brought against them. It is to be noted in this connection that the Office of the UN High Commissioner for Refugees does not insist on absolute confidentiality of asylum records. Their practice indicates a recognition of the occasional necessity to disclose asylum records 'for legitimate purpose', provided '[d]isclosure would not jeopardize the security of the individual concerned, his/her family members, or other persons with whom the individual is associated.'<sup>49</sup>

27. In this connection, Article 23 of the Netherlands Data Protection Act recognises – in a manner relevant to the present case – the disclosure of protected personal data in the following circumstances, among others:

- i. for the establishment, exercise or defence of a right in law [Article 23(1)(c)];

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<sup>49</sup> UN High Commissioner for Refugees (UNHCR), Procedural Standards for Refugee Status Determination Under UNHCR's Mandate, 20 November 2003, available at: <http://www.refworld.org/docid/42d66dd84.html> [accessed 10 February 2015], Unit 2, Section 2.1.2, page 2.2.

- ii. to ensure the vital needs of the subject or a third party and it appears impossible to request the express consent of the data subject; [Article 23(1)(d)]; or
- iii. to comply with an obligation under public international law [Article 23(1)(e)].<sup>50</sup>

28. These exceptions recognised in the Data Protection Act of the Netherlands are entirely in step with international law – be it in relation to international refugee law, international human rights law or international criminal law – applicable in the circumstances. They afford a basis upon which the Netherlands should cooperate with the Court in making the Requested Materials available to the Chamber.

29. Thus, mutual accommodation is called for in the circumstances between principles of law precluding, and those permitting, disclosure of the documents in question. The Chamber commends the efforts of the Dutch Authorities, including the Dutch supervisory judge, in recognising the need for mutual accommodation of the opposing legal rules that seek, on the one side, to protect the confidentiality of the asylum records and, on the other side, to protect the right of the Accused to a fair trial. Hence their indication in the MFA Second Note Verbale that the files may be viewed subject to conditions.

### *C. Applicable Provisions under the Dutch ICC Implementation Act*

30. In considering what are reasonable solutions to the difficulties presented, in view of conditions under which the documents may be released for inspection, Section 52 of the Dutch ICC Implementation Act<sup>51</sup> contemplates circumstances under which highly sensitive information may be provided to the ICC. Information that may be

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<sup>50</sup> Rules for the protection of personal data (Personal Data Protection Act) (Wet bescherming persoonsgegevens) 23 November 1999, [http://www.coe.int/t/dghl/standardsetting/dataprotection/national%20laws/NL\\_DP\\_LAW.pdf](http://www.coe.int/t/dghl/standardsetting/dataprotection/national%20laws/NL_DP_LAW.pdf).

<sup>51</sup> Kingdom Act of 20 June 2002 to implement the Statute of the International Criminal Court in relation to cooperation with and the provision of assistance to the International Criminal Court and the enforcement of its decisions (Dutch ICC Implementation Act) ICC-01/09-01/11-1737-Conf-Anx2.

provided includes telecommunication tapping, systematic surveillance of persons, infiltration, pseudo transactions involving purchases or services, systematic collection of information about a person who is under investigation, and undercover entry into a closed place. Accordingly, it contemplates the provision of information of a very sensitive nature by the Dutch Government to the ICC. It is not certain that these types of information are necessarily less sensitive than asylum records. It is possible that Section 52 of the Dutch ICC Implementation Act is broad enough to include asylum records, in light of the following categories of items: 'the recording of a confidential communication by means of technical equipment' and 'a fact-finding investigation'. It is also possible to classify asylum records under what Section 52(3) contemplates, when it provides as follows: 'Records of proceedings and other objects acquired by application of one of the powers to tap telecommunications or record confidential communications by means of technical equipment may be handed over to the ICC in so far as the District Court grants leave for this purpose. Articles 21-25 of the Code of Criminal Procedure shall apply *mutatis mutandis*.'<sup>52</sup>

31. And quite significantly, Section 53(3) provides: 'Unless the persons entitled to the seized documentary evidence are plausibly shown not to be resident in the Netherlands, *the leave required under subsection 2 shall be granted only on condition that when the documents are handed over to the ICC it is stipulated that they will be returned as soon as they are no longer required for the prosecution.*' [Emphasis added.] This provision, notably, does not impose upon the ICC the conditions indicated in the MFA Second Note Verbale, particularly the requirement either to attend at the offices of the Dutch Government to peruse a file, or for ICC judges to peruse such materials in the presence of a Dutch civil servant. Rather, the 'only condition' that

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<sup>52</sup> ICC-01/09-01/11-1737-Conf-Anx2, page 21.

Section 53(3) contemplates is that when the documents are handed over to the ICC they will be returned as soon as they are no longer required for the prosecution.<sup>53</sup>

32. These provisions of the Dutch ICC Implementation Act, especially Section 53(3), must also be considered as complementary provisions of Article 93(5) of the Statute, which, among other things, provides as follows: ‘if the Court [...] accepts the assistance subject to conditions, the Court [...] shall abide by them.’

*D. The Need for Further Adjustment of the Assistance*

33. The Chamber thus now formally requests the Dutch Authorities to make further adjustments to the request as granted.

1) The Types of Documents Covered by the Request

34. As regards the documents needing to be reviewed, the Chamber considers that it is unnecessary to make available to the Chamber, any document prepared by any legal representative for the asylum applicants. Hence, to the extent that the following documents are prepared by Counsel and not the applicants themselves, the Chamber does not request the Dutch Authorities to make available for review documents of that kind, namely: (i) the written submissions; (ii) the appeal addressed to the Aliens Chamber of the District Court, and the grounds on which it rests; and (iii) the appeal addressed to the Administrative Law Division of the Council of State and the grounds on which it rests.
35. The Chamber does, however, request documents of that kind to be made available for inspection if they were prepared by the asylum applicants themselves and not by Counsel acting on their behalf.

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<sup>53</sup> ICC-01/09-01/11-1737-Conf-Anx2, page 21.

36. In any event, the following documents remain the primary documents of interest for purposes of the present request:

- (i) the written report of the asylum seeker's first interview; and
- (ii) the written report of the asylum seeker's detailed interviews.

## 2) The Conditions for Review of the Documents

37. As regards the conditions indicated in the MFA Second Note Verbale,<sup>54</sup> the Chamber considers that adjustments, as regards the perusal of the documents by ICC Judges, are warranted in light of applicable provisions of both the Dutch ICC Implementation Act and the Rome Statute.

38. The relevant conditions are these:

- (i) the documents may only be viewed by persons who are ICC judges; and
- (ii) the documents remain under Dutch jurisdiction and the perusal must take place in the presence of a civil servant appointed by the Public Prosecutor.

39. The reason why these conditions are not suitable include the following, but are not limited to them: judicial comity and professional courtesy extended to judges of the ICC, presumption of good faith, judicial independence, and inconvenient precedent not justified in the circumstances.

### *a) Judicial Comity and Minimum Professional Courtesy*

40. The Rome Statute contemplates mutual cooperation between the Court and nation jurisdictions. Article 93(10) of the Statute, for instance, contemplates situations in which a State Party may make a cooperation request to the ICC. It is easily conceivable that the Dutch Government may one day make a similar request to the ICC for purposes of a case pending before the superior courts of the Netherlands. It

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<sup>54</sup> ICC-01/09-01/11-1798-Conf-Anx 1 and Anx2.



is to be expected that judicial comity and minimum professional courtesy would guide that manner of such mutual cooperation.

41. The Chamber presumes, however, that no breach of judicial comity or minimum professional courtesy was intended or desired. There was possibly a misunderstanding, the nature of which is implicated in the following explanation. First, it is easy to see that the conditions communicated in the MFA Second Note Verbale may present no difficulty in a judicial system that employs the assistance of an investigating judge. But it should be explained that there are no investigating judges at the ICC. And, in particular, the judges of the Trial Chamber are not investigating judges. Not even the judges of the Pre-Trial Division of the ICC are to be regarded as investigating judges. All the judges of the ICC – be they in the Pre-Trial Division, the Trial Division or Appeals Division – are of equal stature, in the order of the provision of Article 36(3)(a) of the Statute to be discussed presently.
42. Second, by virtue of Article 36(3)(a) of the Statute, all the judges of the ICC enjoy a status that is not lower than the highest judicial offices in Member States, in the Netherlands, they are judges of the Supreme Court. It is expected that the ICC judges will be accorded treatment befitting of such judges. The Chamber does not understand that the conditions indicated in the MFA Second Note Verbale would be appropriate for that level of the judiciary.
43. Third, it may be the case that the conditions communicated in the MFA Second Note Verbale would be unremarkable in the context of mutual legal assistance between States.<sup>55</sup> However, the context and circumstances of the relationship between the ICC and States Parties are necessarily different from those of a bilateral relationship between two States in matters of mutual legal assistance. In such bilateral relationships, the requested State generally has no interest in the assistance beyond a mutual obligation to lend the requested assistance. But in the relationship

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<sup>55</sup> ICC-01/09-01/11-1798-Conf-Anx 1 and Anx2.

between the ICC and a State Party called upon to assist the Court, the interest of the State Party goes beyond an obligation to lend the requested assistance. For, there is the additional consideration of the shared interest that the State Party has in enabling the Court effectively to fulfil the mandate which that State has conjoined in conferring upon the ICC. This is a consideration of general logic as regards the operation of normative principles of public international law – especially as laid down in multilateral treaties, as opposed to transnational law – within the domestic sphere. In the Netherlands, for instance, this consideration acquires a special significance in light of Articles 93 and 94 of the Constitution of the Netherlands, which give international law direct force within the Netherlands.<sup>56</sup>

*b) Presumption of Good Faith*

44. Furthermore, the indicated conditions are unsuitable because they are inconsistent with the presumption of good faith, expressed in the maxim *omnia praesumuntur rite esse acta*. This presumption is a principle of international law.<sup>57</sup> The ICC judges are entitled to this presumption. To that end, there is no basis to fear that ICC judges may not be trusted to keep their word, as communicated in the Revised Conditions indicated at the end of the present request.
45. An assurance that the Chamber will meet the Revised Conditions is guaranteed by the provisions of Article 93(5) of the Statute, which, among other things, provides as follows: ‘if the Court [...] accepts the assistance subject to conditions, the Court [...] shall abide by them’. Article 93(5) thus translates the Revised Conditions into a legal obligation that the Statute itself requires the Chamber to comply with, since the Chamber has provided those Revised Conditions as those under which it has

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<sup>56</sup> Article 93 of the Dutch Constitution provides: ‘Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.’ And Article 94 provides: ‘Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.’ Available at: <http://www.government.nl/documents-and-publications/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>

<sup>57</sup> See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* [Cambridge: Cambridge University Press, 1953 reprinted 2006] p 305.

accepted the assistance of the Dutch Authorities. Those Revised Conditions amply cover the concerns implied in the conditions communicated in the MFA Second Note Verbale. There is, therefore, no reason to insist upon the conditions communicated in the MFA Second Note Verbale.<sup>58</sup> Any such insistence would require clear evidence warranting the rebuttal of the attendant presumption of good faith to which the ICC judges involved in this case are entitled.

*c) Judicial Independence*

46. A further reason that the conditions communicated in the MFA Second Note Verbale are unsuitable in relation to ICC judges is that the conditions amount to an infringement upon judicial independence, especially as they are rendered unnecessary in light of the Revised Conditions indicated in the present decision. In that regard, the following provision of Article 40(1) of the Rome Statute may be noted: 'The judges shall be independent in the performance of their functions'.
47. Respect for judicial independence is a cardinal principle of the administration of justice. To place limits on where, when and how ICC judges are to review documents pertaining to a case before them, when such requirements are not inevitably compelled by any objectively appreciable circumstances or consideration, encroaches upon judicial independence.

*d) Inconvenient Precedent*

48. As a final consideration, the conditions communicated in the MFA Second Note Verbale would set an inconvenient precedent, again unnecessary in light of the Revised Conditions indicated in the present decision. It is to be noted in this regard that the 123 States Parties to the ICC are located in far flung places. The number and range of the Court's membership continue to grow. It would be an undesirable

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<sup>58</sup> ICC-01/09-01/11-1798-Conf-Anx 1 and Anx2.

precedent indeed, for ICC State Parties to consider that the only way in which assistance contemplated in the presented request may be fulfilled is by requiring ICC judges to travel either to the territory of States concerned or to review documents pertaining to cases under trial or appeal in the presence of national civil servants.

*e) An Existing Fundamental Principle of General Application*

49. Consequently, in relation to ICC judges, the conditions communicated in the MFA Second Note Verbale do not, in the Chamber's view, necessarily result from what may be accepted as within the contemplation of Article 93(3) of the Statute, when it speaks of what is 'prohibited in the requested State on the basis of an existing fundamental legal principle of general application'. There does not appear to be any basis to consider that it is an existing fundamental principle of general application that judges of superior courts of nations, let alone those occupying the highest judicial offices in ICC States Parties, are prohibited from reviewing materials implicated in their cases, except if such a review is conducted under the conditions communicated by the MFA Second Note Verbale. To put the matter differently, it is difficult to conceive a situation in which any judge in the Dutch legal system would require judges of the Supreme Court of the Netherlands to review the kinds of documents under the same conditions as those communicated in the MFA Second Note Verbale.

### *The Revised Conditions*

50. In view of the foregoing, the Chamber will accept to review the documents according to the following conditions:<sup>59</sup>

- (i) Upon delivery of the documents to the Chamber, the Chamber shall not permit the parties to inspect the documents; the Chamber shall view the documents under the conditions of confidentiality and secrecy required by Rule 5(1)(a) of the Court's Rules of Procedure and Evidence;
- (ii) the documents are not copied or transmitted in any other form to anyone, including those who have perusal of the information;
- (iii) the current addresses of the three witness are not made available as a result of disclosure of the documents for perusal; and
- (iv) the Public Prosecutor is to provide the interpretation of the documents, as necessary, into the English language.

51. For the reassurance of the Dutch Authorities, should worries persist, the Chamber further undertakes to deal with the files in the following manner:

Step 1: Upon the Chamber's completion of its perusal of the documents, the Chamber shall return the documents to the Dutch Government, with no copies retained at the ICC. [It is recalled that one of the conditions indicated above is that the Chamber will not make any copies of the documents that the Dutch Government provides to the Chamber, in response to this request for assistance]; and

Step 2: In the event that the Chamber considers that non-disclosure of any particular document to the parties poses a serious risk of rendering the trial unfair, the Chamber shall make a further request to the Dutch Government, for purposes of disclosure of the implicated documents, but only after the

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<sup>59</sup> ICC-01/09-01/11-1798-Conf-Anx 1 and Anx2.

documents have been returned to the possession and control of the Dutch Authorities. And in the event that the Chamber considers that non-disclosure of any particular document to the parties poses no serious risk of rendering the trial unfair, the Chamber shall consider the request for assistance fully satisfied with no need for further judicial action.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

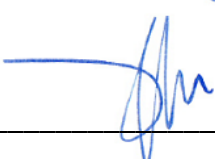
**REQUESTS** the assistance of the Government of the Kingdom of the Netherlands by providing to the Chamber, for the Chamber's own inspection, on the conditions indicated in paragraphs 50 and 51 above, three copies of each of the Requested Materials, translated as necessary into the English language.

**FURTHER REQUESTS** the Dutch Authorities to render the requested assistance as soon as possible, but in any event no later than 16 February 2015.

**DIRECTS** the Registrar, if necessary, to engage in such consultations with the Kingdom of the Netherlands as necessary in order to facilitate the execution of this request.

Judge Eboe-Osuji appends a separate further opinion.

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




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**Judge Chile Eboe-Osuji**  
(Presiding)




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**Judge Olga Herrera Carbuccion**




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**Judge Robert Fremr**

Dated 12 February 2015  
At The Hague, The Netherlands