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TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Lesser public redacted version of

**Decision on Joint Defence Application for Further Prosecution Investigation
Concerning the Asylum Application Records of Certain Prosecution Witnesses**

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

The Office of the Prosecutor

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Others

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court, in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 54, 64, 67 and 93 of the Rome Statute (the ‘Statute’), renders this Decision on Joint Defence Application for Further Prosecution Investigation Concerning the Asylum Application Records of Certain Prosecution Witnesses.

I. PROCEDURAL HISTORY

1. On 17 April 2014, the Chamber ordered the appearance of eight prosecution witnesses by way of summonses.¹
2. In September and October 2014, some of those summonsed witnesses testified before the Chamber, and during the course of their testimonies some witnesses testified that they had deliberately implicated the Accused falsely, partly motivated by material gains, including relocation abroad.²
3. In October 2014, the defence for Mr Ruto (the ‘Ruto Defence’) and the defence for Mr Sang (the ‘Sang Defence’) (together, the ‘Defence’), through *inter partes* communication, requested that the Prosecution contact the domestic legal counsel and/or relevant Dutch authorities to request material related to the asylum applications of three Prosecution witnesses, [REDACTED].³
4. On 3 November 2014, the Defence filed a joint request to order the Office of the Prosecutor (the ‘Prosecution’) to urgently discharge its obligations under Article 54 of the Statute by obtaining potentially exculpatory information concerning the

¹ Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274-Corr2.

² [REDACTED]

³ Joint Defence request under Article 54 (the ‘Application’), ICC-01/09-01/11-1627-Conf, paras 5-16 and Annexes A-C.

asylum applications submitted to the Dutch authorities by the aforesaid Prosecution witnesses (the 'Application').⁴

5. On 7 November 2014, the Prosecution filed its response to the Application (the 'Response'), in which it contends that the Request is misconceived and should be dismissed.⁵
6. On that same date, the Prosecution disclosed additional information to the Defence, related to the Prosecution's [REDACTED].⁶
7. On 10 November 2014, the Defence filed supplementary material relevant to their Application (the 'Supplementary Application').⁷
8. On 12 November 2014, the Prosecution filed its response to the Supplementary Application (the 'Response to Supplementary Application').⁸

II. SUBMISSIONS

Defence Submissions

9. The Defence requests the Chamber to: (i) order the Prosecution to obtain the potentially exculpatory information concerning the asylum applications of [REDACTED] (*i.e.* applications, statements and/or affidavits and all relevant decisions) (the 'Requested Information'); and (ii) order the Prosecution to make the

⁴ Application, ICC-01/09-01/11-1627-Conf.

⁵ Prosecution's Response to "Joint Defence request under Article 54", ICC-01/09-01/11-1642-Conf, para. 2. Pursuant to Regulation 34 of the Regulations of the Court, the Chamber shortened the deadline for responses to 16:00 on Friday, 7 November 2014. See e-mail from Trial Chamber V-A Communications to counsel on 3 November 2014 at 16:13.

⁶ Prosecution's Communication of the Disclosure of Evidence, 11 November 2014, ICC-01/09-01/11-1646 and AnxA.

⁷ Joint Defence request to file supplementary material relevant to "Joint Defence request under Article 54", ICC-01/09-01/11-1645-Conf with Confidential Annexes A-H.

⁸ Prosecution's Response to "Joint Defence request to file supplementary material relevant to "Joint Defence request under Article 54", ICC-01/09-01/11-1649-Conf. Pursuant to Regulation 34 of the Regulations of the Court, the Chamber shortened the deadline for responses to 16:00 on Wednesday, 12 November 2014. See e-mail from Trial Chamber V-A Communications to counsel on 10 November 2014 at 16:20.

necessary requests to the witnesses themselves and the Dutch authorities simultaneously and as soon as possible.⁹

10. The Defence submits that Article 54 of the Statute 'imposes an obligation on the Prosecutor to investigate incriminating and exonerating circumstances equally and to ensure that such investigations are effective'.¹⁰ In the view of the Defence, the Prosecution has failed and 'continues to fail and/or refuses to take the initiative to investigate exonerating circumstances when alerted to these circumstances by the Defence'.¹¹
11. In relation to [REDACTED], the Defence submits that on 27 and 28 October 2014, the Ruto Defence and the Sang Defence respectively requested the Prosecution to contact the domestic legal counsel of the witness or the relevant Dutch authorities to request all documents in their possession regarding the witness's asylum claim; and information as to the legal basis of the asylum application submitted by the witness.¹²
12. As regards [REDACTED], the Defence submits that on 11 October 2014, the Ruto Defence asked the Prosecution for disclosure of all documents pertaining to the asylum requests of these two witnesses, as well as all discussions between the Prosecution and these witnesses concerning, *inter alia*, their asylum applications.¹³ The Defence states that the Prosecution directed the Ruto Defence to contact Mr Göran Sluiter, who is the legal counsel of these two witnesses.¹⁴ Thereafter, the Ruto Defence submits it made two further unsuccessful requests to the Prosecution,

⁹ Application, ICC-01/09-01/11-1627-Conf, para. 34.

¹⁰ Application, ICC-01/09-01/11-1627-Conf, para. 1.

¹¹ Application, ICC-01/09-01/11-1627-Conf, para. 1.

¹² Application, ICC-01/09-01/11-1627-Conf, paras 5-6.

¹³ Application, ICC-01/09-01/11-1627-Conf, para. 8.

¹⁴ Application, ICC-01/09-01/11-1627-Conf, para. 9.

including a request so that the Prosecution would seek the Requested Information from Mr Sluiter or the Dutch authorities.¹⁵

13. The Defence also submits that on 17 October 2014 the Sang Defence asked Mr Sluiter for disclosure of the same Requested Information related to [REDACTED], but Mr Sluiter responded that he was unable to disclose the Requested Information for reasons of confidentiality.¹⁶ Accordingly, the Defence submits that the Trial Chamber's intervention is required.¹⁷

14. The Defence argues that, contrary to the Prosecution's assessment, information concerning asylum applications submitted by Prosecution witnesses is clearly relevant to their credibility and is potentially exculpatory, particularly when the asylum application is founded upon the status of being witnesses for the Prosecution in the case.¹⁸

15. The Defence also contends that Mr Sluiter's argument, that the Requested Information is confidential, is irrelevant to or does not detract from its exonerating nature, and thus cannot be used by the Prosecution to refuse to obtain and disclose this information pursuant to its obligations under Article 54 of the Statute.¹⁹

16. Although the Defence acknowledges that the Requested Information is not in the possession of the Prosecution, it submits the Prosecution has an obligation to obtain this information pursuant to Article 54 of the Statute. In its view, since the Defence

¹⁵ Application, ICC-01/09-01/11-1627-Conf, paras 10-11 and 13-16.

¹⁶ Application, ICC-01/09-01/11-1627-Conf, para. 12.

¹⁷ Application, ICC-01/09-01/11-1627-Conf, para. 11.

¹⁸ Application, ICC-01/09-01/11-1627-Conf, paras 21-22.

¹⁹ Application, ICC-01/09-01/11-1627-Conf, para. 23. The Defence refers to jurisprudence of the ad-hoc tribunals and the Court, which in the Defence's view supports its submissions. See: *Prosecutor v Bagosora et al*, ICTR-98-41-T, Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005, para. 14; *Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005; *Prosecutor v. Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, paras 24-37, 92-97; *Prosecutor v. Muthaura and 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, 25 February 2013, ICC-01/09-02/11-664-Red2, paras 31-40.

argues that certain Prosecution witnesses have, by their own admission, deliberately provided false evidence implicating the Accused, motivated by benefits such as relocation, asylum applications are evidently relevant to the criminal liability of the Accused.²⁰

17. The Defence also argues that pursuant to Article 54 of the Statute, the Prosecution has the duty to establish the truth, and consequently the information sought is potentially exonerating information necessary to establish the truth.²¹ Accordingly, the Defence submits that the Prosecution ought to have sought this information *proprio motu*, as soon as it became aware of such asylum claims. The Defence further submits that it cannot itself seek this information from the Dutch authorities, as the Kingdom of the Netherlands ('The Netherlands') has a policy not to grant any request for cooperation from the Defence, unless backed by a Chamber's order, while any request from the Prosecution is granted, without the need for a judicial order.²² The Defence submits that, in light of the Prosecution's privileged status with the Dutch authorities, and established investigative channels between it and the Dutch authorities, the Prosecution could be ordered to obtain the information sought by the Defence, pursuant to Article 64(6)(d) of the Statute.²³

18. The Defence submits that the Prosecution's obligation is not limited to disclosure of information in its possession or control, but that the Prosecution is under a positive

²⁰ Application, ICC-01/09-01/11-1627-Conf, paras 24 and 25.

²¹ Application, ICC-01/09-01/11-1627-Conf, para. 26.

²² Application, ICC-01/09-01/11-1627-Conf, para. 27.

²³ Application, ICC-01/09-01/11-1627-Conf, paras 28-31. The Defence refers to the jurisprudence of the ad-hoc tribunals that made such orders. See: *See Prosecutor v. Bagilishema*, ICTR-95-1A-T, Decision on the Request of the Defence Pursuant to Rule 73 of the Rules of Procedure and Evidence for Summons on Witnesses, 8 June 2000, paras 18, 19; *Prosecutor v. Bagosora*, ICTR-98-41-T, Decision on the Request for Documents Arising From Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003. See also *Prosecutor v. Karemera*, ICTR-98-44-PT, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005, para. 11.

duty to make its utmost effort to obtain such information, even if it is within the control of another entity.²⁴

19. In its Supplementary Application, the Defence seeks to rely on additional information that was disclosed to the Defence on 7 November 2014, which relates to the Prosecution's [REDACTED]. The information relates to [REDACTED].²⁵ The Defence submits in the Annexes to the Supplementary Application summaries of transcripts of alleged conversations between these two witnesses, in which they mention that they are no longer interested in cooperating with the Prosecution because they have obtained 'permanent residence' and 'citizenship'.²⁶ The Defence states that the information resulting from the [REDACTED] is relevant to its Application 'because [it] evidence[s] a link between cooperation with the Prosecution and witnesses seeking asylum'.²⁷
20. The Defence further submits that the Prosecution's disclosure obligations under Article 67(2) of the Statute do not require a concrete determination that the evidence 'will' affect the credibility of the witness, but that the evidence 'may' affect the credibility of the witnesses.²⁸ In its view, it may be reasonably interpreted that the witnesses were motivated to become Prosecution witnesses in order to secure relocation out of Kenya and ancillary benefits rather than by the desire to tell the truth.²⁹ The Defence also submits that the additional information [REDACTED] may also relate to [REDACTED], and [REDACTED] possible attempts to make an asylum claim.³⁰

Prosecution Submissions

²⁴ Application, ICC-01/09-01/11-1627-Conf, para. 32.

²⁵ Supplementary Application, ICC-01/09-01/11-1645-Conf, para. 2.

²⁶ Supplementary Application, ICC-01/09-01/11-1645-Conf, para. 8, footnotes 3 and 6 and Annexes A-H.

²⁷ Supplementary Application, ICC-01/09-01/11-1645-Conf, para. 6.

²⁸ Supplementary Application, ICC-01/09-01/11-1645-Conf, para. 7.

²⁹ Supplementary Application, ICC-01/09-01/11-1645-Conf, para. 8.

³⁰ Supplementary Application, ICC-01/09-01/11-1645-Conf, para. 9.

21. The Prosecution submits that the Application misconstrues the Prosecution's obligations under Article 54 of the Statute; is unsupported by sufficient factual basis; and fails to substantiate how the Prosecution's obligations were breached.³¹ In its view, the Defence does not explain why the relief sought is necessary, particularly since it can approach the Chamber for an order to obtain the sought information, as the Prosecution's obligations do not supplant the role of the Defence to investigate and prepare a defence.³²
22. The Prosecution submits that the Defence's arguments that the asylum claims contain potentially exculpatory information are generalised and unsupported. In its view, Article 54 of the Statute does not impose on the Prosecution an infinite duty to investigate, in abstract, any statement or act by its witnesses, without justifiable basis. Moreover, the Prosecution argues that Article 54 of the Statute requires the Prosecution to investigate and examine incriminating and exonerating circumstances equally, but not 'circumstances that may be material to the preparation of the defence'.³³
23. The Prosecution also submits that in order to establish that the Prosecution breached its Article 54 obligations; the Defence must adduce tangible evidence.³⁴ Moreover, the Prosecution states that while the Chamber has review powers over the Prosecution's obligations pursuant to Article 54 of the Statute, the Prosecution is best placed to determine, in implementing its independent role, whether or not to investigate or carry out further investigation of a witness. Therefore, the Prosecution submits, the Defence bears a high burden of demonstrating that the Prosecution was obliged to investigate or failed to investigate a particular matter.³⁵ The Prosecution similarly argues that its duties to investigate exonerating

³¹ Response, ICC-01/09-01/11-1642-Conf, para. 2.

³² Response, ICC-01/09-01/11-1642-Conf, para. 3.

³³ Prosecution Response, ICC-01/09-01/11-1642-Conf, paras 5-6 and footnote 5.

³⁴ Prosecution Response, ICC-01/09-01/11-1642-Conf, para. 7.

³⁵ Prosecution Response, ICC-01/09-01/11-1642-Conf, paras 8-9.

circumstances are not without limits. In its view, this 'principle essentially bans a partisan or completely one-sided investigation that does not pursue the establishment of the truth as its main objective'.³⁶ The Prosecution submits that its investigations are not an 'unguided fishing expedition', but are holistic and premised on concrete evaluations of the totality of the circumstances and the larger body of evidence collected.³⁷

24. The Prosecution further contends that the Application seeks not only information related to the witnesses' asylum applications, but also seeks details relating to protective measures afforded by the Victims and Witnesses Unit to [REDACTED] wife.³⁸
25. The Prosecution also submits that the Defence has not adduced any tangible support to trigger the Prosecution's further investigations pursuant to Article 54 of the Statute. The Prosecution states it has referred the Defence to the judgments rendered by Dutch courts on the matter, so that the Defence can determine if there is any indication as to the existence of exonerating material, and that the Defence does not seem to have consulted these decisions in order to substantiate its requests.³⁹ The Prosecution is of the view that the Defence has not demonstrated that exceptional circumstances exist in this case to justify redress under Article 54 of the Statute, but instead bases its Application on unfounded assumptions.⁴⁰ The Prosecution considers the claim that the witnesses concerned are 'false witnesses' 'motivated by benefits' are bald and unsubstantiated claims that cannot provide the basis for showing that the Prosecution breached its obligations.⁴¹ Moreover, the Prosecution considers that the information concerning asylum applications is not

³⁶ Prosecution Response, ICC-01/09-01/11-1642-Conf, para. 10.

³⁷ Prosecution Response, ICC-01/09-01/11-1642-Conf, para. 10.

³⁸ Prosecution Response, ICC-01/09-01/11-1642-Conf, para. 12.

³⁹ Prosecution Response, ICC-01/09-01/11-1642-Conf, para. 13.

⁴⁰ Prosecution Response, ICC-01/09-01/11-1642-Conf, paras 14-15.

⁴¹ Prosecution Response, ICC-01/09-01/11-1642-Conf, para. 15.

clearly relevant to the witnesses' credibility, but should be determined on a case-by-case basis.⁴²

26. The Prosecution also submits that, even if the Dutch authorities have a policy to cooperate directly with the Prosecution or if supported by a judicial order, this does not demonstrate the Prosecution's obligation to obtain the Requested Information.⁴³ The Prosecution argues that the Defence could equally approach the Chamber to obtain such an order. In fact, the Prosecution does not oppose such an approach.⁴⁴
27. The Prosecution also argues that, pursuant to Article 67(2) of the Statute, its disclosure obligations relate only to material in its possession or control and that this is not the case of the Requested Information.⁴⁵ The Prosecution submits that the Court's case law reflects that Chambers will not lightly intervene to review how the Prosecution discharges its obligations, absent tangible support that it has failed to do so. Thus, the Prosecution concludes that the Defence's coupling of Article 54(1)(a) with Article 67(2) of the Statute is of no utility and does not justify the Application.⁴⁶ The Prosecution submits that the Defence's coupling of Rule 76 of the Rules of Procedure and Evidence with Article 54(1)(a) of the Statute is similarly unmeritorious, as not every 'utterance' of a witness to a third party qualifies as a prior recorded statement.⁴⁷
28. Moreover, the Prosecution submits that, even with the Supplementary Application, the Defence has not demonstrated that the Prosecution violated its Article 54(1)(a) obligations to justify the judicial orders they seek.⁴⁸ The Prosecution also contends that the [REDACTED], whose existence had already been communicated to the

⁴² Prosecution Response, ICC-01/09-01/11-1642-Conf, paras 16-17.

⁴³ Prosecution Response, ICC-01/09-01/11-1642-Conf, para. 18.

⁴⁴ Prosecution Response, ICC-01/09-01/11-1642-Conf, para. 18.

⁴⁵ Prosecution Response, ICC-01/09-01/11-1642-Conf, para. 19.

⁴⁶ Prosecution Response, ICC-01/09-01/11-1642-Conf, paras 20-21. The Prosecution refers to: ICC-01/05-01/08-632, para. 20.

⁴⁷ Prosecution Response, ICC-01/09-01/11-1642-Conf, para. 22.

⁴⁸ Response to Supplementary Application, ICC-01/09-01/11-1649-Conf, para. 3.

Defence prior to disclosing the summaries, further undermine the Defence's claim, [REDACTED] that any and all information relating to the witnesses' asylum applications contains exculpatory information.⁴⁹ The Prosecution also submits that the Defence's reliance on Article 67(2) of the Statute is misconceived, as the same standard cannot be transplanted to Article 54(1) of the Statute.⁵⁰ The Prosecution further states that in light of the larger body of the evidence collected so far, it has in good faith determined that the further investigations requested by the Defence are not warranted.⁵¹

III. ANALYSIS AND CONCLUSIONS

29. As a preliminary matter, the Chamber accepts the Supplementary Application, but notes that, contrary to the assertion of the Defence, this additional submission in fact includes new factual arguments.
30. The Chamber notes that the Defence sought to resolve the current matter *inter partes*,⁵² but given the impossibility of an agreement among them, a ruling of the Chamber is now sought to resolve this issue, particularly since the Requested Information is not in the possession of the Prosecution,⁵³ and thus, strictly speaking, is not subject to disclosure pursuant to Article 67(2) of the Statute.
31. The Chamber takes note of the Prosecution's assurance that it has disclosed to the Defence all material already in its possession relating to [REDACTED] asylum processes.⁵⁴ The Chamber also notes that in relation to the Requested Information, the Prosecution has stated that while the fact of the witnesses' application for asylum may be considered potentially exonerating, beyond mere speculation the

⁴⁹ Response to Supplementary Application, ICC-01/09-01/11-1649-Conf, para. 4.

⁵⁰ Response to Supplementary Application, ICC-01/09-01/11-1649-Conf, para. 5.

⁵¹ Response to Supplementary Application, ICC-01/09-01/11-1649-Conf, para. 7.

⁵² Supplementary Application, ICC-01/09-01/11-1645-Conf, para. 13.

⁵³ Prosecution Response, ICC-01/09-01/11-1642-Conf, para. 19.

⁵⁴ Application, ICC-01/09-01/11-1627-Conf, Annex A, page 2, para. 1.

Prosecution has no reason to believe that the contents thereof would be so in fact.⁵⁵ Therefore, the Chamber considers it is essential to first determine whether the Requested Information is potentially exculpatory in nature, in order to: (a) determine whether it may come within the Prosecution's duty to investigate pursuant to Article 54 of the Statute, and thereafter (b) decide whether an order of the Chamber is required to seek the Requested Information for ultimate disclosure to the Defence.

32. The Chamber observes that pursuant to Article 54(1)(a) of the Statute the Prosecution is obligated to investigate incriminating and exonerating circumstances equally. Consequently, should it be determined that there are reasonable grounds to believe that information not in the Prosecution's possession may be potentially exculpatory, Article 54(1)(a) of the Statute obligates the Prosecution to make reasonable efforts to obtain that information.
33. The Chamber does not consider that the mere existence of asylum applications would necessarily trigger the Article 54 obligations of the Prosecution, instead the analysis is case specific. However, the Chamber finds that the current circumstances in respect of these specific witnesses are such that the content, and not only the existence of asylum applications, warrants further investigation. The Requested Information therefore sufficiently qualifies as 'exonerating circumstances' to be investigated under Article 54(1)(a) of the Statute, without prejudice to whether these documents, once obtained, are ultimately deemed to be potentially exculpatory pursuant to Article 67(2) of the Statute.
34. The Chamber notes that the Requested Information concerns three witnesses who are due to testify in court in the two upcoming sessions, currently scheduled to

⁵⁵ Application, ICC-01/09-01/11-1627-Conf, Annex A, page 2, para. 2.

begin on 17 November 2014 and 12 January 2014 respectively.⁵⁶ The Defence has made it sufficiently clear in its Application that it seeks the relevant information for the purpose of assessing the witnesses' credibility. In its view, where the asylum application is based upon their status as a Prosecution witness, this becomes relevant and potentially exculpatory.⁵⁷ Notably, some Prosecution witnesses who lately testified in the case have averred that they had given to the Prosecution false accounts of the events, and had been partly motivated (in doing so) by the prospect of relocation to foreign countries.⁵⁸ Given that these were Prosecution witnesses declared hostile on the application of the Prosecution,⁵⁹ and whose testimonies in the indicated manner are in dispute as regards what motivated them to resile from their initial statements to the Prosecution, the Chamber is yet to assess the credibility of the witnesses as regards such testimony. Nevertheless, testimonies to that effect are on the record. In its Supplementary Application, the Defence has provided concrete and specific information apparently concerning [REDACTED], who allegedly engaged in discussions about their asylum process and their willingness to continue as Prosecution witnesses in this case.⁶⁰

35. In this particular instance, the Application pertains to three further Prosecution witnesses in respect of whom the Prosecution has made submissions to the effect that they had at one time or another withdrawn their cooperation with the Prosecution, and thus it cannot be ruled out that they may become hostile to the Prosecution -- just like the prior witnesses who had testified to the affect that the prospect of asylum in a foreign country had induced them to give initial false accounts to the Prosecution.⁶¹ Moreover, the Prosecution has stated that it may

⁵⁶ ICC-01/09-01/11-1605-Conf, Decision on Prosecution's Second Submission of Schedule of Evidence of Summoned Witnesses, 14 October 2014. See also e-mail from Trial Chamber V-A Communications to counsel on 31 October 2014 at 12:22.

⁵⁷ Application, ICC-01/09-01/11-1627-Conf, para. 21.

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ Supplementary Application, ICC-01/09-01/11-1645-Conf, para. 8, footnotes 3 and 6 and Annexes A-H.

⁶¹ ICC-01/09-01/11-1606-Conf, para. 3.

need to put to these further witnesses prior conflicting accounts when they testify before the Chamber.⁶²

36. That is to say, all three witnesses have at one time or another provided contradictory accounts which may be central to an evaluation of their credibility. And, considering the information provided in the Supplementary Application, the circumstances of the asylum applications may also be of direct relevance in that context, especially in light of the Defence's claim that obtaining asylum status may have been a motivation to act as Prosecution witnesses.
37. Thus, in the circumstances of the present case, the Chamber is not persuaded that the Application involves an 'unguided fishing expedition'⁶³ or an 'infinite duty'⁶⁴ on the Prosecution to anticipate in the abstract any statement or act of its witnesses. The Chamber is of the view that significant forensic events in the circumstances of this case,⁶⁵ including the *inter partes* communications,⁶⁶ have fairly put the Prosecution upon its inquiry as to the need for the further investigation, in a manner that justified the Application requiring the Prosecution now to request the indicated information from the Dutch authorities, if the Prosecution has not already done so. For the needs of the present matter, it is not necessary to pronounce upon the question whether the Prosecution has *violated* as such the provisions of Article 54 of the Statute.
38. The Chamber is particularly not persuaded by the Prosecution argument that it is best placed to determine, in implementing its independent role, whether or not to investigate or carry out further investigations of a witness.⁶⁷ Great caution is called for when the Prosecution purports to assert its 'independent role' under the

⁶² ICC-01/09-01/11-1606-Conf, para. 3.

⁶³ Response, ICC-01/09-01/11-1642-Conf, para. 10.

⁶⁴ Response, ICC-01/09-01/11-1642-Conf, para. 5.

⁶⁵ [REDACTED].

⁶⁶ Application, ICC-01/09-01/11-1627-Conf, Annexes A-C.

⁶⁷ Response, ICC-01/09-01/11-1642-Conf, para. 9.

Statute, whenever the Statute imposes an explicit or implicit *duty* on the Prosecution—such as Article 54 of the Statute does in the present context. In those circumstances, the Prosecution may not correctly assert an ‘independent role’ in any way that suggests that it is ‘best placed’ to determine whether or not it has discharged the duty so imposed. The Chamber retains the amplitude of the power to adjudicate that question whenever it is presented before the Chamber.

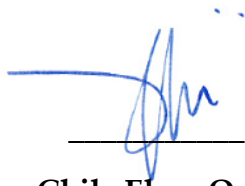
39. Thus, pursuant to Article 93(1)(i) of the Statute, the Prosecution is to seek the cooperation from The Netherlands in order to obtain the Requested Information. Given the impending testimony, particularly of [REDACTED], the Prosecution shall implement this ruling immediately, using all possible mechanisms and channels of communications for prompt disclosure to the Defence.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Defence Application; and

ORDERS the Prosecution to obtain the Requested Information from The Netherlands, pursuant to Article 93(1)(i) of the Statute immediately and disclose to the Defence accordingly.

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



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 17 November 2014

At The Hague, The Netherlands