

## ANNEX

## **Separate Further Opinion of Judge Eboe-Osuji**

1. I am in full agreement with the decision of the Chamber to the effect of taking into account the concerns of the Dutch Authorities; in the outcome that the request for assistance is limited to the extent of allowing inspection by the Chamber only, and not the parties, pursuant to the Revised Conditions.
2. However, for the reasons indicated below, I would have also, in the alternative, formally requested the Dutch Authorities to reconsider their decision in full acceptance of the conditions as indicated in the MFA Second Note Verbale, for purposes of permitting inspection by Counsel for the parties.
3. I fully share the view that the conditions indicated in the MFA Second Note Verbale are unsuitable for judicial inspection by the Chamber as fully explained in the main decision. But, those conditions would have been suitable for perusal of the documents by Counsel for the parties.
4. Given the need for mutual adjustments between the legal norms that require, on the one hand, respect for the privacy rights of the asylum applicants and, on the other, respect for the fair trial rights of the Accused, it must be accepted that what lends real substance, and not mere formalism, to the concerns of the Dutch Authorities are the risk factors appreciably associated with permitting Counsel to inspect the documents. Such concerns arise from Counsel's duty of information to their clients. But, the following may be kept in mind.
5. To begin with, Counsel for the Defence have already given their undertakings that they will not reveal or communicate to their clients any information that they obtain from their inspection of those materials. And, in that regard, Counsel have further agreed that their clients would be excused from the courtroom, should it become necessary to bring up in the course of the trial any information that Counsel gleaned from their inspection of the Dutch asylum materials. In

some jurisdictions, such arrangements are not unusual, in circumstances involving Counsel's inspection of sensitive documents.

6. Against that background, it must be kept in mind that the witnesses concerned in this request are witnesses for the Prosecution. Hence, it is to be supposed that the orientation of the statements that the witnesses gave to the Prosecution involve allegations that the Accused have, in one way or another, committed crimes within the jurisdiction of the Court. That being the case, the ultimate outcome of any testimony of the witnesses that is consistent with such statements might be the conviction of the Accused, if the testimony proves credible.
7. In contrast, the Dutch asylum procedure does not have the ultimate purpose of conviction of the Accused, but rather the assessment of the requests of the concerned witness for the grant of asylum. But, there is the likelihood that these asylum application were founded on claims of fear of reprisals as a result of the applicant's roles as Prosecution witnesses in the case now before the Chamber.
8. Thus, it may very well be that the allegations made in the asylum applications may not involve increased risk of harm to the applicants (in an asylum process that is distinct from the case before the Court) than any risk of harm already associated with any allegation of criminal conduct already made by the asylum applicants against the Accused in their statements to the Prosecution in the criminal prosecution now before the Chamber. It is also important to consider that these statements have already been disclosed to the Accused in this case and to their Counsel.
9. If that is so, one would then struggle to see the concern that should prevent the Dutch Authorities from permitting Counsel in the case to view the asylum documents.

10. What may be required, in order to enable the Dutch Authorities to reconsider their reluctance to permit Counsel to inspect the documents, would be that the Prosecution provides to the Dutch Authorities the statements of the witnesses,<sup>1</sup> to the extent that such statements allege criminal conduct against the Accused. Such an exercise would enable the Dutch Authorities to assess whether there truly remains any concern, from the perspective of risks, that should continue to militate against permitting Counsel to inspect the documents.

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

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

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

Dated 12 February 2015

At The Hague, The Netherlands

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<sup>1</sup> It is noted that the Chamber has in the past, upon the request of the Prosecution, permitted the Prosecution to transmit confidential records to the Dutch Authorities, to assist the latter with their decisions on requests for cooperation.