

## **Annex B**

## Chamberlain, Cynthia

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**From:** Trial Chamber V-A Communications  
**Sent:** 05 December 2014 19:32  
**To:** Steynberg, Anton; Garcia, Lucio; Zago, Alice; Renton, Lara; Goh, Grace  
**Cc:** Khan, Karim; Alagendra, Shyamala; Hooper, David (dhooper@iccepn.org); Faal, Essa ; Jayaraj, Shalini; Sullivan, Grace; Suljanovic, Jasmina; Kigen, Joseph (jkigen@iccepn.org); Buisman, Caroline; Hambrick, Logan; 'Lanham, Honor'; Trial Chamber V-A Communications  
**Subject:** guidance on the further consultations of the Prosecution with the Dutch Authorities regarding asylum applications  
  
**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Dear Prosecution,

The Chamber, hereby gives further directions on the consultation with the government of the Kingdom of the Netherlands concerning the transmission of material regarding the asylum applications. (see, T-168, page 103, line 5 to page 104, line 5, real time version of the transcript)

Mindful of the necessity of specific instructions in order to avoid potential misunderstandings the Chamber transmits the following guidance to the Prosecution for its further communication with the Dutch authorities.

### I. THE MATERIALS COVERED BY THE REQUEST FOR ASSISTANCE

The only materials covered by the request for assistance are testimonial records such as the following:

- The asylum applications,
- any statements of the applicants,
- any affidavits of the applicants,
- any interview transcripts of the applicants,
- any summaries of the interviews or statements of the applicants,
- any documents of a similar nature conveying the stories of the applicants, as told by them.

The following types of materials are not covered by the request for assistance:

- Work product of the Dutch asylum functionaries, including their own assessments, views and judgments concerning the asylum applications.

### II. PROCEDURE TO RESOLVE THE CONCERN OF THE DUTCH AND THE DEFENCE REQUEST

Having listened to the submissions of the parties and the Dutch delegation, the Chamber's views are as follows:

- The Chamber notes the concerns of the Defence about their clients' rights to fair trial.
- The Chamber also fully mindful of the concerns of the Dutch Government about the norm of confidentiality for asylum applications.
- The Chamber is of the view that both national law and international law, carefully considered, do permit the possibility to accommodate both sets of concerns. The legal norms indicated as protecting the concerns on either side are not cast in absolute terms.
- The Lubanga case offers a helpful precedent. The UN had indicated serious concerns about disclosure of confidential information. According to the Lubanga precedent, the Chamber received some materials that were not disclosed to the defence. But what the Chamber did with those materials was to review them, with an eye on other materials in the case – including the conduct of cross-examination. The object of the Lubanga approach was to assess whether the non-disclosure of the material to the defence would result in an unfair trial. If following that assessment the Chamber were to form the view that the non-disclosure to the defence posed no serious risk of unfairness of the trial, then that would be the end of the matter – and the materials in possession of the Chamber would not be disclosed to the defence. But, if the Chamber's assessment encountered material the non-disclosure of which may raise serious concerns about unfairness of the trial, then the Chamber would revert to the providing authority, for further consideration of how to resolve the difficulty.
- Following that model, the Chamber would not directly disclose the materials to the parties, without further consultation with the Dutch Authorities. Even so, such a consultation would only be considered necessary if the Chamber formed the view that there is something among the materials the non-disclosure of which may raise serious concerns about unfairness of the trial. The further consultation will be with the view to reviewing what further measures can be taken to minimise any identified risk of unfairness of the trial.

Kind regards

Thomas Körner

On behalf of the Presiding Judge