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**International
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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public - URGENT

**Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the
Unified Protocol on the practices used to prepare and familiarise witnesses for
giving testimony at trial**

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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Counsel for the Defence

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Legal Representatives of the Victims

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**Victims Participation and Reparations
Section**

Other

I. Introduction

1. This Partly Dissenting Opinion is in response to paragraphs 25 and 31 to 35 of the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial ("Decision"),¹ which refers to the involvement of the entity calling the witness to testify at trial in the preparation and familiarisation of witnesses and rejects, *in limine*, the defence's request to prepare its witnesses for trial, contained in the "Observations of the defence regarding the jurisprudence of Trial Chamber I on procedural issues", filed on 26 November 2009 ("defence Observations").²
2. The dissent will address the reasons underlying my disagreement with the Majority over their dismissal of the defence's arguments and explain the reasons why I am opposed to the summary prohibition of the practice of "witness proofing" for the purpose of the proceedings taking place before this Chamber.

II. The Prohibition on "Witness Proofing"

¹ Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016.

² Observation de la Défense relatives à la jurisprudence de l'Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense, 26 November 2009, ICC-01/05-01/08-620; Corrigendum [*sic*] Observations de la Défense relatives à la jurisprudence de l'Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense, 26 November 2009, ICC-01/05-01/08-620-Corr.

3. The Majority decided that by consenting to the Unified Protocol on familiarisation, the defence implicitly withdrew its submissions on witness proofing contained in the defence Observations,³ and thus declined to address the defence's arguments on this issue. The Majority then stated that it did not find any "compelling reasons to depart from the uncontroversial jurisprudence of the Court" and that it was of the view that no proofing or preparation of witnesses prior to trial is allowed before the ICC.⁴

4. With due respect for my Colleagues, I cannot agree that the defence's approval of the Unified Protocol automatically implies a withdrawal of their previous arguments, because although closely linked, the processes known as "witness familiarisation" and "witness proofing" remain two distinct procedures with different purposes, as recognised by the jurisprudence of this Court. Therefore, I am of the view that the defence's arguments contained in the Observations should have been addressed by the Chamber.⁵

5. In the Observations, the defence argues in favour of a distinction between the proofing of prosecution and defence witnesses. It argues that while the prohibition on proofing by the prosecution should be maintained, a number of factors militate in favour of allowing this practice for defence witnesses.⁶ With regard to the

³ ICC-01/05-01/08-1016, paragraph 35.

⁴ ICC-01/05-01/08-1016, paragraph 34.

⁵ This being said, for the purposes of the present Opinion, the defence argument to the effect that the accused himself should be allowed to meet with witnesses prior to their testimony, contained in paragraph 30 of the defence Observations will not be addressed.

⁶ ICC-01/05-01/08-620-Corr, paragraphs 5 to 25.

merits of the practice, the defence asserts that although for some witnesses the defence may be able to rely solely on the work of its investigators, for most witnesses, counsel would not properly fulfil their duty if they did not meet these witnesses prior to their testimony.⁷ Moreover, the defence suggests that it would be unreasonable to expect the defence to call a witness without making sure that he/she will provide relevant and probative evidence.⁸

6. In its response to the defence Observations, the prosecution objects to the argument that a distinction should be made between the rights of the defence and prosecution with regard to witness proofing.⁹ While the prosecution does not request the Chamber to depart from the previous decisions of the Court with regard to proofing, it argues that if such reconsideration were to be made, it should be done “on the same terms for both parties”.¹⁰
7. In the Decision, the Majority explicitly endorses¹¹ the decisions of Pre-Trial Chamber I¹² and Trial Chamber I,¹³ which imposed a prohibition on the practice of witness proofing by the prosecution in

⁷ ICC-01/05-01/08-620-Corr, paragraph 26.

⁸ ICC-01/05-01/08-620-Corr, paragraph 27.

⁹ Prosecution’s Response to Defence’s “Observation de la Défense relatives à la jurisprudence de l’Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense”, 21 December 2009, ICC-01/05-01/08-661, paragraph 24.

¹⁰ ICC-01/05-01/08-661, paragraph 34 ii).

¹¹ ICC-01/05-01/08-1016, paragraph 34.

¹² Decision on the practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679.

¹³ Decision regarding the Practices Used to prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01-06-1049. I note, that although both Decisions prohibited witness proofing, there are significant differences in the reasoning as well as in the conclusions of these two Decisions. In this dissenting Opinion, I will mainly address the issues raised by the latter Decision which, in my view, is more relevant to the case of Mr Bemba.

proceedings before these Chambers. With due regard, I cannot concur with this position nor agree to the endorsement, without further analysis, of these previous decisions. I consider that any ruling on witness proofing should be made after a careful review of the circumstances prevailing in each case before the Court. Contrary to the defence's assertion, I am also of the opinion that, although the prosecution did not *per se* request to be allowed to proof its witnesses and therefore did not submit any substantive arguments in this regard, both the prosecution and the defence, in the proceedings in this case, should have been allowed, under specific conditions, to have a pre-trial meeting with witnesses to be called by them, in order to prepare their in-court testimony.

8. I fully support, however, Trial Chamber I's position with regard to witness familiarisation,¹⁴ including its finding on the inclusion in the familiarisation process of the authorisation to provide witnesses with their previous statements,¹⁵ which is a notable departure from Pre-Trial Chamber I's decision.¹⁶ As a result of this, and of the same authorisation in the Majority Decision, my dissent to the Decision is limited to the witness proofing issue.

a. Legal basis

¹⁴ ICC-01/04-01-06-1049, paragraphs 29 to 34.

¹⁵ ICC-01/04-01/06-1049, paragraph 50.

¹⁶ ICC-01/04-01/06-679, paragraphs 18 to 27.

9. I agree with both Pre-Trial Chamber I and Trial Chamber I that the Rome Statute ("Statute") is silent on the issue of witness proofing.¹⁷ I would however, base my argument on Article 64(2) and (3)(a), to be read in accordance with Article 21(1)(a), rather than with Article 21(1)(c), on which the abovementioned decisions base their conclusions. Article 64(2) and (3)(a) read:

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regards for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings; [...]

10. The purpose of Article 64 of the Statute is to give judges flexibility in the approaches they can adopt for the good management of a trial. Its formulation makes it clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters such as witness proofing, and that silence on a particular procedural issue does not necessarily imply that it is forbidden. On the contrary, the drafters of the Statute have intended to give judges a broad discretion in admitting or prohibiting certain procedures, in order to facilitate fair and expeditious trials, with full respect for the rights of the accused and due regards for the protection of victims and witnesses.

¹⁷ ICC-01/04-01/06-679, paragraphs 11 and 28; ICC-01/04-01-06-1049, paragraph 36.

11. It is useful to compare the practice followed by the *ad hoc* Tribunals in this regard; while, their respective statutes do not expressly refer to witness proofing, in ruling on the matter chambers have referred to Rule 89(B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and of the International Criminal Tribunal for Rwanda ("ICTR"). For example, the ICTR Appeals Chamber stated:

The Tribunal's Statute and Rules do not directly address the issue of witness proofing. In the absence of express provisions, Rule 89(B) of the Rules generally confers discretion on the Trial Chamber to apply "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law." It is evident from the jurisprudence of the *ad hoc* Tribunals that, as Trial Chambers have exercised this discretion, a practice of witness proofing has developed and has been accepted in various cases.¹⁸

12. While noting that the *ad hoc* Tribunals' jurisprudence is not in any way binding upon this Court, I am of the opinion that the drafters of the ICC Statute intended the judges of the Court to benefit from the same procedural flexibility as enjoyed by the ICTY and ICTR, demonstrated by the language of Article 64 of the Statute. Therefore, I believe that this provision is the proper legal basis to provide the Court with the necessary adaptability to create a system of its own.

b. Definition

¹⁸ ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.8, Appeal Chamber, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, paragraph 8.

13. Having referred to the legal basis, I will now turn to the merits of the practice of “witness proofing”, and on the issue of whether it may facilitate the fair and expeditious conduct of the proceedings, while ensuring the rights of the accused and with due regards to the protection of victims and witnesses.

14. In seeking to define the term “witness proofing” a review of the practice, jurisprudence and literature on the issue highlights the lack of a universal definition for this expression and a lack of agreement over the precise extent of the practice. In a considerable number of jurisdictions with adversarial systems of law and where in-court oral testimony of witnesses plays a central role in the evaluation of the evidence, some form of pre-trial discussion on the substance of the testimony to be given by a witness is either allowed or encouraged between the witness and the party calling the witness.¹⁹ In addition to asking the witness to read his or her prior statement to refresh his or her memory, such discussion usually includes asking whether the statement is accurate and complete, and going through the evidence of the witness, including relevant exhibits.²⁰

¹⁹ Prosecution’s submissions regarding the subjects that require early determination: procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing, 12 September 2007, 01/04-01/06-952, paragraph 24; ICC-01/04-01/06-1049, paragraph 40. See also, Australia: “New South Wales Barrister’s Rules”, April 2001, Rules 43 and 44; Canada (Ontario): “Crown Policy Manual – Witness”, 21 March 2005; Law Society of Upper Canada, Rules of Professional Conduct, Rules 4.03 and 4.04, 1 November 2000; England and Wales: “The Crown Prosecution Service – Pre-Trial Witness interviews, Guidance for Prosecutors”; The Rt Hon The Lord Goldsmith QC, “Pre-Trial Witnesses Interviews by Prosecutors Report”, December 2004; United States: US’ Restatement of Law Governing Lawyers, paragraph 116, adopted in 2000; Nigeria: “Legal Practitioners Act – Rules of Professional Conduct in the Legal Profession”, Chapter 207, Rule 20; New Zealand: “Rules of conduct and client care for lawyers”, point 13.10, 2008; Japan: “Rules of Criminal Procedure” (Rules of the Supreme Court No. 32 of 1948 Article 191-3).

²⁰ England and Wales, “The Crown Prosecution Service – Pre-Trial Witness interviews, Guidance for Prosecutors”, points 7.19 to 7.25.

However, elements such as the timing of the meeting, the way in which the meeting is conducted, who should be allowed to conduct the interview, the types of questions/discussion allowed (or prohibited), the manner in which information obtained as a result of the discussions should be disclosed, and the safeguards in place to ensure the proper conduct of the interview, vary from one jurisdiction to another.²¹ If there is anything common to most of these jurisdictions, it is the prohibition on “witness coaching” or on otherwise contaminating/tainting evidence, influencing (with or without an intent to do so) the content of the testimony, manipulating the evidence or encouraging the witness to obscure or distort the truth.²²

15. The issue of the definition of witness proofing was also raised before the *ad hoc* Tribunals. The ICTY, in the *Haradinaj* case, defined it as

a meeting held between a party to the proceedings and a witness, usually shortly before the witness is to testify in court, the purpose of which is to prepare and familiarize the witness with courtroom procedures and to review the witness’s evidence.²³

The *ad hoc* Tribunals also stated that proofing should not constitute a rehearsal, practice or coaching of a witness²⁴ and that it should not be seen as permission to train or tamper with a witness so as to

²¹ In this regard, the United States Restatement of Law Governing Lawyers, paragraph 116 (2000), is the less restrictive system in comparison with other jurisdictions.

²² Contrary to the practice in other jurisdictions, the position adopted by the United States Restatement of the Law Governing Lawyers, paragraphs 116 and 120(1)(a) expressly allow the witness preparation to include rehearsal of testimony.

²³ ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Trial Chamber I, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, 23 May 2007, paragraph 8.

²⁴ ICTY, *Prosecutor v. Milutinovic et al.*, Case No IT-05-87-T, Trial Chamber, Decision on Ojdanic Motion to Prohibit Witness Proofing, 12 December 2006, paragraph 16.

mould the case against the accused or so as to manipulate the evidence.²⁵

16. Finally, as regards the definition given in the *Lubanga* case, Trial Chamber I substituted the expression “witness proofing” with “the practice of substantive preparation of a witness for their in-court testimony.”²⁶

17. For the purposes of the present Opinion, witness proofing refers to a meeting between a witness and the party calling the witness for the purpose of substantive preparation of the witness’s testimony. It effectively consists of confirming with the witness as to whether his/her statement is accurate and complete, presuming that the witness already has been given the opportunity to review his/her statement during the familiarisation process, and going through the evidence and relevant exhibits. It may also include a question and answer session, but should not be a rehearsal of the questioning that is to take place during the in-court session. “Rehearsing”, “practicing”, “coaching” or any intentional or unintentional contamination of the evidence is therefore not included in the definition.

c. Merits of witness proofing

²⁵ ICTR, *Prosecutor v. Karemera et al*, Case No ICTR-98-44-T, Trial Chamber, Decision on Defence Motion to Prohibit Witness Proofing, 15 December 2006, paragraphs 11, 12 and 15.

²⁶ ICC-01/04-01/06-1049, paragraph 28.

18. With regard to the merits of the practice of witness proofing, I limit myself to analysing three specific aspects, namely, (i) the impact of proofing on the general presentation of the evidence at trial; (ii) the relationship with the prosecution's disclosure obligations; and, (iii) the benefits of proofing for the protection and well-being of witnesses.

(i) General presentation of the evidence at trial

19. The practice of witness proofing may be useful in the presentation of evidence in proceedings before this Chamber, for several reasons:

20. The procedural framework of the Court is different and more hybrid in nature than those of the *ad hoc* Tribunals. However, it does not mean that each and every rule of procedure before this Court must be in a perfect compromise between different domestic legal systems. Regarding the specific rules on the presentation of evidence through witnesses at the trial stage, ICC proceedings are closer to the adversarial legal system than to the inquisitorial system. One of the most relevant features, for the purposes of the present Opinion, is the principle of primacy of oral evidence, which is enshrined in Article 69(2) of the Statute. Most witnesses are called by one of the parties, although the Chamber has the authority to request any evidence it considers necessary for the determination of the truth.²⁷ Therefore, the in-court evidence is primarily constituted with the

²⁷ See Article 69(3) of the Statute.

questioning by the parties, participants and the Chamber, of witnesses called by the parties, pursuant to Rule 140 (2) of the Rules. Although this does not mean that parties have any property in the witnesses they have called, such a system, in my opinion, is different from the practice of many civil law jurisdictions, where witnesses have been thoroughly questioned by a judge (*juge d'instruction*) mandated to instruct the case, and where statements produced by such examination are automatically included in the case file, as highly probative evidence at the trial stage, thus logically rendering witness proofing by the parties unnecessary and irrelevant.²⁸

21. Before this Chamber, the manner in which the evidence is presented through the testimony of witnesses is of the utmost importance. It would undoubtedly be helpful to its truth-finding function to improve the quality of the presentation of evidence by receiving clear, relevant, structured, focussed and efficient testimonies from proofed witnesses. Witnesses who will testify before this Chamber come from places far away from The Hague and are not necessarily familiar with the "Western" way of questioning or with court-systems in general. Also, they give evidence on events which occurred a number of years ago (witnesses will testify on events which occurred in 2002-2003, therefore over seven years ago), and their statements were also given months, or even a few years ago. Sometimes those statements were taken before the confirmation of

²⁸ Similarly, I am not convinced by the reasoning of Trial Chamber I, which argues that the innovative provisions of the Court's procedural framework which impose a duty on the prosecution to investigate both exculpatory and incriminatory evidence as well as permit greater intervention by the Bench and allow victims to participate, have the effect of rendering witness proofing inappropriate, thus justifying the total ban of witness proofing before the Court (see ICC-01/04-01/06-1049, paragraph 45).

charges, by investigators without legal training or without precise directions regarding specific crime-related evidence to be collected, resulting in statements which lack the degree of specificity required to prove that the crimes charged were committed. Without proofing, there is an increased likelihood that the evidence given by the witness will be incomplete, confused and ill-structured.

22. Moreover, the case before this Chamber is complicated, and involves witnesses who will give evidence on both the alleged crimes as well as on the mode of liability, and will necessitate the review of a large number of complicated and detailed exhibits, which may include various types of documents, audio-video records, different kinds of communications from governments or other entities, maps, and pictures. In tackling a case of such magnitude and complexity, I do not believe it is practical and reasonable to prohibit any pre-trial meeting between the parties and their witnesses. Indeed, under these circumstances, witness proofing could be considered as a “genuine attempt to clarify a witness’ evidence”,²⁹ and to ensure the smooth conduct of the proceedings by enabling a more accurate, complete, methodical and efficient presentation of the evidence.

- (ii) Consequences on the prosecution’s disclosure obligations

23. It is likely that during proofing, new information (of either an incriminatory or an exculpatory nature) will be revealed to the

²⁹ ICTY, *Prosecutor v. Milutinovic et al.*, Case No IT-05-87-T, Trial Chamber, Decision on Ojdanic Motion to Prohibit Witness Proofing, 12 December 2006, paragraph 16.

prosecution which was not part of the witness' prior statement and therefore not previously disclosed to the defence. An advantage of proofing in this regard is that this new information may then be disclosed to the defence, in advance of the witness' testimony, pursuant to the relevant provisions of the Statute. Indeed, it is obvious that, if a witness has knowledge of additional relevant facts, such new information will inevitably come to light when the witness gives evidence in court. In this scenario, precious time might be wasted, as a consequence of taking the defence not having prior knowledge of the information thereby creating the need for potential adjournments.³⁰ At the same time, however, admission of such additional evidence, where incriminatory in nature, should be strictly limited and subject to the control of the Chamber so that the proofing process is not abused, and used as a *de facto* delayed investigation.

(iii) Protection and well-being of witnesses

24. An additional benefit of proofing is related to the confidence it can provide to witnesses, especially in respect of vulnerable witnesses. The familiarisation process evidently plays a central role in this regard. However, it is one thing to have the trial processes explained and opportunity to observe the physical setting of the courtroom, and quite another to realise in advance what is expected from a

³⁰ See, for example, ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Trial Chamber III, Decision on Defence Motion to Prohibit Witness Proofing, 15 December 2006, paragraph 9, which stated that: "Both this Tribunal and the ICTY have consistently allowed the practice of pre-testimony interviews of witnesses for the better administration of justice, in the particular context of their proceedings, and to reduce any element of surprise to the Defence."

witness and their likely reactions when testifying in the courtroom. In my opinion, the opportunity for a witness to tell his/her story to the party calling him/her prior to giving evidence in Court may prove comforting, or at least, serve as a very beneficial, substantive preparation for what will occur in Court. It goes without saying that a case-by case assessment of the merits and drawbacks of this practice for each vulnerable witness would have to be made by the VWU, before proofing takes place.

d. Safeguards

25. I agree with Trial Chamber I's warning that proofing "could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony",³¹ although I do not agree that such a risk inevitably necessitates a total ban on the pre-trial meeting between the parties and the witnesses they are calling before this Chamber. There certainly is a grey area between what is acceptable, permissible proofing on one hand and prohibited contamination of evidence on the other. It is only after carefully balancing the merits and drawbacks of proofing and implementing various safeguards that many jurisdictions allow or even encourage witness proofing.³² I believe that, in order to facilitate a fair and expeditious trial, with full respect for the rights of the accused and due regard for the protection of victims and witnesses, this Chamber would have considerably benefited from witness proofing,

³¹ ICC-01/04-01/06-1049, paragraph 51.

³² See above, paragraph 14.

considering the scale, complexity, geographical and temporal scope of the case and cultural and linguistic remoteness from the Court as well as the particular vulnerability of the witnesses. Potential risks associated to witness proofing could have been avoided had the Chamber imposed appropriate safeguards to counter them.³³

26. The first and most obvious safeguard would be to create clear guidelines providing a definition and detailed guidance on the practice of proofing, including a list of recommended, acceptable, and prohibited conduct, together with a strict code of conduct applicable to all counsel. If necessary, the Code of Professional Conduct for counsel ("Code")³⁴ which applies to "defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses...",³⁵ could also be amended so as to adequately reflect this.

27. Other safeguards could include video-audio recording of the proofing session, presence of a third party such as a representative from the VWU or the VPRS, fixing a cut-off date for witness proofing, and specific training of lawyers for the purpose of proofing. The prosecution could also be encouraged to organise a

³³ I should also touch upon the issue of spontaneity, though as a side-note. Although it is ideal to have purely spontaneous in-court testimony, the parties calling a witness for the purposes of the proceedings before the Court are the last of a very long chain of "questioners". Prior to being called before the Court, most witnesses have been interrogated by NGOs, relief agencies, governments, or investigators, etc, which may have the effect of contaminating their testimony. I am not persuaded that lawyers, when and if bound by proper guidelines and codes of conduct, are more "contaminating" than investigators. Therefore, in my opinion, the Chamber should seek a realistic solution to ensure that the need to preserve the spontaneity of the evidence is balanced with the many advantages of proofing, as mentioned above.

³⁴ Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, adopted on 2 December 2005.

³⁵ Code, Article 3.

proofing session before the witness arrives in The Hague, in order to minimise the risk of influencing the evidence and to avoid late disclosure in case any new facts emerged from the proofing session. It would also be possible for the Chamber to designate a lawyer from the prosecution, other than the trial lawyer examining the witness in court, in order to conduct proofing if there is an apparent risk of contamination of the evidence, but where proofing is nonetheless considered preferable.³⁶

28. This list of suggested safeguards is not meant to be exhaustive, and should be carefully constructed after consultation with parties, participants and relevant sections and units of the Registry, in order to minimise the risks, while preserving the advantages that the practice of witness proofing can offer.

IV. Conclusion

29. For the aforementioned reasons, pursuant to Article 64 (2) and (3) of the Statute, I would have addressed the defence's request and requested the parties and participants to file further submissions on the issue of witness proofing, including observations on possible safeguards against any misuse or abuse of the practice. In my opinion, the Chamber should have only then made its own

³⁶ While one of the elements which make the proofing issue complicated in some national jurisdictions is an institutional separation of prosecution and investigations, and also separation of the role of barrister and solicitor, there are no such difficulties in this Court.

assessment on the issue, based on the specific circumstances of the
Bemba case.

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

A handwritten signature in black ink, consisting of stylized, cursive letters, positioned above a horizontal line.

Judge Kuniko Ozaki

Dated this 24 November 2010

At The Hague, The Netherlands