

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 7 August 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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***

Public

**Decision on Sang Defence Application to exclude Expert Report of Mr Hervé
Maupeu**

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
Mr Silas Chekera

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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

Others

**Victims Participation and Reparations
Section**

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*, having considered Articles 64 and 69 of the Rome Statute (the ‘Statute’), Rule 64(1) of the Rules of Procedure and Evidence (the ‘Rules’), Regulations 23 *bis*, 29, 36 and 37 of the Regulations of the Court (the ‘Regulations’), renders the following Decision on Sang Defence application to exclude expert report of Mr Hervé Maupeu.

I. Procedural background

1. On 9 January 2013, the Office of the Prosecutor (the ‘Prosecution’) filed its witness list and summaries of witness testimony into the record of the case.¹ One of the Prosecution’s proposed expert witnesses is Mr Hervé Maupeu.² Mr Maupeu was separately instructed by the Prosecution as a social and political background expert, following unsuccessful *inter partes* negotiations on joint instruction.³
2. On 28 February 2013, the Prosecution disclosed the English translation of the expert report prepared by Mr Maupeu (the ‘Expert Report’).⁴
3. On 14 June 2013, the defence team for Joshua Arap Sang (the ‘Sang Defence’) filed the ‘Sang Defence Application to Exclude Expert Report of

¹ Prosecution’s provision of materials pursuant to Decision ICC-01/09-01/11-440, 9 January 2013, ICC-01/09-01/11-540 with four annexes.

² ICC-01/09-01/11-540-Conf-AnxA-Red; ICC-01/09-01/11-540-Conf-AnxB-Red.

³ See Prosecution’s Updated Report on Joint Instruction of Experts, 30 November 2012, ICC-01/09-01/11-492, paras 1, 15, 18-26. Mr Maupeu’s *curriculum vitae* can be located at ICC-01/09-01/11-492-Conf-AnxD.

⁴ See Annex to Prosecution’s Communication of the Disclosure of Evidence, 4 March 2013, ICC-01/09-01/11-633-Conf-AnxA (KEN-OTP-0093-1308, and the French original’s ERN number is KEN-OTP-0093-0871). This disclosure followed a request from both defence teams for an English translation of the Expert Report, which was originally written in French. See Joint Defence Request for an Order for the Prosecution to Serve Expert Report of Mr. Maupeu in a Language that Mr. Ruto and Mr. Sang Fully Understand and Speak, 19 February 2013, ICC-01/09-01/11-606; Prosecution’s Response to “Joint Defence Request for an Order for the Prosecution to Serve Expert Report of Mr Maupeu in a Language that Mr Ruto and Mr Sang Fully Understand and Speak”, 20 February 2013, ICC-01/09-01/11-608 (indicating that disclosure of the translation would occur on 28 February 2013).

Mr Hervé Maupeu' (the 'Application').⁵ An annex corresponding to the Application was notified three days later (the 'Annex').⁶

4. On 9 July 2013, the Prosecution responded to the Application ('Response').⁷
5. The Ruto Defence did not respond to the Application.

II. Submissions, analysis and conclusions

6. The Sang Defence requests the Chamber to order the exclusion of the entire Expert Report (and related *viva voce* testimony) of Mr Maupeu.⁸ Alternatively, the Sang Defence seeks an order for the exclusion of the excerpts of the Expert Report listed in the Annex to the Application.⁹ The Prosecution requests that the relief sought in the Application be rejected in its entirety.¹⁰

A. Preliminary Issue: Consideration of the Annex to the Application

7. As a preliminary issue, the Chamber notes the Prosecution's submissions that the Application should be dismissed *in limine* because the Annex contains additional submissions which, when combined with the Application, exceed the page limit proscribed in the Regulations.¹¹
8. The Chamber notes Regulation 36(2)(b) of the Regulations, which provides that an 'appendix' containing 'non-argumentative' material shall not be counted in calculating the page limits. This same regulation expressly indicates that '[a]n appendix shall not contain submissions'. The page limit

⁵ ICC-01/09-01/11-774-Conf .

⁶ Annex to the Sang Defence Application to Exclude Expert Report of Mr Hervé Maupeu, 17 June 2013, ICC-01/09-01/11-774-Conf-Anx.

⁷ ICC-01/09-01/11-806-Conf.

⁸ Application, ICC-01/09-01/11-774-Conf, para. 39.

⁹ Application, ICC-01/09-01/11-774-Conf, para. 39. *See also* Annex to the Application, ICC-01/09-01/11-774-Conf-Anx.

¹⁰ Response, ICC-01/09-01/11-806-Conf, para. 20.

¹¹ Response, ICC-01/09-01/11-806-Conf, para. 3.

applicable to the Application is 20 pages, as is provided by Regulation 37(1) of the Regulations.

9. The Chamber agrees with the Prosecution that the annex to the Application indeed contains submissions. The Sang Defence implicitly concedes this point by basing its requested relief on 'the legal reasons given above, and for the more specific reasons highlighted in Annex A to this application [...]'.¹² Accordingly, the Annex is not covered by Regulation 36(2)(b) of the Regulations and must therefore be counted towards the 20 page limit. Combined, the Application and Annex exceed the page limit by six pages.
10. Despite this breach of Regulation 37(1) of the Regulations, the Chamber considers the remedy proposed by the Prosecution to be disproportionate and will not dismiss the entire Application *in limine*. Rather, and, pursuant to Regulation 29(1) of the Regulations, the Chamber will disregard the submissions made in the Annex in its analysis.

B. Applicable Law

11. The Chamber considers an expert witness to be a person who, by virtue of some specialised knowledge, skill or training can assist the Chamber to understand an issue of a technical nature that is in dispute, without undue difficulty.¹³
12. When determining whether testimony should be received as expert testimony pursuant to Article 64(9)(a)¹⁴ and 69(4)¹⁵ of the Statute, the

¹² Application, ICC-01/09-01/11-774-Conf, para. 39.

¹³ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision on "Prosecution's Motion to Exclude Defence Political-Military Strategy Expert", 21 August 2012, ICC-01/05-01/08-2273, para. 8; ICTR, *Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Appeals Chamber, Judgement, 14 December 2011, para. 225; ICTR, *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Appeals Chamber, Judgement, 27 November 2007, para. 174; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.2, Appeals Chamber, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 27 ('Popović Expert Decision').

¹⁴ 'The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to: (a) Rule on the admissibility or relevance of evidence'.

Chamber considers that it must: (i) make a discretionary determination as to whether testimony in the relevant subject area of expertise would be of assistance,¹⁶ (ii) be satisfied that the proposed witness is an expert,¹⁷ giving due consideration as to whether the person is included in the Registry's List of Experts set out in Regulation 44(1) of the Regulations, and (iii) determine that the anticipated testimony falls within the expertise of the witness and does not usurp the functions of the Chamber as the ultimate arbiter of fact and law.¹⁸

13. Anticipated expert testimony which would qualify as usurping the functions of the Chamber by going into the 'ultimate issues' at trial would include, for example, opinions as to an accused's guilt or innocence, or whether the contextual, material or mental elements of the crimes charged are satisfied.¹⁹ The Chamber considers that disclosed reports authored by the expert may be reasonably considered when evaluating the scope of the anticipated testimony.

14. When admitting expert reports into evidence, the same admissibility criteria as for any other kind of evidence must be satisfied.²⁰ In this connection, this Chamber will examine the admissibility of evidence by assessing its relevance, determining its probative value and weighing this probative value against its potentially prejudicial effect.²¹

¹⁵ 'The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence'.

¹⁶ See *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the procedures to be adopted for instructing expert witnesses, 10 December 2007, ICC-01/04-01/06-1069, para. 25; ICC-01/05-01/08-2273, para. 8.

¹⁷ See ICC-01/05-01/08-2273, para. 9; *Popović* Expert Decision, paras 21-24.

¹⁸ See ICTR, *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Appeals Chamber, Judgement, 28 November 2007, para. 212 ('*Nahimana* AJ'); *Popović* Expert Decision, paras 21-24.

¹⁹ See *Nahimana* AJ, para. 212.

²⁰ See Part 6 of the Statute and Chapter 4, Section I of the Rules (making no distinction between expert reports and any other admissibility assessment). See also *Nahimana* AJ, para. 199.

²¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, paras 26-32; *The Prosecutor v. Germain Katanga and*

15. While noting that Rule 64(1) of the Rules provides that admissibility objections to evidence are to be made upon submission,²² the Chamber considers that it may entertain certain objections to the admissibility of evidence prior to formal submission when doing so would ensure a fair and expeditious trial.²³ These preliminary rulings can inform the parties as to what kinds of anticipated testimony would be objectionable and can clarify circumstances under which admitting documentary evidence would be permissible. However, such rulings will only be considered worthwhile when there is a clear intention to adduce the evidence in some form and the proceedings would be made more efficient by litigating admissibility in advance of submission. The Chamber emphasises that no materials can be admitted into evidence until they are submitted,²⁴ and may decide not to actually admit the material concerned even if a pre-submission objection is rejected.

C. Determination of the Application

16. The Chamber notes that the present application concerns an expert report and corresponding expert testimony of one of the first witnesses projected to be called by the Prosecution. There is thus a clear indication that the Prosecution intends to adduce this evidence in the case. Furthermore, there

Mathieu Ngudjolo Chui, Trial Chamber II, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, para. 14; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012, ICC-01/05-01/08-2012-Red, para. 13.

²² Emphasis added: '*An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court*'.

²³ See Article 64(2) of the Statute ('[t]he 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 regard for the protection of victims and witnesses'). See also ICC-01/04-01/06-1399 (determined the pre-submission admissibility of four documents prior to deciding whether to lift redactions).

²⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3 May 2011, ICC-01/05-01/08-1386, paras 43-44.

is limited jurisprudence to date at this Court on the scope of expert testimony, and the Chamber considers that giving the parties some guidance on appropriate expert testimony would be worthwhile. For these reasons, the Chamber will assess the Application on its merits, at least to the extent that the fairness and expeditious of the trial are furthered by doing so. The Chamber will address the arguments made in the Application and Response in the course of its analysis.

1. Whether the Chamber considers it necessary to receive expert testimony from a political and social background expert

17. The Sang Defence argues that the issues Mr Maupeu ventures his opinions on are of a non-technical nature and are not beyond the comprehension of the Chamber.²⁵ The Prosecution responds that, although Mr Maupeu will not be testifying on technical matters, he does have knowledge, experience and training as a researcher in social sciences and thus has the potential to assist the Chamber in understanding the background and context of the post-election violence in Kenya.²⁶

18. The Chamber considers that an understanding of domestic political dynamics is helpful in a case such as the present one involving post-election violence ('PEV'). The Chamber also considers the Kenyan political situation before and during the time relevant to the charges to be sufficiently complex so as to warrant receiving expert testimony regarding it. Accordingly, the Chamber rejects the arguments of the Sang Defence and considers that it would be of assistance for a social and political background expert to testify as to the political environment in which the PEV took place even if other Prosecution witnesses may be able to testify on some of the same facts.

²⁵ Application, ICC-01/09-01/11-774-Conf, para. 32.

²⁶ Response, ICC-01/09-01/11-806-Conf, para. 7.

2. *Whether Mr Maupeu qualifies as an expert*

19. The Chamber notes that the Sang Defence ‘does not challenge Mr Maupeu’s qualification as an expert witness, but reserves the right to do so’.²⁷ The Sang Defence also observes that it does not know whether Mr Maupeu has been admitted to the Court’s list of experts created pursuant to Regulation 44(1) of the Regulations (‘List of Experts’).²⁸ The Prosecution does not address whether Mr Maupeu is on the List of Experts in the Response, but a Chamber inquiry confirmed that he has been accepted to be included on the list.²⁹

20. However, the qualification of a witness as an expert witness in a particular case is a judicial determination to be made in the context of the case, following the examination-in-chief and the cross-examination of the witness as to his specific expertise. The placement of a particular witness on the Court’s List of Experts is an administrative act on the part of the Registrar. It is not binding on the Chamber. Hence, the decision of the Chamber as to qualification of Mr Maupeu will be made upon the necessary examination-in-chief and cross-examination of Mr Maupeu as to his expertise.

3. *Whether the anticipated testimony falls within the expertise of the expert or usurps the functions of the Chamber*

21. The Sang Defence argues that, in his Expert Report, Mr Maupeu inappropriately opines on disputed factual issues³⁰ and identifies five subject areas in particular.³¹ The Sang Defence submits that it would usurp

²⁷ Application, ICC-01/09-01/11-774-Conf, para. 6.

²⁸ Application, ICC-01/09-01/11-774-Conf, para. 6, n. 3.

²⁹ Email from Court Management Section to an Associate Legal Officer of the Trial Chamber on 2 August 2013 at 10:34.

³⁰ Application, ICC-01/09-01/11-774-Conf, paras 24-30.

³¹ Application, ICC-01/09-01/11-774-Conf, para. 30.

the role of the Chamber as the arbiter of law and fact if Mr Maupeu was allowed to give expert evidence on these issues.³²

22. The Prosecution responds that the Expert Report 'does not specifically deal with any of the incidents which form the basis of the charges against the accused' and that it 'is not evidence as to the acts, conduct, mental state or criminal responsibility of the accused'.³³ The Prosecution submits that the Expert Report rather 'deals with the circumstances of the post-election violence generally, including how it started and who or what may have contributed to it, which are perfectly legitimate matters of background and context relevant to the case'.³⁴
23. The Chamber considers that the subject matter of the Expert Report appears to fall within the expertise of a social and political background expert. But whether or not Mr Maupeu is qualified as the specific expert is a matter to be determined following his examination in court. Moreover, the Chamber considers that the Sang Defence's objection that Mr Maupeu's anticipated testimony improperly usurps the role of the Chamber by going into the ultimate issues of fact in the case to be overstated. It would be unduly restrictive to prohibit a social and political background expert from testifying about any facts regarding historical or political background. Such a prohibition would make it effectively impossible to ever receive testimony from this type of experts, and, as decided above, the Chamber is of the view that a social and political background expert would be of assistance in this case. Expert testimony may touch upon facts contested by the parties so long as such facts are related to the expert's expertise and do not usurp the role of the Chamber. This view is in full accord with the *Nahimana et al.* Appeal Judgment relied upon by the Sang Defence in the Application,

³² Application, ICC-01/09-01/11-774-Conf, para. 31.

³³ Response, ICC-01/09-01/11-806-Conf, para. 6.

³⁴ Response, ICC-01/09-01/11-806-Conf, para. 6.

which upheld the Trial Chamber's decision to hear testimony from a social and political background expert.³⁵

24. The Chamber now turns to the five specific subject areas of Mr Maupeu's anticipated testimony raised by the Sang Defence. The Chamber considers that the first three subject areas³⁶ cover background issues which do not touch upon ultimate issues relating to the accused in this case. These subject areas are therefore appropriate subjects for expert testimony. As to the fourth and fifth subject areas,³⁷ the Chamber considers that the anticipated testimony should not, directly or indirectly, address the alleged role of the accused, or other key members of the alleged Network, in the PEV.
25. In view of these findings, the Chamber considers that much of Mr Maupeu's anticipated testimony which is objected to by the Sang Defence can appropriately be considered as expert testimony. The Chamber will rule on any specific objections to Mr Maupeu's testimony, including his own qualifications as an expert, as they arise during trial.

4. *Whether the Expert Report is inadmissible at this time*

26. The Sang Defence also objects to the admissibility of the Expert Report on grounds that: (i) it relies on facts that are not yet established as evidence in the case and which are disputed,³⁸ (ii) it contains evidence which is similar to the parties' agreed facts or anticipated evidence of witnesses of fact³⁹ and, (iii) in many instances, it simply relies on the observations and conclusions

³⁵ Nahimana AJ, para. 212, *quoted in* Application, para. 16 (emphasis added: '[t]hus, while the report and testimony of an expert witness may be based on facts narrated by ordinary witnesses or facts from other evidence, an expert witness cannot, in principle, testify himself or herself on the acts and conduct of accused persons without having been called to testify also as a factual witness and without his or her statement having been disclosed in accordance with the applicable rules concerning factual witnesses. *However, an expert witness may testify on certain facts relating to his or her area of expertise.*'). Paragraphs 214-15 of the Nahimana AJ, along with the corresponding footnotes, provide further details as to which parts of the expert's testimony were considered appropriate.

³⁶ Application, ICC-01/09-01/11-774-Conf, para. 30(a)-(c).

³⁷ Application, ICC-01/09-01/11-774-Conf, para. 30(d)-(e).

³⁸ Application, ICC-01/09-01/11-774-Conf, para. 34.

³⁹ Application, ICC-01/09-01/11-774-Conf, para. 35.

of other experts.⁴⁰ The Prosecution argues that these objections are premature and/or go to weight, rather than admissibility.⁴¹

27. The Chamber considers that none of the arguments of the Sang Defence on these three points affect the admissibility of the Expert Report. First, not only is it impossible for the Prosecution to be expected to establish facts before the commencement of trial, but the Chamber will not be in a position to fully determine what facts are established until all the evidence in the case has been presented. The Chamber considers this objection to be more of a matter of how much weight to give the Expert Report at the end of the trial, rather than an admissibility consideration. Second, it is unreasonable to consider the Expert Report as being unduly cumulative at a point in time when no evidence has been admitted in the case. Third, the Chamber does not consider the sources referenced in the Expert Report to be so lacking in reliability so as to render it inadmissible at this time. As stated by the Prosecution,⁴² concerns as to an expert's methodology or the sources he/she has relied upon more commonly go to an expert report's weight, rather than its admissibility.

28. In view of its findings above, the Chamber sees no reason why the Expert Report should be declared inadmissible at this time. Accordingly, the Chamber rejects the primary relief sought in the Application.

29. As to the alternative request, the Chamber sees no reason to strike any particular passages of the Expert Report or order that it be rewritten at this time. Any determination as to which specific parts of the Expert Report can be considered by the Chamber, and for what purposes they may be considered, will be significantly clarified after Mr Maupeu has testified and

⁴⁰ Application, ICC-01/09-01/11-774-Conf, para. 36.

⁴¹ Response, ICC-01/09-01/11-806-Conf, paras 8-12.

⁴² Response, ICC-01/09-01/11-806-Conf, para. 11.

all objections to his testimony have been made and ruled upon. Accordingly, the Chamber will defer any ruling on the secondary relief sought in the Application until after Mr Maupeu has testified and the Expert Report has been submitted.

D. The classification level of the present litigation

30. As a final matter, the Chamber notes that the Sang Defence justifies the confidential classification for the Application solely because ‘it makes reference to the contents of Mr Maupeu’s Expert Report, which the prosecution has classified as confidential’.⁴³ The Prosecution indicates that the Response is filed confidentially because the Application is filed with the same classification, and has no objection to reclassifying the Response as public, subject only to the redaction of Mr Maupeu, since it does not ‘refer in any specific detail to the information contained in the [Expert Report]’.⁴⁴

31. The Chamber recalls the general principle of publicity in this Court’s proceedings, which can be derived from Articles 67(1) and 64(7) of the Statute.⁴⁵ The Chamber considers that the only valid justification for confidential filings in this litigation is to protect the specific details of the Expert Report, and sees no reason why a public redacted version of the Application could not be prepared to protect any such information. The Prosecution’s request for the redaction of Mr Maupeu’s name is rejected as unnecessary; it is already in the public record that the Prosecution considers Mr Maupeu to be a social and political background expert it intends call in its case.⁴⁶ Pursuant to Regulation 23 *bis*(3) of the Regulations, the Sang

⁴³ Application, ICC-01/09-01/11-774-Conf, para. 6.

⁴⁴ Response, ICC-01/09-01/11-806-Conf, para. 4.

⁴⁵ Article 67(1) of the Statute provides that ‘[i]n the determination of any charge, the accused shall be entitled to a public hearing [...]’. Article 64(7) of the Statute provides that ‘The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence’.

⁴⁶ ICC-01/09-01/11-492, paras 18-26, 60; ICC-01/09-01/11-606; ICC-01/09-01/11-608.

Defence is ordered to prepare a public redacted version of the Application. Further, pursuant to this same regulation, the Registry is ordered to reclassify the Response as public.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

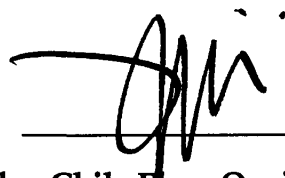
REJECTS, at this stage, the Sang Defence request to exclude the Expert Report and any corresponding oral testimony;

DEFERS consideration of the admissibility of the Expert Report or any specific section of it in accordance with paragraph 29 of the present decision;

ORDERS the Defence to file, within 7 days of notification of the present decision, a public redacted version of the Application (ICC-01/09-01/11-774-Conf-Exp), excluding the annex; and

ORDERS the Registry to reclassify the Response as public.

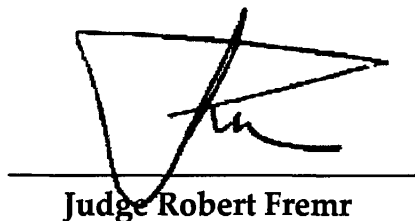
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 7 August 2013

At The Hague, The Netherlands