

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 8 October 2013

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Confidential

Decision on Prosecution's Application for Leave to Appeal the 'Decision on Disclosure of Information related to Prosecution Intermediaries'

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

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Mr Patrick Craig

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**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the 'Chamber') of the International Criminal Court (the 'Court'), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, having considered Article 82(1)(d) of the Rome Statute (the 'Statute'), renders this Decision on the Prosecution's Application for leave to Appeal the Decision on Disclosure of Information related to Prosecution Intermediaries (ICC-01/09-01/11-904-Conf).

I. PROCEDURAL HISTORY

1. On 4 September 2013, the Chamber issued the 'Decision on Disclosure of Information Related to Prosecution Intermediaries' (the 'Impugned Decision'),¹ in which it granted, in part, defence requests pursuant to Rule 77 of the Rules of Procedure and Evidence for disclosure by the Office of the Prosecutor (the 'Prosecution') of certain information relating to Prosecution intermediaries.
2. The next day, the Prosecution filed the 'Prosecution's Application for leave to Appeal the "Decision on Disclosure of Information related to Prosecution Intermediaries (ICC-01/09-01/11-904-Conf)" (the 'Application').²
3. On 9 September 2013, the defence team for Mr Ruto (the 'Ruto Defence') filed a response, in which it opposes the Application (the 'Ruto Defence Response').³
4. On 12 September 2013, the defence team for Mr Sang (the 'Sang Defence') filed a response, in which it also opposes the Application (the 'Sang Defence Response').⁴

II. APPLICABLE LAW

5. Article 82(1)(d) of the Statute sets out the requirements applicable to the granting of a request for leave to appeal, which are as follows:

¹ICC-01/09-01/11-904-Conf.

²ICC-01/09-01/11-910-Conf.

³ICC-01/09-01/11-916-Conf.

⁴ICC-01/09-01/11-935-Conf.

- i. whether the decision involves an issue that would significantly affect:
 - i. the fair and expeditious conduct of proceedings; or
 - ii. the outcome of the trial; and
 - ii. in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
6. The Chamber recalls that, for the purposes of the first prong of this test, the Appeals Chamber has defined an 'issue' as 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.⁵ Therefore, as this Chamber has previously explained,⁶ a mere disagreement regarding the correctness of a Chamber's reasoning does not constitute grounds for leave to appeal an interlocutory decision. Moreover, the 'issue' in question must be one that *would significantly* affect the fair and expeditious conduct of proceedings or the outcome of the trial.
7. Turning to the second prong of the test, the Chamber recalls that - even in circumstances where the requirements of the first prong of the test are satisfied - no automatic right of appeal is conferred by Article 82(1)(d) of the Statute. A right of appeal will arise only if, in the (Pre-) Trial Chamber's opinion, the impugned decision 'must receive the immediate attention of the Appeals Chamber'.⁷ It is recalled that the Appeals Chamber has described the (Pre-) Trial Chamber's opinion as constituting 'the definitive element for the genesis of a right to appeal'.⁸ Therefore, it is emphasised that, in these circumstances, the power to certify an appealable issue rests with the opinion of the Trial Chamber.

⁵*Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 march 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 (the 'Appeals Chamber Judgment'), Para. 9.

⁶ICC-01/09-01/11-596, para. 6.

⁷Appeals Chamber Judgment, ICC-01/04-168, para. 20.

⁸Appeals Chamber Judgment, ICC-01/04-168, para. 20.

III. SUBMISSIONS

8. In the Application, the Prosecution seeks leave to appeal each of the following issues:

- 'Whether the Chamber, when ordering disclosure pursuant to Rule 77, correctly took into consideration the specific circumstances of the case and made case-by-case assessments of the materiality of the information sought by the Defence' (the 'First Issue'); and
- 'Whether the Chamber correctly applied the Defence's burden to establish *prima facie* the materiality of the requested information, or whether the Chamber instead applied a presumption of materiality with respect to certain categories of information' (the 'Second Issue' (and, together with the First Issue, the 'Issues'))'.⁹

A. Prosecution Submissions

9. The Prosecution submits that the Issues arise from the Impugned Decision as, despite correctly stating the law, the Chamber, in practice, 'ruled on the materiality of information in the abstract, without assessing the specific circumstances on the case and without making findings on an intermediary-by-intermediary basis'.¹⁰ The Prosecution proceeds to cite examples from the Impugned Decision which it claims supports this assertion, including specifically the Chamber's findings in relation to the materiality of a list of contacts between Prosecution intermediaries and witnesses, of the dates of such contacts and of information relating to the provision of benefits, payments or other assistance to a witness.¹¹

⁹ Application, ICC-01/09-01/11-910-Conf, para.5.

¹⁰ Application, ICC-01/09-01/11-910-Conf, para.5, see also para.8 ('[n]one of these findings is in any way related to the circumstance of the case or to individual intermediaries').

¹¹ Application, ICC-01/09-01/11-910-Conf, para.7, quoting extracts from paragraphs 48-49, 52 and 59-62 of the Decision.

10. The Prosecution further submits that the Chamber at no point examined 'how the defence arguments are relevant to meet the burden to establish *prima facie* materiality in the circumstances of this case, and with respect to individual intermediaries'.¹² It is argued that the Chamber's findings were made as though the materiality of certain types of information is 'to be assumed as a general principle'.¹³ The Prosecution states that this is in 'stark contrast' to the approach taken by the Chamber in analysing the materiality of the identity of the intermediaries where, it is asserted, the Chamber 'insisted' upon the 'existence of specific facts or circumstances upon which a determination of materiality might be made on a case by case basis'.¹⁴ The Prosecution similarly states that the Chamber took a 'different approach' when determining materiality with respect to Witness 32 and, in that instance, did take into consideration the 'specific circumstances applicable to the witness'.¹⁵
11. The Prosecution submits that the concept of fairness in Article 82(1)(d) of the Statute encompasses the procedural and substantive rights of all participants, including the Prosecution, and is also linked to the ability of a party to present its case.¹⁶
12. It is argued that the alleged relieving of the burden on the Defence to establish *prima facie* materiality and creation of a presumption of disclosability is unfair because it (i) establishes an 'automatic entitlement of access to highly sensitive information the confidentiality of which is deemed essential by the Prosecution for the carrying out of operations' and (ii) reverses 'the Defence's burden to

¹²Application, ICC-01/09-01/11-910-Conf, para.8.

¹³Application, ICC-01/09-01/11-910-Conf, para.8.

¹⁴Application, ICC-01/09-01/11-910-Conf, para.8.

¹⁵Application, ICC-01/09-01/11-910-Conf, para.9.

¹⁶Application, ICC-01/09-01/11-910-Conf, para.11.

demonstrate materiality' into one which requires the Prosecution to demonstrate whether any restrictions on disclosure apply.¹⁷

13. Asserting that the Impugned Decision requires disclosure of 'sensitive information regarding the manner in which it conducts its investigations', the Prosecution submits that this would 'unfairly impact' its ability to conduct future investigations. Additionally, it is argued that the 'sensitive security related information', which it is alleged the Impugned Decision places the Prosecution under a duty to disclose, 'may force the Prosecution to withdraw evidence [...] if it cannot manage the security risks to persons cooperating with the Prosecution'.¹⁸
14. The Prosecution further argues that the Impugned Decision places it under an 'unfair burden' to demonstrate the necessity of protective measures for 'all information related to intermediaries, and not just for that part for which the Defence has met it[s] burden'. The Prosecution asserts it has been faced with the 'extremely onerous task' of identifying 'broad categories of information', assessing potential security risks, applying redactions and justifying those redactions or other relevant protective measures.¹⁹
15. It is further submitted that additional disclosure of sensitive information 'may easily result in further Prosecution evidence being tampered with or more persons being interfered with as a result of their interaction with the Prosecution'.²⁰
16. Regarding the impact of the Issues on the expeditiousness of the proceedings, the Prosecution submits that it 'may be forced to seek postponements' of testimony in order to comply with the 'taxing duties' imposed on it by the Impugned Decision. Furthermore, the Prosecution notes that if a loss of evidence, as described above,

¹⁷ Application, ICC-01/09-01/11-910-Conf, para.12.

¹⁸ Application, ICC-01/09-01/11-910-Conf, para.13.

¹⁹ Application, ICC-01/09-01/11-910-Conf, para.14.

²⁰ Application, ICC-01/09-01/11-910-Conf, para.15.

should occur the Prosecution may be required to find and disclose alternative evidence and that this 'may also result in a delay of the proceedings'.²¹

17. The Prosecution argues that this potential loss of evidence, increased difficulties in conducting ongoing Prosecution investigations and the 'possibility of further witness interference' resulting from the disclosure of sensitive information would affect the outcome of the trial.²²
18. The Prosecution submits that there is a risk that the disclosure obligation placed on it by the Impugned Decision would significantly affect its ability to present its case, in a manner which could not be remedied by an appeal from a judgment pursuant to Article 74 of the Statute, and that immediate resolution by the Appeals Chamber would therefore materially advance the proceedings.²³ It is argued that a wrong decision would 'entail a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process'.²⁴ Additionally, it is submitted that, 'because the Chamber's assessment of materiality is detached from the circumstances of the case and the individual intermediaries and effectively reliefs [sic] the Defence of its burden to establish *prima facie* disclosability', if upheld by other Chambers, the Impugned Decision would have 'serious implications' for how the Prosecution conducts investigations and uses intermediaries. Therefore, it is submitted that resolution by the Appeals Chamber would also 'assist to advance all other proceedings before the Court'.²⁵

B. Ruto Defence Submissions

19. The Ruto Defence submits that the Application should be dismissed as neither of the Issues are appealable issues and additionally, or in the alternative, neither

²¹ Application, ICC-01/09-01/11-910-Conf, paras 16-17.

²² Application, ICC-01/09-01/11-910-Conf, paras 18-19.

²³ Application, ICC-01/09-01/11-910-Conf, para. 20.

²⁴ Application, ICC-01/09-01/11-910-Conf, para. 20.

²⁵ Application, ICC-01/09-01/11-910-Conf, para. 21.

satisfy the criteria for leave to appeal for the purposes of Article 82(1)(d) of the Statute.²⁶ It is submitted that the Issues do not emanate from the Impugned Decision as they are based on a 'misrepresentation' or 'misstatement' of the Chamber's reasoning and that the Application should be dismissed on that basis alone.²⁷ In support, the Ruto Defence quotes extracts from the Chamber's reasoning which it submits demonstrate that the Chamber was 'clearly cognisant of the requirement that materiality be determined by reference to the facts of this particular case'.²⁸ The Ruto Defence further refers to the Chamber's assessment in relation to the identity of intermediaries in asserting that the test set out in the *Lubanga* and *Katanga et al* cases were applied by the Chamber in the Impugned Decision.²⁹

20. In the Ruto Defence Response, it is further submitted that Section III, iv) of the Impugned Decision is 'replete with statements which show that the Trial Chamber properly considered whether the Defence had sufficiently substantiated the materiality of each category of requested information'.³⁰ The Ruto Defence notes that this 'careful assessment led the Chamber to not only grant certain requests for disclosure but also to reject certain others'.³¹
21. The Ruto Defence argues that neither of the Issues would 'significantly' affect the fair and expeditious conduct of proceedings and that the Prosecution in fact failed to address this requirement in the Application.³² It is submitted that 'no plausible argument' can be made that the Issues would have such an effect.³³

²⁶Ruto Defence Response, ICC-01/09-01/11-916-Conf, para. 3.

²⁷Ruto Defence Response, ICC-01/09-01/11-916-Conf, paras 5-6 and 8.

²⁸Ruto Defence Response, ICC-01/09-01/11-916-Conf, para. 6, citing to 27, 42-43 and 47 of the Decision.

²⁹Ruto Defence Response, ICC-01/09-01/11-916-Conf, para. 7.

³⁰Ruto Defence Response, ICC-01/09-01/11-916-Conf, para. 8, citing, by way of example, to paragraphs 42, 43, 48, 50, 52 and 59-60 of the Decision.

³¹Ruto Defence Response, ICC-01/09-01/11-916-Conf, para. 8.

³²Ruto Defence Response, ICC-01/09-01/11-916-Conf, para. 9.

³³Ruto Defence Response, ICC-01/09-01/11-916-Conf, para. 9.

22. The Ruto Defence submits that to the extent the Prosecution's arguments relating to fairness are premised upon the 'erroneous assertion' that the Defence has been relieved of its burden they should be dismissed, as 'a proper analysis' reveals that no presumption of materiality was applied by the Chamber.³⁴ The Ruto Defence further challenges the factual basis of the Prosecution's submissions relating to fairness, including the statement that 'sensitive security related information' is required to be disclosed pursuant to the Impugned Decision.³⁵ The Ruto Defence submits that the disclosure obligations pursuant to the Impugned Decision encompass only 'basic information', which is anonymised and confined to the witnesses in this case, and therefore the impact on the role and activities of Prosecution intermediaries would be 'minimal'. The Ruto Defence additionally queried the extent to which Prosecution investigations are ongoing at this stage of the trial.³⁶
23. It was further submitted that the Prosecution's argument that it may be forced to withdraw witnesses if it cannot manage security risks arising from the disclosure obligations is 'speculative' and ignores the Chamber's 'clear invitation that it be addressed on any protective measures required'.³⁷ The Ruto Defence contests the Prosecution assertion that the Impugned Decision faces it with an 'extremely onerous task', noting, *inter alia*, that there are currently only 40 Prosecution witnesses.³⁸ It is also submitted that as a burden is not a permitted consideration in Rule 77 disclosure assessments, it should not be 'invoked through the back door' through Article 82(1)(d) of the Statute.³⁹ The Ruto Defence Response argues that the Prosecution submission concerning witness and evidence interference should be ignored as the disclosure is to the Defence, not the public, and the Ruto Defence

³⁴Ruto Defence Response, ICC-01/09-01/11-916-Conf, para.10.

³⁵Ruto Defence Response, ICC-01/09-01/11-916-Conf, para.11.

³⁶Ruto Defence Response, ICC-01/09-01/11-916-Conf, para.12.

³⁷Ruto Defence Response, ICC-01/09-01/11-916-Conf, para.13.

³⁸Ruto Defence Response, ICC-01/09-01/11-916-Conf, para.14.

³⁹Ruto Defence Response, ICC-01/09-01/11-916-Conf, para.14.

understanding is that no improper conduct is alleged on the part of the Defence team.⁴⁰

24. It is additionally argued that the Prosecution submissions in respect of the effect on the outcome of the trial - based on withdrawal of evidence, investigative difficulties and witness interference - again 'lack proper substantiation' and are 'baseless'.⁴¹

25. In the Ruto Defence Response, it is submitted that the Prosecution relies on the same arguments - which the Ruto Defence submits are 'all without merit' - under each prong of the Article 82(1)(d) test and therefore immediate resolution by the Appeals Chamber would not materially advance the proceedings.⁴²

C. Sang Defence Submissions

26. The Sang Defence submits that the Application should be dismissed as the Issues neither arise from the Impugned Decision nor meet the additional criteria under Article 82(1)(d).⁴³ It is asserted that the Prosecution 'misconstrues' the Chamber's analysis.⁴⁴ The Sang Defence states that the Appeals Chamber and related jurisprudence concerns the identity of intermediaries and was applied in the Impugned Decision.⁴⁵

27. In the Sang Defence Response, it is submitted that the Chamber 'very clearly (and correctly)' determined *prima facie* materiality of information which may assist the defence in finding additional relevant information. The Sang Defence states that the Chamber provided 'concrete examples of how the defence had met its burden' in respect of some, but not all, the categories of information sought. In support, the

⁴⁰Ruto Defence Response, ICC-01/09-01/11-916-Conf, para. 15.

⁴¹Ruto Defence Response, ICC-01/09-01/11-916-Conf, para. 17.

⁴²Ruto Defence Response, ICC-01/09-01/11-916-Conf, para. 18.

⁴³Sang Defence Response, ICC-01/09-01/11-935-Conf, paras 3 and 15.

⁴⁴Sang Defence Response, ICC-01/09-01/11-935-Conf, para. 4.

⁴⁵Sang Defence Response, ICC-01/09-01/11-935-Conf, para. 6.

Sang Defence quotes extracts from paragraphs 48, 49 and 50 of the Impugned Decision.⁴⁶

28. It is further submitted that the Chamber 'clearly stated' that it had focused upon the questions at issue, and evidence before it, in this case and that the Prosecution submissions therefore amount to nothing more than a disagreement with the Chamber's determination that the low defence burden has been met.⁴⁷
29. The Sang Defence argues that at this stage of the case the Prosecution need to conduct further investigations 'must be minimal' and should be weighed against the defence need to access information for its own investigations.⁴⁸ It is further argued that the Impugned Decision provides an opportunity for the Prosecution to 'mitigate any potential unfairness' by applying for redactions or other protective measures deemed necessary.⁴⁹
30. Addressing the Prosecution arguments related to expeditiousness, the Sang Defence submits that disclosure can be processed during breaks in testimony, including the upcoming scheduled adjournments in the court calendar.⁵⁰ Moreover, the Sang Defence alleges that the potential loss of evidence referred to by the Prosecution 'would seem to expedite the proceedings towards its just conclusion', rather than delay them.⁵¹
31. The Sang Defence argues that the Prosecution submissions in relation to whether a referral to the Appeals Chamber may materially advance the proceedings simply 're-litigate [the Prosecution's] previous arguments on the merits'. Finally, the Sang Defence submits that it is the Prosecution case, rather than the judicial process, which would be at risk of becoming 'unravelling' through implementation of the

⁴⁶Sang Defence Response, ICC-01/09-01/11-935-Conf, paras 7-8.

⁴⁷Sang Defence Response, ICC-01/09-01/11-935-Conf, para. 9.

⁴⁸Sang Defence Response, ICC-01/09-01/11-935-Conf, para. 10.

⁴⁹Sang Defence Response, ICC-01/09-01/11-935-Conf, para. 11.

⁵⁰Sang Defence Response, ICC-01/09-01/11-935-Conf, para. 12.

⁵¹Sang Defence Response, ICC-01/09-01/11-935-Conf, para. 13.

Impugned Decision and that it is therefore 'not in the interests of justice' to grant the Application.⁵²

IV. ANALYSIS AND CONCLUSIONS

32. The Chamber considers that no appealable issues, within the meaning of Article 82(1)(d) of the Statute, which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the case have been established.
33. The First Issue relies on a selective and strained reading of the Impugned Decision which ignores both the explicit statements of the Chamber regarding the specific approach adopted by it towards determinations of materiality and the fact that the Impugned Decision contains copious concrete examples of the practical application of that approach. Accordingly, the First Issue does not arise from the Impugned Decision.
34. In the Impugned Decision, the Chamber commenced its consideration of the requested categories of information by expressly stating that in making its determination of materiality the Chamber had focused on 'the questions at issue, and evidence before it, in this case'.⁵³ The Chamber notes that explicit assertions of this sort were subsequently reiterated frequently throughout the Chamber's analysis.⁵⁴ However, the Chamber considers it self-evident that the mere presence or absence of such explicit assurances in particular paragraphs does not support the Prosecution's contention that the Chamber selectively deviated from this approach in respect of certain categories of information. Even in respect of the categories of information identified in the Application as lacking an explicit case specific analysis the Chamber notes that clear evidence of the grounding of such determinations in the circumstances of the case are to be found in the Impugned Decision. For example, in considering the materiality of the provision of payments,

⁵²Sang Defence Response, ICC-01/09-01/11-935-Conf, para. 14.

⁵³Impugned Decision, ICC-01/09-01/11-904-Conf, para. 42.

⁵⁴Impugned Decision, ICC-01/09-01/11-904-Conf, see e.g. paragraphs 42, 43, 44, 47, 49, 54 and 65.

assistance or benefits to a witness the Chamber noted, *inter alia*, the fact that an intermediary in this case is confirmed to have been involved in the provision of protective measures, including the disbursement of related funds.⁵⁵ Similarly, the Chamber's analysis regarding materiality of a list of contacts between Prosecution intermediaries and witnesses was framed, *inter alia*, by an express consideration of relevant provisions of the redaction protocol which applies in this case.⁵⁶

35. Turning to the Second Issue, the Chamber similarly finds the assertion that it applied a 'presumption of materiality' in the Impugned Decision, in respect of certain categories of information, to not arise from the Impugned Decision. It should be apparent from the Impugned Decision that, instead of applying general assumptions regarding materiality, the Chamber made careful determinations throughout, based on factors which expressly included, amongst other things, the submissions of the parties.⁵⁷ Consequently, certain requests were granted and others denied – and, where relevant, separate consideration was given to specific intermediaries whose identities were known to the Chamber. Furthermore, in instances where *prima facie* materiality was found the Chamber explained such materiality in concrete terms.⁵⁸ The Chamber therefore finds that the Second Issue does not constitute an appealable issue.

36. Moreover, regardless of whether or not the Issues constitute appealable issues, the Chamber considers the Prosecution's submissions regarding the potential impact of the Issues on the fairness and expeditiousness of the proceedings to be contingent and speculative. The Prosecution submits that the Impugned Decision may cause delays as the Prosecution 'may be forced' to seek postponements of testimony to comply with the 'taxing duties' imposed on it. In light of the number of witnesses in this case, and the trial schedule, the Chamber is not persuaded that the burden is

⁵⁵Impugned Decision, ICC-01/09-01/11-904-Conf, para. 58.

⁵⁶Impugned Decision, ICC-01/09-01/11-904-Conf, para. 48.

⁵⁷See e.g. Impugned Decision, ICC-01/09-01/11-904-Conf, paras 44, 54, 58, 65.

⁵⁸See e.g. Impugned Decision, ICC-01/09-01/11-904-Conf, paras 48, 52, 59.

such as would warrant any such delay. Similarly, it is suggested that the Prosecution may be forced to withdraw evidence 'if' it cannot manage related security risks and, consequently, may need to find and disclose alternative evidence which 'may also' result in delays. These submissions rely on cumulative contingencies and fall short of satisfying the standard set out in Article 82(1)(d) of the Statute.

37. The Prosecution submissions regarding the impact of the Issues on the outcome of the case rely on the same speculative and contingent arguments as addressed above and are equally unconvincing in this context.
38. In particular, the Chamber notes that a number of the Prosecution arguments regarding the impact of the Issues on the fair and expeditious conduct of proceedings or outcome of the case are contingent upon what may occur if the Prosecution is forced to disclose 'sensitive security related information'. However, the Chamber notes that it was cognisant of such concerns in the Impugned Decision and expressly invited the Prosecution to apply for any additional protective measures it deemed necessary in order to manage such risks, and thus any impact on the fair and expeditious conduct of the proceedings.⁵⁹
39. Therefore, the Chamber finds that it has not been demonstrated that the Issues would significantly affect the fair and expeditious conduct of the proceedings or outcome of the case. At any rate, the Chamber is not of the opinion that the immediate resolution of the Appeals Chamber may materially advance the proceedings.

⁵⁹ See e.g. Impugned Decision, ICC-01/09-01/11-904-Conf, paragraphs 51, 56, 64, 68.

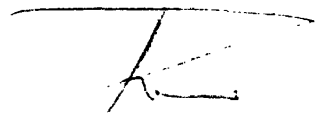
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Prosecution's application for leave to appeal the Impugned Decision.

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



Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccion

Judge Robert Fremr

Dated 8 October 2013

At The Hague, The Netherlands