

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Date: 2 December 2013

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

Public

Decision on the conduct of trial proceedings

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 Benjamin Gumpert

Counsel for the Defence

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives for Victims

Mr Fergal Gaynor

Legal Representatives for 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

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Articles 64(3)(a) and 64(8) of the Rome Statute ('Statute') and Rule 140 of the Rules of Procedure and Evidence ('Rules'), renders this 'Decision on the conduct of trial proceedings'.

I. BACKGROUND

1. On 3 July 2013, the Chamber issued an 'Order requesting submissions on the conduct of the proceedings', in which it indicated that it intended to give directions on the conduct of proceedings at trial, including directions on the order and manner in which evidence shall be submitted within the meaning of Rule 140 of the Rules, and requested submissions from the Office of the Prosecutor ('Prosecution'), the Defence for Mr Kenyatta ('Defence'), and the Common Legal Representative for Victims ('Legal Representative') on a number of issues to which such directions would relate.¹
2. Between 19 and 25 July 2013, the parties and the Legal Representative filed their submissions pursuant to the Chamber's order.²
3. On 6 September 2013, the Chamber held a status conference during which the parties and the Legal Representative made submissions on, *inter alia*, the future conduct of the proceedings.³
4. On 1 October 2013, the Prosecution filed a supplementary submission on the conduct of the proceedings.⁴

¹ ICC-01/09-02/11-769.

² Defence Submissions on the Conduct of the Proceedings, 19 July 2013, ICC-01/09-01/11-775-Conf ('Defence's Submissions'); Prosecution submissions on the conduct of the proceedings, 25 July 2013, ICC-01/09-02/11-778 ('Prosecution's Submissions'); Victims' Submissions on the Conduct of the Proceedings, 25 July 2013, ICC-01/09-02/11-779 ('Legal Representative's Submissions').

³ Transcript of hearing, 6 September 2013, ICC-01/09-02/11-T-26-ENG-ET. See also, Scheduling Order and Agenda for Status Conference, 30 August 2013, ICC-01/09-02/11-779.

5. In issuing this Decision, the Chamber has considered the written and oral submissions of the parties and the Legal Representative. It has also had regard to the practice of other Trial Chambers of this Court.

II. DIRECTIONS

Sitting schedule

6. In light of the parallel proceedings in *Ruto and Sang*, in which two judges of this Chamber also participate, the Chamber announces that, in principle, the present case will be heard in alternating four week blocks with the *Ruto and Sang* case.⁵ More detailed schedules for the hearing dates will be provided in due course.

Opening statements

7. The opening statements from each party will be presented in the following order: (1) Prosecution, (2) Legal Representative, (3) Defence. Each of the parties and the Legal Representative are granted approximately four hours for opening statements. It is not necessary for each of them to use the entirety of their allocated time. Any statement from the accused, pursuant to Article 67(1)(h) of the Statute, should be made within the allotted four hour period.
8. The parties and the Legal Representative are permitted to use audiovisual aids such as videos, photographs, and maps as needed. They are directed to disclose to the Chamber, the other parties and participants, no later than 31 January 2014, copies of the material they intend to use, unless such material is on the Prosecution's list of evidence.

⁴ Second Prosecution submission on the conduct of the proceedings, ICC-01/09-02/11-817.

⁵ See also the announcement of Trial Chamber V(A) in this regard, Transcript of hearing, 9 September 2013, ICC-01/09-01/11-T-26-RED_ENG, page 28, line 14-page 29, line 2.

Procedure for reading of charges

9. As agreed by the parties,⁶ only the “Charges” section of the Document Containing the Charges⁷ will be read out at the opening of the trial for the purposes of fulfilling the requirement of Article 64(8)(a) of the Statute.
10. The Defence is directed to ensure that the accused has read and understood the charges in their entirety in accordance with Article 64(8)(a) of the Statute and to file a certified declaration to this effect, in the form attached as Annex A to this Decision, by no later than 31 January 2014.

Procedure for objections to conduct of proceedings

11. The Chamber recalls its Order of 3 July 2013 directing any party intending to raise any objections or observations at the commencement of trial within the meaning of Rule 134 of the Rules to submit a written notice setting out the content and grounds for any such objection or observation by 1 October 2013.⁸
12. The Chamber takes note that no such notice was filed.⁹

Duration of Prosecution case

13. In its written submissions, the Prosecution indicated that it would require between 257 and 261 hours to question its 30 witnesses, including its two expert witnesses.¹⁰ This amounts to an average of between 8.5 and 8.7 hours per witness. During the status

⁶ Defence’s Submissions, ICC-01/09-02/11-775-Conf, para. 12; Prosecution’s Submissions, ICC-01/09-02/11-778, para. 5.

⁷ ICC-01/09-02/11-732-AnxA-Corr-Red, pp. 28-35.

⁸ ICC-01/09-02/11-769, para. 4.

⁹ As noted above the Prosecution filed a supplementary submission on this date. However, in the view of the Chamber, the submission does not amount to a notice of an objection or observation in the relevant sense.

¹⁰ Prosecution’s Updated Witness List, 16 July 2013, ICC-01/09-02/11-773-Conf-AnxA.

conference of 6 September 2013, the Prosecution submitted a revised estimate of 186 hours for examination-in-chief of its witnesses, amounting to 6.2 hours per witness.¹¹

14. As regards cross-examination of the Prosecution's witnesses, the Defence estimated in its written submissions that it would require up to 404 hours, an average of 13.5 hours per witness.¹² During the status conference of 6 September 2013, the Defence submitted that it would want total flexibility as to the amount of time to be allocated for cross-examination.¹³
15. The Chamber is concerned by the length of time it would take to complete the Prosecution case if the Prosecution's revised estimates and the Defence's request for complete flexibility were to be accepted. Having compared practice and experience in the other cases before the Court,¹⁴ and bearing in mind that witness preparation has been authorised in the present case with the aim of enhancing the 'efficiency, fairness, and expeditiousness' of examinations,¹⁵ the Chamber considers that the Prosecution should be allocated a per witness average of four hours for its examination-in-chief. With respect to cross-examination, the Chamber considers that, in principle, the Defence should be allocated equal time as that used by the Prosecution. Finally, an additional 50% of the time for examination-in-chief should be allocated for questioning by the Legal Representative and the Chamber itself. This amounts to a global estimate

¹¹ ICC-01/09-02/11-T-26-ENG-ET, page 5, lines 7-9. It is noted that the Prosecution has since made a request to add two new witnesses to its witness list. See ICC-01/09-02/11-805-Conf-Red. The request will be the subject of a separate ruling by the Chamber.

¹² Defence's Submissions, ICC-01/09-02/11-775-Conf, para. 10;

¹³ ICC-01/09-02/11-T-26-ENG-ET, page 8, lines 3-13.

¹⁴ In *Lubanga* the Prosecution used approximately 177 hours for its examination-in-chief of 36 witnesses (an average of 4.9 hours per witness). In *Katanga and Ngudjolo* the Prosecution was granted an average of 4.5 hours for examination-in-chief of its witnesses. See ICC-01/04-01/07-1665-Corr, pp. 4-5, paras 7-8. In *Bemba* the Prosecution used approximately 228 hours for its examination-in-chief of 40 witnesses (an average of 5.7 hours per witness). In *Ruto and Sang*, the Chamber granted the Prosecution an average of four hours for its examination-in-chief of each witness. See Decision No. 2 on the Conduct of Trial Proceedings (General Directions), 3 September 2013, ICC-01/09-01/11-900, para. 27.

¹⁵ Decision on witness preparation, filed on 2 January 2013, registered on 3 January 2013, ICC-01/09-02/11-588.

of 320 hours for the Prosecution's case, based on its current witness list of 32 witnesses.¹⁶

16. The Chamber notes that the global estimate does not include time for re-examination-in-chief and re-cross-examination, which will be authorised on a case by case basis. In addition, the Chamber will monitor the time used for examination as the case develops and may alter the time allocations as the need arises.

Scheduling of Prosecution witnesses

17. The Prosecution is directed to provide not later than 16 December 2013 an updated list of the first ten witnesses it expects to call.¹⁷ The Prosecution is further directed to provide, prior to the commencement of trial, an updated list of witnesses listing all witnesses in the expected order of call. The updated witness list should include revised estimates of examination time, in accordance with the Chamber's ruling above. In addition, the Prosecution is directed to file updated summaries¹⁸ of the main facts on which each witness is expected to testify. The summaries must include a statement showing the relevance of the testimony relative to the charges. The deadline for the filing of the updated witness list and the summaries is one week before the commencement of trial. Upon receipt of the updated witness list, the Legal Representative is directed to notify the Chamber, on an *ex parte* basis, which, if any, of the witnesses are dual status witnesses and whether such status has already been notified to the parties.

¹⁶ Two witnesses were added pursuant to the Chamber's decision of 23 October 2013, Decision on Prosecution request to add P-548 and P-66 to its witness list, ICC-01/09-02/11-832.

¹⁷ It is noted that on 12 September 2013 the Prosecution provided a notification of the first ten witnesses it originally intended to call (Prosecution notification of the order of its first ten witnesses, 12 September 2013, ICC-01/09-02/11-803 and confidential Annex A) in accordance with the Chamber's order of 3 July 2013, ICC-01/09-02/11-769, para. 3.

¹⁸ In accordance with the Chamber's Decision on the schedule leading up to trial, ICC-01/09-01/11-440, para. 13 the Prosecution filed initial witness summaries on 9 January 2013: ICC-01/09-01/11-540-Conf-AnxB-Red. The Prosecution filed summaries of witnesses 464's and 488's expected testimony on 12 September 2013. See Annexes B and C to ICC-01/09-02/11-803.

18. After the commencement of trial, the Prosecution is directed to provide, by email addressed to Trial Chamber V(B) Communications, regular witness schedules on a monthly basis, beginning one month after the commencement of evidence of the first witness.

Order of examination of witnesses

19. The party calling the witness shall examine that witness first. Cross-examination by the other party shall follow.
20. Following cross-examination, any re-examination by the calling party, which will be authorised on a case-by-case basis, will be restricted to matters which were raised for the first time in cross-examination.
21. Where an application has been made and leave granted, in accordance with the procedure set out below, the Legal Representative may ask questions of a particular witness after the Prosecution has finished its examination-in-chief or cross-examination, as the case may be.
22. The Chamber may ask questions to the witness at any stage of the testimony, including before the questions from the calling party.
23. It is noted that the reference to the Legal Representative in this and following sections includes reference to the Office for Public Counsel for Victims which will, in accordance with the Chamber's October 2012 Decision on Victims' Representation and Participation,¹⁹ appear on behalf of the Legal Representative during the day to day proceedings. According to the decision, the Legal Representative will appear in person

¹⁹ ICC-01/09-02/11-498, para 74.

at “critical junctures involving victims’ interests”, including but not limited to: opening statements; testimony of dual status witnesses; the presentation of views and concerns by victims in person, if any; closing statements; and reparations hearings, if any.

Questioning by the Legal Representative

24. When the Legal Representative wishes to examine a witness, he is directed, as a general practice, to apply to the Chamber, by means of a filing, notified to the parties, seven days in advance. The parties should file any submissions on the question of examination by the Legal Representative within two working days of notification of the application. In the event of unexpected changes to the witness schedule or unanticipated issues raised during testimony, the seven-day and two-day periods can be altered by the Chamber as necessary. The application of the Legal Representative should provide reasons for separate questioning apart from the questioning by the Prosecution and include an outline of areas for examination. Documents proposed to be used during the examination, or references thereto, where appropriate, should also be provided at this time, in accordance with the regular procedure for parties discussed below.
25. Where the Legal Representative is granted authorisation to examine a dual status witness, the Legal Representative will not ordinarily have the right to conduct a preparation session with the witness.
26. If the Legal Representative seeks to present evidence, he shall provide reasons for a separate presentation of evidence apart from the case presentation by the Prosecution. If leave is granted for presentation, such evidence shall be presented at the end of the

Prosecution case. Further guidance on the modalities of such presentation, if permitted, will be issued in a separate decision in due course.

Mode and scope of questioning

27. The Chamber recalls its general guidance on the scope and mode of questioning by the Legal Representative provided in its 'Decision on victims' representation and participation'.²⁰
28. With respect to questioning by the parties,²¹ the Chamber advises that, as a general principle, leading questions will not be permitted during examination-in-chief on contentious matters but may be used during cross-examination. Questioning during examination-in-chief should be limited to issues of relevance and / or those which are contested between the parties. Questioning during cross-examination may extend beyond issues covered in examination-in-chief, where the non-calling party reasonably expects the witness to have knowledge thereof and the questions are relevant to that party's case.²² In addition, the cross-examining party is expected, as a general matter, to confront a witness with all questions relating to the witness's credibility.

Use of documents during witness examination

29. The party calling a witness is directed to provide to the Chamber, parties and participants, no later than five days before the scheduled hearing, a list of documents which the party intends to use for the purposes of its examination-in-chief.

²⁰ ICC-01/09-01/11-498, paras 74-75.

²¹ The parties are additionally reminded of the provisions of Article 29 of the Code of Professional Conduct for Counsel with which they are expected to comply at all times, including when conducting their examination or cross-examination of witnesses. See also in that regard ICC-01/09-02/11-747, para.16. The Chamber notes that the Prosecution has subsequently also adopted its own Code of Conduct which contains equivalent undertakings in Chapter 4 thereof.

²² Rule 140(2)(b) of the Rules provides that a witness can be questioned on relevant matters related to his/her testimony, credibility and 'other relevant matters'.

Exceptionally, if good cause is shown for the later provision, and the documents concerned are limited in number and volume, parties may seek leave of the Chamber to provide the aforementioned list after the five days before testimony deadline has passed. The list may be provided by email addressed to Trial Chamber V(B) Communications.

30. The calling party is directed to indicate whether it wishes to tender any of the documents into evidence. Objections by other parties, if any, to the use or tendering of such documents shall be filed no later than two days before the examination, or made orally where appropriate.
31. As regards documents to be used during cross-examination that are not already in evidence, the party intending to make use of such documents shall provide a list of the documents, and, where the documents are not already part of the case record, copies thereof, to the Chamber, the other party and participants, no later than 24 hours before the commencement of cross-examination. The cross-examining party should simultaneously ensure that the Chamber is provided with e-court access to each of the documents it intends to use. For the purposes of ensuring that this deadline is met, the calling party is directed to inform the Chamber, the other party and Legal Representative of when it reasonably anticipates it will conclude its examination-in-chief, sufficiently in advance so as to enable the opposing party to provide the said material at least 24 hours before commencement of the cross-examination.
32. The foregoing is without prejudice to the usual disclosure obligations that are ordinarily comprised in the procedural laws of this Court.

Introduction of evidence through a witness

33. Each item of evidence shall, in principle, be introduced by the tendering party through a witness, whose testimony has a connection with that item of evidence. The opposing party may make oral submissions, in addition to the objections previously made in accordance with the procedure set out above.

'Bar table' applications

34. A party tendering evidence other than through a witness shall submit an application accompanied by a table, providing a short description of the content of each document, averment and explanation of its authenticity, an indication of the reason for not tendering the document through a witness, an index of the most relevant portions of the document, as well as a description of its relevance and intended probative value. Before submitting the application, the tendering party shall first seek the consent of the opposing party to tender the document through this method or an indication of the opposing party's objection (and the grounds for any such objection).

Introduction of prior recorded testimony

35. When a party wishes to introduce prior recorded testimony in accordance with Rule 68(b) of the Rules, it shall file an application to that effect at least 21 days before the witness is scheduled to appear. The application shall be accompanied by a copy of the prior recorded statement indicating precisely which passages the party calling the witness wishes to enter into evidence. If these passages contain references to other material that is available to the party calling the witness, they shall equally be attached to the application. The other party and the Legal Representative shall have ten days following the notification of the application to raise any objections.

Self-incrimination

36. Rule 74(1) of the Rules requires the Chamber to notify a witness of the provisions of Rule 74 of the Rules prior to his or her testimony. It is noted that the one exception provided for in that rule envisages a written notification accompanying a cooperation request pursuant to Article 93(1)(e) of the Statute. Therefore, it is apparent that such notifications may be made outside of the courtroom and need not be given directly by the Chamber. The Chamber considers it preferable that the notification be provided to the witness in advance of entering the courtroom. In respect of dual status witnesses, this notification, and any related legal advice which may subsequently be required by the witness, should be provided by the Legal Representative. In respect of all other witnesses, the Victims and Witnesses Unit ('VWU') is instructed to provide the necessary notification as part of the familiarisation process. The Registry is additionally instructed to make all necessary arrangements to ensure that a suitably qualified lawyer is available to provide any related independent legal advice which the witness may request.
37. Where it can be anticipated that a witness may give self-incriminating statements during his or her testimony the party calling such witnesses is directed to notify, as soon as practicable, the VWU and the Chamber of this fact. If the witness considers that he or she requires assurance under Rule 74(3)(c) of the Rules, the advising lawyer or calling party shall seize the Chamber with a relevant application, notifying the Prosecution thereof. The Prosecution shall present to the Chamber its views on the matter in such time as to allow the Chamber to rule before the commencement of the witness's testimony. Should the question of self-incrimination arise during the course of the witness's testimony the Chamber will proceed in accordance with Rule 74(10) of the Rules.

Protective measures

38. 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,²³ and points out that protective measures shall be considered to be an exception to this principle. The parties are directed to make applications for protective measures with respect to witnesses with sufficient individualised detail and in such time as to enable the responses to the application and the observations of the VWU to be submitted, pursuant to Rule 87(1) and (2) of the Rules, as well as the Chamber's ruling on the application before the commencement of testimony of the witness concerned, and, in any event, no later than one month before the commencement of testimony.²⁴ In exceptional cases, upon good cause shown, applications for protective measures that are not filed within this timeframe, including applications by witnesses themselves,²⁵ may be considered. The application shall be filed confidentially, but not *ex parte*. The information which the applying party seeks to withhold from the other party shall be provided in an *ex parte* annex to the application, if it contains information that could jeopardise an ongoing investigation or otherwise contains sensitive material relating to the protection of the witness.

39. Once a party has made an application for protective measures the VWU shall, unless directed otherwise, submit its observations on the application to the Chamber within the same timeframe as applies to the response of the other party. The VWU shall also provide updated individual assessments and recommendations to the Chamber in respect of each witness upon the arrival of the witness in The Hague.

²³ 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'.

²⁴ The Chamber notes that the Prosecution filed its application for in-court protective measures for the first 10 witnesses originally scheduled to testify on 11 October 2013, ICC-01/09-02/11-823-Conf-Red.

²⁵ After the completion of witness preparation or after the time when such preparation is allowed (ICC-01/09-01/11-524-Anx, para. 11), the VWU shall be responsible for conveying the witness's request for protective measures to the Chamber and to the parties.

Agreed facts

40. The Chamber takes note of the parties' agreements as to facts which are not contested.²⁶ In the interests of avoiding the unnecessary presentation of evidence and of judicial economy, the parties are directed not to elicit detailed testimony in relation to these facts and to continue to seek agreement on any additional facts which are not contested.

Rebuttal and sur-rebuttal

41. In the Prosecution's supplementary submissions on the conduct of the proceedings it argued that it should be permitted to adduce evidence in rebuttal at the end of the Defence case under certain circumstances. The Chamber is of the view that it would be premature to address this matter at this stage. Should the need arise, the Prosecution may raise this matter again at the end of the Defence case and the Chamber will issue a ruling having sought the submissions of the Defence and Legal Representative, as appropriate.

Site visit

42. As announced during the status conference of 6 September 2013,²⁷ the Chamber considers that a site visit should only be conducted where it would serve a specific purpose in relation to facts at issue. The Chamber will only decide to conduct a site visit where it is of the view that it may be of assistance in evaluating the evidence and making a determination. The parties should bear this guidance in mind if and when any applications for a site visit are to be filed.

²⁶ ICC-01/09-02/11-479 and ICC-01/09-02/11-704. As announced during the status conference of 6 September 2013, the Chamber has also taken note of Defence filing ICC-01/09-02/11-774 as to its interpretation of one of the agreed facts. ICC-01/09-02/11-T-26-ENG-ET, page 3 line 24 – page 4, line 6.

²⁷ ICC-01/09-02/11-T-26-ENG-ET, page 10, lines 1-7.

43. As to timing, a party intending to request the Chamber to undertake a site visit shall file its application at the end of the Defence case. If a party considers that a site visit should take place prior to the Defence case, it shall file its application no later than two working days after the end of the Prosecution case. In such an application, the party shall specify the locations which, in its view, the Chamber should visit and the purpose of visiting those locations. The relevance of information that the party intends to obtain during such a visit to the issues in the present case shall also be specified.

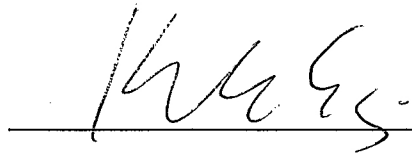
Transcripts of hearings

44. Where a witness's testimony is heard entirely in private or closed session, the calling party shall communicate to the opposing party and the Legal Representative, as applicable, a proposed public redacted version within 24 hours following notification of the edited version of the confidential transcript. Thereafter the opposing party and the Legal Representative should make any objections to the proposed redactions no later than 16.00 hours on the second working day following receipt of the proposal by the calling party. The Chamber will thereafter make its determination on the redactions to be applied. Once the Chamber has ordered the publication of a public redacted version of the relevant transcript pursuant to Regulation 23bis of the Regulations of the Court, the calling party shall transmit to the Registry the electronic version of the English and French redacted transcript by 16.00 hours on the second working day following receipt of the Chamber's decision. Where a witness does not testify entirely in private or closed session, the public version of the transcript shall redact only the portions of the testimony which occurred in private or closed session. If the parties or participants wish for a lesser redacted version of this transcript to be available to the public, then they must seise the Chamber, no later than 14 days following notification of the edited public version of the transcript, with a concrete

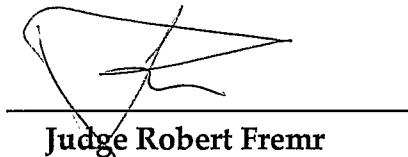
proposal to this effect and reasons for the proposed re-classification. Any objections to the proposal should be made no later than 16.00 hours on the second working day following receipt of the proposal. The Chamber may also order a lesser redacted version of such transcripts *proprio motu*.

45. Requests for corrections to the transcript shall be submitted, within five working days from the notification of the edited version of the transcript, to the responsible person within the Registry. The requests shall be based on the edited version of the transcript and contain a table providing: (i) full reference of the transcript, date and the case name, (ii) the passage extracted from the edited version of the transcript, containing the discrepancies to be reviewed, (iii) pages and lines of the passage from the edited version of the transcript, (iv) time stamp of the passage from the real time version of the transcript, and (v) the language originally used by the speaker.

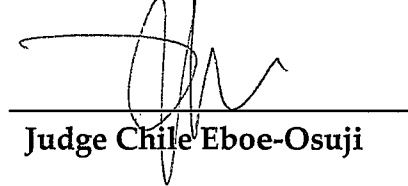
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Robert Fremr



Judge Chile Eboe-Osuji

Dated 2 December 2013

At The Hague, The Netherlands