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No.: ICC-01/04-02/06

Date: **6 July 2016**

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Public redacted version of 'Decision on Defence requests regarding certain materials related to P-0190 and P-0899'

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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Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

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Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64, 67 and 68(1) of the Rome Statute, Rules 76-77 and 81 of the Rules of Procedure and Evidence ('Rules'), and incorporating by reference the applicable law as set out in the 'Decision on the Protocol establishing a redaction regime' ('Redaction Protocol'),¹ issues the following 'Decision on Defence requests regarding certain materials related to P-0190 and P-0899'.

I. Procedural background and submissions

1. On 26 May 2016, the defence team for Mr Ntaganda ('Defence') filed an expedited request ('First Request'),² seeking that the Chamber: (i) order the Office of the Prosecutor ('Prosecution') to lift standard redactions applied to 15 documents relating to Witness P-0190;³ (ii) order the Prosecution to disclose (a) certain documents mentioned in one of Witness P-0190's statements; (b) the audio recording of an interview with Witness P-0190 on 10 February 2015; and (c) the Biographic Data and Security Questionnaire ('BSQ') of Witness P-0190, the updated BSQ of 19 November 2014 as well as an interview with Witness P-0190 concerning protection related issues;⁴ and (iii) find that the Prosecution has breached its disclosure obligations by its late disclosure of certain documents relevant for the Defence's assessment of Witness P-0190's credibility.⁵ The Defence further indicated that while additional time to prepare for the cross-examination of Witness P-0190 was 'not required at [that] juncture' – subject to ongoing investigations and preparations for Witness P-0190's testimony – it may

¹ 12 December 2014, ICC-01/04-02/06-411, particularly paras 12-15 and Annex A.

² Expedited request on behalf of Mr Ntaganda seeking the lifting of standard redactions applied to material related to Witness P-0190 and disclosure orders, ICC-01/04-02/06-1338-Conf-Exp (Prosecution and Defence only) and three confidential *ex parte* Annexes (notified on 27 May 2016). A confidential redacted version, ICC-01/04-02/06-1338-Conf-Red was filed on 27 May 2016.

³ First Request, ICC-01/04-02/06-1338-Conf-Red, paras 10-41, 70.

⁴ First Request, ICC-01/04-02/06-1338-Conf-Red, paras 42-56, 70.

⁵ First Request, ICC-01/04-02/06-1338-Conf-Red, paras 57-68, 70.

be necessary to recall Witness P-0190 for additional cross-examination ‘in the event the Defence investigations related to these documents reveal new and/or additional information, either material for the purpose of impeaching Witness P-0190’s credibility and/or exculpatory in nature.’⁶

2. On 27 May 2016, the Defence filed a related expedited request (‘Second Request’, together with the First Request, ‘Requests’).⁷ According to the Defence, the nature of the relationship between Witness P-0190 and P-0899, who is mentioned in materials related to Witness P-0190, and more particularly this person’s ‘apparent implication in alleged [REDACTED]’,⁸ warranted the Prosecution: (i) lifting standard redactions applied to four documents relating to P-0899; and (ii) disclosing P-0899’s BSQ or a redacted version thereof.⁹
3. On 31 May 2016, in line with the shortened time limit established by the Chamber,¹⁰ the Prosecution responded to the Requests (respectively, ‘First Request Response’¹¹ and ‘Second Request Response’¹²), submitting that they ought to be rejected.¹³
4. In its First Request Response, the Prosecution submits that: (i) the limited redactions to the documents relating to Witness P-0190 are unrelated to his

⁶ First Request, ICC-01/04-02/06-1338-Conf-Red, para. 68.

⁷ Expedited request on behalf of Mr Ntaganda seeking the lifting of standard redactions applied to material related to non-trial witness P-0899 and disclosure orders, ICC-01/04-02/06-1339-Conf and three confidential annexes.

⁸ The Defence refers to [REDACTED].

⁹ Second Request, ICC-01/04-02/06-1339-Conf, para. 35.

¹⁰ Email from a Legal Officer of the Chamber to the parties and participants on 27 May 2016 at 16:22, shortening the response deadline to 31 May 2016.

¹¹ Prosecution response to the “Expedited request on behalf of Mr Ntaganda seeking the lifting of standard redactions applied to material related to Witness P-0190 and disclosure orders”, ICC-01/04-02/06-1338-Conf-Exp, ICC-01/04-02/06-1352-Conf-Exp (Prosecution and Defence only) and nine confidential *ex parte* (Prosecution only) Annexes.

¹² Prosecution response to the “Expedited request on behalf of Mr Ntaganda seeking the lifting of standard redactions applied to material related to non-trial witness P-0899 and disclosure orders”, ICC-01/04-02/06-1339-Conf, ICC-01/04-02/06-1351-Conf and four confidential *ex parte* (Prosecution only) Annexes.

¹³ First Request Response, ICC-01/04-02/06-1352-Conf-Exp, para. 42 and Second Request Response, ICC-01/04-02/06-1351-Conf, para. 22.

knowledge of the case and are necessary;¹⁴ (ii) the Prosecution has disclosed all relevant information in relation to Witness P-0190's [REDACTED];¹⁵ and (iii) the Defence has failed to establish any prejudice from the late disclosure of the information concerning [REDACTED].¹⁶

5. In its Second Request Response, the Prosecution submits that: (i) the limited redactions to P-0899's material concern his or Witness P-0190's [REDACTED] and are unrelated to their knowledge of the case, are necessary, and were applied in accordance with the Redaction Protocol;¹⁷ and (ii) the Prosecution has disclosed all relevant information from P-0899's BSQ through an investigation note¹⁸ relating to this individual.¹⁹
6. On 3 June 2016, the Chamber informed the parties and participants, via email,²⁰ that it had decided the following:

With regard to Request ICC-01/04-02/06-1338-Conf-Exp/Red [First Request]

I. Request for the lifting of certain redactions

Concerning expert report **DRC-OTP-2089-0425** and corresponding letter of instruction **DRC-OTP-2089-0440**:

- The Chamber orders the Prosecution to lift any redactions to P-0190's phone number;

Concerning documents **DRC-OTP-2092-0342**, **DRC-OTP-2092-0343**, **DRC-OTP-2092-0344**, **DRC-OTP-2092-0345**, **DRC-OTP-2092-0346**, and **DRC-OTP-2092-0347**:

- The Chamber orders the Prosecution to lift any (i) category C redactions pertaining to individuals who acted in official capacity and are not considered at risk, and (ii) category B redactions relating to the name of the witness's deceased father;

Concerning Statement **DRC-OTP-2079-0329**:

- The Chamber orders the Prosecution to lift any (i) category B redactions relating to the name of the witness's deceased father; (ii) category A.1 redactions to the witness's

¹⁴ First Request Response, ICC-01/04-02/06-1352-Conf-Exp, paras 9-28.

¹⁵ First Request Response, ICC-01/04-02/06-1352-Conf-Exp, paras 29-39.

¹⁶ First Request Response, ICC-01/04-02/06-1352-Conf-Exp, paras 40-41.

¹⁷ Second Request Response, ICC-01/04-02/06-1351-Conf, paras 7-18.

¹⁸ DRC-OTP-2078-2349.

¹⁹ Second Request Response, ICC-01/04-02/06-1351-Conf, paras 19-21.

²⁰ Email from a Legal Officer of the Chamber to the parties and participants on 3 June 2016 at 17:17.

telephone number; and (iii) category C redactions to the identity of the [REDACTED], mentioned in para. 35 of the document ;

Concerning Transcripts **DRC-OTP-2086-0617**; **DRC-OTP-2086-0647** and investigation note **DRC-OTP-2078-2415**

- The Chamber orders the Prosecution to lift any redactions to P-0190's phone number;

II. Request for disclosure

Concerning the documents annexed to P-0190's statement DRC-OTP-2079-0329 of 19 February 2015:

- The Chamber orders the Prosecution to disclose the photograph of the reference number referred to in paragraph 28 of the document;

Concerning the BSQ, updated BSQ and interview concerning [REDACTED] issues referred to in Investigation note DRC-OTP-2092-0246

- The Chamber orders the Prosecution to provide the Chamber, *ex parte*, with a copy of the BSQs to facilitate consideration of the request.

With regard to Request ICC-01/04-02/06-1339-Conf [Second Request]

I. Request for lifting of redactions

Concerning Screening note **DRC-OTP-2078-2323**

- The Chamber orders the Prosecution, as indicated in its response and to the extent it has not already done so, to lift any Rule 81(1) redactions relating to the basis for contacting P-0899;

II. Request for disclosure

- The Chamber orders the Prosecution to provide the Chamber, *ex parte*, with a copy of P-0899's BSQ in order to facilitate consideration of the request.

The above orders for lifting of redactions, disclosure and provision of documents to the Chamber by the Prosecution **shall be complied with forthwith**.

The remaining requests for lifting of redactions and disclosure are rejected.

7. The Chamber further indicated that this ruling and the reasons therefor would be placed on the record of the case in due course, together with the Chamber's decision on the Defence's request seeking a finding of disclosure violations.²¹

²¹ Email from a Legal Officer of the Chamber to the parties and participants on 3 June 2016 at 17:17, referring to the Defence's submissions in the First Request, ICC-01/04-02/06-1338-Conf-Red, paras 9, 57-68 and 70.

8. On 6 June 2016, the Chamber informed the parties and participants, via email,²² after having considered the BSQs relating to Witness P-0190 and P-0899, communicated by the Prosecution to the Chamber on an *ex parte* basis,²³ that it rejected the Defence's request for disclosure of the requested BSQs, and that this decision would also be placed on the record of the case in due course.
9. On 9 June 2016, the Prosecution indicated that between 1 and 3 June 2016, it disclosed or re-disclosed in lesser redacted form document DRC-OTP-0024-0017, transcript of interview DRC-OTP-2090-0598, and investigation note DRC-OTP-2093-0005 relating to Witness P-0190, as well as screening note DRC-OTP-2078-2323 relating to P-0899.²⁴

II. Analysis

10. As a preliminary matter, the Chamber recalls that the Redaction Protocol provides that any disputes regarding the application of standard redactions be dealt with on an *inter partes* basis, requiring the parties to consult in good faith with a view to resolving the matter before seising the Chamber. The Chamber encourages the parties to do so, to the extent possible, for future witnesses. The Chamber further indicates that it considered the submissions of the parties to have been of limited assistance in assessing the material. While noting the short response deadline imposed, the Chamber recalls that the Prosecution bears the burden of justifying standard redactions which are challenged by the Defence. Relatedly, however, the Chamber notes the late timing of the Requests, and encourages the Defence to review material, and raise any issues regarding redactions, initially *inter partes* as mentioned above, in a more timely fashion.

11. The Chamber will now address the Requests consecutively.

²² Email from a Legal Officer of the Chamber to the parties and participants on 6 June 2016 at 17:54.

²³ Email from the Prosecution to the Chamber on 3 June 2016 at 18:59.

²⁴ ICC-01/04-02/06-1375 and confidential Annex A, Prosecution's Communication of the Disclosure of Evidence.

A) First Request

i. Lifting of certain redactions

- a) Redactions to Report DRC-OTP-2089-0425 and corresponding letter of instruction DRC-OTP-2089-0440

12. Concerning the Defence's challenge to the redaction of Witness P-0190's mobile phone number, the Chamber noted that recent contact information of a witness, including phone numbers, are normally properly covered by the standard justifications for category A.1 redactions. However, in the case at hand, the Chamber considered that the phone number used by P-0190 [REDACTED].²⁵ The Chamber therefore found that the redactions should be lifted.

13. For the remaining redactions, the Chamber found that they were properly covered by the standard justifications for category C redactions, as they relate to other individuals at risk, or are consistent with Rule 81(1), as they refer to internal work product. Considering further that the Defence has failed to demonstrate *prima facie* materiality of the relevant information, the Chamber found that the redactions may be maintained.

- b) Redactions to documents DRC-OTP-2092-0342, DRC-OTP-2092-0343, DRC-OTP-2092-0344, DRC-OTP-2092-0345, DRC-OTP-2092-0346, and DRC-OTP-2092-0347 [REDACTED]

14. The Chamber noted that certain category B redactions applied in these documents relate to the identity of Witness P-0190's deceased father and considered that they are no longer required. The Chamber therefore found that the relevant redactions should have been lifted. The Chamber further noted that some of the category C redactions challenged by the Defence relate to [REDACTED] acting in an official

²⁵ 12 August 2015, ICC-01/04-02-06-777-Conf-Exp.

capacity and are therefore not covered by the standard justification for category C redactions. The Chamber therefore found that these redactions should not have been applied.

15. For the remaining redactions, the Chamber considered that they are properly covered by the standard justifications under categories A.1, B and C as they relate to Witness P-0190's recent location, identities of family members who are still alive, as well as other persons at risk as a result of the activities of the Court. The Chamber therefore decided that the remaining redactions may be maintained.

c) Redactions to investigation note DRC-OTP-2091-0099 (relating to a complaint made by Witness P-0190 about VWU staff members)

16. The document contains category A.1, D.2.6 and Rule 81(1) redactions, which were challenged by the Defence in order to place it in a position to investigate Witness P-0190's credibility. The Chamber considered that the relevant redactions are properly covered by the corresponding standard justifications as they relate to P-0190's recent location, the name of VWU staff and internal work product. The Chamber further found that the Defence failed to demonstrate why the redacted information is relevant to investigate Witness P-0190's credibility or is otherwise material to its preparation, and therefore decided that the redactions shall be maintained.

d) Redactions to statement DRC-OTP-2079-0329 (statement dated February 2015 regarding Witness P-0190's [REDACTED])

17. In relation to this document, the Chamber found that redactions to Witness P-0190's telephone number and the identity of Witness P-0190's father should be lifted. The Chamber further considered that the identity of the [REDACTED], mentioned in paragraph 35 of the document, could be relevant to the Defence's investigations, and that the Prosecution had failed to adequately substantiate the

redaction. The Chamber therefore directed the Prosecution to lift the relevant redactions. The Chamber considered that the remaining category B and C redactions are properly covered by the corresponding standard justifications as they relate to identifying or contact information of Witness P-0190's family members and other individuals at risk and that any category A.1 redactions (other than Witness P-0190's phone number) are necessary as they relate to his recent location. The Chamber found that the remaining redactions may therefore be maintained.

- e) Redactions to transcripts DRC-OTP-2086-0617, DRC-OTP-2086-0647 and investigation note DRC-OTP-2078-2415 (documents dated January and March 2015 and relating to P-0190's allegations [REDACTED])

18. The Chamber found that with the exception of Witness P-0190's telephone number, the category A.1 redactions in these documents are limited to information revealing the recent location of Witness P-0190 and are therefore in line with category A.1 of the Redaction Protocol. The Chamber therefore found that these redactions shall be maintained.

ii. Requests for disclosure

a) Documents annexed to statement DRC-OTP-2079-0329

19. With regard to these documents, which include a photograph with a reference number,²⁶ the Chamber notes the Prosecution's submission that disclosure of this photograph is not necessary, as the reference number is reproduced in unredacted form at paragraph 28 of document DRC-OTP-2079-0329. However, the Chamber considered that the photograph contains additional information relevant to document DRC-OTP-2079-0329.

20. Having reviewed the remaining documents, the Chamber did not consider they are material to the preparation of the Defence, as they exclusively relate to P-0190's recent location and the identity and contact details of persons unrelated to the case, and further notes that they contain sensitive information as they would reveal Witness P-0190's recent location or contact details of other persons at risk. Absent any substantiated demonstration by the Defence why these remaining documents would be of relevance, the Chamber decided that only the aforementioned photograph with the reference number shall be disclosed.

b) Audio recording of the 10 February 2015 interview

21. The Chamber previously considered that despite the absence of a general obligation to disclose audio recordings of statements that have been transcribed, such items may be subject to disclosure if they are deemed material to the preparation of the defence.²⁷ In the present case, the Chamber found that the Defence failed to justify why the recording would have *prima facie* materiality in this case and therefore rejected the request for disclosure.

²⁶ Referred to in DRC-OTP-2079-0329, para. 28.

²⁷ 8 April 2016, Public redacted version of Decision on Defence request for disclosure of the audio recording of Witness P-0963's interview, ICC-01/04-02/06-1258-Red, para. 9.

- c) BSQ, updated BSQ and interview concerning [REDACTED] referred to in investigation note DRC-OTP-2092-0246

22. Having considered the relevant BSQs communicated by the Prosecution to the Chamber on an *ex parte* basis, the Chamber concluded that the information contained therein had been provided to the Defence through the corresponding investigation note and that the documents do not contain any additional information that would be disclosable under Rule 77 of the Rules or Article 67(2) of the Statute. Noting that any further disclosure would therefore be merely duplicative, the Chamber therefore rejected the Defence's request for disclosure.

- iii. Request for a finding that the Prosecution has breached its disclosure obligations

23. The Chamber now turns to the Defence's request for a finding that when disclosing investigation notes dated January 2015,²⁸ 21 May 2015²⁹ and 12 February 2016,³⁰ as well as Report DRC-OTP-2089-0425 dated 16 November 2015, the Prosecution violated its disclosure obligations. In support, the Defence stresses that the documents show that the Prosecution must have had contacts with Witness P-0190 between 12 February and 26 June 2015, while the Prosecution stated in July 2015 that following a 'good faith assessment', it had disclosed all relevant information available in relation to Witness P-0190.³¹ The Defence further stresses that it has previously requested disclosure of all information obtained as a result of technical verifications conducted by the Prosecution or independent experts.³² The Defence claims that the late disclosure is prejudicial to the accused because the documents provide information related

²⁸ DRC-OTP-2078-2415.

²⁹ DRC-OTP-2087-0649.

³⁰ DRC-OTP-2091-0099.

³¹ First Request, ICC-01/04-02/06-1338-Conf-Exp, paras 57-60. The Defence refers to the Prosecution's submission in ICC-01/04-02/06-705-Conf-Exp, para. 35.

³² First Request, ICC-01/04-02/06-1338-Conf-Exp, para. 62, referring to ICC-01/04-02/06-691-Conf-Exp, para. 36.

to Witness P-0190's [REDACTED] for the first time, [REDACTED], and are therefore not only 'highly relevant for the assessment of P-0190's credibility' but also 'essential to understand and conduct investigations on [REDACTED]'.³³

24. The Prosecution responds that the information in the relevant documents is 'strictly related to [REDACTED]', concerning 'a limited volume of information on confined issues unrelated to [Witness P-0190's] knowledge of the case' and that the Defence fails to explain how this information is relevant to Witness P-0190's credibility.³⁴

25. Having considered the content of the documents in question, the respective dates upon which the Prosecution came into possession of the information, when its materiality should have been apparent and when disclosure took place, the Chamber considers that the Prosecution was late in disclosing these documents. However, the Chamber observes that the Defence only requested the Chamber to make a finding that the Prosecution violated its disclosure obligations and did not seek any remedy for the late disclosure. When noting the nature and the content of the documents in light of the information that has been disclosed in relation to P-0190, the Chamber does not consider that it is warranted, at this stage, to attach any further consequence to the above finding of late disclosure. However, the Chamber strongly urges the Prosecution to comply with its disclosure obligations in the future and to review its material periodically and thoroughly to ensure timely disclosure to the Defence.

³³ First Request, ICC-01/04-02/06-1338-Conf-Exp, paras 64-65, referring to ICC-01/04-02/06-658-Conf-Red.

³⁴ First Request Response, ICC-01/04-02/06-1352-Conf-Exp, para. 41.

B) Second Request

i. Request for the lifting of redactions

a) Screening note DRC-OTP-2078-2323

26. The Defence requests the lifting of Rule 81(1) redactions relating, in particular, to the basis for contacting P-0899 and the investigator's conclusions regarding P-0899, arguing that this information is relevant for the Defence to investigate [REDACTED] alleged by P-0190 as well as to analyse and understand the reasons underlying the Prosecution's decision not to rely on the information provided by P-0899.³⁵

27. Noting the Prosecution's submission that upon further review of the material in light of previous disclosure, it agreed to lift the redactions to the stated basis for contacting this individual,³⁶ the Chamber found that the relevant redactions should be lifted. Regarding the remaining redactions, specifically the redactions to the investigator's conclusions regarding P-0899, the Chamber concurred with the Prosecution that they are properly covered by Rule 81(1) of the Rules, as they constitute internal work product. The Chamber found that the redactions may therefore be maintained.

b) Investigation note DRC-OTP-2078-2349

28. Regarding the redactions to places where P-0899 [REDACTED], contested by the Defence as not related to P-0899's recent contact information and therefore not qualifying as standard redactions, the Chamber concurred with the Prosecution that they are properly covered by the standard justifications for category A.1 redactions, as they relate to Witness P-0190's and P-0899's recent location. The

³⁵ Second Request, ICC-01/04-02/06-1339-Conf, paras 13-15.

³⁶ Second Request Response, ICC-01/04-02/06-1351-Conf, para. 10.

Chamber was also of the view that the Defence has failed to demonstrate why this information would be material for its preparation.

29. Concerning the identity of P-0899's [REDACTED], the Chamber considered that lifting the relevant redaction might put that individual at risk and that the Defence has failed to demonstrate the relevance of this name. The Chamber therefore decided that the category C redactions in the document shall be maintained.

c) Investigation note DRC-OTP-2077-0067

30. Having considered the Defence's claim for the lifting of all category A.1 and B and Rule 81(1) redactions, as well as the justifications provided by the Prosecution in response, the Chamber found that the redactions are properly covered by the relevant provisions and therefore decided that the redactions shall be maintained.

d) Investigation note DRC-OTP-2087-0022

31. The Chamber noted that the Rule 81(1) redactions challenged by the Defence do not pertain to P-0899's statements during the interview, but to a note made by the Prosecution, and therefore qualify as internal work product in accordance with Rule 81(1) of the Rules. The redactions shall therefore be maintained.

ii. Request for disclosure

32. Having considered P-0899's BSQ communicated by the Prosecution to the Chamber on an *ex parte* basis, the Chamber concluded that the relevant information contained therein has been provided to the Defence through investigation note DRC-OTP-2078-2349, and that the document does not contain any additional information that would be disclosable under Rule 77 of the Rules

or Article 67(2) of the Statute. Noting that further disclosure would be merely duplicative, the Chamber therefore rejected the Defence's request for disclosure.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

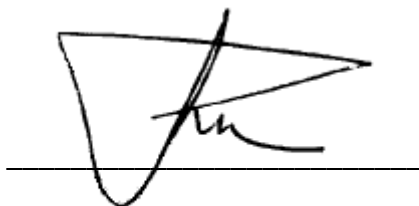
PLACES on the record its decision granting, in part, the Requests, as reproduced at paragraphs 6, 7 and 8 of the present decision, together with the reasoning therefor;

FINDS that the Prosecution has violated its disclosure obligations to the extent reflected in paragraph 25 above;

REJECTS all other requests; and

ORDERS the parties to file public redacted versions of the First Request (ICC-01/04-02/06-1338-Conf-Red), Second Request (ICC-01/04-02/06-1339-Conf), First Request Response (ICC-01/04-02/06-1352-Conf-Exp) and Second Request Response (ICC-01/04-02/06-1351-Conf) within four weeks of issuance of this decision.

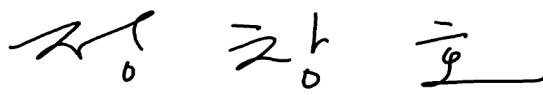
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to read 'Kuniko Ozaki' in a cursive script, written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of stylized Korean characters, written over a horizontal line.

Judge Chang-ho Chung

Dated this 6 July 2016

At The Hague, The Netherlands