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Court

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No.**: ICC-01/09-01/11**
Date: **07 June 2012**

TRIAL CHAMBER V

Before: **Judge Kuniko Ozaki, Presiding Judge**
Judge Christine Van den Wyngaert, Judge
Judge Chile Eboe-Osuji, Judge

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Public Document
with Confidential and Ex parte Annex – Registry and Legal Representative only
Registrar's Observations on the "Urgent Request by the Victims' Representative pursuant to regulation 83(4) of the Regulations" dated 1 June 2012

Source: **Registry**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Applicants

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THE REGISTRAR OF THE INTERNATIONAL CRIMINAL COURT ("the Registrar"),

RESPECTFULLY SUBMITS the present observations on the "Urgent Request by the Victims' Representative pursuant to regulation 83(4) of the Regulations" ("the Request"), in accordance with Regulations 24 *bis* of the Regulations of the Court and the instruction of the Chamber dated 01 June 2012.

I. Admissibility

1. The Legal Representative seized the Chamber under Regulation 83 (4) of the Regulations of the Court, which states that "*Decisions* by the Registrar on the scope of legal assistance paid by the Court as defined in this regulation may be reviewed by the relevant Chamber on application by the person receiving legal assistance". The Legal Representative filed her Request challenging the letter dated 23 May 2012 entitled "Status conference and related matters" and the letter dated 24 May 2012 entitled "Request for clarifications on Request for approval of activities" (Annex B of the Request). There is no doubt that based on the clarity of its contents which also reflect on its title, this second letter is not a decision in accordance with the above-mentioned Regulation.

2. Accordingly, the Registrar submits that by requesting the Chamber to review, *inter alia*, the letter of 24 May 2012 without any prior decision and in a context where the Registry expects to receive additional information in order to arrive to an informed decision, the Legal Representative failed to act in accordance with Regulation 83 (4) of the Regulations of the Court. Hence, the Request for review of this letter dated 24 May is premature and should be considered inadmissible since there has never been a decision upon which the Chamber may be seized for review under Regulation 83(4) of the Regulations of the Court.

3. In the same vein, the Registrar deems it necessary to refer to a precedent in which the Trial Chamber II specifically noted that "The Chamber cannot substitute its own decision for one still to be made by the Registrar, as this would usurp the latter's discretion"[1].

4. Should the Chamber consider the Request admissible, the Registrar submits the following observations concerning the contentions of the Legal representative. The Registrar will demonstrate that the letters referred to above are entirely founded in fact and in law, and elaborate on the necessity, including at this stage of proceedings, to be provided with the requested precisions or clarifications from the Legal Representative to enable her to reach an informed decision on whether or not to fund activities from the Court's legal aid scheme.

5. The Registrar notes that, in her Request, the Legal Representative referred to the fact that the "Trial Chamber II set up a standard for review of decisions of the Registrar, according to which the 'Chamber must not consider whether it would have made the same decision as the Registrar. Instead, the Chamber must assess (a) whether the Registrar has abused her discretion; (b) whether the Registrar's decision is affected by a material error of law or fact; and (c) whether the Registrar's decision is manifestly unreasonable'"[2].

6. Based on these considerations, the Registrar respectfully submits the following observations

[1] Paragraph 23 of the 'Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid' (ICC-01/04-01/07-3277) dated 23 April 2012

[2] Paragraph 9 of the 'Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid'(ICC-01/04-01/07-3277) dated 23 April 2012

II. The merits of the Request

A- Respect of the professional duties of the legal representative

7. The Legal Representative asserts that the Registrar's decision fails to have regard to the professional duties of the victims' representative as counsel before the Court[3].

8. The Registrar notes that Trial Chamber V ordered the legal representative to provisionally represent victims until a decision on common legal representation is reached[4]. In this context, the Registrar refers to her decision set out in the letter dated 23 May 2012, guided by Regulation 83 (1) of the Regulations of the Court, which stipulates that "[l]egal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence". The Registrar considers that this provision applies *mutatis mutandis* to legal representatives. To that effect, she is hitherto guided by Regulation 83(2) of the Regulations of the Court, which states: "the scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate".

9. The Registrar respectfully informs the Chamber that, in conformity with Article 68 (3) of the Rome Statute and the above mentioned Order of the Chamber[5], legal aid has been granted to the victims participating currently in the proceedings before the Chamber by covering the cost of legal representation in accordance with Rules 16-1 b) and c) and 90-5 of the Rules of Procedure and Evidence, and Regulation 83-1 of the Regulations of the Court; in fact none of the current participating victims pays for the legal cost of their Counsel. The pertinent part of the Registrar's decision contained in the letter dated 23 May 2012 states: "[a]s a consequence of this Order, the Registry shall consider the relevant activities performed by you as a legal representative before the Trial Chamber V as eligible for remuneration under the legal aid scheme

[3] See paragraph 36 of the Request.
[4] Paragraph 6 of the Order scheduling a status conference (ICC-01/09-01/11-413) dated 14 May 2012.
[5] Order scheduling a status conference (ICC-01/09-01/11-413) dated 14 May 2012.

until a decision is made on the legal representation of victims or until any other relevant factors justify otherwise"[6].

10. As a direct consequence of this letter, the Legal Representative is eligible to receive up to a maximum of 8221 Euros per month for legal fees (remuneration is based on the relevant activities) and up to a maximum of 30% professional compensation in accordance with the applicable texts[7]. Payment is done by the Registry after submission of the relevant time sheet by counsel; following the same rule applied to all the legal team members operating under the legal aid scheme. In addition to these eligible payments, all costs related to any approved missions for the Legal Representative to the Seat of the Court and the field is eligible for reimbursement under the legal aid regime (Daily subsistence Allowance, transportation, etc.) on the available budget for expenses (4000 Euros monthly and cumulative) or the investigation budget depending on the purpose of the said missions.

11. At this juncture, it is important to recall that the administrative procedure of approval of missions is applied to all team members benefiting from legal aid and is justified for the purpose of good administration of the resources of the Court. The determination is based, *inter alia*, on the activities for ensuring the effectiveness and the efficiency of the representation of indigent person(s).

12. The Registrar's letter dated 23 May 2012 indicated that, while at this stage of the proceedings, the Registry does not find any reason to maintain the remuneration for the full team as was proposed during the pre-trial stage, bearing in mind the fact that the level of resources granted during the pre-trial was duly considered in light of the purpose of the confirmation hearing as indicated in paragraph 24 below. Nonetheless, the Registrar remained of the view that it may sometimes be necessary for the legal representative to benefit from the assistance and the support of a Legal

[6] See paragraph 3 of Annex A of the Request.
[7] See Decision of the Bureau of the Assembly of States parties on Legal Aid, dated 22 March 2012.

Assistant, a Case manager and/or a resource person, and any payment to these persons will be subject to a prior approval of activities.

13. The Registrar submits that, in order to determine whether the costs for payment (and related expenses for example for a mission) of the Legal Assistant, Case manager and/or resource person) are reasonably necessary for an effective and efficient defence in accordance with Regulation 83 (1) of the Regulations of the Court, it is appropriate to take into account objective parameters, including at least the activities, their timeframe, the prospected duration, the stage of proceedings. This approach is consistent with the legal texts of the Court, the proper management of the limited resources allocated to the legal aid scheme and the good administration of Justice. In fact, as it is the case concerning Annex C of the Request, the Registrar is not in a position to determine in an adequate manner the level of resources where information concerning the alleged activities which are requested to be covered by the legal aid scheme is not sufficient.

14. The letter dated on 23 May 2012 also invited the legal representative to revert to the Registrar, at any time during her mandate with a request for additional means should any relevant objective factor arise that increase the need to carry out certain activities in the case and justifies the need of additional resources to ensure the effective representation of the victims.

15. It is unequivocal that the two letters mentioned above are compatible with the legal texts of the Court, including the rules set out in the Code of Professional Conduct for Counsel and guarantees in the one hand that the Legal Representative is able to achieve properly this mandate and in the other hand to ensure that the victims are adequately represented before the Court.

16. The Registrar is of the view that, the level of resources granted in the letter dated 23 May 2012 and the information provided as mentioned above in paragraphs 10 and

following, puts the Legal Representative in a position to execute her mandate independently and professionally before Trial Chamber. Furthermore, and contrary to the assertion contained in paragraph 41 of the Request, the Registry does not require previous approval of counsel's activities for every minutiae of activities before the Trial Chamber V. Nevertheless, activities which have a financial impact need to be monitored by the Registry, in order to ensure that they are necessary and reasonable necessity, providing the details of such do not fall under the consideration of privileged information. Therefore, the Registrar considers that the allegation of breach of confidentiality in the process of the management of the legal aid scheme of the Court is not demonstrated. To the contrary, this allegation is unfounded.

B- Confidentiality and request for clarifications

17. The Legal representative further alleges that a request for clarification amounts to a "micromanagement of the legal representative". The Registrar is of the view that decisions on legal aid concerning the Defense and the Victims, must at any time, be carefully considered and assessed based on objective and relevant parameters. When the Registrar evaluates the necessity to allocate resources or to determine the level of resources under the legal aid scheme, it is appropriate to take into account the needs of the victims in light of the ongoing proceedings, *inter alia*, whilst respecting the independence of Counsel and the confidentiality of any information provided in conformity with Regulation 130-1 of the Regulations of the Registry.

18. In fact, in order to allocate resources or to determine their level, all defence and victims counsels operating under the Court's legal aid scheme are obligated to submit action plans every six months and submit time sheets on a monthly basis which in turn enable to effect payment in accordance with Regulation 134 of the Regulations of the Registry. And where additional resources such as support staff are requested by counsel, this latter is to provide satisfactory justification on the actual

needs of the team and on which activities are expected to be performed by any potential future team member.

19. In the present case, and in the past, the Registrar has not required any confidential information to appear in any request for means, action plan or monthly timesheet, in particular detailed information on any victim. Furthermore, when any such information is required, the Registrar has asked the Legal Representative to provide redacted information only (for example to effect payment when the legal representative has been on mission). In fact, all information received from all counsels in the process of managing the legal aid are confidentially kept and, to date, no defence or victim's team has claimed to have suffered any harm as a result of information provided to enable the Registry reach an informed opinion on the legal aid.

20. The Registrar informs the Chamber that, in view of the implementation of the legal texts and decisions, counsels are often required to submit additional clarifications for any activity that does not overtly relate to legal representation of victims views and preoccupations before a Chamber, and this has been a consistent policy applicable across all counsels. Clarifications are often sought to enable the Registrar to reach an informed decision, having considered all relevant information received. In this context, further clarifications where undoubtedly required to arrive to an informed decision on the letters dated 7 May 2012.

21. The Legal Representative, in direct contravention of the applicable decision of the Appeals Chamber[8] dated 23 April 2012, wrote to the Registrar two contradictory requests within one day[9], on the one hand acknowledging that pre-approval of activities is a precondition for remuneration and on the other hand retracting this position. In a joint letter with Legal Representative acting in the case *The Prosecutor*

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[8] Decision on the "Application of the Victims' Representative pursuant to Article 83 of the Regulations", ICC-01/09-01/11-409.
[9] See Annex C and D of the Request.

vs. Muthaura et al,[10] the Legal Representative expressly stated an understanding that "the Registry must pre-authorise any activities of team members to be eligible for remuneration under the legal aid scheme"[11]. In a separate letter addressed to the Registry, the Legal Representative declared that it was "simply not practical to seek pre-approval from the Registry for each individual item of work"[12]. The Registry officials had to conciliate the requests and identify actual needs falling under the scope of the legal aid.

22. Notably as well, pertinent aspects of the legal representative's letters included factors that do not explicitly fall under the scope of the legal aid scheme such as the request to facilitate activities that fall under the direct mandate of an independent organ of the Court[13] fully facilitated to independently perform all relevant duties, and the expenses for this specific "sensitive and confidential" activity referred to in paragraph 40 of the Request has not been previously, and cannot without proper justification, be indirectly borne by the legal aid scheme.

23. Similar justification was required to include amongst the expenses covered by the legal aid system those mentioned in paragraph 58 of the Request, in particular when the specific assistance has already been found unnecessary by another section of the Registry, primarily and often solely responsible for these matters. For counsel to require that the legal aid scheme covers these costs, it is appropriate to consider that justification must be provided in order to demonstrate a direct link between the specific activity they intend to take and the legal representation of the victims, which is the only cost the legal aid covers.

C- Structure of legal representation team

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[10] ICC-01/09-02/11.
[11] Paragraph 14 of the Joint letter of the legal representatives, Annex C of the Request.
[12] Paragraph 17, Annex D of the Request.
[13] The matter in paragraph 9, Annex D of the Request.

24. The Registrar notes that both the Appeals Chamber and the Trial Chamber decided on the mandate of the legal representative to ensure, according to the Appeals Chamber, that there are no gaps in the legal representation of a client[14], and not her "team" which was set up under the structure of appropriate legal aid determined for the confirmation of charges hearing and related proceedings[15]. The Registrar informs the Trial Chamber that this scope at the pre-trial stage consisted of the legal representative, a Legal Assistant, a Case Manager and two Field Assistants[16], which where specifically identified for adequate support during a specific phase of proceedings. The "team" has been for all intents and purposes, considered as the scope and structure of the resources under the pre-trial phase. In this context, the Appeals Chamber held that "[a]s was explained in paragraphs 18 et seq. above the Legal Representative continues to represent the Victims. This, however, does not mean that the scope of legal assistance paid by the Court must be maintained at the same level as during the pre-trial proceedings"[17].

25. As indicated above, the Registrar applied Regulation 83-1 of the Regulations of the Court in order to determine the scope of legal aid as is reasonably necessary for efficient representation of victims at this particular stage of proceedings before the Trial Chamber, including the question of proper assistance to counsel by a team. The Registrar was further guided by the decision of the Appeals Chamber which stated that "the question of whether the Legal Representative continues to represent the Victims must be distinguished from the scope of legal assistance paid by the Court. While the former is governed by the Code, the latter is governed primarily by regulations 83 et seq, of the Regulations of the Court"[18]. In this context, the Registrar

[14] Paragraph 20 of the Appeals Chamber's "Decision on the "Application of the Victims' Representative pursuant to Article 83 of the Regulations" (ICC-01/09-01/11-409) dated 23 April 2012.
[15] Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings (ICC-01/09-01/11-249) dated 05 Aug 2011.
[16] Three field assistants were funded using this budget.
[17] Paragraph 23 of the Decision on the "Application of the Victims' Representative pursuant to Article 83 of the Regulations"(ICC-01/09-01/11-409) dated 23 April 2012.
[18] Paragraph 22 of the Decision on the "Application of the Victims' Representative pursuant to Article 83 of the Regulations" (ICC-01/09-01/11-409) dated 23 April 2012.

considered, hitherto, that a highly qualified lawyer operating under similar circumstances can reasonably ensure the efficient and effective representation of victims, and may obtain additional resources (additional support staff) by providing all relevant information to the Registrar or the Chamber.

26. The Registrar nonetheless, noted that a Legal Representative may sometimes require assistance in particular from a Legal Assistant and a Case Manager in Court, or for specific information in the field, from Field Assistants. In this context, the Registry indicated its amenability to pre-approve these activities, in accordance with the procedure found adequate by the Appeals Chamber. In accordance with the Registrar's decision of the 23 May 2012, Counsel was invited to contact the Counsel Support Section should any relevant objective factor arise that could increase the real need to carry out certain activities in the case, and which would justify the need for additional resources in order to ensure the effectiveness and the efficiency of the legal representation.

27. The Registrar's approach has been found adequate by the Appeals Chamber, in its *Decision on the "Application of the Victims' Representative pursuant to Article 83 of the Regulations*[19], which stated that "[i]n the view of the Appeals Chamber, and based on the information currently available to the Chamber, the approach of the Registry as to legal assistance paid by the Court for the present phase of the proceedings before the Appeals Chamber, namely that further activities of the Legal Representative must be authorized beforehand by the Registry in order to be covered by the legal aid scheme, is therefore adequate."

28. Nevertheless, the Legal Representative in contradiction of the Appeals Chamber's decision[20] went further to request that the Case Manager and Field Assistants must be allowed to continue receive remuneration on full time basis. The legal aid of the

[19] ICC-01/09-01/11-409.
[20] ICC-01/09-01/11-409.

Court is established to pay for relevant activities in the case, and not to maintain a team at whatever cost[21], irrespective of whether there is a reasonable need for any activities in the case. The concept of the legal aid and its application to date has been limited to payment for relevant activities in the case only, for both defence and victims counsels and teams where applicable.

29. Furthermore, regarding the on-going activities of the case, as notified to the Legal Representative, the scope of legal aid may be varied, in accordance with the Registrar's decision and Regulation 83-3 of the Regulations of the Court, depending on any relevant factors. However, the Legal Representative has not demonstrated why as a highly qualified lawyer with over 30 years experience (See Annex) cannot reasonably perform the activities in relation to the agenda as requested by the Trial Chamber, and failed to provide sufficient information supporting her request for maintaining all the team member, including for the purpose of the upcoming status conference before the Chamber.

D- Missions

30. For purposes of proper understanding of the context of allegations in paragraph 13 to 14 and 56 of the Request, the Registrar respectfully informs the Chamber that elaborate submissions were made to Pre-Trial Chamber II[22] regarding the past missions of the Legal Representative, including matters of financial management of the legal aid funds advanced for use during missions and their accountability after the completion of missions, including steps that were undertaken to ensure the successful completion of the last mission, using the exact funds advanced[23].

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[21] In this instance, full remuneration for the entire team would be 26,817 Euros per month.

[22]Observations on the "Urgent Request by the Victims' Representative for an order from the Chamber requiring the Registrar to provide appropriate resources for the current mission in Kenya", ICC-01/09-01/11-393-Conf-Exp, 29 February 2012.

[23] Paragraph 16 -31 of the Observations on the "Urgent Request by the Victim's Representative for an order from the Chamber requiring the Registrar to provide appropriate resources for the current mission in Kenya", ICC-01/09-01/11-393.

31. Furthermore, in relation to the assertions contained in paragraph 28 to 30 linked to the purpose of the status conference and the discussion in relation to the agenda proposed in the "Order scheduling a status conference"[24], the Registrar notes that the letter dated 23 May 2012 ensured that, at any time, the legal aid payment will cover any justified activities, including missions or activities in the field (including for resource persons). For the purpose of the implementation of the Order of the Chamber concerning the status conference, it is imperative to note that the Legal Representative did not submit any mission request for the month of May 2012 to travel to the field for the purpose of meeting victims to receive their views prior to responding to the Trial Chamber's Order scheduling a status conference.

E- Timeliness of response

32. The Registrar respectfully informs the Chamber that decisions of the Registry regarding legal aid are rendered in a timely and judicious manner with due consideration to all relevant facts and contexts, taking into consideration the necessity of consultation with other sections within the Registry.

33. Furthermore, and depending on the complexities of the request, the Registrar often renders her decision on legal aid for indigent persons within 30 calendar days of the submission of all documentation required, as stipulated by Regulations 132 of the Regulations of the Registry. It is noted that in this case the time lapsed was two weeks. Allowing a Legal Representative to impose an ultimatum on the Registrar for her to issue a decision, which in any case was rendered in a timely manner, creates at least the risk that the Registry will reach a decision without considering the relevant factors or the full parameters of the request and available resources that might be of further assistance to the applicant. The Legal Representative has always been

[24] ICC-01/09-01/11-413.

informed of the time required by the Registry to issue a decision, including when she requested to go on a mission.

34. The Registrar submits that as regards her obligation to properly manage the legal aid scheme as mandated by the legal texts of the Court[25], she has judiciously acted taking into account all relevant legal and financial applicable rules whilst respecting the confidentiality and independence of counsel.

F- Additional Clarification in relation to the payment

35. In paragraph 32 of the Request, the Legal Representative informed the Chamber that she and all the other members of her team have not been paid since 26 March 2012, giving the impression that the Court refuses to remunerate her for services/ activities rendered. The Registrar deems it necessary to recall the context of this matter and her position in relation to the eligibility of payment as clearly and transparently explained; in particular in paragraph 22 of her Observations dated 3 April 2012[26]. In the same vein, it is unequivocal that in accordance with the decision of the Appeals Chamber[27] and the subsequent Order of the Trial Chamber, the activities of the Legal Representative in the case are eligible for payment under the legal aid scheme. Noting that payment of legal fees and reimbursement of costs for Defense and Victims teams under the legal regime of the Court are subjected to the monthly submission of time sheets and proof of expenses, the Registrar informs the Chamber that to date no time sheet concerning activities before Trial Chamber V has been submitted to the Registrar in order to proceed with the processing of the relevant payments.

[25] Regulation 83 of the Regulations of the Court, Resolution ASP/6/4, the decision of the Bureau on legal aid dated 22 March 2012.
[26] ICC-01/09-01/11-408.
[27] Decision on the "Application of the Victims' Representative pursuant to Article 83 of the Regulations, ICC-01/09-01/11, 23 April 2012.

36. In relation to the recently concluded proceedings before the Appeal Chamber, the Chamber also noted that the Registrar's letter dated 13 March 2012 never indicated that future activities of the Legal Representative will not be remunerated through the Court's legal aid scheme. Rather, it was explained to the Legal Representative that because of the end of the pre-trial phase, the level of legal assistance paid by the Court during that phase of the proceedings would be discontinued and in order to receive payment, such activities ought to be authorized beforehand by the Registry. At this juncture, concerning the question of payments related to the proceedings before the Appeal Chamber, the Appeals Chamber endorsed the approach of the Registrar in relation to the conditions of payment based on the activities and recall in paragraph 23 of its above mentioned decision and stated: "that the Victims have already submitted the Victims' Observations, setting out their views on the appeals. Currently, no further intervention by the Victims in relation to the present appeals is anticipated". In accordance with declaration, no time sheet for processing of payment was submitted to the Registrar for any judicial activities before the Appeal Chamber.

G- Conclusion

37. The Registrar respectful submit that the letters dated 23 and 24 May 2012 were issued in the matter where the Registrar has jurisdiction, in accordance with all procedural fairness and the relevant texts of the Court, and having properly asserted her mind to the issues. These letters are reasonable and compatible with the proper implementation of the discretion of the Registrar, based on the relevant factors / facts and the law.

38. In addition, the Registrar submits that her dedication to facilitate the participation of victims during proceedings is unquestionable. Based on the information in her possession, the level of resources allocated in accordance with the letter dated 23 May 2012 and the possibility to request additional means as clearly indicated in this letter, ensures that a highly qualified Legal Representative is able to achieve her mandate, including to properly address the views of the victims before the Chamber.

39. Furthermore, in accordance with the above mentioned letter and the proper application of the responsibility of the Registrar as set out in Article 43 (1) of the Rome Statute, Rules 16(1) (b) and (c) and 90 (5) of the Rules of Procedure and Evidence, the Registrar assures the Chamber that the level of resources allocated will be adjusted in case when any relevant factor justifies to do so, for example where the progression of the judicial activities necessitates the increase of activities of the Legal Representative if her mandate is still valid.

40. The Registrar remains at the disposal of the Chamber, if it deems it appropriate, to provide any guidance on the common legal representation of victims during trial, including any consultation on the structure and scope of legal aid during the trial phase.

III- Classification of the Annex to the present observations

41. Pursuant to Regulation 23bis, Paragraph 1, of the Regulations of the Court, the Annex is filed confidentially because it contains the private information related to the Legal Representative.

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

Didier Preira, Deputy Registrar,

On behalf of

Silvana Arbia, Registrar

Dated this 7th Day of June 2012

At The Hague, The Netherlands