

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 27 October 2006

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*vs. Thomas Lubanga Dyilo***

Public Document

**Decision on the Prosecutor's Application to Separate the Senior Legal Adviser to
the Pre-Trial Division from Rendering Legal Advice regarding the Case**

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

**Legal Representatives for Victims
a/0001/06 to a/0004/06**

Mr Luc Walley
Mr Franch Mulenda
Ms Carine Bapita Buyangandu

Counsel for the Defence

Mr Jean Flamme
Ms Véronique Pandanzyla

Public Office for the Defence

Ms Melinda Taylor

PRE-TRIAL CHAMBER I (“the Chamber”) of the International Criminal Court (“the Court”);

NOTING the Prosecutor’s Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice regarding the Case” (“the Prosecutor’s Application”),¹ filed by the Prosecution on 31 August 2006, in which the Prosecution requests that (i) because of his previous work at the Office of the Prosecutor, the Senior Legal Advisor of the Pre-Trial Division be prevented from rendering advice in the case of *The Prosecutor vs. Thomas Lubanga Dyilo*; and that (ii) he be separated from the case while the Prosecutor’s Application remains pending before the Chamber;

NOTING the Response to the Prosecutor’s Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice regarding the Case, dated 31 August 2006 (“the Defence Response”), filed by the Defence on 5 October 2006, in which the Defence supports the Prosecutor’s Application²;

CONSIDERING article 41 (2) of the Rome Statute (“the Statute”) and rule 4 (2) of the Rules of Procedure and Evidence;

CONSIDERING that on 20 October 2006 all the judges of the Pre-Trial Division requested that the President of the Court convene a special plenary in order to deal with the matters raised in the Prosecutor’s Application and in the Defence Response; and that the judges did so because they consider that the Prosecutor’s Application and the Defence Response may be tantamount to a request for disqualification of the judges or might, at the very least, raise an issue regarding the disqualification of the judges which falls within the scope of article 41 (2) of the Statute;

¹ ICC-01/04-01/06-373.

² ICC-01/04-01/06-516.

CONSIDERING further that, as a provisional measure pending determination of the matters raised in the Prosecutor's Application and the Defence Response by the appropriate organ of the Court, the President of the Pre-Trial Division has separated the Senior Legal Adviser to the Pre-Trial Division from, *inter alia*, the case of *The Prosecutor vs. Thomas Lubanga Dyilo*³;

CONSIDERING therefore that the Chamber considers that under article 41 (2) of the Statute, (i) it is not the appropriate organ of the Court to deal with the matters raised in the Prosecutor's Application and the Defence Response; and (ii) the plenary is the appropriate forum of the Court to deal with such matters;

FOR THESE REASONS

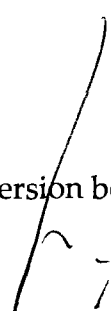
DECLARES that the Chamber lacks jurisdiction to entertain the Prosecutor's Application and the Defence Response;

INFORMS the Prosecution and the Defence of (i) the request to the President of the Court dated 20 October 2006 from all the judges of the Pre-Trial Division; (ii) the provisional separation of the Senior Legal Adviser to the Pre-Trial Division from the case of *The Prosecutor vs Thomas Lubanga Dyilo* pending determination of the matters raised in the Prosecutor's Application and the Defence Response by the appropriate

³ See the annexes attached.

organ of the Court; and (iii) the fact that instructions have been given to the Registrar accordingly.

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



Judge Claude Jorda
Presiding Judge



Judge Akua Kuenyehia



Judge Sylvia Steiner

Dated this Friday 27 October 2006

At The Hague, The Netherlands

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Internal memorandum
Memorandum interne

To À	Judge Philippe Kirsch, President of the International Criminal Court	From De	Judge Hans-Peter Kaul, President of the Pre-Trial Division
Date	20 October 2006	Through Via	
Ref.		Copies	Judges of the Pre-Trial Division
Subject Objet	Request by the President of the Pre-Trial Division, on behalf of the Judges of the Pre-Trial Chamber I and Pre-Trial Chamber II, to the President of the Court to convene the Plenary		

I. Introduction

1. The Judges of the Pre-Trial Division have been seized of the issue of the separation of the Senior Legal Adviser to the Pre-Trial Division from the pending Uganda and DRC proceedings, insofar as they concern cases on which the Senior Legal Adviser allegedly worked while a member of the Office of the Prosecutor (OTP). The issue was addressed by the Prosecutor through various procedural avenues. In this, he was joined by the Defence Counsel in the Case of the Prosecutor vs. Thomas Lubanga Dyilo. These events and their possible implications require a definitive and timely solution.

II. Procedural History

2. On 9 January 2006, the OTP filed an Internal Memorandum entitled "Request for Presidency to Ensure Limitation of the Scope of Duties of Senior Legal Adviser to the Pre-Trial Division, to Prevent Future Challenges to the Appearance of Impartiality of the Judges of that Division" (hereinafter "Request") with the Presidency (see Annex 1). In this document, the OTP requested the Presidency to take measures to ensure that the Senior Legal Adviser to the Pre-Trial Division be separated from the cases on which he had allegedly previously worked while a Legal Adviser in the OTP, namely the pending cases in the Uganda and DRC situation. It was suggested either that the Senior Legal Adviser isolate himself or that the Presidency address this

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issue at the administrative level on the basis of Article 38 (3)(a) of the Statute or refer the matter to the Plenary.

3. On 10 January 2006, Pre-Trial Chamber I and Pre-Trial Chamber II received a “Notice of OTP Request Addressed to the Presidency” (hereinafter “Notice”) (ICC-02/04-01/05-75 and ICC-01/04-97), in which the Prosecutor notified the Pre-Trial Chambers concerned of the submission of the “Request” to the Presidency, highlighting only the essence of the administrative relief sought before the Presidency (see Annexes 2 and 3). The “Notice” did not include a copy of the “Request” mentioned above.

4. Moreover, on the same day, the Prosecutor addressed a letter to the President of the Pre-Trial Division (060110/LMO-sv), notifying him of the “Request” of 9 January 2006 and providing him with a copy thereof (see Annex 4)

5. The Presidency, by Internal Memorandum of 26 January 2006 entitled “Decision of the Presidency on the Memorandum of the Prosecutor of 9 January 2006” (hereinafter “Decision”), declined to grant the Prosecutor’s request for relief, by noting that it neither had the competence to deal with the matter itself, nor did it find any basis on which to refer the matter to the Plenary (see Annex 5). A copy of this “Decision” was communicated to the Judges of Pre-Trial Chamber I and Pre-Trial Chamber II, as well as to the President of the Pre-Trial Division, attaching the “Request” of the Prosecutor dated 9 January 2006.

6. The OTP responded to and commented on the Presidency’s “Decision” in a further Internal Memorandum dated 10 February 2006. By Internal Memorandum (11-2/PK/HA/AJ) dated 8 March 2006 (see Annex 6), the Presidency forwarded a copy of the Prosecutor’s Memorandum of 10 February 2006 to the Judges of Pre-Trial Chamber I and Pre-Trial Chamber II, as well as to the President of the Pre-Trial Division, for their information.

7. On 10 February 2006, the President of the Pre-Trial Division addressed the OTP in an Internal Memorandum informing the Prosecutor that, following the Presidency’s “Decision” of 26 January 2006, the matter remained under active consideration by the Judges of the Pre-Trial Division (see Annex 7).

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8. By Internal Memorandum of 15 March 2006, the President of the Pre-Trial Division informed the Prosecutor of the further developments within the Pre-Trial Division (see Annex 8). The Judges had concluded that the Division could not act on the basis of the Prosecutor's "Request" and highlighted some important procedural issues in relation to said "Request".

9. The Prosecutor, by Internal Memorandum dated 28 March 2006, addressed the President of the Pre-Trial Division, requesting information as to whether the Senior Legal Adviser to the Pre-Trial Division was currently rendering advice to Pre-Trial Chambers I and II (see Annex 9). The President of the Pre-Trial Division declined to disclose any information on possible case-related activities of the Senior Legal Adviser, by Internal Memorandum dated 17 May 2006 (see Annex 10).

10. By letter of 31 March 2006, the Prosecutor informed the Defence Counsel to Mr. Thomas Lubanga Dyilo, Mtre Jean Flamme, of the alleged previous activities of the Senior Legal Adviser to the Pre-Trial Division and of the remedies sought by the OTP. In response, the Defence Counsel addressed the President of the Pre-Trial Division on 4 May 2006 by noting that "[J]e me vois dans l'obligation (...) de me joindre à la demande du Procureur" (see Annex 11).

11. In a letter dated 16 June 2006 (see Annex 12), the President of the Pre-Trial Division replied to Defence Counsel Mtre Jean Flamme, and notified him of the course of events, referring among others to the "Decision" of the Presidency and the Internal Memorandum of the President of the Pre-Trial Division to the OTP dated 15 March 2006.

12. On 31 August 2006, the Prosecutor submitted to Pre-Trial Chamber I (ICC-04-01/06-373, see Annex 13) and Pre-Trial Chamber II (ICC-02/04-01/05-108, see Annex 14) an "Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice Regarding the Case" (hereinafter "Application").

13. In these "Application[s]", the OTP requested that Pre-Trial Chamber I and II separate the Senior Legal Adviser from rendering any advice on the DRC, respectively Uganda cases, on the basis that he was allegedly previously involved in these cases as a member of the OTP before joining the Pre-Trial Division as Senior Legal Adviser. In addition, the OTP requested that the Senior Legal Adviser be separated from the cases, pending the decision of the Chambers.

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14. On 5 October 2006, Mtre Jean Flamme, Defence Counsel to Thomas Lubanga Dyilo, submitted to Pre-Trial Chamber I a “Réponse à la demande du Procureur du 31 août 2006 ‘Prosecutor’s Application to Separate Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice Regarding the Case’” (hereinafter “Réponse”) (see Annex 15). The Defence Counsel joined the Prosecutor’s “Application” to Pre-Trial Chamber I of 31 August 2006 and requested that the Chamber take note of the “réserves les plus expresses de la Défense quant aux activités exercées dans le passé par Monsieur Gilbert Bitti, pour la Chambre Préliminaire I.”

III. Request by the Judges of Pre-Trial Chamber I and Pre-Trial Chamber II

15. The Judges of Pre-Trial Chamber I and Pre-Trial Chamber II would like to draw attention specifically to the Prosecutor’s “Request” of 9 January 2006 and all documents subsequently submitted regarding the same matter, in particular the Prosecutor’s “Application[s]” of 31 August 2006.

16. In addition, the Judges of Pre-Trial Chamber I would like to recall the initiatives taken by Defence Counsel Mtre. Flamme on this matter, in particular the “Réponse” submitted on 5 October 2006.

17. The Judges of Pre-Trial Chamber I and Pre-Trial Chamber II have discussed these issues during several formal Coordination Meetings of the Division and in numerous further informal consultations and have informed the President of the Pre-Trial Division, by letter(s) of the Presiding Judges dated 20 October 2006, that they [i.e. the Judges of Pre-Trial Chambers I and II] are agreed that the Senior Legal Adviser shall, *ex abundanti cautela*, be temporarily relieved from any functions he might have in relation to the Case of the Prosecutor vs. Thomas Lubanga Dyilo, respectively the Case of the Prosecutor vs. Joseph Kony et al., until further notice (see Annex 16). This measure should in no way be seen as prejudging the issues set out below.

18. Therefore, the President of the Pre-Trial Division, by Decision of 20 October 2006, at the request of the Judges of Pre-Trial Chambers I and II, provisionally separated the Senior Legal

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Adviser from the above mentioned cases (Annex 17), pending the decision of the Plenary on the matter referred to below.

19. The Judges of Pre-Trial Chamber I and II consider that the elements set out above make it imperative to convene the Plenary as soon as possible, for the following reasons:

20. The Judges deem that the repeated and insistent references made by the Prosecutor to the issue of the impartiality of the Judges of the Pre-Trial Chambers I and II, linking the issue pertaining to the Senior Legal Adviser to an alleged appearance of bias of the Judges of Pre-Trial Chambers I and II - starting with the Prosecutor's "Request" of 9 January 2006 and culminating in the "Application[s]" of 31 August 2006 - *can* be interpreted as amounting to a request by the Prosecutor, supported by Defence Counsel Mtre Flamme on 5 October 2006, for the disqualification of the Judges of Pre-Trial Chamber I and Pre-Trial Chamber II, or at least to a "question as to the disqualification" of the Judges of Pre-Trial Chambers I and II under Article 41 (2) of the Statute. Various references in the documents of the Prosecutor to the Presidency and the President of the Pre-Trial Division call into question the appearance of impartiality of the judges concerned.¹

21. Moreover, the Prosecutor's Public "Notice" of 10 January 2006 and the "Application(s)" of 31 August 2006, together with the public filing of Defence Counsel Flamme of 5 October 2006, may have raised doubts in public opinion. After all, the issue at hand is not only relevant for the current proceedings before the Pre-Trial Chambers but may also have an impact on the future work of the Court.

¹ See e.g., Internal Memorandum of the Prosecutor to the Presidency dated 10 February 2006 (see Annex 6) para 4: "(...) it was the OTP's view that the affected Pre-Trial Chambers had a right to know that a situation of appearance of bias **had arisen** (. .)" (emphasis added); "Request" by the Prosecutor dated 9 January 2006 (Annex 1), page 2: "Unless a "wall" is erected between Mr. Bitti and the investigations and cases in which he rendered legal advice while at the OTP, each of the potential litigants before the Pre-Trial Chambers – defence counsel, the OTP and victim's representatives – **will have a compelling basis to move** to disqualify Mr. Bitti and the judges of the Pre-Trial Chambers, based on the appearance of bias "(emphasis added); *ibid*, page 4 "For these reasons, the Presidency may view this request to exceed the mere administrative sphere and may prefer to **rely upon the procedure set forth in the statute for considering a challenge to the appearance of impartiality of a judge.**" (emphasis added); *ibid*, page 17: "(. . .) if he is permitted to continue to give legal advice in these proceedings, all future litigants **will have compelling grounds** for applying to disqualify the judges of Pre-Trial Chambers I and II" (emphasis added); "Notice" of 10 January 2006 (see Annexes 2 and 3): "(. . .) [T]he request seeks imposition of a preventive measure (. . .) with the aim of **preventing future challenges** by any party to the appearance of impartiality of the judges of the Pre-Trial Division" (emphasis added)

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22. Furthermore, the Judges, in particular those of Pre-Trial Chamber I, would like to stress that there are serious time constraints, as the first hearing for the confirmation of charges before Pre-Trial Chamber I is scheduled to take place on 9 November 2006.

23. Thus, the gravity and urgency of the issue demand that a final decision be taken without further delay by the body competent to examine “any question as to the disqualification of a judge” according to Article 41 (2) of the Statute.

24. The President of the Pre-Trial Division, on behalf of the Judges of Pre-Trial Chambers I and II, therefore forwards the matter to the President of the International Criminal Court, in order for the latter to convene, on the basis of Rule 4 (2) of the Rules of Procedure and Evidence, a special plenary session to examine and, as appropriate, to determine

Whether in light of the foregoing and the procedural history set out above, the “Application[s]” of the Prosecutor of 31 August 2006 and the “Réponse” by the Defence Counsel of 5 October 2006 amount to a request for disqualification of the Judges of Pre-Trial Chambers I and II under Article 41 (2) of the Statute, or to a “question as to the disqualification of a judge” within the meaning of Article 41 (2) of the Statute, and if so, to decide on the matter.



Judge Hans-Peter Kaul

President of the Pre-Trial Division

Dated this 20th day of October 2006

At The Hague (The Netherlands)



H.E. Judge Claude Jorda

20 October 2006

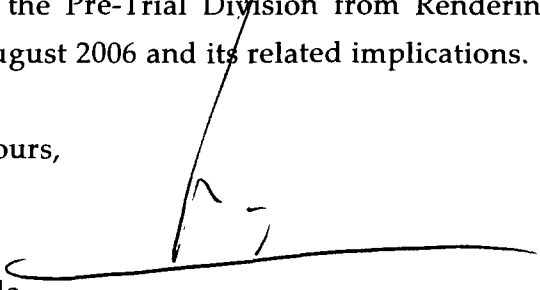
To: Hans-Peter Kaul
President of the Pre-Trial Division

Reference is made to the discussion in the coordination meeting of the Pre-Trial Division held on 10 October 2006 concerning "Prosecutor's Application to Separate the Senior Legal Advisor to the Pre-Trial Division from Rendering Legal Advice Regarding the Case" submitted to Pre-Trial Chamber I and Pre-Trial Chamber II on 31 August 2006 and also concerning Defence Counsel's "Reponse à la demande du Procureur du 31 août 2006, "Prosecutor's Application to Separate Senior Legal Advisor to the Pre-Trial Division from Rendering Legal Advice Regarding the Case" submitted to Pre-Trial Chamber I on 05 October 2006.

This is to confirm to you that the Judges of Pre-Trial Chamber I are agreed that the Senior Legal Adviser shall, *ex abundanti cautela*, be temporarily relieved from any functions he might have in relation to the Case of the Prosecutor vs. Thomas Lubanga Dyilo, until further notice.

It is understood that at the same time the President of the Pre-Trial Division will send a Memorandum to the President of the International Criminal Court to seize the Plenary with regard to the issue of the "Prosecutor's Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice Regarding the Case" dated 31 August 2006 and its related implications.

Sincerely yours,


Claude Jorda
Presiding Judge of Pre-Trial Chamber I

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Internal memorandum
Memorandum interne

To À	Senior Legal Adviser to the Pre-Trial Division	From De	Judge Hans-Peter Kaul, President of the Pre-Trial Division
Date	20 October 2006	Copy	Judges of the Pre-Trial Division
Subject Objet	DECISION BY THE PRESIDENT OF THE PRE-TRIAL DIVISION AT THE REQUEST OF THE JUDGES OF PRE-TRIAL CHAMBERS I AND II TO SEPARATE THE SENIOR LEGAL ADVISER FROM ANY FUNCTIONS HE MIGHT HAVE IN RELATION TO THE CASE OF THE PROSECUTOR VS. THOMAS LUBANGA DYILO AND THE CASE OF THE PROSECUTOR VS. JOSEPH KONY ET.AL.		

1. **THE PRESIDENT OF THE PRE-TRIAL DIVISION** of the International Criminal Court, based on the authority laid down in Regulation 14 of the Regulations of the Court to oversee the administration of the Pre-Trial Division;
2. **CONSIDERING** the 15th Coordination Meeting of the Pre-Trial Division held on 10 October 2006;
3. **CONSIDERING** the letter of 20 October 2006 of the Presiding Judge of Pre-Trial Chamber confirming that “the Judges of Pre-Trial Chamber I are agreed that the Senior Legal Adviser shall, *ex abundanti cautela*, be temporarily relieved from any functions he might have in relation to the *Case of the Prosecutor vs. Thomas Lubanga Dyilo*, until further notice”;
4. **CONSIDERING** the letter of 20 October 2006 of the Presiding Judge of Pre-Trial Chamber II equally confirming that “the Judges of Pre-Trial Chamber II are agreed that the Senior Legal Adviser shall, *ex abundanti cautela*, be temporarily relieved from any functions he might have in relation to the *Case of the Prosecutor vs. Joseph Kony et. al.*, until further notice”;
5. **CONSIDERING** that, according to Article 40 para. 1 of the Statute, the judges shall be independent in the performance of their functions;

DECISION BY THE PRESIDENT OF THE PRE-TRIAL DIVISION AT THE REQUEST OF THE JUDGES OF PRE-TRIAL CHAMBERS I AND II TO SEPARATE THE SENIOR LEGAL ADVISER FROM ANY FUNCTIONS HE MIGHT HAVE IN RELATION TO THE CASE OF THE PROSECUTOR VS THOMAS LUBANGA DYILO AND THE CASE OF THE PROSECUTOR VS. JOSEPH KONY ET AL

6. **CONSIDERING** that the Senior Legal Adviser provides advice and assistance to the Pre-Trial Division as a whole under the general direction and supervision of the President of the Pre-Trial Division;

HEREBY DECIDES:

That as of now the Senior Legal Adviser to the Pre-Trial Division shall be temporarily relieved from any functions he might have in relation to the *Case of the Prosecutor vs Thomas Lubanga Dyilo* and the *Case of the Prosecutor vs. Joseph Kony et. al*, until further notice.

A handwritten signature in black ink, reading "Hans-Peter Kaul", written over a horizontal line.

Judge Hans-Peter Kaul
President of the Pre-Trial Division

Dated this 20th day of October 2006

At The Hague (The Netherlands)

**Cour
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**International
Criminal
Court**

Internal Memorandum

To À	Registrar Court Management Services	From De	Judge Hans-Peter Kaul, President of the Pre-Trial Division
Date	20 October 2006	Ref.	ICC-PTD-01-06

**ADMINISTRATIVE DECISION BY THE PRESIDENT OF THE PRE-TRIAL DIVISION CONCERNING
THE COMMUNICATION OF SUBMISSIONS RELATING TO THE CASE OF THE PROSECUTOR VS.
THOMAS LUBANGA DYILO AND THE CASE OF THE PROSECUTOR VS. JOSEPH KONY ET. AL. TO
THE SENIOR LEGAL ADVISER TO THE PRE-TRIAL DIVISION**

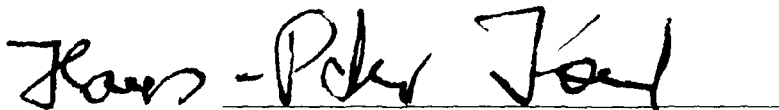
1. **THE PRESIDENT OF THE PRE-TRIAL DIVISION** of the International Criminal Court, based on the authority laid down in Regulation 14 of the Regulations of the Court to oversee the administration of the Pre-Trial Division;
2. **CONSIDERING** the 15th Coordination Meeting of the Pre-Trial Division held on 10 October 2006;
3. **CONSIDERING** the letters of the Presiding Judges of Pre-Trial Chamber I and Pre-Trial Chamber II to the President of the Pre-Trial Division dated 20 October 2006;

HEREBY DECIDES:

- (i) That from now on all submissions relating to the *Case of the Prosecutor vs Thomas Lubanga Dyilo* and to the *Case of the Prosecutor vs. Joseph et. al.* shall not be communicated to the Senior Legal Adviser to the Pre-Trial Division, Mr. Gilbert Bitti.

Administrative Decision by the President of the Pre-Trial Division concerning the communication of submissions relating to the Case of the Prosecutor vs Thomas Lubanga Dyilo and the Case of the Prosecutor vs Joseph Kony et al to the Senior Legal Adviser to the Pre-Trial Division

- (ii) That the Registrar is requested to ensure that the access rights of the Senior Legal Adviser to the TRIM system are modified accordingly.
- (iii) That from now on the Senior Legal Adviser shall not be notified of new submissions in the *Case of the Prosecutor vs. Thomas Lubanga Dyilo* and the *Case of the Prosecutor vs. Joseph Kony et al.*
- (iv) That this Decision shall remain in force until further notice is given.



Judge Hans-Peter Kaul
President of the Pre-Trial Division

Dated this 20th day of October 2006

At The Hague (The Netherlands)

Cc: Presiding Judge of Pre-Trial Chamber I

Presiding Judge of Pre-Trial Chamber II