

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 29 June 2007

THE PRESIDENCY

Before: Judge Philippe Kirsch, President
Judge Akua Kuenyehia, First Vice-President
Judge René Blattmann, Second Vice-President

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO**

Confidential

Ex parte, only available to the Defence

Decision on the "Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves" and on the "Urgent Request for the Appointment of a Duty Counsel" filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively

Mr Thomas Lubanga Dyilo

**Counsel for the Defence
Ms Catherine Mabilile**

I. THE APPLICATIONS FOR REVIEW

1. The Presidency of the International Criminal Court ("the Court") has before it two applications¹ by Mr Thomas Lubanga Dyilo ("the Applicant"), under rule 21(3) of the Rules of Procedure and Evidence ("the Rules")², to review the decision of the Registrar appointing duty counsel to represent him pursuant to orders of the Appeals Chamber and Pre-Trial Chamber I.
2. For the reasons given below, the applications are properly addressed to the Presidency. Both are dismissed on the basis that duty counsel appointed for the Applicant by the Registrar satisfied the criteria set out in regulation 73 of the Regulations of the Court.

II. THE RELEVANT FACTS

3. On 3 April 2007, the Appeals Chamber ordered the Registrar to appoint duty counsel for the Applicant, taking into account his wishes, if he did not have defence counsel by 4pm on 4 May 2007, pursuant to regulation 73(2) of the Regulations of the Court³. The mandate of duty counsel was to be limited to representing the Applicant for the purposes of filing specific documents before the Appeals Chamber by 11 May 2007. On 19 April 2007, Pre-Trial Chamber I also ordered the Registrar to appoint duty counsel for the Applicant, pursuant to the abovementioned regulation⁴. The mandate of duty counsel was to be limited to the sole purpose of responding to the Prosecution's request, of 5 February 2007, for leave to appeal the decision of Pre-Trial Chamber I confirming the charges

¹ *Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves*, 7 May 2007, ICC-01/04-01/06-887-Conf-Exp; *Urgent Request for the Appointment of a Duty Counsel*, 10 May 2007, ICC-01/04-01/06-893-Conf-Exp-tEN.

² Hereinafter, the rules referred to in this decision are the Rules of Procedure and Evidence of the Court.

³ *Appeals Chamber's Decision to Extend Time Limits for Defence Documents*, 3 April 2007, ICC-01/04-01/06-857.

⁴ *Appointment of Duty Counsel*, 19 April 2007, ICC-01/04-01/06-870.

against the Applicant. The Chamber gave no time-limit for the appointment of duty counsel for its proceedings but ordered duty counsel to submit the requested documents within 15 days of his or her appointment.

4. By letter dated 20 April 2007⁵, the Registrar requested the Applicant to compile from the list of counsel, in order of priority by 26 April 2007, a shortlist of candidates to represent him as duty counsel (the list of counsel in English, comprising approximately 200 people, was enclosed therein). That letter was received by the Applicant on 24 April 2007⁶. By letter dated 25 April 2007⁷, the Applicant requested the Registrar for additional information concerning the availability and qualifications of counsel on the list (whether they were immediately available, able to communicate in French, able to work in English and possessed a sound knowledge of international criminal law).

5. Representatives of the Registrar met with the Applicant on 27 April 2007, during which time the latter explained the difficulties he was experiencing in making his selection. During that meeting, the procedure for appointing duty counsel was explained to the Applicant and the deadline for the receipt of the latter's shortlist was extended to 3.30pm on 4 May 2007, in order to provide him with sufficient time to put forward his preferences for the appointment of duty counsel⁸. The Registry explained to the Applicant that it could not assist him further in making his selection due to its neutral position. By letter dated 1 May 2007⁹, the Applicant was reminded of the deadline for the appointment of duty counsel for the purposes of proceedings pending before Pre-Trial Chamber I and the Appeals Chamber.

⁵ *Enregistrement dans le dossier de la correspondance entre M Thomas Lubanga Dyilo et le Chef des Victimes et des Conseils*, Annex, 25 April 2007, ICC-01/04-01/06-872-Conf-Exp.

⁶ *Enregistrement dans le dossier de la correspondance*, Annex, supra note 5.

⁷ *Enregistrement dans le dossier de la correspondance*, supra note 5, at page 2.

⁸ *Observations du Greffier*, infra note 18, at page 4.

⁹ *Demande urgente en vertu de la Règle 21-3*, Annex B, supra note 1 and *Observations du Greffier*, infra note 18, at page 4.

6. On 4 May 2007, the Registrar, not having received any indication of the Applicant's preference by the expiration of the deadline at 3.30pm, proceeded to appoint Mr Altit and Ms Mongo as duty counsel in proceedings before Pre-Trial Chamber I and the Appeals Chamber, respectively¹⁰. On the same day, approximately an hour after the expiry of the deadline, the Applicant informed the Appeals Chamber that he was not in a position to select duty counsel on that date, due to the lack of information about persons on the list of counsel, and requested an extension of time within which to do so¹¹. The Applicant concurrently requested the Registrar for an extension of time to appoint duty counsel and asked to be supplied with a shorter list of counsel, from which those who did not meet his criteria with respect to availability and qualifications had been eliminated¹². Furthermore, the Applicant requested the Registrar to view the files of seven people on the list of counsel¹³. By letter dated 7 May 2007, the Registrar responded, *inter alia*, that the Applicant's request for an extension of time within which to appoint duty counsel was without cause as duty counsel had already been appointed¹⁴.
7. On 7 May 2007, the Applicant filed before the Presidency a "Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves" and, on 10 May 2007, an "Urgent Request for the Appointment of a Duty Counsel" ("the Applications"). The first application contended that the Registrar had appointed

¹⁰ *Désignation de Maître Emmanuel Altit comme conseil de permanence conformément à la Décision de la Chambre Préliminaire I du 19 avril 2007*, 4 May 2007, ICC-01/04-01/06-881; *Désignation de Maître Annick Mongo comme conseil de permanence conformément à la Décision de la Chambre d'appel du 3 avril 2007*, 4 May 2007, ICC-01/04-01/06-882.

¹¹ *Demande d'extension de délai en vertu de la Norme 35-1 du Règlement de la Cour*, 4 May 2007, ICC-01/04-01/06-883-Conf-Exp, at paragraph 12.

¹² *Demande urgente en vertu de la Règle 21-3*, Annex D, supra note 1, sent to the Registry at 4.13pm (see *Observations du Greffier*, Annex 2, infra note 18).

¹³ *Demande urgente en vertu de la Règle 21-3*, Annex E, supra note 1, sent to the Registry at 4.47 pm. Ms Catherine Mabilille, who the Applicant had previously selected to represent him as counsel, was included on that list.

¹⁴ *Observations du Greffier*, Annex 3, infra note 18. On 11 May 2007, the Appeals Chamber also dismissed the Applicant's request, holding that the appointment of duty counsel deprived it of its essence, *Decision of the Appeals Chamber on Mr Thomas Lubanga Dyilo's Request of 4 May 2007*, ICC-01/04-01/06-902.

duty counsel who had not been chosen by the Applicant and requested the Presidency, *inter alia*, to:

- (i) review the decision of the Registrar to appoint Mr Altit and Ms Mongo as duty counsel, or in the alternative, stay the decision of the Registrar appointing them;
- (ii) instruct the Registrar to consider the procedure for cooperation proposed by the Applicant with a view to appointing counsel of the latter's choice; and
- (iii) grant a brief extension of the time-limit to the Applicant in order for him to make his choice¹⁵.

By the second application, the Presidency was requested to:

- (i) review the Registrar's decision to appoint Mr Altit and Ms Mongo as duty counsel;
- (ii) accept the appointment of duty counsel of the Applicant's choice, in accordance with regulation 73(2) of the Regulations of the Court; and
- (iii) require the Registrar to act diligently in considering the application for additional resources that had been made by the Applicant pursuant to regulation 83(3) of the Regulations of the Court, in order to find a definitive solution to the problem of representation by counsel of his choice¹⁶.

8. On 16 May 2007, following the request of the Presidency of 10 May 2007¹⁷, the Registrar submitted his observations on the Applications to the Presidency ("Observations"), wherein the latter was requested to find the Applications inadmissible under rule 21(3). In the alternative, the Presidency was requested to

¹⁵ *Demande urgente en vertu de la Règle 21-3*, supra note 1, at paragraph 40.

¹⁶ *Urgent Request for the Appointment of a Duty Counsel*, supra note 1, at page 3.

¹⁷ *Request for the Registrar's observations on the "Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves" and on the "Demande urgente pour la Désignation d'un Conseil de permanence" filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively*, 10 May 2007, ICC-01-04-01-06-897-Conf-Exp, at page 3.

deny the Applications on their merits and invite the Applicant to comply with the legal texts and procedures before the Court¹⁸.

III. THE APPLICABLE PROVISIONS

9. Article 67(1)(d) of the Rome Statute of the Court (“the Statute”) on the “[r]ights of the accused” stipulates:

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: ... (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused’s choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.

10. Rule 20(1)(c), entitled “[r]esponsibilities of the Registrar relating to the rights of the defence”, maintains that the Registrar shall:

[a]ssist arrested persons, persons to whom article 55, paragraph 2, applies and the accused in obtaining legal advice and the assistance of legal counsel.

11. Rule 21 is entitled “[a]ssignment of legal assistance”. Sub-paragraphs (2) and (3) provide:

2. The Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list.

3. A person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel. The decision of the Presidency shall be final. If a request is refused, a further request may be made by a person to the Registrar, upon showing a change in circumstances.

¹⁸ *Observations du Greffier suite à la Demande de la Présidence concernant la « Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves » et la « Demande urgente pour la Désignation d’un Conseil de permanence » déposées par Thomas Lubanga Dyilo, respectivement, le 7 mai 2007 et le 10 mai 2007, 16 May 2007, ICC-01/04-01/06-907-Conf-Exp, at paragraph 40. The Presidency wishes to draw the Registrar’s attention to the fact that since 11 March 2006 the organ has been composed of President Philippe Kirsch, First Vice President Akua Kuenyehia and Second Vice President René Blattmann.*

12. Regulation 73 of the Regulations of the Court governs the appointment of duty counsel. It provides:

1. The Registrar shall establish and maintain a roster of counsel included in the list of counsel who are available at any time to represent any person before the Court or to represent the interests of the defence.
2. If any person requires urgent legal assistance and has not yet secured legal assistance, or where his or her counsel is unavailable, the Registrar may appoint duty counsel, taking into account the wishes of the person, and the geographical proximity of, and the languages spoken by, the counsel.

13. Regulation 128 of the Regulations of the Registry on “[a]ssistance by the Registry” provides:

1. The Registry shall provide a person seeking legal assistance in the framework of proceedings before the Court with the list of counsel, along with the curricula vitae of counsel appearing on that list.
2. The Registry shall provide assistance when a person entitled to legal assistance under the Statute and the Rules is to be questioned pursuant to article 55, or in any other case where legal assistance is needed by a person entitled to it.

14. Regulation 129 of the Regulations of the Registry, entitled “[a]ppointment of duty counsel”, provides:

1. In accordance with regulation 73, sub-regulation 2, of the Regulations of the Court, the Registry shall guarantee the availability of counsel at the place and the time indicated by the Prosecutor or the Chamber.
2. When requested by a person entitled to legal assistance, the Prosecutor or the Chamber, the Registry shall contact the duty counsel and provide him or her with all the information available.

IV. ADMISSIBILITY

15. The first preliminary issue before the Presidency is the admissibility of the Applications. The Applicant submits that the appointment of Mr Altit and Ms Mongo as duty counsel was tantamount to a refusal by the Registrar to assign

counsel of his choice within the meaning of rule 21(3). The Registrar, in his Observations, does not dispute that, in principle, his decisions refusing the appointment of duty counsel may be subject to review by the Presidency under rule 21(3). The Registrar pleads that, on their facts, the current Applications do not give rise to a situation falling under rule 21(3), in the absence of a request for the appointment of duty counsel and a corresponding refusal to appoint duty counsel.

16. It is the Registrar in whom primary responsibility for managing the legal assistance scheme of the Court is vested, including overseeing the scheme of legal assistance paid by the Court and the determination of matters relating to the qualification, appointment or assignment of counsel¹⁹. Duty counsel is provided for in situations where a person requires urgent legal representation and has not yet secured legal assistance, or where his or her counsel is unavailable, in accordance with regulation 73(2) of the Regulations of the Court. The appointment of duty counsel is designed to ensure the rights of a person to a fair and expeditious trial. The latter may be adversely affected where duty counsel is appointed in contravention of the Regulations of the Court or where the appointment of duty counsel is unreasonably refused.

17. The Presidency is faced with allegations of non-compliance with the Regulations of the Court by the Registrar. Notwithstanding that the Registrar's decision was taken pursuant to orders of Chambers, the actions of the Registrar in the actual appointment of duty counsel are administrative in nature. The Registrar acts under the authority of the President, who is in turn a member of the Presidency: the organ responsible for the proper administration of the Court. The Presidency has express powers to review the decisions of the Registrar in relation to the

¹⁹ In accordance with article 43 of the Statute, rules 20-21, regulations 83-85 of the Regulations of the Court and regulations 130-136 of the Regulations of the Registry. See *Decision of the Presidency upon the document entitled "Clarification" filed by Thomas Lubanga Dyilo on 3 April 2007, the requests of the Registrar of 5 April 2007 and the requests of Thomas Lubanga Dyilo of 17 April 2007, 2 May 2007, ICC-01/04-01/06-893-874*, at paragraph 17.

assignment of counsel, including decisions refusing a request for the assignment of counsel to a person pursuant to rule 21(3). Whilst the appointment of duty counsel is not expressly mentioned within rule 21(3), the power of the Presidency, under the aforementioned rule, to review a decision of the Registrar refusing a request for the assignment of counsel would include a situation in which the Registrar refused a request for the appointment of duty counsel pursuant to regulation 73(2) of the Regulations of the Court.

18. In the present case, where it is alleged that the Registrar unreasonably refused to take the wishes of the Applicant into account in the appointment of duty counsel, the situation is so similar to the type of situation that the Presidency may review under rule 21(3) that, in these particular circumstances, the governing texts should be read as affording some avenue for review in the absence of any explicit provision to the contrary. Were the situation otherwise, then a person for whom duty counsel is appointed in blatant disregard of his or her wishes would be unable to seek administrative remedies for his or her complaint that a decision of the Registrar failed to take into account his or her wishes in breach of regulation 73(2) of the Regulations of the Court.

19. For the preceding reasons, the Presidency will proceed to review the Applications in all the circumstances of the instant case.

20. By way of a second preliminary issue, the Presidency notes that the Registrar, in his Observations, drew its attention to the fact that the persons appointed as duty counsel had been actively involved in discharging their mandate since their appointment and a decision challenging them would have seriously affected the smooth running of the proceedings and the interests of justice²⁰. The Presidency rejects such reasoning, which, if accepted, would perpetually prevent a challenge to the appointment of duty counsel even in the face of questionable decisions on

²⁰ *Observations du Greffier*, supra note 18, at page 5 and paragraph 39.

appointment by the Registrar. The interests of justice would not be served by upholding certain decisions. It is the responsibility of the Presidency to review the Registrar's decisions, as required, and to make the necessary determination.

V. THE STANDARD OF REVIEW

21. Judicial review of administrative decisions of the Registrar is guided by standards applied by both international and national courts. It is concerned with the propriety of the procedure by which the Registrar reached a particular decision and the outcome of the latter's decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached²¹.

VI. THE MERITS

22. On the request of the Applicant that the Presidency require the Registry to act diligently in considering his application for additional means, pursuant to regulation 83(3) of the Regulations of the Court, the Presidency observes that the Registrar has already issued his decisions on the matter²². Decisions by the Registrar on the scope of legal assistance paid by the Court are within his

²¹ Presidency's Decision on the application to review the decision of the Registrar denying Mr Balembu privileged visits with Mr Lubanga Dyilo, under regulation 221 of the Regulations of the Registry, 27 November 2006, ICC-01/04-01/06-731-Conf, at paragraph 24.

²² *Observations du Greffier*, Annex 4 (Decision of the Registrar of 14 May), supra note 18 and "Enregistrement dans le dossier de l'affaire de la " *Décision du Greffier sur les ressources supplémentaires pour la phase du procès, sollicitées par M. Thomas Lubanga Dyilo dans sa « Demande de ressources additionnelles en vertu de la norme 83.3 du Règlement de la Cour », déposée le 3 mai 2007 du 14 juin 2007*", 14 June 2007, ICC-01/04-01/06-927. On 22 June 2007 the Applicant assigned Ms Catherine Mabilille to represent him as defence counsel in the proceedings, *Enregistrement de la désignation et de la déclaration d'acceptation de Maître Catherine Mabilille comme conseil de M. Thomas Lubanga Dyilo*, 22 June 2007, ICC-01/04-01/06-928.

purview, with the possibility of seeking a review from the relevant Chamber in accordance with regulation 83(4) of the Regulations of the Court²³.

23. Essentially, the Applicant submits that the appointment of Mr Altit and Ms Mongo as duty counsel is tantamount to a refusal by the Registrar to appoint duty counsel of his choice on the grounds that: (i) the imposition of duty counsel denies him the right to appoint duty counsel of his choice; and, (ii) the act of appointing persons who do not meet the Applicant's objective criteria also constitutes a refusal by the Registrar to appoint duty counsel of his choice²⁴.

A. The right to choose counsel freely

24. The Applicant argues that his right to choose counsel freely was not respected in that on 4 May 2007, the Registrar, in appointing Mr Altit and Ms Mongo to represent him as duty counsel, appointed persons who had not been chosen by him. On this ground, the Registrar submits that even if regulation 73(2) of the Regulations of the Court provides for the wishes of a person to be taken into account in the appointment process, it does not make a person's wishes the only factor that should guide his decision. The Registrar contends that he is not obliged, in any case, to follow the wishes expressed by the person concerned²⁵. Indeed, in the absence of any selection by the Applicant of specific persons to represent him as duty counsel in the instant case, the Registrar maintains that the imperatives of the proper conduct of proceedings, the interests of justice and the

²³ On 25 May 2005, the Applicant filed before Pre-Trial Chamber I a request for a review of the Registrar's decision of 14 May 2007, pursuant to regulation 83(4) of the Regulations of the Court; *Demande d'intervention sur « Demande de ressources additionnelles en vertu de la norme 83.3 du Règlement de la Cour » déposée devant le Greffe en date du 3 Mai 2007*, 25 May 2007, ICC-01/04-01/06-916. In its decision dated 5 June 2007, the Presidency transferred the Applicant's request to Trial Chamber I, following the decision of Pre-Trial Chamber I of 5 June 2007 that it lacked competence to deal with the Applicant's request for additional means; *Decision transmitting the pre-trial record of proceedings in the case of The Prosecutor v Thomas Lubanga Dyilo to Trial Chamber I*, ICC-01/04-01/06-920.

²⁴ *Demande urgente en vertu de la Règle 21-3*, supra note 1, at paragraph 21.

²⁵ *Observations du Greffier*, supra note 18, at paragraphs 8 and 9.

proper administration of the Court demanded that appropriate measures be taken by him to ensure that the Applicant was represented before the Court.

25. The right to legal representation and to choose one's own counsel is enshrined in article 67(1)(d) of the Statute and rule 21(2). However, this right is not absolute and is necessarily subject to certain limitations²⁶.

26. A person's scope for choice within the appointment process, laid down in regulation 73 of the Regulations of the Court, is even more limited. It is for the Court to decide whether the interests of the person require that he or she be represented by duty counsel appointed by the Court. The abovementioned regulation provides that in appointing duty counsel, the Registrar shall take into account the wishes of the person concerned, but makes clear that the final decision on the appointment of duty counsel lies with the Registrar and not with the person for whom duty counsel is being appointed.

27. Duty counsel is appointed in situations where a person requires urgent legal representation. Thus, depending on the exigencies of the situation and any applicable deadlines, the Registrar would generally have to act with a degree of urgency in appointing duty counsel. Whilst he would consider the views of the person for whom duty counsel is to be appointed, he would not be mandated to

²⁶ For relevant international jurisprudence, see cases of the International Criminal Tribunal for Rwanda: *Prosecutor v Gérard Ntakirutimana, Decision on the motions of the accused for replacement of assigned counsel/Corr*, 11 June 1997, Case No. ICTR-96-10-T, ICTR-96-17-T, at page 5; *Prosecutor v Jean Kambanda, Appeals Chamber Judgement*, 19 October 2000, Case No. ICTR-97-23-A, at paragraph 33; *Prosecutor v Jean Paul Akayesu, Appeals Chamber Judgement*, 1 June 2001, Case No. ICTR-96-4-A, at paragraphs 61-62. See cases of the International Criminal Tribunal for the Former Yugoslavia: *Prosecutor v Vidoje Blagojevic et al., Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team Case*, 7 November 2003, No. IT-02-60-AR73.4, at paragraph 22; *Prosecutor v Jadranko Prlic et al., Decision on Appeal by Bruno Stojic Against Trial Chamber's Decision on Request for Appointment of Counsel*, 24 November 2004, Case No. IT-04-74-AR73.1, at paragraph 19; *Prosecutor v Vidoje Blagojevic et al., Appeals Chamber Judgement*, 9 May 2007, Case No. IT-02-60-A, at paragraphs 14, 16-17 and 23. See cases of the European Court of Human Rights: *Croissant v Germany*, 25 September 1992, Application no. 13611/88, at paragraph 29; *Mayzit v Russia*, 20 January 2005, Application no. 63378/00, at paragraph 66; *Klimentyev v Russia*, 16 November 2006, Application no. 46503/99, at paragraph 116.

follow them in all circumstances. The Registrar may override the wishes of the person where he deems there are reasonable and valid grounds to do so. Indeed, there are obvious limitations to a person's choice of duty counsel which are elucidated in regulation 73 of the Regulations of the Court, including availability and geographical proximity. The limited mandate conferred upon duty counsel and the urgency with which duty counsel would normally be required, warrants a different degree of involvement by a person in the appointment process from that in the procedure for the assignment of counsel of his or her choice under article 67(1)(d) of the Statute and rule 21(2).

28. The Presidency notes the terms of regulation 129 of the Regulations of the Registry, which provides that the Registry shall guarantee the availability of counsel at the place and the time indicated by the Prosecutor or the Chamber. The Presidency finds that on the facts of the instant case, the Registrar acted reasonably in proceeding to appoint duty counsel for the Applicant, in the absence of any particular selection by the latter, bearing in mind the deadline of 4 May 2007 which had been imposed upon him by the Appeals Chamber and the sense of urgency surrounding the proceedings of Pre-Trial Chamber I (in view of the fact that proceedings before that Chamber had been stayed since February 2007).

B. The appointment of Mr Altit and Ms Mongo

29. The Applicant submits that in appointing Mr Altit and Ms Mongo, the Registrar failed to take account his wishes (outlined in his letter of 25 April 2007 to the Registry, wherein he expressed a desire to be represented by counsel who was immediately available, with a sound knowledge of international criminal law, the ability to communicate in French and the ability to work in English), pursuant to regulation 73 of the Regulations of the Court. In response, the Registrar argues, in his Observations, that the Applicant did not put forward any wishes for the

appointment of a particular person as duty counsel. Therefore, the Registrar maintains that in appointing duty counsel, he did not fail to take into account the Applicant's wishes and did not, thereby, refuse a request for the appointment of duty counsel. The Registrar submits that he found himself in a situation where he was obliged to appoint duty counsel in the absence of cooperation from the Applicant or an indication from the latter regarding his choice of duty counsel by the expiry of the deadline that had been set.

30. Additionally, the Applicant contends that the Registrar appointed counsel who failed to meet the criteria outlined in regulation 73 of the Regulations of the Court. The Registrar rejoins that the allegations of the Applicant are unfounded as appointed duty counsel met the conditions stipulated in the relevant texts²⁷.

31. The Registrar interprets a person's wishes under regulation 73(2) of the Regulations of the Court solely as a request for a particular person or persons²⁸. He states on several occasions that the Applicant did not put forward his wishes regarding the names of specific persons whom he wanted to represent him as duty counsel. This restrictive approach to regulation 73(2) of the Regulations of the Court, which equates the wishes of a person purely to the nomination of a specific person as duty counsel, is incorrect. The wishes of a person in regulation 73(2) of the Regulations of the Court encompass both the wishes of a person as to who should be appointed as duty counsel and the wishes of a person as to the specific criteria that any appointed duty counsel should meet. This would be the case whether the person's wishes were made pursuant to an order of Chambers for the appointment of duty counsel, a request of the person for the appointment of duty counsel or the *proprio motu* appointment of duty counsel by the Registrar. Were this not so, the Registrar would invariably be able to override a person's wishes as long as they did not amount to the nomination of a particular person: a

²⁷ *Observations du Greffier*, supra note 18, at paragraph 26.

²⁸ *Observations du Greffier*, supra note 18, at page 4 and paragraphs 3, 11 and 21.

restrictive interpretation that does not reflect the spirit of regulation 73(2) of the Regulations of the Court.

32. Despite this observation of principle, on the facts of the instant case, the Presidency finds that the wishes of the person coincided with the criteria for the appointment of duty counsel under regulation 73 of the Regulations of the Court (competence, availability, geographical proximity and languages spoken). The appointment of Mr Altit and Ms Mongo was, in practice, both consistent with the wishes of the Applicant, as set out in his letter of 25 April 2007, and in accordance with the criteria for appointing duty counsel laid out in regulation 73 of the Regulations of the Court, as set out below.

1. Competence

33. The Registrar submits that the fact that the persons appointed as duty counsel were on the list of counsel was sufficient to infer that they met the criteria to act as counsel in proceedings before the Court as required by rule 22(1) and regulation 67 of the Regulations of the Court²⁹.

34. The Presidency finds that the Registrar acted reasonably in relying upon the inclusion of Mr Altit and Ms Mongo on the list of counsel to justify his assumption that both were adequately qualified to represent the Applicant in proceedings before the respective Chambers. By virtue of a person's inclusion on the list of counsel, he or she is deemed fit to represent persons in proceedings before the Court, either as counsel for the defence or as counsel for victims.

²⁹ Rule 22(1) provides: "[a] counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise". Regulation 67 of the Regulations of the Court provides: "1. [t]he necessary relevant experience for counsel as described in rule 22 shall be at least ten years. 2. Counsel should not have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court."

2. Languages spoken

35. The Applicant submits that there were major concerns about the level of legal English of Ms Mongo, questioning whether her English language skills were sufficient to analyse and correctly understand the documents in question and the highly specialised legal issues raised therein, within the short time-limit set by the Appeals Chamber. The Registrar argues that the files of Ms Mongo and Mr Altit stated that they both had an excellent command of French and qualifications in English and, before appointment, both candidates stated that their level of English would allow them to carry out the tasks required by the Chambers.

36. The Presidency finds that the Registrar satisfied himself that Ms Mongo and Mr Altit were able to work in English, as well as in French. He specifically put these questions to both counsel in email correspondence before appointing them as duty counsel. It was explained to them that, since much of the case file was only available in English, appointed duty counsel would be required to work in English. Both Ms Mongo and Mr Altit replied in writing that they were able to work in English and carry out the tasks required of duty counsel³⁰.

3. Availability and geographical proximity

37. The Applicant argues that Mr Altit was not fully available to immerse himself in the case as he had been retained as counsel in proceedings that were due to commence before the International Criminal Tribunal for Rwanda ("ICTR") in mid-June 2007³¹. The Applicant further argues that duty counsel must be physically present in The Hague if he or she wishes to have access to confidential documents which cannot be safely transmitted electronically. The Registrar on the other hand argues that upon consultation, both Mr Altit and Ms Mongo confirmed their availability to carry out their respective mandates as duty counsel. Furthermore, in correspondence with the Applicant, representatives of

³⁰ *Observations du Greffier*, supra note 18, at paragraph 30 and Annex 1 at pages 1-2 and 6-8.

³¹ *Demande urgente en vertu de la Règle 21-3*, supra note 1, at paragraphs 35-37 and *Urgent Request for the Appointment of a Duty Counsel*, supra note 1, at page 2.

the Registrar make the point that “the tasks [that] duty counsel will face do not make it necessary for them, in principle, to be inactive before other tribunals, either international or national”³².

38. The Presidency finds that the fact that a person appointed as duty counsel is appearing in cases before other courts or tribunals would not necessarily hinder his or her ability to appear as duty counsel in proceedings before the Court. Indeed, it is to be expected that counsel who is willing to act as duty counsel will invariably have other commitments. The availability of a person to act as duty counsel must be assessed in accordance with the mandate of the person to be appointed, any applicable deadlines and the nature of the position or tasks that the person discharges in his or her ordinary capacity. As to the issue of physical presence in The Hague, it would ordinarily be expected for a person receiving legal assistance to be able to see his or her counsel in person. The Presidency finds that the Registrar satisfied himself that Mr Altit was available to act as duty counsel for the Applicant and carry out his specific mandate. Mr Altit expressed his availability to assume the responsibilities of duty counsel in correspondence with the Registry and clearly delineated the days when he would be unable to carry out his tasks, if appointed, due to scheduled appearances before the ICTR (approximately outlining the period commencing 18 June 2007 until the end of June 2007 as his period of unavailability). Bearing in mind that, pursuant to the order of Pre-Trial Chamber I, duty counsel appointed for pre-trial proceedings would have had 15 days to make his or her submissions from the date of his or her appointment (4 May 2007), it was reasonable for the Registrar to conclude that this would have allowed ample time before 18 June 2007 for Mr Altit to exhaust his mandate. The Presidency further notes that both Mr Altit and Ms Mongo travelled to The Hague³³.

³² *Demande urgente en vertu de la Règle 21-3*, Annex A, supra note 1, at page 1.

³³ From the documents filed by duty counsel it may be established that Ms Mongo was in The Hague on 9 May 2007 (See *Demande d’extension de délai*, 9 May 2007, ICC-01/04-01/06-892) and Mr Altit was in The Hague on 22 May 2007 (See *Réponse à la Requête du Procureur du 5 février 2007 en autorisation*

39. With respect to the above issues (competence, languages spoken, availability and geographical proximity), it is the responsibility of the person accepting the appointment of duty counsel to ensure that any information provided to the Registry is correct. Article 13 of the Code of Professional Conduct for Counsel places counsel under a duty to refuse to represent a person before the Court where there is a conflict of interest, where counsel is incapable of dealing with the matter diligently, or where counsel does not consider that he or she has the requisite expertise. Unless he knew or ought to have known of the existence of discrepancies or irregularities, which in the circumstances required further investigation, the Registrar cannot be expected to take steps to verify all the information provided by each person applying for inclusion on the list of counsel and / or accepting an appointment as duty counsel or an assignment as counsel.

4. The number of duty counsel

40. The Applicant expressed his unhappiness with the appointment of two duty counsel, refusing to see his file segmented at the whim of diverse decisions of various Chambers or managed by different counsel with different approaches. He argues that the appointment of two duty counsel renders even more difficult the transition and continuation of the case by future defence counsel of his choice and increases his doubts as to the respect for his right to a fair and effective defence³⁴. From his Observations, the Registrar seemingly appointed two duty counsel for the Applicant due to the short time-limit within which duty counsel would have been required to present his or her submissions both to the Appeals Chamber and to Pre-Trial Chamber I³⁵.

d'interjeter appel de la Décision de la Chambre préliminaire I du 29 janvier 2007, 22 May 2007, ICC-01/04-01/06-913).

³⁴ *Demande urgente en vertu de la Règle 21-3, supra note 1, at paragraphs 31-33.*

³⁵ *Observations du Greffier, supra note 18, at paragraph 9.*

41. The appointment of one or more defence counsel, whether duty or otherwise, is not inconsistent with the Statute, Rules or Regulations of the Court and may indeed be called for in specific cases in the interests of justice. On the present facts, the Registrar did not act unreasonably in appointing two duty counsel to represent the Applicant. This is in view of the deadline which he had been set by the Appeals Chamber to appoint duty counsel and the fact that duty counsel appointed for proceedings before that Chamber would have had only one week to file the requested documents (from 4 May 2007 to 11 May 2007). Although there was no deadline set by Pre-Trial Chamber I for the appointment of duty counsel, the fact that proceedings before that Chamber had been stayed since February 2007 obviously instilled a degree of urgency into the appointment process. Furthermore, duty counsel appointed for the purpose of proceedings before Pre-Trial Chamber I would have had only two weeks to file the requested documents from the date of his or her appointment (from 4 May 2007 to 19 May 2007).

42. The Presidency notes that the Registrar did not consult with the Applicant before appointing two duty counsel. Should a similar situation arise in the future, as a matter of good practice the Registrar should take into account any views expressed by a person as to the number of counsel required. The Registrar may override those views where there are relevant and sufficient grounds for so doing. In the present case, for the reasons expressed in the previous paragraph, the Presidency concludes that there were relevant and sufficient grounds to appoint two duty counsel and that such grounds would have existed even had the Applicant expressed his preference for only duty one counsel.

5. The appointment process

43. The Presidency further considers that the Registrar gave the Applicant ample time within which to peruse the list of counsel provided to him. The Applicant received the list of counsel from the Registry on 24 April 2007 and had until 4

May 2007 to consider the list and, from it, select persons to represent him as duty counsel. The Applicant failed to select anyone at all during that period. The Presidency notes the statement of the Applicant that, during that period, he did not give his priority to the orders of the Chambers for the appointment of duty counsel. The Applicant states that he chose to focus his attention on his application for additional resources pursuant to regulation 83 of the Regulations of the Court and a family visit³⁶. Knowing that duty counsel was required by 4 May 2007, the Applicant should have made the selection of candidates to represent him in this capacity his priority. Moreover, if the Applicant did not expect to be able to meet the deadline, he should also have so notified the Registrar prior to its expiry.

44. The Presidency recognises that it would have been preferable for the Registrar to have responded to the Applicant's request for assistance by providing him with the names of those persons who the Registry had already identified as fulfilling the requirements to act as duty counsel³⁷. The Presidency considers that the provision of such assistance is not inconsistent with the principle of neutrality, to which the Registrar refers in this context, since the process of establishing a roster of duty counsel, which the Registrar is required to do (see paragraph 49 below), necessarily involves a process of selection from the list of counsel. However, for all of the above reasons, the fact that the Registrar did not provide the Applicant with the names of counsel that he had previously identified to act as duty counsel does not, in the circumstances of the present case, affect the conclusion that duty counsel appointed by the Registrar fulfilled the requirements of regulation 73 of the Regulations of the Court.

³⁶ *Demande urgente en vertu de la Règle 21-3*, supra note 1, paragraph 26.

³⁷ In his Observations, the Registrar states that his office had previously consulted several persons in order to establish whether they were available to represent the Applicant as duty counsel in order to ensure, *inter alia*, that any failure by the Applicant to select duty counsel would not prejudice his interests or impede the proper conduct of proceedings before the Court, *Observations du Greffier*, supra note 18, at page 4.

6. *Determination on the merits*

45. The Presidency is satisfied that Ms Mongo and Mr Altit met the criteria laid down in regulation 73 of the Regulations of the Court and that their appointment as duty counsel corresponded with the wishes made by the Applicant pursuant to that regulation. The Applications are therefore dismissed.

VII. OBSERVATIONS

46. Notwithstanding its conclusion on the facts of the present case that the Applications before it should be dismissed, the Presidency deems it appropriate to comment further on one matter by way of providing guidance to the Registrar for the future.

47. During the course of its examination of the arguments, the Presidency has noted that the Registrar has failed to establish a roster of duty counsel as provided in Regulation 73(1) of the Regulations of the Court.

48. The Registrar, in explaining the absence of a roster, cites difficulties in implementation owing to the fact that counsel on the list appear before national and supranational courts³⁸. He argues that the procedure for the appointment of duty counsel adopted by the Registry conforms to the spirit of regulation 73(1) of the Regulations of the Court, which, he submits, is to ensure that persons involved in proceedings before the Court may be represented by duty counsel who are available and fulfil the necessary criteria³⁹.

49. The Presidency does not accept the above arguments of the Registrar. The establishment and maintenance of the duty counsel roster is mandatory, pursuant to regulation 73(1) of the Regulations of the Court. It is part of the Registrar's

³⁸ *Observations du Greffier*, supra note 18, at paragraph 27.

³⁹ The Registry's procedure for the appointment of duty counsel is set out at paragraphs 12-14 of the Registrar's *Observations du Greffier*, supra note 18.

overall duty to assist persons in obtaining legal advice and the assistance of legal counsel, pursuant to rule 20(1)(c), and part of the Registry's mandate to provide assistance to a person entitled to legal assistance, in accordance with regulation 128(2) of the Regulations of the Registry. The purpose of the duty counsel roster is to ensure that a person who requires urgent legal assistance is able to receive such assistance without delay. The absence of such a roster did not have a material impact in the present case as a result of the time made available to the Applicant to select a candidate from the list of counsel, as set out in paragraph 43 above. However, the Presidency does not accept the argument of the Registrar that the full list of counsel that was used in this case would generally comply with the spirit of regulation 73 of the Regulations of the Court in all circumstances. That provision governs situations, *inter alia*, where legal assistance is required urgently, for example where a person requires legal assistance for his or her first appearance before the Court. The Presidency therefore recommends that the duty counsel roster to be established, comprises significantly fewer people than those currently on the list of counsel.

50. For the foregoing reasons, the Registrar should, without delay, establish the roster of counsel who are available to act as duty counsel in proceedings before the Court, in line with regulation 73(1) of the Regulations of the Court. To this end, the Registrar should consider the languages spoken, availability and geographical proximity of counsel. The Presidency will leave the modalities of setting up the roster to the Registrar, who may seek guidance if required from the former.

51. In addition, the Registrar should ensure that, in future, both the list of counsel and the roster of duty counsel are made available in both working languages of the Court and clearly distinguish between those counsel only willing to represent

defendants, those only willing to represent victims, those willing to represent both and those who have indicated no preference⁴⁰.

VIII. CONCLUSION

52. A person's scope for choice in the appointment of duty counsel is limited since the final decision on appointment lies with the Registrar. Whilst the latter must take into account a person's wishes prior to appointing duty counsel, those wishes may be overridden where there are reasonable and valid grounds to do so.

53. The Presidency finds that the decision of Registrar in the instant case was sound. In appointing duty counsel, the Registrar satisfied himself that the criteria set out in regulation 73 of the Regulations of the Court had been met with respect to availability, competence, language skills and geographical proximity, as set forth in paragraphs 33 to 39 of this decision. Furthermore, the Presidency finds that the appointment of Ms Mongo and Mr Altit as duty counsel was consistent with the wishes of the Applicant expressed in his letter of 25 April 2007, setting out his requirements to be represented by duty counsel who was immediately available, who possessed a sound knowledge of international criminal law, the ability to communicate in French and the ability to work in English. For these reasons, the Presidency dismisses the Applications and upholds the decision of the Registrar.

54. The Presidency notes that the Applications and the Registrar's subsequent Observations were filed confidentially and ex parte. No reasons were given for attaching this confidential and ex parte label to the Applications. The Presidency will classify this decision as confidential and ex parte for the present time.

⁴⁰ The Presidency recalls the Applicant's statement that he unilaterally contacted a person who was unwilling to represent the defence, notwithstanding the fact that the Registrar states that the list details counsel's preference to represent the defence. (*Demande urgente en vertu de la Règle 21*, Annex D, at page 3 and *Observations du Greffier*, supra note 18, at paragraph 12). The Presidency further recalls that the list of counsel was transmitted to the Applicant largely in English, *Demande urgente en vertu de la Règle 21*, Annex A at page 7, supra note 1.

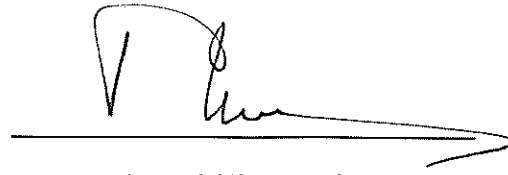
However, the Presidency orders the Applicant to state whether it remains his view that the classification should be maintained and, if so, to set out the factual and legal basis for retaining the classification by 4pm on 9 July 2007. The Registrar is ordered to file any observations he might have on the Applicant's submissions by 4pm on 12 July 2007. The Presidency will thereafter rule upon whether the classification should be maintained.

IX. DECISION

55. For the aforementioned reasons, the Presidency:

- i) dismisses the Applications;
- ii) orders the Registrar to establish and maintain a roster of duty counsel, in line with regulation 73 of the Regulations of the Court, without delay;
- iii) orders the Registrar to make the roster of duty counsel and the list of counsel available in both working languages of the Court and to ensure that the aforementioned roster and list clearly distinguish between persons only willing to represent the defence, persons only willing to represent victims, persons willing to represent both the defence and victims and persons who have indicated no preference; and
- iv) orders the Applicant to state whether it remains his view that the confidential ex parte classification should be maintained and, if so, to set out the factual and legal basis for retaining the classification by 4pm on 9 July 2007 and orders the Registrar to file any observations he might have on the Applicant's submissions by 4pm on 12 July 2007.

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

A handwritten signature in black ink, consisting of a large, stylized 'P' followed by a series of loops and a long horizontal stroke that tapers to a point on the right.

Judge Philippe Kirsch

President

Dated this 29 June 2007

At The Hague, The Netherlands