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Date: 10 March 2009

**THE PRESIDENCY**

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

**SITUATION IN UGANDA  
IN THE CASE OF  
*THE PROSECUTOR v. JOSEPH KONY, VINCENT OTTI, OKOT ODHLAMBO AND  
DOMINIC ONGWEN***

**Public**

**Reasons for the Decision on the Application of Mr Jens Dieckmann of 28 October 2008  
for judicial review of his appointment by the Registrar as defence counsel, in  
accordance with the decision of Pre-Trial Chamber II of 21 October 2008**

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

**The Office of the Prosecutor**

Mr Luis Moreno Ocampo  
Ms Fatou Bensouda

**Counsel for the Defence**

Mr Jens Dieckmann

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**States Representatives**

The Government of the Republic of  
Uganda

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

Mr Esteban Peralta Losilla

**Deputy Registrar**

Mr Didier Preira

The Presidency of the International Criminal Court (hereinafter “Court”) has before it the application of Mr Jens Dieckmann for judicial review of the decision of the Registrar appointing him as defence counsel for the purpose of proceedings before Pre-Trial Chamber II on the admissibility of the case of *the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*.

The application is dismissed for the reasons set out below.

## I. PROCEDURAL HISTORY

1. On 21 October 2008, Pre-Trial Chamber II (hereinafter “the Chamber”) decided to initiate proceedings on its own motion to determine the admissibility of the case of *the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (hereinafter “case”), pursuant to article 19(1) of the Rome Statute (hereinafter “Decision of the Chamber”).<sup>1</sup> The Chamber, noting the terms of regulation 76(1) of the Regulations of the Court and considering that the “appointment of a counsel for the defence to represent [the suspects]” on the admissibility of the case was in the interests of justice as “none of the [suspects] is yet represented by a defence counsel”, decided to appoint Mr Jens Dieckmann as counsel for the defence “within the context and for the purposes of [those] proceedings” (hereinafter all references to regulations are to those of the Regulations of the Court).<sup>2</sup> The Chamber invited newly appointed defence counsel, the Republic of Uganda, the Prosecutor and the victims<sup>3</sup> or their legal representatives, to submit written observations on the admissibility of the case by 10 November 2008.<sup>4</sup> That time-limit was subsequently extended to Tuesday, 18 November 2008.<sup>5</sup>
2. Following the Decision of the Chamber, by letter dated 21 October 2008, the Deputy Registrar informed Mr Dieckmann of his “appointment as counsel for the defence within the context and for the purposes of the proceedings on the admissibility of the case, pursuant to [a]rticle 19(1) of the Rome Statute” (hereinafter all references to articles are to those of the Rome Statute of the Court (“Rome Statute”) unless otherwise provided).<sup>6</sup>
3. On 28 October 2008, Mr Dieckmann (hereinafter “applicant”) submitted to the Presidency a request for judicial review of his appointment by the Registrar as defence counsel for the four suspects in the case, pursuant to rule 21(3) of the Rules of Procedure and Evidence (hereinafter “Application”).<sup>7</sup>

<sup>1</sup> Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence, ICC-02/04-01/05-320, page 8.

<sup>2</sup> Decision of the Chamber, page 8.

<sup>3</sup> As defined at page 7 of the Decision of the Chamber.

<sup>4</sup> Decision of the Chamber, page 8.

<sup>5</sup> Decision on Defence Counsel’s “Request for conditional stay of proceedings”, ICC-02/04-01/05-328, 31 October 2008, page 9. This followed the applicant’s request that the Chamber stay or suspend the admissibility proceedings pending the Presidency’s determination of the Application. Request for conditional stay of proceedings, ICC-02/04-01/05-325, 28 October 2008.

<sup>6</sup> ICC-02/04-01/05-341-Conf-Exp-Anx1.

<sup>7</sup> Request for review of Counsel’s appointment by the Registrar in accordance with Pre Trial Chamber’s Decision of 21 October 2008 and request for conditional stay/suspension of the proceedings, ICC-02/04-01/05-326.

4. Pursuant to the order of the Presidency of 7 November 2008,<sup>8</sup> the Registrar submitted observations on the Application on 10 November 2008 with a classification of “confidential *ex parte* only available to the Registry” (hereinafter “Observations”).<sup>9</sup>
5. On 11 November 2008, the Presidency dismissed the Application.<sup>10</sup> The reasons for that decision are set out below.

## II. ADMISSIBILITY

### A. Arguments of the applicant

6. The applicant submits that his Application is admissible, pursuant to rule 21(3) of the Rules of Procedure and Evidence (hereinafter all references to rules are to those of the Rules of Procedure and Evidence (“Rules”). In so doing, the applicant relies upon the decision of the Presidency of 29 June 2007 in the case of *the Prosecutor v. Thomas Lubanga Dyilo* entitled “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” (hereinafter “Decision of 29 June 2007”).<sup>11</sup>
7. The applicant observes that in that case before the Presidency it was argued by Mr Lubanga Dyilo, for whom duty counsel had been appointed by the Registrar, that rule 21(3) was applicable to “the situation in which a [suspect] is denied the opportunity to freely designate their counsel by virtue of a decision of the Chamber, ordering the Registry to appoint duty counsel.”<sup>12</sup> The applicant recalls that the Presidency found the application of Mr Lubanga Dyilo to be admissible, citing the following passage of the Decision of 29 June 2007:

“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

<sup>8</sup> Order concerning the Application of Mr Jens Dieckmann of 28 October 2008 for judicial review of his appointment by the Registrar as defence counsel, in accordance with the decision of Pre-Trial Chamber II of 21 October 2008, ICC-02/04-01/05-337-Corr.

<sup>9</sup> Observations of the Registrar in accordance with the Presidency’s “Order concerning the Application of Mr. Jens Dieckmann of 28 October 2008 for judicial review of the decision of the Pre-Trial Chamber II of 21 October 2008 and the conditional [sic] stay/suspension of the proceedings” dated 7 November 2008, ICC-02/04-01/05-341-Conf-Exp. In response to the order of the Presidency of 27 February 2009 (ICC-02/04-01/05-373) the Registrar provided the reasons for the classification of the Observations on 3 March 2009 (ICC-02/04-01/05-374-Conf-Exp).

<sup>10</sup> Decision on the Application of Mr Jens Dieckmann of 28 October 2008 for judicial review of his appointment by the Registrar as defence counsel, in accordance with the decision of Pre-Trial Chamber II of 21 October 2008, ICC-02/04-01/05-344-Corr.

<sup>11</sup> ICC-01/04-01/06-931-Conf-Exp, refiled as public (ICC-01/04-01/06-937), pursuant to Presidency Decision of 17 July 2007, ICC-01/04-01/06-935.

<sup>12</sup> Application, paragraph 16.

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”.<sup>13</sup>

8. It is submitted that although, in the instant case, it was the Chamber that issued the formal order concerning the appointment of the applicant as defence counsel, that order was issued in consultation with the Registrar, as required by the terms of regulation 76(1); the wording of which presupposes that the Registrar plays a substantive role in the decision of a Chamber appointing counsel and is not merely responsible for executing the resultant decision. Moreover, it is submitted that in bearing the responsibility for managing the legal assistance scheme of the Court, including the assignment and remuneration of counsel, the Registrar is responsible for the instant appointment of the applicant to represent all four suspects in the case.<sup>14</sup>
9. The applicant further submits that judicial review is the only avenue open to him as he has no reasonable prospect of obtaining a remedy from the Chamber or the Appeals Chamber. In support of this argument the applicant draws the attention of the Presidency to the fact that the Chamber denied the request for leave to appeal on a very similar issue, pursuant to article 82(1)(d), of Mr Michiel Pestman, counsel appointed by the Chamber pursuant to regulation 76(1) for the purpose of representing the interests of the suspects in victims’ participation applications in the Uganda situation and in the case.<sup>15</sup> The applicant notes that the Chamber has held that, as general principle, appellate proceedings should be deferred until final judgment.<sup>16</sup> As such, the applicant submits that he has no reasonable prospect of being granted leave to file an interlocutory appeal pursuant to article 82(1)(d) against the Decision of the Chamber.<sup>17</sup>
10. The applicant further submits that he has no reasonable prospect of obtaining clarification from the Chamber as to whether his mandate as defence counsel is to represent the general interests of the defence or the specific interests of each suspect.<sup>18</sup> In this vein, the applicant recalls the finding of Pre-Trial Chamber I that the texts of the Court do not provide for a request for clarification to be submitted to the Court. As a result, such clarification may only be granted in exceptional circumstances. It is further recalled that Pre-Trial Chamber I has held that a request for leave to appeal under article 82(1)(d) is the only remedy of a general nature whereby participants may voice concerns regarding a decision of a Chamber.<sup>19</sup>
11. Moreover, it is submitted that neither the Regulations of the Court, nor the Regulations of the Registry, nor the Code of Professional Conduct for counsel (hereinafter “Code”) provide for any advisory mechanism through which counsel may obtain advice or a ruling as to whether certain actions would place him or her in violation of his or her ethical obligations.<sup>20</sup>
12. It is argued, with reference to the jurisprudence of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY”) and

<sup>13</sup> Application, paragraph 16 citing the Decision of 29 June 2007, paragraph 18.

<sup>14</sup> Application, paragraph 21.

<sup>15</sup> Application, paragraphs 3 and 4.

<sup>16</sup> Application, paragraph 17.

<sup>17</sup> Application, paragraph 17.

<sup>18</sup> Application, paragraph 19.

<sup>19</sup> Application, paragraph 19.

<sup>20</sup> Application, paragraph 20.

the legal instruments of the ICTY, that a decision appointing counsel to a suspect would normally fall within the supervisory powers of the Presidency and that, in any case, subjecting issues concerning the assignment of counsel to interlocutory appeal would be likely to occasion greater delay as compared to a system of judicial review by the Presidency.<sup>21</sup>

13. In sum, the applicant submits that given the power of the Presidency to review whether the assignment of counsel complies with the regulatory framework of the Court in particular circumstances, it is in the optimum position to rule upon whether his mandate, as ambiguously framed by the Chamber, would cause him to violate his obligations under the Code, in particular his obligation to serve the best interests of his clients and not to engage in any conflicts of interest between them (absent their informed consent).<sup>22</sup>

## **B. Determination by the Presidency**

14. The applicant brings his Application before the Presidency pursuant to rule 21(3), which provides, in relevant part:

“[a] person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel”.

15. The Presidency has had previous occasion to consider the scope of rule 21(3). In its Decision of 29 June 2007, the Presidency ruled upon the applications of Mr Lubanga Dyilo for judicial review of the decisions of the Registrar appointing duty counsel to represent him pursuant to the respective orders of Pre-Trial Chamber I and the Appeals Chamber. Pursuant to rule 21(3), Mr Lubanga Dyilo argued that the appointment of duty counsel by the Registrar without taking into account his wishes was tantamount to a refusal by the Registrar to assign to him counsel of his choice.

16. Those applications were found to be admissible.<sup>23</sup> The Presidency held: “[n]otwithstanding 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”.<sup>24</sup> The Presidency further held that its power, pursuant to rule 21(3), to review decisions of the Registrar refusing requests for the assignment of counsel comprised the power to review refusals by the Registrar of requests for the appointment of duty counsel.<sup>25</sup>

17. Moreover, as noted by the applicant in the instant case,<sup>26</sup> the Presidency held that a situation where it was alleged that the Registrar had unreasonably refused to take into account the wishes of the person for whom duty counsel had been appointed was so similar to the type of situation reviewable under rule 21(3) that, in those particular circumstances, the governing texts should be read as affording an avenue for judicial

<sup>21</sup> Application, paragraph 18.

<sup>22</sup> Application, paragraphs 15 and 20.

<sup>23</sup> Decision of 29 June 2007, paragraph 19.

<sup>24</sup> Decision of 29 June 2007, paragraph 17.

<sup>25</sup> Decision of 29 June 2007, paragraph 18.

<sup>26</sup> Application, paragraph 16.

review in the absence of any explicit provision to the contrary.<sup>27</sup> The Presidency thereby proceeded to review the appointment of duty counsel by the Registrar.

18. The present Application is properly before the Presidency. In essence, the applicant is arguing that the failure of the Registrar to take into account the wishes of the four suspects for whom defence counsel was appointed pursuant to regulation 76 is tantamount to a refusal to assign counsel to the suspects and, as such, is reviewable in accordance with rule 21(3). The Presidency holds the issues raised in the instant Application, being similar to those raised by Mr Lubanga Dyilo, to fall within the ambit of rule 21(3), in accordance with its Decision of 29 June 2007.

### III. MERITS

#### A. The submissions

##### 1. *Arguments of the applicant*

19. The applicant raises three grounds for judicial review. It is submitted that in appointing the applicant to represent the suspects, the Registrar: erred in law; reached an unreasonable decision in depriving the suspects of the opportunity of designating counsel of their chose or opting to represent themselves; and failed to consider the potential conflicts of interest arising in the appointment of one counsel to represent all four suspects in the case.<sup>28</sup>

##### (a) Error of law

20. It is argued that the Registrar erred in law in appointing the applicant, not solely as counsel in the situation, but as counsel for specific suspects in the case pursuant to regulation 76(1). The applicant argues that the aforementioned regulation, which allows for the appointment of counsel “where the interests of justice so require” in order to represent the “interests of the defence” does not grant the power to appoint counsel to a specific suspect as opposed to appointing counsel to represent the general interests of the defence.<sup>29</sup>
21. The applicant submits that he has no reasonable prospect of contacting the suspects, citing in support the fact that Mr Michiel Pestman, counsel representing the suspects in victims’ applications, has been unable to contact them.<sup>30</sup> The applicant maintains that regulation 76 must be construed in a manner consistent with the Rome Statute and the Rules. However, it is argued that in appointing the applicant as defence counsel for specific suspects, the Registrar acted inconsistently with article 67(1), read together with rule 121(1), which provide that a suspect has the right to choose counsel freely or to represent themselves, the right to participate effectively in the proceedings and the right to communicate freely with his or her counsel.<sup>31</sup>

<sup>27</sup> Decision of 29 June 2007, paragraph 18.

<sup>28</sup> Application, paragraph 22.

<sup>29</sup> Application, paragraphs 15, 23 and 24.

<sup>30</sup> Application, paragraph 15.

<sup>31</sup> Application, paragraphs 16 and 25, citing articles 67(1)(b) and 67(1)(d) of the Rome Statute.

22. The applicant argues that, in fact, his appointment as counsel for the suspects may be contrary to the interests of justice if he is “unable to perform his functions in an effective manner due to an ambiguous mandate, an evident inability to consult with his clients, and an inability to ascertain his clients’ view point[s] on the existence of potential conflicts of interest between [their] respective strategies”.<sup>32</sup>
23. Moreover, the appointment of the applicant for the purpose of filing observations on the admissibility of the case may prejudice the right of the suspects to challenge admissibility at a later stage, bearing in mind the terms of article 19(4) providing that admissibility may be challenged only once but for exceptional circumstances by, *inter alia*, the person for whom a warrant of arrest has been issued.<sup>33</sup> It is argued that contrary to the judgment of the Appeals Chamber in the case of *the Prosecutor v. Bosco Ntaganda*, the appointment of the applicant in the instant proceedings heightens the risk of judicial predetermination of any future challenges to admissibility since the Chamber will already have ruled on defence challenges to the issue.<sup>34</sup> It is further recalled that the Appeals Chamber, *inter alia*, expressed concerns over the fact that issues on appeal may be subject to final adjudication before the suspects have had an opportunity to be heard on the matter.<sup>35</sup>

**(b) Unreasonable decision**

*(i) Failure to take into account the choice of the suspects*

24. By reference to the jurisprudence of the Appeals Chamber of the Court and the Appeals Chamber of the ICTY, the applicant submits that if the right vested in the suspect or accused to choose counsel or to represent him or her self could, in principle, be overridden by the power of a Chamber to appoint counsel in the interests of justice pursuant to regulation 76(1), then the exercise of such power should comply with the principles of necessity and proportionality.<sup>36</sup> It is submitted that, in the instant case, his appointment as defence counsel for all four suspects in the case was neither necessary, nor proportionate and, as such, was patently unreasonable.<sup>37</sup> The applicant submits that it is unclear as to whether the Registrar, using her diplomatic channels, attempted to ascertain whether the suspects are currently represented by counsel or whether they wish to choose specific counsel.<sup>38</sup> As such, the suspects cannot be said to have waived their right to participate in the admissibility proceedings or to choose counsel freely.<sup>39</sup>

<sup>32</sup> Application, paragraph 26.

<sup>33</sup> Application, paragraph 26.

<sup>34</sup> Application, paragraph 27, citing “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”. ICC-01/04-169, 13 July 2006.

<sup>35</sup> Application, paragraphs 27 and 28.

<sup>36</sup> Application, paragraphs 29-31.

<sup>37</sup> Application, paragraph 31.

<sup>38</sup> Application, paragraph 32.

<sup>39</sup> Application, paragraph 33.

- (ii) *Failure to take into account the potential conflict of interest ensuing from appointing one counsel to represent all four suspects*

25. By reference to the Decision of 29 June 2007, the applicant argues that the appointment of one counsel to all four suspects constitutes an unreasonable refusal to assign counsel to each suspect, and thus a denial of their right to effective representation.<sup>40</sup> It cannot be assumed that the interests of all the suspects are aligned; on the contrary, media reports indicate a level of dissension between them, particularly as regards the negotiation process and the role of Court.<sup>41</sup> It is argued that it is thus unfeasible for the applicant to represent the interests of all four suspects simultaneously without provoking a potential conflict of interest.<sup>42</sup> It is submitted that regulation 76 must be construed in a manner consistent with rule 22(3) which in turn provides that counsel must act in accordance with the Code.<sup>43</sup> In essence, the applicant submits that his appointment by the Registrar as counsel for all four suspects in the case would cause him to breach his obligations pursuant to article 12 of the Code,<sup>44</sup> which provides, in relevant part:

- “1. Counsel shall not represent a client in a case:  
 (a) If the case is the same as or substantially related to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are incompatible with the interests of the former client, unless the client and the former client consent after consultation.”

## 2 *Relief sought*

26. By his Application, the applicant requests the Presidency to, *inter alia*: review his appointment as defence counsel by the Registrar in accordance with the Decision of the Chamber pursuant to regulation 76(1); determine whether he is entitled to submit observations on behalf of all four suspects on the admissibility of the case without committing an “implicit and unavoidable breach” of his professional ethics under the Code; and determine whether a challenge to admissibility pursuant to article 19(2) would prejudice the rights of the suspects to challenge admissibility at a later stage of the proceedings, bearing in mind the terms of article 19(4), and consequently contravene the duty upon him as counsel to represent the suspects fairly.<sup>45</sup>

## 3. *Observations of the Registrar*

27. The Registrar was ordered to “describe the consultative role played by [her] in the instant appointment, in accordance with regulation 76(1)...”.<sup>46</sup> In her Observations,

<sup>40</sup> Application, paragraph 35.

<sup>41</sup> Application, paragraph 36.

<sup>42</sup> Application, paragraph 36.

<sup>43</sup> Application, paragraph 38.

<sup>44</sup> Application, paragraphs 37 and 38.

<sup>45</sup> Application, paragraph 42.

<sup>46</sup> ICC-02/04-01/05-337, page 3.

the Registrar explained that her role in the appointment of the applicant was executed under the instruction of the Chamber. It was explained that, upon request, the Registrar provided the Chamber with a list of names and the files of counsel from the list of counsel satisfying certain criteria laid down by the Chamber.<sup>47</sup> The applicant's name and file was amongst those provided to the Chamber.<sup>48</sup> At the behest of the Chamber, the Registrar then contacted the applicant to confirm his availability for appointment in the context of the situation.<sup>49</sup>

28. The Registrar submits that her role in the appointment of the applicant was that of a facilitator and administrator.<sup>50</sup> The Registrar further submits that the power to appoint counsel pursuant to regulation 76 is vested solely in the Chamber.<sup>51</sup>

## **B. Determination of the Presidency**

29. It is recalled that the judicial review of the decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that 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 or her mind to the issue could have reached.<sup>52</sup>

30. Bearing in mind the above test, the Application cannot succeed. The applicant was appointed as defence counsel to represent the four suspects in the case by the Chamber, having been expressly named in the Decision of the Chamber.<sup>53</sup> That appointment was made pursuant to regulation 76(1), which provides: “[a] Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require”. The role played by the Registrar in the instant case was that of executing the appointment of the applicant. The Decision of the Chamber left no margin for the Registrar to exercise significant discretion in the appointment process.

31. The instant case must be distinguished from that of Mr Lubanga Dyilo, examined in the Decision of 29 June 2007, in which the then Registrar had appointed duty counsel himself, pursuant to regulation 73(2), in accordance with the orders of the Appeals Chamber and Pre-Trial Chamber I. The Registrar had been directed by the Appeals Chamber, in the event of certain circumstances, “to proceed pursuant to the provisions of regulation 73 (2) [...] to appoint duty counsel to represent the Appellant with regard to the submission of the aforesaid documents. In appointing duty counsel the Registrar shall take into account the wishes of the Appellant as to duty counsel to be

<sup>47</sup> Observations, paragraphs 6 and 7.

<sup>48</sup> Observations, paragraph 8.

<sup>49</sup> Observations, paragraph 10.

<sup>50</sup> Observations, paragraph 11.

<sup>51</sup> Observations, paragraph 11.

<sup>52</sup> The standard of judicial review was defined by the Presidency in its decision of 20 December 2005, ICC-Pres-RoC72-02-5, paragraph 16, and supplemented in its decision of 27 November 2006, ICC-01/04-01/06-731-Conf, paragraph 24.

<sup>53</sup> At page 8 of the Decision of the Chamber, the Chamber “[a]ppoints Mr Jens Dieckmann as counsel for the [d]efence, within the context and for the purposes of the present proceedings”.

appointed”.<sup>54</sup> Pre-Trial Chamber I ordered “the Registrar or his representatives to appoint a duty counsel for Thomas Lubanga Dyilo pursuant to regulation 73 (2) [...]”.<sup>55</sup> Regulation 73(2) provides: “[i]f 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.” As such, in appointing duty counsel for Mr Lubanga Dyilo the then Registrar exercised a wide discretion in performing his administrative functions pursuant to regulation 73(2) and it was for the Presidency to ensure that his discretion had been properly exercised.

32. The consultative role played by the Registrar in the instant appointment of the applicant was merely by way of providing the Chamber with a list of names and files of counsel from the list of counsel matching specific criteria previously laid down by the Chamber. There is nothing before the Presidency which suggests that the Registrar acted improperly in her consultative role in compiling the list of counsel that was subsequently submitted to the Chamber. The Presidency notes that the Registrar was informed by the Chamber that the latter was considering the appointment of defence counsel in the context of the situation.<sup>56</sup> Whilst it could be argued, without prejudging the scope of the consultative role of the Registrar within the ambit of regulation 76(1), that the latter, by virtue of that consultative role is in a position to advise a Chamber on potential conflicts of interests that may arise in the appointment of counsel, the Presidency, without prejudging the issue of whether any conflict indeed arises in the instant appointment, accepts that the Registrar was not in the position to form a view on the issue, being unaware of the intended purpose of the appointment. In sum, the Registrar played a limited role in the instant appointment and cannot be said to have acted unlawfully or unreasonably in effecting the appointment of counsel in accordance with the Decision of the Chamber.
33. As to the argument of the applicant that the texts of the Court do not provide for any mechanism pertaining to the Court for counsel to seek advice or a ruling on matters of professional ethics, the Presidency notes that, in contrast to counsel acting at the national level who have the ability to consult their national bar associations or other relevant bodies on matters of professional ethics, no similar system is provided for at the Court. Noting the terms of rules 16 and 20, the Registrar is requested to explore institutional mechanisms whereby counsel may seek advice on questions of professional ethics and update the Presidency thereon.

The application is dismissed.

<sup>54</sup> Appeals Chamber’s Decision to Extend Time Limits for Defence Documents, ICC-01/04-01/06-857, 3 April 2007, paragraph 3.

<sup>55</sup> Appointment of Duty Counsel, ICC-01/04-01/06-870, 19 April 2007, page 4.

<sup>56</sup> Observations, paragraph 10.

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



**Judge Philippe Kirsch**  
**President**

Dated this 10 March 2009  
At The Hague, The Netherlands