

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: 16 May 2007

THE PRESIDENCY

Before: Mr Philippe Kirsch, President
Ms Akua Kuenyehia, First Vice-President
Ms Elizabeth Odio Benito, Second Vice-President

Registrar: Mr Bruno Cathala

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

Confidential

Ex parte: available only to the Defence

Observations of the Registrar in response to the Presidency's Request concerning the "*Demande urgente en vertu de la Règle 21(3) du Règlement de procédure et de preuves*" and the "*Demande urgente pour la Désignation d'un Conseil de permanence*" filed by Thomas Lubanga Dyilo on 7 May 2007 and 10 May 2007, respectively

Mr Thomas Lubanga Dyilo

THE REGISTRAR of the International Criminal Court ("the Court"),

NOTING the Presidency's request of 10 May 2007¹ that the Registrar file, by Wednesday, 16 May 2007, his observations on the "*Demande urgente en vertu de la règle 21(3) du Règlement de procédure et de preuves*" and the "*Demande urgente pour la Désignation d'un Conseil de permanence*" filed by Mr Thomas Lubanga Dyilo ("the Applicant") before the Presidency on 7 May 2007² and 10 May 2007,³ respectively ("the Applications");

NOTING rule 20(1)(c) of the *Rules of Procedure and Evidence*;

NOTING regulation 73(2) of the *Regulations of the Court*, which sets out the factors to be taken into account in appointing duty counsel;

NOTING regulations 128 and 129 of the *Regulations of the Registry*;

NOTING that Mr Jean Flamme was appointed by the Applicant on 12 April 2006 to represent him in proceedings before the Court;

NOTING the Registrar's decision dated 31 March 2006,⁴ by which the Applicant "is provisionally considered totally indigent under regulation 85(1) *in fine* of the *Regulations of the Court*";

NOTING the decision of Pre-Trial Chamber I of 21 February 2007 granting leave to Mr Flamme to withdraw from the case;⁵

¹ ICC-01/04-01/06-897-Conf-Exp.

² ICC-01/04-01/06-887-Conf-Exp.

³ ICC-01/04-01/06-893-Conf-Exp.

⁴ ICC-01/04-01/06-63.

⁵ ICC-01/04-01/06-833-Conf. This decision was issued on a confidential application by Mr Flamme for leave to withdraw from the case (ICC-01/04-01/06-829-Conf.).

NOTING the "*Appeals Chamber's Decision to Extend Time Limits for Defence Documents*", issued by the Appeals Chamber on 3 April 2007,⁶ which orders the Registrar to appoint a duty counsel to represent the Applicant, pursuant to regulation 73(2) of the *Regulations of the Court* for the purpose of submitting a response to the "*Directions of the Appeals Chamber*" of 5 February 2007,⁷ as well as a supplementation to the document entitled "Defence submissions on the scope of the right to appeal within the meaning of article 82(1)(b) of the Statute" of 7 February 2007;⁸

NOTING that the said Appeals Chamber's decision ordered the Registrar, in the event that the above-mentioned documents were not filed with that Chamber by 4 p.m. on 4 May 2007 owing to the non-representation of the Applicant by counsel by then, to appoint duty counsel, pursuant to regulation 73(2) of the Regulations, to represent the Applicant for the purpose of submitting the above-mentioned documents taking into account the Applicant's preferences;⁹

NOTING the *Decision on Appointment of Duty Counsel* issued by Pre-Trial Chamber I on 19 April 2007¹⁰ ordering "the Registrar or his representatives to appoint a duty counsel for Thomas Lubanga Dyilo pursuant to regulation 73(2) of the Regulations", solely to prepare a response to the "Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 *Decision on the confirmation of charges*", filed on 5 February 2007;¹¹

NOTING that, by his letter of 20 April 2007,¹² the Head of the Division of Victims and Counsel ("DVC") requested the Applicant to provide the Registry, pursuant to regulation 73(2) of the *Regulations of the Court* and Pre-Trial Chamber I's decision of

⁶ ICC-01/04-01/06-857.

⁷ ICC-01/04-01/06-805.

⁸ ICC-01/04-01/06-812.

⁹ See *supra* footnote 2, para. 3.

¹⁰ ICC-01/04-01/06-870.

¹¹ ICC-01/04-01/06-806.

¹² DSS/2007/113. This letter was forwarded to the Applicant on 24 April 2007.

19 April 2007, with a prioritised list of persons by whom he would like to be represented to this end by Thursday, 26 April 2007, and that the updated List of Counsel was provided to him;

NOTING the Applicant's letter of 25 April 2007 in which he stated his preference for the appointment of a duty counsel capable of communicating with him in French, and working in English;

NOTING that during a visit to the Court's Detention Centre on 27 April 2007, the Head of the DVC again explained the procedure for the appointment of duty counsel to the Applicant, and that at the end of the visit the Applicant confirmed that he understood how the List of Counsel was to be used and the procedure for appointing duty counsel;

NOTING that the Applicant had, in the context of the procedure to appoint counsel, previously used without difficulty the List of Counsel authorised to practise before the Court;¹³

NOTING that in his letter of 1 May 2007, the Head of the DVC, in the interest of justice and due process, extended to 15:30 on 4 May 2007 the deadline of 26 April 2006 granted to the Applicant in order to give him sufficient time to make his choice for the appointment of duty counsel, pursuant to the decision of Pre-Trial Chamber I and, with respect to the Appeals Chamber's decision, he again confirmed to the Applicant the deadline to file his list of selected counsel, also 15:30 on 4 May 2007;¹⁴

CONSIDERING that the DVC had not received any indication of preference or request for files from the Applicant to assist the Registrar in appointing duty counsel

¹³ The Registrar refers to the appointment of Mr Jean Flamme as duty counsel and the appointment of Ms Catherine Mabilie.

¹⁴ The letter dated 1 May 2007 is attached in confidential *ex parte* Annex B to the Applicant's Request of 7 May 2007 (ICC-01/04-01/06-887-Conf-Exp).

pursuant to the above-mentioned decisions of the Chambers, by the expiry of the said deadline of 15:30 on 4 May 2007;

CONSIDERING that the Applicant had had almost eleven (11) days to provide the Registry with the list of persons that he wished to have appointed by the Registrar as duty counsel;

CONSIDERING that the Registry had previously consulted several counsel with regard to their availability to represent the Applicant as duty counsel within the framework of the Pre-Trial Chamber I and Appeals Chamber's decisions, for the purpose of ensuring, *inter alia*, that inaction on the part of the Applicant would neither prejudice his interests nor impede the proper conduct of the proceedings before the Court;

CONSIDERING that Mr Emmanuel Altit and Ms Annick Mongo are included in the List of Counsel and had stated that they were available and agreed to represent the Applicant as duty counsel, and that they have an excellent knowledge of French and confirmed in writing that they have a sufficient knowledge of English to carry out the tasks referred to in the Pre-Trial Chamber I and Appeals Chamber's decisions (Annex 1);

CONSIDERING that on 4 May 2007, after expiry of the deadline, the Registrar issued the following documents: "*Désignation de Maître Emmanuel Altit comme conseil de permanence conformément à la Décision de la Chambre Préliminaire I du 19 avril 2007*"¹⁵ and the *Appointment of Ms Annick Mongo as Duty Counsel pursuant to the Appeals Chamber's Decision of 3 April 2007*;¹⁶

¹⁵ ICC-01/04-01/06-881.

¹⁶ ICC-01/04-01/06-882.

CONSIDERING that both duty counsel appointed by the Registrar pursuant to rule 73(2) of the *Regulations of the Court* have been actively involved in discharging their remit since their appointment;¹⁷

CONSIDERING furthermore that the Applicant's Defence team assistant sent two items of correspondence to the Registry, attached to the Request of 7 May 2007 in Annexes D (Annex 2) and E, after the expiry of the deadline and after the Registrar had appointed the duty counsel;¹⁸

NOTING the letter of 7 May 2007¹⁹ from the Head of the DVC (Annexe 3);

NOTING the Appeals Chamber's decision of 11 May 2007²⁰ rejecting the Applicant's request for extension of time for the appointment of duty counsel;

NOTING the Appeals Chamber's decision of 11 May 2007²¹ granting Ms Mongo a new deadline to complete her remit;

NOTING the Registry decision of 14 May 2007 on the "*Demande de ressources additionnelles en vertu de la Norme 83(3) du Règlement de la Cour*" submitted by the Applicant on 3 May 2007, in which the Registrar based his ruling in part on the requirements/resources of the defence at the current stage of the pre-trial phase on the fact that both duty counsel, who are experienced and are included in the List of

¹⁷ It should be noted that since their appointment, and even before travelling to the seat of the Court, the Registrar provided the appointed counsel with the appropriate documents required to discharge their remit. Those documents were then supplemented by the Court Management Section upon their arrival at the Court.

¹⁸ The Registrar notes that Annexes D and E were sent at 16:13 and 16:47, respectively, the deadline set having expired at 15:30, after a period of reflection of almost 11 days granted to the Applicant.

¹⁹ DSS/2007/124/am-ss.

²⁰ ICC-01/04-01/06-902, *Decision of the Appeals Chamber on Mr. Thomas Lubanga Dyilo's Request of 4 May 2007*, 11 May 2007.

²¹ ICC-01/04-01/06-903, *Decision of the Appeals Chamber on the Defence Application for an Extension of Time of 9 May 2007*, 11 May 2007. See also the Appeals Chamber's decision, ICC-01/04-01/06-904, "Clarification", 14 May 2007.

Counsel, had been appointed to carry out tasks related to the finalisation of the submissions related to that phase (Annex 4);

NOTING the letter of 15 May 2007²² from the Head of the DVC, further to the Presidency's decision of 2 May 2007 regarding the appointment of counsel to represent the Applicant on the merits of the case (Annex 5);

NOTING Pre-Trial Chamber I's decision of 16 May 2007²³ granting Mr Altit a new deadline to complete his remit;

CONSIDERING that matters concerning the appointment of counsel under the legal assistance scheme also fall under the authority of the Registry, which is responsible for managing the said scheme pursuant to the relevant texts of the Court;²⁴

NOTING the Presidency's decision of 2 May 2007 emphasising that "[t]he Presidency affirms that the proceedings may not be unreasonably delayed, particularly having regard to article 67(1)(c) of the Statute. It is for the Registrar to continue to take all appropriate steps to facilitate the appointment of Defence Counsel without undue delay";

²² DSS/2007/125/am-ss.

²³ ICC-01/04-01/06-906, "Décision sur la demande de prorogation de délai", 16 May 2007.

²⁴ See, in particular, regulation 73(2) of the *Regulations of the Court*, and the decision of the Presidency of the International Criminal Court of 2 May 2007, "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" (ICC-01/04-01/06-874), par. 17: "It is the Registrar who has the primary responsibility for managing the legal assistance scheme of the Court [...]" See also, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, "Decision on Prosecution's Motion for Review of the Decision of the Registrar to Appoint Mr Rodney Dixon as Co-counsel to the Accused Kubura", 26 March 2002, para. 55, in which the Trial Chamber states that: "The Registrar of the International Tribunal has the primary responsibility in determining which counsel it may appoint or assign, in accordance with the Rules, the Directive and the Code of Conduct." See also, *Prosecutor v. Prlić et al.*, Case No. IT-04-74, "Decision on Appeal by Bruno Stojić against Trial Chamber's Decision on Request of Counsel", 24 November 2004, para. 21.

CONSIDERING that the Presidency of the Court set out the test for "judicial review" and for rejecting the Registrar's administrative decisions in its decision of 20 December 2005;²⁵

MAKES THE FOLLOWING OBSERVATIONS ON THE APPLICANT'S APPLICATIONS:

ON THE ADMISSIBILITY OF THE APPLICATIONS

1. The Registrar notes that the Applicant did not have counsel at the time he submitted his Applications to the Presidency, but that he received assistance, *inter alia*, from Ms Véronique Pandanzyla, a legal assistant included in the List of Assistants, and Ms Catherine Dobson, a lawyer working as an assistant for his team. The Registrar also points out that the Defence team is assisted by the Office of Public Counsel for the Defence within the limits of its remit;
2. The Applicant confuses the procedure for the appointment of duty counsel with that for the appointment of counsel to represent him on the merits. The appointment of duty counsel falls under the responsibility of the Registrar in accordance with the requirements set out in regulation 73(2) of the *Regulations of the Court*;
3. As the content of the present observations shows, at no stage of the proceedings did the Registrar "reject a request for the appointment of

²⁵ See the decision of the Presidency ICC-Pres-RoC72-02-05 entitled "*Decision on the Application to Review the Registrar's Decision Denying the Admission of Mr Ernest Midagu Bahati to the List of Counsel*", of 20 December 2005, para. 16: "Having been guided by standards applied by both international and national courts in reviews of administrative decisions, the Presidency determines that the review of the administrative decision of the Registrar [...] is concerned with the propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it. The review involves a consideration of whether the Registrar has acted without jurisdiction, has committed an error of law, has failed to act with procedural fairness, has taken into account irrelevant factors or failed to take into account relevant factors, or has reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached." See also *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić & Dragoljub Prcać*, IT-98-30/1-A, *Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić*, 7 February 2003.

counsel", be it a duty counsel or otherwise. On the contrary, the Registrar found himself in a situation where he had to appoint duty counsel because of the Applicant's failure to cooperate or request the appointment of counsel before the expiry of the deadlines;

4. As a result, the Registrar submits, as its main submission, that the Applicant was wrong to invoke rule 21(3) of the *Rules of Procedure and Evidence* as the basis of his Applications to the Presidency. As such, in the absence of any decision by the Registrar refusing to appoint counsel, the Applicant's Applications have no legal basis and must therefore be declared inadmissible;
5. The Registrar considers that it is important to direct the Applicant to comply with the texts and established procedures at all phases of proceedings before the Court;
6. In the event that the Presidency were to consider that the applicant's Applications are admissible, the Registrar wishes, in the alternative, to make the following observations.

ON THE MEASURES TAKEN BY THE REGISTRAR REGARDING THE APPOINTMENT OF DUTY COUNSEL

A. Regulation 73(2) of the *Regulations of the Court*

7. The Registrar recalls the factors to be taken into account in appointing counsel under regulation 73(2) of the *Regulations of the Court* which specifies that: "[...] 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";

8. In this respect, the Registrar reaffirms the importance for any concerned person receiving legal assistance paid by the Court to participate in the procedure for the appointment of duty counsel and emphasises that, even if the regulation referred to above provides for the wishes of the person to be taken into account in the appointment, it does not make this the only factor that should guide his decision;
9. Furthermore, it should be noted that the texts of the Court do not oblige the Registrar to follow the wishes expressed by the person concerned by the appointment of duty counsel to represent him or her before the Court. This follows not only from the fact that there are other criteria which must be taken into account in making an appointment, but also from the fact that the interests of justice and the need to ensure the proper conduct of proceedings before the Court must be safeguarded, in particular, when the Chambers have set a deadline for the appointment of duty counsel;
10. The Registrar considers therefore that although the appointment of duty counsel under the Court's legal assistance scheme falls within his authority, in appointing counsel under the scheme, he takes into account the wishes of the person concerned, whilst at the same time ensuring that they are otherwise consistent with the texts of the Court;
11. Furthermore, the Registrar notes that in the absence of any wishes expressed by the person concerned despite the steps taken to assist him in submitting his preferences, the necessity to ensure the proper conduct of the proceedings, the interests of justice and the proper administration of the Court require that he take appropriate measures to ensure that he is represented before the Court.

B. Synopsis of the duty counsel appointment process

12. The Registrar notes that the process for appointing duty counsel follows a specific procedure which starts with the Registrar providing the list of persons authorised to practise as counsel before the Court to the person concerned. The list contains the information (for example, the counsel's knowledge of languages, nationality, a brief biography if it has been provided by the counsel, the counsel's preference to represent the defence or victims) which the person concerned requires in order to provide the names of those persons whose files he wishes to consult. The person concerned chooses one or more counsel that he wishes to have appointed by the Registrar as duty counsel and, to that end, if he deems it necessary, he provides the Registrar with the names of the persons that he has short-listed as he sees fit and whose files he wishes to consult to finalise his choice;
13. Upon receipt of the request, the Registrar provides the person concerned with the file of each person on the list as requested as promptly as possible with a view to the appointment of duty counsel before the Court. Having consulted the files, the person concerned informs the Registry of his wishes concerning the names of those persons he has selected;
14. Next, it falls to the DVC/Registry and not to the person concerned or to members of his team to contact the short-listed counsel to inform him/them of the decision and to ensure that he/she is fully capable of discharging the remit of representing the person before the Court in accordance with the criteria set out in the texts, notably regulation 73(2) of the *Regulations of the Court* and regulation 129 of the *Regulations of the Registry*. To this end, the Registrar ensures, *inter alia*, that the counsel has the language skills required to perform the remit, that he/she is willing and ready to represent the person concerned and that the appointment will not be tainted by a conflict of interest that might prejudice the proceedings and the rights of the participants. The Registrar points out, moreover, that at all stages of the proceedings, including that

preceding his appointment, article 13(2) of the *Code of Professional Conduct for counsel* before the Court places the onus on the counsel to refuse an appointment in the event there is a conflict of interest;²⁶

15. Finally, if all the foregoing conditions are met, the Registrar appoints the duty counsel and immediately makes suitable arrangements to facilitate his or her work before the Court.

C. On the measures taken by the Registrar to enable the Applicant to express his wishes regarding the appointment of duty counsel

16. The Applicant maintains that: "[...] the Registry is reluctant to provide him with the information necessary to enable him to make a quick choice by pleading the principle of neutrality of the Registry"²⁷ and notes that the "lack of notification of the decisions, combined with the late delivery of the recent correspondence and e-mails from the Registry, as well as the Registry's lack of effective cooperation in this selection process contributed, *inter alia*, to the delay by Mr Thomas Lubanga Dyilo in appointing duty counsel of his choice".²⁸ The Registrar points out that the allegations made by the Applicant do not reflect the true situation, are unfounded and must be denied for the following reasons;

17. The Registrar considers that he has taken all the necessary measures to enable the Applicant to express his wishes regarding the appointment of duty counsel. To this end, he recalls that further to the decision of Pre-Trial Chamber I dated 19 April 2007, the DVC sent the Applicant a letter on 20 April 2007, (reference DSS/2007/113/AM), in which it (i) invited him to forward to it, by Thursday 26 April 2007, a prioritised list of counsel included

²⁶ See also *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, *Decision on Requests for Appointment of Counsel*, 30 July 2004, para. 16, in which the Chamber decided that it fell to counsel to refuse appointment in the event of a conflict of interests. See also article 16 of the *Code of Professional Conduct for counsel*.

²⁷ Applicant's Request to the Presidency, dated 07 May 2007, ICC-01/04-01/06-887, para. 25.

²⁸ *Idem*, para. 26.

in the List of Counsel authorised to practise before the Court whom he wishes to have appointed as duty counsel by the Registrar, (ii) provided him at the same time with the updated List of Counsel and (iii) asked him to send any request for files that he might wish to consider by 24 April 2007. The Registrar notes that the Applicant did not receive the above-mentioned letter until 24 April 2007 and, in view of this, he extended the deadline of 26 April to 4 May 2007 at the latest, in order to give the Applicant more time to make his choice of duty counsel;

18. In that same letter, the Applicant was asked to inform the Registry, by 4 May 2007, of his choice of counsel to be appointed as duty counsel for the purposes set out in the decision of the Appeals Chamber of 3 April 2007;
19. Furthermore, the Registrar points out that Registry staff met with the Applicant on 27 April 2007 and at that meeting, the Applicant indicated, *inter alia*,²⁹ that he would submit the list of counsel whose files he wished to consult by 1 May 2007, with a view to the appointment of a duty counsel pursuant to the decision of Pre-Trial Chamber I of 19 April 2007;
20. The Registrar notes, as he pointed out in his letter of 1 May 2007, (reference DSS/2007/0054/ddp-am-ss), addressed to the Applicant, that he had not received any request for files from him and, as a result, he informed the Applicant that he was still waiting for his wishes in order to finalise the appointment of duty counsel by 4 May 2007. In addition, with regard to the proceedings pending before the Appeals Chamber, in the same letter, the Registrar reminded the Applicant of the instructions issued to the Registrar by the Appeals Chamber to “look into the matter in time in order to be able to

²⁹ At that meeting, Registry staff explained to the applicant, in the presence of his assistant, how to use the List of Counsel as well as the procedure for appointing duty counsel. At the end of the meeting, the Applicant confirmed that he had understood both how the list was to be used and the established procedure for appointing duty counsel.

proceed, if need arises, with the appointment of duty counsel before and, if not possible, at the time of the expiration of the period specified for the submission of the documents" (4 May 2007) and explained that if he did not receive the Applicant's wishes regarding the appointment of duty counsel for the purposes of the proceedings pending before the Appeals Chamber by 4 May 2007, he would be forced to appoint a duty counsel for that purpose, in accordance with the instructions of the Chamber;

21. The Registrar reiterates, on the one hand, that the Applicant had nearly eleven (11) days from 24 April 2007 to express his wishes regarding the appointment of duty counsel and, on the other hand, that despite the Registrar's best efforts, the Applicant had failed, within the prescribed time limits, to submit his choice or provide any information regarding his choice of the names of the duty counsel he wished to submit. The Registrar considered that given the lack of action on the part of the Applicant within the time limited, it was his duty to appoint duty counsel to represent the Applicant before the Court;
22. Moreover, the Registrar points out that the Applicant requested additional time for the appointment of the duty counsel, but that his request was made after the expiry of the time limit of 4 May 2007 (see Annex 2);
23. On the other hand, the Registrar considers that the Applicant did not take all of the appropriate measures to communicate his wishes regarding the appointment of duty counsel and that he had chosen, as he himself acknowledges, to focus his efforts on drafting his request pursuant to regulation 83(3) of the *Regulations of the Court* filed on 3 May 2007 – even though this was not subject to any time limit – and on dealing with a family visit;³⁰

³⁰ Applicant's Request to the Presidency, dated 7 May 2007, ICC-01/04-01/06-887, para. 26.

24. From all the foregoing, the Registrar reiterates that he has taken all the appropriate measures to enable the Applicant to express his wishes regarding the appointment of duty counsel and that he acted in accordance with the texts of the Court in appointing the said duty counsel in the absence of the wishes of the Applicant. As a result, the request of the Applicant must be denied on this point.

D. On the measures taken by the Registrar to ensure that duty counsel are available and qualified and that there are no conflicts of interest

25. The Applicant alleges, on the one hand, that “the Registry has not been diligent in carrying out its duties. This lack of diligence is obvious in the fact that the Registry has failed to take into account the criteria set out in regulation 73(2)”³¹ and, on the other hand, that he challenges the appointment of the duty counsel made by the Registrar because they fail to meet the requisite criteria;³²

26. The Registrar wishes to emphasise that prior to the appointment of duty counsel, he ensured that they met the conditions stipulated in the texts of the Court and, as a result, submits that the allegations made by the Applicant do not reflect what happened and are unfounded;

1. On the availability of duty counsel

27. The Registrar is aware of the content of regulation 73(1) of the *Regulations of the Court* which states that: “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” and points out that this provision is difficult to implement insofar as counsel on the list also appear before other national or supranational courts

³¹ *Idem*, para. 28.

³² Applicant’s Request to the Presidency, dated 10 May 2007, ICC-01/04-01/06-893.

and that, as a result, their work schedule is beyond their control. However, the Registrar is of the opinion that the spirit of the regulation quoted above is to ensure that when the time comes, those persons involved in proceedings before the Court will be represented by duty counsel who are available and fulfil the necessary criteria;

28. In this regard, the Registrar notes that further to the decisions of the Appeals Chamber (3 April 2007) and of Pre-Trial Chamber I (19 April 2007), he took the necessary steps to ensure that counsel on the List are available to represent the Applicant before the Court, contrary to the allegation of the Applicant that "Mr Altit does not seem to be fully available and focused on preparing a response to the application by the Prosecutor".³³ The Registrar refers in this regard to his correspondence, whereby he consulted the counsel on their availability, and the relevant responses, including Mr Altit's declaration as to his availability (Annex 6);

2. *On the competence of the duty counsel*

29. The Registrar recalls that the two duty counsel he appointed by his decisions of 4 May 2007 to represent the Applicant before the Court are included in the List, which means that they meet the criteria under rule 22(1) of the *Rules of Procedure and Evidence* and regulation 67 of the *Regulations of the Court* and that they have stated that they are available and agree to represent the Applicant as duty counsel;
30. In this regard, the Registrar points out that the files of Ms Mongo and Mr Altit attest that they both have excellent knowledge of French, solid qualifications in English and proven experience of international criminal justice. They have confirmed in writing the information in their files, and have also stated that

³³ Applicant's Request to the Presidency, dated 10 May 2007, ICC-01/04-01/06-893, p. 2.

their knowledge of English would allow them to carry out the tasks for which they are appointed. In this regard, the Registrar refers to their correspondence and statements in Annex 1;

31. In addition to the measures he undertook to appoint duty counsel for this case, the Registrar points out that the onus is also on counsel to ensure that the statement regarding his or her skills, including linguistic qualifications, is true,³⁴ pursuant to articles 24(3) et 31 of the *Code of Professional Conduct for counsel* and that, according to case law, an assigned counsel is presumed to be competent and such presumption can only be rebutted by evidence to the contrary. From this point of view, it is settled that a person who challenges the competence of the counsel must demonstrate "gross incompetence" on the part of the counsel.³⁵

3. *On conflicts of interest*

32. The Registrar refers to his observations in paragraph 14 above in this regard.

4. *On the free choice of counsel*

33. The inherent right of the accused to be represented by counsel in criminal proceedings is a fundamental and well-established principle of justice which is enshrined in national law and international legal instruments, including the texts the governing International Criminal Court;³⁶

³⁴ See the decision of Pre-Trial Chamber II, Case: ICC-02/04-01-5-211 entitled "*Décision on the 'Requête de la Défense en extension de délai afin de répondre aux 'Observations de la Défense sur les demandes de participation à la procédure a/0010/06, a/0064/06 à a/0070/06, a/0070/06, a/0081/06 à a/0104/06 et a/0111/06 à a/0127/06'*" of 23 February 2007.

³⁵ See *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Appeal Judgement, ICTY, 9 May 2007, para. 23; ICTY Appeals Chamber, *Prosecutor v. Dusko Tadić*, "*Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence*" (15 October 1998), para. 49.

³⁶ See, in particular, article 67(1)(d) of the Statute of the Court, article 5 of the *Directive on assignment of Defence Counsel* of the ICTY (Directive No. 1/94, 28 July 1994), article 21(4) of the Statute of the ICTY,

34. In line with his responsibilities pursuant to the texts of the Court, the Registrar has to respect the right to freely choose counsel, which is afforded to any person involved in proceedings before the Court;³⁷
35. However, case law recognises that the right of the accused to choose his or her counsel is not absolute,³⁸ and that this right is unarguably limited when the legal representation of the person concerned is paid for under the legal assistance scheme.³⁹ In this regard, the Registrar recalls that in *Prosecutor v. Blagojević et al.*, the Trial Chamber of the ICTY – in line with the decision of the ICTR Appeals Chamber in *The Prosecutor v. Akayesu* – stated that:

In principle, the right to free legal assistance of counsel does not confer the right to counsel of one's own choosing. The right to choose counsel applies only to those Accused who can financially bear the costs of counsel. [...]

article 2 of the *Directive on assignment of Defence Counsel* of the ICTR (9 January 1996), article 14(3)(d) of the *International Covenant on Civil and Political Rights* and article 6(3)(C) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

³⁷ See, for example, article 67(1) of the Statute and rule 21(2) and (3) of the *Rules of Procedure and Evidence*.

³⁸ This concept is confirmed by the Applicant in para. 38 of his request of 7 May 2007.

³⁹ See e.g. *Prosecutor v. Hadžihasanović et al.*, *supra*, footnote 24. See also *Prosecutor v. Knežević*, Case No. IT-95-4-PT/IT-95-8/1-PT, 6 September 2002, which was rendered several months after the decision in *Hadžihasanović et al.*, *supra*, and the Trial Chamber merely echoed the precedent established in the latter decision. In the *Knežević* case, the Trial Chamber was reviewing a decision by the Registrar in which the request to assign the counsel selected by the accused was rejected on the basis of a conflict of interest, and instead another lawyer was assigned to the case by the Registrar. The accused in turn argued that the decision infringed upon his right to select a counsel of choice as guaranteed under Art. 21(4)(d) of the Statute of the Tribunal. The Trial Chamber delivered a ruling in support of the decision of the Registrar by stating that: "(...) the right of the indigent accused to counsel of his own choosing is not without limits; that the decision for the assignment of counsel rests with the Registrar having to take into consideration the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request." The *Knežević* decision relied heavily on similar pronouncements from the European Court in *Croissant v. Germany*, No. 62/1991/314/385 (28 August 2003), and jurisprudence from the International Criminal Tribunal for Rwanda in *The Prosecutor v. Gerard Ntakirutimana*, Case No. ICTR-96-10, *Decision on the Motions of the Accused for Replacement of Assigned Counsel*, 11 June 1997 at p. 2. See also *Prosecutor v. Delić*, Case No. IT-04-83-PT, *Decision of the Trial Chamber on Motion Seeking Review of the Registry Decision Stating that Mr Stephane Bourgon cannot be assigned to represent Rasim Delić*, 10 May 2005. *Kambanda v. The Prosecutor*, ICTR-97-23 A, 19 September 2000; *Aston Little v. Jamaica*, communication No. 283/1988; *Wright & Harvey v. Jamaica*, communication No. 459/1991 UN Doc. CCPR/C/55/D/459/1991 (1995); *Kenneth Teesdale v. Trinidad and Tobago*, 677/1996; *F. v. Swiss Confederation* (Decision of 9 May 1989, Application No. 12152/86); *Faretta v. California*, 422 U.S. 806 (1975), No. 73-5772., FN 8: "An indigent criminal defendant has no right to appointed counsel of his choice".

To be sure, in practice an indigent Accused may choose from among counsel included in the list and the Registrar generally takes into consideration the choice of the Accused. Nevertheless, in the opinion of the Appeals Chamber the Registrar is not necessarily bound by the wishes of an indigent Accused. He has wide discretion, which he exercises in the interests of justice.⁴⁰

36. Similarly, the Trial Chamber of the ICTY held in *Prosecutor v. Blagojević et al.*⁴¹ that an indigent accused did not have an absolute right to choose his or her counsel. This right is limited and is at the Registrar's discretion, who may override the wishes of an accused person if there is sufficient and relevant reason to do so and that his or her decision is required in order to guarantee the interests of justice;⁴²
37. On the other hand, regarding the possibility for a person involved in legal proceedings to express his or her wishes regarding the appointment of his or her counsel, case law states that: "the Registrar may take into account an accused's preferences [...] but it is within the Registrar's discretion to override that preference if he considers that it is in the interests of justice to do so"⁴³ owing to the need to prevent conflicts of interest and other parameters which may have undesirable effects on the proceedings;

⁴⁰ *Prosecutor v. Blagojević et al*, Case No. IT-02-60-PT, *Decision on Oral Motion to Replace Co-counsel*, 9 December 2002. This ruling relied on the judicial reasoning of the ICTR Appeals Chamber in *Akayesu v. The Prosecutor*, ICTR-96-4-A, 1 June 2001, where it is stated at paras 61-62., in part, "in principle, the right to free legal assistance of counsel does not confer the right to counsel of one's own choosing. The right to choose counsel applies only to those accused who can financially bear the costs of counsel [...]." See, similarly, article 67(1)(d) of the *Rome Statute*, as well as article 14(3)(d) of the ICCPR where a lawyer can be appointed for a defendant **where the interests of justice so requires**.

⁴¹ Case No. IT-02-60-T, *Decision of the Trial Chamber on Independent Counsel For Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel*, 3 July 2003 ("*Blagojević Chamber Decision*").

⁴² *Prosecutor v. Blagojević et al*, Case No. IT-02-60-T, *Decision of the Trial Chamber on Independent Counsel for Vidoje Blagojević's motion to instruct the Registrar to appoint new lead and co-counsel*, 3 July 2003, at para. 117, per J. Liu Daqun presiding. This ruling relied on the judicial reasoning of the ICTR Appeals Chamber in *Akayesu v. The Prosecutor*, ICTR-96-4-A, 1 June 2001, where it is stated at paras. 61-62., in part, "in principle, the right to free legal assistance of counsel does not confer the right to counsel of one's own choosing. The right to choose counsel applies only to those accused who can financially bear the costs of counsel [...]."

⁴³ *Prosecutor v. Blagojević*, Case No. IT-02-60-AR73.4, *Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his defence Team*, 7 November 2003, para. 22.

38. In light of all the foregoing and acknowledging that the free choice of counsel is a fundamental principle of trial in the Court's system, the Registrar recalls that:

- the Applications of the Applicant relate to the appointment of duty counsel and not to the ongoing process to appoint counsel to handle the case on the merits;
- the appointment of a duty counsel is a matter that falls to the Registrar who, amongst other factors, takes into account the wishes of the person concerned pursuant to regulation 73(2) of the *Regulations of the Court*;
- he has offered the Applicant the possibility to express his wishes and the latter has not indicated a preference in respect of the names of the persons he would like the Registry to appoint within the time limited, and
- finally, in view of the Applicant's inaction, he has appointed duty counsel in the interests of the accused and in the interests of justice, pursuant to the decisions of the Chambers.

ON THE CONSEQUENCES OF REVIEWING THE REGISTRAR'S DECISIONS TO APPOINT DUTY COUNSEL

39. The Registrar notes that his decisions of 4 May 2007 appointing the duty counsels have already begun to bear fruit in the proceedings before the Court,⁴⁴ and that a decision calling them into question, as the Applicant

⁴⁴ The Registrar points out that the duty counsel have begun their respective missions and that important decisions involving them have been taken by the Appeals Chamber, Pre-Trial Chamber I and by the Registrar. See the decisions of the Appeals Chamber (footnote 21, *supra*) and Pre-Trial Chamber I (footnote 23, *supra*), and the decision of the Registrar of 14 May 2007 on the request for additional means filed by the Applicant on 3 May 2007.

requests, would seriously undermine the proper conduct of the proceedings and the interests of justice;

40. As clearly demonstrated above, the Registrar maintains that his decisions comply with the texts of the Court and are in the interests of justice, and that he acted within his jurisdiction keeping in mind fairness in his decisions, based solely on the relevant facts.⁴⁵

FOR THESE REASONS, respectfully requests the Presidency,

I. AS ITS MAIN SUBMISSION, to declare the Applications of the Applicant inadmissible;

II. IN THE ALTERNATIVE,

1. **TO REJECT** the Applications of the Applicant in their entirety on their merits, and,
2. **TO DIRECT** the Applicant to comply with the texts and procedures before the Court.

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

[signed] _____
Esteban Peralta-Losilla
On behalf of the Registrar

Dated this 16 May 2007

At The Hague

⁴⁵ See footnote 25.