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

Date: **11 June 2019**

THE PRESIDENCY

Before: Judge Chile Eboe-Osuji, President
Judge Robert Fremr, First Vice-President
Judge Howard Morrison

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. THOMAS LUBANGA DYILO***

Public

Decision on ‘Requête de la Défense aux fins de solliciter l’autorisation de déposer une réplique à la Réponse de M. le Juge Marc Perrin de Brichambaut notifiée le 20 mai 2019’, dated 23 May 2019

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

The Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabilie
Ms Jean-Marie Biju-Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Paul Kabongo Tshibang

Legal Representatives of Applicants

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms Paolina Massida
Ms Sarah Pellet

**The Office of Public Counsel for the
Defence**

Trust Fund for Victims

States' Representatives

REGISTRY

Registrar

Mr Peter Lewis

Other

Trial Chamber II

The *ad hoc* Presidency of the International Criminal Court ('Court' or 'ICC'), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, has before it the '*Requête de la Défense aux fins de solliciter l'autorisation de déposer une réplique à la Réponse de M. le Juge Marc Perrin de Brichambaut notifiée le 20 mai 2019*' filed on 23 May 2019 ('Leave to Reply Request') by the Defence of Mr Lubanga ('Defence') requesting the *ad hoc* Presidency to grant it leave to reply to Judge Perrin de Brichambaut's written observations to the Defence's request for disqualification dated 10 April 2019.

I. PROCEDURAL HISTORY

1. On 3 March 2015, the Appeals Chamber issued an amended order for reparation referring the case of *The Prosecutor v. Thomas Lubanga Dyilo* to a newly appointed trial chamber.¹ The Presidency referred the case to Trial Chamber II² which designated Judge Perrin de Brichambaut as Presiding Judge.³
2. On 17 May 2017, Judge Perrin de Brichambaut gave a presentation at the Beijing University ('17 May 2017 Presentation').⁴
3. On 10 April 2019, the Defence filed its '*Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut*' requesting the Presidency to order the disqualification of Judge Perrin de Brichambaut ('Disqualification Request').⁵ The transcript of the 17 May 2017 Presentation was annexed to the Disqualification Request.⁶
4. On 16 April 2019, Judge Perrin de Brichambaut requested to be excused from exercising his Presidency functions in respect of the Disqualification Request,⁷ which was granted by the *ad hoc* Presidency on 14 May 2019.⁸

¹ Order for reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA

² Decision referring the case of *The Prosecutor v. Thomas Lubanga Dyilo* to Trial Chamber II, 17 March 2015, ICC-01/04-01/06-3131

³ Ordonnance notifiant l'élection du juge président, 24 March 2015, ICC-01/04-01/06-3132

⁴ Annex 1 to *Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut*, 10 April 2019, ICC-01/04-01/06-3451-Anx1

⁵ *Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut*, 10 April 2019, ICC-01/04-01/06-3451-Conf.

⁶ Annex 1 to *Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut*, 10 April 2019, ICC-01/04-01/06-3451-Anx1

⁷ Annex 1 to Notification concerning the '*Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut*' dated 10 April 2019, 20 May 2019, ICC-01/04-01/06-3454-Anx1

⁸ Annex 2 to Notification concerning the '*Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut*' dated 10 April 2019, 20 May 2019, ICC-01/04-01/06-3454-Anx2

5. On 23 April 2019, the Office of the Public Counsel for Victims and the Legal Representatives of Victims V01 filed responses to the Disqualification Request.⁹
6. On 16 May 2019, Judge Perrin de Brichambaut filed written observations to the Disqualification Request (the ‘Observations’).¹⁰
7. On 20 May 2019, the *ad hoc* Presidency notified to the parties, *inter alia*, Judge Perrin de Brichambaut’s written observations. The *ad hoc* Presidency also notified that a plenary of judges would be convened on 17 June 2019 to address the Disqualification Request¹¹
8. On 23 May 2019, the Defence filed the Leave to Reply Request, requesting leave to reply to Judge Perrin de Brichambaut’s Observations.¹²

II. MERITS

9. The Presidency, in consultation with the plenary of judges, notes that the Leave to Reply Request seeks to reply to the Observations, pursuant to regulation 24(5) of the Regulations of the Court (‘Regulations’), on the basis that :
 - (i) it is unclear whether the disqualification request should be assessed on the basis of the written transcript of the 17 May 2017 Presentation or the audio-visual recording thereof (which the Defence seeks permission to provide).¹³ This question appears connected to the second question raised in the Defence request, namely that the audio-visual record may provide additional clarity as to whether Judge Perrin de Brichambaut’s statement about the number of victims is posed as a question or not;¹⁴ and

⁹ OPCV response to the Defence ‘Requête urgente de la Défense aux fins de récusation de M le Juge Marc Perrin de Brichambaut’, 23 April 2019, ICC-01/04-01/06-3452, Réponse des Représentants légaux des victimes V01 à ‘la Requête de la Défense aux fins de récusation de M le Juge Marc Perrin de Brichambaut’ déposée le 10 avril 2019, 23 April 2019, ICC-01/04-01/06-3453-Conf

¹⁰ Annex 3 to Notification concerning the ‘Requête urgente de la Défense aux fins de récusation de M le Juge Marc Perrin de Brichambaut’ dated 10 April 2019, 20 May 2019, ICC-01/04-01/06-3454-Anx3

¹¹ Notification concerning the ‘Requête urgente de la Défense aux fins de récusation de M le Juge Marc Perrin de Brichambaut’ dated 10 April 2019, 20 May 2019, ICC-01/04-01/06-3454

¹² Requête de la Défense aux fins de solliciter l’autorisation de déposer une réplique à la Réponse de M le Juge Marc Perrin de Brichambaut notifiée le 20 mai 2019, 23 May 2019, ICC-01/04-01/06-3455

¹³ Application, paras 6-8

¹⁴ Application, paras 9-13

(ii) the Observations erroneously interpret the Defence's arguments concerning the methodology adopted by Trial Chamber II to determine the number of victims.¹⁵

10. The *ad hoc* Presidency, in consultation with the plenary of judges, considers that regulation 24 of the Regulations is ill-suited for application to the exceptional procedure governing a request for the disqualification of a judge. The procedural requirements of a disqualification request are clearly established by article 41(2) of the Rome Statute and rule 34(2) of the Rules of Procedure and Evidence. In this regard, the Observations are submitted pursuant to these provisions and are not simply a response within the meaning of regulation 24 of the Regulations, nor does a Judge the subject of a disqualification request become a "participant" in the case or proceedings within the meaning of regulation 24 by filing such Observations.

11. The *ad hoc* Presidency, in consultation with the plenary of judges, recalls the plenary of judges' previous finding that:

the 'equality of arms' perspective, entailing an application, response and reply, which exists between parties in litigation, is not an automatic consideration between a party and a judge trying a case¹⁶

12. Nonetheless, the *ad hoc* Presidency, in consultation with the plenary of judges, considers that the first and second questions raised by the Defence essentially concern the question of whether the plenary should consider the transcript of the 17 May 2017 Presentation or the audio-visual record. The former has been placed before the *ad hoc* Presidency, whereas the latter has not. The *ad hoc* Presidency, in consultation with the plenary of judges, notes that, in order to have a complete evidential record before the plenary of judges, it may be useful to receive a copy of the audio-visual recording of the 17 May 2017 Presentation.¹⁷ There is no further need for submissions on this matter – the plenary itself is entirely capable of assessing the evidence placed before it and giving it weight as it considers necessary. In respect of the Defence request to make further submissions as the Defence contends that Judge Perrin de Brichambaut has erroneously characterised the

¹⁵ Application, paras 14-16


¹⁶ *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu & Narcisse Arido*, Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 20 June 2014, ICC-01/05-01/13-511-Anx, para. 12.

¹⁷ A minority of six judges were unable to concur with this finding. They considered, *inter alia*, that the receipt of such audio-visual record would not be necessary for the determination of the Disqualification Request and/or may be inconsistent with the nature of disqualification procedures before plenary.

Defence's arguments, the *ad hoc* Presidency, in consultation with the plenary of judges, considers that the plenary of judges is entirely capable of assessing such matters without the need for further submissions.

The *ad hoc* Presidency, in consultation with the plenary of judges, *hereby* authorises the Defence to communicate a copy of the audio-visual recording to it.

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



Judge Robert Fremr
First Vice-President

Dated this 11 June 2019

At The Hague, The Netherlands