Cour
Pénale
Internationale

International
Criminal
Court

Original : **English**

N° : **ICC-01/12-01/18**
Date : **24 June 2019**

THE PRESIDENCY

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

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD

Public

Observations by Judge Perrin de Brichambaut on the "Request for the disqualification of Judge Marc Perrin de Brichambaut"

Source: **Judge Marc Perrin de Brichambaut**

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

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I. INTRODUCTION

1. The present observations are made not only to demonstrate how the claims contained in the request fall far short of meeting the required standard for disqualification of a judge, but also to set straight the inaccurate and presumptuous assertions contained therein regarding Judge Perrin de Brichambaut's engagements outside of the Court. As such, these observations will clarify the nature of the activities listed in the request as well as his exact involvement with them.

II. OBJECT OF THE RESPONSE

2. On 14 June 2019 the Defence for Mr Al Hassan requested the disqualification of Judge Marc Perrin de Brichambaut from sitting on the *Al Hassan* case. The current observations are directed at issues raised in the disqualification application.

III. APPLICABLE LAW

3. Article 40 of the Statute contains the governing rules regarding the independence of the judiciary. The request focuses on subparagraphs (2) and (3) in particular:

> 2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
> 3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. With respect to challenges to the independence of a judge, the relevant standard, echoed in both article 40(2) of the Statute and article 3(2) of the Code of Judicial Ethics, is whether the impugned activity "is *likely to interfere* with their judicial functions or to affect confidence in their independence" (emphasis added). The inquiry here is not whether it is at all possible that the activity could interfere with judicial functions or could affect confidence, but whether these consequences are *likely* to occur. It is a high bar for the requesting party to meet in lodging a disqualification charge on this ground.

5. Article 41(2)(a) of the Statute sets out the standard used when evaluating impartiality challenges: "A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground". Article 41 of the Statute and rule 34 of the Rules of Procedure and Evidence further elaborate on this standard by providing examples of possible grounds for disqualification.

6. In determining whether the impartiality of the judge in question might reasonably be doubted on any ground, the relevant inquiry is "whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge".[1]

7. The analysis, however, is not confined only to the question of whether a reasonable observer *could* apprehend bias. It also requires asking whether such apprehension would be *objectively* reasonable.[2] In *Lubanga* Decision I, the plenary of judges elaborated on the characteristics of the objective observer. These attributes included:

- independence, *i.e.*, the perspective of the reasonable observer must not be confused with that of the applicant for disqualification;[3]
- fair-mindedness, the reservation of judgment until she has taken into account the entire context of the case[4] as well as examined and fully understood all sides of the argument;[5]
- not being unduly sensitive or suspicious of either side;[6] and
- cognisant of the nature of a judge's profession, which includes an obligation to administer justice and the ability to dissociate his judicial reasoning from his personal beliefs.[7]

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[1] Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3040-Anx, 11 June 2013, para. 9 [hereinafter *Lubanga* Decision I] (citing Decision of the plenary of judges on the "Defence Request for the Disqualification of a Judge of 2 April 2012", ICC-02/05-03/09-344-Anx, 5 June 2012, para. 11 [hereinafter *Banda* Decision]); Decision of the Plenary of Judges on the Defence Request for the Disqualification of Judge Kuniko Ozaki from the case of *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2355-AnxI-Red, 20 June 2019, para. 32 [hereinafter *Ntaganda* Decision].

[2] *Lubanga* Decision I, para. 10; *Banda* Decision, para. 11.

[3] *Ntaganda* Decision, para. 32; *Lubanga* Decision I, para. 35.

[4] *R. v. S. (R.D.)*, (Canada) 1997 3 S.C.R. 484, para. 32.

[5] *Helow v. Secretary of State for the Home Department and anor.*, (Scotland) [2008] UKHL 62, para. 2.

[6] *Helow v. Secretary of State for the Home Department and anor.*, (Scotland) [2008] UKHL 62, para. 2.

8. Moreover, "there is a strong presumption of impartiality [of judges] that is not easily rebutted", which exists to safeguard the interest of the sound administration of justice[8]:

> The disqualification of a judge is not a step to be undertaken lightly, and a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.[9]

9. The majority in the *Lubanga* Decision on the Request for Disqualification of Judge Fernández emphasized that each judge is charged with "a responsibility to consider whether his or her impartiality might reasonably be doubted".[10] There exists, therefore, a presumption that each judge of the Court undertakes this responsibility and accordingly reflects on whether his or her prior work might reasonably raise such a doubt if involved in the case.[11]

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[7] *Lubanga* Decision I, para. 36 (citing *President of the Republic of South Africa v. South Africa Rugby Football Union* 1999 (7) BCLR 725 (CC) at 753). In *South Africa Rugby Football Union*, the Constitutional Court of South Africa considered:

> The reasonableness of the apprehension must be assessed in the light of oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.

[8] Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3154-Anx1, 3 August 2015, para. 29 [hereinafter *Lubanga* Decision II]; *see also Ntaganda* Decision, para. 31; 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*, ICC-01/05-01/12-511-Anx, 20 June 2014, para. 18; *Lubanga* Decision I, para. 10; *Banda* Decision, para. 14.

[9] *Lubanga* Decision I, para. 11 (citing *Banda* Decision, para. 14); *see also* Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, ICC-02/05-01/09-76-Anx2, 19 March 2010, p. 6.

[10] *Lubanga* Decision II, ICC-01/04-01/06-3154-Anx1, 3 August 2015, para. 35.

[11] *Lubanga* Decision II, para. 35.

10. In performing this analysis there is a "need to examine each case on its own facts from the perspective of the reasonable observer".[12] The reasonable apprehension of bias test, therefore, is highly fact-specific.[13]

11. The plenary in *Lubanga* Decision I also articulated how to evaluate challenges pursuant to article 40 of the Statute based on a judge's membership of a group. The analysis must first examine how direct the judge's involvement is in the organization.[14] This analysis requires a thorough examination of the factual relationship of the concerned person with the entity rather than the mere consideration of the formal title used to describe the connection.[15] Only this, in turn, will inform whether the judge's personal interest or participation in the group could reasonably be said to affect the outcome of the case in a manner beyond a *de minimis* threshold.[16]

12. The burden of demonstrating an objectively reasonable appearance of bias is on the party requesting disqualification.[17]

IV. FACTUAL SUBMISSIONS

13. The factual submissions that underpin the allegations contained in the request are riddled with serious errors and do not reflect the full context. They therefore require to be clarified in order to demonstrate their spurious character.

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[12] *Lubanga* Decision I, para. 48; *Ntaganda* Decision, para. 36.
[13] *Lubanga* Decision I, para. 48 (referencing *Wewaykum Indian Band v. Canada*, 2003 SCC 45, para. 77).
[14] *Lubanga* Decision I, para. 44.
[15] *Ntaganda* Decision, para. 36 (stating that in disqualification and excusal requests, the Court "has not relied on general categories or assumptions as themselves supporting disqualification or excusal requests"); *Lubanga* Decision I, para. 44.
[16] *Lubanga* Decision I, paras 45-46. The plenary of judges in the *Lubanga* Decision I recognized a growing acceptance of a *de minimis* exception to the automatic disqualification of a judge. The plenary referenced the reasoning and jurisprudence relied upon by the Court of Appeal (Civil Division) of England and Wales: "While the older cases speak of disqualification if the judge has an interest in the outcome of the proceedings 'however small', there has in more recent authorities been acceptance of a *de minimis* exception: *BTR Industries South Africa (Pty) Ltd v. Metal and Allied Workers' Union* 1992 (3) SA 673 at 694; R . *v. Inner West London Coroner, ex parte Dallaglio* [1994] 4 All E.R. 139 at 162; *Auckland Casino Ltd. V. Casino Control Authority* [1995] 1 NZLR 142 at 148. This seems to us a proper exception provided the potential effect of any decision one way or the other; but it is important, bearing in mind the rationale of the rule, that any doubt should be resolved in favour of disqualification."
[17] *Ntaganda* Decision, para. 33.

A. *Le Club des Vingt*

14. *Le Club des Vingt* is an informal group of former officials, diplomats and academics dedicated to discussion and debate of topics in international relations. The members are well past retirement age, with no current political affiliation, and they come from different backgrounds both ideologically and personally. The principle activity is to conduct monthly meetings at which one of the participants presents a topic of interest in the field of international relations for academic discussion amongst the group. The opinions expressed usually vary substantially, which are then reflected in a short summary prepared by the *Club* president. This summary is made available to interested websites as a contribution to the public debate.

15. *Le Club des Vingt* is neither a political group nor a lobby. The summaries thus do not represent any official policy of French authorities or the views of individual members. Rather, their purpose is to provide a sense of the issues at stake on a given topic and to stimulate critical reflection among interested readers. Participation in the *Club* only represents a willingness to take part in a debate—not adherence to a particular viewpoint.

B. *Forum du Futur*

16. The *Forum du Futur* is a small NGO whose main activity is to organise public debates on topics in international relations. It usually does so in cooperation with other similarly motivated NGOs in different fields, as mentioned in the request.[18] The topics addressed by these conferences are diverse.[19] The exchanges that take place in each debate involve academics and professionals speaking in a personal capacity. They are open, they welcome—even encourage—differing views, and their contents are made available to the interested public.

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[18] Request for the disqualification of Judge Marc Perrin de Brichambaut, ICC-01/12-01/18, 14 June 2019, para. 12 [hereinafter Disqualification Request].

[19] Disqualification Request, para. 11 (listing topics such as current societal upheavals; demographic changes; economic and societal issues; competition for limited resources: water, mines, energy; technological developments; the spread of revolutionary or radical ideologies, and the development of armed conflict).

17. The board of the *Forum du Futur* meets once per year and is composed mainly of retired diplomats and international relations experts. The role of the board is to ensure the proper management of the organisation, approve its accounts and be informed of the projects promoted by a one-man secretariat. The members of the board occasionally participate in the debates as moderators according to their expertise. Moderators are selected to facilitate discussion and not for the purpose of expressing their personal viewpoints on the topic.

C. *Conseil d'Etat*

18. The *Conseil d'Etat* serves as the Supreme Court for judicial review in France as well as a legal advisor to the national government. Once the members of the *Conseil d'Etat* retire from the group, they are allowed to use the title of *Conseiller d'Etat Honoraire*. This title is only an honorific: it indicates that the individual has no more activity in the institution while recognising their prior service.[20] Judge Perrin de Brichambaut retired from the *Conseil d'Etat* in March 2015 when he was sworn in at the Court.

19. The *Conseil d'Etat* occasionally organises public debates on its premises on a given theme. One such session took place in May 2016 and was dedicated to the Foreign and Security Policy of the European Union. Due to his background in some of these topics, Judge Perrin de Brichambaut was asked to serve as a moderator and did so in an entirely neutral way, taking into account the different opinions presented. The excerpt from his intervention quoted in the request reflects only verifiable and publicly known facts regarding the involvement of the EU in Mali.

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[20] The *Centre National de Ressources Textuelle et Lexicales (CNRTL)* states that when speaking about an individual with involvement with one of the State's governing branches the word *honoraire* refers to "qui, *après avoir cessé d'exercer* une fonction, une charge, un emploi, en conserve le titre et les prérogatives honorifiques" (emphasis added), *available at* https://www.cnrtl.fr/definition/honoraire.

V. ANALYSIS

A. The impugned publications and moderating activities placed in proper context would not lead a fair-minded and informed observer to reasonably apprehend bias on the part of the Judge.

20. Recalling the applicable legal standard above, a request for disqualification must be analysed from the perspective of the reasonable observer. The reasonable observer must evaluate the circumstances in a manner independent of the perspective of the applicant for disqualification—here, the Defence for Mr Al Hassan. This observer must also be well-informed and arrive at a conclusion only after examining the entire context of the actions or comments at issue.

21. In *Lubanga* Decision I, at issue were Judge Song's comments regarding the landmark nature of the decision in the case on the merits. There, the applicant for disqualification contended that his comments would be perceived by others as unreservedly endorsing judgments rendered by the Chamber, including on essential issues that the Judge would face in the case on appeal: the appellant's guilt or innocence, the fitness of sentence, and the reparations awarded to victims.[21] The plenary held that the reasonable observer with the proper context, *i.e.*, knowing that these comments were intended for a general audience with the purpose to recall the Court's larger role in protecting fundamental human rights, and aware that he did not go into any details of the case nor into the pending legal or factual issues,[22] would not have considered these statements as commenting on the merits of the appeal.[23]

22. The pieces from *Le Club des Vingt* at issue similarly cannot be considered to be comments on evidence or issues in the *Al Hassan* case. This is first evidenced by the purpose of the group. The central activity of *Le Club des Vingt* is purely academic: the group convenes monthly to debate a topic of interest in the field of international relations. The resulting published work is a summary encompassing the different views expressed by its members with the purpose of contributing to public debate.

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[21] *Lubanga* Decision I, para. 17.
[22] *Lubanga* Decision I, paras 18-19.
[23] *Lubanga* Decision I, paras 39-40.

These summaries, however, do not represent any official policy of either the French authorities or the views of the individual members.

23. Furthermore, neither the monthly debates nor the summaries have involved a discussion of either the evidence or the factual or legal submissions in the *Al Hassan* case, or any case before the Court, for that matter. The piece regarding Africa of 30 January 2019 is a broad overview of current events and challenges that exist and complicate efforts towards growth and development on the continent. It does not address any political or security conflicts. In addition, the word Mali is nowhere present in the text. The piece of 1 November 2018 discussing the Maghreb is similarly a broad reflection on France's future relationships with countries in this region. It describes existing challenges in a factual manner that does not implicate either the factual or legal issues at stake in the *Al Hassan* case.

24. Moreover, these pieces are devoid of any reference to official policy decisions of France, and therefore cannot be assumed to denote an affiliation with either France's policies or preferences regarding security and political developments in Africa, much less Mali or Timbuktu. While the request attempts to read conclusions regarding terrorism into the article's use of the words *salafist* and *armé*, in reality these words are no more than references to the commonly-known fact that the group adheres to Salafism, a strict textualist sect of Islam, and their past use of firearms. This word choice was in no way intended to implicate the *Al Hassan* proceedings.

25. When placed into context, Judge Perrin de Brichambaut's involvement with the *Forum du Futur* is similarly detached from any of his roles or responsibilities as a Judge.

26. The purpose of the *Forum du Futur* is also academic. Its principle activity is to organise public debates on topics of international relations. When it chooses to invite outside speakers or organisations to participate, it does so with the goal of involving people motivated on the topic of discussion who will help diversify the stances expressed during the course of debate. The views expressed by the speakers invited, however, cannot be ascribed to the individual members of the *Forum*. The goal of the

Forum is simply to advance scholarly debate on topics in international relations, and not to advocate for a particular viewpoint.

27. Regarding the conferences referenced in the request,[24] they can amount to no more than what the Defence describes them as: conferences or debates. The speakers were invited to present their views and research for discussion and critique, not to demonstrate endorsement of them. Like a newspaper publishes opinion pieces submitted by authors of diverse backgrounds and ideologies, the *Forum* posts pieces displaying the views of a multitude of academics and experts to enrich public knowledge. Additionally, any mention Mali made by these speakers had no connection with Mr Al Hassan's case before the Court. The request seeks to conflate statements made by invitees to debates in an institution where Judge Perrin de Brichambaut has had oversight responsibility with his own statements of personal conviction. Needless to say, participation on the board of any organisation dedicated to public debate and academic discussion does not imply adherence to any of the opinions expressed within its domain.

28. With respect to the request's reference to Judge Perrin de Brichambaut's information page on the *Forum*'s site, it lists not only his current position at the Court, but also his past experiences as a high official, a diplomat, member of the *Conseil d'Etat* and secretary general of the Organisation for Security and Cooperation in Europe (OSCE).[25] Quite obviously, his position as a Judge of the Court is merely mentioned to describe his professional experience and does not link any political standpoint to his capacity as Judge.

29. Judge Perrin de Brichambaut has been asked to moderate debates hosted by the *Forum* and by the *Conseil d'Etat*, such as the ones referenced in the request[26], because his background in the areas at issue would better facilitate discussion than an individual uninformed on the topics. This task was performed in an entirely neutral fashion, accounting for the different opinions presented and not endorsing

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[24] *See* Disqualification Request, paras 13-15.
[25] Disqualification Request, para. 37, n. 50.
[26] Disqualification Request, para. 12, n. 14, para. 19, n. 33.

one or the other view. Even where he was asked questions related to the European Union's military operations, his answers noted the EU's general goal of stabilisation and development in Mali and in the Central African Republic. He never expressed nor implied that these observations were linked to Mr Al Hassan's case. It is a stretch to conclude that such mentioning of an organisation's goal to promote stability and development in the region would call Judge Perrin de Brichambaut's impartiality into question.

30. Upon examining the neutral and academic nature of the impugned statements, it is clear that these past publications are not likely to interfere with Judge Perrin de Brichambaut's judicial functions or to affect confidence in his independence. Therefore, these writings do not culminate in a concern for his independence in the *Al Hassan* case.

31. Moreover, considering these factors, the Defence has taken the statements of the Judge out of context. The fair-minded and informed observer, cognizant of the entire content and context of the statements, would neither conclude that the comments addressed the merits of the case before the Pre-Trial Chamber nor that they related to any of the evidence or particular legal or factual issues to be decided. Rather, a reasonable observer would see this activity as developing the academic landscape on topics in international relations, but in a way that does not interfere with the roles and responsibilities of a Judge at the Court.

32. Taken in their proper context, none of the aforementioned activities would lead a fair-minded and informed observer to reasonably apprehend bias. As such, the Defence has not demonstrated that these activities were of such a nature to rebut the presumption of impartiality attributed to the judges of the Court.

B. Judge Perrin de Brichambaut's personal interest in the organisations in question is so small as to be incapable of affecting his decision in the confirmation of the charges proceedings.

33. To determine whether a judge's membership creates an appearance of bias, it must be determined whether the judge's personal interest is large enough to affect his decision-making in the case.

34. In *Lubanga* Decision I, the plenary considered Judge Song's involvement with UNICEF/Korea as nominally the president of the organisation. The applicant for disqualification argued that his position as President created a conflict of interest because UNICEF had tendered written submissions in the trial proceedings which formed part of the grounds of the pending appeal.[27] Ultimately, the plenary rejected the challenge because the judge's involvement did not go beyond the *de minimis* threshold. In arriving at this conclusion, the plenary noted that Judge Song had appointed another individual as Acting President of the organisation, and who would be in charge of running it and assisting the executive director. Consequently, although he nominally held the title of President, the individual he had appointed as Acting President held this position in fact. The plenary also considered that Judge Song had never received any remuneration nor had been involved in policy-making at the organisation. Moreover, UNICEF had never made any submissions before Judge Song in the appeals case.

35. Recalling the need to examine each case on its facts, the plenary concluded that Judge Song's personal interests in the case as a result of his involvement with UNICEF were so small as to be incapable of affecting his decision one way or the other.[28] Whatever the outcome of the case, the fair-minded and informed observer could not reasonably apprehend bias or a personal interest that was beyond the *de minimis* threshold.[29] The plenary concluded that a reasonable observer, aware of the full context of the Judge's involvement with UNICEF, including the limited nature of

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[27] *Lubanga* Decision I, para. 25.
[28] *Lubanga* Decision I, para. 46.
[29] *Lubanga* Decision I, para. 46.

the Judge's work with UNICEF/Korea, would not reasonably apprehend bias in the case on the merits.[30]

36. As part of *Le Club des Vingt*, Judge Perrin de Brichambaut's involvement is limited to a participant in debates. As such, the appearance of his name on the summary pieces serves to denote that he contributed to the discussion of topics at issue, and not to directly attribute any particular viewpoint to him. He does not benefit from any personal gain through his participation in *Le Club des Vingt* aside from scholarly enrichment.

37. As an administrator of the *Forum du Futur*, Judge Perrin de Brichambaut is only responsible for assuring the proper management of the organisation. This includes overseeing the organisations accounts and staying informed of the projects proposed by the *Forum*'s one-man secretariat.

38. The members of the board occasionally participate in the debates hosted by the *Forum* as moderators according to their expertise. The purpose of assigning moderators by expertise, however, is to ensure that discussions run smoothly, rather than them being run by someone with little knowledge in the topic of interest.

39. Judge Perrin de Brichambaut's title as an honorary member of the *Conseil d'Etat* also cannot raise any questions about his impartiality. He officially retired from the *Conseil d'Etat* in March 2015 when he took his oath of office at the Court. As it is common practise in several countries in both academic and judicial institutions, the honorary membership denotes that a person has had in the past an involvement with the *Conseil d'Etat*.[31] Once members of the *Conseil d'Etat* retire from the group, they are attributed the title of *Conseiller d'Etat Honoraire* as a form of acknowledgment of their prior service. Quite plainly, an honorary member is not and could not be directly involved in the *Conseil d'Etat* and does not receive personal benefit from the title other than the recognition of a past service in the institution.

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[30] *Lubanga* Decision I, para. 50.

[31] *See supra* note 20.

40. Moreover, the Defence's contentions regarding the role of the *Conseil d'Etat* in the French legal system reveal a poor understanding of the system in practice.[32] Suffice it to say, there exists a strict separation between the advisory role and the adjudication of administrative claims, which are attributed to distinct divisions. It is worth noting, as well, that similar institutions operate in other nations[33] and never has the relationship between any of these institutions been challenged by international judicial bodies.

41. Given that Judge Perrin de Brichambaut's involvement with these organisations has no direct effect on French politics or policies, it is clear his membership is not likely to interfere with his judicial functions or to affect confidence in his independence. Therefore, his association with *Le Club des Vingt*, *Le Forum de Future* and his title as an honorary *Conseil d'Etat* do not culminate in a concern for his independence in the *Al Hassan* case.

42. Upon examining the full context, it is clear that Judge Perrin de Brichambaut's involvement with the aforementioned organisations is limited, neutral and, at times, confined to administrative matters. He has not taken on any post with the French government during his tenure as Judge, and none of the aforementioned organisations are linked to any French governmental branch either.[34] The impact these organisations have on the foreign interests of France is negligible, if any at all. In return, any personal benefit Judge Perrin de Brichambaut receives from his participation in these organisations is minimal. His personal interest in the *Al Hassan* case as a result of his involvement with *Le Club des Vingt*, the *Forum du Futur*, and the *Conseil d'Etat* are so small as to be incapable of affecting his decision in one way or the other. His personal interest does not surpass the *de minimis* threshold adopted by the plenary in *Lubanga* Decision I. Consequently, a reasonable observer with

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[32] For more information on the role of *Le Conseil d'Etat* in the French legal system, *see generally* BERNARD STIRN AND YANN AGUILA, DROIT PUBLIC FRANÇAIS ET EUROPÉEN, 643 (2018).

[33] *See* Eduardo Jordao and Susan Rose-Ackerman, "Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review, 66 Admin. L. Rev. 1, 23, n. 69 (2014) ("The Consiglio di Stato acts both as an administrative court and an adviser to the government, like its French counterpart.").

[34] *Compare Ntaganda* Decision, para 45.

knowledge of the full context of his minimal involvement with these groups would not reasonably apprehend bias.

C. The request inappropriately raises a disqualification challenge based on future issues and objections it intends to raise in Mr Al Hassan's case but have not yet been alleged or proven.

43. A third issue with the request must be addressed as it presents a novel manner of analysing independence and impartiality that will have concerning consequences for similar challenges in the future.

44. Section 2.4 of the request[35] reveals that the independence and impartiality concerns are raised in view of issues and objections the Defence intends to raise at future stages of the Pre-Trial case. There are two issues with this approach. First, this is a complete reversal of how disqualification proceedings are conducted generally. Disqualification challenges have always been raised after—and only after—the possible conflict has come to light. In other words, the statements or conduct of the judge in question are alleged to touch on already-existing issues or arguments in the case before him. Here, however, instead of basing its challenge on presently-existing legal or factual issues, the request roots its challenge in arguments and observations it intends to raise at the confirmation of the charges hearing.

45. Second, and as a consequence of the first problem, the request has not established the facts for the allegations it intends to raise. In any challenge or complaint before this Court and in the courts of nations worldwide, the onus is on the challenging party to not only put forward the arguments it intends to raise, but also to provide evidence to prove those allegations by at least a preponderance of the evidence. The request, notably, is void of any evidence to support the issues it intends to raise in the future and therefore falls far short of meeting this burden. The request, therefore, has not demonstrated a conflict between the activities in question and Judge Perrin de Brichambaut's responsibilities in the *Al Hassan* case.

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[35] Section 2.4 is titled "Linkage to the issues arising in the case of Mr Al Hassan".

46. Simply put, the impartiality concerns that the request raises are entirely speculative and cannot satisfy the high threshold required to rebut the assumption of judicial impartiality.[36] Moreover, permission of a tactic such as that found in the request would set a dangerous precedent that permits future litigants to raise unfounded challenges on any issue they claim they *might* raise in the future. This is wholly unsupported by the past treatment of any court of procedural challenges.

VI. CONCLUSION

47. In spite of its categorical allegations, the request falls flat in bringing forward circumstances that would impress a reasonable observer. Such an observer, mindful of the full context, would see that the request's attempt to create links between peripheral statements and Judge Perrin de Brichambaut's own personal convictions are weak and artificial.

48. Furthermore, the assertion made by the Defence that the facts—which are misrepresented in the request—are a sign of subordination to the interests or policies of French authorities are gratuitous. More generally, it is unacceptable to imply that any previous involvement of a judge in governmental roles—whether as an official, diplomat and professor—prevent him or her from exercising the judicial functions impartially and independently from the interest of his or her country. It would be as wrong as disallowing a former staff member of a court from acting as a defence lawyer before the same court in the exclusive interest of her client.

49. In sum, the request fails to demonstrate that Judge Perrin de Brichambaut's honorary title and participation in academic projects and debates in fields unrelated to the activities of the Court amount to a reasonable appearance of bias in the *Al Hassan* case. The bases for the impartiality concerns contained therein, moreover, are entirely speculative, since they relate to issues the Defence is considering raising at the confirmation of the charges hearing, and are without evidentiary support. Only precise cases of direct involvement in problematic circumstances would satisfy the standards that have been set by the plenary of judges in the past. The request,

[36] *Ntaganda* Decision, para 49.

therefore, has fallen woefully short of meeting the high threshold necessary to rebut the presumption of impartiality attributed to judges of the Court.

50. Lastly, one cannot but notice the disingenuous nature of the disqualification request, which was filed three weeks before the scheduled confirmation of the charges hearing in a case which has been going on for more than a year in the Pre-Trial phase, presenting it under the guise of fair and expeditious trial rights for the accused. Any reasonable observer would realise that this tactic seeks to delay the proceedings further, while making the Chamber's deliberations more difficult to accomplish should a judge of the panel be replaced only a few days before the hearing. These effects, in fact, would directly and adversely impact the accused's right to fair and expeditious proceedings, which the Court has a duty to protect, and accordingly cast grave doubts on the sincerity of the disqualification request. Accordingly, the request should be rejected.

Judge Marc Perrin de Brichambaut

The Hague, 24 June 2019