



Original: French

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

Date: 23 May 2019

THE PRESIDENCY

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

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

Public Document

**Defence Application for Leave to File a Reply to the Response of Judge Marc
Perrin de Brichambaut Notified on 20 May 2019**

Source: Defence team for Mr Thomas Lubanga Dyilo

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

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Ms Paolina Massida

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REGISTRY

Registrar

Mr Peter Lewis

Other

Trial Chamber II

PROCEDURAL HISTORY

1. On 10 April 2019, the Defence for Mr Lubanga filed its application for the disqualification of Judge Marc Perrin de Brichambaut (“Application”).¹
2. By response of 16 May 2019 notified on 20 May 2019,² Judge Perrin de Brichambaut made his observations on the Application for disqualification (“Response”).
3. Pursuant to regulation 24(5) of the Regulations of the Court, the Defence seeks leave to file a reply to Judge Perrin de Brichambaut’s Response.

SUBMISSIONS

4. Under regulation 24(5) of the Regulations of the Court

[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

5. The Response of Judge Perrin de Brichambaut notified on 20 May 2019 raises three issues which the Defence could not reasonably have anticipated.

(1) First issue: to establish the ground for disqualification laid down at rule 34(1)(d) of the Rules of Procedure and Evidence, does the original talk or the subsequent transcript constitute the “expression” to be considered?

6. In his Response, Judge Perrin de Brichambaut attempts to account for his conduct by the fact that he was not consulted before the transcript of his talk was published, which was prejudicial as his “presentation would have required a number of improvements and careful editing”.³

¹ “Defence Application for Disqualification of Judge Marc Perrin de Brichambaut”, 10 April 2019, ICC-01/04-01/06-3451-Exp-tENG.

² “Réponse du Juge Marc Perrin de Brichambaut à « la Requête de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut » déposée le 10 avril 2019”, 20 May 2019, ICC-01/04-01/06-3454-Anx3.

³ Response, para. 4.

7. The Defence could not have legitimately anticipated the argument which Judge Perrin de Brichambaut makes.
8. Accordingly, the Defence seeks leave to reply, since it is important to identify from the talk or its transcript the expression which could adversely affect the impartiality required of him.

(2) Second issue: in stating the number of child soldiers used by the UPC to be 3,000, was Judge Perrin de Brichambaut being categorical?

9. Judge Perrin de Brichambaut asserts that by stating a figure of 3,000 child soldiers in the UPC, he was answering a question from a student and that the answer he gave was not categorical but was to be interpreted as leading to a question mark.⁴
10. That assertion misrepresents the talk. The issue is important, since the stated figure of 3,000 child soldiers shows that Judge Perrin de Brichambaut had arrived at a firm view before judgment was given and so was expressing a personal opinion.
11. So as to clear up any dispute about interpretation which could arise from a plain reading of the transcript, the Defence would like the opportunity to reply to Judge Perrin de Brichambaut's portrayal of his talk and to provide the recording of it to the Presidency.
12. In addition to the transcript, the University of Beijing also posted online an audiovisual recording of the full talk by Judge Perrin de Brichambaut.
13. Although the video link was removed from the University's website in April 2019, the Defence has kept a copy of the recording and would like to disclose it as part of its reply.

⁴ Response, para. 17.

(3) Third issue: does the second argument set out in the application for disqualification, regarding the method adopted by the Chamber, seek to assert that in May 2017 the collective nature of the reparations had yet to be determined?

14. Judge Perrin de Brichambaut takes the view that the arguments advanced by the Defence on the method make two points, one of which is to assert that “the Chamber had not yet determined whether there should be collective reparations”.⁵
15. That view misrepresents the arguments which the Defence set out in its Application.
16. Accordingly, the Defence seeks leave to reply to the misrepresentation, since it could not reasonably have anticipated that the words it had set down would be thus distorted.

FOR THESE REASONS, MAY IT PLEASE THE PRESIDENCY TO

ENTERTAIN the present application;

GRANT LEAVE to the Defence to file a reply to the three issues raised by the Response from Judge Marc Perrin de Brichambaut notified on 20 May 2019;

GRANT LEAVE to the Defence to disclose the audiovisual recording of the talk given by Judge Perrin de Brichambaut on 17 May 2017.

[signed]

Ms Catherine Mabile, Lead Counsel

Dated this 23 May 2019,

At The Hague

⁵ Response, paras. 19-20.