Cour
Pénale
Internationale

International
Criminal
Court

Original : **English**

N° : **ICC-01/04-01/06**
Date : **14 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

Additional Observations by Judge Perrin de Brichambaut

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 Mabille
Ms Jean-Marie Biju-Duval

Legal Representatives of the Victims
Mr Luc Walleyn
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

States' Representatives

Trust Fund for Victims

REGISTRY

Registrar
Mr Peter Lewis

Other
Trial Chamber II
Plenary of Judges

I. PROCEDURAL HISTORY

1. On 10 April 2019, the Defense for Mr Lubanga filed its *'Requête urgente de la Défense aux fins de récusation de M le Juge Marc Perrin de Brichambaut'* requesting the Presidency to disqualify Judge Perrin de Brichambaut in reparation proceedings in *The Prosecutor v. Thomas Lubanga Dyilo*.

2. On 16 May 2019, Judge Perrin de Brichambaut filed written observations in response to the request.

3. On 23 May 2019, the Defence for Mr Lubanga filed its *'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'*, requesting leave to reply to Judge Perrin de Brichambaut's Observations and to admit an audio-visual recording of the 17 May 2017 Presentation.

4. On 11 June 2019, the *Ad Hoc* Presidency, in consultation with the plenary of judges, rendered its decision and authorising the Defence to communicate a copy of the audio-visual recording to it.

II. INTRODUCTION

5. The decision of the *Ad Hoc* Presidency of 11 June 2019 authorised the Defence for Mr Lubanga to introduce an additional piece of evidence at a late stage of the proceedings, *i.e.* just a few days before the Plenary scheduled for 17 June 2019. This decision was adopted pursuant to article 41(2) of the Statute and rule 34(2) of the Rules of Procedure and Evidence and, considering that the latter provision explicitly allows for the Judge in question to provide observations, it is my view that I am fully entitled to submit these additional observations as part of my initial observations addressed to the Presidency.

6. Seeing as rule 34(2) of the Rules of Procedure and Evidence refers explicitly to "evidence", any request lodged pursuant to this provision must *per analogiam* comply with the relevant requirements related to evidence contained in the Statute and, more generally, the fair trial rights set forth in the Statute. In any event, the *Ad Hoc*

Presidency decision raises issues implicating rights so fundamental that they must be respected in any type of judicial proceedings. On this basis, I am of the view that the decision of the *Ad Hoc* Presidency contravenes such basic notions of fairness in the following ways.

III. OBSERVATIONS

A. First, the procedure leading to the adoption in the decision of the *Ad Hoc* Presidency of 11 June 2019 is, as such, incompatible with any rational notion of fairness.

7. As indicated by a number of Judges consulted by the *Ad Hoc* Presidency, it has been the constant practice of this Court to limit the consideration of the Plenary to the request for disqualification and the observations filed by the Judge in question. The decision by the *Ad Hoc* Presidency to admit an additional piece of evidence through a request for leave to reply fundamentally alters this established way of conducting such proceedings. This is a novelty before the Court for which the *Ad Hoc* Presidency provides no justification save a reference to a previous finding in another case. However, in that particular instance, the Plenary denied a request for leave to reply without admitting additional evidence. In admitting the additional piece of evidence through the request for leave to reply by the Defence of Mr Lubanga, the *Ad Hoc* Presidency is reversing its previous jurisprudence without a proper basis or explicit justification. The decision by the *Ad Hoc* Presidency also omits a critical consideration from the previous decision it invoked, namely: *"[...] the present request for leave to reply to the Submission was, in any case, filed on the eve of the plenary session [...]"*.[1] Had the *Ad Hoc* Presidency consistently applied this principle, it would have had to dismiss the request for leave to reply, including any additional evidence attached to this request, in these proceedings as well.

[1] *The Prosecutor v. Jean Pierre-Bemba Gombo et al.*, 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. 13.

8. The decision of the *Ad Hoc* Presidency contravenes the notion of fairness of process in three ways. First, the Judge in question must be provided with an opportunity to respond to the *request for leave to reply*. Second, and more importantly, the person against whom allegations are made must also be provided with an opportunity to challenge the evidence introduced (see, for example, article 67(1)(d) of the Statute).

9. Third, and as a consequence of the two aforementioned violations, the decision contravenes article 74(2) of the Statute, applied *per analogiam*, stating that a decision by the Court must be based "only on evidence submitted and *discussed* before it" (emphasis added). It has always been understood that the word "discussed" means that all parties must have been afforded the opportunity to make submissions on the evidence. This principle of the equality of arms between parties is widely regarded as a fundamental element of the right to due process, including in the international criminal tribunals.[2] As the International Criminal Tribunal for the former Yugoslavia emphasized, "It is well established in the jurisprudence of this Tribunal that equality of arms [...] mean[s] [...] that each party must have a reasonable opportunity to defend its interests under conditions which do not place him at a substantial disadvantage *vis-à-vis* his opponent".[3] The decision of the

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[2] For example, the United Nations Human Rights Committee emphasizes in General Comment No. 32 that due process under article 14 of the International Covenant for Civil and Political Rights requires equality of arms between the parties. "The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision. *The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side by given the opportunity to contest all the arguments and evidence adduced by the other party.*" (emphasis added, footnotes omitted). *See also, e.g., Dudko v. Australia,* Human Rights Committee, 23 July 2007, U.N. Doc. CCPR/C/90/D/1347/2005, para. 7.4 ("It is for the State party to show that any procedural inequality was based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the author."); Article 6 of the European Convention of Human Rights considers the principle of equality of arms as inherent to the concept of a fair trial. *See* "Guide on Article 6 of the European Convention on Human Rights", paras 327-328. *See also, e.g., Borgers v. Belgium,* [1991] ECHR 46, 12005/86, para. 24; *Zahirovic v. Croatia,* [2013] ECHR 58590/11, paras 47-50.

[3] *The Prosecutor v. Prlić et al.*, Decision on Translation, 4 September 2008, IT-04-74-AR73.9, para. 29. *See also The Prosecutor v. Šešelj,* Contempt Appeal Judgment, 30 May 2013, IT-03-67-R77.4-A, para. 37 ("[T]he Appeals Chamber recalls that a trial chamber continues to abide by the principle of equality of

Ad Hoc Presidency ignores this basic guarantee as I have not been provided with any opportunity to make submissions regarding these matters.[4]

B. Second, the relevant provisions invoked by the *Ad Hoc* Presidency do not constitute an adequate basis to admit additional evidence.

10. The *Ad Hoc* Presidency's conclusion that "[t]he procedural requirements of a disqualification request are clearly established by article 41(2) of the Rome Statute and rule 34(2) of the Rules [...]" and that "[o]bservations [...] submitted pursuant to these provisions are not simply a response within the meaning of regulation 24 of the Regulations" should have logically led it to the conclusion that the proposed additional evidence cannot be admitted on this basis. The Defence for Mr Lubanga relied upon regulation 24(5) of the Regulations of the Court and presents its arguments based on the *specific wording* of that provision. The *Ad Hoc* Presidency concluded that that regulation is "ill-suited". The only possible outcome, therefore, was to dismiss the request for leave to reply, including any additional evidence. By the same token, neither article 41(2) of the Rome Statute nor rule 34(2) of the Rules of Procedure and Evidence provide for a reply or the admission of additional evidence. Rather, the wording of rule 34(2) of the Rules suggests that, following the submission

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arms in ensuring that the accused is not substantially disadvantaged in the presentation of his case and that he likewise benefits from the fair trial guarantees embodied in the [ICTY] Statute.").

[4] For examples of violations of the equality of arms principle *see, e.g., Jansen-Gielen v. Netherlands*, Human Rights Committee, 3 April 2001, U.N. Doc. CCPR/C/71/D/846/1999, para. 8.2 ("[I]t was the duty of the Court of Appeal, which was not constrained by any prescribed time limit to ensure that each party could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings. In the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing, the Committee finds a violation of article 14, paragraph 1 of the Covenant."); *Äärelä and Näkkäläjärvi v. Finland*, Human Rights Committee, 4 February 1997, U.N. Doc. CCPR/C/73/D/779/1997, para. 7.4 ("[T]he Committee notes that it is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party. The Court of Appeal states that it had "special reason" to take account of these particular submissions made by the one party, while finding it manifestly unnecessary to invite a response from the other party. In so doing, the authors were precluded from responding to a brief submitted by the other party that the Court took account of in reaching a decision favourable to the party submitting those observations. The Committee considers that these circumstances disclose a failure of the Court of Appeal to provide full opportunity to each party to challenge the submissions of the other, thereby violating the principles of equality before the courts and of fair trial contained in article 14, paragraph 1, of the Covenant.").

of the request together with any evidence, no further submissions can be made except those of the judge in question.

C. Third, even if article 41(2) of the Rome Statute read together with rule 34(2) of the Rules of Procedure and Evidence provided for the possibility of submitting additional evidence, such evidence should have been rejected for failing to comply with the relevant requirements of the Rome Statute.

11. As a general rule, the introduction of evidence at an advanced stage of the proceedings is predicated upon two conditions: (1) the proposed evidence must be new, that is evidence that was not previously available, and (2) the proposed evidence could not have been discovered through due diligence.[5] In the instant case, the Defence for Mr Lubanga clearly indicated that it has had the video in its possession *before* the request for disqualification was filed. Nothing prevented the Defence from seeking to introduce it when it filed the original request. The proposed evidence is thus not new and, by failing to place it before the Plenary immediately, it has forfeited its entitlement to rely on it.

12. In addition, in admitting the additional evidence, the *Ad Hoc* Presidency failed to consider "any prejudice that such evidence may cause to a fair trial" (article 69(4) of the Statute). The transcripts of the presentation in question are already available and there is consequently no need for the video-recording. The only purpose of the introduction of the video-recording at this late stage of the proceedings is to taint the judges' mind and broaden the scope of the argument as initially presented by the Defence for Mr Lubanga which addressed only three brief segments of this recording, one of which appeared only on the occasion of the questions.

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[5] *The Prosecutor v. Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06 A 5, para. 50; *see also The Prosecutor v. Blagojević and Jokić*, Decision on Appellant Vidoje Blagojević's Motion for Additional Evidence Pursuant to Rule 115, 21 July 2005, IT-02-60-A, paras 6-7 ("In order to demonstrate that evidence was not available at trial, a party seeking its admission at the appeal stage must show not only that he did not possess the evidence during the trial proceedings, but also that he could not have obtained it through the exercise of due diligence.").

D. Finally, the effect of the *Ad Hoc* Presidency decision is that the person against whom allegations have been made has not been afforded the opportunity to have the last word.

13. In general, any party facing allegations is expected to have the last word in judicial proceedings. By way of example, the defence has the right to be the last to examine a witness (rule 140(2)(d) of the Rules of Procedure and Evidence). It is also the defence's presentation of evidence that closes the evidentiary phase of the proceedings. During closing arguments the defence has the opportunity to speak last (rule 141(2) of the Rules of Procedure and Evidence). This is also implied in rule 34(2) of the Rules of Procedure and Evidence: "[t]he request shall state the grounds and attach any relevant evidence, and shall be transmitted to the person concerned, *who shall be entitled to present written submissions*" (emphasis added). This specific wording and the absence of any reference to additional submissions and/or evidence clearly suggests that this rule was drafted in such a way to ensure that the judge in question is entitled to have the last word. However, in the present case, the party *making* the allegations has had the last word by the decision of the *Ad Hoc* Presidency allowing the Defence to submit additional evidence through a request for leave to reply.

IV. CONCLUSION

14. In sum, the decision of 11 June 2019 entails the following violations of basic principles of fairness applicable to any judicial proceedings:

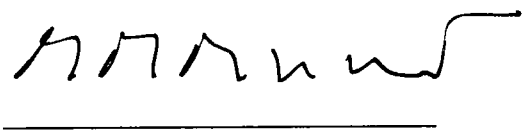
- the procedure leading to the adoption in the decision of the *Ad Hoc* Presidency of 11 June 2019: (i) departed from previous jurisprudence without providing any reasoning and without legal basis; and (ii) entailed a denial of the right to present observations on the request for leave to reply, including on the proposed additional evidence;
- neither regulation 24(5) of the Regulations of the Court nor article 41(2) of the Rome Statute in combination with rule 34(2) of the Rules provide an adequate basis for the admission of additional evidence in these proceedings;

- the proposed additional evidence should have been rejected as: (i) it is not new and could have been introduced by the Defence for Mr Lubanga as the time the request for disqualification was lodged; and (ii) the introduction of additional evidence at a late stage of the proceedings is highly prejudicial given that the transcripts are already available and is a violation of article 69(4) of the Statute; and
- the obligation to provide the person against whom allegations are made to have the last word has not been respected.

15. As a result of the above, the present proceedings suffer from and are vitiated by serious procedural defects. Consequently, the decision of the *Ad Hoc* Presidency must be considered to be a nullity and the additional evidence introduced and admitted by way of this decision should not be considered during the Plenary.

16. This Court and its judges, whose task it is to uphold the rule of law and ensure fair proceedings, might also want to consider the potential consequences of the standards set by the *Ad Hoc* Presidency on other present and future cases concerning the disqualification of Judges. It would not be in the interests of the Court to provide for an opening for systematic harassment of Judges leading to prolonged procedural and evidentiary debates.

17. In the event that the Plenary, despite the serious aforementioned procedural errors and their regrettable potential consequences, decides to proceed and to take into account the video-recording, I request that consideration thereof be limited strictly to the three passages mentioned in the initial written request and to set aside the rest of the recording.



Judge Marc Perrin de Brichambaut

The Hague, 14 June 2019