Cour Pénale Internationale
International Criminal Court

Les Chambres
The Chambers

Internal memorandum
Memorandum interne

To | À	**Presidency**	**From | De**	**Juge Marc Perrin de Brichambaut**
Date	16 May 2019	**Through | Via**	**[name]**
Ref.	[]	**Copies**	[name]
Case | Affaire	LE PROCUREUR c. LUBANGA DYILO		

Objet : 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.

I. Introduction

1. I hereby submit my response to the "*Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut*" ("Request")[1], filed by the Defence of M. Thomas Lubanga in accordance with article 41 of the Rome Statute. The Lubanga Defence claims that statements I made as part of a teaching assignment raise serious ethical, moral issues and call into question my impartiality and that this should result in my disqualification as a Judge in the Lubanga reparation case.

[1] See Request « *Requête urgente de la Défense aux fins de récusation de M. Juge Marc Perrin de Brichambaut* », 10 April 2019, ICC-01/04-01/06-3451-Red.

2. Since the potential consequences of such a request must be taken with the utmost seriousness, I have recused myself from the Plenary of Judges regarding the consideration of this request and trust my colleagues will take into account the clarifications presented here.

3. As for the distribution of this memorandum, I have no objection to its scope being public. Thus, all participants and parties concerned may be at the same stage of information.

4. As a background to the arguments presented here, I would like to indicate first that the transcript on which the claimant bases itself reflect an oral presentation to a group of students at Beijing University on May 17, 2017. I was speaking without notes as part of a two hour long session. My intent was to catch the attention of students which did not necessarily have a concrete understanding of what reparations following a trial at the International Criminal Court. My presentation was recorded by the Norwegian NGO which had organised a series of presentation at Beijing University, CILRAP. Subsequently, CILRAP used this recording to illustrate article 75 of the Rome Statute as part of its presentation on its website of all the components of the Rome Statute. Transcripts were attached. I was not consulted on these transcripts and regret this was not the case since this presentation would have required a number of improvements and careful editing.

5. It is also worth mentioning that when I made the presentation in Beijing in May of 2017, the Lubanga reparations case had already been ongoing for five years, the first reparations decision on Lubanga reparations having been adopted in

2012[2] ; the Appeals Chamber had taken an important decision on reparations on the Lubanga case on March 3, 2015 ; and Trial Chamber II of which I am a member had already rendered a large number of decisions in the case to implement the provisions of this decision. There was in May of 2017 already an ample body of exchanges among the parties on the question of the identification of the victims and of their situation on the ground. The Chamber adopted two decisions on the Draft Implementation Plan submitted by the TFV[3] for the Lubanga reparations respectively on 21 October 2016[4] and 6 April 2017[5] well before the Beijing presentation had been made.

II. Standing Defence team of Thomas Lubanga

6. I recognise that Thomas Lubanga's Defence has standing to make this request for disqualification against me, under Article 41 (2) (a) of the Statute, Rule 34 (1) (d) of the Rules and Procedure and Evidence and Article 4 of the Code of Judicial Ethics.

7. However, as indicated, my statements were always based on public filings made by different Court's organs, thus never reflecting my personal convictions.

[2] *Décision fixant les principes et procédures applicables en matière de réparations, ICC-01/04-01/06-2904-tFRA*, 7 août 2012.
[3] *Projet de plan de mise en œuvre se rapportant à l'Ordonnance de réparation rendue par la Chambre de première instance II le 24 mars 2017*, ICC-01/04-01/07-3728.
[4] *Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations*, 21 October 2016, ICC-01/04-01/06-3251.
[5] *Order approving the proposed programmatic framework for collective service-based reparations submitted by the Trust Fund for Victims*, 6 Avril 2017, ICC-01/04-01/06-3289.

III. Applicable standards in Article 41(2) proceedings on disqualification

8. Pursuant to article 41(2)(a) of the Statute, "[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground". This provision underlines the disqualification in circumstance in which the involvement of a judge could give rise to a reasonable ground to doubt his or her impartiality.

9. Disqualifying a judge from participating in a proceeding at this Court is not a step to be undertaken lightly. Judges enjoy a presumption of impartiality which attaches to judicial office. The judges are elected for their qualifications; impartiality and integrity[6]. They are presumed to be professional judges, who, by virtue of their experience and training, can decide on issues relying solely and exclusively on the evidence before them.

10. In this sense, the prior Plenaries of the Court have further established that "[t]here is a strong presumption of impartiality that is not easily rebutted"[7]. Indeed, in the Decision on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba and al*, the Plenary of Judge stressed:

> *"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*

[6] See the Statute of the ICC, Article 36 (3)(a): "The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices".
[7] 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*, 3 August 2015, para. 29.

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".[8]

11. In a prior decision, the Presidency also clarified that "'the second sentence of article 41(2)(a) is "concerned with disqualification where a judge has previously been involved in any capacity which gives rise to a reasonable ground to doubt his or her impartiality.'"[9] The Presidency explained that "this interpretation is 'most consistent with the objective of ensuring that the impartiality of judges cannot reasonably be reproached' while 'at the same time […] ensuring the efficient conduct of proceedings.'"[10]

12. Furthermore, "[t]he relevant standard of assessment is whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge." This standard "is concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension is objectively reasonable."[11] In 2012, Judge Song, in his capacity as President of the Court, made some extra-judicial comments in a speech concerning the *Lubanga* trial verdict and sentence, saying: "This judgment sets a crucial precedent in the fight against impunity." The Plenary held that the statements had been taken "out of context" and that "a reasonable observer, noting the entire content and context of the statements made by the Judge, would neither have considered them to have been comments regarding the merits of the decisions under appeal, nor related to any of the particular legal issues to be

[8] 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*, (hereinafter "*Bemba et al. Decision*") filed on 20 June 2014 and notified on 23 June 2014, ICC-01/05-01/13-511-Anx, para. 18.
[9] Decision on the requests for excusal from the Appeals Chamber in the pending appeal in the case of *The Prosecutor v. Saif Al-Islam Gaddafi*, 13 May 2015, ICC-01/11-01/11-591-Conf-Exp-AnxI, p. 3 (citing Lubanga Excusal Decision, p. 5).
[10] *Ibidem*.
[11] *Bemba et al. Decision*, para. 17.

decided on appeal. Rather, a reasonable observer would have considered them to be statements regarding the wider implications and precedential significance of the decisions".[12]

13. Accordingly, any application to disqualify a judge from proceedings must meet a high threshold. This standard requires a case-by-case examination, taking into account the specific circumstances of each case.[13]

14. Considering the circumstances of this case, the Defence fails to satisfy the standard for disqualification pursuant to article 41(2)(a) of the Statute of this Court. In effect, the Defence does not demonstrate the impartiality or the existence of conflict of interests that indicate that the conference I made revealed an apparent or potential impartiality.

IV. Analysis of the arguments presented by the claimants

The Defence divides its motion in three parts.

a) The number of victim beneficiaries

15. First of all, the Defence's request contests the number of victims mentioned in my presentation when answering a question by a student.[14] The number I mentioned was 3000 victims. According to the Defence team of Mr. Thomas Lubanga, this only the expression of my personal opinion.[15]

[12] 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*, 11 June 2013, para. 39.
[13] Mladić Disqualification Decision, para. 24 (citing ECtHR cases).
[14] Annex 1, para. 22.
[15] See Request, para. 17.

16. It is fundamental to recall the context in which this statement was made. First, I must underline the difficulty for the Chamber to identify eligible victims.[16] The argument I made in my speech, regarding the number of victims was based on public documents, thus excluding any expression of my personal opinion. Indeed, this number appears in the Trust Fund for the Victims' Plan from November 3, 2015, which covers both potential direct and indirect victims.[17] Although at that time, the determination of the number of victims was being debated, it was nevertheless necessary to quantify it in an approximate manner :

> *"It is necessary to formulate an estimate of the potentially eligible victims (direct and indirect) in the design and drafting of the implementation plan. This estimated number is a total of 3,000 potentially eligible direct and indirect victims is accompanied by the caveat that a final determination of the number of eligible victims will be made during application of the draft implementation plan."*[18]

17. Furthermore the answer I gave was not a categorical one but should be interpreted as leading to a question mark. It cannot therefore be considered as an indication that I had already made my determination regarding the number of victims in the Lubanga reparations procedure. Indeed the decisions adopted by the Chamber never refer to this number but indicate that the potential number of victims is hard to evaluate and, beyond a preliminary list of victims retained, establish a procedure to further seek other victims.[19]

---

[16] Annex 1, para. 24.
[17] *Filing Reparations and Draft Implementation Plan*, ICC-01/04-01/06-3177-Red, para. 253.
[18] See *supra* note 7.
[19] See *Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo*, 22 February 2017 ICC-01/04-01/06-3275-tENG para. 16 ; *OPCV response to the Defence "Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut"* ICC-01/04-01/06-3452, para. 14; *Ordonnance enjoignant au Greffe de foumir aide et assistance aux representants legaux et au Fonds au profit des victimes afin d'identifier des victimes potentiellement eligibles aux reparations* ICC-01/04-01/06-3218 para. 8.

b) The methodology adopted by Pre-Trial Chamber II

18. Mr. Thomas Lubanga's Defence team alleges that disclosing the methodology adopted in the reparation's procedure reveals my personal judgment. The Defence further argues that at that time of the proceedings, the parties had not yet submitted their observations regarding the selected methodology.[20]

19. The arguments presented by the Defence regarding the methodology argument are divided in two points:

- Collective reparations

20. According to the Defence, the Chamber had not yet determined whether there should be collective reparations.

21. In fact the use of collective reparations had been mandated in the Lubanga reparations case by the first decision issued by TC II in 2012. It was subsequently confirmed by the Appeals Chamber on March 3, 2015:

> *"The Appeals Chamber notes that the Statute and rule 98 of the Rules of Procedure and Evidence do not explicitly state that collective reparation awards made against the convicted person, but through the Trust Fund, must be based on the article 75 (1) principles. However, the Appeals Chamber observes that "restitution, compensation and rehabilitation", which are included in the article 75 (1) principles, are various forms and modalities of reparations and that collective reparations may be ordered pursuant to rule 98 (3) of the Rules of Procedure and Evidence because, inter alia, the "forms and modalities of reparations makes a collective award more appropriate". Therefore, the Appeals Chamber considers that a collective*

[20] See « *Requête urgente de la Défense aux fins de récusation de M. le juge Marc Perrin de Brichambaut* », ICC-01/04-01/06-3451-Red, paras 23, 24 et 25.

reparation order made against the convicted person, but through the Trust Fund, must also be based on the relevant article 75 (1) principles."[21]

22. It is on this basis that all parties and the Trust Fund had been operating in the case. Indeed on April 10, 2017[22], Mr. Lubanga's defence team[23] made a reference to the Appeals Chamber's decision concerning "*l'éligibilité au statut de victimes bénéficiaires des réparations collectives*". In addition, the Trust Fund for the Victims' Plan above mentioned indicates an approximate number of beneficiary victims (explained above) as part of the implementation of a collective reparations program[24].

- The choice to select a sample

23. When I mentioned the Chamber's choice to work on a sample basis, I was simply referring to previous decisions adopted by the Chamber *:*

« La Chambre estime que pour s'acquitter du mandat qui lui a été confié par l'arrêt par la Chambre d'appel du 3 mars 2015, au vu de l'Ordonnance du 9 février 2016, considérant les éléments d'information déjà fournis jusqu'à ce jour par les parties et le Fonds et dans l'intérêt du bon déroulement de la procédure en cours, il convient de poursuivre la recherche des victimes potentiellement éligibles aux réparations dans la présente affaire. A cet égard, la Chambre rappelle le délai prévu dans l'Ordonnance du 9 février 2016 pour la transmission à la Chambre de dossiers de victimes potentielles, à savoir le 31 décembre 2016. La Chambre sera ainsi en mesure de compléter l'échantillon déjà disponible et de mieux apprécier la représentative de la liste de victimes identifiées par rapport à l'ensemble des victimes

[21] See Judgment on the appeals against the Decision establishing the principles and procedures to be applied to reparations of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, para. 53.
[22] Defence Observations of Mr. Lubanga at the first transmission of redacted repair forms of March 8, 2017.
[23] See *« Observations de la Défense de M. Lubanga à la première transmission des formulaires de réparation expurgés du 8 mars 2017 »*, ICC-01/04-01/06-3291, 10 Avril 2017.
[24] See *supra* note 8.

potentielles. La Chambre estime en conséquence que le Greffe doit prêter toute l'assistance nécessaire à cette fin au Fonds ainsi qu'aux représentants légaux des victimes.»[25]

24. This decision has been upheld in various decisions dated 15 July 2016, 22 February 2017[26] and 13 July 2017.

"La Chambre rappelle que tel que stipule par la Chambre d'appel, elle doit determiner la responsabilite de M. Lubanga en matiere de reparation. Pour ce faire, elle a considere que des dossiers de victimes potentiellement eligibles lui etaient necessaires afin de completer Fechantillon deja disponible et de mieux apprecier la representative de la liste de victimes identifies par rapport a Fensemble des victimes et dans le but d'informer la decision de la Chambre quant au montant incombant a M. Lubanga a titre de reparation."[27]

25. Indeed, these precedents illustrate the Chamber's intent to identify a sample of victims, thus promoting victims' representativeness and adopting a fair and equitable methodology throughout the reparation procedure.

c) The pressure exerted by Mr. Thomas Lubanga on the potential victims

26. The Defence asserts that my comments on the risks faced by certain victims still residing on Congolese territory, expressed my personal convictions.[28]

27. In this regard, I want to recall that on 22 September 2015, Mr. Thomas Lubanga's sentencing was debated by the Appeals Chamber[29] , notably the consequences of his early release. The conclusion was that Thomas Lubanga remained an

---

[25] See *Ordonnance enjoignant au Greffe de foumir aide et assistance aux représentants légaux et au Fonds au profit des victimes afin d'identifier des victimes potentiellement éligibles aux réparations »*, ICC-01/04-01/06-3218, 15 Juillet 2016, para. 8.

[26] See *« Ordonnance relative à la transmission des dossiers de victimes potentiellement éligibles aux réparations a l'équipe de défense de Thomas Lubanga Dyilo »*, ICC-01/04-01/06-3275, 22 février 2017.

[27] *Ibid*, para. 12.

[28] See *supra* note 5, paras 28 – 30.

[29] See the *"Decision on the review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo" (Three Judges of the Appeals Chamber appointed for the review concerning reduction of sentence),* No. ICC-01/04-01/06-3173, 22 September 2015, para. 64.

important figure in the UPC and admired as a hero[30]. Considering that the UPC remained the ruling group and that its return was expected, the victims collaborating with the Court could be threatened.

28. This is why the Panel emphasised "*the relevance of the information brought by the participants in relation to the potential detrimental effect that Mr. Lubanga's early release could have on the victims and on their families*".[31] Moreover, these dramatic consequences on the victims were highlighted in later submissions from the *Représentants légaux du groupe de victimes V01*[32] *:*

> *« En effet, la communication de données telles que les coordonnées des victimes à la Défense, même des victimes qui ont accepté de dévoiler leur identité, ne peut qu'encourager celle-ci à procéder à des enquêtes dans l'environnement immédiat des victimes et/ou à les contacter directement ou par personne interposée, ce qui est de nature à perturber leur vie privée, voire exposer à des formes de représailles. »*
> *« La majorité des victimes de l'équipe V01 sont de l'éthnie du condamné, qui s'oppose toujours au processus de réparation, de telle sorte que la participations à ce processus peut être mal vue par la communauté et parfois même par la famille des intéressées. Le fait que M. Lubanga soit toujours à la tête de son mouvement et se trouve actuellement en R.D.C demande une attitude de prudence encore plus nécessaire »*
> *« Il ressort également des entretiens avec les bénéficiaires potentiels que nombre d'entre eux ne se sont pas présentés lors des vagues de démobilisation, par crainte d'être repris dans un groupe armé, et ont donc préféré rester cachés. En conséquence, très peu de bénéficiaires potentiels ont été en mesure de présenter une attestation de sortie de groupe armé aux fins de constitution de leur dossier en réparations. »*

29. Therefore, my comments regarding the pressures and the threatening situation prevailing in the Democratic Republic of Congo are purely factual and in line with the public findings of The Appeals Chamber Panel.

---

[30] *Ibid*, par. 56.
[31] *Ibid*, par. 64.
[32] See « *Observations du groupe des victimes V01 à la requête de la Défense du 14 avril* 2017 », ICC-01/04-01/06-3310, paras 5-6.

V. Conclusion

30. Although I did mention the Lubanga case in my presentation in Beijing, I have not revealed anything but information based on public filings. Therefore, it was not a matter of personal opinion, but rather a fair description of the state of affairs in the Thomas Lubanga case at the reparation stage.