



28 June 2019

Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Marc Perrin de Brichambaut from the case *The Prosecutor v. Thomas Lubanga Dyilo*

I. Relevant Procedural History

1. On 10 April 2019, in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, the Defence for Mr Lubanga filed its 'Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut' ('Application'), requesting the Presidency to order the disqualification of Judge Perrin de Brichambaut on the basis of statements made during a presentation by the latter on 17 May 2017 at Beijing University ('2017 Presentation').¹ The Application was accompanied by a public annex containing the transcript of the 2017 Presentation.²
2. On 16 April 2019, Judge Perrin de Brichambaut requested the Presidency to be excused from exercising his Presidency functions in respect of the Application.³
3. On 23 April 2019, the Office of the Public Counsel for Victims ('OPCV') as well as the Legal Representatives of Victims V01 ('LRV') filed their respective

¹ 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-Red.

² 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.

³ 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.

responses to the Application (respectively ‘OPCV Response’ and ‘LRV Response’).⁴

4. On 14 May 2019, the *ad hoc* Presidency granted Judge Perrin de Brichambaut’s request for excusal and requested him to file any further written observations on the Application by 31 May 2016, in accordance with article 41(2) of the Rome Statute (‘Statute’) and rule 34(2) of the Rules of Procedure and Evidence (‘Rules’).⁵
5. On 16 May 2019, Judge Perrin de Brichambaut filed his final written observations (‘Observations’).⁶
6. On 20 May 2019, the *ad hoc* Presidency transmitted to the parties and participants Judge Perrin de Brichambaut’s request for excusal, the decision granting his request for excusal and his Observations. The parties and participants were also informed that a plenary of judges would be convened on 17 June 2019 to address the Application.⁷
7. On 23 May 2019, Mr Lubanga filed the ‘Defence Application for Leave to File a Reply to the Response of Judge Marc Perrin de Brichambaut Notified on 20 May 2019’, requesting that the *ad hoc* Presidency grant him leave to reply to the Observations and seeking leave to disclose an audio-video recording of the 2017 Presentation.⁸

⁴ 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

⁵ 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

⁶ 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

⁷ 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

⁸ Defence Application for Leave to File a Reply to the Response of Judge Marc Perrin de Brichambaut Notified on 20 May 2019, 23 May 2019, ICC-01/04-01/06-3455-tENG

8. On 11 June 2019, the *ad hoc* Presidency, in consultation with the plenary of judges, authorised Mr Lubanga's request to communicate a copy of the audio-video recording of the 2017 Presentation and denied any further submissions on the matter ('Decision of 11 June 2019').⁹
9. On 14 June 2019, pursuant to the Decision of 11 June 2019, Mr Lubanga filed into the record of the case the audio-video recording of the 2017 Presentation, highlighting the specific passages of the recording relevant to the issues in the Application.¹⁰
10. On the same date, Judge Perrin de Brichambaut filed additional observations concerning the Decision of 11 June 2019 ('Additional Observations').¹¹ The Additional Observations contest the Decision of 11 June 2019 as containing serious procedural errors, requesting that it be considered a nullity or, if not, that consideration of the audio-visual recording be strictly limited to its relevant passages.¹²
11. On 17 June 2019, a plenary session of judges was convened in accordance with article 41(2)(c) of the Statute and rule 4(2) of the Rules to consider the Application. The session was attended in person by Judges Chile Eboe Osuji, Robert Fremr, Howard Morrison, Olga Herrera Carbuccion, Antoine Kesia-Mbe Mindua, Bertram Schmitt, Péter Kovács, Chang-ho Chung, Raul Pangalangan, Luz Ibañez, Solomy Bossa, Tomoko Akane, Reine Alapini-Gansou, Kimberly Prost and Rosario Aitala. Judges Geoffrey Henderson and Piotr Hofmański were unable to attend the plenary session.

⁹ 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, 11 June 2019, ICC-01/04-01/06-3456, para. 12.

¹⁰ Communication de l'enregistrement audio-vidéo de l'intervention de M. le Juge Perrin de Brichambaut du 17 mai 2017, 14 June 2019, ICC-01/04-01/06-3457, Annex to Communication de l'enregistrement audio-vidéo de l'intervention de M. le Juge Perrin de Brichambaut du 17 mai 2017, 14 June 2019, ICC-01/04-01/06-3457-Anx1.

¹¹ Additional Observations by Judge Perrin de Brichambaut, 14 June 2019, ICC-01/04-01/06-3458

¹² Additional Observations, para. 17

II. The Arguments

A. Application

12. Mr Lubanga requests the disqualification of Judge Perrin de Brichambaut from Trial Chamber II, which is currently seized of reparation procedure in the case of *The Prosecutor v Thomas Lubanga Dyilo*, on the basis that during the 2017 Presentation, Judge Perrin de Brichambaut made several statements which question his impartiality.¹³
13. Mr Lubanga first submits that during the 2017 Presentation, Judge Perrin de Brichambaut made a statement about the number of victims eligible for reparations, which demonstrates that he had formed a personal opinion on the issue because, at the time, all relevant material and submissions had yet to be put before Trial Chamber II. According to Mr Lubanga, this questions Judge Perrin de Brichambaut's impartiality.¹⁴
14. Mr Lubanga also argues that Judge Perrin de Brichambaut's statement about the methodology to be employed by Trial Chamber II to determine the number of eligible victims, demonstrates prejudgement on his part because, at the time of the 2017 Presentation, Trial Chamber II had yet to receive any submissions of the parties on the issue. Mr Lubanga argues that this puts in doubt Judge Perrin de Brichambaut's impartiality.¹⁵
15. Finally, Mr Lubanga argues that during the 2017 Presentation, Judge Perrin de Brichambaut asserted in no uncertain terms that Mr Lubanga and his supporters would exert pressure on Ituri communities to prevent potential

¹³ Application, paras 16-35

¹⁴ Application, paras 16-20.

¹⁵ Application, paras 21-26

victims from seeking reparations. He argues that this demonstrated that Judge Perrin de Brichambaut was prejudiced, thereby questioning his impartiality.¹⁶

B. Observations of Judge Perrin de Brichambaut

16. Judge Perrin de Brichambaut observes, generally, that all of his statements were based on publicly available filings and never reflected his personal convictions,¹⁷ noting also that an ample body of relevant exchanges between the parties had occurred as of the date of the 2017 Presentation.¹⁸
17. Judge Perrin de Brichambaut first observes the importance of the context in which his statement of the number of victims was made. He underlines that the statement was based on public documents and that this excludes the possibility that they were an expression of his personal opinion.¹⁹ Further, Judge Perrin de Brichambaut observes that the number of 3000 victims appears in the Trust Fund for Victims' Plan filed in November 2015.²⁰
18. As regards the statement concerning Trial Chamber II's methodology, Judge Perrin de Brichambaut interprets the Application as arguing that, at the time of the presentation, Trial Chamber II had not yet determined whether there would be collective reparations nor had it chosen to select a sample of victims.²¹ In this respect, he observes that collective reparations had been mandated by Trial Chamber II since 2012 and confirmed by the Appeals Chamber in 2015;²² and that his statement simply made reference to previous

¹⁶ Application, paras. 27-35

¹⁷ Observations, para. 7

¹⁸ Observations, para 5.

¹⁹ Observations, para 16.

²⁰ Observations, para 16

²¹ Observations, paras 19-20, 23

²² Observations, para 21.

decisions illustrating Trial Chamber II's intent to identify a sample of victims.²³

19. Finally, Judge Perrin de Brichambaut recalls that in the context of the sentencing proceedings before the Appeals Chamber, it was established that Mr Lubanga remained an important figure in the UPC and was admired as a hero²⁴ and that, as such, victims collaborating with the Court could have been threatened.²⁵ Judge Perrin de Brichambaut observes that the relevant statements are purely factual and in line with public findings of the Appeal Chamber Panel.²⁶

C. Responses of Victims

20. The OPCV opposes the Application as baseless, indicating that, on each of the three grounds, Judge Perrin de Brichambaut spoke on the basis of publicly available information.²⁷ The OPCV submits that the Application should be rejected and the proceedings allowed to progress expeditiously given that the situation of victims is worsening with the passage of time.²⁸

21. The LRV Response defers to the wisdom of Judge Perrin de Brichambaut and/or the Presidency to assess the necessity of a recusal at this stage,²⁹ but draws attention to the need to proceed without delay in the event of recusal or disqualification due to the potential impact on the implementation of reparations.³⁰

²³ Observations, paras 23-25.

²⁴ Observations, para. 27

²⁵ Observations, paras. 27-28

²⁶ Observations, para 29

²⁷ OPCV Response, paras. 14, 17, 20, 21.

²⁸ OPCV Response, para 22.

²⁹ LRV Response, para 6

³⁰ LRV Response, para 7.

III. Relevant law

22. Article 41 (2) of the Statute provides:

- (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.
- (b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.
- (c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

23. Rule 34(1)(d) of the Rules provides:

In addition to the grounds set out in article 41, paragraph 2, and article 42, paragraph 7, the grounds for disqualification of a judge, the Prosecutor or a Deputy Prosecutor shall include, *inter alia*, . . . [e]xpression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.

24. Rule 34(2) of the Rules provides:

... a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based. The 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.

IV. Preliminary issues

25. In respect of the Additional Observations' request that the Decision of 11 June 2019 be treated as a nullity, the majority of the judges present at the plenary did not favour reconsidering the Decision of 11 June 2019. The plenary of judges clarified, however, that they considered it implicit in the Decision of 11 June 2019 that it would only consider the specific portions of the audio-video recording relevant to the issues raised in the Application.

V. Findings of the Plenary

A. Applicable legal standard

26. The plenary of judges notes the previous consideration that the disqualification of a judge is not a step to be undertaken lightly and that a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office.³¹ Unless rebutted, it is presumed that the judges of the Court are professional judges capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in a particular case.³²

³¹ Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para. 14, 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, ICC-01/04-01/06-3040-Anx, para. 37; 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. 18, 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, ICC-01/04-01/06-3154-AnxI, para. 29

³² Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para. 14, referring to, 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*

27. The plenary of judges understands that the Application alleges actual and apparent bias on the part of Judge Perrin de Brichambaut. In respect of the latter, the plenary recalls its full support for the maxim that justice must not only be done, but must additionally be seen to be done. The plenary recalls its previous determination that it is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; rather, the appearance of grounds to doubt his or her impartiality will be sufficient.³³ The plenary of judges also recalls that it has consistently considered that the question of impartiality should be viewed from the objective perspective of whether a fair-minded and informed observer, having considered all the facts and circumstances, would reasonably apprehend bias in the judge.³⁴ Such fair-minded person is an objective observer, not to be confused with the applicant himself,³⁵ whose consideration of facts and circumstances includes the nature of a judge's profession.³⁶ The plenary of judges also refers to previous findings that, in forming a view regarding the appearance of bias, the fair-minded observer should take into account the entire context of the case,³⁷ and in the case of public statements, the relevant content of the statement, as well as its

Hassan Ahmad Al Bashir, pursuant to article 41 (1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, 19 March 2010, ICC-02/05-01/09-76-Anx2, page 7

³³ Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para 11; 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, ICC-01/04-01/06-3040-Anx, para. 9, Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of *The Prosecutor v Germain Katanga*, 22 July 2014, ICC-01/04-01/07-3504-Anx, para 38, 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 16.

³⁴ 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, ICC-01/04-01/06-3040-Anx, para 34.

³⁵ *Ibid*, para 35

³⁶ *Ibid*, para 36

³⁷ *Ibid*, para 38.

context.³⁸ It is for the party requesting the disqualification to demonstrate the appearance of bias.³⁹

28. In light of the applicable legal standard, before proceeding to the merits of the Application, the plenary of judges emphasises that any decision must begin from the principle that the impartiality of a judge is presumed and that the threshold for overcoming this presumption is high.
29. The plenary of judges further emphasises that, whilst judges of the Court may exercise their freedom of expression and association, as guided by the applicable legal framework including the Code of Judicial Ethics, they should take particular care to exercise caution in ensuring that they do so in a manner that does not raise needless questions of judicial impartiality and propriety.⁴⁰

B. Findings concerning the statement of the number of victims to be awarded reparations

30. The plenary of judges notes that Mr Lubanga bases his argument on Judge Perrin de Brichambaut following statement: *'The UPC had, in your opinion, how many child soldiers operative? (More or less in the same principles as Ongwen, by the way.) - 3000'*⁴¹
31. The plenary of judges further notes that although the Application provides some information on the context of the case, in particular on the stage of the reparation proceedings at the time of the 2017 Presentation, it does not

³⁸ *Ibid*, para 39

³⁹ Decision of the Plenary of Judges on the Defence Request for Disqualification of Judge Kuniko Ozaki from the case *The Prosecutor v Bosco Ntaganda*, 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para 33.

⁴⁰ Article 9 of the ICC Code of Judicial Ethics may provide further guidance in this respect. The judges did not consider, however, that this provision creates a blanket prohibition on all public references to pending cases and is not, in any event, decisive of the issue of impartiality arising under article 41 of the Statute.

⁴¹ Application, paras. 16-17

provide a full and complete picture of such context. The plenary of judges reiterates that, in forming a view regarding the appearance of bias, the entire context of the case should be taken into account.⁴² In this respect, it transpires from the Observations and the OPCV Response that, at the time of the 2017 Presentation, several public documents filed into the records of the *Lubanga* case already referred to an estimated number of 3000 victims. In particular, the plenary of judges notes that the figure 3000 appears in the Trust Fund for Victims' Plan which was filed before Trial Chamber II on 3 November 2015.⁴³

32. Furthermore, the plenary of judges finds that, the circumstances in which the relevant statement was made are also a relevant factor to be taken into account by a reasonable observer. In this respect, the plenary of judges notes that Judge Perrin de Brichambaut comment about the figure 3000 was made while he was seeking to explain to a group of students not familiar with the Court the challenging aspects of reparation proceedings at the Court.⁴⁴ The plenary of judges considers that, in addition to clearly being an expression of information available in the public record and not a personal opinion, a well-informed reasonable observer would, in any event, understand that the figure 3000 was merely provided for illustrative purposes.

C. Findings concerning the statement on Trial Chamber II's methodology

33. In support of his arguments, the plenary of judges notes that Mr Lubanga provides some information on the context of the case with regard to the extent to which the issue of the methodology of Trial Chamber II had been discussed

⁴² 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, ICC-01/04-01/06-3040-Anx, para. 38

⁴³ Filing Reparations and Draft Implementation Plan, 3 November 2015, ICC-01/04-01/06-3177-Red, para 253

⁴⁴ Annex 1 to the Application, p 23, See Observations, para 4

at the time of the 2017 Presentation. The Observations and the OPCV Response provide further information on such context.

34. In this respect, the plenary of judges understands that, notwithstanding the fact that, at the time of the 2017 Presentation, the parties had not yet filed submissions on the issue of the Trial Chamber II's methodology, Trial Chamber II had already issued a number of orders referring to such methodology. In particular, the plenary of judges notes that reference to the use of a sample of victims' was made in July and October 2016,⁴⁵ and in February 2017.⁴⁶
35. Furthermore, the plenary of judges finds that the statement at issue merely describes the fact that Trial Chamber II was in the process of working on a methodology and does not assert that the use of such methodology had already been determined. In this respect, the plenary of judges refers to the following language used by Judge Perrin de Brichambaut: *'We are working on the idea of having a sample'*.⁴⁷ In other words, it is a very general prospective statement derived from publicly available information.
36. In light of the above, the plenary of judges finds that a reasonable observer, taking into consideration the context of the case, the nature and content of the statement at issue and the circumstances in which it was made,⁴⁸ would not have considered that the statement on Trial Chamber II's methodology demonstrates prejudgement or a lack of impartiality on the part of its maker.

⁴⁵ Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations, 15 July 2016, ICC-01/04-01/06-3218-tENG, para 8 ; Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016, 21 October 2016, ICC-01/04-01/06-3252-tENG, para 15

⁴⁶ 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. 12

⁴⁷ Annex 1 to the Application, p. 24

⁴⁸ See paras. 31-32 above

Consequently, the Application fails to meet the required high threshold standard for disqualifications in this regard.

D. Findings concerning the statement on Mr Lubanga and his supporters exerting pressure on Ituri communities

37. The plenary of judges notes that, in the context of the review of the sentence of Mr Lubanga, the issue of the potential detrimental effect of Mr Lubanga's early release in the Ituri community was extensively debated and taken into consideration by the Appeal Panel in its decision, which is part of the public record of the case since September 2015.⁴⁹
38. The plenary of judges considers that a reasonable observer would not consider that a mere reference to an issue which had been publicly debated during proceedings before the Court, stated in the context of the 2017 Presentation, would give rise to a reasonable appearance of bias, particularly in view of the understanding that 'when assessing the appearance of bias in the eyes of the reasonable observer, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, are capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case, whilst excluding any information that was available to them in other capacity'.⁵⁰
39. In such circumstances, the plenary of judges does not consider that the high threshold for the displacement of the presumption of impartiality is satisfied.

⁴⁹ Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, 22 September 2015, ICC-01/04-01/06-3173, paras. 54-71

⁵⁰ Presidency, Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2019 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, 19 March 2010, ICC-02/05-01/09-76-Anx2, p. 7

VI. Disposition

40. In light of the foregoing, the plenary, by absolute majority consisting of Judges Fremr, Mindua, Schmitt, Kovács, Chung, Pangalangan, Akane, Alapini-Gansou, Prost and Aitala, decide to dismiss the Application.
41. Judges Eboe-Osuji, Morrison, Ibáñez and Bossa abstained from participating in any aspects of the decision of the plenary of 17 June 2019, as they had each reached a conviction that, in the particular circumstances, their participation may place them in a potential situation of conflict *vis-à-vis* their responsibilities as judges of the Appeals Division. Judge Herrera-Carbuccia also chose to abstain from participating in decision-making, noting in this regard that she is also a member of Trial Chamber II.



Judge Robert Fremr
First Vice-President