Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01-04/01-06**
Date: **23 April 2019**

THE PRESIDENCY

Before: **Judge Chile Eboe-Osuji, President**
Judge Robert Fremr
Judge Marc Perrin de Brichambaut

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document

OPCV response to the Defence "*Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut*"

Source: **Office of Public Counsel for Victims**

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

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I. INTRODUCTION

1. Pursuant to regulation 24 of the Regulations of the Court, the Principal Counsel of the Office of Public Counsel for victims (respectively the "Legal Representative", and the "OPCV" or the "Office") files her response to the "*Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut*" (the "Request for Disqualification"*)*.[1]

2. The Legal Representative submits that the statements relied upon by the Defence to support actual bias or loss of appearance of impartiality of the Presiding Judge of Trial Chamber II (the "Trial Chamber") constitute no more than a reaffirmation of information already available in the public record of the *Lubanga* case. Contrary to the submissions of the Defence, a reasonable and informed observer cannot apprehend bias, in the circumstances, from any of the statements put forward. It follows that the Request for Disqualification should be rejected and the reparations proceedings proceed expeditiously, more than 16 years after the commission of the crimes.

II. PROCEDURAL BACKGROUND

3. On 3 March 2015, the Appeals Chamber issued an amended Order for reparations referring the present case to a newly constituted Trial Chamber tasked with monitoring and overseeing the implementation stage of said Order.[2]

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[1] See the "*Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut*» déposée le 10 avril 2019", No. ICC-01/04-01/06-3451-Conf, 10 April 2019 with Public Annex 1, No. ICC-01/04-01/06-3451-Anx1, containing the "Transcription écrite de l'intervention de Monsieur le Juge Marc Perrin de Brichambaut à la Peking University Law School (Beijing) du 17 mai 2017, publiée par le *Centre For International Law Research and Policy*" (the "Transcript of the Presentation"). A Public redacted version of the Request for Disqualification was filed on the same day, No. ICC-01/04-01/06-3451-Red (the "Defence Request for Disqualification").

[2] See the "Order for reparations (amended)" (Appeals Chamber), No. ICC-01/04-01/06-3129-AnxA A, A2 A3, 3 March 2015, paras. 75-76.

4. On 17 March 2015, the Presidency referred the present case to Trial Chamber II.[3]

5. On 24 March 2015, the Judges composing the Trial Chamber designated that Judge Perrin de Brichambaut as Presiding Judge.[4]

6. On 17 May 2017, the Presiding Judge gave an academic presentation at a Law School in a State not party to the Rome Statute (the "17 May 2017 Presentation").[5]

7. On 15 December 2017, the Trial Chamber issued its decision setting the size of the reparations award for which Mr Lubanga is liable.[6]

8. On 10 April 2019, the Defence filed its "*Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut*".[7]

III. APPLICABLE LAW

9. Article 41(2)(a) of the Statute sets out the standard for the judges of the Court with respect to impartiality:

> "[a] *judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground*".

10. Rule 34(1) of the Rules provides a list of non-exhaustive grounds for disqualification, including:

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[3] See the "Decision ref erring the case of *The Prosecutor v Thomas Lubanga Dyilo* to Trial Chamber II" (Presidency), No. ICC-01/04-01/06-3131, 18 March 2015 (dated 17 March 2015).
[4] See the "Ordonnance notifiant l'élection du juge président" (Trial Chamber II), No. ICC-01/04-01/06-3132, 24 March 2015.
[5] See the Transcript of the Presentation, *supra* note 1.
[6] See the "Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (Trial Chamber II), No. ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017.
[7] See the Defence Request for Disqualification, *supra* note 1.

> *"(d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned".*

11. As set out in Plenary decisions addressing previous requests for disqualification, the relevant standard of assessment is whether "*the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge*".[8] Previous Plenaries established that said standard "*is concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension is objectively reasonable*".[9] Moreover, they also stated that "*there is a strong presumption of impartiality that is not easily rebutted*".[10]

IV. SUBMISSIONS

12. The Defence seeks the disqualification of the Presiding Judge of the Trial Chamber that has been conducting, since 2015, the reparations proceedings in the *Lubanga* case.[11] The Request for Disqualification is supported by a set of arguments, all referring the 17 May 2017 Presentation.

13. In particular, the Defence submits that in the course of the 17 May 2017 Presentation the Presiding Judge expressed his opinion about a case that is pending before the Court as well as on issues that were being discussed at the time and were later adjudicated by the Trial Chamber in the 14 December 2017 Decision.[12] It submits

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[8] See the "Decision of the Plenary of Judge 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*" (Plenary), No. ICC-01/05-01/13-511-Anx, 23 June2014, para. 16 (the "*Bemba* et al. Disqualification Decision"). See also "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*", No. ICC-01/04-01/06-3040-Anx, 11 June 2013.

[9] *Idem*.

[10] See the *Bemba* et al. Disqualification Decision", *supra* note 8, para. 16 which reads as follows: "*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*".

[11] See the Defence Request for Disqualification, *supra* note 1, p. 12.

[12] *Idem*, para. 15.

that an opinion was expressed, first, about the number of child soldiers that were operative in the UPC at a time where "*the number of victims in the case*" was one important issue being discussed before the Trial Chamber.[13] This contention is supported by the following passage at page 24 of the Transcript of the Presentation: "*Victims of Mr. Lubanga* – [who] *was convicted and sentenced for the use of child soldiers by his political movement in notheastern Congo, the UPC. The UPC had, in your opinion, how many child soldiers operative? (more or less in the same principles as Ongwen, by the way.) – 3000*".[14]

14. The Legal Representative posits that the reasonable observer would not decontextualize said statement and would read it together with the preceding paragraph in the Transcript of the Presentation, where the Presiding Judge states: "[*n*]*ow, numbers of the applicants, this is really the major problem, because it's very difficult to address. I gave you an example regarding Katanga and reparations-how difficult it is to make sure that you give a fair treatment to every applicant, when you determine that they have a right to reparations. In the following case – and this is public, so I can tell you – our Chamber has to address the victims of Mr. Lubanga*".[15] Accordingly, Judge Perrin de Brichambaut was pointing to a fact that is significant for the determination of the Request for Disqualification. Indeed, the public record of the case showed, at the time of the 17 May 2017 Presentation, that the amount of potentially eligible victims was estimated to a total of 3,000 persons.[16] To what is more, later in its 21 December 2017 Decision, the Trial Chamber did not hesitate to find that:

> "*233. Having pondered Trial Chamber I's relevant findings on the number of victims, and having examined the additional evidence*

[13] *Ibid.*, paras. 16 *et seq.*
[14] See the Transcript of the Presentation, *supra* note 1, p. 24.
[15] Emphasis added.
[16] See *inter alia* the "Filing on Reparations and Draft Implementation Plan", No. ICC-01/04-01/06-3177-Red, 3 November 2015, para. 253; repeated in the "Prosecution's observations on the Trust Fund for Victims' Filing on Reparations and Draft Implementation Plan", No. ICC-01/04-01/06-3186, 18 December 2015, para. 5. See also the "Information regarding Collective Reparations", No. ICC-01/04-01/06-3273, 13 February 2017, paras. 34 and 39 and the "*Opinion de Mme la juge Herrera Carbuccia*", No. ICC-01/04-01/06-3252-Anx, 25 October 2016, para. 9.

> *entered on record at the reparations phase and the parties' submissions thereon, the Chamber is likewise unable to arrive at a precise number of victims of the crimes of which Mr Lubanga was convicted"*.[17]

15. Moreover, the public information existing in the record of the case (3,000 victims) and the intimate conviction Judge Perrin de Brichambaut was forming at the time did not necessarily correspond and he chose to report on the former.

16. Furthermore, the Defence submits that in his 17 May 2017 Presentation the Presiding Judge expressed an opinion about the methodology to be followed for the determination of the number of beneficiaries for reparations.[18] However, it was only on 13 July 2017 that the Chamber requested observations from the Defence and from the Victims about the methodology to be followed for the determination of the number of potential beneficiaries.[19] This contention is supported by the following passage at page 24 of the Transcript of the Presentation: *"So, it's quite difficult and complicated to help identify those victims, but we are not going to be able to do the same thing as Katanga, to identify them individually. We are working on the idea of having a sample, and on the basis of the sample, we determine the criteria of those who can claim to be victims, and then when the Trust Fund will be doing reparations programs and people come which say who met those criteria, we will allow them, we will certify them afterwards. So, you have to be creative in doing this job altogether"*.[20]

17. Again, the Legal Representative posits that a reasonable and informed observer cannot ignore that the Chamber had announced said methodology long before the 17 May 2017 Presentation. The Trial Chamber made clear, including in its

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[17] See the "Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (Trial Chamber II), No. ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017, para. 233.
[18] See the Defence Request for Disqualification, *supra* note 1, paras. 21-26.
[19] *Idem*, paras. 23-24.
[20] See the Transcript of the Presentation, *supra* note 1, p. 24.

15 July 2016, 21 October 2016, and 22 February 2017 Orders[21] that it needed to identify a sufficient number of victims with a limited – albeit important – purpose: to supplement the existing victims' sample in order to understand whether the information collected was representative of all potentially eligible beneficiaries. More detailed aspects of this methodology were developed subsequently and continue to be developed to date to cater for the implementation of the reparation order in the present case.[22] Accordingly, the 17 May 2017 Presentation contains what, at the time, was already public information which does not leave room for a reasonable and informed observer to apprehend bias.

18. Finally, the Defence submits that certain observations made in the course of the 17 May 2017 Presentation demonstrate that the Judge is biased against the convicted person, which casts doubt upon his impartiality.[23] It submits that the Presiding Judge expressed that Mr Lubanga and his supporters exerted pressure upon their communities to discourage potential victims from requesting reparations.[24] It alleges that this is unsupported by evidence, shows bias[25] and therefore the Presiding Judge shall not continue serving as a Judge in the reparations proceedings in the present case.[26]

19. This contention is supported by different statements made during the Presentation, as follows:

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[21] See respectively the "Ordonnance enjoignant au Greffe de fournir aide et assistance aux représentants légaux et au Fonds au profit des victimes afin d'identifier des victimes potentiellement éligibles aux réparations" (Trial Chamber II), No. ICC-01/04-01/06-3218, 15 July 2016, para. 8 ; See the "Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016" (Trial Chamber II), No. ICC-01/04-01/06-3252-tENG, 21 October 2016, para. 15; and See the "Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo" (Trial Chamber II), No. ICC-01/04-01/06-3275-tENG, 22 February 2017, para. 12.

[22] See *i.e.* the "Decision Approving the Proposals of the Trust Fund for Victims on the Process for Locating New Applicants and Determining their Eligibility for Reparations" (Trial Chamber II), No. ICC-01/04-01/06-3440-Red-tENG, 7 February 2019.

[23] See the Defence Request for Disqualification, *supra* note 1, paras. 27-35.

[24] *Idem*, para. 27.

[25] *Ibid.*, para. 30.

[26] *Ibid.*, para. 35.

> "'*The mere fact that you declare yourself a victim of Mr. Lubanga, which is in trial in The Hague, can create a lot of trouble for you because Mr. Lubangas tribal members and some of his henchmen are still very much present in your village. So, they are not going to be very happy that you go to a foreign court and ask for justice and potentially for reparations. So, this is a very complicated issue' 'Now, of course the first thing, once we had Mr. Ongwen, was for the VPRS to go to Northern Uganda to Acholiland, and to go around and say, who is interested in being considered as a victim of Mr. Ongwen. Quite a few people where interested in fact, and this is a good situation because the LRA is out of the way.* ***So, in Congo it was more complicated because all groups of Katanga and Lubanga are still present and can threaten you****, but in Uganda they are out of the way »* (nous soulignons). *'Now there, it's a real problem to claim that you are a victim because UPC still exists. Mr. Lubanga is in the jail, in Kinshasa, but has a lot of networks. So, if you raise your finger and say, "I'm a victim of this guy," you really have to be motivated. So, we are having a much harder time getting a victim's claim for reparations, and we have to make a much bigger effort in protecting them in terms of redactions and so on, for those who are willing to come out'*".[27]

20. The Legal Representative is of the view that a reasonable and informed observer cannot ignore that the Court had entertained, prior to the 17 May 2017 Presentation, an in-depth debate about these issues in the context of the review concerning reduction of sentence of Mr Lubanga.[28] In the analysis of whether his early release would give rise to significant social instability, it was submitted that he remains a powerful figurehead for the UPC,[29] and that the "*prevailing sentiment*" is that the "*UPC will await his return and maintain their loyalty*".[30] Given that Mr Lubanga is considered a "*hero/martyr figure*" by UPC supporters, there may be possible disturbances if large crowd gatherings occur.[31] In turn, the victims had observed that "*based on Mr Lubanga's current attitude, they fear that his release and return in the region*

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[27] *Ibid.*, para. 27 (footnotes omitted).
[28] 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.
[29] *Idem*, para. 56.
[30] *Ibid.*, para. 57.
[31] *Ibid.*

would give rise to tensions between communities, even within his own community from which some victims originate".[32]

21. The Appeals Chamber Panel appointed for the review concerning reduction of sentence (the "Appeals Chamber Panel") found that the information and the submissions received demonstrated that Mr Lubanga's release would give rise to some level of social instability.[33] The victims' submissions did no go unheard, indeed the Panel expressly noted "*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*".[34] Accordingly, the statements contained in the 17 May 2017 Presentation merely reflect the public record of the case, *i.e.* the existing position of the Appeals Chamber Panel. Therefore, in these circumstances, contrary to the submissions of the Defence, a reasonable and informed observer cannot apprehend bias.

22. As a final and general note, the Legal Representative respectfully conveys a reality that it has observed during various missions her team undertook in the Democratic Republic of Congo. The situation of the victims is clearly worsening with the passage of time. Their sufferings including physical injuries, psychological distresses and/or economic harm, which remain unaddressed since the commission of the crimes in 2002-2003, are worsening. Due to the transgenerational impact of the harm suffered, an increasing number of individuals are in urgent need for support. It is therefore imperative that the Plenary rejects the Request for Disqualification thereby allowing the proceedings to progress expeditiously in the interest not only of

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[32] *Ibid.*, para. 62. See also the "Observations of the V01 group of victims on the possible review of Mr Thomas Lubanga Dyilo's sentence", No. ICC-01/04-01/06-3149-tENG, 10 July 2015, para. 12.
[33] See the "Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo", *supra* note 28, para. 64.
[34] *Idem*, para. 70.

Justice but of the victims who are waiting for reparation for the harm suffered for more than 16 years.[35]

23. The Legal Representative therefore submits that the statements invoked by the Defence to support bias or loss of appearance of impartiality on the Judge constituted no more than a reaffirmation of information already available in the public record of the present case. Contrary to the contentions of the Defence, a reasonable and informed observer cannot apprehend bias, in the circumstances, from any of the quoted statements.

24. Consequently, the Legal Representative respectfully requests the Presidency to consider the paramount principle of expeditious proceedings and the correlative rights of the victims of the present case in relation to the reparations proceedings in entertaining promptly the Defence Request for Disqualification.

Respectfully submitted,

Paolina Massidda
Principal Counsel

Dated this 23rd day of April 2019

At The Hague, The Netherlands

[35] See *inter alia* the "Information regarding the Issues as well as the Concerns and Wishes of the Potentially Eligible Victims in the Reparations Proceedings", No. ICC-01/04-01/06-3293-Red-tENG, 25 April 2017.