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**PRESIDENCY**

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

**SITUATION IN THE REPUBLIC OF MALI**

**IN THE CASE OF  
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG  
MAHMOUD**

**Public**

**With Public Annexes A, B and C**

**Public redacted version of the Request for the disqualification of Judge Marc  
Perrin de Brichambaut**

**Source:** Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag  
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## 1. Introduction

1. Judicial impartiality is the *sine qua non* of a fair trial. Its importance is underlined by the requirement that judges “should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively give rise to an appearance of bias”.<sup>1</sup>
2. Article 40(2) of the Statute breathes life to this requirement by specifying that “[j]udges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence”. Rule 34(1)(d) further provides that there may be grounds for disqualification if a judge expresses opinions that “objectively, could adversely affect the required impartiality of the person concerned”.
3. As a result of his ongoing membership of French defence and political think-tanks and the *Conseil d’État*, there is an appearance that Judge Brichambaut continues to wear the hat of a French political-military advisor, whilst ensconced in the robes of an ICC judge. Since his appointment as an ICC judge, Judge Brichambaut has continued to engage in a variety of professional activities, which are geared towards advancing the political and military interests of France. And in this capacity, he has issued multiple pronouncements on factual issues that have yet to be adjudicated in this case.
4. The Defence for Mr. Al Hassan has considered these issues carefully. Mr. Al Hassan has been detained by the ICC since late March 2018, and was detained for twelve months prior in Mali. His right to expeditious proceedings is of paramount concern, and the Defence does not wish to delay the scheduled date of the confirmation hearing. The weight of evidence concerning Judge Brichambaut’s ongoing activities and views is, however, simply too much to ignore. Irrespective as to the outcome, these issues must be evaluated and adjudicated at this stage to ensure that the confirmation process is free from any possible taint of partiality or dependence. Mr. Al Hassan also should not be compelled to choose between his right to expeditious process, and his right to be tried before an independent and impartial Court.

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<sup>1</sup> ICTY, *Prosecutor v. Anto Furundžija*, Appeals Judgement, IT-95-17/1-A, 21 July 2000, para. 189.

5. The Defence therefore submits the current request to disqualify Judge Brichambaut from sitting on the *Al Hassan* case, but at the same time, respectfully invites the Presidency to consider whether, without prejudice to the merits of this request, it would be in the interests of justice and good administration to compose a new Chamber for this case, in the interim. Judges have also recused themselves, notwithstanding their personal disagreement with the merits of a particular challenge, in order to avoid unnecessary delays in the proceedings.<sup>2</sup> In the *Lubanga* case, two judges of the Plenary further cautioned that where ‘apparent’ rather than ‘actual’ bias is alleged, it may be prudent for the judge in question to step aside in order “to protect the judicial process from the charge of bias”.<sup>3</sup>

## 2. Factual submissions

6. The current application is based on Judge Brichambaut’s public interventions and ongoing professional activities, and their linkage to key issues in this case. The interventions and activities are comprised of:
- a. The Publication of joint position papers, under the name of ‘*Le Club des Vingt*’;
  - b. His position as ‘*administrateur*’ of the ‘*Forum du Futur*’; and
  - c. His honorary membership of the *Conseil d’État*, and continued performance of the role of ‘*Conseiller d’État*’.

### 2.1 *Publication of joint position papers, under the name of ‘Le Club des Vingt’*

7. On the basis of open source investigations, the Defence discovered, on 2 June 2019, that Judge Perrin de Brichambaut is a member of an association, which refers to itself as ‘*Le Club des Vingt*’. This Club “réunit des anciens ministres des affaires étrangères, des diplomates et experts (Hubert Védrine, Régis Debray, Henry

<sup>2</sup> For example, in recusing himself from the *Karadzic* appeal, President Meron emphasised that although he considered himself able to adjudicate the issues before him with an impartial mind, “in order not to allow disqualification proceedings to impede the progress of the appeals in this case, it is in the interests of justice that [he] withdraw from this case”: *Prosecutor v. Karadzic*, Decision, 27 September 2018, MICT-13-55-A, p. 2. See also *Prosecutor v. Karemera et al*, Decision on Motions by Nzirorera and Rwamakuba for Disqualification of Judge Vaz, Trial Chamber, ICTR-98-44-T, 17 May 2004, p. 3.

<sup>3</sup> ICC-01/04-01/06-3154-AnxI, 3 August 2015, para. 39.

Laurens...),”<sup>4</sup> and publishes various position papers on issues that concern French policy, which are issued under the names of all twenty members of the Club (including ‘Marc Perrin de Brichambaut’). The papers are hosted on a site ‘Esprit Surcouf’, which, according to its editorial policy, is “réservé aux informations, aux études, aux discussions, publications et toutes autres actions relatives à la Défense et à la Sécurité.”<sup>5</sup>

8. The perspective set out in these papers is oriented towards the interests of France: for example, in a 30 January 2019 position paper concerning the current state of Africa, the Club referred to French action in Africa as ‘*Notre action en Afrique*’.<sup>6</sup> The paper in question further delineated specific policy steps that ‘our country’, as in France, should take to improve its position in Africa.<sup>7</sup>
9. On 1 November 2018, *Le Club des Vingt* issued a démarche titled ‘Redécouvrir le Maghreb’, which was promulgated in the names of all its members, including ‘Marc Perrin de Brichambaut’.<sup>8</sup> The communication is also written from the perspective as to what might be the best interests of France in relation to its political, economic and military strategy regarding the Maghreb, including as concerns the threat of ‘terrorism’.<sup>9</sup> The concluding section, concerning the larger policy direction that should be taken by France in the Maghreb, observes that:

*Mais rien ne pourrait être fait qui vaille si l'on ne prend pas en considération le fait qu'après des décennies d'immobilisme, les*

<sup>4</sup> [Babelio](#), *Le Club des Vingt*, Biographie.

<sup>5</sup> Esprit Surcouf, [Charte éditoriale](#).

<sup>6</sup> Boulevard Extérieur, [l'Afrique n'est plus ce qu'elle était](#), *Le Club des Vingt*, 30 January 2019 : “Notre action en Afrique s’est trouvée focalisée ces dernières années sur le militaire. Sans remettre celui-ci en cause, nous devons marquer une rupture par rapport aux décisions antérieures.”

<sup>7</sup> Boulevard Extérieur, [l'Afrique n'est plus ce qu'elle était](#), *Le Club des Vingt*, 30 January 2019 : “Notre action en Afrique s’est trouvée focalisée ces dernières années sur le militaire. Sans remettre celui-ci en cause, nous devons marquer une rupture par rapport aux décisions antérieures.”

<sup>8</sup> Boulevard Extérieur, [Redécouvrir le Maghreb](#), *Le Club des Vingt*, 1 November 2018.

<sup>9</sup> Boulevard Extérieur, [Redécouvrir le Maghreb](#), *Le Club des Vingt*, 1 November 2018 : “Nous voyons dans le Maghreb une zone où nos intérêts demeurent nécessairement privilégiés alors que s’y affirme la concurrence des États-Unis, de la Chine, de certains pays européens, et que s’y exerce l’influence agissante des pays du Golfe. Au reste, leurs économies, restant largement tributaires des importations traditionnelles, n’ont guère changé depuis un demi-siècle. Les pays d’Asie, qui étaient alors au même niveau économique, se sont portés, eux, à l’avant-garde du progrès. Ils ont développé la recherche et l’innovation. Ils fabriquent et exportent des produits très évolués, devenant ainsi parmi les pays les plus dynamiques au monde. Le Maroc, l’Algérie et la Tunisie continuent néanmoins de présenter une importance majeure pour la France. Aux intérêts multiformes qu’ils présentent pour elle, s’ajoute l’existence de plusieurs millions de citoyens français originaires de ces pays et ayant souvent la double nationalité. Il y a en outre en commun les problèmes migratoires et la menace terroriste.”

*sociétés maghrébines commencent à bouger sous l'effet de deux mouvements différents : d'une part une contestation sociale, exploitée par l'islamisme, d'autre part une plus grande ouverture au monde extérieur et l'aspiration à davantage de liberté en particulier chez les plus jeunes.*

*L'entassement dans les villes, des espaces ruraux restés très en retard, l'exode rural, ne sont pas choses nouvelles. Mais aujourd'hui, le mécontentement s'exprime, notamment par les réseaux sociaux, il y a ici et là des micro-manifestations en Algérie. Plus généralement, on assiste à l'éveil d'une « sous-culture » contestataire. L'influence islamique se répand à partir des régions proches. Le groupe salafiste armé Ansar Eddine, venant du Mali, s'installe en Tunisie et commence à y recruter.*

10. At the same time that Judge Brichambaut co-authored a position paper, which refers to Ansar Eddine (also spelled Ansar Dine in English text and ICC filings) as an armed Salafist group within an overall context concerning the threats from terrorism, Judge Brichambaut was sitting as an ICC judge in the *Al Hassan* case. Commentators often use the designation 'Salafist' to denote 'jihadist' or a group associated with Al Qaeda and violent terrorism.<sup>10</sup>

## **2.2 Position as 'administrateur' of the 'Forum du Futur'**

11. On 5 June 2019, the Defence discovered further that Judge Perrin de Brichambaut is listed as an 'administrateur' of the group 'Forum du Futur'.<sup>11</sup> The *Forum* has the following mission:<sup>12</sup>

*Le Forum du Futur est un centre indépendant qui a pour vocation d'étudier et d'analyser les grands bouleversements qui sont à l'œuvre aujourd'hui : évolutions démographiques ; enjeux économiques et sociétaux ; compétitions pour l'accès aux ressources rares : eau, mines, énergie ; révolutions technologiques ; diffusion des idéologies révolutionnaires ou radicales ; dissémination des conflits armés. Son champ de réflexion est résolument pluriel et international.*

<sup>10</sup> C. Moniquet, [The Involvement of the Salafism/Wahhabism in the Support and Supply of Arms to Rebel Groups Around the World](#), 'Directorate-General for External Policies of the Union, 11 June 2013, p. 4; J. Wagemakers, [Salafism](#), Oxford Research Encyclopedia of Religion, August 2016.

<sup>11</sup> Forum du Futur, [Marc Perrin de Brichambaut – Administrateur](#).

<sup>12</sup> Forum du Futur, [Qui sommes-nous ?](#)

*Il se veut aussi le miroir de la société française, le creuset de ses interrogations. Conscient que les valeurs assurent la cohérence de la pensée et que la prospective est le moteur de l'espoir, le Forum du Futur, plus pragmatique qu'idéologique, prend appui sur les fondements de notre histoire et de celle de l'Europe, et cherche à dessiner l'avenir.*

*Le Forum du Futur s'oppose aux systèmes de pensée rigides, aux opinions extrêmes. Dans son enceinte, les idées et les expériences font l'objet d'une analyse critique, en privilégiant la pluralité plutôt que l'homogénéité des points de vue. Le court terme risquant toujours d'occulter la réflexion sur le futur, ses travaux s'inscrivent par ailleurs dans la durée et sont conduits sur un mode interrogatif.*

12. Judge Brichambaut has occupied this function, whilst sitting as an ICC judge,<sup>13</sup> and has participated actively in events organised by the association.<sup>14</sup> The association states that it is funded by the “*soutien d'entreprises, d'institutions et de particuliers*”. Its partner associations include:<sup>15</sup>

- ‘Minerve’, an advanced French military training academy;<sup>16</sup>
- Centre Thucydide, a French think-tank on international relations;<sup>17</sup>
- the ‘Société d'encouragement pour l'industrie nationale’, which is – as reflected in its name – a society which encourages the development of French industries;<sup>18</sup>
- Synopia, a think-tank dedicated to issues of governance,<sup>19</sup> which describes one of its six objectives as to “Développer l'influence française dans le monde”,<sup>20</sup>

<sup>13</sup> Forum du Futur, [Marc Perrin de Brichambaut – Administrateur](#) : **Marc PERRIN DE BRICHAMBAUT**, haut fonctionnaire et un diplomate, est ancien membre du Conseil d'État, secrétaire général de l'Organisation pour la Sécurité et la Coopération en Europe (OSCE) de juin 2005 à juin 2011 et juge à la Cour pénale internationale depuis le 11 mars 2015”.

<sup>14</sup> For example, Forum du Futur, [Equilibres stratégiques et doctrine nucléaire en Asie du Sud](#), 20 May 2018: “Modérateur : **Marc Perrin de Brichambaut**, ancien membre du Conseil d'État, juge à la Cour pénale internationale”.

<sup>15</sup> Forum du Futur, [Qui sommes-nous ?](#)

<sup>16</sup> Minerve, Association de l'Enseignement Militaire Supérieur Scientifique et Académique, [Objectifs de l'association](#).

<sup>17</sup> [Centre Thucydide](#), analyse et recherche en relations internationales; Centre Thucydide, [Présentation](#).

<sup>18</sup> Twitter, Société d'Encouragement pour l'Industrie Nationale; Wikipedia, [Société d'encouragement pour l'industrie nationale](#)

- ‘Le Cercle France-Amériques’, which organises events with a view to promoting fruitful relations between private and public entities within France and the Americas;<sup>21</sup> and
  - private companies, such as Google.
13. In May 2107, the *Forum* hosted a conference titled ‘Opération Barkhane et l’avenir de la Zone Sahélo-Saharienne’, at the École Militaire.<sup>22</sup> The conference was organised jointly with its partner associations, ‘Minerve’,<sup>23</sup> which is the advanced French military training academy.<sup>24</sup> The key note speakers were:
- **Rémi MARÉCHAUX**, *ancien ambassadeur au Kenya, directeur d’Afrique et de l’Océan indien au Ministère des Affaires étrangères et du Développement international.*
  - **Général Patrick BRÉTHOUS**, *ancien commandant de la force Barkhane, chef du centre de planification et de conduite des opérations (CPCO) à l’État-major des armées, Ministère de la Défense.*
14. In 2017, the year Mr. Al Hassan was arrested and detained by French forces in Mali, General Bréthous was head of French special-forces operating in the Sahel.<sup>25</sup>
15. In the same year, the *Forum du Futur* and the Minerve association organised a conference/debate titled ‘la guerre des islamismes’.<sup>26</sup> The keynote speaker (a resident professor from the École Spéciale Militaire de Saint-Cyr) promulgated the following advice for the French government (which is hosted on the website of the *Forum du Futur*):

Pour se prémunir contre l’importation des guerres de religion musulmanes et pour éviter que leurs partisans ne sévissent sur le

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<sup>19</sup> [Synopia](#), observatoire des gouvernances.

<sup>20</sup> Synopia, [Présentation](#).

<sup>21</sup> [France-Amériques](#), Cercle des Nations Américaines.

<sup>22</sup> Forum du Futur, [L’opération Barkhane Et L’avenir De La Zone Sahélo-Saharienne](#), *Conférence-débat, organisée en partenariat avec l’Association Minerve*, 18 May 2017.

<sup>23</sup> Forum du Futur, [Qui sommes-nous ?](#)

<sup>24</sup> Minerve, Association de l’Enseignement Militaire Supérieur Scientifique et Académique, [Objectifs de l’association](#).

<sup>25</sup> [Forces Spéciales de l’armée de terre : la stratégie du secret](#), 16 October 2017, see Annex B

<sup>26</sup> Forum du Futur, [La Guerres des Islamismes](#), *Conférence-débat, organisée en partenariat avec l’Association Minerve*, 22 February 2017.

territoire national, il est urgent que le prochain gouvernement, quelle que soit sa couleur politique, mène une campagne de sensibilisation à grande échelle visant :

- 1) à expliquer l'état actuel de guerre interne que vit l'islam sur la rive sud de la Méditerranée et au Moyen-Orient, une guerre qui est étrangère à la situation nationale ;
- 2) à prévenir la population contre les stratégies d'exportation de ces guerres par des organisations telles que Daech et contre l'importation de ces guerres sur le territoire national ;
- 3) à promouvoir la laïcité non pas comme un outil coercitif imposé à la communauté musulmane mais comme la seule protection véritable contre l'extension des guerres de religion musulmanes sur notre territoire.

Cela devrait passer par des campagnes de sensibilisation et de conscientisation incluant des rencontres et des conférences dans les établissements scolaires et universitaires, des spots télévisés didactiques exposant les faits sans idéologisation ni politisation, ainsi que des manifestations culturelles montrant les mérites de la laïcité comme bouclier protecteur contre les dérives sectaires et contre l'hégémonie d'un groupe religieux sur les autres. En somme, il s'agit de gagner les cœurs et les esprits au modèle laïque français qui a déjà fait ses preuves dans la garantie donnée à chacun de vivre sa foi dans le respect de l'Autre et de la République.

16. The power-point slides presented during this conference (which are hosted on the *Forum du Futur* website) show the Touareg areas of Northern Mali as being actively associated with Al Qaeda.<sup>27</sup>

### 2.3 *Honorary membership of the Conseil d'État, and continued activities as 'Conseiller d'État'*

17. Although the *Conseil d'État* has judicial functions, it also provides policy advice to the French Government:<sup>28</sup> it has been opined that this role gives the *Conseil* “considerable leverage over the Government”.<sup>29</sup>

<sup>27</sup> Forum du Futur, Mathieu Guidère, [Conférence-débat : La Guerre des Islamismes](#), 22 February 2017, p. 9.

<sup>28</sup> Conseil d'État, [Les missions du Conseil d'État](#), “Le Conseil d'État exerce deux missions historiques : conseiller du Gouvernement pour la préparation des projets de loi, décret..., il est aussi le juge administratif suprême qui tranche les litiges relatifs aux actes des administrations. Le Conseil d'État a également pour mission de gérer l'ensemble de la juridiction administrative”.

<sup>29</sup> S. Rose-Ackerman, T. Perroud, [Policymaking And Public Law In France: Public Participation, Agency](#)

18. Individuals, appointed as *Conseiller d'État*, provide advice to the French Government on a range of administrative and policy issues,<sup>30</sup> although “[u]nfortunately, details on the nature and quality of *Conseil d'État* advice are not generally available for public critique. Its advice has traditionally remained secret unless the Government chooses to release it”.<sup>31</sup>
19. On 12 June 2019, the Defence discovered that Judge Brichambaut, as *Conseiller d'État*, continues to be actively engaged in this particular aspect of the mandate of the *Conseil d'État*.<sup>32</sup> This is reflected by open source materials, which note that Judge Brichambaut moderated a political affairs conference on 18 May 2016, convened by the *Conseil d'État*, in his role as “Marc Perrin de Brichambaut, Conseiller d'État, juge à la Cour pénale internationale, ancien secrétaire général de l'OSCE”.<sup>33</sup>
20. In a video extract of the conference, which has the subtitle ‘*Marc Perrin de Brichambaut, Conseiller d'État, juge à la Cour pénale internationale, ancien secrétaire général de l'OSCE*’,<sup>34</sup> Judge Brichambaut appears to endorse the French intervention in Mali and the CAR, as a means to address destabilising elements in the region. He also advocates for other European Union States to support the French

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[Independence, And Impact Assessment](#), Columbia journal of European law, Transnational Juris Publications, 2013, p. 239.

<sup>30</sup> [Conseil d'État, Advising](#), “The Conseil d'État advises the Government through five specialized departments: the department of Home Affairs, the Finance department, the department of Public Works, the Social department, and the Administrative department which was created in 2008. A rapporteur (advocate-reporter) is assigned to gather the relevant legal documentation and to study the relevant case. The officials and top civil servants from the ministries, also known as Government commissioners, provide the Conseil d'État with the necessary clarifications concerning the general scope of a text, the conditions of its elaboration and the reasons for the choices made by the ministries. The rapporteur then submits the case to the relevant department for discussion and the department votes on any potential amendments. In addition to these departments, the General Assembly convenes all the Conseillers d'État under the chairmanship of the Vice-President of the Conseil d'État, who participates in the elaboration of most Government bills and ordinances. Although the opinions of the Conseil d'État are not binding in theory, they are to a large extent followed by the Government in practice.”

<sup>31</sup> S. Rose-Ackerman, T. Perroud. [Policymaking And Public Law In France: Public Participation, Agency Independence, And Impact Assessment](#), Columbia journal of European law, Transnational Juris Publications, 2013, p. 240.

<sup>32</sup> Judge Brichambaut's OSCE biography ascribes him a counsellor role in the *Conseil d'État*: “Ambassador de Brichambaut started his career at the Conseil d'État, first as an administrative judge, later as Conseiller d'État.” [OSCE, Marc Perrin de Brichambaut](#), the Fourth Secretary General.

<sup>33</sup> Conseil d'État, [Faut-il accroître la capacité d'intervention diplomatique et militaire de l'Union ?](#), 18 May 2016.

<sup>34</sup> Le Conseil d'État et la Juridiction Administrative, [Vidéo : Faut-il accroître la capacité d'intervention diplomatique et militaire de l'Union ?](#), 18 May 2016 ; Vimeo, [Marc Perrin de Brichambaut](#). For transcript, see Annex A.

and United Nations interventions, and provides specific advice as to how best to organise such interventions.<sup>35</sup>

21. A further site, which lists Judge Brichambaut as an honorary member of the *Conseil d'État*, published a public analysis that he had provided in that capacity concerning the best means to ensure that President Macron succeeds in promoting French values.<sup>36</sup>

#### 2.4 *Linkage to the issues arising in the case of Mr. Al Hassan*

22. In April 2017, Mr. Al Hassan was apprehended, [REDACTED] and [REDACTED] by Operation Barkhane – a French counter-terrorism force.<sup>37</sup> He has alleged that he was [REDACTED] during this period.<sup>38</sup> Mr. Al Hassan was transferred subsequently to the custody of the Malian security services, where he asserts that he continued to be [REDACTED] and [REDACTED].<sup>39</sup> The ICC Prosecution [REDACTED] in [REDACTED]. During the [REDACTED], Mr. Al Hassan [REDACTED] that he had been [REDACTED] and [REDACTED] with [REDACTED], and that he was [REDACTED].<sup>40</sup> The [REDACTED] continued to [REDACTED] Mr. Al Hassan [REDACTED], whilst he remained detained by the Malian security services at the Sécurité d'État.<sup>41</sup>
23. On 20 March 2018, the Prosecution informed the Pre-Trial Chamber that they had heard that Mr. Al Hassan might be released from the Sécurité d'État; the Prosecution therefore requested the Chamber to issue an urgent arrest warrant.<sup>42</sup> The Chamber, composed of Judge Kovács, Judge Brichambaut, and Judge Alapini-Gansou issued the warrant on 27 March 2018.<sup>43</sup> Judge Brichambaut presided over the initial

<sup>35</sup> Annex A.

<sup>36</sup> Institut Montaigne, [International Organizations, an analysis by Marc Perrin de Brichambaut](#).

<sup>37</sup> ICC-01/12-01/18-335-Conf-Corr (hereinafter: 'DCC' or 'document containing the charges'), at para. 16.

<sup>38</sup> [REDACTED].

<sup>39</sup> [REDACTED].

<sup>40</sup> [REDACTED].

<sup>41</sup> [REDACTED], [REDACTED].

<sup>42</sup> [REDACTED].

<sup>43</sup> [REDACTED].

appearance, where Mr. Al Hassan revealed – through his Counsel – that he had been [REDACTED] by [REDACTED].<sup>44</sup>

24. On 8 May 2019, the Prosecution filed its document containing the charges against Mr. Al Hassan (‘the DCC’). The DCC alleges that Mr. Al Hassan was a member of Ansar Dine, and that Ansar Dine was in turn, an armed Salafist group which had a common plan to install Sharia law in Timbuktu.
25. In setting out these allegations, the question as to whether Ansar Dine can be characterised as an ‘armed group’ is an issue of key importance to the confirmation of charges, as reflected the fact that the Prosecution DCC address this point, with a view to satisfying the nexus elements for war crimes.<sup>45</sup> The association between Ansar Dine and AQIM (Al Qaeda in the Islamic Maghreb) and the specific strand of Islamic belief adhered to by Ansar Dine are relevant to the Prosecution’s allegation that there was a common plan between Ansar Dine and AQIM, and that it was foreseeable that the implementation of the ideology shared by these groups would result in the commission of war crimes and crimes against humanity.<sup>46</sup>
26. The case also turns on the perception of the compatibility between Islamic principles, and fundamental human rights protections: the Prosecution has characterised the establishment of Sharia law courts, and the implementation of particular ‘Hudud’ punishments under Sharia law as war crimes, and crimes against humanity, and further argued that the application of certain Islamic practices amounts to ‘persecution’ as a crime against humanity.<sup>47</sup>
27. The Prosecution DCC relies heavily on the statements taken from [REDACTED], [REDACTED]. The admissibility of these statements will turn on litigation concerning the actions and conduct of [REDACTED], [REDACTED].
28. Finally, this case has been characterised by a significant amount of litigation concerning the imposition of a particularly restrictive surveillance regime as concerns Mr. Al Hassan’s detention communications, on the grounds that his

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<sup>44</sup> [REDACTED].

<sup>45</sup> DCC, paras 52-58.

<sup>46</sup> DCC, paras 44, 46, 52, 54, 57, 62, 68, 107-110, 212.

<sup>47</sup> DCC, paras 212, 528, 535, 623, 883, 893-896.

conversations could touch on the [REDACTED]. Mr. Al Hassan is prohibited from discussing [REDACTED]. He is the only detainee who has not been allowed any [REDACTED]. All of his communications are [REDACTED], and [REDACTED].

29. The following are therefore ‘live issues’ in this case:
- a. The legality of [REDACTED], the manner in which he was [REDACTED], his [REDACTED] by [REDACTED] authorities, and their [REDACTED];
  - b. The characterisation of Ansar Dine: that is, whether it fulfils the definition of an armed group, is associated with AQIM, and adhered to extremist and violent strands of Islamic belief;
  - c. Whether certain Islamic practices are compatible with international criminal law or would amount to crimes under the ICC Statute; and
  - d. The [REDACTED].

### 3. Legal Submissions

30. Judge Brichambaut’s activities and publications create an appearance that he continues to adhere to, and advocate for the interests of the French State – that he is a *de facto* Statesman, who continues to engage in policy formulation concerning military, political and factual issues arising from the cases that he is adjudicating, as an ICC judge. Judge Brichambaut’s publications also reveal preconceived positions concerning key factual issues in this case regarding Ansar Dine, and its alleged objectives in Timbuktu. As a result, an objective bystander would have reasonable doubts as to whether Judge Brichambaut could adjudicate the issues before him, in an impartial and independent manner.
31. Judge Brichambaut’s statements and activities attract two inter-related bases for disqualification from this case:
- *firstly*, Judge Brichambaut’s ongoing participation in French political and military activities on issues related to the *Al Hassan* case affects confidence in his independence as an ICC judge, which attracts disqualification under Articles 40(2) and (3) of the Statute; and
  - *secondly*, Judge Brichambaut’s public statements concerning Ansar Dine and Islamists in the Maghreb give rise to an appearance that he would not

approach the issues before him with a mind untainted by bias or preconceptions, which is a basis for disqualification under Rule 34(1)(d) of the Rules.<sup>48</sup>

32. There is no indication from publicly available ICC records that Judge Brichambaut sought and received authorisation to engage in particular outside activities, during his judicial tenure. Article 41(2)(b) of the Statute gives the Defence the right to request Judge Brichambaut's disqualification from this case, notwithstanding the possible existence of such authorisation.
33. Conversely, if it is the case that Judge Brichambaut did not seek authorisation before engaging in the aforementioned activities, then this would also militate in favour of his disqualification from this case. The absence of prior vetting would only serve to reinforce the impression that Judge Brichambaut has not executed his judicial duties in a manner that is consistent with the ICC Code of Judicial Ethics: that he has engaged in these activities without due consideration as to the impact on the judicial process before this Court.

**3.1 *The first disqualification prong: Judge Brichambaut's ongoing participation in French political and military affairs is incompatible with the appearance of judicial independence***

34. Judge Brichambaut has served his country for over forty years at the highest level of military and diplomatic office. Judge Brichambaut's persistent engagement in French political and military affairs throughout his subsequent tenure as an ICC judge creates an appearance that it is not possible for him to approach the matters before him with a mind free from any vestige of French influence, or a mind which is devoid of any consideration of the impact of particular decisions on French diplomatic and military interests. This appearance of partiality and lack of independence arises from Judge Brichambaut's ongoing role as administrator of the *Forum du Futur*, honorary but active membership of the *Conseil d'État*, and active membership of '*le Club des Vingt*'.

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<sup>48</sup> "Both the common law and the Convention for the Protection of Human Rights and Fundamental Freedoms recognise the fundamentality of every litigant's right to a tribunal free both of bias and of the objective appearance of bias. The appearance of bias includes a clear indication of a prematurely closed mind", *Steadman-Byrne v. Amjad*, [2007] 1 W.L.R. 2484.

35. Article 40(2) of the Statute is engaged notwithstanding the fact that Judge Brichambaut has participated in these associations in a voluntary or honorary capacity. Article 40(2) of the Statute is framed broadly so as to preclude a Judge from engaging in ‘any activity’ that would be likely to affect confidentiality in their independence. Article 10(2) of the ICC Code of Judicial Ethics sheds further light on the nature of proscribed activities, through its directive that “Judges shall not exercise any political function”. The references to ‘activity’ and ‘function’ confirm that it is the content of the activities/function that matters, and not the formal capacity under which they are undertaken. This is consistent with the findings of Plenary majority that:<sup>49</sup>

Article 40 eschews such broad references to abstract categories of prohibited functions and demonstrates a closer concern with analysing the actual activities or occupations proposed by a judge.

36. A fair-minded and informed observer would conclude on the basis of these activities that Judge Brichambaut’s ongoing political activities, and advocacy of French national interests constitutes grounds for disqualification from sitting as a judge in this particular case, pursuant to Article 40(2) of the Statute.

### *3.1.1 Judge Brichambaut’s role as administrator of the Forum du Futur*

37. In heralding Judge Brichambaut’s role as an administrator of the association, *Forum du Futur*, the website explicitly references Judge Brichambaut’s appointment as an ICC judge.<sup>50</sup> This creates a public perception that there is no separation between these two functions: that he engages in the activities of the *Forum du Futur* as an ICC judge, and judges as a member of the *Forum du Futur*. This conflation of Judge Brichambaut’s roles is inimical to the perception of the independence and impartiality of the *Al Hassan* case. As set out above, there is also an extremely close association between the *Forum*, and French political, military and industrial associations dedicated to promoting French interests. This association falls foul of Value 1 (paragraph 1.3) of the 2002 Bangalore Principles of Judicial Conduct (‘the Bangalore Principles’), which proscribes that a “judge shall not only be free from

<sup>49</sup> ICC-01/04-02/06-2326-Anx1, para. 10.

<sup>50</sup> Forum du Futur, [Marc Perrin de Brichambaut – Administrateur](#): “**Marc PERRIN DE BRICHAMBAUT**, haut fonctionnaire et un diplomate, est ancien membre du Conseil d’État, secrétaire général de l’Organisation pour la Sécurité et la Coopération en Europe (OSCE) de juin 2005 à juin 2011 et juge à la Cour pénale internationale depuis le 11 mars 2015.”

inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom”.<sup>51</sup>

### 3.1.2 Judge Brichambaut’s honorary membership of the *Conseil d’État*

38. Judge Brichambaut’s continued involvement in French political analysis, as an honorary member of the *Conseil d’État*, is also antithetical to the separation between the judiciary and the executive. The Commentary to the Bangalore Principles specifies in this regard that “a judge’s duties are incompatible with certain political activities, such as membership of the national parliament or local council”,<sup>52</sup> and further elaborates that:<sup>53</sup>

The movement back and forth between high executive and legislative positions and the judiciary promotes the very kind of function blending that the concept of separation of powers is intended to avoid. That blending is likely to affect the judge’s perception, and the perception of the officials with whom the judge serves, regarding the judge’s independent role. Even if it does not, such service will adversely affect the public perception of the independence of the courts from the executive and legislative branches of government. Such employment is different from a judge serving in the executive or legislative branch before becoming a judge, and serving in those positions after leaving judicial office. In these cases, the appointment and the resignation processes provide a clear line of demarcation for the judge, and for observers of the judicial system, between service in one branch and service in another.

39. Judge Brichambaut’s ongoing honorary membership of the *Conseil d’État* blurs the ‘clear line of demarcation’ between his active involvement in the executive activities of the French State, and his appointment as an ICC judge.
40. This public designation of his positions in May 2016 (‘Conseiller d’État, juge à la Cour pénale internationale’) gives rise to a perception that there has been a ‘blending of roles’ between the different mandates. Judge Brichambaut’s public delineation of

<sup>51</sup> Chief Justices, Judicial Group on Strengthening Judicial Integrity. [The Bangalore Principles of Judicial Conduct](#), (2002).

<sup>52</sup> The Judicial Integrity Group, [Commentary on the Bangalore Principles of Judicial Conduct](#), March 2007, para. 135.

<sup>53</sup> The Judicial Integrity Group, [Commentary on the Bangalore Principles of Judicial Conduct](#), March 2007, para. 38(b).

policy recommendations for President Macron, and specific interventions concerning the French intervention in Mali – which both occurred while he was wearing the hat of *conseiller d'État* and the role of an ICC judge, also exposes Judge Brichambaut to potential critique on grounds of neutrality. An Opinion on Judicial Ethics, issued by the Consultative Council of European Judges,<sup>54</sup> has observed in this regard that:

Judges' participation in political activities poses some major problems. Of course, judges remain citizens and should be allowed to exercise the political rights enjoyed by all citizens. However, in view of the right to a fair trial and legitimate public expectations, judges should show restraint in the exercise of public political activity. Some States have included this principle in their disciplinary rules and sanction any conduct which conflicts with the obligation of judges to exercise reserve. They have also expressly stated that a judge's duties are incompatible with certain political mandates (in the national parliament, European Parliament or local council), sometimes even prohibiting judges' spouses from taking up such positions.

More generally, it is necessary to consider the participation of judges in public debates of a political nature. In order to preserve public confidence in the judicial system, judges should not expose themselves to political attacks that are incompatible with the neutrality required by the judiciary.

### 3.1.3 *Joint authorship of position papers issued by 'Le Club des Vingt'*

41. Finally, by allowing his name to be appended to joint demarches issued by 'Le Club des Vingt', Judge Brichambaut has engaged actively in the political sphere, on issues that concern the *Al Hassan* case directly, with a view to influencing the position of governments and decision-makers. Judge Brichambaut has, as a result, put himself in direct conflict with the cautionary advice set out in the Commentary to the Bangalore Principles that "a judge who uses the privileged platform of judicial office to enter the partisan political arena puts at risk public confidence in the impartiality of the judiciary."<sup>55</sup>

<sup>54</sup> Council of Europe, [Consultative Council of European Judges \(CCJE\)](#), 19 November, CCJE (2002) Op. N° 3, paras 30-31.

<sup>55</sup> The Judicial Integrity Group, [Commentary on the Bangalore Principles of Judicial Conduct](#), March 2007, para. 65.

3.2 *The second disqualification prong: the appearance that Judge Brichambaut has predetermined key issues in this case or would not be in a position to determine them with a mind free from bias or partiality*

42. As a result of his multiple publications and interventions on issues concerning the nature of Ansar Dine, and the role of Islamic forces in Mali, there is a perception that Judge Brichambaut harbours preconceptions concerning Ansar Dine, and would not, as a result adjudicate the issues put before him, with a mind free from the taint of pre-determination or pre-judgment. The apparent level of pre-determination is incompatible with the right to be tried by an impartial tribunal.<sup>56</sup>
43. Judge Brichambaut's public endorsement of the position that 'Ansar Dine' is an armed group, which adheres to a violent, extremist creed, creates an impression that he has prejudged elements of the offences for which Mr. Al Hassan has been charged. The situation therefore falls within the four corners of the SCSL Appeals Chamber's determination that it was necessary for Judge Robertson to be recused from certain cases due to writings in which he impugned the armed group (the RUF) associated with several of the defendants.<sup>57</sup>
44. In the SCSL *Sesay et al.* case, after considering the passages in question, the Appeals Chamber concluded that:<sup>58</sup>

an independent bystander so to speak, or the reasonable man, reading those passages [of his book] will have a legitimate reason to fear that Justice Robertson lacks impartiality. In other words, whether one can apprehend bias. I have no doubt that a reasonable man will apprehend bias, let alone an accused person and I so hold.

45. The perception of bias is greater in the current case: whereas Judge Robertson authored the passages in question before he was appointed a judge before the SCSL,

<sup>56</sup> "The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial": UNHRC, [General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial](#), U.N. Doc. CCPR/C/GC/32 (2007), para. 21.

<sup>57</sup> SCSL, *Prosecutor v. Issa Hassan Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, SCSL-2004-15-AR15, 13 March 2004, para. 2.

<sup>58</sup> SCSL, *Prosecutor v. Issa Hassan Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, SCSL-2004-15-AR15, 13 March 2004, para. 15.

Judge Brichambaut authorised ‘*Le Club des Vingt*’ publications while he was sitting as a judge in this case.

46. Judge Brichambaut’s persistent association with, and endorsement of French military interests (including the engagement of Operation Barkhane in Mali) also gives rise to an appearance that he would not be in a position to judge allegations brought against the conduct of Operation Barkhane in an impartial manner. The joint publication issued by ‘*Le Club des Vingt*’ identifies publicly with the interests of the French State in the Maghreb, and further posits Ansar Dine, and extreme Islamic ideology as obstacles to these interests. This professed commitment to the interests of a State, which is implicated in the proceedings, and affected by the activities of a group associated with the defendant, “could shake public confidence in the administration of justice”.<sup>59</sup>
47. Finally, there is an appearance that Judge Brichambaut will reach conclusions in this case on the basis of information falling outside the evidential record, due to his:
- administration’ of an association, which convened conferences with the armed forces of France (including the commander of Operation Barkhane), and hosts opinions concerning extremists elements of Islam;
  - related political/military analysis concerning the role of Ansar Dine in the Maghreb; and
  - ongoing performance of the role of *Conseiller d’État* in relation to events concerning Mali.
48. These activities and related stances cannot be reconciled with the ethical advice, promulgated by the Council of Europe, that:<sup>60</sup>

Judges should therefore discharge their duties without any favouritism, display of prejudice or bias. They should not reach their decisions by taking into consideration anything which falls outside the application of the rules of law. As long as they are

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<sup>59</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 2) (Pinochet II) [2000] 1 AC 119, per Lord Hutton, p. 21.

<sup>60</sup> Council of Europe, [Consultative Council of European Judges \(CCJE\)](#), 19 November, CCJE (2002) Op. N° 3, para. 23.

dealing with a case or could be required to do so, they should not consciously make any observations which could reasonably suggest some degree of pre-judgment of the resolution of the dispute or which could influence the fairness of the proceedings.

#### 4. Conclusion

49. At a time when there are vigorous attempts to undermine the independence of the Court through external attacks and threats, it is of the utmost importance that this crucial element of independence is not undermined from within. Nor should the Court's legitimacy be put into question through the issuance of key decisions, spoiled by an appearance of taint. As eloquently expressed by the Supreme Court of the United States:<sup>61</sup>

The Court's authority ... possessed of neither the purse nor the sword ... ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

50. Judges at the ICC are tasked with fulfilling the Court's promise to render fair and impartial justice to both victims and defendants alike, and "the seriousness of those alleged offenses and the gravity of the penalty they may carry make the need for an unimpeachable adjudicator all the more important."<sup>62</sup>
51. With the greatest respect and deference to the role of judicial office, and the judges of this Court, the Defence therefore requests the Plenary to disqualify Judge Brichambaut from this case, with immediate effect, in order to ensure that Mr. Al Hassan's day in court is not shrouded with a cloud of illegitimacy and unfairness.

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<sup>61</sup> *Baker v. Carr*, Supreme Court of the United States, (1962) 369 US 186, per Frankfurter J.

<sup>62</sup> *In re: [Abd Al-Rahim Hussein Muhammed Al-Nashiri](#)*, No. 18-1279 (D.C. Cir. 2019), at p. 31.



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Dated this 18<sup>th</sup> Day of June 2019  
At The Hague, The Netherlands