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Date : **6 August 2019**

**THE PRESIDENCY**

**Before :** **Judge Chile Eboe-Osuji, President**
**Judge Robert Fremr, First Vice-President**
**Judge Howard Morrison**

**SITUATION IN THE REPUBLIC OF MALI**

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

**Public**

**Observations by Judge Perrin de Brichambaut on the "Urgent Request for the Disqualification of Pre-Trial Chamber I"**

**Source:** **Judge Marc Perrin de Brichambaut**

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

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## I. INTRODUCTION

1. The present observations, which are particular to Judge Perrin de Brichambaut, are made in response to the Defence's request to dismiss the entirety of the Pre-Trial Chamber in the confirmation of the charges proceedings. After addressing the Defence's contention against Judge Perrin de Brichambaut, it will provide observations regarding disqualification requests filed shortly before or once proceedings have commenced.

## II. PROCEDURAL HISTORY

2. On 18 April 2019, Pre-Trial Chamber I issued a decision scheduling the confirmation of the charges hearing in the case against Mr Al Hassan to begin 8 July 2019.[1]

3. On 8 July 2019, the first date of the hearing, the Defence for Mr Al Hassan made an oral request to the Pre-Trial Chamber for the disqualification of Judge Alapini-Gansou from the confirmation proceedings.[2]

4. On 11 July 2019, the Defence filed a written request to the Presidency for the disqualification of Pre-Trial Chamber I in its entirety.[3]

5. On 29 July 2019, the Prosecution filed its response, requesting the Presidency to dismiss the Defence's request.[4]

## III. APPLICABLE LAW

6. As the Defence raises an impartiality challenge during the course of the confirmation hearing, Article 41 of the Statute and Rule 122 of the Rules of Procedure and Evidence apply to the present request.

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[1] Décision fixant une nouvelle date pour le dépôt du document contenant les charges et pour le début de l'audience de confirmation des charges, ICC-01/12-01/18-313, 18 April 2019, para. 20.
[2] Transcripts of the Confirmation Hearing, ICC-01/12-01/18-T-003-ENG ET WT 08-07-2019 NB PT, p. 15, lns 5-17. These cited lines refer to public portions of the hearing transcripts.
[3] Public redacted version of Urgent Request for the Disqualification of Pre-Trial Chamber I, ICC-01/12-01/18-406-Red, 11 July 2019 [hereinafter Defence's Request].
[4] Public redacted version of Prosecution's response to the Urgent Request for the Disqualification of Pre-Trial Chamber I, ICC-01/12-01/18-436-Red, 29 July 2019.

7. Article 41(2)(a) of the Statute sets out the standard used when evaluating impartiality challenges: "A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground". In determining whether the impartiality of the judge in question might reasonably be doubted on any ground, the relevant inquiry is "whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge".[5]

8. The analysis, however, is not confined only to the question of whether a reasonable observer *could* apprehend bias. It also requires asking whether such apprehension would be *objectively* reasonable.[6] In *Lubanga* Decision I, the plenary of judges elaborated on the characteristics of the objective observer. These included:

- independence, *i.e.*, the perspective of the reasonable observer must not be confused with that of the applicant for disqualification;[7]
- fair-mindedness, the reservation of judgment until she has taken into account the entire context of the case[8] as well as examined and fully understood all sides of the argument;[9]
- not being unduly sensitive or suspicious of either side;[10] and
- cognisant of the nature of a judge's profession, which includes an obligation to administer justice and the ability to dissociate his judicial reasoning from his personal beliefs.[11]

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[5] 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*, ICC-01/04-01/06-3040-Anx, 11 June 2013, para. 9 [hereinafter *Lubanga* Decision I] (citing Decision of the plenary of judges on the "Defence Request for the Disqualification of a Judge of 2 April 2012", ICC-02/05-03/09-344-Anx, 5 June 2012, para. 11 [hereinafter *Banda* Decision]); Decision of the Plenary of Judges on the Defence Request for the Disqualification of Judge Kuniko Ozaki from the case of *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2355-AnxI-Red, 20 June 2019, para. 32 [hereinafter *Ntaganda* Decision].

[6] *Lubanga* Decision I, para. 10; *Banda* Decision, para. 11.

[7] *Ntaganda* Decision, para. 32; *Lubanga* Decision I, para. 35.

[8] *R. v. S. (R.D.)*, (Canada) 1997 3 S.C.R. 484, para. 32.

[9] *Helow v. Secretary of State for the Home Department and anor.*, (Scotland) [2008] UKHL 62, para. 2.

[10] *Helow v. Secretary of State for the Home Department and anor.*, (Scotland) [2008] UKHL 62, para. 2.

[11] *Lubanga* Decision I, para. 36 (citing *President of the Republic of South Africa v. South Africa Rugby Football Union* 1999 (7) BCLR 725 (CC) at 753). In *South Africa Rugby Football Union*, the Constitutional Court of South Africa considered:

> The reasonableness of the apprehension must be assessed in the light of oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.

9. Moreover, "there is a strong presumption of impartiality [of judges] that is not easily rebutted", which exists to safeguard the interest of the sound administration of justice.[12] Unless this high threshold of impartiality is rebutted, it is presumed that the judges of the Court are professional judges capable of deciding the issue before them while relying solely and exclusively on the evidence adduced in the case.[13] It is also presumed that the judges have enough years of experience and training to "disabuse themselves of any irrelevant personal beliefs or predispositions".[14]

10. In performing this analysis there is a "need to examine each case on its own facts from the perspective of the reasonable observer".[15] The reasonable apprehension of bias test, therefore, is highly fact-specific.[16]

11. The burden of demonstrating an objectively reasonable appearance of bias is on the party requesting disqualification.[17]

12. Rule 122 of the Rules of Procedure and Evidence addresses procedural matters as related to a hearing on the confirmation of charges. Subparagraph 6 of this rule

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[12] 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*, ICC-01/04-01/06-3154-Anx1, 3 August 2015, para. 29 [hereinafter *Lubanga* Decision II]; *see also Ntaganda* Decision, para. 31; 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*, ICC-01/05-01/12-511-Anx, 20 June 2014, para. 18; *Lubanga* Decision I, para. 10; *Banda* Decision, para. 14.

[13] 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. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12/-01/18-398-AnxI, 8 July 2019, para. 19; *see also e.g., Lubanga* Decision I, para. 11 (citing *Banda* Decision, para. 14); 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 Hassan Ahmad Al-Bashir*, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, ICC-02/05-01/09-76-Anx2, 19 March 2010, p. 6.

[14] 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. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12/-01/18-398-AnxI, 8 July 2019, para. 19; *see also e.g., Lubanga* Decision I, para. 11 (citing *Banda* Decision, para. 14); 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 Hassan Ahmad Al-Bashir*, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, ICC-02/05-01/09-76-Anx2, 19 March 2010, p. 6.

[15] *Lubanga* Decision I, para. 48; *Ntaganda* Decision, para. 36.

[16] *Lubanga* Decision I, para. 48 (referencing *Wewaykum Indian Band v. Canada*, 2003 SCC 45, para. 77).

[17] *Ntaganda* Decision, para. 33.

governs situations where a party raises objections or makes observations concerning an issue related to the proper conduct of the proceedings:

> 6. If the objections raised or observations made or those referred to in sub-rule 3 [*i.e.*, objections or observations concerning an issue related to the proper conduct of the proceedings], the Pre-Trial Chamber shall decide whether to join the issue raised with the examination of the charges and evidence, or to separate them, in which case it shall adjourn the confirmation hearing and render a decision on the issues raised.

13. As a motion for disqualification pertains to the proper conduct of proceedings, rule 122 applies.

## IV. ANALYSIS

### A. Observations on the Defence's allegations

14. The Defence contends that Judge Perrin de Brichambaut's impartiality has been compromised for failing to adjourn the proceedings or take other steps upon receiving the request for Judge Alapini-Gansou's disqualification on 8 July 2019.[18]

15. The Defence draws a comparison between the present request and the impartiality concerns raised in the *Karemera* case before the ICTR.[19] The Defence's comparison, however, is misguided. First, contrary to the Defence's assertion, the entire Chamber was not disqualified simply for a "failure to take steps to protect the integrity of the proceedings".[20] Rather, in fact, the other judges on the panel had taken steps on the matter: they ultimately elected to reject the disqualification request against the impugned judge.[21] The impartiality issue ultimately arose from concerns as to why the request was dismissed instead of due to inaction by the other judges.[22]

16. Second, the disqualification of the entire bench in *Karemera* was based on the judges' knowledge of a clear conflict of interest. Namely, the other judges were

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[18] Defence's Request, paras 2, 7, 45-46.
[19] Defence's Request, para 45.
[20] Defence's Request, para. 45.
[21] *The Prosecutor v. Karemera et al.*, International Criminal Tribunal for Rwanda, ICTR-98-44-AR15bis.2, 22 October 2004, para. 68.
[22] *The Prosecutor v. Karemera et al.*, International Criminal Tribunal for Rwanda, ICTR-98-44-AR15bis.2, 22 October 2004, para. 68 (noting that "the appearance of bias also attaches to the remaining Judges *by virtue of their decision to continue the trial*[.]") (emphasis added).

aware that their colleague on the bench had been closely associating and even cohabiting with the prosecution counsel and knew that this would create bias or an appearance of bias. In fact, the impugned judge explained the nature of her relationship with counsel while hearing was in session, making her colleagues aware of the conflict of interest.[23] Despite this admission, however, and contrary to the evidence presented by the requesting party, the other judges chose to dismiss the disqualification request anyway.[24]

17. Here, the concerns about the prior work of Judge Alapini-Gansou are not nearly as obvious as in the *Karemera* case. In great part, this is because it is generally known that "a Judge of the ICC does not come to the Court in the state of *tabula rasa*".[25] Rather, each judge arrives with an extensive resume and the highest level of experience in one or more fields pertinent to the work of the Court.[26] Thus, while a judge may have past experience that would appear on first glance to diminish his or her impartiality, a concern about a conflict may be obviated upon conducting the deeper, fact-based analysis required by article 41 and the relevant jurisprudence. In other words, "conflicts" with past work experience are not immediately obvious—unlike a domestic relationship between a judge and counsel in the same affair—and do not necessitate immediate suspension of proceedings.

18. By expecting the panel of judges to immediately suspend proceedings, the Defence forgoes the article 41 analysis and—ironically—expects the judges to reprimand and punish the judge in question before they or the plenary can determine whether the allegations are founded. It is quite clear that this suggestion

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[23] *The Prosecutor v. Karemera et al.*, International Criminal Tribunal for Rwanda, ICTR-98-44-AR15bis.2, 22 October 2004, para. 66 ("The Appeals Chamber notes that the allegations of appearance of bias are supported by Judge Vaz's admission of association and cohabitation with a Prosecution counsel who was one of the trial attorneys appearing in the present case.").

[24] *The Prosecutor v. Karemera et al.*, International Criminal Tribunal for Rwanda, ICTR-98-44-AR15bis.2, 22 October 2004, para. 68.

[25] 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. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12/-01/18-398-AnxI, 8 July 2019, para. 42.

[26] 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. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12/-01/18-398-AnxI, 8 July 2019, para. 42; *see also* article 36(3) of the Statute.

contravenes both the presumption of impartiality[27] and the presumption of innocence[28] protected by the Statute.

19. In addition, it would be a far cry from efficient, expedient proceedings if the other judges on panel were required to immediately suspend proceedings at the moment a party lodges any allegation concerning a judge's impartiality. Permission of such a practice, moreover, would open the door to using such requests as a tool to delay litigation on any basis, bringing proceedings at the Court to a screeching halt no matter how unfounded the claims may be.

20. It is also important to mention that rule 122 is devoid of a requirement of the other judges on the panel to immediately suspend proceedings upon learning of any impartiality objections. There are two features of the wording of rule 122(6) of the Rules of Procedure and Evidence that are key here. First, since "the Pre-Trial Chamber *shall* decide whether to join the issue raised with the examination of charges and the evidence, or to separate them", the rules not just envision but *require* the Chamber to use its own discretion in handling the objection (emphasis added).

21. Second, and as a result of this discretion, the rules permit but do not require either separation of the objection or adjournment of the proceedings. It is only where the panel chooses to treat the objection as separate from the charges and evidence that the Pre-Trial Chamber must adjourn the confirmation hearing to first decide the raised issue.[29] This means that the rules envision the possibility that the confirmation of the charges hearing and the disqualification proceedings will occur simultaneously. Thus, lodging a disqualification request has no suspensive effect.

22. Thus, contrary to the Defence's argument that the Chamber failed to take steps to protect the integrity of the proceedings, and in light of the discretion given to the Chamber under rule 122(6), the decision to join the issue with the proceedings on the merits and to continue the hearing was, in fact, a step that the Chamber elected to

[27] *See supra* note 12.
[28] Article 66 of the Statute.
[29] If the Chamber decides to treat the issues separately, "it shall adjourn the confirmation hearing and render a decision on the issues raised". Rule 122(6) of the Rules of Procedure and Evidence.

take.[30] It was a step taken upon balancing competing considerations, namely protecting the integrity of the Chamber with ensuring an expedient trial and preventing the accused from remaining in detention longer than necessary. Moreover, since no decision has yet been reached on the merits of the case, no prejudice has been accrued.

23. Accordingly, by choosing to not adjourn the hearing upon the Defence's request, Judge Perrin de Brichambaut and the Pre-Trial Chamber I as a whole acted consistently with their responsibilities under rule 122 of the Rules of Procedure and Evidence. A reasonable, properly informed observer could not apprehend bias as a result.

### B. Observations on the nature and timing of disqualification requests

24. Although the Statute, the Rules of Procedure and Evidence and the Regulations do not provide deadlines for disqualification requests, given that the present request was made during the hearing rather than at any point during the fifteen months that the parties knew of the composition of the Chamber,[31] Judge Perrin de Brichambaut uses his observations to discuss the timing of such motions.

25. It is true that the Statute, Rules of Procedure and Evidence and Regulations of the Court do not supply a specific deadline for filing a request to disqualify a judge. However, several courts worldwide—including this Court,[32] as well as other international[33] and national tribunals[34]—have a base requirement that

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[30] *See* Transcripts of the Confirmation Hearing, ICC-01/12-01/18-T-003-ENG CT WT 08-07-2019 NB PT, p. 34, lns 6-13 (reading the decision on the disqualification request).

[31] *See* cover page of Version publique expurgée de la « Requête urgente du Bureau du Procureur aux fins de délivrance d'un mandat d'arrêt et de demande d'arrestation provisoire à l'encontre de M. Al Hassan Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud », ICC-01/12-01/18-1-Red, 31 March 2019.

[32] Rule 34(2) of the Rules of Procedure and Evidence; Decision on the "Request for Reconsideration of the Decision of Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute", ICC-01/04-02/06, 14 May 2019, para. 22.

[33] *See* Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, World Trade Organization, section VIII(1); *c.f. The Prosecutor v. Ratko Mladić*, Decision on Defence Motions for Disqualification of Judges Theodore Meron, Carmel Agius and Liu Daqun, International Criminal Tribunal for the Former Yugoslavia, 3 September 2018, MICT-13-56-A, para. 56 (stating that although the ICTY Rules of Procedure and Evidence do not envisage or provide for a deadline to file disqualification requests, "this procedure should be regulated in the future" due to the consequences it may have for the trial process).

disqualification requests are made as soon as there is knowledge of the grounds of the conflict. It is important to note that this is not the same as a standard requiring a request to be made as soon as the party learns of the conflict: the latter risks rendering disqualification requests into no more than a litigation strategy to delay the proceedings.[35] Where the party has not timely raised the complaint, some tribunals require an explanation for such delay.[36]

26. Some tribunals even have set concrete deadlines for the filing of requests. For example, article 21(2) of the Rules of Procedure of the Inter-American Court of Human Rights states, "Motions for recusal or allegations of impediment must be filed prior to the first hearing of the case".[37] The Rules permit motions for recusal after the start of the hearing only where the grounds occur or first become known at that time.[38] The Permanent Court of Arbitration places an even stricter deadline on

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[34] *See e.g.*, Australian Civil Trials Bench Book, [1-0030] Procedure, ("Generally an application should be made as soon as reasonably practicable after the party seeking disqualification becomes aware of the relevant facts".); Criminal Procedure Code of the Kingdom of Cambodia, article 557 ("A party who wishes to challenge against a judge shall file a challenge when he/she is aware of the reasons for challenging, otherwise it shall not be admissible".); *R v. Curragh Inc.*, [1997] 1 S.C.R. 537 (Canada) (accepting that "in order to maintain the integrity of the court's authority such allegations must, as a general rule, be brought forward as soon as it is reasonably possible to do so"); German Criminal Procedure Code (Strafprozeβordnung – StPO), § 25(2) (allowing the requesting party to challenge the conflict after the time the circumstances arose only if "the right of challenge if asserted without delay"); Swiss Criminal Procedure Code of 5 October 2007, article 58, ("Lorsqu'une partie entend demander la récusation d'une personne qui exerce une fonction au sein d'une autorité pénale, elle doit présenter sans délai à la direction de la procédure une demande en ce sens, dès qu'elle a connaissance du motif de récusation"); *see also* Charles Gardner Geyh, "Judicial Disqualification: An Analysis of Federal Law", Federal Judicial Center (2010) ("Most [U.S.] circuits, however, require that a motion for disqualification be brought 'at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification.'") (citing *Travelers Ins. Co. v. Liljeberg Enters, Inc.* 38 F.3d 1404, 1410 (5th Cir. 1994); *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987); *Pontarelli v. Stone*, 978 F. 2d 773, 775 (1st Cir. 1992); *United States v. Barnes*, 909 F.2d 1059, 1071; *In re Nat'l Union Fire Ins. Co.*, 839 F.2d 1226, 1232 (7th Cir. 1988)).

[35] *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 262 (1978) ("The timeliness requirement is an important guard against abuse: without it, a party could sample the temper of the court or ever wait until after final judgment before deciding whether to file the affidavit. The timeliness requirement inhibits the use of disqualification as a delaying device and makes disqualification more likely at the beginning of litigation, thus sparing expense and delay").

[36] *E.g.*, Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, World Trade Organization, section VIII(3) ("When such evidence is not provided at the earliest practicable time, the party submitting the evidence shall explain why it did not do so earlier[.]"); 28 U.S.C. § 144 (stating that if the request is not made by the deadline, "good cause shall be shown for failure to file it within such time").

[37] Rules of Procedure of the Inter-American Court of Human Rights, article 21.

[38] Rules of Procedure of the Inter-American Court of Human Rights, article 21.

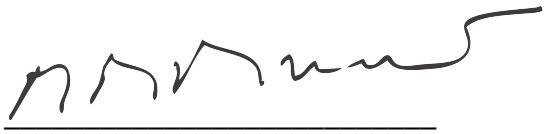
the parties, requiring a party to raise any motion for disqualification "within 30 days after it has been notified of the appointment of the challenged arbitrator".[39] Such concrete deadlines exist at the national level, as well. Austrian Criminal Procedure mandates that the latest time that a party may request the disqualification of a trial judge is twenty-four hours before the beginning of the hearing.[40] German Criminal Procedure states that "[t]he challenge on grounds for fear of bias of an adjudicating judge shall be admissible prior to commencement of examination of the first defendant".[41] And federal law in the United States requires that an affidavit requesting the disqualification of a judge "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard".[42]

27. These practices demonstrate that motions for disqualification—especially those made shortly before the opening of the proceedings or at the proceedings—should be approached with caution. Where a potential question about a judge's impartiality comes to light near the time of or during the proceedings, it makes sense to permit the parties to raise such a request even though it may be disruptive or delay the review of the merits. However, where the information in question has been known and publicly accessible for some time before the proceedings, a request to disqualify the judge should be examined more sceptically. The latter situation describes the nature of the Defence's request to disqualify Judge Alapini-Gansou.[43] In such cases, it may be prudent for the plenary to adopt an approach similar to the tribunals mentioned above so as to prevent unnecessary procedural delays, which in turn protects the accused from further prolonged detention.

[39] Permanent Court of Arbitration Rules 2012, article 13.
[40] Austrian Criminal Procedure Code (Strafprozeβordnung 1975) § 73.
[41] German Criminal Procedure Code (Strafprozeβordnung), § 25(1).
[42] 28 U.S.C. § 144.
[43] The concerns the Defence has expressed relate to matters that date back to 2013 and have been publicly known throughout the period leading up to the confirmation of the charges hearing, including on the Court's website, https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2017/ICC-ASP-EJ2017-BEN-CV-ENG.pdf.

## V. CONCLUSION

28. For the reasons stated above, the request to disqualify Judge Perrin de Brichambaut and the rest of the Pre-Trial Chamber I from the confirmation of the charges proceedings should be dismissed.



Judge Marc Perrin de Brichambaut

The Hague, 6 August 2019