



8 July 2019

Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Marc Perrin de Brichambaut from the case *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*

I. Relevant Procedural History

1. On 14 June 2019, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, the Defence for Mr Al Hassan filed its 'Request for the disqualification of Judge Marc Perrin de Brichambaut' ('Application'), requesting that the plenary disqualify Judge Perrin de Brichambaut from the case with immediate effect.¹
2. On 18 June 2019, Judge Perrin de Brichambaut requested to be excused from exercising any functions of the Presidency in respect of the Application,² with such request being granted that same date.³
3. On 19 June 2019, the *ad hoc* Presidency filed an Order setting deadlines for responses to the Application by any party or participant, as well as for the filing of the observations of Judge Perrin de Brichambaut, pursuant to

¹ Request for the disqualification of Judge Marc Perrin de Brichambaut, ICC-01/12-01/18-376-Conf, a public redacted version is available: ICC-01/12-01/18-376-Red.

² ICC-01/12-01/18-379-Anx1.

³ ICC-01/12-01/18-379-Anx2.

article 41(2)(c) of the Rome Statute ('Statute') and rule 34(2) of the Rules of Procedure and Evidence ('Rules').⁴

4. On 24 June 2019, Judge Perrin de Brichambaut filed his written observations ('Observations').⁵
5. That same date, the Office of the Prosecutor also filed a brief response to the Application ('Prosecution Response').⁶
6. On 2 July 2019, a plenary session of judges was convened in accordance with article 41(2)(c) of the Statute and rule 4(2) of the Rules to consider the Application. The session was attended in person by Judges Robert Fremr, Olga Herrera Carbuccion, Geoffrey Henderson, Piotr Hofmański, Antoine Kesia-Mbe Mindua, Bertram Schmitt, Péter Kovács, Chang-ho Chung, Raul Pangalangan, Luz Ibañez, Tomoko Akane, Reine Alapini-Gansou, Kimberly Prost and Rosario Aitala. Judges Chile Eboe-Osuji, Howard Morrison and Solomy Bossa were not present for the plenary session.

II. The Arguments

A. Application

7. Mr Al Hassan requests the disqualification of Judge Perrin de Brichambaut on two inter-related basis.
8. First, he alleges that Judge Perrin de Brichambaut has engaged in 'ongoing participation in French political and military activities related to the *Al*

⁴ Order concerning the 'Request for disqualification of Judge Marc Perrin de Brichambaut' dated 14 June 2019 (ICC-01/12-01/18-376-Red), ICC-01/12-01/18-379.

⁵ Observations by Judge Perrin de Brichambaut on the "Request for the disqualification of Judge Marc Perrin de Brichambaut", ICC-01/12-01/18-382.

⁶ Prosecution's Response to Request for the disqualification of Judge Marc Perrin de Brichambaut, 24 June 2019, ICC-01/12-01/18-387

Hassan case’,⁷ specifically, his alleged participation in the publication of joint position papers as part of ‘*Le Club des Vignt*’, his position as an ‘*administrateur*’ of the group ‘*Forum du Futur*’ and his honorary membership of the *Conseil d’État* and alleged continued activities as a *Conseiller d’État*.⁸ Mr Al Hassan submits that such ongoing activities create an appearance that Judge Perrin de Brichambaut ‘continues to adhere to, and advocate for the interests of the French State’⁹ and is unable to act ‘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’,¹⁰ thereby undermining the appearance of his independence and meriting disqualification.¹¹

9. Second, Mr Al Hassan alleges that public statements which he attributes to Judge Perrin de Brichambaut relate to issues which are relevant to his case, concerning Ansar Dine and Islamists in the Maghreb, thus giving rise to an appearance that Judge Perrin de Brichambaut would be unable to approach the issues before him in the context of the confirmation of charges proceedings with a mind untainted by bias or prejudgment, thus warranting disqualification in accordance with rule 34(1)(d) of the Rules.¹²

B. Observations of Judge Perrin de Brichambaut

10. Judge Perrin de Brichambaut observes that the Application misrepresents the nature of the activities in question and that none of the statements or activities satisfy the applicable standard of a reasonable appearance of

⁷ Application, para. 31

⁸ Application, paras. 7-21

⁹ Application, para. 30.

¹⁰ Application, para. 34.

¹¹ Application, paras. 34-41

¹² Applications, paras. 31, 42-48; see also paras. 7-21

- bias.¹³ He further notes, in general, the unacceptability of the implication that previous involvement of a judge in government roles prevents him or her from exercising judicial functions impartially and independently from the interests of his or her country.¹⁴
11. Judge Perrin de Brichambaut provides clarifications as to the nature of each of the *Club des Vingt*, the *Forum du Futur* and the *Conseil d'État* ¹⁵
 12. In respect of the first limb of the argument in the Application, he observes that the impugned publications and moderating activities, placed in their proper context, would not lead a fair-minded and informed observer to reasonably apprehend bias,¹⁶ providing further contextual details in respect of each of the activities in question. These details pertain to both the content of the statements and their lack of any appearance of affiliation to French policy.
 13. In respect of the second limb of the Application, Judge Perrin de Brichambaut observes, with reference to an earlier decision of the plenary of judges,¹⁷ that his role in the organisations in question is so minimal to be incapable of affecting his decision-making in the case.¹⁸
 14. Judge Perrin de Brichambaut additionally observes that the Application appears to concern issues which will be raised by the Defence for Mr Al Hassan *in the future*, questioning whether this is consistent with the nature of disqualification proceedings which should, rather, be concerned with

¹³ Observations, paras 1, 3-13.

¹⁴ Observations, para. 48.

¹⁵ Observations, paras. 14-19.

¹⁶ Observations, paras. 20- 32.

¹⁷ Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v Thomas Lubanga Dyilo*, 11 June 2013, ICC-01/04-01/06-3040-Anx.

¹⁸ Observations, paras. 33-42.

presently existing legal or factual issues.¹⁹ Judge Perrin de Brichambaut also notes the timing of the Application, made only three weeks before the scheduled opening of the confirmation of charges hearing.²⁰

C. Prosecution Response

15. The Prosecution Response confines itself to noting that some of the issues which the Defence for Mr Al Hassan raises are likely to be relevant to the confirmation of charges proceedings.²¹

III. Relevant law

16. Article 40 of the Rome Statute provides:

Independence of the judges

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.
4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

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

- (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related

¹⁹ Observations, paras 43-46

²⁰ Observations, para. 50.

²¹ Prosecution Response, paras. 2-3.

criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

- (b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.
- (c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

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

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

IV. Findings of the Plenary

A. Applicable legal standard

19. The plenary of judges notes the previous consideration that the disqualification of a judge is not a step to be undertaken lightly and that a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office.²² Unless rebutted, it is

²² Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para. 14 ; Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v Thomas Lubanga Dyilo*, 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 37; Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 20 June 2014, ICC-01/05-01/13-511-Anx, para. 18; Decision of the Plenary of Judges on the Defence Application for the

presumed that the judges of the Court are professional judges capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in a particular case.²³ It is entirely ordinary and, indeed, is to be presumed, that judges can disabuse themselves of any irrelevant personal beliefs or predispositions.²⁴

20. The plenary of judges understands both limbs of the Application to effectively concern the appearance of impartiality.²⁵ The plenary recalls its full support for the maxim that justice must not only be done, but must additionally be seen to be done.²⁶ The plenary recalls its previous determination that it is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; rather, the appearance of grounds to doubt his or her impartiality will be sufficient.²⁷ The plenary of judges also recalls that it has consistently considered that the question of

Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v Thomas Lubanga Dyilo*, 3 August 2015, ICC-01/04-01/06-3154-AnxI, para 29

²³ Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para 14, *referring to*, Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir*, pursuant to article 41 (1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, 19 March 2010, ICC-02/05-01/09-76-Anx2, page 7.

²⁴ Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v Thomas Lubanga Dyilo*, 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 36, quoting, in this regard, *President of the Republic of South Africa v South Africa Rugby Football Union* 1999 (7) BCLR 725 (CC) at 753.

²⁵ See Application, para 31

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 Thomas Lubanga Dyilo*, 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27.

²⁷ Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para 11; Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v Thomas Lubanga Dyilo*, 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 9, Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of *The Prosecutor v Germain Katanga*, 22 July 2014, ICC-01/04-01/07-3504-Anx, para 38; Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 20 June 2014, ICC-01/05-01/13-511-Anx, para 16

impartiality should be viewed from the objective perspective of whether a fair-minded and informed observer, having considered all the facts and circumstances, would reasonably apprehend bias in the judge.²⁸ Such fair-minded person is an objective observer, not to be confused with the applicant,²⁹ whose consideration of facts and circumstances includes an understanding of the nature of a judge's profession.³⁰ The plenary of judges also refers to previous findings that, in forming a view regarding the appearance of bias, the fair-minded observer should take into account the entire context of the case;³¹ and in the case of public statements, the relevant content of the statement, as well as its context.³² It is for the party requesting the disqualification to demonstrate the appearance of bias.³³

21. In light of the applicable legal standard, the plenary of judges emphasises that any decision must begin from the principle that the impartiality of a judge is presumed and that the threshold for overcoming this presumption is high.

22. The plenary of judges also noted prior plenary decisions which provided insight in respect of the issue of a judge's role with an outside organisation:

Whatever the outcome of the appeals, the Judge's own personal interests in his capacity as a patron of UNICEF/Korea, could not reasonably be said to be affected in a manner which was beyond the *de minimis* threshold. This was by virtue of the Judge's minimal active

²⁸ Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v Thomas Lubanga Dyilo*, 11 June 2013, ICC-01/04-01/06-3040-Anx, para 34

²⁹ *Ibid*, para. 35.

³⁰ *Ibid*, para. 36

³¹ *Ibid*, para. 38.

³² *Ibid*, para 39

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

involvement in UNICEF/Korea, the nature of the connection between UNICEF/Korea and the intervening party UNICEF, the nature of UNICEF's participation in the case, and the nature of UNICEF's interest in the outcome of the appeals.³⁴

23. The plenary of judges also takes note of the previous finding of the plenary of judges, albeit made in the different context of statements expressed by a judge prior to assuming judicial office at the Court, concerning the impact of general statements on the appearance of impartiality in a given case:

The majority also considered that merely having expressed an opinion on an issue generally concerned with the AU and the situation in the Sudan ... could not lead to a reasonable view that the respondent would be unable to impartially determine the case. In this respect, the Court had previously determined that the fact that a judge had, prior to assuming judicial office, been involved in considering and adopting a report involving a fact-finding mission to the Darfur region of the Sudan in her capacity as a Commissioner to the African Commission on Human and Peoples' Rights, did not later prevent that judge from participating in cases in the situation in Darfur before the Court. Thus, it was evident that formations or expressions of opinion tangentially connected to a case did not necessarily give rise to disqualification....³⁵

³⁴ Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v Thomas Lubanga Dyilo*, 11 June 2013, ICC-01/04-01/06-3040-Anx, para 46.

³⁵ Decision of the plenary of judges on the "Defence Request for the Disqualification of a Judge" of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para 19, citing "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, 19 March 2010, ICC-02/05-01/09-76-Anx2 and *Prosecutor v Vojislav Seselj*,

24. Further, the plenary of judges finds that whilst there is a connection between articles 40 and 41 of the Rome Statute³⁶ and that, indeed, a judge who is not independent in the performance of his or her function is likely to be a judge whose impartiality might reasonably be doubted within the meaning of article 41(2)(a), the legal standard which it is required to apply in a disqualification request is that concerning impartiality.³⁷
25. Finally, the plenary of judges further notes that judges of the Court may exercise their freedom of expression and association, as guided by the applicable legal framework including the Code of Judicial Ethics.³⁸ In so doing, of course, they should take particular care to exercise caution in ensuring that they do so in a manner that does not raise needless questions of judicial impartiality and propriety.³⁹

B. Findings concerning the claim that Judge Perrin de Brichambaut's impartiality is undermined due to his ongoing participation in French political and military affairs

26. The plenary of judges has considered each of the three bases which Mr Al Hassan alleges demonstrate that Judge Perrin de Brichambaut remains

IT-03-67-T, Order on the Prosecution Motion for the Disqualification of Judge Frederik Harhoff, Order of the President of 14 January 2008

³⁶ 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*, 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 34 ; See also Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decisions of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, 23 September 2009, ICC-01/04-01/06-2138-AnxIII, p. 6.

³⁷ Contrary to the Application's suggestion that a judge could be disqualified 'pursuant to Article 40(2) of the Statute', Application, paras. 31, 35-36.

³⁸ See Article 9 of the ICC Code of Judicial Ethics

³⁹ Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Marc Perrin de Brichambaut from the case *The Prosecutor v Thomas Lubanga Dyilo*, 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 29.

engaged in French political and military affairs and that, accordingly, his impartiality may reasonably be doubted.

a. *Le Club de Vingt*

27. In respect of his participation in *Le Club de Vingt*, the plenary of judges notes Judge Perrin de Brichambaut's explanation that it is an unaffiliated 'informal group of former officials, diplomats and academics dedicated to discussion and debate of topics in international relations' which meets on a monthly basis for academic discussion, which are summarised and made available to interested websites as a contribution to public debate.⁴⁰ The plenary of judges considers that *le Club de Vingt* is, in effect, a private academic study group in a non-legal field which makes summaries of its discussions publicly available. Noting that, pursuant to article 9 of the ICC Code of Judicial Ethics, judges are entitled to exercise their right to freedom of expression and association, within applicable limits, the plenary of judges does not consider Judge Perrin de Brichambaut's association with such group to be problematic. The plenary of judges also observes that, in respect of the two position papers referred to by the Defence for Mr Al Hassan, the list of club members, which includes 'Marc Perrin de Brichambaut', makes no reference or affiliation whatsoever to his position as Judge of the ICC.⁴¹

28. In addition, the plenary of judges has reviewed the evidence adduced by the Defence, namely the fact that *le Club de Vingt* used the possessive 'our' in writing when referring to French action in Africa,⁴² and considers that

⁴⁰ Observations, paras. 14-15

⁴¹ At the same time, it is similarly noted that a reasonable and fair-minded observer would not become confused as to affiliation where a Judge of a Court includes the fact that he or she holds such position as part of biographical information, see further discussion at paragraph 32 below.

⁴² Application, para. 8.

this is insufficient to create an appearance that such club is in any way related to French official policy.

29. In sum, when considered in the above proper context, the plenary of judges does not consider that a fair-minded and well-informed observer would apprehend bias on the part of Judge Perrin de Brichambaut.

b. Forum du Futur

30. In respect of the *Forum du Futur*, a small NGO which organises public academic debates on topics of international relations,⁴³ the plenary of judges has considered Judge Perrin de Brichambaut's role as an *administrateur* who sits as one member of 11 members on an administrative board.⁴⁴ In his Observations, Judge Perrin de Brichambaut clarifies that this Board meets once per year to 'ensure the proper management of the organisation, approve its accounts and be informed of the projects'.⁴⁵ Beyond this role, Mr Al Hassan identifies one occasion on which Judge Perrin de Brichambaut moderated a panel on the topic of 'Evolution des doctrines nucléaires: enjeux et perspectives', a topic bearing no connection to the *Al Hassan* case.⁴⁶

31. The plenary of judges considers the circumstances to be similar to the previous instance in which a request for the disqualification of Judge Sang-Hyun Song from *The Prosecutor v. Lubanga* was made due, *inter alia*, to an alleged conflict of interest arising from his involvement as the President of UNICEF/Korea. That disqualification request was denied on the basis that

⁴³ Observations, para. 16.

⁴⁴ See <https://forumdufutur.fr/equipe/> (last accessed on 8 July 2019).

⁴⁵ Observations, para. 17.

⁴⁶ Application, footnote 14.

the Judge had only a nominal involvement in the organisation in question.⁴⁷ An inactive role of a non-legal academic-like body is clearly non-substantive in nature. Further, unlike in the *Lubanga* case, there is presently no link or connection whatsoever between the *Forum du Futur* and the Court.

32. The plenary of judges further rejects the suggestion that a well-informed and reasonable observer would fear from the biographical information on the *Forum du Futur*'s website, which mentions that Judge Perrin de Brichambaut is an ICC Judge,⁴⁸ 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*'.⁴⁹ Such statement appears overwrought. The biographical information on the website in question purports to be simply that: a biography. A judge of the Court is not expected to censor his or her biographical information, including the fact of his or her current role as a Judge of the Court.

33. The plenary of judges is similarly unconvinced by the Defence's suggestion that the sources of funding of the *Forum du Futur* are akin to an inappropriate connection with the executive and legislative branches of government.⁵⁰ The plenary takes note of the Observations' statement that none of the organisations in which Judge Perrin de Brichambaut has been involved 'are linked to any French governmental branch'.⁵¹ The plenary of judges notes that the partner associations of the *Forum du Futur* do not

⁴⁷ Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v Thomas Lubanga Dyilo*, 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 44.

⁴⁸ **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

⁴⁹ Application, para. 37

⁵⁰ Application, para. 37.

⁵¹ Observations, para. 42.

appear to be out of the ordinary for an NGO of its nature, noting further that their diversity, including think-tanks, private enterprises and institutional and cultural bodies, appears to reflect the very absence of any reasonable appearance of connection to the French executive or legislative in this regard.

34. The plenary of judges further expresses its full support for the characterisation in the Observations that the Application ‘seeks to conflate statements made by invitees to debates in an institution where Judge Perrin de Brichambaut has oversight responsibility with his own statements of personal conviction. Needless to say, participation on the board of any organisation dedicated to public debate and discussion does not imply adherence to any of the opinions expressed within its domain’.⁵² The plenary of judges emphasises that this is particularly so given the *Forum du Futur*’s core statement that it is ‘a space where ideas and experiences undergo critical analysis and where a range of perspectives are preferred to a uniformity of opinion’.⁵³ The plenary of judges considers that the fact that the *Forum du Futur* hosted discussions on issues which the Defence alleges to be relevant to the *Al Hassan* case could not give rise to any concerns as the appearance of Judge Perrin de Brichambaut’s impartiality. The Application does not provide any indication that Judge Perrin de Brichambaut was involved in the organisation of the events at which potentially relevant topics were discussed, nor that he was even present or had knowledge of any of these discussions, nor that he has any connection to the individuals whose words or roles the defence considers problematic.⁵⁴ The plenary of judges notes, in this regard, that rule 34(1)(d) of the Rules is concerned with risks of impartiality connected to the

⁵² Observations, para. 27.

⁵³ Application, para 11, unofficial English translation.

⁵⁴ Application, para 13-16.

expression of opinions *by the Judge*, not the expression of opinions by third parties to whom a judge may only be connected in a tangential manner.

35. In sum, the plenary of judges considers that a well-informed reasonable observer would not fear any appearance that either the Court and the *Forum du Futur* are linked nor that the latter and the French State are linked. Similarly, viewed in its proper context, there is no risk that an appearance of bias could be derived from Judge Perrin de Brichambaut sitting on the *Forum du Futur*'s administrative Board, nor could it be accepted that Judge Perrin de Brichambaut adopts the views, perspectives or interests of activities undertaken under the auspices of the organisation.

c. *Conseil d'État*

36. Turning to the issue related to the *Conseil d'État*, the plenary of judges first observes that the *Conseil d'État*, in its current form, has two main non-political functions: to give advice to public authorities and to act as an administrative jurisdiction of last resort.⁵⁵ The plenary of judges notes that

⁵⁵ Article L111-1 of the *Code de justice administrative* states: '*Le Conseil d'Etat est la juridiction administrative suprême. Il statue souverainement sur les recours en cassation dirigés contre les décisions rendues en dernier ressort par les diverses juridictions administratives ainsi que sur ceux dont il est saisi en qualité de juge de premier ressort ou de juge d'appel*'; Article L112-1 of the *Code de justice administrative* states: '*Le Conseil d'Etat participe à la confection des lois et ordonnances. Il est saisi par le Premier ministre des projets établis par le Gouvernement. Le Conseil d'Etat émet un avis sur les propositions de loi, déposées sur le bureau d'une assemblée parlementaire et non encore examinées en commission, dont il est saisi par le président de cette assemblée. Le Conseil d'Etat donne son avis sur les projets de décrets et sur tout autre projet de texte pour lesquels son intervention est prévue par les dispositions constitutionnelles, législatives ou réglementaires ou qui lui sont soumis par le Gouvernement. Saisi d'un projet de texte, le Conseil d'Etat donne son avis et propose les modifications qu'il juge nécessaires. En outre, il prépare et rédige les textes qui lui sont demandés*'; See also articles L112-2 to L112-6 of the *Code de justice administrative*; For advisory function see also description on the official website of the *Conseil d'État* at <https://www.conseil-etat.fr/le-conseil-d-etat/missions/conseiller-les-pouvoirs-publics> (last accessed on 8 July 2019); For its function as an administrative jurisdiction see also description on the official website of the *Conseil d'État* at <https://www.conseil-etat.fr/le-conseil-d-etat/missions/juger-l-administration> (last accessed on 8 July 2019). In addition, the *Conseil d'État* is responsible for managing the 8 administrative court of appeal and the 42 administrative tribunals as well as the national asylum

the *Conseil d'État*'s advisory functions are limited to providing legal advice to the French government for the preparation of *projets de loi*, *ordonnances* or *décrets*, in particular on their legality and administrative feasibility. In performing such function, the plenary of judges understands that the *Conseil d'État* does not discuss the political choices of public authorities and limits itself to assessing whether the relevant proposal is in conformity with, *inter alia*, the French Constitution, European law or international law.⁵⁶

37. The plenary of judges observes that as a retired member of the *Conseil d'État*, Judge Perrin de Brichambaut is entitled to use the honorific title of *Conseiller d'État Honoraire*.⁵⁷ The use of such honorific customarily awarded in recognition of prior service would not cause a reasonable fair-minded observer to doubt a judge's impartiality.

38. The remaining element of this claim purports to establish Judge Perrin de Brichambaut's ongoing interest in the work of the *Conseil d'État*. The plenary of judges notes that the website cited by the Application⁵⁸ does not support its allegation that Judge Perrin de Brichambaut 'continues to be actively engaged in this particular aspect of the mandate of the *Conseil d'État*'.⁵⁹ It is, rather, a biographical account of Judge Perrin de Brichambaut's prior career trajectory at the time when he became the OSCE Secretary-General (i.e. before he became a Judge of the Court).

court (see <https://www.conseil-etat.fr/le-conseil-d-etat/missions/gerer-les-juridictions-administratives> (last accessed on 8 July 2019).

⁵⁶ See explanatory video on the official website of the *Conseil d'État* available at <https://www.conseil-etat.fr/le-conseil-d-etat/missions/conseiller-les-pouvoirs-publics> (last accessed on 8 July 2019); See description on the official website of the French *Assemblée Nationale* at <http://www2.assemblee-nationale.fr/decouvrir-l-assemblee/role-et-pouvoirs-de-l-assemblee-nationale/les-institutions-francaises-generalites/le-conseil-d-etat> (last accessed on 8 July 2019).

⁵⁷ Observations, para. 18.

⁵⁸ <https://www.osce.org/node/117072> (last accessed on 8 July 2019).

⁵⁹ Application, para. 19.

39. The evidence of 'active engagement' provided by the Defence for Mr Al Hassan consists of the fact that Judge Perrin de Brichambaut acted as a moderator at a single political affairs conference which was convened by the *Conseil d'État* in May 2016.⁶⁰ Acting as a moderator at a conference is evidently a far cry from continuing to engage in work as a *Conseiller d'État* and advising the French government.⁶¹ The fact that the description of his background at this conference would appear to have omitted the customary '*Honoraire*' in listing this aspect of his background would not cause confusion in the mind of the reasonable observer, particularly in view of Judge Perrin de Brichambaut's categorical contextual clarification that he 'retired from the *Conseil d'État* in March 2015 when he was sworn in at the Court'.⁶² Further the fact that there is a website which contains a public analysis by Judge Perrin de Brichambaut of President Emmanuel Macron's commitment to multilateralism⁶³ similarly does not support the claim that the Judge continues to provide advice to the French government. This analysis makes no reference to Judge Perrin de Brichambaut's position as an ICC Judge and the assumption of the role of Judge does not preclude a Judge from holding and expressing any political views, within applicable limits.

40. In sum, a fair-minded reasonable observer would not see a reasonable appearance of bias arising out of the use of an honorific title such as *Conseiller d'État Honoraire* and the plenary of judges does not consider that a reasonable and fair-minded observer would harbour any fear as to an

⁶⁰ Application, paras. 19-20.

⁶¹ Application, paras. 18-19.

⁶² Observations, para. 18.

⁶³ <https://www.institutmontaigne.org/en/macron-the-12-months-of-jupiter/international-organizations#tab1> (last accessed on 8 July 2019).

appearance that Judge Perrin de Brichambaut remains connected to the *Conseil d'État*.

C. Findings concerning alleged predetermination of key issues in the case

41. In considering Mr Al Hassan's argument that Judge Perrin de Brichambaut may be reasonably perceived as harbouring preconceptions or prejudgment, the plenary of judges will consider only statements actually made by Judge Perrin de Brichambaut himself and not any of the statements in the Application made by third parties.⁶⁴
42. Prior to doing so, the plenary of judges notes that a Judge of the ICC does not come to the Court in a state of *tabula rasa*. Rather, she or he arrives at the Court with the highest level of experience in relevant fields, be that criminal law and procedure or international law,⁶⁵ with it also being entirely possible that a judge may, in addition, come to the Court with extensive experience in a partially non-legal field, such as international relations or security. It is also ordinary that judges may come to the Court with prior experience working for national governments. The existence of such prior experience or expertise does not, of itself, lead to a reasonable appearance that a judge may be unable to perform her or his judicial role impartially. Rather, the underlying presumption, as noted at paragraph 19 above, is that it is an ordinary part of the judicial role that a judge is able to place to one side information or knowledge acquired from any other source and determine a case based entirely on the evidence adduced.

⁶⁴ See discussion at para 34.

⁶⁵ See article 36(3)(b) of the Statute

a. *Alleged appearance of predetermination in Judge Perrin de Brichambaut's statements*

43. The potentially relevant statements of Judge Perrin de Brichambaut himself, to which Mr Al Hassan draws the plenary's attention, are as follows:

- In the context of a position paper of *Le Club de Vingt* published 1 November 2018:

Nothing worthwhile can be done if we disregard the fact that, after decades of inertia, society across the Maghreb is being stirred by two different currents: on the one hand, public protest, which Islamism is exploiting, and, on the other, a greater openness to the outside world and a desire for greater freedom, especially on the part of the youth.

Urban overcrowding, acute rural underdevelopment and rural flight are nothing new. The difference now is that discontent is being voiced, particularly across social media, and there are some sporadic, very small-scale demonstrations in Algeria. On the whole, we are seeing an emerging anti-establishment "subculture". Islamic influence is spreading from neighbouring regions. The Salafist armed group, Ansar Dine, which hails from Mali, has come to Tunisia and is starting to recruit there.⁶⁶

- In the context of moderating a conference, Judge Perrin de Brichambaut stated the following in response to a question of 'What military or civilian operations led by the European Union do you think have been the most successful?':

⁶⁶ Application, paras. 9-10, unofficial English translation. The plenary of judges will simply assume for present purposes that a position paper with the name of all members of *le Club de Vingt* can be attributed to one of its authors, without prejudice to the possibility that this may not be the case.

MPB: Allow me to speak about two which are currently working because there is no point in reviewing past operations. Let's take a look at what challenges the European Union is facing and how it is responding.

The two cases I would say are the operation currently under way in Mali and the operation being conducted in the Central African Republic. In both cases, in fact, the European Union is, in a way, taking over what were essentially military operations that had been led by France and the United Nations but broadening their scope over time by focusing on stabilization and development to create new conditions and prevent the resurgence of the factors of destabilization that had necessitated those military interventions. It is therefore, if you will, a manner of incorporating the European Union, ensuring continuity and sustainability, in a role in which it can assert all its assets – a military component and especially components of police training, components of development and civilian capacity building in Mali; needless to say, the task in both countries is tremendous and will be commensurate with the patience of the European Union.⁶⁷

44. In view of the potential issues arising in the case, the plenary of judges considers the use of the phrase 'Salafist armed group' to describe Ansar Dine as being of most potential relevance.
45. The plenary of judges notes that, considered in their proper context, the statements actually made by Judge Perrin de Brichambaut are brief, general

⁶⁷ Annex A to Request for the disqualification of Judge Marc Perrin de Brichambaut, 14 June 2019, ICC-01/12-01/18-376-Red-AnxA, unofficial translation into English.

in nature and are peripheral to the case itself. They are made in a geopolitical context, not a legal one, bearing no connection to any criminal proceedings, let alone to the case against Mr Al Hassan. The plenary of judges further observes that the general comments of Judge Perrin de Brichambaut say nothing at all about the (potential) criminal responsibility of any group operating in Mali and, as such, are entirely different from the circumstances of Judge Robertson and the Special Court for Sierra Leone referred to by the Defence.⁶⁸

46. Further, in respect of the description of Ansar Dine as a ‘Salafist armed group’, the plenary of judges notes that the Court, in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* considered that ‘[t]he evidence demonstrates that Ansar Dine and AQIM qualified as organised armed groups at the relevant time’.⁶⁹ Without prejudice to whether this may have any relevance to the *Al Hassan* case itself, the plenary did not consider that a reasonable, well-informed observer would consider that an appearance of bias could arise out of a public statement of a judge which, in addition to being so general and made in a context entirely divorced from the case, is also consistent with factual findings of the Court itself.

b. Alleged appearance of predetermination connected to nationality

47. The plenary of judges notes that there is one aspect of the Defence’s arguments on predetermination which concerns the general notion of whether, as a judge of French nationality who has previously played diplomatic and advisory roles within France, he may have determined any issues in relation to actions alleged to have been taken by the armed forces

⁶⁸ Application, paras. 43-45

⁶⁹ *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171, para. 49.

of France within the context of Operation Barkhane in Mali.⁷⁰ The plenary of judges considers this allegation to be entirely speculative. In accordance with the relevant findings above, the plenary of judges does not consider there to be a risk that Judge Perrin de Brichambaut could appear to have an ongoing affiliation to France's official interests.

c Other matters

48. The plenary of judges notes, finally, that the Observations raise an important issue concerning the need for disqualification requests to pertain to presently existing legal or factual issues and not be based on issues a party claims might be raised in the future.⁷¹ The plenary of judges agrees entirely that there is a need for prudence in this regard.

49. In the present circumstances, however, these matters have been raised only a few weeks before the scheduled date of the confirmation hearing, a point at which the Parties presumably have a clear idea of the issues likely to arise. The plenary has also taken note that both Mr Al Hassan and the Prosecution are in agreement as to the likelihood of these issues arising in the forthcoming confirmation proceedings.⁷² Considering that it would likely be disruptive to such confirmation of charges proceedings to require a Party to wait until a foreseeable issue is actually raised in the proceedings before a disqualification request could be made and that this could create issues concerning compliance with the requirement to make such request as soon as there is knowledge of the grounds on which it is based,⁷³ the plenary of judges accepts that it is appropriate to consider the Application

⁷⁰ Application, para. 46.

⁷¹ Observations, paras. 44-46

⁷² Prosecution's Response, para 3

⁷³ Rule 34(2) of the Rules.

at the current point of time. It observes, however, that this does not provide a free license for the filing of 'prospective' disqualification requests and that counsel must always act in accordance with her or his duties to the Court as set out in the Code of Professional Conduct for Counsel.

V. Disposition

50. The plenary of judges does not consider that Judge Perrin de Brichambaut's affiliations and limited involvement in *Le Club de Vingt*, the *Forum du Futur* or the *Conseil d'État*, placed in their proper context, would lead a reasonable fair-minded observer to consider that he has a continuing involvement in French political and military affairs such that an appearance of a lack of impartiality might arise. On the allegation that it may appear that Judge Perrin de Brichambaut has predetermined issues or could not determine them absent bias, the plenary of judges does not consider that any information has been presented which would rebut the ordinary presumptions of judicial impartiality.

51. In light of the foregoing, the plenary, by absolute majority consisting of Judges Fremr, Herrera Carbuccion, Mindua, Schmitt, Kovács, Chung, Pangalangan, Akane, Alapini-Gansou and Aitala, decide to dismiss the Application. Judges Henderson, Hofmański, Ibáñez and Prost abstained from the plenary's final decision.



Judge Robert Fremr
First Vice-President