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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

Public redacted version of "Prosecution's response to the Urgent Request for the disqualification of Pre-Trial Chamber I", 29 July 2019, ICC-01/12-01/18-436-Conf

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Introduction

1. Pre-Trial Chamber I is currently composed of Judge Péter Kovács (presiding), Judge Reine Alapini-Gansou and Judge Marc Perrin de Brichambaut. On 11 July 2019, the *Al Hassan* Defence requested the Presidency, under article 41(2)(b) of the Statute, to "disqualify the current composition of Pre-Trial Chamber I from sitting on the case of Mr Al-Hassan".[1] The Request fails to displace the presumption of impartiality attaching to judges at this Court. It fails to demonstrate, in concrete terms, that the appearance of impartiality has been affected in a manner that would warrant disqualification. The Prosecution respectfully requests the Plenary to dismiss the Request.

2. The Request has two aspects. Neither aspect should succeed.

3. *First*, the Defence argues that Judge Alapini-Gansou should be disqualified, under article 41(2)(a),[2] because she had previously investigated human rights violations in Mali (first, as the head of the human rights component of the African-led International Support Mission in Mali (AFISMA) in mid-2013, and then later, as head of the human rights component of *La Mission de L'Union Africaine pour le Mali et le Sahel* (MISAHEL) between November 2013 to April 2014).[3] However, Judge Alapini-Gansou's prior experience (and statements made or reports issued in that capacity) fall squarely within the legitimate parameters of article 41(2)(a) that the Presidency/Plenary have already recognised as appropriate. The Defence fails to establish a sufficient link between the Judge's previous experience and the

[1] ICC-01/12-01/18-406-Red ("Request" with Annex A (Confidential) and Annex B), paras. 1, 49. *See also* ICC-01/12-01/18-414 ("Presidency Order"), p. 3, ordering the Parties and participants to file any response by 1 August 2019.
[2] Article 41(2)(a), Statute: "A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. […]"
[3] Request, paras. 8-44.

proceedings at hand, such that it would warrant disqualification.[4] Likewise, the Defence merely speculates that the Judge's "involvement in formulating questions for the confirmation proceedings" was somehow influenced by her prior experience, such that it would lead to a reasonable apprehension of bias.[5]

4. *Second*, the Defence argues that the entire Pre-Trial Chamber should be disqualified because (i) they purportedly failed to take any steps to protect the impartiality of the proceedings "when apprised of these issues"; and (ii) Judge Kovács and Judge Alapini-Gansou participated in a Plenary decision which, in the Defence's view, determined "the relevance of the *Al Mahdi* judgment to factual issues in this case".[6] Yet, this aspect of the Request is also flawed. The Defence does not argue—let alone establish—that it relates to any of the permitted grounds for disqualification, either in article 41(2)(a) or in rule 34(1).[7] It can be dismissed on this basis alone.

5. Significantly, the Defence's claim that the Pre-Trial Chamber declined "to protect the integrity of the confirmation proceedings" is undermined by its own choice (or strategy) to bring its disqualification request before the *same* Chamber—and not the Presidency/Plenary.[8] Having only recently requested one such disqualification,[9] the Defence was aware that the Presidency/Plenary—and not the Chamber—was the appropriate forum under article 41 to seek judicial disqualification. Yet, it chose otherwise, and inappropriately seised the Pre-Trial Chamber—the object of its disqualification request—on the first day of the confirmation hearing.[10] In any event,

[4] *Contra* Request, para. 2(a), stating "Judge Alapini-Gansou's prior involvement in advising, and investigating facts related to domestic proceedings against Mr Al-Hassan and other members of the [common plan]".
[5] Request, para. 2(b).
[6] Request, paras. 2(c) and (d).
[7] *See* Request, paras. 45-46.
[8] Request, para. 45.
[9] *See* ICC-01/12-01/18-376-Red ("First Disqualification Request"), seising the Presidency/Plenary.
[10] ICC-01/12-01/18-T-003-ENG CT ("Confirmation Hearing"), 15:5-26:19, in particular, 25:9-11 ("It follows therefore that the Defence must have an implicit right to move this Chamber to consider requesting the Presidency to excuse the Bench from exercising its functions in this case."), incorrectly relying on ICC-01/04-168 OA3 ("DRC Extraordinary Review AD"), para. 20 (on a discussion on article 82(1)(d) criteria governing leave to appeal).

although the Chamber did not adjourn the proceedings at the time, no prejudice from continuing the proceedings can be said to have occurred. The Chamber only heard legal submissions from counsel for a limited period of five days. It took no substantive decision in this time. Similarly, the Defence's reading of the 8 July 2019 Plenary Decision is incorrect: the Judges' participation in that Plenary does not show that they should be disqualified.[11]

6. *Finally*, the Prosecution notes that the Request is untimely. Although this may not be a dispositive consideration before the Plenary, it is a relevant one. A party is obliged to bring requests for disqualification as soon as the grounds are known.[12] Information on Judge Alapini-Gansou's previous experience in relation to Mali has been well-documented, and publicly available, at least, since her nomination as judge in June 2017.[13] That Pre-Trial Chamber I was constituted in its current composition was also known since March 2018.[14] The Defence has had ample opportunity to consider the issues and could have brought this Request in a timely and appropriate manner, should it have considered it necessary.[15] It did not do so. The reasons advanced for why the Defence did not bring this Request earlier (in the appropriate forum) are undeveloped and wholly unconvincing—especially when the information was publicly available[16] and when, given the purported gravity of the allegations made, duly diligent counsel could have made the request earlier.[17]

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[11] Request, para. 46.
[12] ICC-01/04-02/06-2346 ("*Ntaganda* Presidency Decision"), para. 22. *See also* rule 34(2), Rules of Procedure and Evidence.
[13] *See e.g.,* Judge Alapini-Gansou's model curriculum vitae and statement of qualification (on the ASP's website, https://asp.icc-cpi.int/en_menus/asp/elections/judges/2017/Nominations/Pages/ALAPINI-GANSOU.aspx), noting her appointment as Head of the Human Rights Component of the African International Support Mission to Mali (MISMA) and that of the MISAHEL from 2012-2014.
[14] *See* ICC-01/12-53 ("Presidency Assignment Decision"), p. 9.
[15] *C.f.,* Confirmation Hearing, 25:14-16 ("Now the Defence has amply demonstrated through the filing of its 100-page brief with eight detailed annexes that it is ready for this hearing. This is not a delaying tactic. […]").
[16] *Contra* Request, para. 6 (claiming that the Prosecution disclosed no information on this point, referring to an email exchange dated 5-8 July 2019); para. 7 (claiming that the Defence only started to research this issue after it received the LRV submissions on 4 July 2019).
[17] *Contra* Request, [redacted] and preparation for the confirmation hearing), *but see* Confirmation Hearing, 26:23-28:17 (where the Defence only advanced generic submissions). To the extent that the Defence refers to [redacted], the Prosecution does not see its relevance to or impact on the current matter.

Level of Confidentiality

7. This response is filed confidentially, pursuant to regulation 23*bis*(2) of the Regulations of the Court, since it refers to the contents of a confidential filing. The Prosecution will file a public redacted version in due course.

Submissions

8. Judges enjoy a presumption of impartiality at this Court. Requesting the disqualification of a judge is not a step to be taken lightly. A judge may be disqualified from participating in a specific case if an unacceptable apprehension of bias is made out, *i.e.*, whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge. This standard "is concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension is objectively reasonable."[18] A case-by-case examination is needed, taking into account the specific circumstances of each case.[19]

A. The legal standard: article 41(2)(a) does not serve as an automatic bar

9. The Defence seeks Judge Alapini-Gansou's disqualification under article 41(2)(a).[20] However, article 41(2)(a) does not serve as an automatic bar to a judge's participation in a case. A judge is not "automatically" disqualified from participating in a case merely on grounds of past involvement in any capacity in the same or related case before the Court. A judge is disqualified on grounds of prior participation in the same case *only* if "their impartiality can be reasonably

[18] ICC-01/04-01/06-3154-Anx1 ("*Lubanga* Sentence Review Disqualification Decision"), para. 28. *See also Prosecutor v Mladić,* MICT-13-56-A, Decision on Defence Motions for Disqualification of Judges Theodor Meron, Carmel Agius and Liu Daqun, 3 September 2018 ("*Mladić* Disqualification Decision"), para. 19 ("A 'reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality […] and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.'").
[19] *Mladić* Disqualification Decision, para. 24 (citing ECtHR cases).
[20] Request, paras. 27-44.

doubted".[21] In so doing, the Presidency has considered whether the judge's previous participation in the case was likely to be *directly related* to the issue at hand so as to doubt their impartiality.[22] Ultimately, assessing requests for disqualification based on a judge's previous involvement in a case turns on whether there is a "degree of congruence between the legal issues" or whether "the factual determinations" would be "based on the same evidence".[23]

10. Notwithstanding a judge's prior involvement in a case or related case, the Court's case-law has allowed judicial participation with some latitude (given the limited pool of judges). In a broadly similar situation, the Presidency had noted Judge Monageng's previous experience, as Commissioner to the African Commission on Human and Peoples' Rights, and her role in preparing the report of the fact-finding mission to Darfur, Sudan—but had allowed the Judge to participate in a decision reconsidering whether a warrant of arrest for genocide should be issued against Mr Al Bashir.[24] The Presidency noted that the Commission was not aimed at establishing or assessing the individual criminal responsibility of Mr Al-Bashir or any other individual.[25] Critically, the Presidency stated, in this context, that

> when assessing the appearance of bias in the eyes of the reasonable observer, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, are capable of deciding on the issue before them *while relying solely and exclusively on the*

[21] ICC-01/04-01/06-2138-AnxIII ("*Lubanga* Presidency Decision"), pp. 4-7. *See e.g.,* ICC-01/04-01/10-503-AnxII ("*Mbarushimana* Excusal Decision"), p. 3; ICC-02/11-01/15-142-AnxI ("*Gbagbo* Excusal Decision"), p. 4; ICC-01/04-02/06-925-AnxI ("*Ntaganda* Excusal Decision"), p. 3; ICC-01/05-01/13-1329-AnxI ("*Mangenda* Compensation Excusal Decision"), p. 3; *Lubanga* Sentence Review Disqualification Decision, para. 30.
[22] *See also* ICC-01/04-02/06-162-Anx2 ("*Ntaganda* Interim Release Excusal Decision "), pp. 2-3.
[23] *Ntaganda* Excusal Decision, p. 3; *Gbagbo* Excusal Decision, p. 3; *Mangenda* Compensation Excusal Decision, p. 3; *Lubanga* Sentence Review Disqualification Decision, para. 31.
[24] ICC-02/05-01/09-76-AnxII ("*Al Bashir* Excusal Decision"), pp. 1-6.
[25] *Al Bashir* Excusal Decision, p. 6.

evidence adduced in the particular case, while excluding any information that was available to them in other capacity.[26]

11. Likewise, forming or expressing opinions *tangentially* connected to the case does not lead to disqualification.[27] Most recently, on 8 July 2019, the Plenary expressed its view that a judge does not come to the Court in a state of *tabula rasa*.[28] The existence of 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. Ordinarily, a judge "is able to place to one side information or knowledge acquired from any other source and determine a case entirely on the evidence adduced".[29]

B. The Request does not establish a basis for disqualification

12. The Defence must show that disqualification is warranted. But it fails to articulate a founded basis, and accordingly, the Request must fail.

I. The Request to disqualify Judge Alapini-Gansou must fail

13. Although the Defence claims that Judge Alapini-Gansou was previously involved "in domestic proceedings concerning Mr Al-Hassan in an investigative and advisory

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[26] *Al Bashir* Excusal Decision, p. 6. *See also* ICC-01/12-01/18-398-Anx1 ("*Al Hassan* Plenary Decision"), para. 23. *Contra* Request, para. 32 (relying on ECtHR, *Piersack v. Belgium,* Application no. 8692/79, 1 October 1982, para. 31, which related to a person who had previously been the head of Section B of the Brussels public prosecutor's department, which was responsible for the prosecution instituted against Mr Piersack, and who subsequently presided over the Brabant Assize Court before which the Indictments Chamber of the Brussels Court of Appeal had remitted Mr Piersack for trial.)

[27] ICC-02/05-03/09-344-Anx ("*Banda* Disqualification Decision"), para. 19.

[28] *Al Hassan* Plenary Decision, para. 42. *See also* ICTY, *Prosecutor v. Furundžija,* IT-95-17/1, Appeal Judgment, 21 July 2000 ("*Furundžija* AJ"), para. 205 ("The Appeals Chamber does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements. […] The possession of this experience is a statutory requirement for Judges to be elected to this Tribunal. It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias. […]")

[29] *Al Hassan* Plenary Decision, para. 42. *See also* ICTR, *Ntawukulilyayo v. The Prosecutor,* Case No. ICTR-05-82-A, Decision on Motion for Disqualification of Judges, 8 February 2011 ("*Ntawukulilyayo* Disqualification Decision"), para. 12 ("[…] It is assumed, in the absence of evidence to the contrary, that, by virtue of their training and experience, the Judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case […] 'a judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases.'")

capacity",[30] it merely speculates. The information available does not establish that the Judge had previously investigated Mr Al Hassan for the purposes of a criminal case. Rather, it demonstrates that the Judge had participated, as a human rights observer, in fact-finding missions in Mali and drafted reports and issued press statements in that capacity. Any "findings" she may have been associated with in this context were made applying human rights standards and methodology at a different earlier stage, and not in the context of a criminal trial with specific and higher standards of proof and rules establishing individual criminal responsibility. The Request does not establish that the Judge made findings on Mr Al Hassan's criminal responsibility or guilt. A reasonable and fair-minded observer would not apprehend bias.

i. Role and statements in the context of AFISMA

14. *First,* that Judge Alapini-Gansou participated (as one out of a four-member delegation) in a fact-finding mission to the Republic of Mali from 3-7 June 2013 cannot itself amount to a reasonable apprehension of bias.[31] This mission lasted only four days. Further, the Defence refers to other "missions, which took place from April-June 2013",[32] but does not explain their significance in this context. It remains unclear which aspects of these missions the Defence challenges.

15. Mere participation in human rights investigations or fact-finding missions in a country or situation would not lead a reasonable observer to apprehend bias. The Presidency has already made that clear.[33] In this context, the Defence's attempt to differentiate between the various roles and functions assumed by judges of this Court when undertaking their previous human rights mandates must fail.[34] Even though Judge Monageng did not undertake the mission to Darfur (between 8-18 July 2004), she was part of the 11 Commissioners who considered the draft report and

[30] Request, paras. 28-32.
[31] *Contra* Request, para. 11.
[32] Request, para. 11.
[33] *Al Bashir* Excusal Decision, pp. 3-6.
[34] Request, paras. 30(a) and (b) (arguing that Judge Monageng's role was different).

adopted it.[35] Although the Defence argues that the fact that "Judge Monageng had not been *personally involved* in the fact-finding mission" was decisive, it was not.[36] The Presidency's decision did not depend on Judge Monageng's actual role or level of personal involvement in the fact-finding mission itself. Rather, the Presidency considered the objectives of the African Commission on Human and Peoples' Rights in assessing the situation in Darfur and its report (which Judge Monageng endorsed), and found that such assessments did not raise "a question of partiality".[37] When viewed in this light, there does not appear to be a tangible distinction between the objectives of the Darfur mission and the Mali mission.[38]

16. In any event, the Defence appears to take information out of context: for instance, although the Defence claims that "Judge Alapini-Gansou personally led and participated in the mission that took place in Timbuktu [14 June 2013]"[39]—it fails to note that the Judge, while in Timbuktu, was tasked with "ascertain[ing] the security and logistical work conditions of the [human rights] Observers".[40] The Judge does not appear to have been in Timbuktu in a fact-finding capacity.

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[35] *Al Bashir* Excusal Decision, p. 2.
[36] *Contra* Request, para. 30(a) (emphasis added). *See* *Al Bashir* Excusal Decision, p. 2 (noting, as part of the factual background, that Judge Monageng "was not part of the fact-finding mission", and further noting that she was "not named as one of the delegates in paragraph 12 of the Report.")
[37] *Al Bashir* Excusal Decision, p. 6 (finding (i) that the Commission did not reach any conclusions with regard to whether the crime of genocide was committed in Darfur; and (ii) that the Commission was not aimed at establishing or assessing the individual criminal responsibility of Mr Al Bashir, or of any other individual.)
[38] *Compare* *Al Bashir* Excusal Decision, p. 3 ("The objectives of the fact-finding mission included discussing the human rights situations in the Darfur region with the Sudanese authorities and other national and international stakeholders, as well as gathering evidence from all "actors, stakeholders and victims," to throw light on the human rights situation in Darfur, particularly the allegations of serious and massive human rights violations. Additionally, the mission aimed to consider possible solutions to end the situation.") *with* terms of reference of the AFISMA fact-finding mission (ICC-01/12-01/18-401-Anx2, p. 58, para. 6) (hold discussions with the authorities and key stakeholders in the area of human rights promotion and protection; investigate and gather relevant information on the situation and human rights violations committed in northern Mali; learn about the situation of internally displaced persons following the conflict in northern Mali, the level of enjoyment of their rights and the challenges they face; visit the northern part of Mali if the security and logistical conditions are conducive; meet with the beneficiaries of soldiers victims of the atrocities committed in January 2012 in Aguel'hoc; interview individuals who may provide information on the events of Aguel'hoc and human rights violations committed in northern Mali, etc.")
[39] Request, para. 13.
[40] *See* Request, fn. 16, referring to Annex B ("AFISMA Human Rights Observers deploy to Timbuktu", 17 June 2013, noting "[she] will be in Timbuktu until 18 June 2013, to ascertain the security and logistical work conditions of the Observers.")

17. *Second*, statements attributed to "the delegation" at a press conference on 7 June 2013 would not lead to an apprehension of bias.[41] These statements are not specifically attributed to the Judge. As the Plenary has stated, while assessing the risk to impartiality, expression of opinions *by the Judge* in question is germane, but not necessarily the expression of opinions *by third parties*.[42] In any event, the statements by the delegation or mission are entirely consistent with its human rights and fact finding mandate that potentially *precedes* criminal trials and the process of establishing accountability in the courtrooms (whether national or international):[43] the statements do not show that the delegation (even if assumed to represent Judge Alapini-Gansou's own views) assessed or judged Mr Al Hassan's criminal responsibility. Similarly, that the delegation may have met either government or non-state actors is irrelevant.[44]

18. *Third*, the selected statements from the Report of the Fact-Finding Mission to the Republic of Mali (3-7 June 2013) ("AFISMA Report") also would not lead to an apprehension of bias. None of the sentences, whether viewed individually or cumulatively, would support the conclusion that the Judge "has reached a predetermination on fundamental issues concerning the charges in this case."[45] The Request quotes selectively. [46] For instance,

- Statements in the AFISMA Report attributing "acts such as stoning, flogging and amputation" to "armed Islamic groups, in particular Ansar Dine, MUJAO

[41] Request, para. 12.
[42] *Al Hassan* Plenary Decision, para. 34.
[43] *See* Request, para. 12, fn. 14, noting that "the delegation informed the Malian public that the goal of the mission was to 'prove the guilt of the perpetrators of human rights violations and then bring them in front of national courts, or where appropriate, subnational and international courts'" (citing Amnesty International, Agenda for Human Rights in Mali, p. 39, fn. 37, citing *L'indicateur du Renouveau*, Malian Crisis: Serious human rights violations reported by the AU, 10 June 2013, website unavailable, original source not verified).
[44] *Contra* Request, para. 12.
[45] Request, para. 35.
[46] Request, paras. 13-15, 35.

and AQMI" are generic in nature.[47] They do not determine Mr Al Hassan's role or responsibility.

- Likewise, the single statement that "[there] is *no doubt* that there were serious and massive human rights violations"[48] cannot be equated to an assessment and judgment of Mr Al Hassan's criminal responsibility. Nor was it controversial to find that human rights violations had occurred in Mali.

- Similarly, the remark that "the rape carried out against women and girls during the crisis are crimes against humanity" falls squarely within the expected human rights mandates. [49] Nor has the holding of such individual or collective views (supporting the prosecution of such crimes) led to disqualification.[50] In particular, the very fact that the AFISMA Report recommended that such crimes "should be judged by the International Criminal Court in the absence of action by the Malian Government" demonstrates that criminal accountability for such conduct was yet to be established. In this context (and based on the materials it presents), the Defence's comment that the Judge "has already expressed a particular opinion concerning whether crimes *in this case* had been established […]") is unfounded.[51]

[47] *See* Request, para. 13, citing the AFISMA Report, para. 53 ("Still with regard to the implementation of sharia, the delegation learned that terrible acts such as stoning, flogging and amputation were carried out during the period of occupation. According to information gathered, these acts were carried out by armed Islamic groups, in particular Ansar Dine, MUJAO and AQMI, following a system of summary justice which they established.").
[48] *See* Request, para. 14, citing the AFISMA Report, para. 90 ("Considering the length of the period during which human rights violations were committed and the number of victims, there is no doubt that there were serious and massive human rights violations.") emphasis added.
[49] *See* Request, para. 15, citing the AFISMA Report, para. 91 ("[…]The rape carried out against women and girls during the crisis are crimes against humanity and should be judged by the International Criminal Court in the absence of action by the Malian Government.").
[50] *See e.g., Furundžija* AJ, paras. 206-215 (where the allegations that Judge Mumba showed bias for "advocating the position that rape was a war crime" and "encouraging the vigorous prosecution of persons charged with rape as a war crime" were dismissed); para. 202 ("To endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification.")
[51] Request, para. 30 (b).

19. *Fourth,* Judge Alapini-Gansou's possible participation in a July 2013 workshop on methodologies for documenting human rights violations (organised by FIDH among others) would not lead a reasonable observer to apprehend bias.[52] The Defence merely speculates that the Judge "would have communicated her factual findings and experiences to FIDH, with a view to assisting them in their advocacy efforts".[53] Moreover, even if this was done, it would not have been inappropriate. Sharing experiences of fact-finding missions in documenting human rights violations with human rights actors is both expected and proper.[54] Similarly, the excerpt that the Defence relies on does not show that the Judge communicated "her factual findings". Rather, it shows that the Judge underscored sharing methodological approaches between various actors, including by sharing "experience acquired on the ground".[55]

ii. Role and statements in the context of MISAHEL

20. Similar to her role in the AFISMA fact-finding context, Judge Alapini-Gansou's previous role as head of the human rights component of MISAHEL would not lead to an apprehension of bias.[56]

21. *First,* in alleging that Judge Alapini-Gansou (in her MISAHEL role) may have met [redacted][57] [redacted][58] the Request advances nothing more than conjecture. For instance,

- The Request merely speculates that [redacted].[59]

[52] Request, para. 16. *See also* ICC-01/12-01/18-401-Anx2, pp. 106-107 (paras. 17-19).
[53] Request, para. 18.
[54] *Contra* Request, para. 25.
[55] *See* Request, para. 17.
[56] Request, para. 20.
[57] [redacted].
[58] [redacted].
[59] [redacted].

[redacted] Even if the Judge had previously met [redacted], there would be no apprehension of bias. Judges are assumed to "assess credibility findings without any preconceived position and strictly within the context of the case in which such findings were made, not on the basis of extraneous information."[60] As the *ad hoc* tribunals have found, judges are permitted to hear the *same* witnesses in overlapping but different cases. This is not in itself considered a sufficient basis for disqualification. It is axiomatic, therefore, that Judge Alapini-Gansou can be assumed to assess any witness based on the case record alone, irrespective of any prior interactions with witnesses that may or may not have occurred.[61]

- Further, the Request does not establish [redacted] would mean that the Judge met specifically with [redacted][62]

- Similarly, the Request fails to explain why any role in [redacted] would mean that the Judge was associated with the domestic proceedings [redacted][63] Even if this had been the case, the Request offers no link between those purported actions and the case at hand. In any event, [redacted].

22. *Second,* although the Defence alleges that a "report drafted by Judge Alapini-Gansou […] included findings concerning crimes committed by Ansar-Dine in Timbuktu", it fails to substantiate this any further. In any event, the information in

[60] *See e.g.,* ICTR, *Prosecutor v. Kanyarukiga,* Case No. ICTR-02-78-A, Decision on Gaspard Kanyarukiga's Motion to Disqualify Judge Vaz, 24 February 2011 ("*Kanyarukiga* Disqualification Decision"), para. 17*;* *Ntawukulilyayo* Disqualification Decision, para. 13 ("The fact that the same Judges heard the same witnesses in two separate trials does not in itself demonstrate an appearance of bias on their part. […]")
[61] *Contra* Request, para. 36.
[62] [redacted]
[63] [redacted].

the document that the Defence cites in support appears general in nature.[64] It does not pre-judge Mr Al Hassan's responsibility or guilt. A reasonable observer would not apprehend bias.

23. *Third,* the Request attempts to draw a link between the criminal complaint filed by FIDH, AMDH and other Malian NGOs against Mr Al Hassan (for allegations concerning Timbuktu) *and* the Judge.[65] But this link is untenable. That the Legal Representative of Victims (LRV, Mr Seydou Doumbia) may have been associated with this complaint in the domestic proceedings against Mr Al Hassan is plainly insufficient to meet the high threshold for disqualification of a judge.[66] It is unsustainable to suggest that the LRV's submissions—purportedly based on his actions in Mali—then allegedly influenced the Chamber's questions to the Parties and participants, in such a manner warranting disqualification.[67] In any event, the 43 questions were issued by the Chamber *en banc,* and not by Judge Alapini-Gansou on her own. The substance of those questions was entirely appropriate.[68] By claiming that the questions were intended "to the detriment of the defendant",[69] the Request merely speculates. In any case, the questions were issued only after the Defence filed lengthy (over 100 pages) written submissions on 4 July 2019.[70]

II. The Request to disqualify the Pre-Trial Chamber must fail

24. The Defence does not argue—let alone concretely demonstrate—that its request to disqualify the Pre-Trial Chamber relates to any specific ground of disqualification in article 41(2)(a) or rule 34.[71] Rather, it only advances generic submissions. This aspect

[64] *See* Request, fn. 39 (citing Annex B, Institute for Security Studies, *Rapport sur le Conseil de paix et de sécurité* (N. 58, May 2014), p. 2).
[65] Request, paras. 26, 38-44.
[66] *Contra* Request, paras. 38-39.
[67] *Contra* Request, paras. 39-44.
[68] *See generally* ICC-01/12-01/18-399-Anx-Red ("Chamber's Questions").
[69] Request, para. 42.
[70] ICC-01/12-01/18-394-Red ("Defence Confirmation Submissions"), with seven annexes.
[71] Request, paras. 45-46.

of the Request should be dismissed on this basis alone. In any event, the Request remains unfounded.

25. *First,* by arguing the disqualification matter before the Chamber during the confirmation proceedings, the Defence prompted its own claim of purported judicial impropriety.[72] Indeed, if the Defence had appropriately filed its disqualification request before the correct forum (the Presidency/the Plenary), this claim would not even have arisen. It should accordingly be dismissed. Further, since the Chamber was, in any event, the incorrect forum for such requests, there was little it could do to "protect the integrity of the confirmation proceedings in light of the information raised by the Defence". Moreover, when it was asked to seise the Plenary with this request,[73] the Defence took four additional days to do so. Although the confirmation proceedings continued, there was no prejudice. Nor has the Defence shown any. The Chamber only heard legal submissions, and it made no substantive decisions.

26. *Second,* since the Request fails to demonstrate that the Chamber's questions to the Parties and participants were inappropriate, it follows therefore that there was no impropriety in "continu[ing] to adhere to [them]".[74]

27. *Third,* the reference to the *Karemera* decision at the ICTR is inapposite.[75] The Defence does not acknowledge that the procedure for seeking judicial

[72] *Contra* Request, para. 45 (arguing that the Chamber declined to take any steps to protect the integrity of the confirmation proceedings).
[73] Confirmation Hearing, 29:23-30:4 (MR DUTERTRE: "When the Defence makes submissions about Judge Alapini-Gansou, I think they are simply looking for recusal or disqualification, and obviously your Chamber is not the forum to tackle such a request. […] I believe that in those circumstances, therefore, on that important point, we may have to adjourn the proceedings and forward the transcript of these proceedings to the plenary of judges […]"); 34: 19:23 ("[…] Just a clarification, if you don't mind. Is the Chamber referring the issue to the plenary? […] And we would like the Chamber to refer the issue to the plenary while the proceedings continue."); 34:24-35:2 (PRESIDING JUDGE KOVÁCS: "*Regarding the decision, the Defence may draw the appropriate conclusions and do what is necessary in accordance with the procedure set out in the Rome Statute and the Rules of Procedure and Evidence*. Thank you") emphasis added.
[74] Request, para. 45.
[75] Request, para. 45 (citing *Prosecutor v. Karemera et al,* Case No. ICTR-98-44-AR15bis.2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004 ("*Karemera et al.* AD")).

disqualification at the *ad hoc* tribunals was different.[76] In any event, the Defence was aware that disqualification requests at this Court are made before the Presidency, to be considered by the Plenary.

28. Moreover, the outcome in *Karemera et al.* (leading ultimately to a new Trial Chamber being constituted) turned on a series of complex procedural developments—none of which are apposite to the case at hand.[77]

29. *Fourth,* that Judge Alapini-Gansou and Judge Kovács participated in the Plenary's deliberations concerning Judge Perrin de Brichambaut does not warrant disqualification.[78] Even if the Defence had raised arguments relating to Ansar Dine in its previous disqualification request, the Plenary found no merit in them.[79] More so, the Plenary's findings related to the particularities of the request (concerning a different judge) before it. The Defence assumes a link between that request and Judge Alapini-Gansou;[80] this has no basis.

30. Likewise, in claiming that the Plenary's reliance on the *Al Mahdi* Trial Judgment related to a "live and contested issue" in this case, the Defence misreads the Plenary Decision.[81] The Decision states, in clear terms, that the reference to the *Al Mahdi* Judgment was "without prejudice" to whether this was relevant to the *Al Hassan*

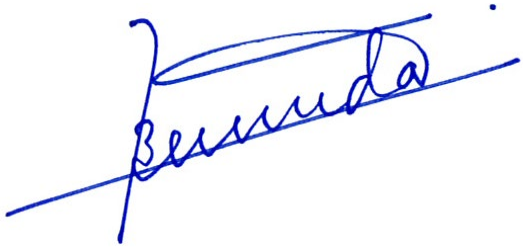
[76] *See* rule 15(B), ICTR Rules of Procedure and Evidence: "Any party may apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber from a case upon the above grounds. After the Presiding Judge has conferred with the Judge in question, the Bureau, if necessary, shall determine the matter. […]"
[77] *Karemera et al.* AD, para. 65 ("The Appeals Chamber finds that the remaining Judges erred in the exercise of their discretion when they took into account that the Bureau has confirmed the impartiality of all three judges. While the Bureau has denied two motions for disqualification of the three trial Judges which was based on their decisions, the Bureau has *not* passed on the question of apprehension of bias allegedly arising from Judge Vaz's admitted association and cohabitation with a Prosecution counsel involved in the case."); para. 69 ("Having found that the appearance of bias attached to Judge Vaz, the Appeals Chamber now find that this appearance also extended to Judges Latanzi and Arrey because, although aware of the circumstances of Judge Vaz's association with the Prosecution counsel, they acquiesced in rejecting Nzirorera's motion and, therefore, in continuing the trial with Judge Vaz on the Bench.")
[78] Request, para. 46.
[79] *Al Hassan* Plenary Decision, para. 46.
[80] Request, para. 46 (arguing that there is an appearance that Judge Alapini-Gansou had a personal interest in the outcome of the decision).
[81] Request, para. 46.

case.[82] By alleging that this "creates an appearance that the majority of the bench has determined an issue of key importance to the confirmation proceedings, before the confirmation submissions have been fully heard", the Defence only speculates.[83]

31. For all the reasons above, the Prosecution respectfully requests the Plenary to dismiss the Request. Significantly, the Request falls short of the high threshold for disqualification. The Defence fails to provide a cogent explanation for why it brought this Request late or why it had first raised this matter in the wrong forum. Should the Plenary nonetheless decide that disqualification of the Chamber is warranted, the Prosecution submits that a new Chamber could render a decision without conducting a new confirmation hearing. The Prosecution notes that the Defence has a similar view.[84]

Conclusion and Relief

32. The Request fails to establish a founded basis for judicial disqualification. The high threshold governing such requests is not met. The Prosecution, therefore, respectfully requests the Plenary to dismiss the Request.



Fatou Bensouda, Prosecutor

Dated this 29th day of July 2019
At The Hague, the Netherlands

[82] *Al Hassan* Plenary Decision, para. 46 ("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.")
[83] Request, para. 46.
[84] Request, paras. 47-48.