

## SEPARATE OPINION OF JUDGE PÉTER KOVÁCS

1. I am in agreement with the final outcome reached by the Majority that on the basis of the hearing and the evidence presented, there are substantial grounds to believe that Ahmad Al Faqi Al Mahdi is criminally responsible for the war crime charged by the Prosecutor under article 8(2)(e)(iv) of the Rome Statute (the "Statute"). Nevertheless, I remain dissatisfied with the deliberate approach endorsed by the Majority to underestimate the significant role of the Pre-Trial Chambers in exercising their filtering function. I disagree with the manner in which the Majority approaches and reasons the decisions of this Chamber, in particular those decisions which carry substantial weight either due to their sensitive nature or because they lie at the heart of the pre-trial proceedings.

2. In this context, I am referring to decisions rendered under article 15 of the Statute, which are indeed of a delicate nature due to the political ramifications they may have on the credibility and future operation of the Court. I am also referring to decisions regarding the confirmation of charges, pursuant to article 61(7) of the Statute. The latter certainly carry particular weight, because these decisions design the fate of future cases before the International Criminal Court (the "ICC") as well as the parameters of these cases when the relevant Pre-Trial Chamber decides to commit the suspect(s) to trial. In principle, my separate opinion should focus on the decision of the Majority on the confirmation of charges in the case of the *Prosecutor v. Ahmad Al Faqi Al Mahdi* (situation in the Republic of Mali). However, due to what I consider to be a misapprehension of the role of the Pre-Trial Chamber, I am compelled to express in a few lines my dissatisfaction with the overall approach endorsed by the Majority in treating these significant decisions, before I turn my focus to the subject-matter of the present separate opinion.

3. With respect to the confirmation of charges decision of the Majority in the *Al Mahdi* case (the “Decision/Majority Decision”), my concerns revolve around a number of points relating both to substance and presentation. I shall spare my comments on the presentation, and focus instead on the substance of the Decision.

4. In this respect, I would point out that my disagreement mainly goes to fundamental statements of law rather than facts; accordingly, my opinion shall not engage with an analysis of the facts of the case and the evidence presented. However, it is sufficient to point out in this regard that one of my concerns stems from the fact that the Decision lacks concrete references to the relevant pieces of evidence, which support the Prosecutor’s allegations. Throughout the entire factual findings of the Decision, the Majority refers three times in brackets *only* to the codes of six witnesses, without even attempting to link or spell out the relevant part of the statement in support of the Prosecutor’s allegation.<sup>1</sup>

5. In other parts of the Decision, the Majority speaks of “[e]vidence submitted by the Prosecutor”<sup>2</sup> as well as “reports from the UN and media”<sup>3</sup> which support the existence of an armed conflict not of an international character<sup>4</sup> or the major role played by the suspect to “discourage the population from following their established practices concerning the mausoleums [...] [and] to proceed with their destruction”.<sup>5</sup> Nowhere in the Majority’s reasoning is the slightest reference to the source of evidence on the basis of which the Majority based its findings or conclusions. Nor

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<sup>1</sup> Pre-Trial Chamber I, Situation in Mali, “[Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#)”, 24 March 2016, ICC-01/12-01/15-84-Red, paras 31, 33 and 45.

<sup>2</sup> Pre-Trial Chamber I, Situation in Mali, “[Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#)”, 24 March 2016, ICC-01/12-01/15-84-Red, para. 30.

<sup>3</sup> Pre-Trial Chamber I, Situation in Mali, “[Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#)”, 24 March 2016, ICC-01/12-01/15-84-Red, para. 30.

<sup>4</sup> Pre-Trial Chamber I, Situation in Mali, “[Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#)”, 24 March 2016, ICC-01/12-01/15-84-Red, para. 30.

<sup>5</sup> Pre-Trial Chamber I, Situation in Mali, “[Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#)”, 24 March 2016, ICC-01/12-01/15-84-Red, paras 48-49.

there is any account of the content of the United Nations or media reports referred to. As such, the Majority's reasoning gives the impression that it rests on mere assumptions due to the lack of specific support from the evidence presented to the Chamber. Moreover, even if the suspect has consented on certain facts as publicly declared, judicial reasoning dictates that a proper account of the events and evidence presented is reflected in the Decision.

6. As I mentioned in a previous separate opinion, albeit in the context of an article 15 proceedings,<sup>6</sup> the role of the Pre-Trial Chamber (as envisaged by the Statute and confirmed by the *travaux préparatoires*) is not to conduct a "marginal assessment".<sup>7</sup> Rather, its role is, *inter alia*, to "provide a clear and well-reasoned decision, which presents a full account of the relevant facts and law in order to reveal transparency of the judicial process and guarantee a considerable degree of persuasiveness".<sup>8</sup> I am afraid that the Majority Decision in this respect does not meet these standards.

7. The degree of seriousness of a Chamber's examination should not depend on the stage of the judicial process, be it at pre-trial or trial stages as the Majority's reasoning suggests. Being at the pre-trial phase does not justify a light assessment of facts or disregarding the proper presentation of evidence submitted. It simply means that the assessment should be carried out against the evidentiary standard required for the particular stage of the judicial process, be it low or high. Still such an

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<sup>6</sup> Pre-Trial Chamber I, Situation in Georgia, [Separate Opinion of Judge Péter Kovács](#), 27 January 2016, ICC-01/15-12-Anx-Corr.

<sup>7</sup> Pre-Trial Chamber I, Situation in Georgia, [Separate Opinion of Judge Péter Kovács](#), 27 January 2016, ICC-01/15-12-Anx-Corr, para. 11.

<sup>8</sup> Pre-Trial Chamber I, Situation in Georgia, [Separate Opinion of Judge Péter Kovács](#), 27 January 2016, ICC-01/15-12-Anx-Corr, para. 12; see also, *inter alia*, Appeals Chamber, [Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'"](#), 26 October 2012, ICC-02/11-01/11-278-Red (OA), para. 49; Appeals Chamber, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"](#), 13 February 2007, ICC-01/04-01/06-824 (OA7), para. 124.

assessment even against the back drop of a relatively low evidentiary standard of proof should be carried out *thoroughly* and the decision should demonstrate the thoroughness of the assessment conducted by the Chamber. Any other interpretation would certainly diminish the expected role of the Pre-Trial Chamber, which was actually designed by the drafters of the Statute. This is an unfortunate result for the Court as a whole.

8. The same holds true in relation to the controversial question concerning the assessment of evidence at the pre-trial stage *vis-à-vis* the trial stage. It is quite clear that the Majority sets a clear demarcation line between the weighing of evidence at the pre-trial stage and at the trial stage showing deference only to the latter.

9. This is apparent from reading paragraphs 19-20 of the Decision, which suggest that the Majority does not believe that the Pre-Trial Chamber should “conclusively determine issues of probative value of evidence, including in respect of credibility of witnesses”.<sup>9</sup> Also, the Majority believes that the Pre-Trial Chamber should “refrain from seeking to resolve any apparent contradictions in the evidence”.<sup>10</sup> This view clearly shaped the Majority’s approach towards the assessment of evidence throughout the Decision in the sense that the Majority “[did] not address in [the] decision *all issues* with respect to credibility of witnesses or probative value of evidence except where the answer [was] manifest”.<sup>11</sup>

10. Although the appearance of witnesses at trial may shed light on inconsistencies in their testimonies which were not apparent from their written statements, this does

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<sup>9</sup> Pre-Trial Chamber I, Situation in Mali, “[Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#)”, 24 March 2016, ICC-01/12-01/15-84-Red, para. 19.

<sup>10</sup> Pre-Trial Chamber I, Situation in Mali, “[Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#)”, 24 March 2016, ICC-01/12-01/15-84-Red, para. 19.

<sup>11</sup> Pre-Trial Chamber I, Situation in Mali, “[Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#)”, 24 March 2016, ICC-01/12-01/15-84-Red, para. 19.

not alter the fact that the Pre-Trial Chamber may be called upon to *conclusively* determine issues of probative value including assessment of credibility of witnesses or resolve apparent inconsistencies or contradictions *solely* on the basis of their written statements. Thus, I disagree with the Majority's proposition which not only misreads the relevant portions of the Appeals Chamber's judgment on this matter,<sup>12</sup> but also goes against the plain wording of articles 64(9) and 69(4) of the Statute together with rule 63(1) and (2) of the Rules.

11. According to article 64(9)(a) of the Statute, the "Trial Chamber shall have, *inter alia*, the power [...] to: (a) [r]ule on the admissibility or relevance of evidence [...]. Further, article 69(4), first sentence states that the "Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence [...]". Rule 63(1) and (2) of the Rules comes into play to confirm that the "rules of evidence [...], together with article 69, shall apply in proceedings before all Chambers", and that a Chamber, be it Pre-Trial or Trial, "shall have the authority, [in accordance with article 69(4)], to assess *freely* all evidence submitted in order to determine its relevance or admissibility" (emphasis added). Hence, in principle, the Statute and Rules do not draw a distinction as to the assessment of evidence before the different Chambers, be it Pre-Trial or Trial.

12. This conclusion finds support in the jurisprudence of the Appeals Chamber where it was stated that the above provisions "*all* reflect a general authority on the part of the Pre-Trial Chamber to assess the evidence",<sup>13</sup> and that for the purpose of evaluating the evidence as required by article 61(7) of the Statute, the Pre-Trial

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<sup>12</sup> Appeals Chamber, "[Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'](#)", 30 May 2012, ICC-01/04-01/10-514 ("Mbarushimana OA 4").

<sup>13</sup> Appeals Chamber, "[Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'](#)", 30 May 2012, ICC-01/04-01/10-514 ("Mbarushimana OA 4"), para. 41(emphasis added).

Chamber's authority is not limited to "freely assess evidence".<sup>14</sup> In the same judgment, the Appeals Chamber expressed its disagreement with the Prosecutor's claim that the Pre-Trial Chamber "cannot evaluate the credibility of witnesses without their in person testimony".<sup>15</sup> This statement was clearly contradicted by the Majority in paragraph 19 of the Decision, where it was stated that "the credibility of witnesses can only be properly addressed at trial, where the *witnesses will be called to testify* and their evidence properly tested".<sup>16</sup> The Majority also went against another conclusion drawn by the Appeals Chamber when the former stated, "[w]ithout the full airing of the evidence, the Chamber should refrain from seeking to resolve any apparent contradictions in the evidence".<sup>17</sup> The Majority's finding is in clear contradiction with the Appeals Chamber's pronouncement that it was "not persuaded by the Prosecutor's argument that the Pre-Trial Chamber cannot properly evaluate the evidence because it lack[ed] the full evidence".<sup>18</sup> In addition, I fail to see how the Pre-Trial Chamber could "separate those cases and charges which should go to trial from those which should not" without a proper evaluation of the evidence presented by the Prosecutor.<sup>19</sup> This is an essential role to be played by the Pre-Trial Chamber not only for the sake of judicial economy, but more importantly to preserve the credibility of this Court.

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<sup>14</sup> Appeals Chamber, "[Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'](#)", 30 May 2012, ICC-01/04-01/10-514 ("Mbarushimana OA 4"), para. 42.

<sup>15</sup> Appeals Chamber, "[Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'](#)", 30 May 2012, ICC-01/04-01/10-514 ("Mbarushimana OA 4"), para. 45.

<sup>16</sup> Pre-Trial Chamber I, Situation in Mali, "[Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#)", 24 March 2016, ICC-01/12-01/15-84-Red, para. 19.

<sup>17</sup> Pre-Trial Chamber I, Situation in Mali, "[Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#)", 24 March 2016, ICC-01/12-01/15-84-Red, para. 19.

<sup>18</sup> Appeals Chamber, "[Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'](#)", 30 May 2012, ICC-01/04-01/10-514 ("Mbarushimana OA 4"), para. 44.

<sup>19</sup> Appeals Chamber, "[Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'](#)", 30 May 2012, ICC-01/04-01/10-514 ("Mbarushimana OA 4"), para. 39.

13. The approach endorsed by the Majority regarding, *inter alia*, the assessment of evidence is inspired, to a great extent, by some statements from the “Chambers Practice Manual”, which certainly has no legal authority,<sup>20</sup> if one considers the applicable law designed by the drafters of the Statute. According to article 21 of the Statute, the Court shall apply:

- (a) [i]n the first place, [the] Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) [i]n the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) [f]ailing that, general principles of law derived by the Court from national laws of legal systems of the world including as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with [the] Statute and with international law and internationally recognized norms and standards.<sup>21</sup>

14. Thus, I find difficulty in placing the “Chambers Practice Manual” within the applicable sources of law of this Court. The Manual is a pedagogical or informative tool but not a genuine legal instrument as such. It is, therefore, even more difficult, if not impossible, to expect that the “Chambers Practice Manual” overrides the Statute and Rules of Procedure and Evidence (the “Rules”). These statutory documents make clear that the question of weighing evidence, its probative value and resolving any inconsistencies, be it “slight” or “manifest” is a matter that equally falls within the mandate of a Pre-Trial Chamber.

15. This view on the position of the “Chamber Practice Manual” finds further support in one of the recent judgments issued by the Appeals Chamber in *Laurent Gbagbo and Charles Blé Goudé*. When Mr. Gbagbo argued that the decision of Trial Chamber I to have recourse to regulation 55 of the Regulations of the Court was “inconsistent with the recommendation of the Pre-Trial Practice Manual”,<sup>22</sup> the

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<sup>20</sup> Chambers Practice Manual, February 2016, p. 17.

<sup>21</sup> Rome Statute, Art. 21 (1)(a)-(c).

<sup>22</sup> Appeals Chamber, “[Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled ‘Decision giving notice pursuant to Regulation 55\(2\) of the Regulations of the Court’](#)”, 18 December 2015, ICC-02/11-01/15-369, para. 54.

Appeals Chamber considered such an argument to be “misguided”.<sup>23</sup> In order to set the record straight, the Appeals Chamber found that the:

Pre-Trial Practice Manual is an explanatory document that contains general recommendations and guidelines regarding best practices at the Court [...] However, it is not a binding instrument designed to have the same force and effect as the Statute, Rules of Procedure and Evidence or the Regulations of the Court.<sup>24</sup>

Thus, relying on certain statements concerning evidentiary assessment at the pre-trial stage as referred to in the “Chambers Practice Manual”, in a manner which clearly goes against the explicit provisions governing evidence as set out in articles 64(9) and 69(4) of the Statute together with rule 63(1) and (2) of the Rules, is also misguided.

16. Even assuming *arguendo* that the Chamber was supposed to follow the “Chambers Practice Manual”, it is clear from the reasoning of the Decision that the factual findings section does not comply with said manual. In this context, the “Chambers Practice Manual” states that the “Pre-Trial Chamber, for the decision on the confirmation of charges, will consider all the evidence that is included in the parties’ lists of evidence, and [...] any other evidence disclosed *inter partes* provided that the parties are given an opportunity to be heard on any such other item of evidence”.<sup>25</sup> The “Chambers Practice Manual” also states that “[r]eference to evidence (including to subsidiary facts) [should be] made to the extent necessary and sufficient to support the factual findings on the material facts”.<sup>26</sup> Yet, this is not the case and as mentioned above, the Decision lacks concrete references to the evidence in support of the Prosecutor’s factual allegations. By so doing, the Majority not only opted for a selective approach but also an apparently inconsistent one in trying to

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<sup>23</sup> Appeals Chamber, “[Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled ‘Decision giving notice pursuant to Regulation 55\(2\) of the Regulations of the Court’](#)”, 18 December 2015, ICC-02/11-01/15-369, para. 54.

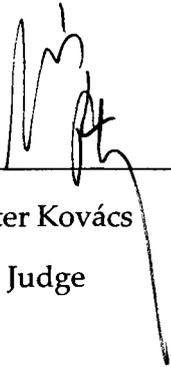
<sup>24</sup> Appeals Chamber, “[Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled ‘Decision giving notice pursuant to Regulation 55\(2\) of the Regulations of the Court’](#)”, 18 December 2015, ICC-02/11-01/15-369, para. 54.

<sup>25</sup> Chambers Practice Manual, February 2016, p. 15.

<sup>26</sup> Chambers Practice Manual, February 2016, p. 18.

apply the “Chambers Practice Manual”. This – in my view – could have a negative impact *pro futuro*. The danger of such potential harm was the driving force behind this separate opinion.

Done in both English and French, the English version being authoritative.



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Péter Kovács  
Judge

Dated this Monday, 9 May 2016

At The Hague, The Netherlands