

**Public Redacted Version
of Confidential Annex I**



12 September 2019

Decision of the Plenary of Judges on the Defence Application for the Disqualification of judges of Pre-Trial Chamber I from the case *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*

I. Relevant Procedural History

1. On 8 July 2019, the confirmation of charges hearing in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, opened.¹
2. On the same date, the Defence for Mr Al Hassan ('Defence') made oral submissions before the Pre-Trial Chamber requesting the disqualification of Judge Alapini-Gansou specifically and Pre-Trial Chamber I, composed of Judges Perrin de Brichambaut, Kovács and Alapini-Gansou, as a whole. The Defence also requested the suspension of the confirmation of charges proceedings pending adjudication of its request.² On the same date, Pre-Trial Chamber I dismissed the request for suspension and invited the Defence to file an application for disqualification before the competent organ.³

¹ ICC-01/12-01/18-T-003-ENG.

² ICC-01/12-01/18-T-003-ENG, pp. 15-26.

³ ICC-01/12-01/18-T-003-ENG, p. 34.

3. On 11 July 2019, the Defence filed its Urgent Request for Disqualification of Pre-Trial Chamber I before the Presidency ('Disqualification Request').⁴
4. On the same date, Judge Perrin de Brichambaut requested to be excused from exercising any functions of the Presidency in respect of the Disqualification Request,⁵ with such request being granted by the *ad hoc* Presidency, composed of Judges Eboe-Osuji, Fremr and Morrison, on 17 July 2019.⁶
5. On 19 July 2019, the *ad hoc* Presidency filed an Order setting deadlines for responses to the Disqualification Request by any party or participant, as well as for the filing of the observations of judges of Pre-Trial Chamber I, pursuant to article 41(2)(c) of the Rome Statute ('Statute') and rule 34(2) of the Rules of Procedure and Evidence ('Rules').⁷
6. On 26 July 2019, the *Fédération internationale des ligues des droits de l'Homme* ('FIDH') and the *Association malienne des droits de l'Homme* ('AMDH'), jointly filed observations to the Disqualification Request ('NGOs Joint Observations').⁸
7. On 29 July 2019, the Office of the Prosecutor filed its response to the Disqualification Request ('OTP Response').⁹

⁴ ICC-01/12-01/18-406-Conf, with annexes A and B. The Defence also filed a public redacted version of the Disqualification Request, ICC-01/12-01/18-406-Red.

⁵ Annex 1 to Order concerning the 'Urgent Request for the Disqualification of Pre-Trial Chamber I' dated 11 July 2019, 19 July 2019, ICC-01/12-01/18-414.

⁶ Annex 2 to Order concerning the 'Urgent Request for the Disqualification of Pre-Trial Chamber I' dated 11 July 2019, 19 July 2019, ICC-01/12-01/18-414.

⁷ Order concerning the 'Urgent Request for the Disqualification of Pre-Trial Chamber I' dated 11 July 2019, 19 July 2019, ICC-01/12-01/18-414.

⁸ Joint Observations of the *Fédération internationale des ligues des droits de l'Homme* (FIDH) and the *Association malienne des droits de l'Homme* (AMDH), 26 July 2019, ICC-01/12-01/18-434.

⁹ 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; The Prosecution also filed a public redacted version of its response, ICC-01/12-01/18-436-Red.

8. On 6 August 2019, Judges Perrin de Brichambaut, Kovács and Alapini-Gansou each filed their respective written observations in respect of the Disqualification Request.¹⁰
9. On 7 August 2019, the Defence filed a request for leave to reply to the written observations of Judges Perrin de Brichambaut and Alapini-Gansou.¹¹
10. On 15 August 2019, the Presidency, in consultation with the plenary of judges, rejected the request for leave to reply.¹²
11. On 19 August 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 Disqualification Request. The session was attended in person by Judges Eboe-Osuji, Robert Fremr, Howard Morrison, Olga Herrera Carbuccion, Geoffrey Henderson, Piotr Hofmański, Antoine Kesia-Mbe Mindua, Bertram Schmitt, Chang-ho Chung, Raul Pangalangan, Solomy Bossa, Tomoko Akane, Kimberly Prost and Rosario Aitala. Judge Luz Ibañez was not present for the plenary session.

II. The Arguments

A. Disqualification Request

12. The Disqualification Request has two inter-related limbs. First, it argues that Judge Alapini-Gansou's impartiality is undermined as a result of two

¹⁰ Observations de Mme la juge Reine Adélaïde Sophie Alapini-Gansou sur la Requête urgente de la défense en récusation de la Chambre préliminaire I, 6 August 2019, ICC-01/12-01/18-446-Conf, with public redacted version: ICC-01/12-01/18-446 ('Judge Alapini-Gansou Observations'); Observations by Judge Péter Kovács on the 'Urgent Request for the Disqualification of Pre-Trial Chamber I, 6 August 2019, ICC-01/12-01/18-447 ('Judge Kovács Observations'); Observations by Judge Perrin de Brichambaut on the 'Urgent Request for the Disqualification of Pre-Trial Chamber I', 6 August 2019, ICC-01/12-01/18-448 ('Judge Perrin de Brichambaut Observations').

¹¹ ICC-01/12-01/18-451-Conf with annex A.

¹² ICC-01/12-01/18-452-Conf-Corr.

of her previous functions, namely as head of the African Commission on Human and Peoples' Right ('ACHPR') mandated to conduct a fact-finding mission in Mali in mid-2013;¹³ and as head of the Human Rights Component of the *Mission de l'Union Africaine pour le Mali et le Sahel* ('MISAHÉL') between November 2013 and April 2014.¹⁴ It is submitted that, in the course of such roles, Judge Alapini-Gansou has previously been involved in the *Al Hassan* case in an investigative and advisory capacity,¹⁵ and has made statements concerning live issues in the case.¹⁶

13. The second limb of the Disqualification Request submits that the impartiality of Pre-Trial Chamber I as a whole has been undermined as a result of the Chamber's failure to take steps to protect the integrity of the proceedings after having been alerted to the issues concerning Judge Alapini-Gansou's impartiality, making reference to a decision of the ICTR Appeals Chamber in the *Karemera* case.¹⁷ The Disqualification Request also suggests that Judges Kovács and Alapini-Gansou's participation in the plenary deliberations concerning Judge Perrin de Brichambaut,¹⁸ creates an appearance that the majority of Pre-Trial Chamber I has predetermined a key issue of the applicability of findings from the *Al Mahdi* case to the *Al Hassan* case.¹⁹ It is further submitted that the replacement of the Pre-Trial Chamber I bench would not cause delays as confirmation of charges

¹³ Disqualification Request, paras. 8-19.

¹⁴ Disqualification Request, paras. 8-44.

¹⁵ Disqualification Request, paras. 27-29.

¹⁶ Disqualification Request, paras. 33-43.

¹⁷ Disqualification Request, paras. 45, referring to ICTR, *Prosecutor v. Karemera et al.*, 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, Appeals Chamber, 22 October 2004, ICTR-98-44-AR15bis.2, para. 69 ('*Karemera* Decision').

¹⁸ 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*, 8 July 2019, ICC-01/12-01/18-398-AnxI ('*Al Hassan* Disqualification Decision 8 July 2019').

¹⁹ Disqualification Request, para. 46.

proceedings may be conducted in writing, extensive written submissions have been filed and a decision has yet to be issued.²⁰

B. OTP Response

14. The Prosecution responds that Judge Alapini-Gansou's prior experience in the ACHPR or MISAHEL would not lead a reasonable observer to apprehend bias. Concerning the ACHPR, the Prosecution argues that the information available only demonstrates the Judge's previous participation in a fact-finding mission in Mali as a human right observer,²¹ which report is not concerned with Mr. Al Hassan's individual criminal responsibility.²² Concerning the MISAHEL, the Prosecution submits that the allegations that Judge Alapini-Gansou met with detainees, including [REDACTED],²³ made findings in a report on crimes committed by *Ansar Dine*,²⁴ and influenced questions formulated by Pre-Trial Chamber I for confirmation proceedings,²⁵ are baseless.
15. Further, the Prosecution submits that the Defence's request to disqualify Pre-Trial Chamber I arises only as a result of the Defence's incorrect choice of forum for raising concerns regarding Judge Alapini-Gansou,²⁶ that the *Karemera* Decision is not pertinent to the case at hand,²⁷ and that, in participating in the plenary deliberations concerning Judge Perrin de

²⁰ Disqualification Request, paras. 47-48.

²¹ OTP Response, paras. 13, 15.

²² OTP Response, para. 18.

²³ [REDACTED]

²⁴ OTP Response, para. 22.

²⁵ OTP Response, paras. 3, 23.

²⁶ OTP Response, para. 25.

²⁷ OTP Response, paras. 27-28.

Brichambaut, Judges Kovács and Alapini-Gansou have not pre-determined any issue.²⁸

C. NGOs Joint Observations

16. The NGOs Joint Observations purport to clarify the nature of the interactions between the FIDH and AMDH, and Judge Alapini-Gansou,²⁹ as well as the lack of her involvement in the filing of the complaint against Mr Al Hassan by both NGOs.³⁰

D. Observations of Pre-Trial Chamber I Judges

17. Judge Alapini-Gansou expresses her agreement with the OTP Response³¹, and provides clarifying information regarding the nature of her previous roles and activities within the ACHPR and MISAHEL.³² She observes that, viewed in their proper context, the facts forming the basis of the Disqualification Request would not lead a reasonable observer to question her impartiality.³³ She specifies that her role within the ACHPR did not involve proving the criminal responsibility of any alleged perpetrators but rather concerned the monitoring of the human rights situation in Mali.³⁴

18. Judge Alapini-Gansou's Observations also question the accuracy, relevance and authenticity of documents annexed to the Disqualification Request,³⁵ as

²⁸ OTP Response, paras. 29-30.

²⁹ NGOs Joint Observations, paras. 4, 8-11.

³⁰ NGOs Joint Observations, paras. 12-13.

³¹ Judge Alapini-Gansou Observations, para. 3.

³² Judge Alapini-Gansou Observations, paras. 16-20, 42, 44.

³³ Judge Alapini-Gansou Observations, paras. 32-44.

³⁴ Judge Alapini-Gansou Observations, paras. 34-36, 39.

³⁵ Judge Alapini-Gansou Observations, paras. 36, 37, 40, 41.

well as its timeliness³⁶ and the diligence and professional conduct of Counsel for Mr Al Hassan in this regard.³⁷ Judge Perrin de Brichambaut further states that disqualification requests which are made shortly before the opening of proceedings or at the proceedings, as in the present case, must be approached with caution, especially where they concern information which has been part of the public domain for some time.³⁸

19. In response to the Defence's claim against Pre-Trial Chamber I, Judges Perrin de Brichambaut and Kovács observe that the Chamber acted properly under rule 122 of the Rules.³⁹ In addition, Judge Perrin de Brichambaut observes that the ICTR *Karemera* decision, which is based on different facts, is not pertinent to the present case.⁴⁰ Further, Judge Kovács observes that, in considering the potential relevance of the *Al Mahdi* case findings on *Ansar Dine*, the plenary of judges has not pre-determined a key issue in the case.⁴¹

III. Relevant law and applicable legal standard

20. 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 criminal case at the national level involving the person being investigated or

³⁶ Judge Alapini-Gansou Observations, paras. 47-52, *referring* to relevant provisions of the European Convention on Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human Rights. Reference is also made to the jurisprudence of the Inter-American Court of Human Rights.

³⁷ Judge Alapini-Gansou Observations, paras. 62-65.

³⁸ Judge Perrin de Brichambaut Observations, paras. 24, 25, 27.

³⁹ Judge Kovács Observations, para. 19, Judge Perrin de Brichambaut Observations, para. 20.

⁴⁰ Judge Perrin de Brichambaut Observations, paras. 14-17.

⁴¹ Judge Kovács Observations, paras. 22-26.

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.

21. Rule 34(1) Rules provides in relevant parts:

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* ...

(b) Involvement, in his or her private capacity, in any legal proceedings initiated prior to his or her involvement in the case, or initiated by him or her subsequently, in which the person being investigated or prosecuted was or is an opposing party;

(d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.

22. Rule 34(2) provides :

Subject to the provisions set out in article 41, paragraph 2, and article 42, paragraph 8, a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based. The request shall state the grounds and attach any relevant evidence, and shall be transmitted to the person concerned, who shall be entitled to present written submissions.

23. The plenary of judges notes its 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.⁴² Unless rebutted, it is presumed that the judges of the Court are professional judges capable of deciding on issues before them while relying solely and exclusively on the evidence submitted in a case.⁴³ It is presumed that judges can disabuse themselves of any irrelevant personal beliefs or predispositions.⁴⁴

24. The plenary of judges understands the Disqualification Request to effectively concern the appearance of impartiality.⁴⁵ In this respect, it is recalled 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

⁴² 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 ('*Banda & Jerbo* Disqualification Decision 5 June 2012'); 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 ('*Lubanga* Disqualification Decision 11 June 2013'); 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 ('*Bemba et al* Disqualification Decision 20 June 2014'); Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 29 ('*Lubanga* Disqualification Decision 3 August 2015').

⁴³ *Banda & Jerbo* Disqualification Decision 5 June 2012, 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 ('*Al Bashir* Excusal Decision').

⁴⁴ *Lubanga* Disqualification Decision 11 June 2013, 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; See also *Al Hassan* Disqualification Decision 8 July 2019, paras. 19, 43.

⁴⁵ See Disqualification Request, paras. 33-44.

grounds to doubt his or her impartiality will be sufficient.⁴⁶ Justice must not only be done, but must additionally be seen to be done.⁴⁷

25. The plenary of judges has consistently considered that the question of 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.⁴⁸ Such fair-minded person is an objective observer, not to be confused with the applicant,⁴⁹ whose consideration of facts and circumstances includes an understanding of the nature of a judge's profession.⁵⁰ In forming a view regarding the appearance of bias, the fair-minded observer should take into account the entire context of the case.⁵¹ It is for the party requesting the disqualification to demonstrate the appearance of bias.⁵²

26. Further, the plenary of judges notes prior relevant decisions which provide insight in respect of the issue of a judge's previous involvements. In prior decisions, the Presidency clarified that 'the second sentence of article 41(2) is 'concerned with disqualification where a judge has previously been involved in any capacity which gives rise to a reasonable ground to doubt

⁴⁶ *Banda & Jerbo* Disqualification Decision 5 June 2012, para. 11; *Lubanga* Disqualification Decision 11 June 2013, 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; *Bemba et al* Disqualification Decision 20 June 2014, para. 16.

⁴⁷ 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.

⁴⁸ *Lubanga* Disqualification Decision 11 June 2013, para. 34.

⁴⁹ *Lubanga* Disqualification Decision 11 June 2013, para. 35.

⁵⁰ *Lubanga* Disqualification Decision 11 June 2013, para. 36.

⁵¹ *Lubanga* Disqualification Decision 11 June 2013, para. 38.

⁵² 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.

his or her impartiality’’.⁵³ It further explained that ‘this interpretation is ‘most consistent with the objective of ensuring that the impartiality of judges cannot reasonably be reproached’ while ‘at the same time ... ensuring the efficient conduct of proceedings’’.⁵⁴ In particular, the Presidency has ‘emphasized the need to note the ‘degree of congruence between the legal issues’ and whether ‘the factual determinations’ would be ‘based on the same evidence’ in considering requests for excusal on grounds of an applicant’s previous involvement in the case.⁵⁵ It has also been noted that ‘it may reasonably appear to an objective observer that’ a judge lacks impartiality where he or she is ‘not free to depart from previous factual findings which [he or she has] made upon consideration of the same issues and evidence’.⁵⁶

IV. Determination of the Plenary

A. Preliminary Issues

27. Before assessing the merits of the Disqualification request, the plenary of judges addresses two preliminary issues.

⁵³ Decision on the requests for excusal from the Appeals Chamber in the pending appeal in the case of *The Prosecutor v. Saif Al-Islam Gaddafi*, 13 May 2015, ICC-01/11-01/11-591-Conf-Exp-AnxI, p.3 (*‘Gaddafi Excusal Decision’*); *Lubanga Disqualification Decision* 3 August 2015, para. 30.

⁵⁴ *Gaddafi Excusal Decision*, p.3; *Lubanga Disqualification Decision* 3 August 2015, para. 30.

⁵⁵ Decision on the Request of First Vice President Diarra and Second Vice President Kaul to be excused from the Presidency in relation to the “Defence Application for Review of the Registrar’s Decision of 10 June 2009 entitled *Third Decision of the Registrar on the Monitoring of Non-privileged Telephone Communications and Visits of Mr Mathieu Ngudjolo Chui*”, 17 December 2009, ICC-RoR221-04/09-2-Conf-Exp-Anx2, p. 4 (*‘Ngudjolo Excusal Decision’*); *Gaddafi Excusal Decision*, p. 3. *Lubanga Disqualification Decision* 3 August 2015, para. 31.

⁵⁶ *Ngudjolo Excusal Decision*, p. 4; *Gaddafi Excusal Decision*, pp. 3-54; *Lubanga Disqualification Decision* 3 August 2015, para. 31.

1. Timeliness of the Disqualification Request

28. The plenary of judges notes that the issues concerning Judge Alapini-Gansou and Pre-Trial Chamber I's impartiality were firstly raised on 8 July 2019, the first day of the confirmation hearing. The Disqualification Request was then filed on 11 July 2019 while the confirmation hearing was ongoing. It recalls the requirement provided in rule 34(2) of the Rules that 'a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based'. Whilst, this provision does not set a strict time limit for filing disqualification requests, it clearly requires that they be filed in a timely manner and it must be understood as requiring that such requests are filed so as not to disrupt the proper conduct of the proceedings. The plenary of judges emphasises that any assessment as to the timeliness of disqualification requests has to be made on a case-by-case basis, taking into consideration all relevant facts and circumstances.
29. Having assessed the circumstances of the case at hand, a Majority considers that the Disqualification Request was not filed in a timely manner.⁵⁷ In doing so, the Majority has taken into consideration that the fact that Judge Alapini-Gansou held previous roles pertinent to Mali was readily accessible and publicly known for some time, thus putting the defence on notice to consider the issue further if it considered relevant; that Judge Alapini-Gansou has been assigned to Pre-Trial Chamber I since 16 March 2018;⁵⁸ that pre-trial proceedings in the case have been ongoing for 15 months and that the issues contained in the Disqualification Request were first raised at

⁵⁷ Such majority consisted of Judges Eboe-Osuji, Hofmański, Schmitt, Chung, Bossa, Akane, and Aitala. A minority of judges, consisting of Judges Fremr, Morrison, Herrera Carbuccion, Henderson, Mindua, Pangalangan and Prost, was however unable to concur with this finding. In view of the equality of judges, the President's vote was casting, in accordance with rule 4(4) of the Rules.

⁵⁸ Presidency, 'Decision assigning judges to divisions and recomposing Chambers', 16 March 2018, ICC-01/12-53.

a time when it would be foreseeably likely to cause disruption to the confirmation proceedings (with the suspension thereof being sought). A majority of judges considers that the further detail about the prior functions of Judge Alapini-Gansou lying at the heart of the Disqualification Request evidently should have been researched at an earlier junction in view of the publicly available information, and that Counsel's explanations in this respect are unconvincing.

30. Whilst, in view of the above, three judges would have dismissed the request *in limine* due to its lack of timeliness,⁵⁹ a Majority considers that, notwithstanding this failure, the particular circumstances of the case at hand warrant an exceptional assessment of the merits of the Disqualification Request.

2. Admissibility of the NGOs Joint Observations

31. The plenary of judges notes that the Presidency's procedural order setting deadlines for responses to the Disqualification Request issued on 19 July 2019, referred only to parties and participants in the *Al Hassan* case.⁶⁰ Since the FIDH and AMDH are neither, leave to make such observations should have been sought. That being said, a majority of 10 judges decides to admit the NGOs Joint Observation given that the Disqualification Request directly implicates the two NGOs and their factual observations are relevant to the issue at hand.⁶¹ A majority of judges considers it to be in the interests of justice to have such pertinent factual information before the plenary.

⁵⁹ Judges Eboe-Osuji, Hofmański and Chung.

⁶⁰ Order concerning the 'Urgent Request for the Disqualification of Pre-Trial Chamber I' dated 11 July 2019, 19 July 2019, ICC-01/12-01/18-414.

⁶¹ A minority of 2 judges is unable to concur with this, with 2 Judges abstaining.

B. Merits

32. In considering the merits of the Disqualification Request, the plenary of judges separately discussed the limb which pertained specifically to Judge Alapini-Gansou and the limb related to Pre-Trial Chamber I as a whole.
33. Having considered all relevant information before it, an absolute majority of judges, consisting of Judges Chile Eboe-Osuji, Olga Herrera Carbuccion, Piotr Hofmański, Antoine Kesia-Mbe Mindua, Bertram Schmitt, Chang-ho Chung, Raul Pangalangan, Solomy Bossa, Tomoko Akane, Kimberly Prost and Rosario Aitala, rejects the Disqualification Request in its entirety. A minority of judges, consisting of Judges Robert Fremr, Howard Morrison and Geoffrey Henderson, is unable to reach the same conclusion with respect to the first limb of the Disqualification Request (i.e. concerning Judge Alapini-Gansou specifically).

1. Merits of the Disqualification Request in respect of Judge Alapini-Gansou

i. Opinion of the Majority

34. The Majority considers that the issue at hand is whether Judge Alapini-Gansou's roles and activities in the context of her prior experiences as head of ACHPR and the Human Right Component of the MISAHEL, are such that a well-informed reasonable observer would apprehend bias. It considers that such observer would have taken into consideration relevant factors such as: the nature of the activities of the relevant bodies, the nature of the functions held and the type of activities undertaken by Judge Alapini-Gansou, as well as the nature and context of statements made by her in carrying out such functions.

35. Concerning the nature of the activities of ACHPR and the Human Rights Component of the MISAHEL, the Majority notes that the mandate of both bodies are concerned with monitoring and assessing the human right situation in Mali,⁶² and not with establishing individual criminal responsibility.⁶³ Investigations aimed at establishing human rights violations apply standards which are significantly different from those applied for establishing individual criminal responsibility in the context of criminal cases. The Majority expresses its agreement with the prior finding of the Presidency that a Judge's previous work as a Commissioner to the ACHPR did not undermine her appearance of impartiality, given that such body was not aimed at establishing or assessing individual criminal responsibility but rather at gathering information about the situation in Darfur in order to address the humanitarian crisis.⁶⁴
36. Further, the Majority notes that, as head of the ACHPR and head of the Human Rights Component of the MISAHEL, Judge Alapini-Gansou participated in fact-finding and observation missions, drafted reports and attended seminars organised by the FIDH and AMDH. The Defence suggests that in performing such functions, Judge Alapini-Gansou met with [REDACTED] or alleged co-perpetrators of Mr Al Hassan.⁶⁵ Having taken into consideration the totality of the information presented before it, in

⁶² African Charter on Human and Peoples' Right, article 45; Rules of Procedure of the ACHPR, rule 72; See also ICC-01/12-01/18-401-Anx2, pp. 57-76, Report of the Fact-Finding Mission to the Republic of Mali (3-7 June 2013), para. 6 ('ACHPR Fact-Finding Mission Report'); ICC-01/12-01/18-401-Anx2, pp. 102-114, Rapport, 54th Ordinary Session, Banjul, 22 October to 5 November 2013, para. 7 ('MISAHEL 2013 Report').

⁶³ See African Union, Communiqué, Peace and Security Council, 332th Meeting, PSC/PR/COMM(CCCXXXII), 4 September 2012; ACHPR, Report, Commissioner Alapini-Gansou Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa, 54th Ordinary Session, 22 October to 5 November 2013.

⁶⁴ *Al Bashir* Excusal Decision, p. 7.

⁶⁵ Disqualification Request, para. 21.

particular Judge Alapini-Gansou Observations on the issue,⁶⁶ the Majority finds that it has not been demonstrated that Judge Alapini-Gansou met with such persons and discussed Mr Al Hassan with them.⁶⁷ Similarly, in light of the information provided in the NGO Observations and in Judge Alapini-Gansou Observations, the Majority is not convinced that, in the course of her previous functions, Judge Alapini-Gansou advised and assisted the FIDH and AMDH in filing a criminal complaint against Mr Al Hassan,⁶⁸ or that she provided advice to national judicial authorities responsible for conducting domestic proceedings against Mr Al Hassan and alleged co-perpetrators.⁶⁹

37. Turning to statements made in the course of Judge Alapini-Gansou's functions, the Majority notes that Judge Alapini-Gansou prepared a report compiling the findings of ACHPR fact-finding missions in northern Mali.⁷⁰ In line with the mandate of the ACHPR, such report aimed at presenting the findings of the fact-finding missions in relation to human rights violations in northern Mali and making recommendations to the Malian Government as to how to address these issues.⁷¹ The Disqualification Request argues that such report contains statements and findings concerning live issues of the case, making reference to specific paragraphs of the report.⁷² Having assessed all relevant information, in particular the information contained in Judge Alapini-Gansou Observations concerning

⁶⁶ Judge Alapini-Gansou Observations, paras. 18-19, 42.

⁶⁷ The press article referred to in footnote 26 of the Disqualification Request is general and does not directly support the allegation; See also MISAHEL 2013 Report, para. 8.

⁶⁸ NGOs Observations, paras. 8-9, 12-13.

⁶⁹ MISAHEL 2013 Report, paras. 7: the report only refers to the mission's role in assisting Mali in implementing transitional justice in general, not with specific criminal cases; ACHPR Fact-Finding Mission Report, pp. 19-20.

⁷⁰ African Charter on Human and Peoples' Rights, article 54; Rules of Procedure of the ACHPR, rule 72; See also ACHPR Fact-Finding Mission Report.

⁷¹ ACHPR Fact-Finding Mission Report, para. 1.

⁷² Disqualification Request, paras. 13-17.

the overall purpose of the report, the content of the statements made therein as well as their context,⁷³ the Majority considers that a reasonable observer would not understand such statements as creating an appearance that Judge Alapini-Gansou has predetermined issues concerning the individual criminal responsibility of Mr Al Hassan. The Majority considers that the relevant statements, which were made in the specific context of human rights investigations, are general and generic in nature and, as such, do not give rise to an apprehension of bias.

38. The Majority also considers that the statements made at press conferences, which the Disqualification Request argues demonstrate an appearance of a lack of impartiality on the part of Judge Alapini-Gansou,⁷⁴ are not directly attributable to Judge Alapini-Gansou⁷⁵ or do not concern Mr Al Hassan's individual criminal responsibility.
39. Overall, the Majority finds that the statements at issue are tangentially connected to the *Al Hassan* case and do not give rise to disqualification.⁷⁶
40. Furthermore, the Majority also finds the Defence's allegation that there is an appearance that Judge Alapini-Gansou 'is likely to base her decision on the impressions formulated during her interactions with unidentified victims and witnesses'⁷⁷ to be merely speculative. In this respect, the Majority recalls that judges of the Court are professional judges capable of deciding on issues before them while relying solely and exclusively on the

⁷³ Judge Alapini-Gansou Observations, paras. 20, 23, 34-41.

⁷⁴ Disqualification Request, paras. 12, 19, 25, 34.

⁷⁵ The statements referred to at paragraphs 12 and 25 of the Disqualification Request are generally attributed to 'the delegation' or the 'MISAHEL human rights section'. The statements referred to at paragraph 19 of the Disqualification Request are hearsay.

⁷⁶ *Banda & Jerbo* Disqualification Decision 5 June 2012, para. 19, citing *Al Bashir* Excusal Decision and *Prosecutor v. Vojislav Seselj*, IT-03-67-T, Order on the Prosecution Motion for the Disqualification of Judge Frederik Harhoff, Order of the President of 14 January 2008.

⁷⁷ Disqualification Request, para. 36.

evidence submitted in a case.⁷⁸ The Disqualification Request fails to rebut the presumption that Judge Alapini-Gansou would be able to disabuse herself of any irrelevant personal beliefs or predispositions.⁷⁹

41. In light of the above, the Majority considers that a reasonable well-informed and fair-minded observer, taking into consideration all relevant information, would not conclude that Judge Alapini-Gansou has previously been involved in an investigative or advisory capacity in the *Al Hassan* case, nor would such observer conclude that her appearance of impartiality is undermined. The Majority does not consider that any information has been presented which would rebut the ordinary presumptions of judicial impartiality.

ii. Opinion of the Minority

42. The Minority is of the view that certain statements in the reports prepared by Judge Alapini-Gansou, appear to make conclusions on alleged crimes committed by *Ansar Dine* in Timbuktu,⁸⁰ which Mr Al Hassan, as an alleged member of *Ansar Dine*,⁸¹ is charged with in the context of the proceedings.⁸² As a result, the Minority considers that, a fair-minded reasonable observer, having assessed the content of the relevant statements

⁷⁸ *Banda & Jerbo* Disqualification Decision 5 June 2012, para. 14, referring to, *Al Bashir* Excusal Decision, page 7; *Al Hassan* Disqualification Decision 8 July 2019, paras. 19, 43.

⁷⁹ *Lubanga* Disqualification Decision 11 June 2013, 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.

⁸⁰ See for alleged crimes of rape: ACHPR Fact-Finding Mission Report, paras. 44-50, 71-73; See for alleged crimes of torture, cruel, inhuman and degrading treatment: ACHPR Fact-Finding Mission Report, paras. 53-54. See also ACHPR Fact-Finding Mission Report, paras. 35, 51, 53, 64, 71.

⁸¹ Version publique expurgée de la « Version amendée et corrigée du Document contenant les charges contre M. Al HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud » ICC-01/12-01/18-335-Conf-Corr, 11 mai 2019, 2 July 2019, ICC-01/12-01/18-335-Corr-Red, para. 2.

⁸² Version publique expurgée de la « Version amendée et corrigée du Document contenant les charges contre M. Al HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud » ICC-01/12-01/18-335-Conf-Corr, 11 mai 2019, 2 July 2019, ICC-01/12-01/18-335-Corr-Red, pp. 217-252 (torture and cruel, inhuman and degrading treatment), and pp. 342-346 (rape).

and their linkage to the charges in the *Al Hassan* case, could reasonably conclude that Judge Alapini-Gansou's appearance of impartiality is undermined.

2. *Merits of the Disqualification Request in respect of Pre-trial Chamber I*

43. In light of the above finding of the Majority, an unanimity of judges considers that the Disqualification Request is practically moot in so far as it concerns the claim that there is an appearance of a lack of impartiality on the part of Pre-Trial Chamber I as a whole, because it failed to protect the integrity of the confirmation proceedings in light of the information raised concerning Judge Alapini-Gansou.⁸³
44. In any event, the plenary of judges does not consider the circumstances of the present case comparable to those which lead to the ICTR Appeal Chamber decision in the *Karemera* case. It also considered baseless the suggestion that a reasonable well informed observer would conclude that there is an appearance that, by participating in the plenary deliberation concerning Judge Perrin de Brichambaut, Judges Kovács and Alapini-Gansou have predetermined the issue of the applicability of findings regarding *Ansar Dine* in the *Al Mahdi* Judgement to the *Al Hassan* case. As the Disqualification Request itself recognizes, the plenary of judges clearly stated that its reliance on such findings was 'without prejudice to whether this may have any relevance to the *Al Hassan* case itself'.⁸⁴
45. The plenary of judges, by unanimity dismisses this Disqualification Request in this respect.

⁸³ Disqualification Request, para. 45

⁸⁴ *Al Hassan* Disqualification Decision 8 July 2019, para. 46.

V. Disposition

46. The plenary, by absolute majority, decides to dismiss the Disqualification Request in so far as it concerns Judge Alapini-Gansou. The plenary of judges, by unanimity, decides to dismiss the Disqualification Request in so far as it concerns Pre-Trial Chamber I.

A handwritten signature in black ink, appearing to be 'Chile Eboe-Osuji', is written over a light gray rectangular background.

Judge Chile Eboe-Osuji

President