



Original: English

No.: ICC-01/12-01/18

Date: 11 July 2019

PRESIDENCY

Before: Judge Chile Eboe Osuji, President
Judge Robert Fremr, First Vice-President
Judge Marc Perrin de Brichambaut, Second Vice-President

SITUATION IN THE REPUBLIC OF MALI

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

Public

With Confidential Annex A, and Public Annex B

**Public redacted version of Urgent Request for the Disqualification of Pre-Trial
Chamber I**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
Mahmoud

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart

Counsel for the Defence

Melinda Taylor
Marie-Hélène Proulx

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. The Defence for Mr. Al Hassan respectfully submits a request, pursuant to Article 41(2)(b), to disqualify the current composition of Pre-Trial Chamber I from sitting on the case of Mr. Al Hassan.
2. The basis for this request arises from:
 - a. Judge Alapini-Gansou's prior involvement in advising, and investigating facts related to domestic proceedings against Mr. Al Hassan and other members of the alleged 'common plan';
 - b. Judge Alapini-Gansou's involvement in formulating questions for the confirmation proceedings, which appear to be influenced by her prior involvement in related proceedings concerning Mr. Al Hassan;
 - c. The Pre-Trial Chamber's failure to take any steps to protect the impartiality of the proceedings, when apprised of these issues; and
 - d. Judge Kovács and Judge Alapini-Gansou's participation in a Plenary decision which made a determination in relation to the relevance of the *Al Mahdi* judgment to factual issues in this case.
3. The Defence firstly wishes to underscore its respect and admiration for Judge Alapini-Gansou's extremely important and pioneering work as a Commissioner for the African Commission on Human and Peoples' Rights, and as Head of the Human Rights Component of the *Mission de l'Union africaine pour le Mali et le Sahel* (MISAHEL). This request arises from indicia concerning the incompatibility of these functions with the role of sitting as a judge in this particular case – no more, no less.
4. In placing these matters before the Plenary, the Defence further notes that the Statute affords the Defence with the right to raise these issues, and no adverse inferences or consequences can arise from the fact that it has done so.¹ This request is directed solely to the objective of the Defence to preserve and protect Mr. Al Hassan's right

¹ [ICC-01/04-02/06-2355-AnxI-Red](#), paras. 48-49.

to be judged – at all phases of the proceedings – by a Tribunal which possesses the necessary guarantees of fairness and impartiality, including the appearance of fairness and impartiality.

5. The fact that this issue has arisen at the pre-confirmation proceedings also does not lessen the importance of these issues: the Appeals Chamber has affirmed that the right to fair proceedings applies to all stages of the case before the ICC.² This is reflected by Article 84(1)(c) of the Statute, which provides that the misconduct of a judge involved in the confirmation of charges, could be a ground for the revision of a judgment.
6. The Defence also raised these issues at the earlier point at which it became aware of them. As explained to the Pre-Trial Chamber, for almost the entire duration of this case, the Defence was diverted by litigation concerning issues of representation.³ In the last two months, the Defence has also been occupied with essential preparation for the confirmation hearing. The Prosecution also disclosed no information on this point, and indicated that it was unaware of such issues,⁴ even though it has been investigating these proceedings since 2013.
7. The Defence only started to research this issue after it received the written submissions of the Legal Representatives for Victims, on 4 July 2019,⁵ and continued to do so, after it received the Pre-Trial Chamber's questions, on the evening of 5 July 2019.⁶ The Defence raised these matters at the earliest juncture possible, on 8 July 2019.⁷ The Pre-Trial Chamber declined to adjourn the proceedings or to take any other steps in light of the information raised by the Defence.⁸ Given that it is simultaneously participating in the confirmation proceedings, the Defence has filed this request at the earliest point possible.

² [ICC-01/04-01/06-772](#), para. 37: "First and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety" (footnote omitted).

³ ICC-01/12-01/18-T-003-ENG ET WT 08-07-2019, p. 26, lns. 23 to p. 28, ln. 17.

⁴ Annex A.

⁵ [ICC-01/12-01/18-395](#)

⁶ The questions were sent at 7.20pm, and then filed in the record on 8 July 2019: ICC-01/12-01/18-399, and ICC-01/12-01/18-399-Anx-Conf (setting out the questions).

⁷ ICC-01/12-01/18-T-003-ENG ET WT 08-07-2019, p. 15, ln. 5 to p. 26, ln. 19.

⁸ ICC-01/12-01/18-T-003-FRA ET WT 08-07-2019, p. 33, lns. 12-26.

I. Submissions

A. Factual submissions

8. In 2013, Judge Alapini-Gansou was appointed in accordance with a decision by the Peace and Security Council of the African Union to conduct a fact-finding mission in Mali in relation to the events in 2012, including alleged crimes committed in the North of Mali (including Timbuktu).⁹
9. The genesis of the establishment of the mission was not neutral. On 14 July 2012, the Council issued a resolution, in which it:¹⁰
 4. Expresses its deep concern at the seriousness of the situation in northern Mali, marked by the increasing consolidation of control of the region by the armed, terrorist and criminal groups. Council notes with concern the presence in northern Mali of different armed and terrorist groups, such as Al Qaeda in the Islamic Maghreb (AQIM), Ansar Dine, the Movement for Unity and Jihad in West Africa (MUJWA) and Boko Haram. Council further notes that this situation poses a serious threat to regional and international peace and security and, as such, calls for urgent and effective action by the entire international community;
 5. Strongly condemns the violations of human rights perpetrated by the various armed, terrorist and criminal groups which occupy the northern part of Mali, and the senseless and unacceptable destruction of the cultural, spiritual and historical heritage of this region, notably in Timbuktu, which is a serious violation of international law, and urges that the perpetrators be brought to justice before the relevant international jurisdictions.

...

 15. Calls upon the African Commission on Human and People's Rights to investigate the human rights situation in northern Mali, including the atrocities committed against the Malian military and their families in Aguel'hoc, in January 2012, and to submit a comprehensive report with concrete recommendations on the way forward;
10. Following this Resolution, on 4 September 2012, the Peace and Security Council of the African Union issued a Resolution where it:¹¹

⁹ [ICC-01/12-01/18-401-Anx2](#), p. 57 : Report of the Fact-Finding Mission to the Republic of Mali (3-7 June 2013), paras 1-2; African Union, « [Communiqué](#) », Peace and security Council, 353th Meeting, PSC/AHG/COMM/2.(CCCLIII), 25 January 2013).

¹⁰ Annex B, The Peace and Security Council of the African Union (AU), at its [327th meeting](#) held on 14 July 2012, adopted the following decision on the situation in the Republic of Mali.

¹¹ African Union, « [Communiqué](#) », Peace and security Council, 353th Meeting, PSC/AHG/COMM/2.(CCCLIII), 25 January 2013), para. 7(d).

8. Condemns the abuses and violations of human rights committed in Mali and warns the perpetrators that they will be held accountable for their actions. In this regard, Council welcomes the initiatives taken by the African Commission on Human and People's Rights in the context of the implementation of the relevant provisions of paragraph 15 of its communiqué of 14 July 2012 referred to above and on the opening of an investigation into the human rights situation in northern Mali;
 9. Expresses its deep concern at the holding of northern part of Mali by terrorist and armed groups, and condemns the reported presence of elements of the Movement for the Uniqueness and Jihad in West Africa (MUJAO) around Douentza near the city of Mopti;
 10. Strongly condemns the announcement by the terrorist group MUJAO of the murder of an Algerian diplomat who had been held hostage, demands the immediate and unconditional release of the Consul of Algeria to Gao and his colleagues still being held hostage, and expresses its solidarity and condolences to the Algerian Government and the affected families;
11. Judge Alapini-Gansou was appointed by the African Commission on Human and Peoples Rights to head this mission,¹² and participated in missions, which took place from April-June 2013.¹³
 12. At a press-conference on 7 June 2013 - which took place at the same time as this mission, 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”.¹⁴ The mission also affirmed that the mandate was not confined to human rights violations, but also extended to violations of humanitarian law. Before embarking on the mission to the North of Mali, the delegation spent the preceding weeks “in Bamako, meeting with Malian Government and technical officials, non-state and international human rights players, detainees and members of the

¹² [ICC-01/12-01/18-401-Anx2](#), p. 57: Report of the Fact-Finding Mission to the Republic of Mali (3-7 June 2013), para. 3.

¹³ Annex B, African Union, [AFISMA human rights observers arrive in Mali](#), 4 April 2013.

¹⁴ 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, available at the following address: <http://www.maliweb.net/news/societe/2013/06/10/article.151747.html>, also available at [ICC-01/12-01/18-401-Anx2](#), p.45.

International Community, with a view to creating the proper environment for implementation of their mandate.”¹⁵

13. Judge Alapini-Gansou personally led and participated in the mission that took place in Timbuktu.¹⁶ The mission report, which was issued during the 53rd session of the African Commission on Human and Peoples’ Rights, made specific findings concerning alleged crimes committed by Ansar Dine – pursuant to the implementation of Sharia law in Timbuktu. For example, at paragraph 53, the delegation observed, using language which mirrors the Prosecution’s allegations in this case, that:

*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.¹⁷*

14. At paragraph 90, the report states that:

*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.¹⁸*

15. At paragraph 91, the report further concludes that:

*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.¹⁹*

¹⁵ Annex B, AUC, [AFISMA human rights observers deploy to Northern Mali](#) (African press organization, 10 June 2013).

¹⁶ Annex B, AUC, [AFISMA human rights observers deploy to Timbuktu](#) (African press organisation 17 June 2013) : “The Timbuktu team is accompanied by the Head of the AFISMA Human Rights Component, Ms. Reine Alapini Gansou, a Lawyer and Law Professor from Benin, who is a Member of the African Commission on Human and Peoples’ Rights, the Special Rapporteur on the situation of Human Rights Defenders in Africa and a Member of the UN Permanent Court of Arbitration. She will be in Timbuktu until 18 June 2013, to ascertain the security and logistical work conditions of the Observers”.

¹⁷ [ICC-01/12-01/18-401-Anx2](#), p. 66: Report of the Fact-Finding Mission to the Republic of Mali (3-7 June 2013), para. 53, [Emphasis added].

¹⁸ [ICC-01/12-01/18-401-Anx2](#), p. 72: Report of the Fact-Finding Mission to the Republic of Mali (3-7 June 2013), para. 90. [Emphasis added]

¹⁹ [ICC-01/12-01/18-401-Anx2](#), p. 72: Report of the Fact-Finding Mission to the Republic of Mali (3-7 June 2013), para. 91. [Emphasis added] See also p.65, para. 46:

16. On 1-3 July 2013, Judge Alapini-Gansou was invited by FIDH and other Malian human rights associations to lead a workshop on documenting human rights violations, and to facilitate information sharing between decision makers and human rights activities. In her report to the African Commission during the 54th session Judge Alapini-Gansou stated that “[t]he link between this training component and the ongoing work of documenting human rights in Mali by various actors cannot be overemphasized”.²⁰

17. In the same report, Judge Alapini-Gansou emphasised that:

*The Commission’s experience in the documenting of human rights, through its fact finding missions in particular, must necessarily be shared. Furthermore, as Head of the Human Rights Component of the African Union Mission in Mali and in the Sahel which engages in monitoring and human rights documentation activities in Mali, it was logical for us to share the experience acquired on the ground. I therefore highlighted the importance of documenting violations in the effort to combat impunity. I also indicated that the objective of this documentation should not be limited to the denunciation of acts, but should be extended to planning effective future activities to deal with cases of violations so as to help prevent future violations.*²¹

18. It would be reasonable to infer from this statement that Judge Alapini-Gansou would have communicated her factual findings and experiences to FIDH, with a view to assisting them in their advocacy efforts.

19. At a conference held in October 2013, Judge Alapini-Gansou informed the press that her findings concerning violations of human rights and humanitarian law committed in the North of Mali were “overwhelming”.²² Judge Alapini-Gansou further

“From the information gathered, the delegation notes that rape victims are reported to have been dark skin women. It should also be noted that these women do not know the rapists. They however stated that the majority of the rapists are light skin men most of whom speak Tamasheq, Arabic and Daoussaq. These acts of rape often led to unwanted pregnancy.”

²⁰ [ICC-01/12-01/18-401-Anx2](#), p. 106: 54^{ème} Session Ordinaire, Banjul, du 22 Octobre au 5 Novembre 2013 (Avril 2013 – Octobre 2013 par Honorable Commissaire Reine Alapini Gansou), pp. 5-6, para. 18.

²¹ [ICC-01/12-01/18-401-Anx2](#), pp. 106-107: African Union, 54^{ème} Session Ordinaire, Banjul, du 22 Octobre au 5 Novembre 2013 (Avril 2013 – Octobre 2013 par Honorable Commissaire Reine Alapini Gansou), para. 19.

²² Bruno D Segbedji, [Crise politico-sécuritaire au Mali : La MISAHÉL dénonce les violations massives des droits de l’Homme](#) (L’Indépendant 28 October 2013), also available at [ICC-01/12-01/18-401-Anx2](#), p. 118.

confirmed that these findings included instances of illegal detention and violations of fair trial proceedings.²³

20. From November 2013 to April 2014, Judge Alapini-Gansou then acted as Head of the Human Rights Component of MISAHHEL. In this capacity, it appears that Judge Alapini-Gansou continued to document evidence concerning crimes allegedly committed in Timbuktu during 2012 and the first part of 2013 (which included meeting with victims and witnesses), and to liaise with local activists and authorities involved in domestic investigations and prosecutions.²⁴ Judge Alapini-Gansou also explained in her report to the African Commission that her mandate included providing direct assistance to Malian authorities in relation to transitional justice and reconciliation issues.²⁵
21. At a March 2014 press conference, MISAHHEL further explained that Judge Alapini-Gansou's role included meeting detainees who had been arrested in connection with alleged crimes committed in the North.²⁶ [REDACTED].²⁷ At least one alleged co-perpetrator, Ag Alfousseyni Houka Houka,²⁸ was detained in Bamako during this

²³ Bruno D Segbedji, [Crise politico-sécuritaire au Mali : La MISAHHEL dénonce les violations massives des droits de l'Homme](#) (L'Indépendant 28 October 2013), also available at [ICC-01/12-01/18-401-Anx2](#).

²⁴ Annex B, Bulletin d'information de la Mission de l'Union Africaine pour le mali et le Sahel, [Juin 2014](#); Seyni Toure, [Allégations persistantes de disparitions forcées et d'assassinats : bientôt le deuxième rapport de la misahel](#) (Le Reporter 31 October 2013) :

“Selon Mme Reine Alapini Gansou, chef de la Misahel, la mise en place d'une composante civile au sein de la Mission, vise à documenter et rapporter les cas de violation des droits de l'Homme et du droit humanitaire perpétrés au Mali et particulièrement dans le Nord. La Composante droits de l'homme de la Misahel assure aussi le monitoring de la situation des droits de l'homme ; donne des avis et conseils aux autorités maliennes sur les voies et moyens de mieux prendre en charge les questions des droits de l'homme, de réconciliation nationale et la mise en place des mécanismes de justice transitionnelle. Aussi, elle recommande à l'Union africaine les meilleures stratégies pour soutenir le Mali dans le domaine de la gouvernance et des droits de l'homme.

[...]

Les informations recueillies dans le cadre de ce rapport, à travers les moyens tels que l'observation, les dialogues communautaires, les discussions ouvertes avec des groupes, les interviews avec les témoins, le monitoring des médias, la revue des rapports journaliers, la rencontre avec les victimes, couvrent la période allant de janvier 2012 à juin 2013. L'analyse des données obtenues a été minutieusement faite en tenant compte des détails les plus subtiles et du mandat de la Mission.”

²⁵ [ICC-01/12-01/18-401-Anx2](#), p. 106, para. 18 : 54ème Session Ordinaire, Banjul, du 22 Octobre au 5 Novembre 2013 (Avril 2013 – Octobre 2013 par Honorable Commissaire Reine Alapini Gansou), paras. 7-10.

²⁶ Issa B Dembélé, [Mission de l'union africaine pour le Mali](#), (Mali-web, 20 mars 2014), available also at [ICC-01/12-01/18-401-Anx2](#), pp. 127-128.

See also Amnesty International, [Agenda for Human Rights in Mali](#), p. 39: “The delegation has also visited the detention centre at Camp I of the National Gendarmerie, where they met the soldiers detained following the April 2012 coup.”, also available at [ICC-01/12-01/18-401-Anx2](#), p. 45.

²⁷ [REDACTED]

²⁸ DCC, p. 64, paras. 147, 241, 254.

time period. The local authorities also initiated criminal proceedings against him in connection with allegations that are directly linked to the current case, although he was later released.²⁹

22. In her reports to the African Commission, Judge Alapini-Gansou stated that her mandate in MISAHHEL included documenting human rights abuses, particularly on the North of Mali,³⁰ actively following all major domestic cases and investigations, and advising according concerning observed human rights violations.³¹ The 2014 Annual Report for MISAHHEL added a third component, which was to reinforce the capacity of civil society and local organisation in relation to such matters.³² Given that Judge Alapini-Gansou stated that her role included advising and assisting Malian authorities in relation to transitional justice issues,³³ there are reasonable grounds to conclude that she would have provided advice in relation to the proceedings initiated in relation to Mr. Houka Houka.³⁴
23. In June 2014, Judge Alapini-Gansou participated in a press conference and a series of workshops in Bamako with human rights lawyers, including from FIDH and AMDH. The purpose of this workshop was to discuss collaboration between Judge Alapini-Gansou's department in MISAHHEL, and the NGOs in question.³⁵
24. According to a contemporaneous news article,³⁶ the 24 June 2014 press conference had been hosted by FIDH and AMDH, and included a discussion on evidential

²⁹ Annex B, International federation for human rights, '[Mali / Release of Ag Alfousseyni Houka Houka d'Ançardine : true attack against justice for victims of serious human rights violations in Northern Mali](#)', (FIDH press release, 26 August 2014)

³⁰ [ICC-01/12-01/18-401-Anx2](#), p. 104, para. 9, para. 7.

³¹ Annex B, Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa, [Report to the 55th Ordinary Session](#) of the African Commission, para. 6; [ICC-01/12-01/18-401-Anx2](#), p. 104: 54^eme Session Ordinaire, Banjul, du 22 Octobre au 5 Novembre 2013 (Avril 2013 – Octobre 2013 par Honorable Commissaire Reine Alapini Gansou), para. 9.

³² MISAHHEL, [Rapport Annuel de la Mission de l'union Africaine pour le Mali et le Sahel Janvier 2014 — Janvier 2015](#), (African Union Peace and Security, 2014), p.8, also available at [ICC-01/12-01/18-401-Anx2](#), p. 139.

³³ [ICC-01/12-01/18-401-Anx2](#), p. 104, paras. 7, 9.

³⁴ [ICC-01/12-01/18-401-Anx2](#), p. 161, the Malian authorities also informed FIDH in June 2013 that an investigating judge had been appointed to investigate alleged crimes committed in the North of Mali, but had difficulty obtaining evidence:

³⁵ [ICC-01/12-01/18-401-Anx2](#), pp. 151-152 : Inter-Session Report, 56th Ordinary Session, Banjul, 21 April to 7 May 2015 (May 2014 – April 2015, presented by Honourable Commissioner Reine Alapini Gansou.), p. 6

³⁶ Boubacar Peitao, [Résolution de la crise malienne : La FIDH et l'AMDH exigent justice et réparation pour toutes les victims](#), (L'indépendant, 26 June 2014), also available at [ICC-01/12-01/18-401-Anx2](#), pp. 161-162.

issues concerning allegations of sexual violence committed in the North of Mali, including the difficulty of obtaining evidence.³⁷

25. A month later, on 30 July 2014, the MISAHEL human rights section hosted a conference on information exchanges with Malian civil society organisations.³⁸ During this conference, MISAHEL presented a report given to the AU Peace and Security Council in April 2014. It would appear that this report was the June 2013 report, drafted by Judge Alapini-Gansou, which included findings concerning crimes committed by Ansar Dine in Timbuktu.³⁹ The MISAHEL human rights division further advised the participants concerning the instigation of litigation concerning these violations.

26. In March 2015, FIDH, AMDH, and other Malian NGOs, filed a criminal complaint against Mr. Al Hassan and others in relation to allegations of sexual violence that took place in Timbuktu in 2012 and 2013. This complaint has been filed as evidence in the *Al Hassan* case.⁴⁰ The failure of the Malian authorities to progress the case was relied upon by the Prosecution in its application for an arrest warrant against Mr. Al Hassan.⁴¹

B. Legal Submissions

27. On the basis of this procedural history, the Defence for Mr. Al Hassan respectfully submits that there are reasonable grounds to conclude that:

³⁷ Boubacar Peitao, [Résolution de la crise malienne : La FIDH et l'AMDH exigent justice et réparation pour toutes les victimes. \(L'indépendant, 26 June 2014\)](#) : “the président de l'AMDH a précisé que concernant les violences faites au nord du pays, la délégation a constaté l'absence de victimes de violences sexuelles et des viols. En effet, l'insécurité dans cette partie du pays est passée par là. Car, a-t-il déploré, les juges d'instruction manquent de moyens pour s'y rendre au nord du Mali afin de mener des enquêtes sur place et recueillir les témoignages des victimes.”, also available at [ICC-01/12-01/18-401-Anx2](#), p. 162.

³⁸ MISAHEL, [Bulletin d'information de la mission de l'union africaine pour le Mali et le Sahel](#) (2014, N. 4 August 2014), p. 4, also available at [ICC-01/12-01/18-401-Anx2](#), p. 171.

³⁹ Annex B, Institute for Security Studies, [Rapport sur le Conseil de paix et de sécurité](#) (N. 58, May 2014), p. 2: “Conseil de paix et de sécurité (CPS) de l'Union africaine, en sa 426ème réunion tenue le 7 avril 2014, s'est «félicité du rapport de la Commission de l'Union africaine sur la situation des Droits de l'homme au Mali élaboré sur la base des informations recueillies par les observateurs des Droits de l'Homme de l'UA déployés au Mali, dans le cadre de la mise en œuvre du Communiqué PSC/AHG/ COMM/2.(CCCLIII) du Conseil de paix et de sécurité adopté en sa 353ème réunion tenue le 28 janvier 2013».”

⁴⁰ MLI-OTP-0024-2814, p. 281.

⁴¹ [ICC-01/12-01/18-1-Red](#), paras 290-295.

- **Firstly**, Judge Alapini-Gansou was previously involved in the proceedings against Mr. Al Hassan in an investigative and advisory capacity; and
- **Secondly**, this prior involvement has impacted on the impartiality of the proceedings.

i. Judge Alapini-Gansou's prior involvement in domestic proceedings concerning Mr. Al Hassan in an investigative and advisory capacity

28. Article 41(2)(a) of the Statute is framed broadly and specifies that

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.

29. This prohibition would therefore capture:

- a. Judge Alapini-Gansou's prior involvement in collecting evidence concerning alleged crimes committed by members of Ansar Dine during the time period of the charges in this case;
- b. Judge Alapini-Gansou's role in meeting with detainees, and collecting evidence from individuals who are likely to be participating victims and witnesses in this case;
- c. Judge Alapini-Gansou's role in providing information, advice and assistance to the NGOs that filed a criminal complaint against Mr. Al Hassan in connection with allegations that overlap with this case; and
- d. Judge Alapini-Gansou's role in advising the national judicial authorities that were responsible for conducting the domestic proceedings against Mr. Al Hassan, and alleged co-perpetrators in this case.

30. These circumstances are also clearly distinguishable from the previous decision of the Presidency not to recuse Judge Sanji Monageng from the *Bashir* case, due to her role in approving a resolution concerning the adoption of a report by the fact-finding mission in Sudan.⁴² Specifically,

⁴² [ICC-02/05-01/09-76-Anx2](#), Notification of the decision on the request for excusal of a Judge, 19 March 2010.

- a. Whereas the Presidency noted that Judge Monageng had not been personally involved in the fact-finding mission,⁴³ Judge Alapini-Gansou played a direct and personal role in conducting the fact-finding missions, and drafting the factual findings concerning alleged crimes committed by Ansar Dine; and
- b. Judge Monageng was appointed to the Pre-Trial Chamber at a time when the only issue before the Chamber was whether to issue an arrest warrant in connection with allegations of genocide; the prior composition of the bench had already determined that the requisite threshold had been met for war crimes and crimes against humanity. The report of the AU fact-finding mission had also not touched on the issue of genocide.⁴⁴ In contrast, Pre-Trial Chamber I must issue a determination as to whether the requisite standard for all of the charges in this case is met, and Judge Alapini-Gansou has already expressed a particular opinion concerning whether crimes in this case had been established – including as concerns acts of sexual violence as crimes against humanity.⁴⁵

31. The framework for evaluating Judge Alapini-Gansou's prior involvement in domestic proceedings related to Mr. Al Hassan must also take into consideration the nexus between allegations of human rights violations in Timbuktu and the charges in this case: namely, the Prosecution's charges including allegations of criminal responsibility related to:

- a. The failure of the Islamic Tribunal in Timbuktu to comply with Malian domestic law, and fair trial rights under human rights law;⁴⁶ and
- b. General violations of human rights in Timbuktu in 2012, which are claimed to amount to persecution.⁴⁷

32. Judge Alapini-Gansou's role in collecting evidence, providing her related work product national authorities and NGOs, and advising them on potential approaches

⁴³ Cf. [ICC-02/05-01/09-76-Anx2](#)

⁴⁴ [ICC-02/05-01/09-76-Anx2](#), p. 6.

⁴⁵ See para. 15 above.

⁴⁶ ICC-01/12-01/18-T-004-ENG RT 09-07-2019 SZ PT, p. 33, lns. 16-25, p. 34, lns. 1-5.

⁴⁷ ICC-01/12-01/18-T-005-ENG RT 10-07-2019 PT, p. 47, lns. 14-25.

to litigation initiated against suspected perpetrators, including Mr. Houka Houka and Mr. Al Hassan, also falls within the four corners of the ECHR's ruling in *Piersack v Belgium*.⁴⁸ In that judgment, the ECHR found that the judge's former involvement in the prosecution services, which included revising submissions, providing legal advice and discussing the approach adopted in the case in question, gave rise to an appearance of partiality.⁴⁹

ii. *The impact on the appearance of the impartiality of the proceedings stemming from Judge Alapini-Gansou's prior involvement in this case*

33. The appearance of impartiality in this case is fundamentally undermined by:

- Firstly, Judge Alapini-Gansou's prior statements concerning live issues in this case; and
- Secondly, the link between the matters previously investigated by Judge Alapini-Gansou, and the questions formulated by the bench for the parties to address during the confirmation proceedings.

34. Judge Alapini-Gansou has, on the basis of her analysis of evidence and testimony related to the allegations in this case, claimed that the evidence of such crimes was "overwhelming", and that there was "no doubt" that certain crimes against humanity had been committed.⁵⁰ Judge Alapini-Gansou's statements and findings concern issues that are contested by the Defence.⁵¹

35. When viewed in connection with firstly, the specific findings set out in Judge Alapini-Gansou's report concerning alleged crimes committed by Ansar Dine,⁵² and the weight placed by the Prosecution in its DCC on Mr. Al Hassan's membership of

⁴⁸ *Piersack v. Belgium* (Application no. 8692/79), Judgment, 1 October 1982.

⁴⁹ *Piersack v. Belgium* (Application no. 8692/79), Judgment, 1 October 1982, para. 31.

⁵⁰ See paras 14 and 19 above.

⁵¹ See, for example, ICC-01/12-01/18-394-Conf, paras 75-91 (commission of crimes against humanity), 118-122 (existence of an occupation), 143-144 (link between installation of Sharia law and commission of crimes), 148-151 (link between installation of Sharia law and commission of rape); **Compare** [ICC-01/12-01/18-401-Anx2](#), pp. 55-76 (2013 Report), para. 46 with [ICC-01/12-01/18-395](#) (LRV submissions), paras 39-40 on skin colour of victims; **Compare** 2013 Report paras. 52, 54 of the 2013 with [LRV submissions](#) para. 51 regarding the obligation for women to wear a veil; **Compare**, 2013 Report paras. 44-49, with [LRV submissions](#) paras 24-26, regarding rape in detention/illegal confinement, sexual slavery and forced marriage; and **compare** 2013 Report paras 56-60, with paras 46-50 of [LRV submissions](#) regarding the destruction of the mausoleums, and its alleged consequence to the identity and beliefs of the population of Timbuktu.

⁵² [ICC-01/12-01/18-401-Anx2](#), p.60, paras. 18, 35, 46, 51.

Ansar Dine,⁵³ an informed observer would have reasonable grounds to conclude that there is an objective appearance that Judge Alapini-Gansou has reached a predetermination on fundamental issues concerning the charges in this case.

36. The particular language set out in Judge Alapini-Gansou's report concerning interactions with victims of these alleged crimes also give rise to an appearance that Judge Alapini-Gansou is likely to base her decision on the impressions formulated during her interactions with unidentified victims and witnesses. One only has to juxtapose the concern expressed by Judge Alapini-Gansou concerning the "striking case" of a girl, who was flogged because her veil fell off,⁵⁴ and the amount of times that the Prosecution referred to similar instances during the confirmation hearing.⁵⁵
37. The ability of the Defence to define the scope of the potential prejudice in this case fully is hampered by the fact that at this phase of the proceedings, the Defence has not received any redacted or un-redacted victim application forms, nor has it received the identity of all of the Prosecution witnesses ([REDACTED]).
38. The Defence does, however, know that Prosecution witnesses [REDACTED] participated as civil parties in the complaint filed by FIDH, in Bamako, in relation to allegations of sexual violence against Mr. Al Hassan⁵⁶. It is also apparent from the record that Mr. Seydou Doumbia – who was appointed to represent victims in this case – was one of the lawyers who submitted the complaint against Mr. Al Hassan in connection with allegations of sexual violence in Bamako.⁵⁷ It is also reasonable to conclude that Mr. Doumbia, as a member of Avocats Sans Frontières Mali,⁵⁸ participated in the workshops and interactions that were organised by Judge Alapini-Gansou and MISAHÉL during the course of 2013 and 2014.

⁵³ ICC-01/12-01/18-335-Conf-Corr (DCC), paras. 2, 23, 58, 99, 105.

⁵⁴ [ICC-01/12-01/18-401-Anx2](#), p. 66, para. 54.

⁵⁵ ICC-01/12-01/18-T-004-ENG RT 09-07-2019 SZ PT, p. 32, lns. 23-25, p. 33, lns. 3-7, p. 79, lns. 21-25 to p. 80, lns. 1-17, ICC-01/12-01/18-T-005-ENG RT 10-07-2019 PT, p. 50, lns. 21-25 to p. 51, ln. 1, p. 58, lns. 12-15, p. 99, lns. 18-23.

⁵⁶ [REDACTED]. See also LRV referring to a meeting with a witness while Judge Alapini-Gansou would have been in Mali (ICC-01/12-01/18-T-006-ENG RT 11-07-2019, p. 7 and 8).

⁵⁷ MLI-OTP-0024-2768, p. 2812.

⁵⁸ Annex B, Bréhima Sogoba, [Droits des personnes privées de liberté : ASF-Mali assure l'assistance judiciaire à 208 détenus](#) (Bamako, 11 September 2015).

39. In terms of the link to the current proceedings, in the joint observations submitted on 4 July 2019, the Legal Representatives for Victims (LRV) raised the same points discussed with Judge Alapini-Gansou during the June 2014 workshop, concerning the difficulty of obtaining testimony concerning allegations of sexual violence.⁵⁹ And on the basis of these difficulties, the LRV further invited the Chamber to consider that evidence of sexual violations exists – even if it has not been referred to in the victim application forms or witness statements – that is, even if it is not in the record of the case.⁶⁰ The LRV observations also cited to factual articles and factual allegations,⁶¹ even though firstly, the Pre-Trial Chamber had not granted the victims a right to tender evidence in this phase,⁶² and secondly, the deadline for raising any factual allegations concerning the charges had clearly expired.
40. One day after receiving these observations, the Pre-Trial Chamber issued a list of forty-three questions, which it requested the parties and the LRV to address during the course of the confirmation proceedings.⁶³
41. The first sub-set of questions refer specifically to [REDACTED] and [REDACTED] – that is, the victims in the FIDH complaint – and appear to have the objective of inviting the prosecutor to expand the charges in order to conform with the submissions of the LRV (namely, Mr. Doumbia).⁶⁴
42. Even though the LRV had no right to file evidence or raise factual allegations, the Pre-Trial Chamber also based several questions directly on the information set out in the LRV observations. Once again, the purpose of these questions appears to be to invite the Prosecution to consider expanding certain legal and factual aspects of the case, to the detriment of the defendant.⁶⁵

⁵⁹ [ICC-01/12-01/18-395](#), paras. 27-32; [ICC-01/12-01/18-401-Anx2](#), p. 162.

⁶⁰ [ICC-01/12-01/18-395](#), para. 29

⁶¹ [ICC-01/12-01/18-395](#), paras 31-32.

⁶² [ICC-01/12-01/18-289-Red-tENG-Corr](#), para 52.

⁶³ [ICC-01/12-01/18-399-Conf-Anx](#).

⁶⁴ [ICC-01/12-01/18-399-Conf-Anx](#), questions 2 and 3.

⁶⁵ ICC-01/12-01/18-T-003-ENG ET WT 08-07-2019, p. 12, ln. 12 to p. 14, ln. 6.

43. The subject matter of the forty-three questions also touch directly on sentiments expressed by Judge Alapini-Gansou in connection with her fact-finding missions in Mali, such as the experience of victims of sexual violence in Timbuktu.⁶⁶
44. Throughout the confirmation hearing, the LRV also advanced elaborate factual submissions concerning [REDACTED]- again, one of the civil parties who participated in the domestic complaint filed by FIDH and AMDH against Mr. Al Hassan.⁶⁷

iii. The impact on the Pre-Trial Chamber as a whole

45. Due to the secrecy of deliberations, it is not possible to determine the extent to which Judge Alapini-Gansou has influenced the formation and regulation of the confirmation proceedings.⁶⁸ But it is apparent that the Pre-Trial Chamber, as a whole, declined to take any steps to protect the integrity of the confirmation proceedings in light of the information raised by the Defence. The Pre-Trial Chamber, as a whole, also continued to adhere to the forty-three questions, notwithstanding the concerns raised by the Defence concerning the propriety of these questions.⁶⁹ The Pre-Trial Chamber, as a whole, have also heard submissions and considered evidential arguments in light of the issues raised in these forty-three questions. The situation is therefore analogous to the *Karemera* case, where the ICTR Appeals Chamber found that the impartiality of the entire Trial Chamber had been undermined due to the Trial Chamber's failure to take steps to protect the integrity of the proceedings, when alerted to a conflict of interest concerning one of the judges on the bench.⁷⁰

⁶⁶ [ICC-01/12-01/18-399-Conf-Anx](#) (Questions), [ICC-01/12-01/18-401-Anx2](#), pp. 55-76 (2013 Report). Compare Question 6 with 2013 Report para. 46; Compare Questions 2, 3, 5 and 8-10 with 2013 Report paras 44-49 and [ICC-01/12-01/18-401-Anx2](#), pp. 117-118.

⁶⁷ [REDACTED].

⁶⁸ Cf *Morice v. France* [GC], [29369/10](#), para. 89; *Otegi Mondragon & others v. Spain*, [4184/15](#), para. 67, concerning the impact of secrecy of deliberations on the appearance of impartiality of the bench as a whole.

⁶⁹ ICC-01/12-01/18-T-003-ENG ET WT 08-07-2019, p. 12, ln. 12 to p. 14, ln. 6.

⁷⁰ ICTR, *Prosecutor v. Karemera et al.*, Appeals Chamber, [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, para. 69.

46. Judge Alapini-Gansou and Judge Kovács also both participated in the plenary deliberations concerning Judge Brichambaut, even though:⁷¹

- Judge Alapini-Gansou must have been aware, in light of the particular arguments raised by the Defence concerning Judge Brichambaut's statements on 'Ansar Dine' were equally, if not more applicable to her, and that as such, there is an appearance that she had a personal interest in the outcome of the decision; and
- Both Judges were aware that the applicability of findings from the *Al Mahdi* case is a 'live' and contested issue in this case, in particular, as concerns the nexus elements of war crimes and crimes against humanity.⁷² Even though the plenary stated that its reliance on the *Al Mahdi* judgment, in order to dispose of the Defence request, was "without prejudice to whether this may have any relevance to the *Al Hassan* case",⁷³ the fact that the majority of the Pre-Trial Chamber bench considers that it would have been reasonable for Judge Brichambaut to be informed by factual findings in that case, 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.

47. The replacement of the bench at this juncture would also not in itself create a delay in the proceedings. Article 61(7) of the Statute specifies that the Chamber should reach its decision as to whether to confirm the charges on the matters discussed during the hearing; there is therefore no need for the bench to be appointed to the case prior to the confirmation hearing itself. In line with the fact that the confirmation process is not a "mini-trial", there is also ICC precedent for both:

- Conducting the confirmation proceedings on the basis of written pleadings,⁷⁴ which would obviate the need to convene another confirmation hearing (or a lengthy one); and

⁷¹ ICC-01/12-01/18-398-AnxI, p. 2, para. 6.

⁷² [ICC-01/12-01/18-394-Red](#), paras 102-105.

⁷³ [ICC-01/12-01/18-398-Anx1](#), para. 46.

⁷⁴ [ICC-01/05-01/08-424](#), paras. 15-21; [ICC-02/11-01/11-656-Red](#), paras. 9-16 ; [ICC-01/05-01/13-749](#), para. 4.

- Changing the composition of the bench after the commencement of the confirmation proceedings, but before the issuance of the confirmation decision itself.⁷⁵

48. Given that the Prosecution filed an extremely extensive charging document, and the parties have yet to file their final observations, it could, therefore, be possible for a new Chamber to render an adjudication on the charges, without any significant modifications to the existing time-frame.

II. Relief sought


49. For the reasons set out above, the Defence for Mr. Al Hassan requests the Presidency to excuse Pre-Trial Chamber I from its functions in this case, and to compose a new Pre-Trial Chamber to conclude the confirmation of the charges against Mr. Al Hassan.



Melinda Taylor

Lead Counsel for Mr Al Hassan

⁷⁵ [ICC-01/05-01/08-424](#), paras. 15-21.



Marie-Hélène Proulx

Associate Counsel for Mr Al Hassan

Dated this 11th Day of July 2019

At The Hague, The Netherlands