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N° : **ICC-01/12-01/18**

Date : **6 August 2019**

THE PRESIDENCY

Before : Judge Chile Eboe-Osuji, President
Judge Robert Fremr, First Vice-President
Judge Howard Morrison

SITUATION IN THE REPUBLIC OF MALI

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

Public

**Observations by Judge Péter Kovács on the “Urgent Request for the
Disqualification of Pre-Trial Chamber I”**

Source: Judge Péter Kovács

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 Luvenika 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. PROCEDURAL HISTORY AND THE DEFENCE'S REQUEST FOR DISQUALIFICATION OF PRE-TRIAL CHAMBER I

1. On 18 April 2019, Pre-Trial Chamber I ("PTC I" or "the Chamber") issued a decision in which it determined that the new date for the confirmation of charges hearing (the "Hearing") would be 8 July 2019.¹
2. On 4 July 2019, the Defence filed its written submission pursuant to Rule 121-9 of the Rules of Procedure and Evidence ("Rules").²
3. On 5 July 2019, the Chamber sent by email to the parties and participants a list of 43 questions of law and fact, requesting them to answer those questions, to the extent possible, during the Hearing. On 8 July 2019, before the commencement of the Hearing, the Chamber issued a formal order appending the same list of questions.³
4. On 14 June 2019, the Defence filed a "Request for the disqualification of Judge Perrin de Brichambaut".⁴
5. On 8 July 2019, the Plenary of Judges issued its "Decision of the Plenary of Judges on the 'Request for disqualification of Judge Marc Perrin de Brichambaut' dated 14 June 2019"⁵ ("Decision of the Plenary of Judges") dismissing the Defence request to disqualify Judge Perrin de Brichambaut from the case with immediate effect.
6. The Hearing took place on 8, 9, 10, 11 and 17 July 2019.

¹ Décision fixant une nouvelle date pour le dépôt du document contenant les charges et pour le début de l'audience de confirmation des charges, ICC-01/12-01/18-313 and ICC-01/12-01/18-399-Anx-Red.

² Submissions for the confirmation of charges, ICC-01/12-01/18-394-Red.

³ Ordonnance enjoignant aux parties et participants de répondre aux questions contenues dans l'annexe lors de l'audience de confirmation de charges, ICC-01/12-01/18-399.

⁴ Request for the disqualification of Judge Marc Perrin de Brichambaut, 14 June 2019, ICC-01/12-01/18-376-Red. *See also* Observations by Judge Perrin de Brichambaut on the « Request for the disqualification of Judge Marc Perrin de Brichambaut », 24 June 2019, ICC-01/12-01/18-382; Prosecution's response to Request for the disqualification of Judge Marc Perrin de Brichambaut, 24 June 2019, ICC-01/12-01/18-387.

⁵ Notification of the Decision of the Plenary of Judges on the 'Request for disqualification of Judge Marc Perrin de Brichambaut', 14 June 2019, ICC-01/12-01/18-398; Annexe I to the Notification of the Decision of the Plenary of Judges on the Request for disqualification of Judge Marc Perrin de Brichambaut, 8 July 2019, ICC-01/12-01/18-398-AnxI.

7. On the first day of the Hearing, when asked whether it intended to raise objections or make observations pursuant to Rule 122-3 of the Rules, the Defence claimed that Judge Alapini-Gansou “was previously involved in the proceedings against Mr Al Hassan in an investigative and advisory capacity”, and that, in the alternative, “this prior involvement has impacted on the appearance of impartiality in this case”.⁶

8. After hearing the response of the Prosecution on the matter, the Chamber suspended the hearing to deliberate the issue. When the Hearing resumed, I read out the decision the Chamber had taken:

The request [by the Defence to stay the proceedings] is denied. The Defence may, if it deems it necessary, seize the competent organ with a request for disqualification. With regard to the other points raised by the Defence, the Chamber calls upon you, if you so wish, to file your written observations on the subject by Monday 22 July 2019 at the latest. The Prosecution must respond by 29 July 2019. Under Regulation 122(6) of the Regulation of Proceedings and Evidence, the Chamber shall rule on this question in the decision regarding the confirmation of charges”.⁷

9. On the first day of the Hearing, the Defence also made the following remarks as to the list of 43 questions communicated by the Chamber:

The questions do not concern just legal or procedural issues, rather, in many cases it would appear that the Chamber is inviting the Prosecutor to expand the scope of its charges and to raise new evidential arguments at the hearing, evidential arguments that will not have been disclosed in advance of the hearing. Rule 121(8) then prohibits the Pre-Trial Chamber from

⁶ Transcripts of the Confirmation Hearing, 8 July 2019, ICC-01/12-01/18-T-003-ENG, p. 21, l. 4-9.

⁷ Transcripts of the Confirmation Hearing, 8 July 2019, ICC-01/12-01/18-T-003-ENG, p. 34, l. 6-13. 10. On the 9th of July 2019, the Prosecutor returned to this question, *see* Transcripts of the Confirmation Hearing, 9 July 2019, ICC-01/12-01/18-T-004-CONF-ENG, p. 2 (open session) (“Before we begin, I would like to put a question to the Defence for clarification, and this is subsequent to the observations made by the Defence yesterday concerning Judge Alapini. Does the Defence intend to raise the issue with the plenary of Judges? Thank you.”), and the Defence answered the following: “We are not quite aware of the propriety of having this inter partes disclosure happening in the courtroom. I think we have made our position clear for the record and we will act accordingly.” *See* Transcripts of the Confirmation Hearing, 9 July 2019, ICC-01/12-01/18-T-004-CONF-ENG, pp. 2-3 (open session).

taking into account any charges or evidence presented after those deadlines. As a result of these new questions and issues, the Defence is entering this hearing without any clear idea as to what charges might be put in place or the nature, cause and content of these charges.⁸

10. On 11 July 2019, the Defence submitted a request to the Presidency for the disqualification of the Pre-Trial Chamber I (“Defence Request”).⁹ First, the Defence contends that Judge Alapini-Gansou was involved in advising and investigating facts related to domestic proceedings against Mr Al Hassan and other members of the alleged “common plan”, and that she also formulated questions for the confirmation proceedings that would have been influenced by her previous involvement in related proceedings concerning Mr Al Hassan.¹⁰

11. Second, the Defence also argues that a lack of impartiality or appearance of bias of PTC I as a whole is shown by: (i) the fact that PTC I refrained from adjourning the proceedings and continued to hear the oral observations of the parties and participants during the Hearing despite “the information raised by the Defence” about Judge Alapini-Gansou and the forty-three questions, which amounts, according to the Defence, to a failure to “protect the integrity of the confirmation proceedings”¹¹; and (ii) the reference in the Decision of the Plenary of Judges to factual findings reached in the *Al Mahdi* judgement, which “creates an appearance that the majority of the bench has determined an issue of key importance [...] before the confirmation submissions have been fully heard”.¹²

12. On 19 July 2019, the Presidency issued its “Order concerning the ‘Urgent Request for the Disqualification of Pre-Trial Chamber I’ dated 11 July 2019” ordering the parties and participants “to file any response to the Application by 16:00 on

⁸ Transcripts of the Confirmation Hearing, 8 July 2019, ICC-01/12-01/18-T-003-ENG, pp. 13-14.

⁹ Urgent Request for the Disqualification of Pre-Trial Chamber I, 11 July 2019, ICC-01/12-01/18-406-Red.

¹⁰ Defence Request, paras 8-44.

¹¹ Defence Request, paras 7, 45. The Defence also disputes the fact that PTC I “also continued to adhere to the forty-three questions notwithstanding the concerns raised by the defence concerning the propriety of these questions”.

¹² Defence Request, par. 46.

1 August 2019; and request[ing] the judges of Pre-Trial Chamber I to present any written observations, either individually or collectively, by 16:00 on 8 August 2019”.¹³

13. On 29 July 2019, the Prosecution filed the “Prosecution’s response to the Urgent Request for the disqualification of Pre-Trial Chamber I” requesting the Plenary to dismiss the Defence Request¹⁴ (“Prosecution Response”).

II. OBSERVATIONS IN RESPONSE TO THE DEFENCE REQUEST

14. The following observations are intended to respond to the arguments made by the Defence concerning my alleged lack of impartiality or appearance of bias.

A. Applicable law

15. I refer to Articles 40, 41 and 61 of the Statute and Rules 34 and 122 of the Rules of Procedure and Evidence.

16. Article 41(2)(a) reads as follows: “A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground”. 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,¹⁵ and that the relevant standard to assess whether the impartiality of a judge “might reasonably be doubted on any ground” is

¹³ ICC-01/12-01/18-414, p. 3.

¹⁴ ICC-01/12-01/18-436-Conf. The Prosecution filed a redacted public version on 2 August 2019, ICC-01/12-01/18-436-Red.

¹⁵ Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Chile Eboe-Osuji from the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-344-Anx, 5 June 2012 (“Banda Decision”), par. 14; 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*, ICC-01/12-01/18-398-AnxI, 8 July 2019, par. 19; 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, ICC-02/05-01/09-76-Anx2, 19 March 2010, p. 6.

“whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge”.¹⁶

17. However, according to the Court’s well-established jurisprudence, the disqualification of a judge is not a step to be undertaken lightly; therefore a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office.¹⁷ Such high threshold functions to safeguard the interests of the sound administration of justice.¹⁸ Unless this high threshold of impartiality is rebutted, it is presumed that the judges of the Court are professional judges capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.¹⁹ It is also presumed that the judges of the Court “can disabuse themselves of any irrelevant personal beliefs or predispositions”.²⁰

¹⁶ *Banda* Decision, par. 11; Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3040-Anx, 11 June 2013, par. 9; Decision of the Plenary of Judges on the Defence Request for the Disqualification of Judge Kuniko Ozaki from the case of *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2355-AnxI-Red, 20 June 2019, par. 32.

¹⁷ Decision of the Plenary of Judges on the Defence Applications for the Automatic Temporary Suspension of Judge Cuno Tarfusser from the case *Le Procureur c. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu et Narcisse Arido*, ICC-01/05-01/13-407, 20 June 2014, par. 18.

¹⁸ *Banda* Decision, par. 14; 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*, ICC-01/04-01/06-3154-Anx1, 3 August 2015, par. 29.

¹⁹ *Banda* Decision, par. 14; 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*, ICC-01/12/-01/18-398-AnxI, 8 July 2019, par. 19.

²⁰ *Banda* Decision, par. 14; 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*, ICC-01/12/-01/18-398-AnxI, 8 July 2019, par. 19; see also e.g., *Lubanga* Decision I, par. 11; 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, ICC-02/05-01/09-76-Anx2, 19 March 2010, p. 6.

B. Conclusions

18. As noted above, the Defence raises two grounds to challenge the PTC I's impartiality as a whole : (i) that PTC I erred in not suspending the proceedings following the Defence's oral arguments about Judge Alapini-Gansou and the list of 43 questions; and (ii) the reference to the Al Mahdi's judgement in the Decision of the Plenary of Judges.

i. The PTC I's decision not to suspend the proceedings

19. First of all, the law is clear on the fact that it was within the discretion of the Chamber to decide not to suspend the Hearing immediately after the Defence's oral arguments under Rule 122-3 of the Rules. Although Rule 122-3 of the Rules provides the suspect with the opportunity to "raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing", nothing requires the Pre-Trial Chamber before whom such objections are raised to immediately suspend the proceedings. Rather, Rule 122-6 of the Rules leaves it to the Pre-Trial Chamber to "decide whether to join the issue raised with the examination of the charges and the evidence *or* [...] to adjourn the confirmation hearing".²¹ In fact, if a chamber were to be required to automatically suspend the hearing on the basis of any objections or observations made pursuant to Rule 122-3 of the Rules or any request for disqualification, a party would *de facto* be granted the power to simply suspend proceedings when it wishes. Put otherwise, should a Defence counsel consider, for example, that he or she is not prepared enough for the confirmation of charges hearing, it would suffice for him or her to simply raise allegations of impartiality against any judge of the bench, in order to obtain the postponement of such hearing. This discretion afforded to judges in deciding what the best course of action is, and whether or not suspend proceedings given the particular circumstances of the case, therefore prevents, among others, any misuse of the said provision by the parties.

²¹ Emphasis added.

20. Since the law is clear about the fact that it was within the discretion of the Chamber to decide to suspend the proceedings or not, the second question that arises is whether the Chamber exercised this discretion in a reasonable way. On this second issue, I argue that the Appeals Chamber is the appropriate and only forum to decide whether a chamber exercised its discretion in a reasonable way or whether it erred in law or in fact – even though the Defence did not timely request leave to appeal on the basis of abuse of discretion.²² The plenary, seized of a disqualification request, is not entitled to decide on the technical issue on whether a judge erred in law or in fact. In this regard, I note that it is indeed to an *Appeal Chamber's* decision on an interlocutory appeal in the case of *Karemera* that the Defence refers to in support of its arguments,²³ and not to a decision of a panel of three judges deciding on the merits of an application for disqualification pursuant to Rule 15 of the ICTR Rules of procedure and evidence. Since it is not for the plenary, seized of a disqualification request, to decide on whether a judge erred in law or in fact, partiality or appearance of bias raised in a disqualification request therefore cannot be shown based on the outcome of a decision a judge took in exercising his or her discretion.

21. Furthermore, even if the reasonableness of this decision were to be assessed, no prejudice has accrued to the Defence, as pointed out by the Prosecutor²⁴. The Chamber simply considered that the appropriate course of action was not to cancel the Hearing and to hear the arguments of the parties and participants despite the allegations made by the Defence regarding Judge Alapini-Gansou. I still remain convinced that it was the most reasonable decision to take at the time. As noted by the Defence, there is for Judges a “necessity to ensure, as much as possible, judicial

²² Rule 155(1) of the Rules reads as follows: “When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.”

²³ Defence Request, par. 45 referring to ICTR, Appeals Chamber, *The Prosecutor vs. 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, 22 October 2004, ICTR-98-44-AR15bis.2.

²⁴ Prosecution Response, paras 5, 25.

economy in the interests of justice”.²⁵ If in the future there is a judicial determination that Judge Alapini-Gansou should be disqualified, and that the Hearing proceedings have been tainted by a lack of appearance of impartiality, that will be the suitable time to consider the most appropriate remedy for the Defence and the Suspect in this regard. In this respect, I would like to quote the Defence, who put forward that “there [might be] no need for the bench to be appointed to the case prior to the confirmation hearing itself”.²⁶

ii. The Decision of the Plenary of Judges

22. The Defence also submits that the reference in the Decision of the Plenary of Judges to factual findings reached in the *Al Mahdi* judgement, created an “appearance that the majority of the bench has determined an issue of key importance [...] before the confirmation submissions have been fully heard”.²⁷

23. I still share the view, as expressed in the Decision of the Plenary of Judges, that Judge Perrin de Brichambaut’s statement that “Ansar Dine is a “Salafist *armed* group” is a “general” one; and the reference to the *Al Mahdi* judgement should be read as being only circumscribed to this limited statement, since it is clearly referred to only to show its consistency with factual findings of the Court.

24. Saying that Ansar Dine is an armed group, which means that it is a movement which possesses arms, is different from saying that there are substantial grounds to believe that Ansar Dine is an armed group which degree of organization meets the requirement to be considered as an “organized armed group” as defined in the ICC jurisprudence interpreting Articles 7 and 8 of the Rome Statute.

25. Therefore, I disagree with the Defence when it avers that referring to the factual findings in the *Al Mahdi* case is the same as “consider[ing] that it would have been reasonable for Judge Perrin de Brichambaut to be informed by factual findings

²⁵ ICC-01/12-01/18-T-003-ENG, p. 6, l. 21-23.

²⁶ Defence Request, par. 47.

²⁷ Defence Request, par. 46.

in that case”, and that, in turn, amounted to “the bench [determining] an issue of key importance to the confirmation proceedings”. The plenary, in this instance, has only determined that the statement “Ansar Dine is an *armed* group” is a “general” statement, which was also a factual finding in the *Al Mahdi* Judgement; but which has not been, until now, and not surprisingly, “a ‘live’ and contested issue in [the *Al Hassan*] case”.

26. I also note that the Defence is requesting the plenary to find that the judges of PTC I who signed the Decision of the Plenary of Judges have shown an appearance of bias and as such, cannot sit on the *Al Hassan* case. But, according to this reasoning, none of the current ICC judges could do so, and only the judges to be elected at the Assembly of the State Parties in December 2020 and entering into function in March 2021 could be assigned the *Al Hassan* case.²⁸ This, however, would without any doubt delay the proceedings.

27. For the foregoing reasons, I request the plenary of Judges to dismiss the Defence Request.

Respectfully,

Péter KOVÁCS

August 6, 2019.

A handwritten signature in black ink, appearing to read 'Péter Kovács', with a long vertical line extending downwards from the end of the signature.

²⁸ See also the argument made by the Prosecution regarding to the “limited pool of judges” at the ICC in Prosecution Response, par. 10.