

In: KSC-BC-2018-01

Before: The President of the Specialist Chambers
Judge Ekaterina Trendafilova

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

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Thaçi Defence Request for Substitution or Disqualification of a Judge

With Public Annexes 1 and 2

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I. INTRODUCTION

1. The Single Judge assigned to the present proceedings, pursuant to Article 30(3) of the KSC Law,¹ is His Honour Judge Nicolas Guillou.² As well as being a Judge at the KSC, Judge Guillou is also a Judge of the International Criminal Court (“ICC”).³ Following his swearing-in as an ICC Judge on 8 March 2023,⁴ the Defence filed the *Thaçi Defence Request for Substitution or Recusal of a Judge*, asking the President to order the substitution of Judge Guillou as the Single Judge in these proceedings; or, in the alternative, assign a panel of three judges in accordance with Rule 20(3) of the KSC Rules, to determine its application for recusal.⁵

2. This first Defence Request was dismissed by the KSC President on 8 April 2024 because she considered, *inter alia*, that the President’s competence to substitute a Judge cannot be triggered unless that Judge “becomes unable to perform his or her duties as a result of an actual engagement in another activity or occupation”. The President reasoned that [t]his is not the case with respect to Judge Guillou’s situation. Judge Guillou will only exercise his judicial functions at the ICC as of 19 August 2024.”⁶

3. This finding has now been overtaken by events. On 24 April 2024, Judge Guillou was assigned to the ICC Pre-Trial Chamber I (“PTCI”) in the *Situation in*

¹ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”).

² KSCPR-2018/F00004, President, Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law, 29 May 2018, public (“Decision Assigning a Single Judge”).

³ See ICC, ‘[Current Judges](#)’. See also Judge Guillou’s specific entry on the ICC website, ‘[Judge Nicolas Guillou](#)’ (“ICC Biography”).

⁴ ICC Press Release, ‘[Six new judges sworn in today at the seat of the International Criminal Court](#)’, 8 March 2024.

⁵ KSC-BC-2018-01/F00615, *Thaçi Defence Request for Substitution or Recusal of a Judge*, 14 March 2024 (‘Defence Request’).

⁶ KSC-BC-2018-01/F00630, Decision on Defence Requests for Substitution or Recusal of a Judge, 8 April 2024 (“8 April 2024 Decision”).

Palestine,⁷ and on 20 May 2024, the ICC Prosecutor applied for arrest warrants before this PTCI against three leaders of the Islamic Resistance Movement (“*Hamas*”), and the Prime Minister and Minister of Defence of the State of Israel.⁸ The ICC framework does not specify a timeframe for a Pre-Trial Chamber’s consideration of an application for an arrest warrant. However, given the ongoing armed conflict, the dire humanitarian situation in Gaza, and the fact that numerous civilians are still being held hostage, no reasonable argument could be made that Judge Guillou would be in a position to delay consideration of this urgent and pressing question until mid-August 2024. He has accordingly become unable to perform his duties at the KSC.

4. As such, the Defence files the present request, and again asks the KSC President to substitute Judge Guillou, and assign a different Single Judge in these proceedings. In the alternative, the Defence makes an application for Judge Guillou’s disqualification.

II. PROCEDURAL HISTORY

5. On 29 May 2018, His Honour Judge Guillou was assigned as the Single Judge “to consider any request for judicial authorisation and related matters submitted by the Specialist Prosecutor prior to the filing of an indictment and the ensuing assignment of a Pre-Trial Judge under Article 33(1)(a) of the Law.”⁹ He remains assigned as Single Judge in the present proceedings.

⁷ ICC, ICC-01/18-164, Presidency, Decision replacing a judge in Pre-Trial Chamber I, Secret, 22 April 2024, reclassified as public on 20 May 2024.

⁸ Annex 1, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state> (“Statement”).

⁹ See Decision Assigning a Single Judge, pp. 1, 5.

6. Judge Guillou was elected as an ICC Judge on 6 December 2023¹⁰ and was sworn in as an ICC Judge, in a public ceremony, on 8 March 2024. His term officially commenced on 11 March 2024, in accordance with Regulation 9(1) of the ICC Regulations.¹¹

7. On 12 March 2024, the ICC Presidency issued its 'Decision assigning judges to divisions and recomposing Chambers', indicating that Judge Guillou had been assigned to the ICC Trial Division.¹² Specifically, Judge Guillou was assigned: (i) to Trial Chamber I, as an Alternate Judge in the ongoing *Abd-Al-Rahman* case in the Situation in Darfur, Sudan; (ii) to Trial Chamber II as a Judge in the *Katanga, Lubanga*, and *Ntaganda* cases in the Situation in the Democratic Republic of the Congo, the *Al Mahdi* case in the Situation in the Republic of Mali, as well as the *Ongwen* case in the Situation in Uganda, and (iii) to Trial Chamber IV, as a Judge in the *Banda* case in the Situation in Darfur, Sudan.¹³ The decision further stated that, "in accordance with article 35(3) of the Statute, **on the basis of the workload of the Court**", Judge Guillou would "**serve on a full-time basis from 19 August 2024**".¹⁴

8. This Request was dismissed by the President on 8 April 2024. The President considered, *inter alia*:

9. [...] the President's competence to substitute a Judge cannot be triggered unless that Judge becomes unable to perform his or her duties as a result of an actual engagement in another activity or occupation.

10. This is not the case with respect to Judge Guillou's situation. Judge Guillou will only exercise his judicial functions at the ICC as of 19 August 2024. It follows that until that time Judge Guillou remains available to perform his duties at the KSC. Accordingly, the President rejects the Request concerning Judge Guillou's substitution.

[...]

¹⁰ ICC ASP, '[2023 – Election of six judges – Results](#)', 6 December 2023.

¹¹ ICC-BD/01-05-16, Regulations of the Court, 12 November 2018 ("ICC Regulations").

¹² ICC, ICC-01/14-185, Presidency, Decision assigning judges to divisions and recomposing Chambers, 12 March 2024 ("12 March 2024 Decision"), para. 9, para. 37.

¹³ *Ibid.*, pp. 7-8.

¹⁴ *Ibid.*, p. 9.

14. [...] [a]ny arguments by Mr Thaçi in relation to Judge Guillou's availability and the potential impact his appointment as an ICC Judge has on the efficiency of proceedings before the KSC are premature. Thus, Mr Thaçi's suggestions as to the professional activities Judge Guillou may or may not have to undertake as a Judge of the ICC prior to taking up office in August 2024 and his ability to exercise his functions as a Single Judge before the KSC are speculative in nature.

[...]

18. As noted above, Judge Guillou's availability to exercise his functions as Single Judge is a matter for the President to assess and is administrative in nature. The President therefore finds Mr Thaçi's Alternative Request for the disqualification of Judge Guillou as Single Judge lacking in substance and summarily dismisses it.¹⁵

9. On 22 April 2024, the ICC Presidency granted Judge María del Socorro Flores Liera's Request for excusal from PTC1 in the *Situation in the State of Palestine* and decided to recompose PTC1 in the situation in the State of Palestine as follows: Judge Reine Alapini-Gansou, Judge Iulia Motoc, and **Judge Nicolas Guillou**.¹⁶ This decision was reclassified as public on 20 May 2024.

10. On 20 May 2024, the ICC prosecutor filed applications for warrants of arrest before PTC1 in the *Situation in the State of Palestine*, against five individuals: Benjamin Netanyahu, the Prime Minister of Israel, Yoav Gallant, the Minister of Defence of Israel, Yahya Sinwar, Head of " Hamas " in the Gaza Strip, Mohammed Diab Ibrahim Al-Masri, Commander-in-Chief of the military wing of Hamas, and Ismail Haniyeh, Head of Hamas Political Bureau.¹⁷

11. The Defence has not been advised of any orders issued by the KSC Presidency replacing Judge Guillou as the Single Judge in these proceedings. Judge Guillou still appears on the KSC website under 'The Judges appointed to the Roster of International Judges', rather than 'Former Judges'.¹⁸ As such, at the date of filing,

¹⁵ 8 April 2024 Decision (Emphasis added).

¹⁶ ICC, ICC-01/18-164, Presidency, Decision replacing a judge in Pre-Trial Chamber I, Secret, 22 April 2024, reclassified as public on 20 May 2024.

¹⁷ Annex 1.

¹⁸ KSC, '[Chambers](#)', 2024, see section titled 'The Judges appointed to the Roster of International Judges'.

Judge Guillou is a member of the Roster of International Judges at the KSC, a Judge of the KSC, and a Judge at the ICC, actively seized of the *Situation in Palestine* where applications for five arrest warrants have been pending since 20 May 2024.

III. APPLICABLE LAW

12. Article 26(1) of the KSC Law requires that a “Roster of International Judges” be established. Judge Guillou is a member of this Roster.¹⁹ Once on the Roster, Judges can then be assigned pursuant to Article 30(3) “to hear a pre-trial, trial, court of appeal or supreme court phase of a case or to hear a constitutional referral”. In accordance with Article 31(2), **“the Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.** Article 31(3) further provides that, “[i]f assigned pursuant Article 30(3), Judges shall **not engage in any other occupation of a professional nature.**” Article 26(4) of specifies that “[t]he Judges on the roster shall endeavour **not to undertake any activity which could compromise the President of the Specialist Chambers’ ability to assign them** to exercise functions as a Judge in the Specialist Chambers.”

13. The KSC has adopted ‘Rules on the Assignment of Specialist Chambers Judges from the Roster of International Judges’.²⁰ Rule 5 addresses the ‘Inability of Judges to Perform Duties’, and provides that **“[i]n the event that a Judge, due to recusal, disqualification or other compelling reasons, is unable to take up his or her duties at the time of the assignment to a Panel or becomes unable to perform his or her duties at a later stage, the President shall substitute that Judge.”**

¹⁹ KSC, ‘[Chambers](#)’, 2024, see section titled ‘The Judges appointed to the Roster of International Judges’.

²⁰ KSC-BD-02, Rules on the Assignment of Specialist Chambers Judges from the Roster of International Judges, 27 March 2017 (“Rules on Assignment of Judges”).

14. The conduct of KSC Judges is also governed by the Code of Judicial Ethics.²¹

Article 3 addresses the independence of Judges, and provides that:

(1) In the exercise of their judicial functions, Judges shall be independent of any authority and influence.

(2) Judges shall uphold the independence of their office and the authority of the Specialist Chambers and shall conduct themselves accordingly in carrying out their judicial functions.

(3) **Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence and respect for their judicial office.**

15. Article 10 of the same Code then addresses “Other Activity” of KSC Judges and provides that, “[i]n accordance with Article 26(4) of the Law, any activity undertaken by Judges other than that before the Specialist Chambers **shall be compatible with their judicial functions and the efficient and timely functioning of the Specialist Chambers.**”

16. Rule 20 of the KSC Rules²² governs the recusal or disqualification of Judges. Rule 20(1) provides that “[a] Judge shall not sit in any case in which he or she has a personal interest or has or has had any involvement which may affect or may appear to affect his or her impartiality, **judicial independence or the integrity of the proceedings.**”

17. Rule 20(3) then provides that “[a] Party may apply to the President for the disqualification of a Judge immediately, but no later than ten (10) days after the grounds on which the application is based become known to the Party.” A Judge whose disqualification is sought may recuse himself or herself after being notified of the application for disqualification. If the President considers that the request is

²¹ KSC-BD-01/Rev1/2023, Code of Judicial Ethics for Judges Appointed to the Roster of International Judges of the Kosovo Specialist Chambers, 24 March 2023 (“KSC Code of Judicial Ethics”).

²² KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”).

vexatious, misconceived, frivolous or lacking in substance, he or she shall summarily dismiss it as soon as possible. However, “[i]n any other case, the President shall assign a Panel of three Judges to determine whether the Judge should be disqualified.”

IV. SUBMISSIONS

A. TIMING OF THE REQUEST

18. The present request is being made in two parts. First, the Defence is asking that the President replace Judge Guillou as the Single Judge in the present proceedings. There is no applicable time limit for this primary request.

19. In the alternative, the Defence is asking that Judge Guillou be disqualified. Rule 20(3) of the KSC Rules provides that “[a] Party may apply to the President for the disqualification of a Judge immediately, but no later than **ten (10) days after** the grounds on which the application is based become known to the Party.”

20. In this case, the assignment of Judge Guillou to the ICC PTCI in the Situation of Palestine was made public on 20 May 2024, the same day that the ICC Prosecutor applied to PTCI for the issuance of arrest warrants against five individuals.

21. The Defence submits that these new circumstances, disclosed on 20 May 2024, warrant the substitution or, in the alternative, the disqualification of Judge Guillou in the present proceedings. As such, the present request is filed within the applicable time limit in Rule 20(3) of the KSC Rules.

B. REQUEST FOR SUBSTITUTION

22. Judges assigned before the KSC must remain not only independent in the

performance of their functions,²³ but also available to exercise of their duties. Thus, they shall not engage in any other occupation of a professional nature,²⁴ nor in any activity which is likely to interfere with their judicial functions or independence,²⁵ and in the event that a Judge, due to recusal, disqualification or other compelling reasons, becomes unable to perform his or her duties, the President shall substitute that Judge.²⁶

23. Judge Guillou became unable to perform his duties before the KSC following his assignment to PTCI in the *Situation of Palestine* on 22 April 2024²⁷ and the ICC Prosecutor's applications for five arrest warrants before PTCI on 20 May 2024. In a statement issued on 20 May 2024, ICC Prosecutor Karim A.A. Khan KC declared:²⁸

"Today I am filing applications for warrants of arrest **before Pre-Trial Chamber I** of the International Criminal Court in the Situation in the State of Palestine.

[...]

In presenting these applications for arrest warrants, my Office is acting pursuant to its mandate under the Rome Statute. On 5 February 2021, **Pre-Trial Chamber I** decided that the Court can exercise its criminal jurisdiction in the Situation in the State of Palestine and that the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem. This mandate is ongoing and includes the escalation of hostilities and violence since 7 October 2023. My Office also has jurisdiction over crimes committed by nationals of States Parties and by the nationals of non-States Parties on the territory of a State Party.

Today's applications are the outcome of an independent and impartial investigation by my Office. Guided by our obligation to investigate incriminating and exonerating evidence equally, my Office has worked painstakingly to separate claims from facts and to soberly present conclusions based on evidence **to the Pre-Trial Chamber. [...]**"

²³ Article 31(1) of the KSC Law.

²⁴ Article 31(3) of the KSC Law.

²⁵ Article 31(2) of the KSC Law.

²⁶ Rule 5 of the Rules on Assignment of Judges.

²⁷ ICC, ICC-01/18-164, Presidency, Decision replacing a judge in Pre-Trial Chamber I, Secret, 22 April 2024, reclassified as public on 20 May 2024.

²⁸ Annex 1.

24. The ICC webpage on the Situation in Palestine further lists Judge Guillou as current member of PTCI and explicitly states it is now for the judges of the PTCI to rule on the applications for arrest warrants:²⁹

“Pre-Trial Chamber I
Judge Iulia Motoc (Presiding Judge)
Judge Reine Alapini-Gansou
Judge Nicolas Guillou
[...]

On 20 May 2024, the ICC Prosecutor filed applications for warrants of arrest **before Pre-Trial Chamber I:**

- Concerning Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri (Deif), and Ismail Haniyeh for war crimes and crimes against humanity allegedly committed on the territory of Israel and the State of Palestine (in the Gaza strip) from at least 7 October 2023;
- Concerning Benjamin Netanyahu and Yoav Gallant for war crimes and crimes against humanity allegedly committed on the territory of the State of Palestine (in the Gaza strip) from at least 8 October 2023.

It is now for the judges of the Pre-Trial Chamber I to decide whether the necessary standard for the issuance of warrants of arrest has been met.”

25. The presentation of Judge Guillou on the ICC website³⁰ also lists him as:

“Assigned to: Trial Division
Current chamber: Trial Chamber I, Trial Chamber II, Trial Chamber IV, **Pre-Trial Chamber I”**

26. While there is no set timeframe for a Pre-Trial Chamber’s decision on an application for an arrest warrant, no reasonable argument could be made that this process could start after mid-August 2024. Almost from the moment the ICC Prosecutor’s application for arrest warrants became public knowledge on 20 May 2024, the media and legal experts started to speculate on the timeframe within which the PTCI could rule on the application, suggesting a decision could be expected within one or two months, if not less, on the basis of the precedent before the ICC.³¹ Indeed,

²⁹ <https://www.icc-cpi.int/palestine>.

³⁰ <https://www.icc-cpi.int/judges/judge-nicolas-guillou>.

³¹ Annex 2: For instance, pursuant to an article from apnews.com, dated 20 May 2024, “A panel of three judges will now decide whether to issue the warrants and allow a case to proceed. Such decisions typically take **two months**.” An article from expansion.mx dated 22 May 2024 noted that the PTCI,

the ICC arrest warrants against Vladimir Putin, President of the Russian Federation, and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation, were issued in less than a month from the application being filed.³² The warrants against Russian military commanders Sergei Kobylash and Viktor Sokolov,³³ and against other heads of state, such as Libyan leader Muammar al-Qaddafi³⁴ and Ivorian President Laurent Gbagbo,³⁵ were also issued within about a month of the applications.

27. While the 8 April 2024 Decision considered that the Defence Request of 14 March 2024 was speculative and premature, this reasoning was based on the assumption that Judge Guillou was expected to work full-time at the ICC from 19 August 2024 only. Judge Guillou's assignment to the PTCI, and the application for five arrest warrants now pending before this Chamber, are new circumstances, which were accordingly not contemplated by the ICC President in its 12 March 2024

including Judge Guillou, was expected to issue its decision within around **two months**. Another article on atlanticcouncil.org, dated 20 May 2024, observed that "There is **no set time frame** in which the pretrial chamber must make its decision on the prosecution's application. The pretrial chamber will need to review the evidence submitted by the prosecution against the charges sought, but the chamber has previously acted with expediency to issue decisions granting arrest warrants **within about a month**." In an interview on aa.com.tr on 22 May 2024, Sergey Vasiliev, associate professor at University of Amsterdam's Law Faculty, observed that given the "urgency of the present matter, the high-profile character of the cases against the Hamas and Israeli leadership, and the dire nature of the humanitarian situation on the ground in Gaza," a decision could be expected "**within three to six weeks**." (Emphasis added).

³² The OTP applications were filed on 22 February 2023, and the arrest warrants were issued on 17 March 2023. See <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>, <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>, <https://www.icc-cpi.int/situations/ukraine>.

³³ The OTP applications were filed on 2 February 2024, and the arrest warrants were issued on 5 March 2024. See <https://www.icc-cpi.int/situations/ukraine>.

³⁴ The OTP application was filed on 16 May 2011 and decided on 27 June 2011; see ICC, [ICC-01/11-01/11-1](#), Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al Senussi", 27 June 2011; ICC, ICC-01/11-01/11-2, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, 27 June 2011.

³⁵ The OTP application was filed on 25 October 2011 and decided on 23 November 2011; see ICC, [ICC-02/11-01/11-1](#), Warrant Of Arrest For Laurent Koudou Gbagbo, 23 November 2011.

Decision, or by the KSC President in her 8 April 2024 Decision. These new circumstances now require Judge Guillou's substitution.

28. The 12 March 2024 Decision was issued "on the basis of the workload of the Court" at the time.³⁶ Since then, Judge Guillou's workload has changed. Rather than waiting until 19 August 2024 to begin full-time work, Judge Guillou must start immediately reviewing the underlying material submitted in support of the Prosecution application for arrest warrants. He will need to consider potentially complex jurisdictional questions, and familiarise himself with the Court's practice and caselaw on the applicable legal standards. Thus, Judge Guillou's involvement at the ICC is no longer "limited" or "occasional".³⁷ It is another occupation of a professional nature,³⁸ and it is impossible to contemplate judicial work of this importance and volume being done on the side.³⁹ As such, Judge Guillou is rendered unable to perform his duties at the KSC, as envisaged by Rule 5 of the Rules on Assignment of Judges. His role as ICC Judge is no longer compatible with his judicial functions and the efficient and timely functioning of the Specialist Chambers, in violation of Article 10 of the Code of Judicial Ethics.

³⁶ 12 March 2024 Decision, p. 9.

³⁷ The meaning of "any other occupation of a professional nature" was considered by the UN Secretary General in 1995, in the context of Judges of the International Court of Justice ("ICJ") occasionally moonlighting as international arbitrators; the UN Secretary General noted that the ICJ had: "in view of the judicial character of the activities involved, interpreted the bar to the members of the Court engaging in other occupations of a professional nature as not debarring **a limited participation of Judges** in other judicial or quasi-judicial activities of an **occasional nature**, as well as scholarly pursuits in the sphere of international law as members of learned societies or as occasional lecturers. The Judges accepting such **occasional activities** give the fullest precedence to their supervening duties as members of the Court." See UN General Assembly, A/C.5/50/18, *Conditions of service and compensation for officials other than Secretariat officials, Members of the International Court of Justice, Report of the Secretary-General*, 2 November 1995, para. 31 (emphasis added).

³⁸ Article 30(3) of the KSC Law.

³⁹ The Defence notes that in addition to his assignment before the PTCL, Judge Guillou is bound to contribute to the regular operation of the ICC, such as attending the ICC Judges' Induction Programme, participating in ICC Plenary sessions and deliberations, attending the annual ICC Judges' Retreat, engaging in continuing Judicial education, and that from mid-August 2024, he will form part of three ICC Trial Chambers, seized of cases across multiple ICC situations, which are in varied phases of proceedings, from the trial phase through to the reparations phase.

29. As such, pursuant to Articles 31(1) and (3) of the KSC Law, Rule 5 of the Rules on Assignment of Judges and Articles 3 and 10 of the Code of Judicial Ethics, the Defence asks the President to replace Judge Guillou as the Single Judge in the present proceedings. The President's competence to substitute Judge Guillou has been triggered because Judge Guillou has become unable to perform his or her duties as a result of an actual engagement in another activity or occupation.⁴⁰

C. IN THE ALTERNATIVE, REQUEST FOR DISQUALIFICATION

30. Should this request for substitution be denied, the Defence seeks Judge Guillou's disqualification, on the basis that his obligation of independence pursuant to Article 31 of the KSC Law, which requires him to be independent in the performance of his functions, and not to engage in any other occupation of a professional nature, can no longer be met.

31. Importantly, there is no requirement for the Defence to demonstrate that Judge Guillou's independence has, in fact, been undermined by his dual roles. In considering whether recusal is warranted due to a lack of independence, "[i]t is not necessary that a Judge's independence be actually compromised; it is sufficient if confidence in the judge's independence is compromised."⁴¹ In other words, the "question is inevitably

⁴⁰ 8 April 2024 Decision, para. 9.

⁴¹ A. Cassese, P. Gaeta and J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), p. 256. See also UNODC, 'Commentary on the Bangalore Principles Of Judicial Conduct', September 2017: "An individual who wishes to challenge the independence of a tribunal need not prove an actual lack of independence, although that, if proved, would be decisive for the challenge. Instead, the test for this purpose is the same as the test for determining whether a decisionmaker is biased. The question is whether a reasonable observer would (or in some jurisdictions "might") perceive the tribunal as independent. Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, the test for independence is thus whether the tribunal may be reasonably perceived as independent. See also, *Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00272, Decision on the Application for Recusal or Disqualification, 6 August 2021,

concerned with the appearance of judicial independence, in the eyes of reasonable outsider observers.”⁴² Given the urgency of the pending litigation in the *Situation in Palestine* and the extent of the material to be reviewed to assess the application for arrest warrants, in a situation to which Judge Guillou has only recently been assigned,⁴³ any reasonable observer may well believe that Judge Guillou’s fulfillment of his duties at the ICC will be to the detriment of an exhaustive consideration of issues pending in KSC proceedings, and of the efficiency of proceedings before the KSC.

32. It is imperative that any impartial and independent adjudicatory system is infallible to any questions of this kind. The independence of KSC Judges should be beyond reproach. Judge Guillou’s concurrent roles as ICC Judge and KSC Judge, has opened the door to these kinds of concerns over independence, and the integrity and efficiency of the present proceedings. Rule 20(1) of the KSC Rules provides that “[a] Judge shall not sit in any case in which he or she has a personal interest or has or has had any involvement which may affect or may appear to affect his or her impartiality, **judicial independence or the integrity of the proceedings.**” On this basis, the Defence requests Judge Guillou’s disqualification.

V. CONCLUSION AND RELIEF SOUGHT

33. In reliance on the above submissions, the Defence asks that the President:

ORDER the substitution of Judge Guillou as the Single Judge in these proceedings; OR, in the alternative,

para. 31: “At the outset, the President recalls the overarching precepts governing disqualification proceedings. As consistently found by various international and other judicial institutions applying the same standards, an unacceptable appearance of bias exists where the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias”.

⁴² ICC, *Prosecutor v Ntaganda*, ICC-01/04-02/06-2326-Anx1, Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute, 29 March 2019, para. 15, being the reasoning of the minority.

⁴³ He was assigned only on 22 April 2024 to the ICC PTCL.

ASSIGN a panel of three judges in accordance with Rule 20(3) of the KSC Rules, to determine the present application for disqualification.

[Word count: 4585 words]

Respectfully submitted,



Luka Misetic

Counsel for Hashim Thaçi

Tuesday, 28 May 2024

At New York, United States