Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/05-03/09**
Date: **2 April 2012**

THE PRESIDENCY

Before: **Judge Sang-Hyun Song, President**
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Cuno Tarfusser, Second Vice-President

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*
v.
ABDALLAH BANDA ABAKAER NOURAIN
&
SALEH MOHAMMED JERBO JAMUS

Public Document with Public Annex

Defence Request for the Disqualification of a Judge

Sources: **Defence Team of Abdallah Banda Abakaer Nourain**

Defence Team of Saleh Mohammed Jerbo Jamus

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

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Judge Chile Eboe-Osuji

I. Introduction

1. Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus face charges arising out of a battle on 29 September 2007 between armed groups from the Sudanese revolutionary movements and a company of Nigerian troops assigned to protect the African Union Mission in Sudan ("AMIS") Military Group Site ("MGS") at Haskanita. Nine soldiers of Nigerian nationality were killed and seven were seriously wounded. Vehicles and ammunition belonging to the African Union ("AU") were taken. The AU and Nigeria sit squarely at the centre of this case.

2. On 16 March 2012, Judge Chile Eboe-Osuji was assigned to Trial Chamber IV.[1] This Chamber will decide upon guilt or innocence, and, if applicable, sentence and reparations. Judge Eboe-Osuji, a superbly qualified jurist, was sworn in as a judge of the International Criminal Court ("the Court") on 9 March 2012 having been twice nominated as a candidate judge by Nigeria and twice officially endorsed for the position by the AU. During his judicial election campaign, Judge Eboe-Osuji published a commentary about the need to "heal the rift" between the AU and the Court in which he wrote:

> *For obvious reasons, alienation of the AU will not augur well for the Court. I anticipate here a demurrer to the effect that this amounts to mixing justice with politics. It certainly is. For, it will be a painful show of naïveté to presume otherwise.*[2]

3. Judge Eboe-Osuji's published commentary, the fact that he shares the nationality of the forces the Accused fought against, shares the nationality of the primary victim group, and was endorsed for his position by the

[1] ICC-02/05-03/09-308.
[2] See Reflexions in International Criminal Law, "Healing the Rift: the Impasse between the African Union and the International Criminal Court", 20 March 2010 which can be found at: http://ceboe-osuji.blogspot.com/2010/03/healing-rift-impasse-between-african.html. A copy of this commentary is provided in the Annex hereto.

government of Nigeria and the AU, establishes that his impartiality might reasonably be doubted.

4. Therefore, the Defence respectfully request the Presidency to convene a special plenary session in accordance with Rule 4(2) of the Rules of Procedure and Evidence ("Rules") and that the judges of this Court disqualify Judge Eboe-Osuji from acting as a judge in this particular case.

II. No Challenge to the Integrity or Competence of Any Judge

5. As set out below, the standard for disqualification of a judge at this Court does not depend on any showing of actual bias, but rather the appearance of grounds for "doubting" impartiality. The Defence wish to make it clear from the outset that they are in no way challenging the competence, integrity or professionalism of any judge at this Court. On the contrary, the Defence consider that all those who have acted or been appointed on this case are supremely well-qualified and have performed their functions with the utmost professionalism. Indeed, Defence counsel have the highest respect for Judge Eboe-Osuji's intelligence, integrity and judgment. The issue in this request is not his competence – he clearly is competent – nor is it whether he actually has any bias. The issue is whether a reasonable observer could reasonably doubt his impartiality in this case.

III. Legal Standard for Disqualifying a Judge

6. Judges should be disqualified in cases of apparent bias as well as cases of actual bias. This principle is recognised in the Rome Statute ("Statute") and the jurisprudence of this Court and is consistent with the approaches taken in both national and international jurisdictions. Judges should, therefore, be disqualified if the circumstances would lead a reasonable observer, properly informed, to reasonably doubt the judge's impartiality.

7. Article 41(2) of the Statute provides in relevant part that:

> *(a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. […] A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.*
>
> *(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.*

8. Rule 34(2) of the Rules provides in part that:

> *[...] a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based. The request shall state the grounds and attach any relevant evidence, and shall be transmitted to the person concerned, who shall be entitled to present written submissions.*

9. Rule 34(1) of the Rules provides that the grounds for disqualification of a judge, shall include, *inter alia*, the following:

> *(c) Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned;*
> *(d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.*

10. These grounds are not exclusive. First, Article 41(2) of the Statute specifically provides that "[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground".[3] Second, Rule 34(1) includes the phrase "the grounds [...] shall include, *inter alia*, the following [...]".[4] The drafting of both provisions, thus, indicates that the grounds for disqualification are not a closed list.

[3] Emphasis added.
[4] Emphasis added.

11. It is vital that there is no objective appearance of bias, especially in criminal cases, because "[j]ustice must not only be done, but should manifestly and undoubtedly be seen to be done."[5] Especially in this Court, where one objective is to reassure international public opinion that politics and national interests play no role in the adjudication of cases or the determination of punishments, it is critical that none of the small number of judges assigned to cases are seen to have any possibility of partiality.

12. In assessing whether there is an objective appearance of bias, the Presidency cited with approval the conclusion of the Appeals Chamber of the International Criminal Tribunal for Yugoslavia ("ICTY") that the appropriate test is whether "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias".[6] At the ICTY even such highly respected Judges as Judge Alphons Orie[7] and Judge Carmel Agius[8] have been disqualified, not because of any actual bias, but solely on the basis of reasonable perception of bias in that particular case.[9]

[5] *R v. Sussex Justice, Ex Parte McCarthy* (1923) 1 K.B. 256, p. 259. See also *Prosecutor v. Sesay et al.*, SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004 ("*Sesay* Disqualification Decision"), para. 16; Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005), p. 55.
[6] ICC-02/05-01/09-76-ANN2, p. 5 citing *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgment, 21 July 2000, para. 189; *Prosecutor v. Galić*, IT-98-29-A, Judgment, 30 November 2006, para. 39; *Prosecutor v. Brđanin and Talić,* IT-99-36, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, paras. 15, 19; *Prosecutor v. Šešelj*, IT-03-67-T, Order on the Prosecution Motion for the Disqualification of Judge Frederik Harhoff, 14 January 2008, para. 9. Note in *Furundzija*, the ICTY Appeals Chamber drew on an extensive survey of the jurisprudence of the European Court of Human Rights, the UK, Australia, Canada, South Africa, the USA, Germany, France, Italy, the Netherlands and Sweden to support the principal that the appropriate test is objectively perceived bias (see para. 189). In the UK, the test of objectively perceived bias set out in the case of *Porter v. Magill* [2002] 2 AC 357, 494H was most recently reaffirmed in the Supreme Court decision of *Helow v. Secretary of State of State for the Home Department and another* [2009] SC (HL) 1 ("*Helow* Disqualification Decision"), para. 14. The decisions of the ICTY may be taken into account by this Court pursuant to Article 21 of the Statute.
[7] Judge Orie is currently the Presiding Judge of the Pre-Trial Chamber assigned to the case *Prosecutor v. Mladić* (see http://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf).
[8] Judge Agius is currently Vice-President of the ICTY (see http://www.icty.org/sid/150).
[9] *In the case against Florence Hartman*, IT-02-54-R77.5, Public Redacted Version of Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer, 27 March 2009.

13. With regard to disqualification on grounds of "expression of opinions," some guidance may be drawn from the Special Court for Sierra Leone ("SCSL") where, in *Sesay et al.*, a Defence request for the disqualification of Judge Robertson was upheld based on passages in his book about the conflict. The SCSL Appeals Chamber held that:

> *[t]he crucial and decisive decision is whether an independent bystander so to speak, or the reasonable man, reading those passages will have a legitimate reason to fear that Justice Robertson lacks impartiality. In other words, whether one can apprehend bias.*[10]

14. The Defence submit that the involvement of a party in a judge's campaign for election may constitute a ground for disqualification. National jurisprudence on the point is limited, because not every State operates a system whereby judges are elected. However, the US Supreme Court has held that:

> *there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.*[11]

IV. <u>This Court should treat Nationality as a ground for Disqualification</u>

15. The Defence submit that the nationality of a judge is a relevant and, in some cases, decisive consideration. Any reasonable observer would expect that the natural sympathies of a judge towards fallen victims from his or her own country, who had sacrificed their lives in a mission they undoubtedly believed would serve the cause of peace, would make that judge more likely than one from a neutral country to find those who participated in this attack criminally responsible.

[10] *Sesay* Disqualification Decision, para. 15.
[11] *Caperton v. Massey*, No 08-22, 8 June 2009, p. 14. The decisions of national courts do not bind this Court. But the Defence submit that the Court's reasoning is unassailable; as a matter of common sense there must be a reasonable apprehension of bias where a party with a stake in a case contributes to the judge being placed on that case, by assisting in his / her election campaign.

16. On this issue, the credibility of the Court as an institution resolved to guarantee lasting respect for international justice is at stake.[12] The Court holds out the promise of a new, truly international court, which adjudicates cases not on the basis of political interests or power, but on the basis of universal principles of justice. Those States that have signed the Statute have compromised their own sovereignty and thereby exposed their own national militaries to the jurisdiction of the Court. Surely they did so confident in the expectation that the justice administered would be unbiased and that they would not be abandoning their own soldiers to justice administered by nationals of the very country they had fought against.

17. While case law from the a*d hoc* tribunals has found that the nationality of a judge cannot be grounds for disqualification at those tribunals,[13] the facts of those cases are dissimilar to the instant case and this jurisprudence is not dispositive. First, this Court is in a different position from the *ad hoc* tribunals. The Appeals Chamber has held that "[t]he International Criminal Court is not in the same position [as the ICTY and ICTR] in that it is beginning, rather than ending, its activities. In addition, being a permanent institution, it may face a variety of different and unpredictable situations."[14]

18. On this issue, the differences between an *ad hoc* tribunal created in response to a specific conflict and a permanent international court necessitate a different outcome. Where a tribunal is created to respond to a specific conflict, a judge's impartiality in relation to that conflict might be expected to be addressed at the stage of their appointment. Moreover, to disqualify a judge based on their nationality at the *ad hoc* tribunals would presumably have the effect of disqualifying that judge from all cases before that tribunal. Neither

[12] Statute, Preamble.
[13] *Prosecutor v. Šešelj*, IT-03-67-PT, Decision on motion for disqualification, 10 June 2003.
[14] ICC-01/04-169, para. 80.

consideration applies to a permanent international criminal court with a variety of cases arising from different situations involving diverse countries.

19. Second, the issue before the *ad hoc* tribunals was not the same as the issue raised in this case. In none of those cases was the challenged judge of the same nationality as the primary victim group. Nor had any of the judges written in defence of the actions of one of the main groups involved in the case before them.[15] For instance, in *Šešelj*,[16] the accused sought the disqualification of Judge Schomburg, a German national, on the basis that Germany was traditionally "hostile to Serbia". Thus, the challenge was considerably more tangential than in this case. It is noteworthy that no single judge who is or was a national of a state from the Former Yugoslavia has ever served on the ICTY bench. Similarly, no judge of Hutu or Tutsi ethnicity or Rwandan nationality has ever served as an ICTR judge. Certainly, there are many well-qualified judges of unquestionable integrity of these nationalities or ethnicities. Undoubtedly, the reason no judge from such background has been chosen to sit at these *ad hoc* tribunals is precisely because a reasonable outside observer might doubt their impartiality and the States that choose these judges were aware of the damage that such appointments would inflict upon the image of impartiality of those tribunals. Thus, the *ad hoc* tribunals have never faced the issue presented by the instant situation.

20. Third, the drafting history of the Statute suggests that nationality is a relevant consideration. At the Rome Conference, the draft of what became Article 41 included in square brackets a provision that judges should be excluded where they are a "[... national of a complainant State, [of the State on whose territory the offence is alleged to have been committed] or of a State of which the accused is a national]". Ultimately, there was insufficient agreement between

[15] cf. the position of Judge Robertson at the SCSL in the *Sesay* Disqualification Decision.
[16] *Prosecutor v. Šešelj*, IT-03-67-PT, Decision on motion for disqualification, 10 June 2003.

States for the words in square brackets to form part of the Statute. However, the fact that nationality was considered an issue demonstrates that the draftsmen did not consider that challenges to impartiality on grounds of nationality were foreclosed. The fact that nationality is not specifically mentioned in the final version of the Statute does not mean that it is not a relevant circumstance to consider – rather it means that nationality falls to be considered on the facts of specific cases.[17] Had the drafters of the Statute intended that nationality could never be grounds for disqualification they certainly would have written such a provision into the Statute. Instead, the Statue provides that disqualifications can be made when "impartiality might reasonably be doubted on any ground."

21. Fourth, rather than the various international *ad hoc* tribunals which have been set up to deal with conflict or case specific situations, the Defence submit that the appropriate comparators for this Court are the permanent International Court of Justice ("ICJ") and the permanent international human rights courts. None adopt the Utopian view that the nationality of a judge can never lead the reasonable observer to doubt that judge's impartiality. The ICJ has adopted specific rules to prevent the appearance of bias arising from the nationality of judges, thus, implicitly acknowledging that nationality can lead one to reasonably doubt impartiality even of judges of the most prestigious international courts. First, Article 31 of the ICJ Statute provides that where a national of one of the parties is on the bench, the other party may choose one of its own nationals to sit as a judge.[18] Second, Article 32 of the ICJ Rules of

[17] See e.g. the statement of Mr. Nyasulu on behalf of Malawi "whether nationality should be a ground for disqualification might depend on the circumstances of the particular case": United Nations Diplomatic Conference of Plenipotentaries on the Establishment of an International Criminal Court, 15 June – 17 July 1998, A/CONF.183/C.1/SR.15, 15TH Meeting of the Committee of the Whole, para. 79.
[18] The ICJ Statute can be found at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

Court provides that the President of the Court may not exercise his functions in respect of a case, if he is a national of one of the parties to the case.[19]

22. Similar provisions exist at the international human rights courts. Rule 8(2) of the Rules of Court of the African Court of Human and Peoples' Rights provides that "any Member of the Court who is a national of a State that is party to a case shall abstain from hearing that case".[20] Rule 8(3) provides that "a Member of the Court shall also refrain from hearing cases in which the State by virtue of which he/she was elected is a party". Article 10(2) of the Statute of the Inter-American Court of Human Rights provides that "[i]f one of the judges called upon to hear a case is a national of one of the States Parties to the case, any other State Party to the case may appoint a person to serve on the Court as an ad hoc judge".[21] Rule 13 of the Rules of Court of the European Court of Human Rights provides that "[j]udges of the Court may not preside in cases in which the Contracting Party of which they are nationals or in respect of which they were elected is a party".[22] The only function of these provisions is to avoid the appearance of bias which arises from a judge deciding international cases involving their own country.

23. This Court should not adopt a lower standard than the ICJ, or the international human rights courts given that this Court is concerned with criminal trials, where the accused face the prospect of losing their liberty if convicted. Moreover, since each Trial Chamber contains only three judges, the assignment of any single judge has a more significant impact on the composition of the bench than would be the case at the ICJ or the international

[19] The ICJ Rules of Court can be found at http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0.
[20] The Rules of Court of the African Court of Human and Peoples' Rights can be found at http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf.
[21] The Statute of the Inter-American Court of Human Rights can be found at http://www.oas.org/en/iachr/mandate/Basics/statutecourt.asp.
[22] The Rules of Court of the European Court of Human Rights can be found at http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf.

human rights courts, where the number of judges who hear a case is considerably larger. Indeed, as the world's permanent criminal court, this Court should follow the example set by other such entities which neutralize any appearance of bias by affirmatively dealing with the issue of nationality.

24. In cases concerning armed conflicts, the nationality of judges naturally leads one to doubt their impartiality. For example, the Prosecutor is currently reviewing requests to open investigations concerning the Russia-Georgia war of 2008.[23] If a charge were filed against a Russian commander, it would clearly raise doubts as to impartiality if a Georgian judge were to be appointed to the Trial Chamber. In such a scenario, regardless of the qualifications, integrity and absolute lack of actual bias by the judge, confidence in the Court would suffer due to a reasonable doubt as the judge's impartiality.

25. Moreover, it is certain that States and militaries all over the globe will be watching the Court's decision on this issue. If the Court were to adopt the position that nationality can never play a role in a motion for disqualification, States must accept that cooperation with this Court risks exposing their nationals to a trial by judges who are nationals of the very country they were fighting against. States Parties to the Statute and States which are considering becoming parties, big and small, will surely take note and confidence in this institution will suffer.

V. A Reasonable Observer Properly Informed Would Reasonably Doubt Impartiality on the Facts of this Case

26. A reasonable observer, who was properly informed about Judge Eboe-Osuji's nationality, his endorsement by the AU, nomination by Nigeria and his

[23] See e.g. Press Release, "Georgia preliminary examination: OTP concludes second visit to the Russian Federation" at http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/georgia/pr625.

previous expressions of opinion in defence of AU actions, would reasonably doubt his impartiality.

i) Nigeria is a victim in this case

27. Nigerians were the primary victims in the battle of 29 September 2007, as nine of the twelve alleged murder victims and seven of the eight alleged attempted murder victims were Nigerian nationals.[24] The allegation in this case is that the AU itself suffered direct harm from the incident. Mr. Banda and Mr. Jerbo are charged with the crime of pillage as various items, particularly vehicles and ammunition that apparently belonged to the AU or Nigeria, were looted or destroyed during or following the battle. Under Rule 147, the AU as the owners of the property would have the right to be heard as to the forfeiture of "specific proceeds, property or assets which have been derived directly or indirectly from the crime."

28. Moreover, although various countries including Kenya, Mali and Botswana contributed troops to AMIS, Nigeria played a particularly prominent role. The first Force Commander of AMIS, Major-General Okankwo, and the first Special Representative of the AU, Ambassador Babagana Kingibe, were both Nigerian. In or around June 2007, another Nigerian, General Agwai, was appointed Force Commander. Specifically, in relation to MGS Haskanita, the commander of the protection force, the relevant battalion commander and the relevant Sector Commander were all Nigerian.

ii) Endorsement of Judge Eboe-Osuji by the AU and Nigeria

29. The AU officially endorsed Judge Eboe-Osuji's campaign to be elected to the Court.[25] This support was important to his election success. Judge Eboe-Osuji

[24] ICC-02/05-03/09-79-Red, para. 101.
[25] http://www.au.int/en/sites/default/files/COUNCIL_EN_24_28_JANUARY_2011_%20EXECUTIVE_COUNCI

himself clearly expressed the hope that the AU's "repeated endorsements" would "make a difference this time".[26]

30. Judge Eboe-Osuji's was nominated as a candidate Judge for the Court in both 2008 and 2011. In the course of promoting his candidacy, Nigeria relied specifically on its role in AMIS in promoting peace in Darfur.[27] Moreover, Judge Eboe-Osuji also promoted his candidacy on the basis of Nigeria's "robust and consistent role in the pursuit of peace".[28]

iii) Publication defending the AU

31. On 20 March 2010, Judge Eboe-Osuji published a commentary entitled "Healing the Rift: the Impasse between the AU and the Court" on his blog.[29] In this article, Judge Eboe-Osuji defends the AU's actions in rejecting the obligation to arrest President Al-Bashir of Sudan and calling for a deferral of the case against him under Article 16 of the Statute.[30] In the course of so doing, he states that:

> *One important consideration in the effort to heal the rift is that the views of the AU must be treated with respect and dignity and given due regard. Failure to do that runs a great risk of alienating one of the—if not the—most important constituencies of this young Court [...] alienation of the AU will not augur well for the Court. I anticipate here a demurrer to the effect that this amounts to mixing justice with politics. It certainly is. For, it will be a painful show of naïveté to presume otherwise.*[31]

32. In the article, Judge Eboe-Osuji addresses what he terms the "rift" between the Court and the AU. He explicitly states that the "rift" was exacerbated by

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L_EIGHTEENTH_ORDINARY_SESSION.pdf at p. 55, and here: http://www.au.int/en/sites/default/files/EX%20CL%20Dec%20644-667%20(XIX)%20_E.pdf, p. 29.
[26] See "ICC Judicial Election: a Personal Message", October 2011 at http://eboe-osuji.com/message.htm.
[27] See "Speech by the Ambassador of the Federal Republic of Nigeria to the Royal Kingdom of the Netherlands, Dr. Nimota Nihinlola Akanbi, at the Occasion of the 7th Session of the Assembly of States Parties Meeting, The Hague Netherlands", 14-22 November 2008 at http://www.nigerianembassy.nl/index_Page5429.htm.
[28] See "ICC Judicial Election: a Personal Message", October 2011 at http://eboe-osuji.com/message.htm.
[29] See Annex hereto.
[30] See Annex hereto. In the Annex, the Defence have underlined the relevant parts of the commentary which show that Judge Eboe-Osuji aligns himself with the AU.
[31] See Annex, p. 6, para. 1.

the Court's actions concerning the situation in Darfur, the situation from which this case originates. Judge Eboe-Osuji also warns of the "the trauma of concrete and immediate chaos that will result from the spiraling out of control of Darfur and Sudan, were Bashir to be immediately and forcibly removed from office and arraigned at The Hague for trial."[32] He advocates treating the views of the AU with more respect because he is concerned that "alienation of the AU will not augur well" for the Court and because he argues that "good faith must be presumed" in regards to the AU's leaders.[33] Thus, Judge Eboe-Osuji defends the AU for accommodating the Al Bashir government while a critical part of the Defence in this case is that the AU was overly accommodating, thus, compromising its neutrality.[34]

33. Further, the commentary clearly reveals that Judge Eboe-Osuji is basically advocating for the *status quo* – that Al Bashir remain in power to pave the way for a peaceful transition. Mr. Banda and Mr. Jerbo in this case are actively fighting against the maintenance of this *status quo* whether on the battlefield or through political means.

iv) Issues which this Trial Chamber must confront

34. Whether the impartiality of Judge Eboe-Osuji can reasonably be doubted must be judged against the specific issues that the Trial Chamber in this case must resolve. On 16 May 2011, the Prosecutor and the Defence informed the Trial Chamber that Mr. Banda and Mr. Jerbo would only contest three issues at trial.[35]

[32] See Annex, p. 2, para. 5.
[33] See Annex, p. 6, para. 2; p. 3, para. 4.
[34] The Defence note the comments of Lord Hope of Craighead in the *Helow* Decision at para. 5 that "[h]ad there been anything to indicate that Lady Cosgrove had by word or deed associated herself with these views so as to indicate that they were her views too, I would have had no difficulty in concluding that the test of apparent bias set out in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, para 103 was satisified."
[35] ICC-02/05-03/09-148, para. 3. The three contested issues are: (i) whether the attack on the MGS Haskanita was unlawful; (ii) if the attack is deemed unlawful, whether the Accused were aware of the factual circumstances that established the unlawful nature of the attack; and (iii) whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.

35. The first and second contested issues require the Prosecutor to establish beyond reasonable doubt that MGS Haskanita was not a legitimate military objective, and that the Accused persons were aware that the attack was unlawful. At trial, the Defence will establish that intelligence information, including targeting information, was being passed to the Government of Sudan from within MGS Haskanita with the knowledge of the base command. This will require the Court to scrutinise the actions of the commanders at MGS Haskanita, as well as the support that they received from the Sector and Battalion commanders, both Nigerian. If the evidence at trial supports the Defence contention that the AMIS Haskanita base was being used as an intelligence asset by the Government of Sudan, the Chamber will have to make the courageous but necessary decision that the base was a legitimate military target. Any reasonable observer would expect that, all other factors being equal, a judge nominated for the position by Nigeria and endorsed by the AU would be more likely than a judge from any other country to reject Mr. Banda and Mr. Jerbo's justifications for the attack.

36. In relation to the third contested issue, the Defence contend that the evidence does not support a finding that AMIS and the MGS Haskanita site in particular met the requirements for a "peacekeeping mission", in part, because they failed to maintain their impartiality. It is the Defence's contention that, at the relevant time, AMIS was, perhaps unintentionally but effectively, assisting the Government of Sudan in its criminal campaign against the civilian population in Darfur and its military offensive against the revolutionary movements.

37. In so doing, the Defence will invite the Court to make highly critical judgments about AMIS. The Trial Chamber will have to decide on this issue which has unavoidable political implications for both the AU and Nigeria. In

light of Judge Eboe-Osuji's comments about the dangers of alienating the AU, the need to "heal the rift" and the acknowledgment that it would require "naïveté" to doubt that the remedy requires "mixing justice with politics", the reasonable observer would reasonably doubt impartiality on this contested issue. Moreover, on this contested issue, Judge Eboe-Osuji's prior statement that "good faith" must be presumed on the part of the AU, creates the appearance that he will not judge the evidence on this issue impartially.

38. In addition to the contested issues at trial, the Trial Chamber will need to resolve a number of procedural issues which impact on Mr. Banda and Mr. Jerbo's right to a fair trial. On 21 December 2011, upon an application made by the Defence, the Trial Chamber requested the AU to provide documents to the Accused pursuant to Article 57(3)(b), Article 64(6)(a) and Article 87(6) of the Statute.[36] The AU has not acknowledged nor responded to the request, save that on 27 January 2012 a legal officer at the AU Commission informed the Registry that the Commission was unable to respond "due to the preparation of and the ongoing elections at the AU Commission".[37] Given the importance of these documents to a fair hearing of this case, the cooperation of the AU with the Court is a live issue.[38]

39. On 27 July 2011, the Defence requested the Government of Nigeria through the Registry to "locate, obtain and provide" information that the Nigerian Government is in possession of that is relevant to the trial and determination of the truth of the facts surrounding the 29 September 2007 incident. To date, the Defence understand that the Registry has not received a response from the Government of Nigeria. The cooperation of Nigeria with the Court is, therefore, also a live issue in this case.[39]

[36] ICC-02/05-03/09-268-Red.
[37] ICC-02/05-03/09-284, p. 4.
[38]ICC-02/05-03/09-274, para. 17; ICC-02/05-03/09-234, paras. 24 – 27.
[39] ICC-02/05-03/09-274, para. 17.

v) The Pattern of Appointment of Judges to the Trial Chamber who are nationals of countries which contributed troops to AMIS

40. On 16 March 2011, the Presidency constituted Trial Chamber IV.[40] The three Judges appointed to the bench included Judge Joyce Aluoch and Judge Fatoumata Dembele Diarra. Judge Diarra is a national of Mali, the same nationality as the head of the Military Observer Mission and commander of the MGS Haskanita camp and also of one of the deceased AMIS soldiers. Judge Aluoch is a national of Kenya, also a country that contributed troops to AMIS and formerly worked with the AU as a distinguished member of the African Union Committee on the Rights of the Child.[41]

41. As noted above, on 16 March 2012, Judge Diarra, whose term had expired, was replaced by Judge Eboe-Osuji on Trial Chamber IV.[42]

42. Four judges at the Court are nationals of a country that contributed troops to AMIS. All four have been appointed to the Pre-Trial or Trial Chambers on this case.[43] To outside observers, the pattern of judicial appointments from AMIS contributing countries would reasonably raise questions given the improbability such repeated appointments would occur randomly[44] and the

[40] ICC-02/05-03/09-124.
[41] See http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/The+Judges/The+Judges/Judge+Joyce+ALUOCH/Judge+Joyce+ALUOCH+_Kenya_.htm.
[42] ICC-02/05-03/09-308.
[43] Judge Sanji Mmasenono Monageng of Botswana, the fourth judge from an AMIS troop-contributing country was appointed to the Pre-Trial Chamber that confirmed the charges against Mr. Banda and Mr. Jerbo and, thus, is not eligible to sit on the Trial Chamber.
[44] Because the three judges, who had participated in the confirmation hearing, are ineligible according to the Rules to sit on the Trial Chamber, there were 15 judges who could possibly have been assigned to a Trial or Pre-Trial Division and, therefore, assigned to this case. For the first of the judges, there was a 3/15 (or 1/5) chance of being assigned to Trial Chamber IV (3 positions for 15 judges). For the second (since the first judge is no longer one of the possibilities and only two positions remain), there is a 2/14 probability. So, for both judges from AMIS troop contributing countries to be selected for Trial Chamber IV, the probability was only 1/5 x 2/14 = 2/70 or 1/35. Judge Eboe-Osuji was one of six new judges when he was selected to fill Judge Diarra's vacancy. For all of these events to occur on the same case, the chances would be 1/35 x 1/6 = 1/210. In other words, the probability was less than one-half of one percent. Obviously, the reality is more complex as judges for the Appeals Chamber were already selected before the composition of Trial Chamber IV was decided and some judges may have been more and some less available because of other commitments. But the point is that, for the

fact that no other Trial Chamber is so heavily weighted towards AMIS troop contributing countries.

43. The assignment of judges at the Court is entirely discretionary and the procedure opaque. No criteria exist in the Statute, Rules, Regulations or published policies of the Court. No rationale is given when assignments are made. The result is that the reasons for a particular assignment will never be explained to the Accused or the public.[45] The pattern of appointments, combined with the lack of any explanation, would lead the reasonable observer to doubt impartiality.

VI. Conclusion and Relief Requested

44. Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus believe in this Court's promise to administer justice equally to the weak and the strong and to bring hope to victims of atrocity crimes. They share the trust that the people of Darfur, and victims from other conflicts in Africa, place in this Court. For that reason, they have taken the extraordinarily courageous step of voluntarily appearing before this Court. They continue to cooperate with the Court notwithstanding the risk they take of imprisonment and despite the fact that the Court has no means to affect their arrest in Sudan where the government criminalizes cooperation with the Court.

45. However, Mr. Banda and Mr. Jerbo do not seek martyrdom by submitting to a trial where the cards have been stacked against them. They believe they were justified in attacking the AMIS base at Haskanita and hope to be exonerated in a fair trial. Their Defence team is confident that, when all facts are known, an

perception of the international public, the consistent assignment in this case of judges from AMIS troop contributing countries, to the prejudice of the Accused, was unlikely to occur by chance. It is noteworthy that none of the other three Trial Chambers have two judges from AMIS troop-contributing countries.

[45] The Defence do not suggest actual bias on the part of the Court as an institution or the Presidency but it is inevitable that reasonable doubts about impartiality will be exacerbated by a pattern of appointments that suggest criteria favourable to one of the parties even though in actuality the pattern was purely the result of random events.

impartial trier of fact will find that they committed no violation of international law. They deserve, as do all accused before this Court, a fair trial from a bench free of any actual or perceived lack of impartiality. This will not be such a trial if a third of the Trial Chamber is composed of a judge who shares the nationality of the force they were fighting against at Haskanita, was nominated for his position by the government of the overwhelming majority of victims, was endorsed by the organization that itself was the owner of property pillaged in the attack, and who campaigned for his position in part by advocating the need to mix politics with justice to heal the rift between the AU and the Court. The credibility of this institution requires the removal of the eminently qualified Judge Chile Eboe-Osuji from this particular case.

Respectfully Submitted,

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Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 2nd Day of April 2012
At The Hague, The Netherlands

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