Cour
Pénale
Internationale

International
Criminal
Court

5 June 2012

Decision of the plenary of the judges on the "Defence Request for the Disqualification of a Judge" of 2 April 2012

I. Procedural history

1. On 2 April 2012, the "Defence Request for the Disqualification of a Judge"[1] (hereinafter "Defence Request") was filed before the Presidency by the defence in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (hereinafter "case"). The defence teams for Messrs Banda and Jerbo (hereinafter "defence") requested that a plenary session be convened, in accordance with rule 4(2) of the Rules of Procedure and Evidence (hereinafter all references to rules are to those of the Rules of Procedure and Evidence), and that the judges of the Court disqualify Judge Chile Eboe-Osuji (hereinafter "respondent") from the case.[2]

2. The defence submitted that a reasonable observer might reasonably doubt the impartiality of the respondent in the case on three grounds: (1) his nationality; (2) the endorsement of his candidacy as a judge by a regional body and by his state of nationality; and (3) the comments made in a blog written by him prior to his election as a judge.[3]

3. On the issue of nationality, the defence argued that the nationality of a judge is a relevant and sometimes decisive consideration in requests for disqualification, referring in this regard to the practice of the *ad hoc* tribunals and other international courts, as well as to the

[1] ICC-02/05-03/09-317.
[2] Defence Request, paragraph 4.
[3] Defence Request, paragraph 3.

drafting history of the Rome Statute.[4] In the current circumstances, it was submitted that the respondent shares Nigerian nationality with sixteen of the alleged victims in the case.[5]

4. The defence further argued, by reference to jurisprudence of the Supreme Court of the United States of America, that involvement in the campaign of a judge for election may also constitute a ground for disqualification,[6] referring to the fact that the respondent's campaign for election as a judge of the Court was supported by both Nigeria and the African Union (hereinafter "AU").[7]

5. In respect of the blog, the defence submitted that the content of the commentary entitled "Healing the Rift: The Impasse between the AU and the Court", published on 20 March 2010, demonstrated pre-conceived views on the part of the respondent in relation to both the AU and the government of the Sudan.[8] It was submitted that such views were relevant since the defence case invites the Trial Chamber to make highly critical findings in respect of the role of the AU in the Sudan, as well as in respect of its relationship with the government of the Sudan.[9] Further, the defence submitted that requests for co-operation had been made to both the AU and Nigeria without response, as such co-operation was a "live issue" in the case.[10]

6. On 4 April 2012, the Presidency requested a response to the Defence Request by 16 April 2012 from the respondent, pursuant to article 41(2)(c) of the Rome Statute (hereinafter all references to articles are to those of the Rome Statute) and rule 34(2).[11] The respondent provided such response to the Presidency on 16 April 2012.[12]

7. Noting that article 41(2)(c) provides that "[a]ny question as to the disqualification of a judge shall be decided by an absolute majority of the judges", a plenary session of judges was convened on 25 April 2012 to consider the Defence Request. The plenary session was

[4] Defence Request, paragraphs 15-25.
[5] Defence Request, paragraph 27.
[6] Defence Request, paragraph 14.
[7] Defence Request, paragraphs 29-30.
[8] Defence Request, paragraphs 31-33.
[9] Defence Request, paragraphs 34-37.
[10] Defence Request, paragraphs 38-39.
[11] ICC-02/05-03/09-321-Anx1.
[12] ICC-02/05-03/09-321-Anx2.

attended in person by Judges Song, Monageng, Tarfusser, Kaul, Kuenyehia, Kourula, Ušacka, Trendafilova, Aluoch, Van den Wyngaert, Fernández de Gurmendi, Ozaki and Morrison, as well as by Judges Carmona, Herrera Carbuccia and Fremr via teleconference. Accordingly, with sixteen judges present, the absolute majority required for any decision was nine.

8. During the deliberations, a number of judges expressed concerns about the length and tone of the respondent's submission.

II. Background

9. On 16 March 2012, the Presidency assigned the respondent to Trial Chamber IV to hear the case.[13] The accused in the case are alleged to have unlawfully attacked the African Union Mission in Sudan (hereinafter "AMIS").[14] The actions of the AU and AMIS will be in dispute in the trial, as the Trial Chamber will need to determine whether: (1) AMIS was a peacekeeping mission[15], (2) the accused was aware that an attack on AMIS was unlawful[16], (3) AMIS was impartial in its dealings with all parties to the conflict[17], and (4) the victims were unlawfully killed.[18]

III. Relevant legal provisions

10. Article 41(2)(a) sets the standard for the judges of the Court with respect to impartiality: "[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground." Non-exhaustive grounds for disqualification are mentioned in this article and in rule 34. The latter provides in sub-rule 1:

> [...] the grounds for disqualification of a judge, the Prosecutor or a Deputy Prosecutor shall include, *inter alia*, the following: [...]
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> (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

[13] Decision replacing a judge in Trial Chamber IV, ICC-02/05-03/09-308, 16 March 2012.
[14] Corrigendum of the "Decision on the Confirmation of the Charges", ICC-02/05-03/09-121-Corr-Red, 7 March 2011, paragraphs 1-2.
[15] Confirmation Decision, paragraph 63(ii).
[16] Confirmation Decision, paragraphs 65, 76.
[17] Confirmation Decision, paragraph 63(ii).
[18] Confirmation Decision, paragraphs 93, 101, 105.

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.

11. The judges noted that the Defence Request did not allege any actual bias on behalf of the respondent, but was rather concerned with the *appearance* of grounds to doubt his impartiality.[19] It was considered that the relevant standard of assessment was whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the respondent.[20]

IV. Explanation of the view of the majority of the judges

12. An absolute majority of the judges, consisting of Judges Song, Monageng, Tarfusser Kuenyehia, Kourula, Trendafilova, Aluoch, Ozaki, Morrison, Carmona and Herrera Carbuccia, considered that the Defence Request was without merit for the following reasons.

13. With respect to the test elucidated in paragraph 11, the majority emphasised that such test was concerned not only with whether a reasonable observer *could* apprehend bias, but whether any such apprehension was objectively reasonable.

14. The majority first considered that the disqualification of a judge was not a step to be undertaken lightly, noting that a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice.[21] When

[19] Defence Request, paragraph 5.
[20] See Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v, Omar Hassan Ahmad Al Bashir*, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, 19 March 2010, ICC-02/05-01/09-76-Anx2, page 6.
[21] See e.g. Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, 23 September 2009 as contained in ICC-01/04-01/06-2138-AnxIII, 13 November 2009, page 6; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Decision on Vojislav Šešelj's Motion to Disqualify Judge Alphons Orie, 7 October 2010, paragraph 11; *Prosecutor v. Milan Lukić*

assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.[22]

A. Nationality

15. In respect of the nationality shared by the respondent and the alleged victims, the majority considered that although the nationality of a judge may be potentially relevant to the application of article 41(2)(a), in the present case, the mere co-incidence of shared nationality with some of the alleged victims did not provide a basis to reasonably doubt the impartiality of the respondent. Moreover, the fact that the accused persons are of a different nationality to the respondent in no way alters the mere co-incidental nature of the congruence of nationality between the respondent and some of the alleged victims.

B. Election campaign

16. In respect of the endorsement by Nigeria of the respondent's candidacy for election as a judge in both 2009 and 2011, the majority considered that article 36 provided for the nomination of judges by States Parties and that the exercise of that procedure for the nomination of judges was, in itself, insufficient to provide a basis to reasonably doubt the impartiality of the respondent. In respect of the endorsement by the AU of the respondent's candidacy in the judicial elections held in December 2011, the majority regarded such endorsement as a customary regional procedure, a characterisation which is not altered by the fact that such endorsement may turn out to be practically significant in the context of a

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and Sredoje Lukić, Case No. IT-98-32/1-T, Decision on the Motion for Disqualification 12 January 2009, paragraph 3; *Prosecutor v. Blogojević*, Case No. IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008, paragraph 3; *Prosecutor v. Sejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo,* Case No. IT-96-21-A, Appeals Judgment, 20 February 2001, paragraph 707.

[22] Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v, Omar Hassan Ahmad Al Bashir*, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, 19 March 2010, ICC-02/05-01/09-76-Anx2, page 7; See *Prosecutor v. Brdanin & Talic*, IT-99-36, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000, paragraph 17; *Prosecutor v. Stanislav Galić*, IT-98-29-A, Appeals Chamber Judgment of 30 November 2006, paragraphs 41 and 44; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4, Appeals Chamber Judgment of 1 June 2001, paragraph 269.

judge's campaign. No evidence had been presented to demonstrate that the degree of support for the respondent's candidacy offered by either the AU or Nigeria was in any way extraordinary, thus there was no basis to depart from the ordinary position that election formalities do not suffice to doubt the impartiality of a judge.

C. Blog commentary

17. In respect of the respondent's blog commentary, the majority of judges considered that the content of the blog, which focused on the AU's request to the United Nations' Security Council for a deferral pursuant to article 16 in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (hereinafter "Al Bashir Case"), was insufficiently connected to the issues in the case against Messrs. Banda and Jerbo. For example, the blog commentary made no mention whatsoever of the case, let alone to the guilt or innocence of the accused. Further, the blog commentary did not take any substantive position on the aforementioned deferral request, but merely offered an assessment concerning the international response to such request. In the absence of a genuine link between the blog commentary and the case, no reason to doubt the respondent's impartiality was demonstrated.

18. Further, the majority considers that the blog commentary does not demonstrate any appearance of favour to the AU. The majority considered that the commentary was general in nature, calling for acceptance of the good faith of the AU position in requesting an article 16 deferral. In tenor, it noted the need for "respect", "dignity" and having "due regard" to the AU; all neutral notions which are insufficient to cause a reasonable observer to doubt the respondent's impartiality in determining evidence in a case that might relate to actions of the AU.

19. The majority also considered that merely having expressed an opinion on an issue generally concerned with the AU and the situation in the Sudan, namely, the international response to the request for an article 16 deferral, the latter being a legal mechanism provided for in the Rome Statute, arising from the Al Bashir Case, could not lead to a reasonable view that the respondent would be unable to impartially determine the case. In this respect, the Court had previously determined that the fact that a judge had, prior to assuming judicial office, been involved in considering and adopting a report involving a

fact-finding mission to the Darfur region of the Sudan in her capacity as a Commissioner to the African Commission on Human and Peoples' Rights, did not later prevent that judge from participating in cases in the situation in Darfur before the Court.[23] Similarly, the International Criminal Tribunal for the former Yugoslavia had held that the fact that a judge was previously involved as an "interviewer" for a non-governmental organisation which sought to gather evidence to forward to the United Nations Security Council's Commission of Experts to analyse evidence of serious violations of international humanitarian law committed during the conflict in the former Yugoslavia, was an insufficient basis upon which to found an appearance of bias.[24] Thus, it was evident that formations or expressions of opinion tangentially connected to a case did not necessarily give rise to disqualification. In view of the above precedents, a reasonable observer would be similarly unconvinced that there existed an appearance of bias by virtue of the respondent having previously made general legal comments concerning the AU and the Sudan.

20. Further, the majority considered that the blog commentary was not contrary to any position taken by the Court, considering that it in no way questioned the decision of the Court to issue a warrant of arrest against President Al Bashir, but merely questioned the procedures concerning the article 16 deferral request, a matter which fell to the Security Council and was completely outside the jurisdiction of the Court itself. In the relevant passage of the blog commentary in which the respondent made reference to a "middle course",[25] the respondent did not advocate that course, but merely made the point that, contrary to the manner in which the debate on that topic was normally framed, the middle course existed. Moreover, even if the blog commentary had advocated such "middle course", it would not have been directly relevant to the case against Messrs Banda and Jerbo. Thus, in addition to an insufficient link between the case and the blog commentary, there was also nothing in the content of the blog commentary which would have caused a reasonable observer,

[23] Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v, Omar Hassan Ahmad Al Bashir*, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, 19 March 2010, ICC-02/05-01/09-76-Anx2.
[24] *Prosecutor v. Vojislav Seselj*, IT-03-67-T, Order on the Prosecution Motion for the Disqualification of Judge Frederik Harhoff, Order of the President of 14 January 2008.
[25] ICC-02/05-03/09-321-Anx2, page 50.

properly informed, to understand the respondent to have been generally biased in favour of positions of the AU.

V. Explanation of the views of the minority of the judges

21. A minority of judges, consisting of Judges Ušacka and Fremr, considered that the Defence Request was well-founded for the following reasons.

22. The minority found that the standard of rule 34(1)(d) of the Rules of Procedure and Evidence is also applicable to opinions expressed before taking office as a Judge of the Court and pointed to the importance of the values of impartiality and independence of the Judges within the Court's legal framework[26] and for the preservation of the Court's integrity. From the viewpoint of a reasonable observer, properly informed, the minority found that the impartiality of the respondent could be affected in relation to the case.

23. First, there was a strong nexus between the expression of opinion in the blog commentary and the case. The blog commentary was a long statement of opinion related to the Al Bashir Case. In the blog commentary, the respondent expressed the following opinion with respect to the future of the relationship between the Court and the AU:

> 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.[27]

24. The attack on AMIS that will be prosecuted in the case occurred prior to this statement. In the blog commentary, the respondent also called for a middle ground in approaching President Al Bashir and the government of the Sudan: "[t]he point rather is that the available choices are not limited to either (a) perpetual tyranny that promises ostensible social stability or (b) instant removal and prosecution that yields instant chaos to society.

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[26] *See* articles 36(3)(a), 40, 41, 45, 64(8)(b), and 67(1) as well as rules 5(1)(a), 34, and 91 of the Rules of Procedure and Evidence.

[27] Chile Eboe-Osuji, "Reflexions in International Criminal Law, 'Healing the Rift: the Impasse between the African Union and the International Criminal Court'", 20 March 2010, ICC-02/05-03/09-321-Anx2, page 52.

There is a middle course."[28] This middle course ran, in his opinion, contrary to the actions of the Court, i.e. to issue an arrest warrant for Al Bashir while he was still in office.[29]

25. In respect of the relevant details of the case, it is recalled that Nigerians were killed or injured and AMIS property was allegedly looted.[30] The Confirmation Decision mentioned the AU about thirty times in connection with AMIS. Excerpts from witness statements showed that evidence in the case will merge AMIS and the AU as if they are the same entity.[31] Further, the Trial Chamber will need to determine issues concerning the nature and actions of AMIS and whether the Nigerians were victims of unlawful killing.

26. Thus, while the blog commentary did not directly relate to the case but to the Al Bashir Case, both cases stem from the same situation and concern similar actors. However, unlike the Al Bashir Case, the AU was directly implicated in the facts under prosecution in the case. It was also not negligible that there was an allegation relevant to the case that AMIS (and the AU) did not act impartially, as required from a peacekeeping mission. The roles of and relationship between the AU and the government of the Sudan will be determinative factors in the trial. Although in 2010 the respondent did not, and objectively could not, express an opinion on the individual criminal responsibility of Messrs. Banda and Jerbo, he did create the impression of acceptance of the AU's viewpoints and expressed the need (and the will) not to "alienate" the AU from the Court. The blog commentary expressed the personal opinion of the respondent with respect to the AU and was not an official statement.[32] Further, the middle course proposed by the respondent in his blog commentary in relation to the Al Bashir case ran contrary to the judicial steps taken by the Court according to its legal framework – to issue an arrest warrant for President Al Bashir while he was still in office.[33]

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[28] *Ibid.*, page 50.
[29] Warrant of Arrest for Omar Hassan Ahmed Al Bashir, ICC-02/05-01/09-1, 4 March 2009.
[30] Confirmation Decision, paragraphs 2-3, 90-93.
[31] See, e.g., Confirmation Decision, paragraph 68, "the reason given for the attack was that the AU was giving information to the [G]overnment of Sudan about rebel positions.", paragraph 55, footnote 69, "when they shouted like this, they attacked the African Union compound."
[32] With respect to the criterion of the personal character of a statement, *see Prosecutor v. Anto Furundžija,* Case No. IT-95-17/1-A, Appeals Chamber Judgment of 21 July 2000, paragraphs 198-203; *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, and Esad Landzo,* Case No. IT-96-21-A, Appeals Chamber Judgement of 20 February 2001, IT-96-21-A, paragraphs 699-701.
[33] For a discussion of the criterion of the acceptance of an opinion that is in line with international law, *see Prosecutor v. Anto Furundžija,* Case No. IT-95-17/1-A, Appeals Chamber Judgment of 21 July 2000, paragraphs 201-202.

27. During the trial, evidence will be presented concerning the AU, which will need to be weighed by the respondent. In addition, Trial Chamber IV is also in charge of facilitating cooperation with the AU when requested by the defence.[34] From the viewpoint of a reasonable observer, the personal opinion held by the respondent might create the impression that he could favour positions taken by the AU.

28. Second, several months ago the respondent was heavily supported by the AU in his 2011 election campaign. The AU endorsed him twice during the 2011 election over the seven other candidates from AU member states. The respondent referred to these endorsements on his campaign website during the election and expressed the hope that the endorsements "will make a difference this time".[35] Thus, the respondent himself acknowledged that the AU's support was instrumental to his election.[36] The election campaign, the endorsement of his candidature by the AU, as well as the personal character of his statement are factors that add to the concerns about the expression of opinion. Alone, however, as pointed out by the majority, factors such as election campaigns or endorsements by states hardly suffice to create doubt concerning the impartiality of a judge.

29. Third, in addition to the conduct of the respondent, his nationality should be considered because he holds the same nationality as most of the victims in the case. While nationality should not automatically be grounds for disqualification, in this specific case it is an aggravating factor because the accused persons have a different nationality and belong to a group that attacked AMIS, of which Nigerians formed a large part.

30. Based on the totality of these considerations, a reasonable observer could apprehend that the required impartiality of the respondent was affected. Therefore, his impartiality in handling the case must reasonably be doubted.

31. As an afterthought, it should not be disregarded how the expressed opinion, the election campaign and the nationality of the respondent will be viewed by the two accused persons. They appear at this Court voluntarily with the belief that they await justice from an

[34] See articles 57(3)(b), 64(6)(a) of the Rome Statute.
[35] Chile Eboe-Osuji, "ICC Judicial Election: a Personal Message", accessed at http://eboe-osuji.com/message.htm.
[36] *Ibid.*

impartial and independent court free of prejudice. The possible impact of the conduct discussed above on their perceptions might be deeply problematic.

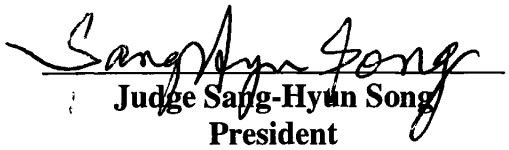
32. The minority concluded that this Court has a special responsibility as a permanent international tribunal with a blend of legal systems and global contexts. As such, the respondent's shared nationality with the victims in the case, when evaluated in conjunction with his affinity for the AU, views expressed in his blog, and his election campaign, could adversely affect his impartiality in this discrete case. Therefore, the minority would have held to disqualify the respondent from sitting on the case.

VI. Abstentions

33. Judges Kaul, Van den Wyngaert and Fernandez de Gurmendi abstained from the decision. Judge Kaul was of the view that more time for further discussion was needed to clarify the issues involved. Judges Van den Wyngaert and Fernández de Gurmendi, whilst supporting the majority position, considered that the decision needed to be postponed in order to allow time for further discussion of the procedural aspects involved.

In light of the foregoing, the plenary of judges, by absolute majority of eleven, with two judges in disagreement and three judges abstaining, decided to:

Deny the Defence Request.



Judge Sang-Hyun Song
President