

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/09

Date: 19 March 2010

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Fatoumata Dembele Diarra, First Vice-President
Judge Hans-Peter Kaul, Second Vice-President

**SITUATION IN DARFUR, SUDAN
IN THE CASE OF
THE PROSECUTOR
v. OMAR HASSAN AHMAD AL BASHIR**

Public

Notification of the decision on the request for excusal of a Judge

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

The Office of the Prosecutor
Mr. Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy-Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims
Ms Paulina Massida

**The Office of Public Counsel for the
Defence**
Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section
Mr Esteban Peralta Losilla

Deputy Registrar
Mr Didier Preira

Victims and Witnesses Unit
Ms Maria Luisa Martinod-Jacome

**Victims Participation and Reparations
Section**
Ms Fiona Mckay

Other
Pre-Trial Chamber I

The Presidency of the International Criminal Court;

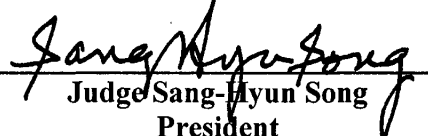
Having before it the request by Judge Sanji Monageng entitled “Request for recusal pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of procedure and Evidence” dated 25 February 2010;¹

Noting its decision of today’s date in which it denied the abovementioned request;²

Hereby

Orders the Registrar to notify this Notification and its annexes to the relevant parties and participants in the case.

Done in both English and French, the English version being authoritative.


Judge Sang-Hyun Song
President

Dated this 19 March 2010

At The Hague, The Netherlands

¹ Annex 1.

² Annex 2.

ANNEX I

Cour
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International
Criminal
Court

2010/PRES/155

Les Chambres

26.02.10

The Chambers

HA
CD

Internal memorandum
Memorandum interne

To À	Presidency	From De	Judge Sanji Mmasenono Monageng
Date	25 th February 2010	Through Via	
Ref.	SMM/PS/2010/01	Copies	Judge Steiner, President of PTC Division
Subject Objet	Request for recusal pursuant to article 41 (1) of the Statute and rules 33 and 35 of the Rules of procedure and Evidence		

RE: THE CASE OF THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR

1 I wish to draw your attention to the fact that while I was a Commissioner of the African Commission of Human and Peoples' Rights, which is an organ of the African Union, a position I have since relinquished, I participated in a fact finding mission report on Darfur, the Sudan.

2 The Commission has a mandate to undertake fact finding missions to respective member states of the African Union, on receipt of allegations of serious or massive human rights violations. From 8th to 18th July 2004 some members of the Commission undertook such a mission. Although I was not part of the said mission, I was part of the eleven Commissioners who considered the draft report and adopted it. That report has since been adopted by the Assembly of Heads of State and Government.

3 In the course of our investigation, the Government of the Sudan informed us that there was no genocide in Darfur (See Paragraph 35 bullet 4 of the attached report). When we met national human rights institutions and international humanitarian organisations, the report at Paragraph 38 bullet 5 indicates that some of the humanitarian agencies told us that the crisis in the Darfur region could not be considered as genocide.

4 The procedure is that the Commission should make recommendations to several stakeholders including the member state, emanating from its appreciation and understanding of the interviews/investigations it undertook. To this extent, one of the Recommendations that we made as a Commission, was that the Government of the Sudan

should accept the setting up of an International Commission of Enquiry – see Paragraph 137 (a). Further, that “the Government should allow the International Commission of Enquiry unhindered access to the Darfur region, to enable it to thoroughly investigate alleged human rights violations, with a view of further investigating as to whether or not genocide occurred” - see Paragraph 138.

5 I should confirm that the African Commission did not express any view as to whether or not genocide occurred in Darfur, but rather left it to the envisaged Commission of Inquiry to do that.

6 I, however, draw your attention to Paragraphs 120 to 123 of the enclosed report of the Commission, wherein the Commission came to the conclusion that war crimes and crimes against humanity had occurred in Darfur.

7 In view of the fact that the Appeals Chamber has recently remitted the above case to PTC1, of which I am a member, for reconsideration, I felt the need to disclose this information to you as required by the relevant articles of the Rome Statute and Rules of Procedure and Evidence, and to recuse myself from sitting as a Judge in this case. This is especially so, as this may entail making a finding as to whether or not genocide, and possibly later, war crimes and crimes against humanity, might have been allegedly committed in Sudan.

8 Pursuant to rule 33 (2) of the Rules of Procedure and Evidence, I submit this request confidentially. However, I would not object if the Presidency wished to make public the reasons for its eventual decision on this request (second sentence of rule 33 (2) of the Rules of procedure and evidence).

I look forward to your decision.

ANNEXURE III

THE AFRICAN COMMISSION'S REPORT OF THE FACT-FINDING MISSION TO THE REPUBLIC OF THE SUDAN UNDERTAKEN FROM 08 – 18 JULY 2004.

EX.CL/364 (XI)
Annex III
Page 1

**REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS'
FACT-FINDING MISSION TO THE REPUBLIC OF SUDAN IN THE DARFUR REGION**

(08 TO 18 JULY 2004)

I- INTRODUCTION.

1. The African Commission on Human and Peoples' Rights was established in 1987, by the Organisation of African Unity - OAU - (currently the African Union, AU), upon the adoption of the 1981 African Charter on Human and Peoples' Rights, with the mandate of ensuring the promotion and protection of human and peoples' rights on the African continent. Within the framework of its mandate and in order to maintain close contacts with State Parties and gather information about the prevailing human rights situation on the ground, the African Commission dispatches regular promotional and protection missions, as situations demand, to the State Parties to the African Charter on Human and Peoples' Rights.
2. The African Commission has followed closely, events in Sudan, especially the humanitarian and human rights situation in the Darfur region. The African Commission has been receiving reports from human rights NGOs, specialized agencies of the United Nations and other reliable sources, drawing its attention to the continuous deterioration of the human rights situation in the Darfur region, mainly due to armed conflict which has persisted for more than a year, involving the armed forces of the government of Sudan, armed rebel groups and armed tribal militias.
3. The reports highlighted the killing of civilians, particularly men from the Fur, Marsalit, and Zaggawa ethnic groups, who are indigenous to the Darfur region. Attacks by government forces involving ground forces and bombing raids, and in certain cases, allegations of coordinated government forces' attacks, involving armed Arab militias, have led to the destruction of hundreds of villages, looting crops, livestock and other goods, reportedly forcing hundreds of thousands of often impoverished, starving and terrorized villagers, to flee to other parts of Darfur, or outside the Sudan, in particular to the Republic of Chad.
4. International specialized agencies and humanitarian non governmental organizations, wishing to provide humanitarian aid to hundreds of thousands of displaced persons were, due to a number of reasons, particularly during the period prior to the signing of the N'djamena Humanitarian Ceasefire Agreement on the 8th April, 2004, reported to have faced numerous constraints, to deliver and distribute emergency relief supplies, whilst famine or epidemics were on the increase or about to start in the region, in view of the onset of the rainy season. The situation however improved when the government of Sudan lifted travel and work restrictions, which it had imposed against the agencies.

EX.CL/364 (XI)
Annex III
Page 2

5. The tens of thousands of Sudanese refugees currently in refugee camps in Chad are also said to be living in extremely difficult conditions, with very little food, water or shelter.
6. Under these circumstances, the African Commission on Human and Peoples' Rights is obliged to investigate and establish the human rights situation affecting the people of Darfur, as a result of the conflict.
7. Article 45(2) of the African Charter on Human and Peoples' Rights mandates the African Commission to ensure the protection of human rights in the State Parties to the Charter and in accordance with the provisions stipulated by the said Charter.
8. The Republic of Sudan ratified the African Charter on 18/02/1986 and is consequently a State Party to the said Charter.
9. Cognizant of the information briefly outlined above and desirous of the need to fulfil the mandate under the African Charter and its Rules of Procedure, and in accordance with its practices⁴³, the African Commission on Human and Peoples' Rights, at its 35th Ordinary Session⁴⁴, adopted a resolution to send a fact-finding mission to the Republic of Sudan, especially to the Darfur region, with a view to establishing the facts regarding allegations of serious and massive human rights violations in the said region.
10. The Fact-finding mission to Sudan was undertaken with the full approval of the Republic of Sudan, whose consent was officially sought and obtained by the Secretariat of the African Commission before dispatching the mission.
11. The objectives of the mission to Sudan were:
 - To discuss with the authorities in Sudan the human rights situation in the Darfur region;
 - To consult and discuss with all other relevant stakeholders (United Nations' agencies, national and international humanitarian NGOs, etc.) the human rights situation in the Darfur region;
 - To hear all actors, stakeholders and victims, capable of providing the mission with evidence to throw light on the human rights situation in the

⁴³ Within the framework of its protection mandate, the African Commission has already conducted fact-finding missions in some State Parties, notably Senegal (1-7 June 1996); Mauritania (19-27 June 1996); Sudan (1-07 December 1996); Nigeria (7-14 March 1997) and Zimbabwe (24-28 June 2002).

⁴⁴ The 35th Ordinary Session of the African Commission was held from 21st May to 4th June 2004 in Banjul, the Gambia.

EX.CL/364 (XI)
Annex III
Page 3

Darfur, particularly concerning allegations of serious and massive human rights violations;

- To verify allegations/facts relating to the human rights situation in the Darfur and consider with all actors, possible medium and long term solutions for arresting the situation;
- To arrange with the authorities in Sudan and, eventually the Embassy of Chad in Khartoum and officials of relevant specialized agencies of the United Nations, visits to camps of displaced persons within the Darfur region, and refugee camps located in Chad, and gather from displaced persons and refugees evidence on their situation as well as information on their needs.

12. The delegation of the African Commission on Human and Peoples' Rights mission to Sudan comprised the following:

- H.E Mrs. Salamata Sawadogo, Chairperson of the African Commission: Head of mission;
- Commissioner Angela Melo, Special Rapporteur on Women's Rights in Africa;
- Commissioner Bahame Tom Mukirya Nyanduga: Special Rapporteur on Refugees, Internally Displaced Persons, in Africa;
- Commissioner Mohammed Abdellahi Ould Babana: Commissioner in charge of promotional activities in the Republic of Sudan; and
- Mr. Robert Ayéda Kotchani, Legal officer at the Secretariat of the African Commission, who accompanied and assisted the mission.

13. The mission of the African Commission on Human and Peoples' Rights to Sudan took place from 8th to 18th July 2004. An earlier mission, which was planned to take place in early March 2004, could not proceed due to communication problems resulting in the late receipt of the request for authorization sent by the Secretariat of the African Commission to the authorities in Sudan.

14. Due to logistical, mainly transport, and security constraints, the mission was unable to visit all the places it intended to. The mission was, for instance, unable to visit the Sudanese refugee camps situated in Chad, because it was logistically not possible to cross the border from El Geneina into Abeche, Chad, without the prior authorisation of the Chadian government. The mission was unable to meet members of opposition political parties in Sudan. Several attempts to meet the opposition parties through both official and informal contacts did not yield the expected results.

15. Given the urgency of some issues observed by the mission, particularly: insecurity, sexual and gender based violence, problems of access to IDPs in the rural areas, involuntary repatriation of IDPs, the need to grant access to human

rights monitors to the Darfur region and the arbitrary detention of members of the political opposition and human rights activists opposed to the government handling of the Darfur conflict, the Chairperson of the Commission sent a letter to His Excellency Mr. Omar El Bashir, President of the Republic of Sudan, and copied to His Excellency Alpha Oumar Konaré, Chairman of the African Union Commission on 27th July 2004, requesting the adoption of urgent provisional measures regarding the issues outlined above.

16. After a brief introduction on the origin of the crisis in Sudan, this report outlines the essence of consultations held with different political and administrative leaders, representatives or members of national and international organizations operating in Sudan. The report then makes analytical observations on the various issues, including the mission's visits to camps for displaced persons and recommendations.

II- A BRIEF INTRODUCTION TO THE CRISIS IN DARFUR.

17. Sudan is situated in the north-east of Africa and covers a surface area of 2,505,810 km². It is the largest State on the African continent. It stretches about 2,250 km from north to south and about 1,950 km from east to west. Sudan has a population of over 30 million inhabitants and is divided into 26 states, which form a federal system of government. The southern part of the country, which has recently come out of a long civil war, has important petroleum reserves.
18. With natural borders extending over 700 km along the red sea, Sudan has borders with Kenya, Uganda and the Democratic Republic of Congo on the south; Central African Republic, Chad and Libya on the west, Eritrea and Ethiopia on the east and Egypt on the north.
19. Khartoum, the capital comprises Khartoum North, Khartoum and Omdurman, with an estimated population of about 6 million inhabitants. There are other major towns such as Port Sudan (the country's only major port situated on the Red Sea), Wad Medani (administrative centre of the most fertile region in the country), Gezira, Juba (capital of Equatoria region and the only major town in the south), El Obeid, (capital of Kordofan region) and El Fasher (capital of North Darfur on the western part of the country). Other major towns in the Darfur region are, Geneina, (capital of West Darfur), and Nyala, (capital of South Darfur).
20. The Darfur region is situated on the western part of Sudan. The region is semi-desert covering an area of about 500,000 km² and comprises the three States of Sudan: West Darfur, North Darfur and South Darfur. Darfur had a population of about 5 millions inhabitants composed of mainly the Massalit, Zaggawa, Fur, Tama, Masharia, Gemer of the African tribes, the majority of whom are farmers. There are also Arabs who are mainly pastoralists.

EX.CL/364 (XI)
Annex III
Page 5

21. Immediately after attaining its independence (in 1956), Sudan became a victim of a civil war between the North and the South, which ravaged the country. An interim peaceful period prevailed from 1972 to 1983. The civil war wrecked the Sudanese economy, which is now classified as one of the poorest countries in the world. Following the imposition of Sharia law by the Sudan government, and the adoption of Islamist policies, in the early 1980s, a civil war broke out once again between the Government of Sudan and the SPLM/A of Dr. John Garang representing the African and Christian tribes of Southern Sudan.
22. The civil war in the south of Sudan ended effectively following the IGAD sponsored talks and the signing of the Naivasha Peace Agreement in Kenya, in May, 2004 between the SPLM/A and the Government of Sudan.
23. While the Machakos and Naivasha peace process was gaining momentum for more than a year, commencing February 2003, an armed conflict broke out in the Darfur region, involving armed rebel groups which attacked government garrisons and security infrastructures, which included police stations, military aircrafts and other government properties. Official account and reports received by the Commission, corroborated by NGOs, indicate that small armed groups existed in the region in the past. However their influence on the frequent communal conflicts between pastoralist livestock keepers, and farmers was limited and, were often resolved through traditional mediation.
24. The present situation which is characterized by an all out civil war between the Government and the two rebel movements operating in the Darfur region, namely the Sudanese Liberation Movement (SLM) and Justice and Equality Movement (JEM), has seen the escalation of the conflict through the involvement of heavy military hardware, regular and indiscriminate bombing by the Sudanese air force helicopter gunships and Antonov planes, and the rampant abuses, specified below, committed by the *Janjawid* militia.
25. The rebel movements claim to be fighting against the Khartoum Government because of political and economic marginalisation of the Darfur region, and to defend the marginalized black population against attacks by Arab militia commonly known as the *Janjawid*. The government on the other hand says that it is fighting a rebellion, and it has a responsibility to re establish law and order in the Darfur region. This conflict has resulted in the killing of an estimated 30,000 to 50,000 civilians. Hundreds of villages have been destroyed, crops, livestock and other goods have been looted, forcing about 1,200,000 people to move to internal camps for displaced people within Darfur and about 150,000 refugees to flee to Chad.
26. Allegations of massive human rights violation by *Janjawid* militia, apparently the only force, which fought the rebels, when the violence broke out in early 2003 have been rampant. The *Janjawid*, were allegedly recruited among Sudanese tribes claiming to be of "arabic" origin. According to Roland Marchal, Researcher

EX.CL/364 (XI)
Annex III
Page 6

for studies and international research (CERI), an expert on the Horn of Africa, using such types of armed groups "*dates back to the first Ottoman colonization in the XIXth century. The British were also said to have resorted to the same practice to destroy the Darfur sultanate in 1915. This practice resurfaced in 1991, when a rebel leader in Southern Sudan attempted to take control of the Darfur.*"

27. Specialized agencies and NGOs seeking to channel humanitarian assistance to the affected people are, for many reasons, said to be facing enormous difficulties in doing so whilst famine and epidemic are on the increase in the region and that refugees and displaced persons are reportedly living in extremely difficult conditions with the imminent arrival of the rainy season: little food, difficult access to drinking water, makeshift shelter, cold weather etc.
28. When the government of Sudan officially announced the lifting of the travel, visa and work permit restrictions, international humanitarian organizations started organizing, in relatively safe conditions, relief for the affected people. But the situation is far from normal in the region as fighting continues in spite of the on-going peace negotiations under the auspices of the African Union and international community.

III- ORGANISATION OF THE MISSION.

29. At the start of its mission the African Commission's mission met Dr. Abdelmonem Osman Taha, the Rapporteur of the Advisory Council for Human Rights, the organisation designated by the Government of Sudan to coordinate the mission's programme. The mission then met H.E Ali Mohammed Osman Yassin, Minister of Justice, H.E. Najeep Elkhair the State Minister of Foreign Affairs of Sudan, Honourable Judge Abdel Diem Zumrawi, the Under Secretary, Ministry of Justice, as well as senior civil servants and representatives of national and international humanitarian organizations in Khartoum. The mission then visited the Darfur region where it was able to visit camps for displaced persons and hold discussions with political and administrative heads, humanitarian organizations operating on the ground and IDPs.
30. Upon its return to Khartoum, the mission held meetings with various Sudanese political and administrative leaders including, H.E Gen. Abdel Rahim Mohammed Hussein, the Minister of Interior, Hon Mubark Al Fadii Al Mahadi, Assistant to the President, Hon Dafalla El Haj Yousif, (former Chief Justice), Head of the National Commission of Inquiry on the Human Rights Abuses in the Darfur region, and officials of national and international humanitarian organizations.
31. While in Khartoum, the mission visited the African Union Mission in Sudan, and held discussions with the Administrative Officer for AUMS with regard to transportation logistics to and from, and within Darfur. The Government of Sudan in cooperation with the WFP had arranged flight schedules, which the mission utilised to go to El Fasher. Once the mission got into El Fasher, the daunting task

of transportation within Darfur became a major problem. However through the coordination between the AUMS in Khartoum, and the Chairman of the African Union Ceasefire Commission (CFC), in El Fasher, Brigadier General Okonkwo, the CFC provided an aircraft which enabled the Mission to visit the three Darfur states and back to Khartoum.

32. The CFC also facilitated with ground transport when the mission visited an IDP camp in Tawila, about one and half hour drive outside El Fasher, and Nyala. Otherwise, ground transport was facilitated by the Sudanese authorities.

A - Meetings and discussions with government officials.

33. Upon arrival in Darfur, the mission held discussions with the three Wallis (Governors) of North, West and South Darfur, who were accompanied by various state officials. The mission also met officials of the Office of the Coordinator for Humanitarian Affairs (OCHA) and a number of humanitarian agencies, which provided the mission with information on the Darfur crisis. A number of issues concerning the conflict were raised.

a) Origins of the conflict.

34. Senior government Ministers, state and government officials identified different causes of the conflict, and in particular gave the historical context of the conflict arising as a result of natural factors, national and sub-regional geopolitical conflicts, which had affected the Sudan for much of its post colonial history.
- the drought and desertification problem which began in the 1970s affecting the Sahelian countries had worsened the economic situation in the Darfur region in recent years. This situation has led to massive migration of livestock owners towards greener pastures in the south of the Darfur region, which is inhabited by farming tribes. The cyclical movement of the Arabic pastoralist due to shortage of pasture and water, and the traditional divide between these nomadic tribes and tribes of African origin, who are generally sedentary farmers have been at the core of communal conflicts which previously involved loss of life, cattle and stock theft and loss of property at a low scale compared to the current situation,
 - a longstanding civil war in southern Sudan which has raged for over 20 years, and wars between and within neighbouring states (Chad, The Central Africa Republic, Ethiopia, Libya - Chad etc.) have encouraged the massive movement of all kinds of arms in the Darfur region and entrenched a culture of carrying firearms which already existed among the people. Furthermore, many irregular foreign armed groups were said to have used Darfur's vast region as their bases, particularly during the Chadian civil war. Chad and Sudan have similar tribes across their common border,

EX.CL/364 (XI)
Annex III
Page 8

- furthermore, armed militia groups have, for the past years been intermittently formed the Darfur region to safeguard the interest of different tribes. To underline the culture of war and open possession and carrying of weapons, these groups have assumed such names as the *Pashtuns*, *the Tora bora*, *Peshmerga*, etc. In fact, 77% of persons aged 17 years and above living in the Darfur region possess a firearm. The very low level of education in the Darfur region and generalized poverty among the population, due to the region's enduring poor economic and social development performance indicators also represent key factors to be taken into consideration for a better understanding of the crisis affecting in the region, thereby making these youth to be easily enlisted by the armed groups,
- more recently, since 2002, political tensions within the ruling party and between the Government and opposition parties led to the withdrawal of a number of politicians from the Darfur region and other parts of Sudan sympathetic to the Darfur conflict from the ruling party (the National Congress Party) because of their opposition to the government handling of the Darfur crisis, in support of the armed rebel movements, which were fighting against the Government in Khartoum. The Sudan Liberation Movement (SLM) and the Justice and Equality Movement (JEM) were formed to defend interests of the people of Darfur, who claim to be marginalised by the central government.
- the rebellion started in early 2003 when rebels attacked police and military installations, which symbolised the Government's presence in the Darfur region. For a period of nine months the government had not mobilised to defend their positions. According to government ministers, at the beginning of the conflict the rebels killed about 100 military personnel, 64 police officers, and lost 6 military helicopters,
- as the conflict escalated, more than 80 police stations throughout the region were destroyed, leaving the people without adequate police protection. The government authorities saw their position weakened and overtaken. According to government ministers, the vacuum left by this situation allowed the pastoralist tribes to organise their own militia, the *Janjawids* to defend themselves against the rebels. At that point the *Janjawids* militia served the same military objectives, as that of the government.

b) Consequences of the conflict.

35. According to the Government:

- the number of displaced persons caused by the conflict in Darfur was estimated at about 1 million, who were split up among fifty or so camps identified in the Darfur region. The government has embarked on a repatriation programme, whereby it is « encouraging » internally displaced persons to go back to their villages.

EX.CL/364 (XI)
Annex III
Page 9

- number of refugees: the conflict in Darfur has resulted in a refugee population estimated at close to 200,000. These refugees are living in camps situated in Chad, across its common border with Sudan. The government informed the mission that 100,000 refugees had voluntarily repatriated back to Sudan, information which the mission was unable to verify,
 - serious and massive human rights violations: the conflict in Darfur has occasioned human rights violations: murders, rape, destruction, arson and plundering of villages. The government denied that rape had been committed, and stated that it had asked victims to report such cases to police stations. Government further stated that the victims could not identify the alleged offenders, therefore the rape allegations were not verifiable. The Government denied having deployed its military aircrafts and helicopters to attack villages indiscriminately, to have recruited or armed the *Janjawid* militia, or even to have coordinated military attacks with the said *Janjawid* militia,
 - the government stated that genocide or ethnic cleansing were not committed in the Darfur, even though serious human rights violations might have been committed in the region, just like any other place in a situation of war,
 - the government stated that the security situation had improved considerably compared to the period prior to the signing of the N'djamena Humanitarian Ceasefire Agreement, and due to the deployment of police. By July 2004, the government stated that it had deployed 3912 out of 6000 policemen, and was planning to rebuild the 89 police stations destroyed by the rebels, as part of government repatriation policy.
36. When asked to explain the problem concerning sexual and gender based violence, the government stated that it could not verify victims' allegations of rape by the *Janjawids*. The humanitarian agencies personnel however stated that they were receiving reports of rape from women, when they report at health centres for treatment.
37. Government ministers and officials explained to the mission that in the past when inter ethnic conflicts occurred in the Darfur, they were generally resolved by the government through the formation of traditional tribal Councils and Commissions of reconciliation. The Government ensured that damages were paid to victims and that the protagonists undertook to peacefully settle any future disputes. During the current crisis the Government has undertaken a number of measures to resolve the crisis. These include :
- The establishment of a Commission of Inquiry responsible for receiving complaints linked to the crisis in Darfur, commissioning of police

EX.CL/364 (XI)
Annex III
Page 10

investigations, which led to the arrest and prosecution of several suspects including *Janjawids*. Those found guilty were sent to prison where they are currently serving different sentences. Some of the cases are still in court;

- The establishment of a Reconciliation Commission to reconcile communities affected by the crisis ;
- The establishment of Commissions for Humanitarian Affairs in each of the three Darfur states ;
- The establishment of a Ministry responsible for Humanitarian Affairs to specifically manage the crisis ;
- The establishment of three Women Committees composed of eminent Sudanese women lawyers to look into the gender dimension of the crisis and make concrete proposals to the authorities;
- Distribution of food and other humanitarian assistances to displaced communities, with support from the international community;
- The gradual deployment of units from the police and army in the area affected by the crisis in order to restore security;
- Gradual restoration of social and developmental services (as in El Geneina where the local government worked out a poverty alleviation plan), in consultation with tribal leaders, for the return of displaced communities to their villages of origin through the reconstruction of destroyed villages, water supply systems, restoration of security, and health services, etc.

B- Meetings with national human rights organizations and international humanitarian organizations.

38. The mission held meetings with officials of a number international and national humanitarian organizations on humanitarian crisis in the Darfur region and best ways of addressing it. The list of organizations met is annexed to this report. They informed the mission about the following:

- during the entire period of this crisis, neither the government of Sudan nor the international community has put in place an effective system of protection for the population in Darfur,
- human rights observers should be deployed in the region in order to protect the civilian population and investigate alleged crimes,
- since 2000, the UN and the international community have received through reliable sources accurate information on the situation in the Darfur, but nothing was done about it then,
- human rights violations in the Darfur region have been committed by all the actors on the ground, which include government forces, the rebel forces, tribal militias, and in particular the *Janjawid* militia,
- some of the humanitarian agencies on the ground stated that the crisis in the Darfur region could not be considered as ethnic cleansing or genocide, even if the human rights violations are a cause of concern,

EX.CL/364 (XI)
Annex III
Page 11

- the delivery of humanitarian assistance to affected communities and displaced persons has, on the overall, been delayed, but had improved after the government of Sudan lifted restriction to work and travel to the Darfur,
- access to camps for displaced persons is relatively easy in the El Fasher and El Geneina towns ; but humanitarian organizations find it difficult to obtain the necessary authorization to do their work in the camps outside Nyala town,
- human rights violations are still going on in the South Darfur region where the *Janjawid* militia and rebel activity is still very active,
- the government's policy of forced repatriation of displaced persons to their villages of origin, is a problem in the sense that no practical arrangements for their return has been put in place; and lack of consultations with humanitarian agencies.

Security situation

- the organisations stated that the security situation in Darfur remains precarious. The on-going fighting in the region has lead to loss of human life, destruction of villages and property, forcing the population to flee the villages and preventing the free movement of persons and goods. The agencies were continuing to receive displaced person in the various IDP camps throughout the Darfur region. The mission was for instance discouraged from making any visit outside Nyala, in South Darfur, because of recent fighting there,
- when the mission arrived in El Fasher on 11th July 2004 at around 12: 15 (local time), the Chairman of the CFC had just arrived from Nyala where he had gone to verify a ceasefire violation in South Darfur. While in El Fasher itself, a ceasefire violation was reported on the same day when rebels attacked a local community, about one hour drive from El Fasher and captured the local emir. We learned upon return to Khartoum, five days later that the emir had been released,
- at the time of the mission, there was scarcity of aviation fuel at the three major airports in the Darfur region. Local transporters had refused to send their trucks from Khartoum, fearing rebel attacks, after a number of vehicles, including trucks carrying fuel were looted in Darfur, allegedly by rebel forces,
- the humanitarian agencies personnel, while acknowledging that the security situation in the IDP camps had improved, they indicated that there was still insecurity in areas surrounding IDP camps, and that women were attacked and raped by *Janjawid* militia whenever they ventured 3 to 5 kilometres radius outside the camps to fetch water and the ever dwindling stock of firewood for their cooking,

EX.CL/364 (XI)
Annex III
Page 12

- that notwithstanding the government's decision to lift work and travel restrictions for humanitarian agencies' staff, bureaucratic red tape, and roadblocks for security checks, restricted their capacity to deliver humanitarian assistance to IDPs, some of whom were still scattered across the vast Darfur region outside formal camps. The ICRC was conducting a survey to determine the exact number of IDPs who are still scattered in the rural areas, outside the established camps. OCHA identified a number of major concerns facing IDPs,
 - (i) physical safety of the vulnerable population,
 - (ii) the possibility of forced relocation and repatriation of IDPs,
 - (iii) sexual and gender based violence,
 - (iv) restriction to access to humanitarian assistance,
 - (v) violence against the civilian population.

39. The mission was informed about the government repatriation policy. The humanitarian agencies staff observed that the policy is implemented without adequate preparations. They advised that repatriation must be conducted in a voluntary manner. They gave an example of the relocation of 5000 IDPs from Meshtal in North Darfur, within few hours, to the Abou Shouk camp without adequate consultations, preparation nor adequate sanitary and relief supplies, bringing the population of the Abou Shouk camp to more than 45000 IDPs.

40. The Commission took note of the existence of one government funded local Sudanese NGO, El Zubeir Charity Foundation which is assisting in relief assistance. This NGO is said to promote the government repatriation policy of IDPs to their villages. The international humanitarian agencies, while not opposed to repatriation as such, urge the Sudan authorities against forced repatriation, and to coordinate the said efforts with the humanitarian agencies in order to ensure that conditions of peace, security and stability are re established in the villagers, so that IDPs and refugees repatriate voluntarily.

41. The mission was also informed that the civilian population was targeted because:

- government believe that rebels often hide within the population. Some villages were therefore attacked to dislodge rebels that sought refuge there,
- some of the villages were burnt by rebel groups, which have every interest in ensuring that the international community maintains pressure on the Government of Sudan, whilst the latter is making efforts to repatriate the displaced persons to their villages so that it restores its authority.

42. The mission held a meeting with the Sudanese Women Union, which is a federation of Sudanese women organisations, organised from the grassroots level. They gave a detailed explanation of their work, and what they were doing in

EX.CL/364 (XI)
Annex III
Page 13

the Darfur region, which includes intervention with police and government officials against cases of arbitrary arrest, providing legal aid to victims. They also organized seminars for the IDP's and government leaders in Nyala. They lamented the fact that the Sudanese Women Union is not taking part in the peace negotiations on the Darfur conflict. They also highlighted some of the problems they and other national NGOs face:

- national NGOs do what they can to deliver humanitarian assistance to displaced persons and morally support them in their moments of great difficulty,
- national NGOs launched a campaign against arbitrary arrest and detention as well as against human rights violations, in particular of women's rights,
- the humanitarian work done by local Sudanese NGOs towards the affected communities of Darfur is constrained by the difficulty in accessing the Darfur since the only practical and quick route to the region is by air.

The Janjawid phenomenon.

43. The mission enquired from the various personalities and actors to explain the *Janjawid* phenomenon and their role in the Darfur conflict. Government ministers and officials referred to them as outlaws, the name *Janjawid* being an Arabic word for outlaws. The *Janjawid* was commonly identified as the Arab militia which has been fighting on the side of government against the rebels, and is associated with massive human rights violation in the Darfur, such as the looting of property and cattle, burning of villages, rape, abduction of women, and wanton killing of defenceless civilian population in the Darfur region.
44. According to humanitarian agencies' workers, men who are commonly identified as *Janjawid* militia can be seen roaming streets of the three Darfur states, with impunity, wearing military uniforms, with guns on their backs riding donkeys, horses or camels, suggesting that they were known, and tolerated by the government. When asked to confirm their association with the *Janjawid*, the government denied either recruiting or arming the *Janjawid* militia, or coordinating military activity with them. On the other hand, a number of the IDPs interviewed by the mission at Dali near the Tawila village in North Darfur, and in Abou Shouk camp, stated that they were attacked by the *Janjawid* Arab militia, prior to the attacks which led to their eventual displacement, and again shortly after their villages were bombed by government aircrafts and helicopters.
45. Another problem relating to the *Janjawids* was the fact that, they are not a structured force, nor are they part of the humanitarian ceasefire Agreement, and are therefore not bound by it. They are not formally involved in the peace process. The general consensus among many people the mission spoke to seems to suggest that the *Janjawids* were armed by the Government of Sudan in order to fight the rebels. Now that the *Janjawids* have become very strong, disarming them seems problematic.

C- Visits to camps for displaced persons and other places.

In the North Darfur region.

46. In the North Darfur region, the mission visited camps for displaced persons in Dali (near the Tawila village) and Abu Shouk, as well as the burnt down village of Shekshegu. The Abu Shouk camp is located about 3 kilometres outside El Fasher and is managed by the ICRC. At the time of the visit, it had more than 40,000 IDPs. The camp appeared to be well managed, security was good, health and other services such as shelter, water supply and food distribution was well organised.
47. The IDPs in the Dali camp near the village of Tawila were living without any shelter, except for branches of shrub and cardboard cover, i.e. no cover at all. In other words they were living under the scorching sun and the open sky. This camp had not been visited by any government or international humanitarian agencies' officials for supply of any essential humanitarian assistance. This was a typical case of IDPs who are scattered through Darfur region who have not been reached because of the insecurity. The mission visited the burnt out village from where the Dali IDPs had escaped the bombardment by government aircrafts and helicopters and *Janjawid* militia. It also visited the burnt out compound of tribal headman.
48. The arrival of the mission in El Fasher coincided with news that members of an unidentified armed group violated the cease-fire in the region by attacking two towns the day before. The rebels were reported to have abducted a leader of the Berthi tribe, looted a bank and set a police station and houses on fire.
49. The Walli then notified the CFC representative (General Okonkwo and his Vice Chairperson were absent from El Fasher) that these attacks could end in inter-tribal conflicts because the targeted tribe might attempt to seek revenge against the tribes that attacked it. The CFC representative had promised to report to the CFC Chairperson so that necessary investigations are carried out.

Visit to IDP camp in Dali ,the village burnt in Shekshegu Tawila, North Darfur.

50. The camp is situated about an hour and a half drive, on a poor stretch of the road from El Fasher passing through the dry and semi desert conditions, to a local trading town called Tawila. The head of the camp, one Taher Adam Shugar, explained to the mission that the camp hosts about 1200 IDPs composed of tribes of African origin: the Fur and Zaggawa forming the majority, who arrived at the camp from 25 surrounding villages who were mainly engaged in farming.

EX.CL/364 (XI)
Annex III
Page 15

51. The inhabitants of the camp, totally left to themselves, had no shelter and were consequently vulnerable to bad weather conditions. There was no infrastructure for water supply, food, health care or education.
52. The mission had a meeting with the head of the camp and some displaced persons, who gave accounts of air raids and land attacks by forces identified by the displaced persons as those of the government. The displaced persons were not able to provide exact dates for the attacks, contenting themselves with the fact that the attacks happened twice on Fridays, and peak market days. They also declared that men on horseback and camel provided support on the ground to the attacks by forces of the government army.
53. When questioned by the mission, whether these attacks were done by rebel forces, they stated that the attacks were mainly carried out by the armed forces of the Government of Sudan and men on horseback and camels, and not by other forces.
54. The displaced persons related cases of rape, abductions and disappearance of children and girls as well as beating by men in military uniforms, and by men on horseback and camel. They could not provide exact figures for victims, but stated that at least 216 people were killed, unspecified numbers were wounded. They stated further that, during the said attacks, houses were burnt and household goods plundered, cattle and other goods were stolen.
55. When asked about the likely reasons for the attacks on their villages, the displaced persons stated that they did not know any reasons why they were attacked, and put down their misfortune to bad luck. They categorically denied having any links to any rebel group opposed to the Government. They also denied having any problems with other tribes and held the Government responsible for their plight.
56. The displaced persons furthermore stated that few people had remained in the abandoned villages. They also stated that whenever women IDPs returned to the abandoned villages to tend their farms, they are often raped. As for the men, when they return to the abandoned villages, they are killed.
57. Commissioner Angela Melo met with about one hundred women living in the camp and interviewed 18 of them. These women essentially confirmed the information provided by the men, notably the attacks. The women also stated that rape and abduction of an unspecified number of women happened during the attacks. The women were locked up in a room and raped by the assailants. They said their children could not go to school and that there was no health facilities for them.

EX.CL/364 (XI)
Annex III
Page 16

Visit to the village burnt in Shekshegu.

58. Located about 2 to 3 kilometres from the Dali camp, the village of Shekshegu, which is inhabited by the Fur, Zaggawa and Berti tribes, was attacked and partially destroyed by fire on 27/02/2004, according to the village head, Mr. Mohamed Abubakar Ahmed, whose hut was burnt down. The mission counted some 10 totally burnt down huts and had a meeting with the village head, in the presence of some inhabitants of the village.
59. The attackers were identified by the villagers as soldiers belonging to government armed forces, supported by men on horseback and camel who looted and burnt down the huts before escaping.
60. The mission asked the inhabitants how certain they were that attackers were members of the government armed forces when there were also armed rebel groups that were operating in the region. The villagers respond that they were able to identify the attackers because they were dressed in Sudanese army uniforms.
61. The villagers stated that they have heard about rebel groups opposed to the government, but they did not know the rebels because they do not have any links to the village.
62. When asked about their views on the reasons for these attacks, the villagers responded that the Government accuses them of being relatives of rebels and opposition politicians. The attacks, mass murder and destruction are in retaliation to the purported contacts between the villagers and the rebels.
63. The villagers declared that the village had an initial population of 1,300 inhabitants, which presently stands at 250. Everyone is afraid to venture far away from the village because some time ago men on horseback, *Janjawid militia*, attacked and raped women from that village.
64. The mission asked the villagers whether there were traces of these attacks: cartridges, bullet marks, bomb fragments, etc. The villagers stated that these could be seen at the nearby dry river valleys. Due to time constraints, and the distance and conditions for travelling early back to El Fasher, the mission was not able to have access to these elements before leaving the village.

Visit to the camp for displaced persons in Abu Shouk.

65. The camp for displaced persons in Abu Shouk is situated not far from El Fasher. The mission visited it in the presence of Mr. Al Fatah Abdelaziz, Assistant Director of the camp. The latter explained that the camp was established on 20/04/2004 and has 48,000 displaced persons of which 80% are women and children, that come from all the villages attacked.

EX.CL/364 (XI)
Annex III
Page 17

66. The Assistant Director of the camp informed the mission about assistance that the camp receives from humanitarian agencies such as UNICEF, ICRC, WFP, etc., which provide water, food, shelter and medical care. The Sudanese government provides staff for education and health services to the displaced persons. The mission observed that the camp is well organised and provided with adequate facility and basic supplies as stated above.
67. The mission met and interviewed IDPs who are resident in the camp. A group of elders who agreed to talk with the mission stated that the majority of persons living in the camps were from the Fur and Zaggawa tribes which were living in the mount Djebel Mara region, whose villages were attacked and destroyed by bombs and land attack by men in military vehicles, or on horseback and camel. The raids and attacks were said to have been carried out regularly between the months of March to July 2003 by planes during the day and land attack at night.
68. The IDPs said that they did not know why they were attacked. They confirmed that there had been several cases of rape and abduction of women. They further stated that they were afraid to return to their abandoned villages. They said that, during previous communal conflicts, when pastoralists' herds had destroyed their crops, they did not have any fundamental problems with members of tribes of Arabic origin.
69. Commissioner Angela Melo interviewed over thirty women belonging to the Fur tribe. The women confirmed the information relating to the attacks, plundering and abduction of children by the armed forces identified as those of the Government. Some of the women spoke about having experienced cases of rape but did not give further details. The mission believes that it could not get further information because interpretation was conducted by a man. The women refused to return to their villages of origin as long as security is not fully restored there. They complained about idleness in the camp.
70. Before its departure from El Fasher, the mission witnessed a march organized by the inhabitants of the town to protest against rebel attack, which occurred 2 days earlier in the region. The protesters, who gathered in front of the offices of the Ceasefire Commission, were received by the CFC Chairperson and gave him their petition, which called on the latter to quickly and effectively act to stop the cease-fire violations. A delegation of elders from El Fasher also handed a similar petition to the Chairperson of the African Commission's mission.

In the West Darfur region.

71. The mission visited camps for displaced persons in Ardamata and Droti in El Geneina, West Darfur region.

Visit to the displaced persons camp in Ardamata.

72. The mission met the camp supervisor, Mr. Ahmed Oubeid Eissa who said that the Ardamata camp for displaced persons, hosted 34,000 persons mainly from tribes of African origin: Fur, Massalit, Zaggawa, Tama, Mashiria and Gemer. The camp was established in April 2003.
73. The displaced persons in this camp came from several villages following attacks they described, as air raids and land attacks, by government forces supported by men on horseback and camels. These attacks resulted in loss of human life, injuries, destruction of villages and houses and theft of livestock.
74. The displaced persons affirmed that humanitarian organizations provided them with relief in the form shelter, food, water and health services as a result of which the camp did not face major difficulties.
75. The displaced persons informed the mission of on-going preparations with the participation of tribal leaders for displaced persons to return to their villages of origin. The displaced persons assured the mission that 50% of them are ready to return to their villages of origin if the logistics and security conditions are effectively met.
76. During the interview that Commissioner Angela Melo had with a group of displaced women, the latter explained to her that during the attacks on their villages, an unspecified number of women were raped by men described as light skinned, who came on horse back and camels. These men were said to have abducted an unspecified number of women. The women also talked about theft of goods belonging to the women, such as jewellery, cash and other valuable items, during the attacks.
77. In response to a specific question by Commissioner Angela Melo about complaints against rape, the women said that they have lodged complaints concerning theft, rape and other offences committed against them at the nearby police station but that these complaints had not been investigated.
78. The mission was able to observe in the Ardamata camp the existence of a school that had an enrolment of about 700 school children that were supervised by teachers who also lived in the camp. The camp has a health centre with a capacity of 100 beds. Shelter in the camp consists of tarpaulin provided by international humanitarian organizations. The camp was relatively clean and well kept.

Visit to the Drothi camp for displaced persons.

79. The Drothi camp had 4,132 displaced persons at the time of the mission's visit. The camp did not have a school and children attended school at the Ardamata,

EX.CL/364 (XI)
Annex III
Page 19

situated some two or three kilometres away. The camp had a health centre, and four water pumps, which were however inadequate due to the high number of displaced persons.

80. The inhabitants of the camp informed the mission that the people who attacked them were armed horsemen and men dressed in Khaki uniform, who identified themselves and claimed to be members of government forces. These attackers killed, looted and burnt down houses, destroyed crops and took away valuable objects and livestock during the day and at night. The attackers also shot those who dared to resist them. Many cases of rape, by horsemen of Arab origin, were reported.
81. The displaced persons also stated that there were cases where displaced persons were attacked within the camp and injured, security is not assured due to nightly attacks by armed men. The most recent attack however was reported to have taken place six months ago. According to one of the IDPs, unidentified people come into the camp to intimidate the inhabitants and prevent them from returning to their villages of origin.
82. The displaced persons consequently said that they were not in any way ready to return to villages that were destroyed and rendered insecure. According to them, some days before, one displaced person visited their village situated 20 km from Drothi and some militias of an armed group intimidated and accused him of being an opponent to the regime and he had to return to the camp, intimidated and frightened.
83. Commissioner Angela Melo asked whether rape cases were investigated. The displaced persons responded that complaints which were lodged since November 2003 had not been investigated to date. The police are accused of being indifferent.
84. The mission also wanted to know from the displaced persons the reasons why their villages were attacked and they responded that the government considered them as members of the opposition, whilst they considered themselves merely as poor farmers who are not in any way linked to the opposition or rebels. The displaced persons believe that they were attacked because they were black.
85. The mission wanted to know whether the displaced persons heard about the *Janjawid militia*, and they replied that these were bandits, Arabs or blacks, normally riding horses or camels, who are guilty of numerous atrocities and that even the police are afraid of them, justifying the abandonment of actions lodged against them.
86. Commissioner Angela Melo separately met with a group of women living in the camp. These women stated that 6 months ago their villages were attacked by government forces, supported by men riding horses and camels. The attacks

resulted in several deaths and injury of people. Some of these women who sustained injuries, showed their wounds to the Commissioner. The women furthermore stated that during the attacks, a number of cases of rape were committed, some of the raped women became pregnant. Complaints were lodged at the police but were yet to be investigated. They declared that the attackers came back at night to intimidate the villagers who had not fled, accusing them of supporting the opposition. Everyone had to run away from the villages.

87. The women indicated that they were traumatized by the violent nature of the attacks and said that they would not want to return to the villages as long as their security is not assured. They lamented lack of water and a school in the camp.
88. The mission visited the police station to verify complaints and the level of progress made on the reported cases of rape and other offences, but the mission was unable to have access to the files as the officer in charge of the said cases was absent at the time. At one of its meetings in El Geneina, the mission was informed by the authorities of West Darfur State that even though cases of rapes were reported to the police, investigations could not be conducted because the victims could not identify their attackers. Therefore the files were closed for lack of identification of the perpetrators.

Visit to the hospital in El Geneina.

89. Following reports received during discussions with the humanitarian agencies staff and a visit to the camp in Ardamata about most recent attacks, the mission visited the hospital in El Geneina where it was able to observe that there were two wounded civilians and a soldier. The mission interviewed one of the civilians identified as Sherif, who agreed to talk to the mission. He said that he was attacked together with other villagers by Arab horsemen who stole their goods before running away.

South Darfur region.

90. Due to some logistical security and communication problems in the South Darfur region, the mission was only able to visit the displaced persons at a makeshift camp known locally either as the *Deriberi* or « UNICEF camp», outside Nyala
91. Upon its arrival at Nyala airport, the mission saw a huge 747 Jumbo cargo plane which was unloading humanitarian relief supplies, which it learnt, was donated by the Government of Nigeria to the displaced persons in the region.

Visit to the camp for displaced persons in Deriberi (UNICEF camp)

92. The camp, which is located within a stone throw of the last street of Nyala towards the location of the local polytechnic, was set up on 03/07/2004, and was said to have about 4,700 inhabitants mainly blacks from the Hotya tribe, who said

to be of Arabic origin from the Deriberi village of South Darfur, and hence the name Deriberi camp. The camp is also known as the UNICEF camp, because the site it occupies used to be a holding ground for IDPs before they were moved to bigger IDP camps outside Nyala.

93. The makeshift camp had no shelter of any kind apart from shrubs and dried branches put together in the open air and no infrastructure or social services at all. The mission observed that the number of displaced persons reported was higher than the number of IDPs found on the ground, because, it was told that, most of the IDPs had gone to town in search of food. The camp had previously received visits by UNICEF and CARE staff, who made arrangements to supply them with water. However government officials were discouraging the permanent settlement of the said IDPs at the said site.
94. The displaced persons, who in times of peace are farmers, stated that they were attacked on 03/07/2004 by groups of heavily armed black men travelling in vehicles and identified as the *Torabora militia*. The displaced persons also claimed that their villages were destroyed.
95. The displaced persons told the mission that they did not receive any help from the government or humanitarian organizations. Only some good Samaritans, students from the local polytechnic, and the local mosque provide them with some food supplies. Food, water, shelter and health care are the main causes of concern to the camp dwellers. They did not know the reasons why their villages were attacked and confirmed that they were not involved in any dispute with the rebels.

IV- ANALYSIS OF THE SITUATION IN DARFUR.

96. The information gathered by the mission from the Sudanese authorities, the CFC, the international and national humanitarian agencies, the observations and interviews made with IDPs enabled the African Commission to make the following analysis.

A- Origins of the conflict.

97. The armed conflict in the Darfur region, began in February 2003, when two armed groups, the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), launched an armed rebellion against the government, attacked and destroyed military and police installations, killing many soldiers and police stationed in the various towns of the Darfur region.
98. The mission enquired through the Chairperson of the CFC whether it was possible to meet with representatives of the two rebel movements, a request, which was very difficult to implement because of the inaccessibility to the South

Darfur, an area that was still in active conflict. The Chairperson of the CFC advised against venturing outside Nyala because of the insecurity.

99. We are therefore unable to reflect any of their opinion concerning their understanding of the origins of the conflict. However, from the various interviews and discussions, it was very clear to the mission that, at the core of the military and armed conflict in the Darfur region, is a political power struggle, between the two armed groups, representing the three major tribes of the Darfur, which consider themselves to be of an African origin, namely the Fur, the Massalit and the Zaggawa, and the central Government of Sudan, for the control of Khartoum, and the Darfur region.
100. The Commission was told that the detention of 73 opposition politicians and other persons, by the government in Khartoum, including the influential politician, Mr. Hassan Al Tourabi, was a result of their support for the Darfur rebellion.

Land, water and pasture disputes.

100. A number of people whom the mission met, both in government and in the international humanitarian community, agree that the conflict for land pasture and water between the farmers and the pastoralists was a major problem. The government said that in the past, it had set up inter-ethnic/community based structures to resolve this type of conflict. However these structures were not suited for dealing with the massive conflict which flared up in February 2003, which involve large scale armament and indiscriminate killing of defenceless and innocent civilians, whose only fault was to belong to the ethnic communities of farming tribes in Darfur, whom the Government and the Arab *Janjawid* militia consider to be the backbone of the armed groups.
101. The Minister for Internal Affairs, who has been charged with the responsibility of overseeing the situation in the Darfur, said that 95% of the two rebel groups are from the Zaggawa ethnic group, even though there are about 18 other tribal groups in the Darfur, among whom are some African tribes which are pastoralists, similar to the Arab pastoralist tribes.

Marginalisation and poverty.

102. The government rejects the accusation of marginalising the Darfur region. Ministers and government officials argued that poverty affected the whole country. Poverty alone could not be a reason for the armed conflict which was started by the rebels and for that reason the government was arguing that the war in the Darfur region would stop only if the rebellion stopped. The drought and desertification which affects the Darfur region for long periods, was the main reason why pastoralist tribes stay longer in the south of Darfur (around

the Djebel Mara area) where there is more rain, and hence water and pasture, leading to conflict between farmers and pastoralists.

103. The government informed the mission that during the 1979-84 drought affecting the entire Sahel region, the World Bank assisted the Sahelian countries with US\$200million to address the consequences of the drought. The Islamic Development Bank donated US \$15 million. However this time around the international community has not addressed the drought affecting the Darfur.
104. The government was indirectly admitting the poverty and marginalisation question, but it stated that in the past ten years, it has built 3 universities in Darfur, (out of a total of 40 universities countrywide) enrolling 5800 students, out of a national total of 200,000. It admits that there are economic problems, but that they are not restricted to the Darfur region.

Sub regional conflicts and the weapons culture.

105. The civil or inter-state wars of the 1980s and 90s, in states bordering Sudan, along the Darfur region undoubtedly encouraged the uncontrolled trafficking and easy movement of arms in the region. Of particular significance were the civil wars in Chad, the war between Libya and Chad, and the period of military instability in Central Africa Republic. The ethnic composition along the border regions in all those countries, are similar to the tribes in the Darfur. The tribes got accustomed to carrying firearms to defend themselves leading to the development of a culture of carrying firearms, which has now taken root in the region.

Suppression of political dissent.

106. The new political dissent within the ruling party (National Congress Party), and support by the opposition for the Darfur rebellion, was viewed by the Khartoum authorities as a threat to national security and integrity, and hence the position taken to wage an indiscriminate all out war. In response to rebel attacks, the central government in Khartoum launched a counter-offensive that was often deadly against villages wrongly or rightly suspected of sheltering the rebels or rebel sympathisers. This resulted in deaths, destruction, plundering and other atrocities as well as a flood of refugees and displaced persons.

B- The role of the government forces, irregular armed groups, rebel movements and the Janjawids.

107. The armed forces of the government of Sudan, the rebel movements, namely the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), as well as all irregular armed groups and the

EX.CL/364 (XI)
Annex III
Page 24

Janjawids, have generally taken an active part in fighting in Darfur, and have to a varying degree been accused of committing human rights abuses, against the civilian population.

108. The persistent allegations of massive abuses and violations of human rights by the *Janjawids*, which includes *inter alia* systematic murder, rape and abductions for purposes of slavery, against defenceless and innocent civilian population, constitute war crimes and crimes against humanity as per the Rome Statute.
109. The government armed forces have also been accused of committing massive human rights violations such as widespread murder through air bombardment of villages against defenceless civilian population, and this also constitutes war crimes and crime against humanity.
110. The general impression the mission got, when it met the displaced persons and the humanitarian agencies, sustains the view that the Sudanese Government supported the said militia, because they played a crucial defensive role, particularly at the beginning of the conflict, after the police stations and the military installations were destroyed. The fact that the *Janjawids* have not been disarmed by the government of Sudan, indicates that they still continue to play an auxiliary role in the conflict on the side of government. The attacks against villages by the government armed forces, though intended as a strategy to dislodge rebel strongholds or sympathisers ended up dislodging the civilian population.

Ethnicity

111. The demographic structure of Sudanese society in the Darfur, from the mission's own observation, and from the account by government officials, does not render itself to a clear cut racial division. While it is quite clear that there are distinct tribes of African descent, particularly the Massalit, the Zaggawa in West and North Darfur, and the nomadic Arab tribes who are spread across the Darfur, there is a great deal of racial inter-relationship and inter-marriages over a long period of time among the tribes in the Darfur and Sudan generally. Similarly, the mission was told that there are those who said to have Arab ancestry who however bear pure African features. The tribes prefer to define themselves along those racial terms.
112. When the mission visited the IDP camps, it observed that there were no Arab IDPs in the said camps. However, at the Deriberi camp near Nyala in South Darfur, the IDPs that the mission met said they were of an Arab ancestry.

C - Consequences of the conflict.

113. The conflict in Darfur has had disastrous consequences on the human rights situation. It has caused displacement of thousands of refugees and more than 1.2 millions of displaced persons and tens of thousands of death and injured, denying them their basic rights. The right to life of those who were killed in the course of the conflict have been violated. The fundamental freedoms of the refugees and IDPs have been greatly curtailed. Families have been separated, with women and children suffering the most.
114. When the mission visited the Dali IDP camp near Tawila, it noticed that an open space had been converted into a praying area and a lone man was seen praying under the hot sun. The mission was later on informed by the IDPs that their village had been destroyed including the mosque. Their civil, political, economic, social and cultural rights have been violated. Children are not attending schools, and where they do, they face great constraints. The mission noticed that some of the health centres did not have adequate medical supplies.
115. The violations of the rights of women, rape and sexual violence, even though denied by government, have been committed during the Darfur conflict. Generally speaking, women would not talk about such painful experiences, because such acts violate their sense of dignity and honour. The culture of the Sudanese women in Darfur, who are Muslims, makes it even more difficult for the latter to talk in public about sexual violence they underwent. The mission however heard reliable accounts detailing numerous cases of rape, and that some of the women became pregnant as a result of the rape.
116. At the time of the mission, the rains had just started and the humanitarian agencies were concerned that there would be an outbreak of infectious diseases, affecting particularly children and women, who are the most vulnerable in any conflict. As for IDPs who were not in camp, ie. Dali near Tawila and Deriberi informal camps, the mission notified their existence to both the government authorities and the humanitarian agencies, and hopes that adequate humanitarian and protection measures were taken to address their immediate needs. The mission was informed about the existence of a large number of IDPs who are still scattered in the rural areas at the mercy of the elements and the *Janjawid*. At the Shekshegu village, which had been almost totally destroyed, there were still a number of elderly people who had remained behind with their families.
117. For the majority of displaced persons who were traumatized by the fighting, insecurity and an uncertain future, they can only count on the support of the authorities and other humanitarian organizations for their protection and survival since they have lost everything.

118. The social fabric has been badly affected by the crisis: tribal groups of African origin consider tribal groups of Arab origin, and vice versa, as their aggressors.
119. The scarce socio-economic infrastructure that existed in the Darfur, particularly in the rural areas, where the bulk of the displaced persons and refugees come from, have been destroyed, whilst the prevailing situation inhibits the implementation of development programmes, unless peace and security is restored. Apart from rehabilitation of the social and security services infrastructure, government must undertake a physical inventory of the destroyed properties and compensate the victims.

D- Human Rights violations.

120. The information provided by the victims established that the majority of the population that have been dislodged from their villages are from the African tribes, which are mainly farmers.
121. The mission was able, however to establish that there was a pattern of gross human rights abuses, which were committed during the armed conflict, by all parties to the conflict. Having said that though, the weight of information from the interviews conducted with the displaced persons, indicate that the *Janjawid* were responsible for massive violations of human rights of the civilian population, who are now living in the IDP camps. The IDPs in the Deriberi camp near Nyala, indicated that they have been attacked by a militia group known as the *Torabora*, which is one of several armed militia formed by the various ethnic groups involved in the Darfur conflict.
122. The crisis in the Darfur region has resulted in loss of life of an unspecified number of people. Some sources have estimated the number of dead people to be between 30000 and 50000 people. Many others were injured, lost their property, villages were set on fire, cattle and various household goods were plundered, and over a million people have been forced into exile as refugees and internally displaced persons.
123. The attacks on the civilian population are war crimes and crimes against humanity. The displaced persons spoken to stated that their villages were attacked indiscriminately by armed forces, using military aircrafts, helicopters and vehicle of the Sudanese army. These military attacks were then followed by attacks by militia, identified as the *Janjawid*, who killed people, burnt houses, looted property, stole cattle and other livestock, food, and raped women. The land is now allegedly occupied by the *Janjawid* militia

E- Humanitarian assistance.

124. The Commission commends the international and national humanitarian agencies, which have responded to the crisis, and have provided humanitarian assistance in the form of shelter, health services, water, food supplies and other basic social services, in spite of very difficult working conditions, particularly before the restrictions were lifted/eased by the Government of Sudan. The Commission also learnt about the existence of an undetermined number of IDPs who are still roaming the Darfur rural areas and to whom international humanitarian agencies do not have access, mainly because of the security situation.
125. Efforts by humanitarian agencies to reach these zones in order to determine the number of displaced persons and identify their needs are sometimes frustrated by authorities in the Darfur states, particularly South Darfur. The Commission urges the Government of Sudan to take all necessary measures to identify the scattered IDPs, and to render any assistance possible to the humanitarian agencies, to ensure that all displaced persons are identified and afforded the necessary protection and given the assistance they desperately need.

F- Security and repatriation.

126. The Government of Sudan informed the mission that (by mid July 2004) it had deployed 3,912 police officers, out of a total of 6,000 it intends to deploy, in the Darfur region. During the mission's visits to the IDP camps, the displaced persons expressed concern about the repatriation policy promoted by the government, because they do not trust the police and government. The displaced persons expressed lack of trust in the security forces, because of the trauma they suffered as a result of the indiscriminate attacks by government security forces in their villages. They also cited lack of action, or cooperation from the police, when they report *Janjawid* attacks, particularly complaints against gender based violence and case of rape against women. The government however rejected those accusations and said that, the fact that the major IDP camps were located within the outskirts of major towns in the Darfur, was an indication that the people fled the rebels to centres where security was still controlled and could be guaranteed by the government.
127. Attacks perpetrated by the *Janjawids* against civilians are continuing and women who venture outside the immediate vicinity of some IDP camps for water and firewood are physically and sexually abused. The men, when they venture outside the camps, are killed.
128. The Commission has found that the Government of Sudan did not pay proper attention to reported cases of rape and other forms of violence

EX.CL/364 (XI)
Annex III
Page 28

against women, in the Darfur crisis. By denying the existence of these forms of sexual and gender based violence, and by stating that they could not be verified, it failed in its duty to protect women, who as citizens are entitled to government protection.

129. The establishment by the Government of the Commission of Inquiry is yet to have any impact in terms of restoration of the confidence and trust by the displaced persons. Up to the time the mission went to Sudan, the Commission of Inquiry had not visited the Darfur region.
130. The Government of Sudan has recently formed three Women's Committees to investigate allegations of rape and sexual violence against women in the Darfur during the crisis. These are steps in the right direction, but further efforts and measures need to be taken by the government to guarantee the independence of the two bodies, by giving them adequate financial resources and expertise, to facilitate their investigations.
131. The Government is implementing in consultation with tribal leaders a policy of repatriation of displaced persons to their villages of origin. The government has promised to provide them with security, social services and basic infrastructures and eventually reconstruction of houses. On the contrary a number of humanitarian agencies indicated lack of adequate preparation by the government.
132. The Commission is of the opinion that the government repatriation policy, must conform to the voluntary wishes of the displaced persons and refugees, upon the establishment of security and other favourable conditions. Consultations with humanitarian agencies on the ground will facilitate the restoration and promotion of the IDPs' confidence, which is currently lacking in government.
133. The government must compensate the people for the loss to their houses, cattle, and other goods, which were looted, burnt or stolen by the *Janjawid*, or destroyed during the military attacks.

G- Detention of opposition politicians.

134. Due to the crisis in Darfur, 73 persons including members of opposition political parties have been detained without trial for some months now. The Commission raised its concern that the detentions without trial were a violation of article 6 of the African Charter on Human and Peoples Rights.

H- Upper Nile Situation.

135. In the course of its consultations with different people, the mission learnt that an armed conflict is currently being fought in the Upper Nile state, where

massive human rights of the civilian population are equally violated. The tragedy of the situation is that the Darfur conflict has diverted attention from that civil war. One of the senior government Ministers said that, that conflict involves tribal factions of the former rebels movements in Southern Sudan opposed to the Naivasha Agreement, and were jockeying for the control of petroleum resources.

VI- Recommendations.

136. The mission is making the following recommendations to the Government.
137. The Government should accept the setting up of an International Commission of Enquiry, which would include international experts from the United Nations, African Union, Arab States, international humanitarian and human rights organisations with the following terms of reference:
- a) to investigate the role and involvement of the military, the police, and other security forces in the Darfur conflict, and to establish those responsible for committing war crimes and crimes against humanity, violation of human rights and international humanitarian law and ensure that they are brought to justice;
 - b) to investigate the role of rebel movements, all armed militias, in particular the Janjawids, the Pashtun, the Pashmerga, and the Torabora, and to establish those responsible for war crimes, crimes against humanity and massive violation of human rights and international humanitarian law and ensure that they are brought to justice.
 - c) to rehabilitate the destroyed physical security infrastructure, and to suspend any police or security agents who are alleged to have been involved in the violation of human rights, pending the finalisation of investigations.
138. The Government should allow the International Commission of Inquiry unhindered access to the Darfur region to enable it to thoroughly investigate alleged human rights violations with a view of further investigating as to whether or not genocide has occurred.
139. The Government should immediately stop the military and aerial bombardment of the civilian population, and should take appropriate measures to protect the civilian population against attacks by armed groups, in particular the *Janjawids*, and rebel forces by accepting the deployment of African Union peacekeeping/protection forces.
140. The government should ensure that no more bombardment of civilian population occurs.

EX.CL/364 (XI)
Annex III
Page 30

141. The Government should disarm all irregular armed groups, in particular the *Janjawid militia, the Pashtun, the Torabora, the Pashmerga*, and any such militias operating illegally within the Darfur.
142. The Government should undertake training programmes for the police and security forces on human rights and international humanitarian law principles.
143. In recognition of the existence of the weapon culture, which is a major problem in the Darfur, the international community should assist the government in a disarmament, demobilisation and rehabilitation programme (DDR) for the militia, by creating a special fund to buy back the weapons which are so readily available to the militia in Darfur.
144. The Government should provide the National Commission of Inquiry and the recently established Women's Committees with all the resources and expertise, and where possible, accept international technical assistance from the UN, AU, Arab League, or any international humanitarian and human rights organisations, needed to effectively perform their mission.
145. The Government should ensure that the terms of reference of the Commission of Inquiry set up on 08 May 2004, specifically include investigation of all human rights violations
146. The government should ensure that all reports on rape already lodged with the police should be immediately investigated by the police and the culprits are brought to justice.
147. The Government should bear the cost of medical care and psychological treatment for victims of violence and sexual abuse, notably rape.
148. The Government should take urgent measures to facilitate access by humanitarian agencies to IDP camps which have not been accessed and enable the supply of humanitarian assistance in the form of water, food, shelter and other essential needs to them.
149. The implementation of the government policy of repatriation should be strictly voluntary, on condition that the security and social infrastructure is repaired and the burnt out villages are rebuilt. To that end, the mission is recommending that Government fully cooperate with international humanitarian agencies and other relevant partners with a view to ensuring that the above-mentioned conditions are fully adhered to, thereby ensuring that displaced persons and the refugees return voluntarily to their villages of origin.

EX.CL/364 (XI)
Annex III
Page 31

150. The arbitrary arrest and detention without trial of opposition politicians, on account of their political views concerning the Darfur conflict, under emergency powers, is a violation of the African Charter. The Government should either release the 73 political detainees including Mr. Hassan Al Turabi or immediately bring them before the courts so that they can defend themselves against the allegations made by the state.
151. The Commission therefore recommends to the Government of Sudan to abide by its international obligations under international human rights and humanitarian law, and in particular the African Charter on Human and Peoples' Rights to ensure that it guarantees the enjoyment by its people of their basic rights, in spite of their cultural and ethnic diversity.

VII- General observations.

152. The conflict in Darfur is but one of the persistent conflicts, which the Sudan has experienced since independence, almost fifty years ago. The recent peace agreements signed between the government of Sudan and the SLPM/A in Naivasha, Kenya, under the IGAD peace process show that the government of Sudan is capable of resolving its internal conflicts through peaceful means. As stated hereinabove, the Darfur conflict has diverted attention from another alleged crisis in the Upper Nile region of Sudan, which could unravel the good work of the Naivasha process.
153. The Commission is aware of the ongoing negotiations under the framework of the African Union, to find a comprehensive political solution to the Darfur conflict. The Commission calls on the Government of Sudan and the rebel movements to consider the negative human rights and humanitarian situation on the civilian population, arising out their delay in adopting a peace agreement on the Darfur conflict. The Commission urges them to resolve their differences through negotiations, in the interest of peace in the Darfur.

VIII- ACKNOWLEDGEMENTS.

154. The African Commission wishes to express its profound gratitude to the Government of Sudan for the valuable assistance it provided to the mission throughout its stay in Sudan. The Commission is particularly grateful for the warm reception the authorities accorded to it both in Khartoum and during visits in the Darfur region.
155. The Commission also wishes to express its deep appreciation to the African Union Commission for the valuable logistical support it provided through the Cease-Fire Commission (CFC). Without the dedication of the soldiers and the CFC pilots, the mission would not have been able to visit all the places and camps, situated in some cases hundreds of kilometres from each other in the

EX.CL/364 (XI)
Annex III
Page 32

Darfur region, where means of transport and communication are scanty, within the limited time at its disposal.

156. To all the specialized agencies of the United Nations, national and international humanitarian organizations operating in Sudan that provided assistance to the mission, it expresses its gratitude.

**Done in Pretoria,
Republic of South Africa,
September 20, 2004**

ANNEX II



**Internal memorandum
Memorandum interne**

To / À	Judge Sanji Mmasenono Monageng	From / De	The Presidency <i>SHS</i>
Date	19 March 2010	Through /	Via
Ref.	2010/PRES/155-2	Copies	Judge Sylvia Steiner, President of the Pre-Trial Division
Subject / Objet	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 <i>The Prosecutor v. Omar Hassan Ahmad Al Bashir</i> , pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence		

The Presidency, composed of the President (Judge Sang-Hyun Song), the First Vice-President (Judge Fatoumata Dembele Diarra) and the Second Vice-President (Judge Hans-Peter Kaul), hereby decides the request of Judge Sanji Mmasenono Monageng (hereinafter "applicant") of 25 February 2010 to be excused from reconsidering, in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (hereinafter "case"), whether a warrant of arrest for the crime of genocide should be issued against Mr Al Bashir.

The request for excusal is denied.

Factual Background

On 4 March 2009, Pre-Trial Chamber I composed of Judges Akua Kuenyehia, Anita Ušacka and Sylvia Steiner issued a warrant for the arrest of Mr Al Bashir for war crimes and crimes against humanity. In the same decision Pre-Trial Chamber I declined the Prosecutor's application for a warrant of arrest in respect of the crime of genocide.¹

¹ Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-3, 4 March 2009.

On 19 March 2009, Pre-Trial Chamber I was reconstituted as follows: Judges Sylvia Steiner, Sanji Monageng and Cuno Tarfusser.²

On 3 February 2010, the Appeals Chamber reversed the decision of Pre-Trial Chamber I not to issue a warrant of arrest in respect of the crime of genocide against Mr Al Bashir, in light of its application of an erroneous standard of proof. The Appeals Chamber remitted the matter to the Pre-Trial Chamber, and directed it to decide anew, on the basis of the correct standard of proof, whether a warrant of arrest in respect of the crime of genocide should be issued.³ The Pre-Trial Chamber's decision to issue an arrest warrant against Mr Al Bashir in respect to crimes against humanity and war crimes remained valid, as it was not subject to appeal.

On 25 February 2010, by memorandum classified as confidential, the applicant submitted a request for excusal to the Presidency pursuant to article 41(1) of the Rome Statute (hereinafter "Statute") and rules 33 and 35 of the Rules of Procedure and Evidence (hereinafter "Rules").

The request for excusal is based upon the involvement of the applicant as a Commissioner to the African Commission on Human and Peoples' Rights (hereinafter "Commission") in the preparation of the report of the fact-finding mission to the Darfur region of the Sudan, undertaken by the Commission between 8 and 18 July 2004. The full mission report of the Commission was annexed to the request for excusal (hereinafter "Report").⁴ Although not part of the fact-finding mission,⁵ the applicant was one of the eleven Commissioners who considered and adopted the draft report.⁶

² Decision on the constitution of Pre-Trial Chambers and on the assignment of the Central African Republic situation, ICC-02/05-01/09-14, 19 March 2009.

³ Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-73, 3 February 2010.

⁴ The African Commission's Report of the Fact-Finding Mission to the Republic of the Sudan Undertaken from 8-18 July 2004, EX.CL/364 (XI) Annex III.

⁵ Request, paragraph 2. Note that the applicant is not named as one of the delegates in paragraph 12 of the Report.

⁶ Request, paragraph 2.

The Report

The objectives of the fact-finding mission included discussing the human rights situation in the Darfur region with the Sudanese authorities and other national and international stakeholders, as well as gathering evidence from all “actors, stakeholders and victims,” to throw light on the human rights situation in Darfur, particularly the allegations of serious and massive human rights violations. Additionally, the mission aimed to consider possible solutions to end the situation.⁷

The Commission expresses no view as to whether genocide had occurred in Darfur.⁸ It concluded, however, that war crimes and crimes against humanity had occurred in Darfur.⁹ With regard to identifying the perpetrators of these crimes, the Report did not make conclusive statements, but rather referred to victims’ statements according to which the perpetrators were “armed forces, using military aircrafts, helicopters and vehicle [*sic*]of the Sudanese army”, and “militia, identified as the *Janjawid*.”¹⁰

The Commission recommended, *inter alia*, that “the Government should accept the setting up of an International Commission of Enquiry” to, *inter alia*: “investigate the role and involvement of the military, the police, and other security forces in the Darfur conflict, and to establish those responsible for committing war crimes and crimes against humanity, violation [*sic*] of human rights and international humanitarian law and ensure that they are brought to justice”; and “investigate alleged human rights violations, with a view of further investigating as to whether or not genocide has occurred”.¹¹

⁷ Report, paragraph 11.

⁸ Request, paragraph 5.

⁹ Request, paragraph 6, referring to the Report, paragraphs 120-123.

¹⁰ Report, paragraph 123.

¹¹ Request, paragraph 4, referring to the Report, paragraphs 137-138.

The Request

The applicant requests excusal “[i]n view of the fact that the Appeals Chamber has recently remitted the...case to [Pre-Trial Chamber I], of which [she is] a member, for reconsideration”.¹² The Presidency hereby understands the request to be a request for excusal from the Pre-Trial Chamber’s reconsideration of whether to issue a warrant of arrest against Mr Al Bashir for the crime of genocide, rather than as a broader request for excusal from the entire case, noting the timing of the request, which was made on 25 February 2010, shortly after the decision of the Appeals Chamber remitting the matter to the Pre-Trial Chamber for reconsideration, and the fact that the applicant has been a member of the relevant Chamber since 19 March 2009.

Decision

The request for excusal is properly before the Presidency in accordance with article 41 of the Statute and rule 33 of the Rules.

The Presidency, having thoroughly examined the matter before it, finds the request for excusal to be without merit.

The Presidency recalls that, pursuant to rule 35 of the Rules, there is a duty upon a judge to request to be excused in the absence of a request for disqualification should he or she believe that a ground for disqualification exists. The Presidency further recalls that article 41(2)(a) of the Statute provides, in relevant part:

A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground.

As the Presidency has found in previous decisions, the overriding purpose of article 41(2)(a) is to safeguard the integrity of proceedings of the Court by ensuring that no judge participates in a case in which his or her impartiality might reasonably be doubted on any ground.¹³ The Presidency notes that the assessment of judicial impartiality requires not only

¹² Request, paragraph 7.

¹³ 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*,

that a judge be impartial in the sense of being subjectively free from bias, but also that there is no objective appearance of bias.¹⁴

Given that there is no subjective bias or conflict of interest that would disqualify the applicant from sitting in the present case,¹⁵ the Presidency will turn to consider whether an appearance of bias could objectively be perceived in the present circumstances.

The Presidency notes that following a survey of the jurisprudence of the European Court, the United Kingdom, Australia, Canada, South Africa, the United States of America, Germany, France, Italy, the Netherlands and Sweden, the Appeals Chamber of the *ad hoc* tribunals has concluded that the assessment of the appearance of bias requires consideration of whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.¹⁶ Examples of such circumstances are set out in rule 34(1)(c) and 34(1)(d) of the Rules which concern an objective appearance of impartiality due, *inter alia*, to extra-judicial activities and the Presidency has found that an objective appearance of impartiality may be denied when a judge previously made determinations of fact based upon consideration of the same issues and evidence, from which it would appear that he or she is not free to depart.¹⁷

The question that is now pending decision before the Pre-Trial Chamber is whether “[t]here are reasonable grounds to believe”¹⁸ that Mr Al Bashir has committed the crime of genocide.¹⁹

pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence”, ICC-01/04-01/06-2138-AnxIII, 23 September 2009, page 6; Decision of the Presidency of 10 December 2009, ICC-RoR221-04/09-2-Conf-Exp-Anx2, 10 December 2009, page 5.

¹⁴ Decision of the Presidency of 10 December 2009, page 5.

¹⁵ Cf. Decision of the Presidency of 30 September 2009 entitled “Decision on the request to be excused from the exercise of judicial functions in Trial Chamber II, pursuant to article 41 of the Rome Statute”, ICC-01/04-01/07-1503-Anx2, 30 September 2009, page 2.

¹⁶ *Prosecutor v. Anto Furundzija*, IT-95-17/1-A, Appeals Chamber Judgment of 21 July 2000, paragraph 189; *Prosecutor v. Stanislav Galic*, IT-98-29-A, Appeals Chamber Judgment of 30 November 2006, paragraph 39; *Prosecutor v. Brdanin & Talic*, IT-99-36, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000, paragraphs 15, 19; *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, paragraph 9.

¹⁷ Decision of the Presidency of 10 December 2009, page 5.

¹⁸ See article 58(1) of the Statute.

¹⁹ Judgment on the Appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09-73, 3 February 2010.

As noted above, the Commission did not reach any conclusions with regard to whether the crime of genocide was committed in Darfur. It merely recommended that further investigation, in the form of an International Commission of Enquiry, be conducted as to whether genocide had occurred.

More significantly, the Commission was not aimed at establishing or assessing the individual criminal responsibility of Mr Al Bashir, or of any other individual. As the Report indicates, it was aimed at gathering information about the situation in Darfur in order to address the humanitarian crisis.

The Presidency is of the view that, when assessing the appearance of bias in the eyes of the reasonable observer, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, are capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case,²⁰ whilst excluding any information that was available to them in other capacity.

For these reasons, the Presidency finds that the present circumstances do not raise a question of partiality on the part of the applicant due to her previous extra judicial activities.

The Presidency shall make public the request for excusal and this decision, noting that the applicant has expressed her consent in accordance with rule 33(2) of the Rules.

²⁰ 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.