Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/05-03/09**
Date: **17 April 2012**

THE PRESIDENCY

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

SITUATION IN DARFUR, SUDAN

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

Public with two public annexes

Notification concerning the "Defence Request for the Disqualification of a Judge" dated 2 April 2012

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

The Office of the Prosecutor
Mr. Luis Moreno-Ocampo
Ms. Fatou Bensouda
Mr. Adebowale Omofade

Counsel for the Defence
Mr. Karim A. A. Khan
Mr. Nicholas Koumjian

Legal Representatives of the Victims
Ms. Hélène Cissé
Mr. Jens Dieckmann

REGISTRY

Registrar
Ms. Silvana Arbia

Deputy Registrar
Mr. Didier Preira

Other
Trial Chamber IV

The Presidency of the International Criminal Court (hereinafter "Court");

In the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (hereinafter "case");

Noting the "Defence Request for the Disqualification of a Judge" dated 2 April 2012 in which it was requested that the Presidency "convene a special plenary session in accordance with Rule 4(2) of the Rules of Procedure and Evidence ... and that the judges of this Court disqualify Judge Eboe-Osuji from acting as a judge in this particular case" (hereinafter "Defence Request");[1]

Noting that on 4 April 2012, the Presidency, pursuant to article 41(2)(c) of the Rome Statute and rule 34(2) of the Rules of Procedure and Evidence, requested that Judge Chile Eboe-Osuji make any submissions in response to the Defence Request by 16 April 2012;[2] Noting further that on 16 April 2012, such response was provided;[3]

Hereby notifies that a plenary session of the judges shall be convened on 25 April 2012 to address the Defence Request;

Hereby orders the Registrar to transmit this notification to all parties and participants in the case.

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

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

Judge Sang-Hyun Song
President

Dated this 17 April 2012

At The Hague, The Netherlands

ANNEX 1

Cour Pénale Internationale

International Criminal Court

La Présidence

The Presidency

Internal memorandum
Memorandum interne

To | À	**Judge Chile Eboe-Osuji**	**From | De**	**Presidency**
Date	4 April 2012	**Through | Via**	
Ref.	2012/PRES/00199	**Copies**	
Subject | Objet	**Disqualification Request of 2 April 2012**		

As you are aware, the defence teams in the case of *the Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* have recently filed before the Presidency a "Defence Request for the Disqualification of a Judge" ("Defence Request") (ICC-02/05-03/09-317), requesting your disqualification. The Defence Request asks that the Presidency convene a special plenary session to address this matter.

Pursuant to article 41(2)(c) of the Rome Statute and rule 34(2) of the Rules of Procedure and Evidence, you are entitled to present written submissions on the Defence Request. The Presidency asks that you make any such submissions by Monday 16 April 2012.

For your information, the relevant provisions of the legal texts governing excusal and disqualification are article 41 of the Rome Statute and rules 33-35 of the Rules of Procedure and Evidence.

ANNEX 2

Cour
Pénale
Internationale

International
Criminal
Court

To | À	**Presidency**	**From | De**	**Judge Chile Eboe-Osuji**
Date	16 April 2012	**Through | Via**	
Ref.	2012/PRES/00199	**Copies**	
Subject | Objet	**JUDGE EBOE-OSUJI'S MEMORANDUM CONCERNING 'DEFENCE MOTION FOR DISQUALIFICATION OF A JUDGE'**		

I. OPENING REMARKS

To Recuse or Not to Recuse

1. I begin with the following quote:

> Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realisation of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. *The oath requires a judge to render justice impartially.* To take that oath is the fulfilment of a life's dreams. *It is never taken lightly. ... Courts have rightly recognised that there is a presumption that judges will carry out their oath of office. ... This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high.* However, despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something that the judge has done gives rise to a reasonable apprehension of bias.[1] [Emphasis added.]

2. The author of those words was Justice Cory, at the Supreme Court of Canada. The lesson in the quote aptly frames the issues now before the Plenary. And, as will be seen, that lesson resonates throughout the jurisprudence of international and national courts in relation to challenges to judges on grounds of 'apparent' bias.

3. Upon the motion of Defence Counsel for my recusal, made to the Plenary of Judges, the Presidency has invited my views. Counsel rest their motion on two grounds: (i) the coincidence of my nationality with the nationality of many of the military victims of the attack that is the factual subject matter in *Prosecutor v Abdallah Banda Ababakaer*

[1] *RDS v R* [1997] 3 SCR 484, at paras 116 and 117 [Supreme Court of Canada.]

Nourain and Saleh Mohammed Jerbo Jamus [the '*Banda & Jerbo* Case']; and (ii) an academic commentary that I posted in a blog in March 2010, long before my election, in which I explored ways that the African Union's waning support for the Court might be rekindled—in the context of the *manner* in which a *specific* global debate, *at a point in time*, was being conducted concerning a *specific* indictment. Although the commentary said nothing at all about the *Banda & Jerbo* Case, counsel now attempt to conflate the two and link them up. The link is laboured. I did not make it. Nor did I intend it.

4. In the nature of things, I must consider recusing myself (mindful that there is always an option to do so regardless of the grounds of the motion and out of an abundance of caution[2]) or decline self-recusal and engage a peremptory judicial review and ruling by the Plenary.

5. I note that in their motion for recusal, learned counsel repeatedly invoke, with a studied air of great doom, the spectre of damage to the integrity of the Court and loss of confidence in its administration of justice, if a judge perceived as biased were to try a case. That would be true if the perception of bias is well-founded in the view of a fair-minded observer who is well-informed of all the facts and circumstances.

6. We must equally keep the contrary damage fully in view at all times. As it has been amply stated in the jurisprudence of the ICTY on disqualification of judges: '[I]t would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias'.[3] Justice Mason at the High Court of Australia had made a similar point, when he observed as follows:

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and *do not*, by acceding too readily to suggestions of appearance of bias, *encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.*[4] [Emphasis added.]

7. In view of these considerations and my view that the challenge falls far short of the high threshold required of a reasonable case, I have decided to not recuse myself. Let the Plenary decide.

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[2] See *Prosecutor v Šešelj (Decision on Motion for Disqualification and Order Replacing a Judge in a Case before a Trial Chamber)* 3 April 2009 [ICTY]: Judge Agius voluntarily self-recused, though he saw no merit to the motion for his disqualification.

[3] *Prosecutor v Delalić* et al, *(Judgment)* 20 February 2001 ('*Čelebići* Appeal Judgment') [ICTY Appeals Chamber], para 707; *Prosecutor v Kanyarukiga (Decision on Gaspard Kanyarukiga's Motion to Disqualify Judge Vaz)* 24 February 2011 [ICTR Appeals Chamber, before President Robinson] para 9; *Prosecutor v Ntawukulilyayo (Decision on Motion on Disqualification of Judges)* 8 February 2011 [ICTR Appeals Chamber, before President Robinson] para 7.

[4] *Re JRL, ex parte CJL* (1986) 161 CLR 342 [High Court of Australia] at p 352.

An Understandable Question

8. As a preliminary matter, I should observe that, taking the motion as asking questions, it is perfectly understandable that learned counsel, from their own subjective corner, may want to ask whether an ICC judge should sit in a case in which the victims of the conduct under inquiry share a nationality with the judge. Viewed from that subjective perspective, it is arguable that the question is one that counsel owe their clients the duty to ask in good faith—since it has occurred to them to ask it. I respect the question and treat it with dignity. I do not presume that counsel were acting in bad faith in asking it. This is notwithstanding that challenges of bias against a judge are really questions about 'judicial integrity' concerning 'not simply the personal integrity of the judge, but the integrity of the entire administration of justice,' as Justice Cory had observed at the Supreme Court of Canada.[5] In accepting counsel's statement, as I do, that their intention is not to attack my integrity, I must assume that counsel were unaware of such eminent observations on the matter as that conveyed by Justice Cory.

9. Of course, the correctness of learned counsel's submissions in the present case is quite a different matter. Their conclusions are hasty; and their analysis incomplete and one-dimensional and wholly disconnected from the law that guides the answers to the questions they ask. I disagree with them.

10. But, then again, even the incorrectness (if also so found by the Plenary) of counsel's submissions may yet hold some salutary value. It helps to rid law's lawn of niggling weeds of distracting thought of the particular kind here engaged. I fully welcome the opportunity presented for this discussion. It is to be expected that the resolution of the motion, especially in the aspect that deals with shared nationality, holds value beyond the concern of Defence Counsel in the present case. It also holds value for the future occasion in which concern may be raised as to the impartiality of the judge who shares a nationality with alleged perpetrator(s). And, it holds further value in respect of other manner of shared identity that implicates forbidden grounds of discrimination in international law. For, it is difficult to see where and how the line is to be drawn that separates nationality from religion or race or ethnicity, as permissible grounds for recusal. Would the Court also not have to confront sooner or later a complaint from another defence team who will argue that because a judge is a Jew, a Christian or a Moslem, (s)he cannot be trusted to uphold the judicial oath in cases where the victim or perpetrator is a Jew, a Christian or a Moslem, as the case may be?

11. Good faith must also be presumed as regards the aspect of the motion that concerns my commentary in the blog post; notwithstanding that the objection derives from a greatly exaggerated misunderstanding of what was actually written and intended, and from supposing into the commentary words, phrases and senses that are

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[5] *RDS*, *supra*, para 113.

not in it and links that are too remote to make.

The Allegation of Bench-Packing

12. Before proceeding, I note that in the closing pages of counsel's motion paper, there is a wide-ranging complaint made, not only against named judges who had been assigned in the past to the present case, but also against the authority that assigned those judges to the case. The implicit allegation is one of a deliberate and cynical packing of the bench against the accused, by consistently assigning to the case judges of the same nationality as the countries that contributed troops to the AU peacekeeping mission in Darfur. That complaint continued, questioning the propriety of assigning judges to cases without accounting for such assignments to 'the Accused'.[6] Sinister notions such as 'opaque' procedure were used to drive home the point.

13. Although the Presidency has invited my views on the motion filed by counsel that includes that part, I do not feel called upon to engage in discussion on the factual merits of that particular allegation. It is for the Presidency to react to the factual allegation, if they see the need. I need only make a few procedural observations.

14. First, that criticism ought not have been lightly made by counsel learned in the law, without the clearest evidence of the corrupt motive suggested. To ask questions about the integrity (*merely* on grounds of shared nationality with AU peacekeepers) of three named judges assigned to the case is serious enough. But to, also, ask questions of the integrity[7] of other judges (without the same shared nationality) who did the

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[6] *Prosecutor v Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus (Defence Request for the Disqualification of a judge)* No ICC-02/05-03/09-317 of 2 April 2012 [the 'motion paper'], para 43. Notably, counsel also make a show of complaining on behalf of 'the public'. But that submission on behalf of 'the public' lacks a serious basis. It is self-serving. Counsel have no retainer to speak as counsel for the public. Their rights of audience and to make submissions derive only from their retainer in the case as counsel for the Accused. Therefore, this complaint must be understood purely as arising from the partisan interests of the accused that counsel have been retained to represent.

[7] The error of this allegation is compounded, not alleviated, by the submissions contained in footnotes 44 and 45 of the motion paper. I begin with footnote 45. The submission opens with the preliminary declaration: 'The Defence do *not* suggest *actual bias* on the part of the Court as an institution or the Presidency ...'. [Emphasis added.] However, they immediately continued, without a pause, with the assertion that 'it is *inevitable* that *reasonable* doubts about impartiality will be exacerbated by a pattern of appointments that suggest criteria favourable to one of the parties even though in actuality the pattern was purely the result of random events.' A basic flaw with that submission is that the law has never assumed that the *reasonableness* of the *doubt* is to be assessed from the viewpoint of defence counsel (see opinion of Lord Hope in *Helow, infra*), such that counsel's bare assertion of the *inevitability* of it permits them so easily to deploy the criticism against the institution. As for footnote 44: it is readily apparent that their clear suggestion of *apparent bias* against the assigning authority was also partly informed by the submissions in footnote 44. In the words of counsel 'the point' there is stated as follows: 'for the perception of the international public, the consistent assignment in this case of judges from AMIS troop contributing countries, to the prejudice of the Accused, was unlikely to occur by chance. It is noteworthy that none of the other three Trial Chambers have two judges from AMIS troop-contributing countries.' Once more, I recall the legal principle that the perception of the complainer is not to be mistaken as 'the perception of the international public.' But, more substantively, the exordium to 'the point' made in footnote 44 is fundamentally flawed even on the face of it. First, there is seen an exercise in a certain calculation (unexplained) in mathematical probability that, in the main, is stated as follows: 'So, for both

assigning, is something that truly invites the need to refresh the memory on some fundamental standards that guide our profession as officers of the court (in our work as judges and counsel). These standards stress the need for decorum in the conduct of cases. They are classically stated in the following way in the American College of Trial Lawyers' *Canadian Code of Trial Conduct*:

> (a) A lawyer should conduct himself or herself so as to preserve the right to a fair trial, which is one of the most basic of all constitutional guarantees. This right underlies and conditions all other legal rights, constitutional or otherwise. In administering justice, trial lawyers should assist the courts in the performance of two difficult tasks: discovering where the truth lies between conflicting versions of the facts, and applying to the facts as found, the relevant legal principles. These tasks are demanding and cannot be performed in a disorderly environment. Unless order is maintained in the courtroom and disruption prevented, reason cannot prevail and constitutional rights to liberty, freedom and equality under law cannot be protected. The dignity, decorum and courtesy which have traditionally characterized the courts of civilized nations are not empty formalities. They are essential to an atmosphere in which justice can be done.
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> (b) During the trial, a lawyer should always display a courteous, dignified and respectful attitude toward the judge presiding, not for the sake of the judge's person, but for the maintenance of respect for and confidence in the judicial office. The judge, to render effective such conduct, has reciprocal responsibilities of courtesy to and respect for the lawyer who is also an officer of the court. A lawyer should vigorously present all proper arguments against rulings or court demeanour the lawyer deems erroneous or prejudicial, and see to it that a complete and accurate case record is made. In this regard, the lawyer should not be deterred by any fear of judicial displeasure or punishment.
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> (c) In advocacy before a court or other tribunal, a lawyer has the professional obligation to represent every client courageously, vigorously, diligently and with all the skill and knowledge the lawyer possesses. It is both the right and duty of the lawyer to present the client's cause fully and properly, to insist on an opportunity to do so and to see to it that a complete and accurate case record is made without being deterred by any fear of judicial displeasure or punishment. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less does it demand of a lawyer for any client, violation of law or any manner of fraud or chicanery: The lawyer must obey his or her own conscience and not that of the client.

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judges from AMIS troop contributing countries to be selected for Trial Chamber IV, the probability was only 1/5 x 2/14 = 2/70 or 1/35. Judge Eboe-Osuji was one of six new judges when he was selected to fill Judge Diarra's vacancy. For all of these events to occur on the same case, the chances would be 1/35 x 1/6 = 1/210. In other words, the probability was less than one-half of one percent'. But, counsel did not indicate what particular theorem is being employed or that it is a theorem that has been approved by courts anywhere as a generally accepted method of judicial reasoning in the settlement of human disputes concerning the realities of life. Second, the probability calculation is even wrong, as it assumes a huge number that cannot be assumed. It assumes that all appeal judges are available to be assigned to the Trial Chamber to try their clients and that all six new judges are available to be assigned to their case: both of which assumptions are wrong. What is more, even when they were internally confronted with the unworkability of the theorem, upon the realisation that the availability of the Appeals Chamber judges *must* be ruled out of their calculation, they still continued undeterred to assert 'the point' supporting the criticism of the procedure for the assignment of judges to cases at the ICC and to their case.

(d) In performing these duties, a lawyer should conduct himself or herself according to law and the standards of professional conduct as defined in codes, rules and canons of the legal profession and in such a way as to avoid disorder or disruption in the courtroom. A lawyer should advise the client appearing in the courtroom of the kind of behaviour expected and required of the client there, and prevent the client, so far as lies within the lawyer's power, from creating disorder or disruption in the courtroom.[8]

15. The point is that the courtroom, even an international criminal courtroom, is not to be approached as if it were the 'Wild Wild West', where everything goes in terms of what legal professionals in the courtroom say to—and about—one another, even without support in the law or the evidence. Decorum must prevail at all times, so that the search for the truth may be carried on in an orderly manner.

16. Second, it is a mystery that learned counsel chose to make this belated complaint about past composition of the Bench in their case. It is not even clear how it ultimately helps their case. It is, indeed, an unnecessary broadside that, properly considered, arguably tends to chip away at their main complaint against my own participation in the case. That should be the case if counsel had appealed no ruling of the Pre-Trial Chamber (that included one of the African judges complained against) on grounds of bias by reason of shared nationality with AU peacekeepers. That they had litigated no such appeals in the past does detract from their main complaint now, that they will be denied justice on grounds of bias by reason of shared nationality.

17. Finally, it is noted that counsel cited no legal authority for the suggestion that the assigning of judges to a criminal case will be a tainted process unless 'the Accused' has been either consulted or given explanation for the assignment. In view of the serious implication that the allegation of 'opaque' process[9] entails, counsel ought not have made that kind of allegation without strong legal authority in support. Indeed, learned counsel's own legal culture in the common law ought to have recommended great restraint in voicing that manner of criticism; as it would be a most unusual complaint for an advocate to make in the UK or the USA. In the circumstances, counsel should not be seen to be promoting that kind of criticism against the Court: 'A lawyer has a duty to promote the dignity and independence of the judiciary, and protect it against unjust and improper criticism and attack.'[10] It is not for the lawyer to engage in it.

18. Finally, learned counsel's complaint in this regard largely ignored the incidence of the limited pool of judges available to the Court in general: made the more so by prescriptions and practices that separate judges into divisions; prevent appeals judges from sitting at trials, and pre-trial judges from trying the cases they considered; and, generally requires panels of three judges to sit in trials and pre-trial matters. In the

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[8] American College of Trial Lawyers, *Canadian Code of Trial Conduct* (1999), pp 9—10. See also American College of Trial Lawyers, *Code of Pre-Trial and Trial Conduct* (2009) pp 4 and 11—12.
[9] Motion paper, para 43.
[10] American College of Trial Lawyers, *Code of Pre-Trial and Trial Conduct, supra*, p 4.

circumstances, the Presidency may not always have the luxury to pick and chose which judges to assign to cases, in order to avoid complaints that may stem from an extravagant conception of judicial purity. Justice is not a lily so delicate that what it commands for its own protection is an air-triggered sensitivity that belies what truly becomes a readiness to presume bias in a judge. That has not been the way of the law.

19. The Privy Council recognised this reality when they held as follows: 'It has also to be recognised that the purity of principle may require to give way to the exigencies and realities of life. In extreme cases the doctrine of necessity may require a judge to determine an issue even although he would otherwise be disqualified.'[11] In a related standard, the Canadian Judicial Council has laid down the following principle for Canadian judges: 'Disqualification is not appropriate if: (a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification, or (b) no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a miscarriage of justice.'[12] The CJC elaborated this principle in the following commentary:

> Extraordinary circumstances may require departure from the approaches discussed above. The principle of necessity holds that a judge who would otherwise be disqualified may hear and decide a case where failure to do so could result in an injustice. This might arise where an adjournment or mistrial would work undue hardship or where there is no other judge *reasonably available* who would not be similarly disqualified.[13] [Emphasis added.]

20. The pragmatic approach indicated above has an even greater service at the ICC, where judges serve in panels of three or five, and the ruling of no single judge (whether or not suspected of bias) can control the outcome and lead to a miscarriage of justice, without presuming that other members of the panel (and the Appeals Chamber that must correct an error below) are truly lacking in integrity.[14]

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[11] *Panton & Anor v Minister of Finance & Anor* [2001] UKPC 33 [Privy Council] para 16; [2001] All ER 178.
[12] Canadian Judicial Council, *Ethical Principles for Judges*, Principle E3, p 29.
[13] *Ibid*, Commentary E17, p 49.
[14] Notably, counsel have adverted their minds to this, in light of the practice of international courts such as the ICJ, the American Court of Human Rights and the European Court of Human Rights, where judges are not forbidden to sit in cases concerning their States of nationality (see paras 21 and 22 of the motion paper). But they argue that 'since each Trial Chamber contains only three judges, the assignment of any single judge has a more significant impact on the composition of the bench than would be the case at the ICJ or the international human rights courts, where the number of judges who hear a case is considerably larger': para 23 of the motion paper. Ultimately, in my view, this is a distinction without a functional difference in the outcome of a case. It makes no difference in the outcome of a case whether it was decided by a vote of 2:1 (at the end of an ICC trial) or 14:1 (at the ICJ). The only difference, in terms of the suggested 'more significant impact on the composition' that a single judge makes, must be the fear that the single judge would more easily influence two judges (in an ICC Trial Chamber) than 14 (at the ICJ). But such a fear is validated only by the presumption that the two influenced judges lack enough integrity to resist such undue influence. Such a presumption is impermissible in the face of the legally accepted presumption of integrity on the part of judges.

Counsel's Method of Submissions

21. Counsel's submissions adopt a 'grenade-and-catchall' approach to disputation. In that approach, myriad projectiles—big and small—are discharged in every direction. It appears that everything is thrown in, in the hope that something will work.

22. I shall only discuss the weakness of some of these submissions, as illustrative of the unreliability of the rest. In choosing this approach, it must be stressed that there is no argument—I repeat, none at all—that counsel made in their submission that does not attract much discussion: but to take on each of those arguments will make for a truly voluminous memorandum on my part. If the Plenary wishes my views in respect of any specific point that I omitted to address, I shall gladly oblige in an addendum.

II. REASSURANCE OF IMPARTIALITY

23. At this juncture, I should, perhaps, make it very clear that in the case of *Banda & Jerbo*, as in any other case to which I am assigned at the ICC, I shall approach my functions with absolute open-mindedness and I shall determine every issue according to the evidence presented on the record and the applicable law as I know it. I do not harbour any bias in favour of or against any party in this case or any other.

24. My resolve to keep an open mind in this case will remain so in the event that the Plenary considers and dismisses counsel's motion for my disqualification.

III. THE STANDARD OF ASSESSMENT

The Fully Informed and Fair-Minded Observer

25. From my own past experience as an advocate representing parties in cases, I must acknowledge the anxiety of counsel to keep the Bench perfectly pure in impartiality. Hence, every act and word that counsel see as out of place in a judge runs the risk of provoking fear of bias. Many a time, these bouts of fear result in motions for recusal. [I do not recall ever making one, though I had suspected it once or twice; but managed to keep my thoughts to myself!] But, these motions have become truly unexceptional in their frequency in international criminal practice. At the ICTR and ICTY, open allegations of bias have been made against more judges than not,[15]

[15] The incidence of recusal motions as an endemic problem in the work of the *ad hoc* tribunals is seen in the following sample litany—not an exhaustive list—of requests for the disqualification of ICTY judges as indicated: **Judge Jorda** and **Judge Riad** [in *Prosecutor v Kordić and Čerkez (Decision on the Application of the Accused for Disqualification of Judges Jorda and Riad)* 21 May 1998]; **Judge Riad, Judge Wang** and **Judge Nieto-Navia** [*Prosecutor v Delalić (Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves)* 25 October 1999]; **Judge Mumba** [*Prosecutor v Brđanin & Talić (Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge)* 18 May 2000]; **entire Trial Chamber: Judge Hunt, Judge Mumba** and **Judge Li Daqun**) [*Prosecutor v Brđanin & Talić (Decision on Joint Motion to Disqualify the Trial Chamber Hearing the Brđanin-Talić Trial)* 3 May 2002]; **Judge Orie** [*Prosecutor v Galić (Decision on Galic's Application Pursuant*

unconcerned that such a challenge to judicial impartiality 'is a serious step that should not be undertaken lightly.'[16] It is only a matter of time before that epidemic makes its way to the ICC.

26. It is, however, important always to keep in mind that the law does not appraise fear of judicial bias exclusively from the lens of the complaining counsel. In this connection, it has been correctly observed that, 'in considering whether there was a legitimate reason to fear that a judge lacks impartiality, the standpoint of the accused is important but not decisive. "What is decisive is whether this fear can be held objectively justified."'[17]

27. This brings us to the yardstick against which complaints of judicial bias must be assessed. In that regard, we must recall this settled point of law. The correct test for recusal of a judge is *whether the fair-minded and informed observer, having considered all the facts and all the circumstances, would consider that there was a real danger of bias.*[18]

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to Rule 15(B)) 28 March 2003]; **entire Trial Chamber: Judge Schomburg, Judge Mumba** and **Judge Agius** [*Prosecutor v Šešelj (Decision on Motion for Disqualification)* 10 June 2003]; **entire Trial Chamber hearing a contempt case** [*Prosecutor v Brđanin (Decision on Application for Disqualification)* 11 June 2004]; **Judge Hopfel** and **Judge Orie** [*Prosecutor v Šešelj (Decision on Motion for Disqualification)* 16 February 2007]; **Judge Pocar, Judge Parker** and **Judge Meron** [*Prosecutor v Lukić & Lukić (Order on Second Motion to Disqualify President and Vice-President from Appointing Judges to Appeal Bench and to Disqualify President and Judge Meron from Sitting on Appeal)* 11 May 2007]; **Judge Schomburg** [*Prosecutor v Martić (Order on Defence Motion to Disqualify Judge Wolfgang Schomburg from Sitting on Appeal)* 23 October 2007]; **Judge Harhoff** [*Prosecutor v Šešelj (Order on the Prosecution Motion for the Disqualification of Judge Frederik Harhoff)* 14 January 2008]; **entire Appeals Chamber: Judge Pocar, Judge Shahabuddeen, Judge Güney, Judge Vaz** and **Judge Meron** [*Prosecutor v Blagojević (Decision on Motion for Disqualification)* 2 July 2008]; **Judge Robinson, Judge Van den Wyngaert** and **Judge David** [*Prosecutor v Lukić & Lukić (Decision on Motion for Disqualification)* 12 January 2009]; **Judge Agius** [*Prosecutor v Šešelj (Decision on Motion for Disqualification and Order Replacing a Judge in a Case before a Trial Chamber)* 3 April 2009]; **Judge Picard** [*Prosecutor v Karadzić (Decision on Motion to Disqualify Judge Picard)* 18 May 2009]; **Judge Prandler** [*Prosecutor v Prlić (Decision of the President on Jadranko Prlic's Motion to Disqualify Judge Árpád Prandler)* 4 October 2010]; **Judge Orie** [*Prosecutor v Šešelj (Decision on Vojislav Seselj's Motion to Disqualify Judge Alphons Orie)* 7 October 2010]; **Judge O-Gon Kwon** and **Judge Parker** *(Decision on Motion by Professor Vojislav Seselj for the Disqualification of Judges O-gon Kwon and Kevin Parker)* 19 November 2010]. In *Prosecutor v Furundžija (Judgment)* 21 July 2000 [ICTY Appeals Chamber], the impartiality of **Judge Mumba** was challenged on grounds of apparent bias; and in *Prosecutor v Delalić* et al, *(Judgment)* 20 February 2001 ('*Čelebići*') [ICTY Appeals Chamber], **Judge Odio-Benito** was similarly complained against. A review of ICTR decisions shows a similar picture.

[16] *RDS, supra*, para 113.

[17] See *Magill v Porter* [2001] UKHL 67 [House of Lords], para 100, citing *Hauschildt v Denmark* (1989) 12 EHRR 266 [ECtHR] 279, para 48.

[18] *Magill v Porter, supra*, para 103. See also *Prosecutor v Furundžija (Judgment)* 21 July 2000 [ICTY Appeals Chamber], para 189; *Prosecutor v Delalić* et al, *(Judgment)* 20 February 2001 ('*Čelebići*') [ICTY Appeals Chamber], para 682; *Prosecutor v Akayesu (Judgment)* 1 June 2001 [ICTR Appeals Chamber], para 203; *Prosecutor v Kayishema and Ruzindana (Judgment, Reasons)* 1 June 2001 [ICTR Appeals Chamber], para 55; *Rutaganda v Prosecutor (Judgment)* 26 May 2003 [ICTR Appeals Chamber], para 39; *Karemera et al v Prosecutor (Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material)* 22 October 2004, para 66 [ICTR Appeals Chamber]; *Prosecutor v Galić (Judgment)* 30 November 2006 [ICTY Appeals Chamber] para 40; *Nahimana* et al *v Prosecutor (Judgment)* 28 November 2007 [ICTR Appeals Chamber], para 50; *Prosecutor v Ntawukulilyayo (Decision on Motion on Disqualification of Judges)* 8 February 2011 [ICTR

28. Speaking about the attributes of the fair-minded observer called upon to assist with an objective assessment of the existence of bias in a judge alleged to have lost impartiality, Lord Hope of Craighead usefully stressed the need to avoid confusing the fair-minded observer with the complainer. They are not the same person. In particular, the fair-minded observer comes to the task with a sense of detachment that the complainer typically lacks. According to Lord Hope:

> The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious ... . Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.[19]

29. And, regarding the requirement that the fair-minded observer must be reasonably informed, Lord Hope continued, highlighting the difference between the predispositions of the fair-minded observer and those of the complainer. A crucial difference between the two is that while the complainer will bristle and dwell upon only the words and phrases and sentences that distress him in a long article written by a judge, the fair-minded observer comes with an active aptitude of detachment that enables her to read every single word written, for its context and purpose and what it actually says. Once more, I quote Lord Hope:

> Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.[20]

30. Indeed, the fair-minded observer must take the trouble to read around the text of an article that the complainer has chosen to highlight, underline and side-bar in remove of their contexts—as is the case with learned counsel's motion paper. The fair-minded observer understands that the complainer would have selectively highlighted, underlined and side-barred texts, out of a partisan sensitivity that attracts undue suspicion to the complainer's mind as regards every word and action that he wrongly—

Appeals Chamber, before President Robinson] para 5; *Prosecutor v Kanyarukiga (Decision on Gaspard Kanyarukiga's Motion to Disqualify Judge Vaz)* 24 February 2011 [ICTR Appeals Chamber, before President Robinson] para 7.

[19] *Helow v Secretary of State for Home Department and anor* [2008] UKHL 62 [House of Lords] para 2.

[20] *Ibid*, para 3.

or even understandably—sees as out of place in a judge.

31. Before concluding the discussion on the attributes of the fair-minded observer, it may be useful to answer the practical question as to who is the 'fair-minded observer'. It is the court that is called upon to determine the question of bias.[21] At the ICC, that would be the Plenary of Judges. It is the Court's view of the matter—not the complainer's view—that settles the question.

The Test of Impartiality

32. The test then is (i) a fair-minded and informed observer must consider all the facts and appreciate them in their context; and (ii) having done that, the fair-minded observer must see a 'real danger' of bias, before it can be found to exist in a judge. By 'real danger of bias' is meant 'real possibility'.[22] The test is not as high as 'real likelihood'. Nor is it as low as *mere possibility*, let alone *fanciful possibility* or *speculative possibility* created by a highly active or suspicious mind. That is to say, the fair-minded observer that is fully informed of all the facts must see that the *danger of bias* is *real.*

The Presumption of Impartiality

33. The disqualification of judges from cases on grounds of appearance of bias is not readily achieved. This is because of the presumption of impartiality. It is a legal presumption. And the threshold for its displacement is rather high. The statement of this high presumption is consistently seen in the jurisprudence of the ICTR and the ICTY. It comes through in what is now a standard template[23] of reasoning that the judges of those tribunals have adopted and employed routinely to dismiss recusal motions, which, as we have seen, have become so endemic in their work. First, it is recalled, in the standard template, that the Appeals Chamber has held that:

> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if: (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[24]

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[21] See *Magill v Porter, supra*, para 99.
[22] See *Magill v Porter, supra*, paras 99—104.
[23] See, for instance, *Prosecutor v Kanyarukiga (Decision on Gaspard Kanyarukiga's Motion to Disqualify Judge Vaz)* 24 February 2011 [ICTR Appeals Chamber, before President Robinson]; *Prosecutor v Ntawukulilyayo (Decision on Motion on Disqualification of Judges)* 8 February 2011 [ICTR Appeals Chamber, before President Robinson]; *Prosecutor v Šešelj (Decision on Vojslav Šešelj's Motion to Disqualify Judge Alphonse Orie)* 7 October 2010 [ICTY, per President Robinson].
[24] See, *Prosecutor v Kanyarukiga (Decision on Gaspard Kanyarukiga's Motion to Disqualify Judge Vaz)* 24 February 2011, *supra*; *Prosecutor v Ntawukulilyayo (Decision on Motion on Disqualification of Judges)* 8

34. Next, it is recalled that '[w]ith respect to the reasonable observer prong of this test, the Appeals Chamber has held that the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, *including the traditions of integrity and impartiality that form part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.*"'[25] [Emphasis added.]

35. With the stage thus set, the third step in the reasoning delivers the strong drive of a reminder on the strength of the high presumption of impartiality that judges enjoy. It is usually stated in the following way:

> The Appeals Chamber has also emphasised that *there is a presumption of impartiality that attaches to any Judge of the Tribunal.* Accordingly, *the party who seeks the disqualification of a Judge bears the burden of adducing sufficient evidence that the Judge is not impartial.* In this respect, *the Appeals Chamber has consistently held that there is a high threshold to reach to rebut the presumption of impartiality.* The party must demonstrate "a reasonable apprehension of bias by reason of prejudgement" that is *"firmly established".* The Appeals Chamber has explained that this *high threshold is required because "it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias".*[26] [Internal references omitted. Emphases added.]

36. It is thus evident that in the jurisprudence of international criminal law, the party alleging apparent bias is *required* to (i) *demonstrate* its existence, and (ii) demonstrate it *firmly*. Spectacular or speculative arguments alone are not enough.

37. The presumption of judicial impartiality on that high threshold is also a hallmark of relevant case law in national jurisdictions. In *RDS*[27], for instance, Justices L'Heureux-Dubé and McLachlin of the Supreme Court of Canada cited with approval the observation in the US Supreme Court case of *United States v Morgan*[28] recognising that 'judges "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances"'. They also endorsed the following observation in Professor Richard Devlin's case comment entitled 'We Can't Go On Together with Suspicious Minds: Judicial Bias and Radicalized Perspective in *R v RDS*': '[t]he law will not suppose possibility of bias in a judge, who is

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February 2011, *supra*; *Prosecutor v Šešelj (Decision on Vojslav Šešelj's Motion to Disqualify Judge Alphonse Orie)* 7 October 2010, *supra*.

[25] See, *Prosecutor v Kanyarukiga (Decision on Gaspard Kanyarukiga's Motion to Disqualify Judge Vaz)* 24 February 2011, *supra*; *Prosecutor v Ntawukulilyayo (Decision on Motion on Disqualification of Judges)* 8 February 2011, *supra*; *Prosecutor v Šešelj (Decision on Vojslav Šešelj's Motion to Disqualify Judge Alphonse Orie)* 7 October 2010, *supra*.

[26] See, *Prosecutor v Kanyarukiga (Decision on Gaspard Kanyarukiga's Motion to Disqualify Judge Vaz)* 24 February 2011, *supra*; *Prosecutor v Ntawukulilyayo (Decision on Motion on Disqualification of Judges)* 8 February 2011, *supra*; *Prosecutor v Šešelj (Decision on Vojslav Šešelj's Motion to Disqualify Judge Alphonse Orie)* 7 October 2010, *supra*.

[27] *RDS*, *supra*, para 32.

[28] 313 US 409 (1941) at p 421 [US Supreme Court].

already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.' But notwithstanding the 'strong presumption of impartiality' judges will nevertheless be held to certain stringent standards regarding bias.[29] Writing in the same vein, following a review of the different formulations of the applicable test for judicial bias, Justice Cory observed as follows:

> Regardless of the words used to describe the test, the object of the different formulations is to emphasise that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegation. Yet, this is a serious step that should not be undertaken lightly.[30]

38. In *Helow*, the 'high threshold' of presumption of judicial impartiality was similarly recognised. And, as in *RDS*, it was also accepted that it is a rebuttable presumption that can be displaced with the adducing of 'cogent evidence'.[31]

How to Prove Apparent Bias

39. We have now seen consistent pronouncements in the jurisprudence to the effect that: (i) judges enjoy a presumption of impartiality; (ii) the threshold for displacing the presumption of impartiality is high; (iii) though high, the threshold can be surmounted with 'cogent evidence' in the proper case; (iv) displacing the presumption is not to be taken lightly; (v) the judicial oath of office has real value and must be taken into account.

40. But how do all these pronouncements come together in a more actionable conception of the requisite proof when apparent bias is alleged? Regrettably, more time has been spent in the case law debating whether *what* needs to be proved is 'real likelihood' or 'real danger' of bias.[32] Not as much time has been spent in the discourse to suggest *how* to go about the proof—whatever the agreed test for it may be. This is one area where the ICC Plenary now has the opportunity to assist in clarifying the jurisprudence, especially taking into account the particular circumstances of the ICC where the pool of judges is necessary limited (more drastically than is the case in national jurisdictions where the law of judicial bias was originally conceived) both by the overall number and by the incidence of the rules and conventions at the ICC that exclude existing judges from being assigned to certain divisions, chambers and cases, and by the fact that no one judge at the ICC can control the outcome of any case so as to occasion miscarriage of justice, especially given the presence of an Appeals Chamber whose function is precisely to correct any errors made below.

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[29] *RDS*, *supra*, para 33.
[30] *Ibid*, para 113.
[31] *Helow*, *supra*, para 57.
[32] For instance, see *Magill v Porter*, paras 99—104.

41. The exigencies of the ICC and the case law reviewed (illustrated by *Furundžija* in the international system and *RDS* in the national sphere) recommend that the Plenary should make clear that the 'cogent evidence' that displaces doubt involves two levels of proof:—(i) demonstration of the existence of objective fact (such as something said or done) that reasonably conveys a sensory impression in the fair-minded observer of real possibility that *anyone* (judge or not) who does or says such a thing may be biased; and, (ii) demonstration of why the fair-minded observer should worry that the author of the words or action, *being a judge*, is unable to set aside the suggested predisposition for bias, notwithstanding his or her judicial oath of office.

42. It is only by making this clarification that the right effect will be given to the idea that there is a high threshold of presumption of impartiality which is not lightly displaced; yet, it may be displaced in the proper case with cogent evidence. This clarity of the requisite levels of proof is lacking in the jurisprudence of international law and national law; although, as we have seen, its elements amply abound in a scattered manner in the jurisprudence. The ICC judges will be contributing to improvement in this area of the law by making the clarification.

IV. PRESUMPTION OF BIAS ON GROUNDS OF SHARED NATIONALITY

43. In the first part of their complaint, counsel urge the Court to treat the nationality of a judge as grounds for disqualification. They 'submit that the nationality of a judge is a relevant and, in some cases, decisive consideration.'[33] Counsel hitch this submission tightly to armed conflicts[34]—the events that trouble international criminal law the most.

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[33] See para 15 of the motion paper.

[34] In paragraph 16 of the motion paper, for instance, counsel unhelpfully argue as follows: 'The Court holds out the promise of a new, truly international court, which adjudicates cases not on the basis of political interests or power, but on the basis of universal principles of justice. Those States that have signed the Statute have compromised their own sovereignty and thereby exposed their own national militaries to the jurisdiction of the Court. Surely they did so confident in the expectation that the justice administered would be unbiased and that they would not be abandoning their own soldiers to justice administered by nationals of the very country they had fought against.' In paragraph 25, a variant of the same contention appears as follows: 'Moreover, it is certain that States and militaries all over the globe will be watching the Court's decision on this issue. If the Court were to adopt the position that nationality can never play a role in a motion for disqualification, States must accept that cooperation with this Court risks exposing their nationals to a trial by judges who are nationals of the very country they were fighting against. States Parties to the Statute and States which are considering becoming parties, big and small, will surely take note and confidence in this institution will suffer.' This submission is quite surprising in many ways. ICC judges should not be quick to give it legal credence. For one thing, it suggests counsel's misunderstanding of the ICC's *raison d'être* to be primarily a forum where States would show up and defend their citizens (soldiers or not) accused of gross violations of human rights amounting to international crimes; rather than primarily as an international forum of last resort, established to remind States of their primary responsibility to hold accountable their nationals who are suspected of having engaged in conducts amounting to international crimes. Cases will not come to the ICC, as the Court now stands, if States genuinely fulfill that primary responsibility in this regard. Then they would have no reason to worry that ICC judges may try their nationals. It may be granted that the only legitimate value that counsel's concerns may have could be as regards cases involving the crime of aggression, strictly speaking. But, those will be exceptional cases if and when they come to the Court, in view of the

As they argued: 'In cases concerning armed conflicts, the nationality of judges naturally leads one to *doubt* their impartiality.'[35] [Emphasis added.]

44. There is, of course, very little that is really remarkable about 'doubt' in the administration of justice. Justice does not quiver, turn tail and run in the face of mere doubt. For doubt to matter, it must be reasonable. The drafters of the Rome Statute recognised this basic legal axiom. Hence, their consideration and deletion of nationality as a factor to be considered in recusing judges from the cases.[36] But, learned counsel boldly persist in urging the Plenary to recognise nationality as grounds for disqualification. In this regard, they curiously submit as follows:

> Had the drafters of the Statute intended that nationality could never be grounds for disqualification they certainly would have written such a provision into the Statute. Instead, the Statute provides that disqualification can be made when "impartiality might reasonably be doubted on any ground."[37]

45. In so submitting, counsel ignore the converse conundrum that more obviously obstructs their goal. That is: had the drafters of the Statute intended nationality to be a disqualifying factor, they *would have* proceeded to list it as such, as it had so very clearly occurred to them to do. The weight of that obstacle is sufficient to permanently sink counsel's submissions in this regard. For, the judges of the Court may not, at the urging of counsel, smuggle in through the backdoor of case law a consideration that the drafters of the Statute had clearly considered and locked out at the front door.

46. Beyond that obvious obstruction to counsel's goal, there is a plethora of other reasons that deprives wisdom to the idea of recognising nationality as vitiating judicial impartiality. For one thing, the ICTY Bureau of judges in *Šešelj*, as a matter of existing international jurisprudence, considered the proposition and correctly rejected it in the following uncomplicated language:

> The nationalities and religions of Judges of this Tribunal are, and must be, irrelevant to their ability to hear the cases before them impartially. The Statute of the Tribunal requires Judges to be "persons of high moral character, impartiality and integrity."

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jurisdictional configurations for that particular crime. But their *exceptional* nature should not warrant the formulation of a *general* rule that recognises nationality as vitiating the presumption of judicial impartiality, even in cases not involving the crime of aggression. Even in cases of the crime of aggression, when the Court gets to the point of exercising jurisdiction over that crime, the better approach may be to employed—for those specific cases—the European Court of Human Rights model, where judges from the States whose conducts are under examination are not permitted to preside, in order to avoid unnecessary distractions in the case from the perspective of observers who may not necessarily qualify as fair-minded observers that are fully informed of all the circumstances—not because judges are presumed to lose impartiality because of nationality. But even the employment of that model for aggression cases should not require the Plenary to formulate a rule that excludes nationality from the presiding chair. The Presidency and the judges should have the good sense to manage the situation. But all that is speculation about what may or may not happen in future.

[35] See para 24 of the motion paper.

[36] See para 20 of the motion paper.

[37] *Ibid.*

> Before taking up their duties, each Judge must make a solemn declaration committing himself or herself to performing those duties "honourably, faithfully, impartially and conscientiously." Judges in every domestic system of justice need to put aside any identification with a particular group based on religion, ethnicity, gender or other traits, characteristics, or grounds. Similarly, they must put aside any of these bases of identification in relation to any accused who appear before them. Their ability to do so, and to consider nothing but the evidence presented to them in deciding on an individual's guilt, constitute a touchstone of their role as judges. So it is at this International Tribunal.[38]

47. Insisting that judges of international tribunals must be presumed to put aside national allegiances when the sensitivities of their states of nationality are implicated in the case under consideration, the ICTY Bureau held as follows: 'The policies of the governments of the countries from which Judges of this International Tribunal come are, and must be, irrelevant to the carrying out of their judicial responsibilities. Judges of this International Tribunal serve only the international community. In taking their solemn declaration to perform their duties "honourably, faithfully, impartially and conscientiously," they necessarily disavow any influence by the policies of any government, including the government of their home country.'[39]

48. Another complaint of apparent bias against Judge Schomburg on grounds of nationality was similarly rejected in *Prosecutor v Martić*. The contours of the complaint in that case are remarkably similar—in more ways than one—to the complaint here under consideration. There, it was alleged that '(a) Judge Schomburg's German nationality gives rise to an appearance of bias as the Defence appeal involves many issues "directly connected with the German involvement and German policy towards Croatia during World War II and during the period relevant for the present case (1990-1995)"; (b) Judge Schomburg's past position as Undersecretary of State at the Senate Justice Department in Berlin from 1989 to 1991 means that he "was a member of the German state machinery" during "the period of crucial German support to Croatia"; and (c) Statements of Judge Schomburg quoted in an 18 November 2005 *Deutsche Welles* article demonstrate a "prejudicial position relating to the facts that have to be elaborated by the Appeals Chamber"'.[40]

49. Relying on *Šešelj*, Vice-President Parker also rejected the complaint. In his decision, Judge Parker notably repeated the reasoning that 'the policies of the governments of the countries from which Judges of this International Tribunal come are, and must be, irrelevant to the carrying out of their judicial responsibilities.'[41] In a rather emphatic language indicating that allegations such as these do not even begin to rebut

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[38] *Prosecutor v Šešelj (Decision on Motion for Disqualification)* 10 June 2003 [ICTY Bureau], para 3.
[39] *Ibid*, para 4.
[40] *Prosecutor v Martić (Order on Defence Motion to Disqualify Judge Wolfgang Schomburg from Sitting on Appeal)* 23 October 2007 [Judge Parker, Vice-President], pp 1—2.
[41] *Ibid*, p 3.

the presumption of impartiality, Judge Parker considered 'that the implication of the Defence's argument that a judge cannot be considered impartial where he or she might be called upon to *consider acts of the government* of the state of which he or she is a national is *flatly contradicted* by the established jurisprudence of the Tribunal and *patently insufficient* to rebut the presumption of impartiality.'[42] [Emphasis added.]

50. The foregoing thus makes extremely thin, a complaint the crux of which is expressed as follows: 'Any reasonable observer would expect that, *all other factors being equal*, a judge nominated for the position by Nigeria and endorsed by the AU would be *more likely* than a judge from any other country to reject Mr Banda and Mr Jerbo's justifications for the attack.'[43] [Emphasis added.] As the gravamen of their complaint, that argument is too weak to bear the weight of its purpose. For one thing, all other factors are not equal. The judicial oath and the jurisprudence make it so. Second, the argument precisely engages what Justice Mason at the High Court of Australia has cautioned against in these sorts of complaint: the point of the exercise is not to 'encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be *more likely* to decide the case in their favour.'[44] [Emphasis added.] It follows, then, that a motion for recusal is not an occasion merely to engage in a comparison of the relative predispositions of judges to decide a case in a certain way. Counsel are required to 'firmly establish' that a *particular judge*, as himself or herself, will not respect his or her judicial oath to try the case impartially. Finally, one can easily see the ready adaptation of the 'more likely' argument to different cases and situations around the world: a white judge will be recused from a case when the accused is black and the victim white; a Christian judge recused when the accused is Moslem and the victim Christian; and so on. It is not surprising then to see why such reasoning has been repeatedly rejected in international courts (such as in *Šešelj*) and national courts.

51. Learned counsel for the defence tried hard in their submissions to distinguish the jurisprudence according to *Šešelj* as specific and unique to the *ad hoc* tribunals; and, of limited value to the ICC as a permanent court. But, there is nothing in the quoted passages from *Šešelj* and *Martić* that is unique to *the judges* of the *ad hoc* tribunals and inapplicable to *the judges* of the ICC as a permanent court. The stated principles are of identical import to both sets of judges.

52. Counsel's arguments of distinction thus fall short of their forensic objective. They are, in certain respects, even injurious to their complaint. Consider, for instance, counsel's argument that 'this Court is in a different position from the *ad hoc* tribunals,' because '[t]he Appeals Chamber has held that "[t]he International Criminal Court is not

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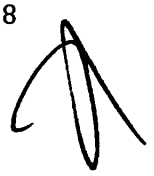
[42] *Ibid*, p 3.
[43] See motion paper, para 35.
[44] *Re JRL, ex parte CJL, supra*, at p 352.

in the same position [as the ICTY and ICTR] *in that it is beginning, rather than ending, its activities. In addition, being a permanent institution, it may face a variety of different and unpredictable situations.'*[45] [Emphasis added.] It is truly difficult to see how this argument supports the proposition that the Plenary should ignore ICTY jurisprudence that rejected nationality as grounds for recusal of judges. That two pachyderms are 'in different places' in their life span does not make one a rhino and the other an elephant. The more obvious suggestion may be the difference between an older and younger animal of the same kind. But even accepting the materiality of the different-places-in-their-mandates factor: one could readily see how such a difference would precisely recommend against a quick recognition of nationality as grounds for recusal of judges in this Court. This is for the simple reason that a disqualifying rule of nationality has a greater potential to cause difficulty in the administration of justice at the ICC in the long run. Here is why. Many of the countries that have nominated candidates for election as judges of the ICC are States who have a notable history of deploying troops abroad, in the troubled spots of the world—often, but not always, in multilateral peacekeeping or humanitarian protection missions, as part of the UN, the AU, NATO, 'Coalition of the Willing', etc. And some of the States that may yet ratify the Rome Statute in future may have a similar history. Some of the military deployment may result from bi-lateral military assistance pacts. While others may result from unilateral actions, involving possible questions of self-defence or protection of nationals abroad. In certain cases, such activities may prove more controversial than in others. But such controversies, when they arise, are irrelevant to the impartiality of nationals (from those military powers) who are nominated and selected later to serve as judges at the ICC and other tribunals, to attend to the task of cleaning up the humanitarian dross that result from the particular conflicts. In the result, it should be plain enough to see that, as a permanent court, the ICC will, sooner or later, have to deal with other cases where the impartiality of ICC judges from other regions of the world (not just judges from AU countries who sent peacekeepers to Darfur) is challenged because the cases before them bear direct or remote connections to the involvements of their own compatriots who served as soldiers on peacekeeping or other humanitarian intervention missions abroad. Such connections may even be strikingly similar to the facts implicated in the present complaint. Therefore, for the Plenary to ignore existing judicial precedent, established at the ICTY, that have so emphatically and clearly rejected nationality (as grounds for recusal) will be quite short-sighted. This is because the prospects are real that such a rule of nationality will come back to haunt the administration of justice at the ICC more in future than would have been the case at the *ad hoc* tribunals which had shorter temporal mandates.

53. As a final matter, it should be noted that counsel's submission that 'undoubtedly'

[45] Motion paper, para 17.



'no judge from' the 'nationalities or ethnicities' of Rwanda and the former Yugoslavia have been chosen to serve at the ICTY and ICTR, respectively, clearly ignores a recent trend that emerged on the international criminal/transitional justice scene, following the ICTY and ICTR experiments. That is, the post-ICTY&ICTR-creation years have witnessed an increase in tendency towards judicial mechanisms in which jurists from the States (in whose territories the conflicts occurred) are selected to serve as judges alongside jurists of other nations. The Special Court for Sierra Leone, where both learned counsel have served as defence and prosecuting counsel, is a perfect example. At the SCSL, three Sierra Leonean jurists (two in the Appeals Chamber and one in a Trial Chamber) served as judges. That feature of the SCSL is a clear recognition that international law does not presume bias in a judge merely on grounds of shared nationality or ethnicity.

54. It is to be noted that national courts, in their own spheres, have said things similar to what was said in *Martić* and *Šešelj*, rejecting shared identity as reason for recusal. In *RDS*, for instance, the Supreme Court of Canada rejected the imputation of bias against a judge who shared the same racial identity with the accused before her.[46] The Supreme Court of Canada made clear in that case that shared identity was insufficient to rebut the presumption of impartiality that all judges enjoy. Even the fact that the judge had considered the racial perspective in the case did not displace the presumption of impartiality that the judge enjoyed.

55. And, in *Locabail (UK) Ltd v Bayfield Properties Ltd,* the Court of Appeal of England and Wales expressly excluded 'religion, ethnic or *national origin*, gender, age, class, means or sexual orientation' from the category of grounds upon which complaints of bias may be soundly alleged against judges of the permanent courts of England and Wales.[47]

56. The common lesson from *Šešelj*, *Martić*, *RDS* and *Locabail* is that judges of international and national courts know that the integrity, dignity and oath of their office transcend any sympathies that they may truly or putatively harbour on account of nationality, race, religion, ethnicity, sexual orientation and the like, such as are extraneous to the evidence and the law that must guide their work as judges; and, that they must be presumed to act accordingly. Indeed, in *Prosecutor v Furundžija*, an international *locus classicus* on judicial bias, the ICTY Appeals Chamber stated that 'in the absence of evidence to the contrary, it must be assumed that Judges of the International Tribunal "can disabuse their minds of any irrelevant personal beliefs or

[46] *RDS v R, supra*, para 119 [Supreme Court of Canada].
[47] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 [Court of Appeal of England] para 25. [Emphasis added.]

predispositions.'"[48] *Šešelj*, *Martić*, *RDS* and *Locabail* make the same point.

57. It is important to point out here that the requirement of 'evidence to the contrary', laid down in *Furundžija*, does not speak to evidence tending to show possible *existence* of 'personal beliefs or predispositions'. It calls for evidence of a judge's *inability to 'disabuse* [his or her mind] of personal beliefs or predispositions.' In *RDS*, Justice Cory underscored the point in the following way: 'In demonstrating partiality, it is ... not enough to show that a particular juror has certain beliefs, opinions or even biases. It *must be demonstrated* that those beliefs, opinions or biases *prevent* the juror (or, I would add, any other decision-maker) *from setting aside any preconceptions and coming to a decision on the basis of the evidence.*'[49] [Emphases added.]

58. Indeed, the common lesson from *Šešelj*, *Martić*, *RDS* and *Locabail*—and *Furundžija*—affords a perfect explanation for the consideration and deletion of nationality, from the Rome Statute, as grounds for disqualification of judges from cases. The drafters of the Statute presumably recognised the concern as adequately covered by the requirement in article 36(3)(a) of the Statute that the judges of the Court 'shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.' The requirement of article 36(3)(a) coupled with the consideration and rejection of nationality as grounds for disqualification has the precise effect of the jurisprudence according to *Šešelj* and *Martić* that flatly rejected nationality and religion as grounds for disqualification of judges.

59. The rejection of nationality as grounds for recusal of judges, crisply articulated in *Šešelj* and *Martić*, also has the value of recognising the legitimacy of justice administered by national courts in relation to other instances of armed conflicts—not contemplated by learned counsel in their submissions. Indeed, if the objection that counsel has now lodged is to attract any serious traction in the context of a case in which the judge's state of nationality is one of a number that contributed troops to an international peace-keeping mission, it must have an even greater traction in criminal cases arising from the conduct of armed conflicts of an international or non-international character (of any purpose or participatory configuration); as it does in criminal cases arising from operations to suppress terrorism; as it does in non-criminal cases arising from those events; and, as it necessarily does in the adjudication of non-criminal legal action between two states for whatever cause. That is to say, if counsel's contention (that nationality is a vitiating factor) is to be accepted, it will afford an international legal authority to repudiate the legitimacy of the following trials: the *Nuremberg* trial, the *Tokyo* trial, the *Yamashita* case and all the post-WWII trials in Europe and the Far East

[48] *Prosecutor v Furundžija (Judgment)* 21 July 2000 [ICTY Appeals Chamber], para 197.
[49] *RDS v R, supra*, para 107.

involving trials of persons, in the language of learned counsel's submissions, 'by judges who [were] nationals of the very [countries] they were fighting against',[50] and; the *Eichmann* trial, because all the judges in that case were Jews who shared the same racial/religious identity as Adolf Eichmann's victims. Acceptance of nationality as negating impartiality will effectively frustrate the jurisdiction to which detaining powers are entitled in international law to try prisoners of war.[51] It will negate the very idea of passive personality and protective principles of jurisdiction, by virtue of which international law has permitted States the jurisdiction to prosecute foreigners for criminal conducts injurious to citizens and interests of the State in question. That is to say, it will impugn the legitimacy of a trial conducted by American, British, Spanish and Indian judges in respect of any foreigner implicated in the infamous terrorist attacks carried out in New York, London, Madrid and Mumbai. Expatriates and foreign investors will refer to the jurisprudence of the ICC as giving them reason to repudiate justice rendered by judges of the forum in litigation between a national and the expatriate.

60. In short, the negative consequences of recognising nationality as grounds for recusal are too numerous to mention. In the end, the real shame will be an ill-considered line of jurisprudence that presumes bias in a judge on account of shared nationality with victim or perpetrator. It will do more harm than good to the standing of the Court, given the endless problems that such line of jurisprudence will produce in the Court's own work, as well as the broader effect it will have in administration of justice in national jurisdictions around the world.

Nationality and Ability of Judges to Rule According to their Conscience

61. There are, notably, many instances where judges in national courts have issued judgments that differed from the preferences of governments of their own States in relation to government's efforts against terrorism and in relation to other wars. In 2010, for instance, a US Federal Court in New York acquitted Ahmed Ghailani, a Tanzanian national, of 276 counts of murder and attempted murder, arising from the 1998 suicide bombings of two US embassies in East Africa that killed 224 people, including 12 Americans. He was only convicted of just one count of conspiracy to damage or destroy US property.[52] There are many more instances where national judges (as a majority or in dissent) ruled according to their best views of the law and the evidence and their conscience founded on judicial integrity, notwithstanding the preferences of their governments.[53] It would have been wrong to presume that they would abnegate their

[50] See motion paper, para 25.
[51] See articles 99 to 107 of the Geneva Convention relative to the Treatment of Prisoners of War.
[52] See <http://articles.latimes.com/2010/nov/18/nation/la-na-ghailani-verdict-20101118>
[53] Some examples are *Hamdan v Rumsfeld*, 548 US 557(2006) [US Supreme Court]; *A (FC) & Ors v Secretary of State for the Home Department; X (FC) & Anor v Secretary of State for the Home Department* [2004] UKHL 56 [UK House of Lords]; *Secretary of State for the Home Department v MB* (FC) [2007] UKHL 46; *Charkaoui v Canada (Minister of Citizenship and Immigration)* 2007 SCC 9 [Supreme Court of Canada]; *A and Others v*

oaths of office, just to please their governments who had been engaged in efforts to avenge or to protect their citizens from executed or anticipatory terrorist or belligerent attacks.

Complementarity

62. Quite apart from the reasons reviewed above that strongly recommend against recognising nationality as grounds for disqualification of a judge at the ICC, there is yet another peculiar reason that makes the idea wholly incongruous at the ICC. It is complementarity. The very essence of the ICC is that States have the right of first option to investigate and prosecute the crimes for which the ICC was created. Only when the States with the sovereign jurisdiction in the given situation fail to investigate and prosecute genuinely will the ICC come within its remit to act. That is to say, no case will come to the ICC for trial if it is genuinely investigated and prosecuted at the national level. Hence, to recognise nationality as presumptively displacing impartiality in an ICC judge is to presumptively displace the very idea of complementarity. This is because genuine prosecution of a Rome Statute case will typically be done before national judges. If they cannot try those cases sitting at the ICC, it means that they cannot try them sitting at home. That is directly contrary to what the State Parties to the ICC agreed to.

63. This is yet another reason that should explain the consideration and deletion of nationality, from the Rome Statute, as grounds for disqualification of judges.

V. ELECTION AS A MODE OF SELECTION OF JUDGES

Election as the preferred method of selection of international judges

64. In their submissions, counsel attempted to implicate the fact of selection of ICC judges by a process of election. Counsel tentatively urged that the 'involvement of a party in a judge's campaign for election *may* constitute [grounds] for disqualification.'[54] [Emphasis added.] It is hopefully not to be understood that the suggestion is that selection of judges by executive appointment is superior to selection by the democratic process of election, as far as judicial impartiality goes. Such a supposition would be a non-starter. There is no serious reason to accept that a judge selected through the electoral process is more likely, than one appointed by executive fiat, to be influenced or impaired by feelings of gratitude that corrode judicial independence and impartiality in

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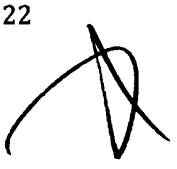
United Kingdom (Application No. 3455/05), 19 February 2009 [ECtHR: Judge Bratza of the UK joined in an ECtHR decision overruling aspect of measures adopted by the UK Government in Part 4 of the Anti-Terrorism, Crime and Security Act 2001]. In *Holder (Attorney General) et al v Humanitarian Law Project et al*, 561 US ___ (2010) [US Supreme Court], the Supreme Court upheld the US Government's authority to ban aid to designated terrorist groups. But Justice Stephen Breyer dissented, joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor. Their dissent is consistent with the ability of national judges to disagree with their Governments. So, too, was Justice Frank Murphy's very frank dissenting opinion in the *Yamashita v Styer*, 327 US 1 (1946).

[54] Motion paper, para 14.



cases involving the party credited with the judicial selection in question. Executive appointments are appreciably less noisy and more dignifying to the candidate's ego. But that has little bearing on the question of impartiality.

65. It is therefore unhelpful to quote the passage from the US Supreme Court judgment in *Caperton v A T Massey Coal Co, Inc*,[55] which counsel suggested as relevant because the case involved an attack on the impartiality of a West Virginia judge who had been selected by the process of election. *Caperton* has no bearing on the determination of the matter now before the Plenary. Counsel's quote of the passage is both incomplete and out of the defining context that made all the difference in that case.

66. The only passage in *Caperton* that counsel quoted is the one that says as follows:

> [T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.

67. But, this is a quote that is directly removed from its immediate and unique context. That context is clear from what the US Supreme Court had said *immediately before* and *immediately after* the text selected by counsel. Properly understood, it is clear that the Supreme Court was saying that *Caperton* was 'an exceptional case'. That point was made in so many words in the passage immediately preceding the quote selected by counsel. There, it was said: 'We turn to the *influence at issue in this case*. *Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal*, but *this is an exceptional case*.'[56] [Emphases added.] And immediately after the passage that counsel quoted, the following was also said: 'The inquiry centers on the contribution's *relative size in comparison* to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.'[57] [Emphasis added.] The full quote then, including the passage selected by counsel, appears as follows:

> We turn to *the influence at issue in this case*. *Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case*. ... We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and *disproportionate influence* in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The *inquiry centers on the contribution's relative size in comparison* to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.[58] [Emphases added.]

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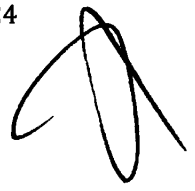
[55] *Caperton v A T Massey Coal Co, Inc*, 556 US ___ (2009) [US Supreme Court, Slip Opinion].
[56] *Ibid*, p 13. See also *Storms v Action Wisconsin Inc; Donohoo v Action Wisconsin Inc*, 754 NW 2d 480 (2008) [Supreme Court of Wisconsin].
[57] *Caperton*, p 14.
[58] *Ibid*, pp 13 to 14.

68. The import of the emphasised words marks the sharp contrast between *Caperton* and the circumstances of the case now before the Plenary. First, the controlling elements in *Caperton*, and what makes it 'an exceptional case' was the fact of 'disproportionate influence' or contribution that the third party brought to bear in achieving the selection of the judge. And, what made that influence or contribution 'disproportionate' was its 'relative size'—that is, relative to the contributions of other sources of support that should have been at the same general level of contribution towards the election of the judge. It is this that rendered improper the contributions of Mr D Blankenship, the Chairman of A T Massey Coal Co, towards the election of Judge Benjamin in that case.

69. In contrast, there was nothing unusual or exceptional, in the *Caperton* sense, in the contributions that an ICC State Party ('the nominating State Party') would make to the successful judicial election of its national. There is no other source of contribution of support that is expected to be at the same level as that of the nominating State Party, such as to make any contribution of the nominating State Party unusual or disproportionate *relative* to the other sources of contribution. Quite to the contrary, such support *is usual*, in the *Caperton* sense. Secondly, the unusualness of Mr Blankenship's contribution must be seen as flavoured by the fact that he had no natural or expected relationship with the lawyer whom he was sponsoring so robustly into judicial office. The remarkable event that showed connection between the two was the election campaign. And, we are, notably, told that Mr Blankenship had chosen to spend $3 million in supporting the lawyer for judicial election, *precisely* because he had calculated that a $50 million lawsuit in which his company (A T Massey Coal Co) was a party was on its way to the court on the bench of which the new judge he was so massively supporting would shortly sit. This made it very unusual. In addition, it would accentuate feelings of gratitude towards a person to receive such a large amount of support from him or her when there is no expected relationship between the two persons concerned.

70. A comparable set of facts is absent in the present case. I had a natural or expected relationship with Nigeria, as was the case with all the other candidates and their respective States. Support for my candidacy was expected of Nigeria, so, too, of other States who nominated candidates. I expected the support as a matter of civic entitlement, as an aspect of diplomatic support from one's own country on the international arena. There was no expectation of me to return the favour in any manner whatsoever, let alone by perversion of justice.[59] The unusual event would have been absence of Nigeria's support for my candidature. And, unlike in *Caperton*, where the first evidence of Mr Blankenship's support for a judicial candidate was as his company's case was on its way to the court in question, Nigeria's efforts to achieve judicial election for

[59] Indeed, it may be noted, the non-renewable nature of the tenure of ICC judges is an added factor that inures to the benefit of the presumption of impartiality and of judicial independence.



her citizens to the ICC judiciary date back to the first ICC judicial elections in 2003. This was long before the case of *Banda & Jerbo* arose. Nigeria had nominated other candidates between then and 2011 for election at the ICC. Nigeria has a long history of successfully and unsuccessfully nominating candidates to other international bodies, including back in the 1960s when her citizen was first elected to the ICJ. It is therefore wrong to compare her efforts in achieving an eventual successful election of one of her nationals to the ICC in 2011, with the efforts of Mr Blankenship who only set out to see to the successful election of a judge (with whom he had no known relationship) who would sit in his company's case that was bound to come up before the judge.

VI. THE BLOG COMMENTARY

Preconceptions and Opinions Held Prior to Elevation to the Bench

71. Counsel's second ground of complaint concerns my blog commentary. The complaint that the blog commentary is evidence of bias is a complaint that there is something wrong with a judge who had held or expressed an opinion or held sympathies prior to his or her elevation to the Bench. It really stands for the proposition that it is *impossible* for a professional to separate his or her personal views from the job that (s)he must do; such that even a judge who had expressed a personal view in the past when (s)he was not a judge will no longer be able to judge a case before him or her on the basis of the evidence presented and the applicable law.

72. There is a large body of authorities that has summarily rejected this sort of complaint. Correctly understood, these authorities stand for the general position that the concern should not be whether a judge may have formed sympathies, opinions or pre-conceptions; but whether (s)he will be able to overcome them, in order to entertain and act upon different points of view with an open mind. This is part of the reason why the presumption of impartiality is so high. The submissions of counsel do not even begin to address this presumption. In fact, they said not a single word in recognition or acknowledgment of it.

73. In *Furundžija*, the ICTY Appeals Chamber made two related points that are significant in the determination of the present complaint. For one thing, they dispelled the myth that judges must not have personal convictions. They expressed themselves in this way: 'The Appeals Chamber recognises that Judges have personal convictions. "Absolute neutrality on the part of a judicial officer can hardly if ever be achieved."'[60] Next, they decried the cognitive dissonance entailed in attacks against judges on grounds of opinions and preconceptions, in the sense that it is in fact a negation of the very thing called 'relevant experience' that judges are required to possess in order to be seen as qualified for the job. In this regard, the ICTY Appeals Chamber said as follows:

[60] *Prosecutor v Furundžija (Judgment)* 21 July 2000 [ICTY Appeals Chamber], para 203.

> The Appeals Chamber considers that the allegations of bias against Judge Mumba based upon her prior membership of the UNCSW should be viewed in light of the provisions of Article 13(1) of the Statute, which provide that "[i]n the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."[61]

74. The ICTY Appeals Chamber then flatly rejected it as 'an odd result if the operation of an eligibility requirement were to lead to an inference of bias'. The fuller quote appears as follows:

> The Appeals Chamber does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements. Judge Mumba's membership of the UNCSW and, in general, her previous experience in this area would be relevant to the requirement under Article 13(1) of the Statute for experience in international law, including human rights law. The possession of this experience is a statutory requirement for Judges to be elected to this Tribunal. It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias. Therefore, Article 13(1) should be read to exclude from the category of matters or activities which could indicate bias, experience in the specific areas identified. In other words, the possession of experience in any of those areas by a Judge cannot, in the absence of the clearest contrary evidence, constitute evidence of bias or partiality.[62]

75. A similar pattern of reasoning appears in the *Čelebići* appeals judgment. There, it was also noted that 'personal convictions and opinions of judges are not in themselves a basis for inferring a lack of impartiality.' [63] Once more, the ICTY Appeals Chamber rejected the incongruous result that the very experience that is a required element of *qualification* for judicial office should be later accepted as a source of *disqualification* on grounds of bias.[64]

76. The case law of US appellate courts contain colourful statements to the same effect. There, a controlling legal authority on this matter is the US Supreme Court case

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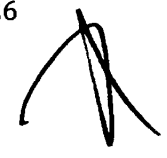
[61] *Ibid*, para 204.
[62] *Ibid*, para 205.
[63] *Prosecutor v Delalić* et al, *(Judgment)* 20 February 2001 ('*Čelebići* Appeal Judgment') [ICTY Appeals Chamber], 699.
[64] In the words of the Appeals Chamber: 'It is clear that the Statute of the Tribunal, by requiring that the "experience of the judges in criminal law, international law, including humanitarian law and human rights law" be taken into account in composing the Chambers, anticipated that a number of the judges of the Tribunal would have been members of human rights bodies or would have worked in the human rights field. As Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was included on her curriculum vitae submitted by the Secretary-General to the General Assembly prior to the election of judges of the Tribunal in 1993 and 1997, it was no doubt considered to be relevant to her experience in the field of human rights law and therefore to the judicial qualification requirements. As noted in the *Furundžija* Appeal Judgement, it would be an odd result if the fulfilment of the qualification requirements of Article 13 were to operate as a disqualifying factor on the basis that it gives rise to an inference of bias. Counsel for Landžo was obliged to argue that such membership was both a qualification and a disqualification at the same time and that, given the prevalence of allegations of torture in cases to be tried by the Tribunal, Judge Odio Benito should accordingly have spent four years as a judge of the Tribunal doing absolutely nothing.': *Ibid*, para 702.



of *Laird v Tatum*.[65] It was generally observed in that case that it is virtually impossible and indeed undesirable to limit judicial office to persons who never had preconceived views on legal issues that might appear before them. Indeed, in *Laird v Tatum*, Justice Rehnquist dismissed a complaint against him in the following way: 'Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication *would be evidence of lack of qualification, not lack of bias.*' [Emphasis added.]

77. In the earlier case, of *In Re Linahan*, Judge Jerome Frank, at the US Federal Court of Appeal for the Second Circuit had put the matter strongly thus:

> Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. *If, however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will.* The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. Without acquired "slants," pre-conceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem he would go mad. Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference. "To live is to have a vocation, and to have a vocation is to have an ethics or scheme of values, and to have a scheme of values is to have a point of view, and to have a point of view is to have a prejudice or bias..." An "open mind," in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist's descriptions of the feeble-minded.[66]

78. In *Republican Party of Minnesota v White*, the US Supreme Court recalled *Laird v Tatum* with approval.[67] Justice Scalia, delivering the judgment of the Court, held that there was no compelling State interest that warranted Minnesota from limiting freedom of expression by virtue of a Minnesota professional code of conduct for lawyers and judges that forbade judicial candidates and incumbent judges to 'announce his or her views on disputed legal or political issues.' Recalling, with approval, Justice Rehnquist's ruling (in *Laird v Tatum*) that it is impossible and undesirable to require or expect an

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[65] *Laird v Tatum*, 409 US 824 (1972) (Memorandum Opinion), p 835.
[66] *In Re J P Linahan Inc*, 138 F 2d 650 (1943).
[67] *Republican Party of Minnesota v White*, 536 US ___ (2002) [US Supreme Court], pp 11—12.

absence of prior held view in a judge, Justice Scalia added: 'And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, *pretending otherwise by attempting to preserve the "appearance" of that type of impartiality* can hardly be a compelling state interest either.'[68] [Emphasis added.] Justice Stevens also observed that 'opinions that a lawyer may have expressed before becoming a judge, or a judicial candidate, do not disqualify anyone for judicial service because every good judge is fully aware of the distinction between the law and a personal point of view.'[69]

79. The Supreme Court of Canada has also confronted the question of whether a judge may be disqualified on the basis of preconceived opinions. In *RDS*, for instance, it was alleged, as we saw earlier, that a black provincial court judge was biased in favour of the black defendant and against the white officer who had arrested him. In dismissing the complaint, Justice Cory explained judicial impartiality, by approving the following passage from the Canadian Judicial Council's *Commentaries on Judicial Conduct* [very reminiscent of Judge Jerome Frank's dictum in *In Re Linahan*]:

> The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.[70]

80. In their own concurring opinion in *RDS*, Justices L'Heureux-Dubé and McLachlin (now the Chief Justice of Canada) also accepted that standard, following their recognition of Justice Cardozo's following observations:

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[68] In *Republican Party of Minnesota v White*, Justice Stevens and Justice Ginsburg (with whom Justices Breyer and Souter joined) dissented from the judgment of the Court. But Justice Stevens's concern was that the Court did not differentiate between statements made prior to the election, and statements made on the campaign trail.

[69] 536 U S ___ (2002), [Dissenting Opinion of Justice Stevens] p 3, although Justice Stevens generally disagreed with the Court that such a protection should extend to speech made on the campaign trail in which the candidate promised to decide a case in a certain way, if elected as a judge. Justice Ginsburg (with whom Justice Breyer and Souter joined) also registered a dissent. But her complaint was that the Court did not differentiate between expressions of legal opinion in general from making campaign promises to judge a case in a certain way: '[T]he Court ignores a crucial limiting construction placed on the Announce Clause by the courts below. The provision does not bar a candidate from generally "stating [her] views" on legal questions, ante, at 7; it prevents her from "publicly making known how [she] would decide" disputed issues': 536 U. S. ___ (2002), [Dissenting Opinion of Justice Ginsburg] p 7.

[70] *RDS, supra*, at para 119 [Supreme Court of Canada.] See also *Arsenault-Cameron v Prince Edward Island* [1999] 3 SCR 851 para 3.

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs ... In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.
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> ...
>
> Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether he [or she] be litigant or judge.[71]

81. In *Panton & Anor v Minister of Finance & Anor*, a Privy Council case originating from Jamaica, the appellants had pleaded bias against the President of the Court of Appeal of Jamaica, in the hearing of a case challenging the constitutionality of the Finance Institutions Act of 1992. The complaint was that the President of the Court was the Attorney-General at the time of the passage of the Act. In that capacity, he was the legal advisor to the Government that sponsored the Act; and that upon the presentation of the Act to the Governor-General for assent, he had signed the compliance certificate that had stated as follows: 'I have examined the accompanying Act entitled The Financial Institutions Act 1992 and I am of opinion that the Act is one that is not contrary to the Constitution and that there is no legal objection to the Governor-General assenting thereto.' It was hence complained that the President of the Court of Appeal would not be impartial in the subsequent judicial determination as to whether the Act was constitutional or not. But the Privy Council rejected the complaint of bias, insisting that it must be presumed that judges can rise above certain historical associations in the interest of performing judicial duty with independence and impartiality.[72]

82. Notably, the Privy Council rejected a distinction sought to be made in relation to the capacity in which a lawyer's past opinion had been authored on a point of law. Such past opinions are not to be accepted as preventing a judge from judging on the merits of the case before him or her. Writing in that regard, Lord Clyde observed as follows:

> The appellants sought to distinguish the present case on the ground that the Attorney General was acting in an executive capacity, which was different from the act of a counsel giving an opinion or a judicial decision. But the essential element is the same, namely that in some capacity or other the person has expressed a view about the question in issue. It is that past expression of view which is said to disqualify him from sitting. An opinion can be obtained from counsel in a variety of different situations. He may, for

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[71] *RDS, supra*, at para 34, quoting Benjamin N Cardozo, *The Nature of the Judicial Process* [New Haven: Yale University Press, 1921], pp 12—13 and 167.

[72] *Panton & Anor v Minister of Finance & Anor* [2001] UKPC 33 [Privy Council] para 17; [2001] All ER 178. As part of their reasoning, Lord Clyde wrote as follows: 'Experience outside the law, whether in politics or elsewhere may reasonably be regarded as enhancing a judicial qualification rather than disabling it. In countries where it is recognised and accepted that judges may well have behind them a history of political affiliation or partisan interest *it has also to be recognised that such historical associations can be put aside in the interest of performing a judicial duty with independence and impartiality.*' [Emphasis added.]

> example, be totally independent in private practice, or he may be regularly retained by a government department, or he may be treasury counsel, or he may be in the employment of a government department, or he may be a member of the government or an office-bearer in that government. *Distinctions of that kind should not affect the principle that the independence of a judge is not to be affected by the fact that in a previous incarnation or even in his current capacity he has expressed a view on a point of law. It is not to be thought that a judge will have such mental allegiance to his earlier views or such lack of integrity as to be unable to approach the question with an open mind or to be embarrassed at the prospect of revising or rejecting the view which he had earlier expressed.*[73] [Emphasis added.]

83. It is also notable that in *Panton*, the Privy Council cited *Locabail (UK) Ltd v Bayfield Properties* Ltd with approval[74]; where the Court of Appeal of England had indicated some examples of where complaints of bias would be generally unsustainable against a judge. In *Locabail*, the Court of Appeal had rejected both shared identity and past opinions as sufficient to displace the presumption of judicial impartiality. As they wrote:

> We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or *national origin*, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or *extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers)*; or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers ...[75] . [Emphasis added.]

84. However, the resulting presumption in favour of judicial impartiality, though strong, is still a rebuttable one. It may be displaced by cogent evidence tending to show that the judge in question did not or was not likely to rid himself or herself of those pre-existing sympathies or opinions; and, had thus been unable to free himself or herself to entertain and act upon different points of view with an open mind.[76] But, as we have seen, this must be *firmly established.*

85. In conclusion, the ample case law that rejects prior opinions and preconceptions as presumptive of bias is recognition of the fact that mere opinions by lawyers are not vows of commitment or 'mental allegiance' to earlier views or predispositions. People who, in the throes of newfound love and happiness, exchanged vows of commitment 'until death do us part' have been known to change their minds with the passage of time or the appearance of a more powerful love interest. That being the case, it is only right to

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[73] *Ibid*, para 11.
[74] *Ibid*, para 10.
[75] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 [Court of Appeal of England] para 25.
[76] See *Helow*, *supra*, para 57.

recognise that the assumption of judicial office, complete with the oath of office, is a powerful intervening event that must be presumed, rather than not, to cause the judge to overcome his or her previous opinion and preconceptions. That is why, at the ICC, the judge's declaration before taking office involves a *ceremony* that is *solemn*, made in *public* and *broadcast* to the *whole world*. It must be accorded value.

The Correct Approach to Article 41(2)(a) of the Statute and Rule 34(1) of the Rules

86. In the matter now before the Plenary, the mind must inevitably turn to the correct interpretation of article 41(2)(a) of the Statute and rule 34(1) of the Rules. In this connection, the Plenary should not be quick to accept that the notion of recusal of judges should concern actions and comments that have no *direct* bearing *in the case* before the judge, in terms of the investigation and prosecution of *that* case according to its specific facts. This proposition is readily apparent in the provisions of article 41(2)(a):

> A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia,* that judge has previously been *involved* in any capacity *in that case before the Court* or *in a related criminal case* at the national level *involving* the *person* being *investigated* or *prosecuted*. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence. [Emphases added.]

87. From the language of the provision, it is clear that the drafters were concerned about things said and done in the particular context of a given *criminal* case against a *particular* accused person. The emphasis on 'criminal' case is important, because article 41(2)(a) specifically says so. We see that in the phrases 'in that case before the Court' [noting that all cases before the ICC are criminal] and 'in a related *criminal* case at the national level *involving* the *person* being *investigated* and *prosecuted*' before the ICC. It is important to avoid a casual expansion of this provision in a manner that encourages interruptive litigation concerning what judges may have said or done in the past that are not directly connected with the criminal case against a particular accused.

88. The caution noted here remains sound, in spite of the longer list of grounds indicated in rule 34(1). For one thing, although article 41(2)(a) incorporates the expanded grounds indicated in rule 34(1), it remains the case that the expanded list must still be read *ejusdem generis*[77] relative to article 41(2). That is to say, article 41(2) has established the genus that must control the interpretation of rule 34(1). That genus is *the (criminal) case before the ICC to which the judge is assigned*. And, when article 41(2)(a) allows for an expansion of the grounds of disqualification in the Rules, it should be kept in mind that the expansion can be—and has been—done in a manner that adds more grounds to what is specifically mentioned in article 41(2), while still remaining

[77] See McNair, *Law of Treaties* [Oxford: Clarendon Press, 1961, reprinted 2003] pp 393—395.

within the genus indicated in the article, or at least not straying too far beyond it. For instance, article 41(2) indicates in specific terms only *previous involvement* in the criminal case in any capacity. Such previous involvement can be in the capacity of judge, *juge d'instruction*, prosecuting (barrister, solicitor or other legal adviser or assistant), defence (barrister, solicitor or other legal adviser or assistant), investigator, etc, involved in the particular criminal case. But grounds of recusal has been expanded beyond *previous involvement* in the following manner: personal interest, filial interest, involvement in a private capacity in any legal proceeding (the only exception to the requirement that the case be criminal) where the accused is a party, and many of the other grounds listed in rule 34(1).[78] What needs to be borne in mind is the need to keep the interpretation of rule 34(1) close to the genus indicated in article 41(2)—i.e. the specific criminal case before the ICC judge, as it *directly* relates to the accused person. Indeed, the general context created by the language of rule 34(1) is truly conducive to this proposition. The context of '*in the case*' appears clearly in the following resonating phrases: '[p]ersonal interest *in the case* ...',[79] '[i]nvolvement [in a private capacity] in any legal proceedings initiated prior to his or her involvement *in the case* ...',[80] '[p]erformance of functions, prior to taking office, during which he or she could be expected to have formed an opinion *on the case in question* ...'.[81] Hence, we see a certain orientation of the inquiry in the direction of how the impugned conduct, association or interest of the judge directly relates to *the particular case* before the judge in terms of its facts and the person on trial. And, indeed, that is the direction in which the jurisprudence of the Court has thus far progressed in the disputes concerning questions of admissibility, regarding the 'same person/same conduct' test at the 'case' stage.[82]

'Expression of Opinion' as Indicated in Rule 34(1)(d)

89. Two observations would be in order as regards rule 34(1)(d), which implicates 'expression of opinion' as grounds for disqualification. First, in light of the discussion appearing immediately above, it must be noted that rule 34(1)(d) appears to be the outlier that needs to be fully brought within the interpretational fold of the genus of '*in the case*' indicated in article 41(2)(a) and largely recognised in the general context of rule 34(1). In other words, it must be interpreted *ejusdem generis* relative to both article

[78] It is recognised that rule 34(1) in this respect permits considering participation as a private party in a civil case against a party in the criminal case before the Court. Indeed, this is an exception to the indication in article 41(2) that the prior involvement of a judge must relate only to cases that are criminal. Still, there is nothing in this exception that permits derogation from the requirement that the conducts and utterances complained about must have a *direct* bearing to the case before the Court. That is to say, even though the judge's participation 'in a private capacity' in a non-criminal case may affect perceptions of his impartiality in the ICC case in which he is assigned, the proposition remains valid that the accused in the ICC case must also be a party in the civil case in which the judge participated in his private capacity.
[79] Rule 34(1)(a).
[80] Rule 34(1)(b).
[81] Rule 34(1)(c).
[82] See, for instance, *Prosecutor v Muthaura* et al (*Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber of 30 May 2011*) 30 August 2011 [ICC Appeals Chamber] para 46.

41(2)(a) and the general context of rule 34(1)(d), so that the opinion at issue is one that directly suggests whether the judge has already made up his or her mind that the accused is guilty or not guilty *in the case* before the judge. This proposition is fully consistent with a basic rule of treaty interpretation to the effect that terms of a treaty are to be interpreted 'in their context'.[83] The context in which the phrase 'expression of opinion' must be interpreted is the context of article 41(2)(a) and the rest of rule 34(1) which concerns words, actions, mind-sets, associations or interests that have a direct bearing *in the case*. This interpretation is fully consistent with relevant international jurisprudence.[84]

90. Hence, it just won't do to embark upon a tortured interpretation of an opinion that has no clear bearing on the guilt or innocence of the accused, and panel-beat it into a wholly unintended proposition, in pursuit of a claim that the judge has a predisposition towards a dreaded outcome in the given case.

91. The second observation to be made in respect of rule 34(1)(d) is whether it should concern opinions and suspected predispositions that predate the judge's oath of office at the ICC. It is important to note that rule 34(1)(d) in its own terms is silent on the matter. But, that silence does not require the Plenary to implicate *every* antecedent opinion and suspected predisposition in the factors that may be argued as showing bias. That silence, rather, allows the Plenary to interpret the provision in a manner that is consistent with both international law and national law,[85] previously reviewed in this discussion, that have rejected the proposition that opinions and predispositions of a judge that predate his or her oath of office should easily form grounds for disqualification.

92. It is instructive to note in this connection that, in the interpretation of article 41(2) of the Statute, in Otto Triffterer's book on the ICC,[86] there is a heavy reliance on the jurisprudence of the ICTY which, as we have seen, has steadfastly rejected prior opinions and predispositions as material in the assessment of a judge's impartiality. As already seen in the aspects of that jurisprudence that are relevant to this case, recurring reasons for that rejection is rooted in (a) the presumption of impartiality founded in the

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[83] See Vienna Convention on the Law of Treaties, art 31(1).

[84] See, for instance, *Prosecutor v Sesay (Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber)* 13 March 2004 [SCSL Appeals Chamber]. That decision concerned remarks that Judge Robertson had made in a book containing direct and critical commentary on the culpability of the RUF fighters during the Sierra Leon civil war. Judge Robertson, it would appear from the decision, did not even contest the complaint of appearance of bias in respect of the *particular case* of Sesay (an RUF leader). The 'crux' of Robertson's concern, as indicated in the decision, appears to be the overreach of the motion as seeking to remove him entirely from office either as a judge or as the president of the court, which would amount to a negation of the notion of judicial independence.

[85] See Vienna Convention on the Law of Treaties, art 31(3)(c). See also article 21(1)(b) and (c) of the Rome Statute.

[86] Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn [Munich, Oxford and Baden-Baden: C H Beck, Hart and Nomos, 2008] pp 967—968.

judicial oath of office and the required qualifications of judges 'as persons of high moral character, impartiality and integrity'; and, (b) the required prior professional experience—by virtue of which the judges are expected to have expressed opinions in their past, precisely in a manner that has a general bearing on the job they must do to be seen as competent and qualified. It is important to keep in mind that both these factors form part of the legal context in which rule 34(1)(d) must operate. In particular, in the interpretation of rule 34(1)(a), effect must be given to the import of article 36(3)(b) (requiring established competence in legal practice and scholarship and related work in a field relevant to the work of the Court)—by virtue of which judges are necessarily expected to have expressed opinions in the past. Similarly, effect must be given to the import of both article 36(3)(a) (requiring that judges are to be chosen from persons of 'high moral character, impartiality and integrity') and article 45 (requiring that before assuming office judges shall make 'solemn declaration *in open court* to exercise his or her functions *impartially* and *conscientiously*')—by virtue of which it must be demonstrated in any given case that the given judge is unable to put aside prior opinions or predispositions that are incompatible with the oath of office, despite that oath.

93. Indeed, it must be said that the Plenary has no choice but to interpret rule 34(1)(d) in a manner that, at the gentler level of appreciation, allows articles 36(3)(a), 36(3)(b) and 45 their proper place as co-habitants with rule 34(1)(d) in the scheme of the Rome Statute; noting that a treaty 'must be read as a whole, and that its meaning is not to be determined merely upon particular phrases ...'[87]. In the more peremptory mode, it is arguable that failure to give due accommodation to articles 36(3)(a), 36(3)(b) and 45 would make rule 34(1)(d) not only an outlier, but, one that is possibly in conflict with the Statute and must stand down pursuant to article 51(5) of the Statute.

Factual Correction

94. In counsel's submissions, it is written that I was 'twice nominated as a candidate judge by Nigeria and twice officially endorsed for the position by the AU.'[88] It should not be understood that the AU had endorsed me on the two occasions that Nigeria nominated me—i.e. in 2008 and 2011. The two endorsements by the AU were respectively in January and June 2011. They were only for purposes of the 2011 judicial elections. I neither sought nor received any AU endorsement in the 2009 elections.

95. Counsel also averred as follows: '*During* his judicial election campaign, Judge Eboe-Osuji published a commentary about the need to "heal the rift" between the AU and the Court ...'[89]. [Emphasis added.] This is incorrect. The commentary was published

[87] *Competence of the ILO to Regulate Agricultural Labour*, Advisory Opinion, 12 August 1922, PCIJ, Series B, Nos 2 and 3, p 23.
[88] See para 2 of the motion paper.
[89] *Ibid.*

on 20 March 2010—i.e. after the 2009 judicial elections and before the 2011 judicial elections. Nor was the commentary intended as part of the campaign. I have a long track record of academic commentary (published and unpublished) on matters of international criminal law, international human rights law and public international law. Each was written when the spirit moved. In fact, a proper view of the commentary should indicate that it would have at best a neutral value, and might even be injurious, to my judicial election prospects; given the danger that some delegations might have taken the negative view of it that we see in counsel's submissions. One does not run a successful ICC election campaign on the strategy of making only the AU happy.

96. The better view is that the article was a candid opinion offered in its own moment in time—in March 2010.

Commentary Made Long Before Selection as a Judge

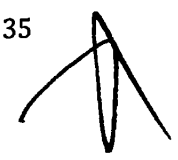
97. It is also important to stress that the commentary was written well before my election as a judge. It must therefore be considered in that time context, for purposes of the resolution of counsel's motion. It would thus be wrong to view it from the perspective of the question whether an ICC judge ought to have made public commentary that some might view as controversial. I was not a judge at the time and had no reason to presume that I would ever be an ICC judge.

98. As an ICC judge now sworn into office, will I make those kinds of public comments? Generally, not. And, that is not an apology. It is purely a matter of sensibilities of my current position.

Propriety of Political Commentary that Bears on the Administration of Justice

99. The fair-minded observer that is fully informed would also know that the rules of ethics of the legal profession to which the commentator in question belongs do in fact encourage lawyers to engage in political discussions that relate to the administration of justice, in order to enable in the strengthening—not weakening—of the legal system, by assisting in the public understanding of legal issues. In that connection, one must note the following commentaries in the *Code of Professional Conduct* for the Bar of Ontario:

> A lawyer is often called upon to comment publicly on the *effectiveness of existing statutory or legal remedies*, on the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted or are about to be instituted. *This, too, is an important role the lawyer can play to assist the public in understanding legal issues.*
>
> A lawyer is often involved as advocate for interest groups whose objective is to bring about changes in legislation, governmental policy, or *even a heightened public awareness about certain issues. This is also an important role that the lawyer can be called upon to*



play.[90] [Emphasis added.]

100. The blog commentary comes fully within the parameters of proper public comments and statements, under these standards of professional conduct, to assist 'the public in understanding legal issues' or 'a heightened public awareness about certain issues' relating to the administration of justice within his area of special legal expertise and knowledge. The objective of the commentary was to assist in 'healing [a perceived] rift' that existed between the Court and an important bloc of its constituency; in order to arrest waning support in a way that strengthens the Court and its processes; so that everyone could move forward with the work at hand, without needless distraction and vilification across the board. It is, of course, possible that reasonable people might have been of a different view from the approach and the arguments indicated in the commentary. But, it was a personal opinion expressed at a given time in the past, within its own context and perspective. It must be seen as such and nothing more. It had no evident bearing on the *Banda & Jerbo* Case, such that a fair-minded observer would perceive bias.

The Import of Commentary Limited to a Specific Deferral Debate

101. In the bid to inform the fair-minded observer of the whole facts, it may be helpful to provide now some background details to the commentary that are not apparent on the face of it. The inspiration to write the commentary was stirred in the wake of the 2008 issuing of the indictment discussed in the commentary. [For ease of reference, I shall use the customary terminology 'indictment' in place of the statutory language of 'document that contains the charges.'] There had been a TV news commentary on one of the more prestigious international news channels. The journalist had interviewed President Kikwete of Tanzania who was the AU Chairman about the AU's reaction to the indictment discussed in the commentary. Mr Kikwete said as follows: 'Justice is a matter of essence—it must be done, it must be seen to be done. We are simply concerned with the best possible sequencing of measures so that the most immediate matters of saving lives and easing the suffering of the people of Darfur are taken care of first.' Right after that, the footage cut out to the journalist's round-up remarks, where the only thing, as I recall, she said was *'the comments [from that AU Chairperson] are widely viewed as a subterfuge used by African leaders to protect one of their own cronies'*; or words to that precise effect.

102. A year later, in 2009, the debate was still on. This time, it had to do with the AU leaders' request for the deferral of the specific indictment discussed in the commentary. The indictment, by this time, had been confirmed by the Pre-Trial Chamber, while

[90] Law Society of Upper Canada, *Rules of Professional* Conduct (2005 consolidation), excerpts of commentaries to Rule 6.06 concerning 'Public Appearances and Public Statements'. See also Canadian Bar Association, *Code of Professional Conduct* (2009), commentaries 9 and 10 under Chapter XVIII.

denying the count of genocide. I watched the same journalist reporting on the debate. She replayed her 2008 footage of the interview with President Kikwete. Once again (in the 2009 footage), she made exactly the same closing remarks as she had made in 2008. It was just the bald statement. It had contained no factual examination of whether there was reason to believe that the AU leaders were speaking in good faith when they said in 2008 that they believed that 'Justice is a matter of essence—it must be done, it must be seen to be done;' but that they were more immediately concerned with securing lives and easing the suffering of the people. Was it really true that all they cared about was saving one of their cronies from accountability? Had there not been other instances in recent memory where they did not protect a crony? Had they not demanded that a crony be brought to justice in at least one well-known case? There was no examination of these questions. I was tempted to write an academic piece then, but held back.

103. Then in 2010, the debate was stoked again, when the Appeals Chamber reversed the Pre-Trial Chamber on the genocide count, upon the reasoning that the correct standard of review had not been used, and remitted the question to the Pre-Trial Chamber. The same journalist, who had by now become this news channel's expert on the issue, was at it again: replaying the 2008 footage; making afresh the same concluding remarks that she had made in 2008 and 2009; and, failing to conduct any analytical appraisal of whether the AU leaders should be given the benefit of the presumption of good faith when they said: 'Justice is a matter of essence—it must be done, it must be seen to be done. We are simply concerned with the best possible sequencing of measures so that the most immediate matters of saving lives and easing the suffering of the people of Darfur are taken care of first.' At this point, the request for deferral had not been acted upon, and there was concern (reflected in the mention of this non-action in AU resolutions) that certain leaders at the AU had been feeling disrespected; there was an open question whether the mindset that the journalist had repeatedly asserted was implicated in the reason for non-action; at least one resolution had been passed by the AU calling for non-cooperation with the Court; an initiative to establish an ICC liaison office at the AU Headquarters in Addis Ababa had stalled; an attempt had been made by some AU member States to trigger a mass withdrawal of African States from the ICC; uncomplimentary things were regularly said about the Court in the media; initiatives were afoot at the AU to consider giving criminal jurisdiction to an existing African court; etc. I particularly felt that comments and mind-sets such as those repeatedly made by this journalist (from a prestigious and widely watched news channel) in the closing remarks of her footages might be making matters worse on both sides of the debate, rather than helping. It implicated a presumption of bad faith in AU leaders. It was only in those circumstances that I felt compelled finally to intervene in the debate. The aim was simply to give the AU leaders a sense of being fairly heard and understood, in my own small way. In so doing, I had hoped to contribute my modest bit in helping to arrest the downward spiralling that I had feared was occurring in relations between the AU and

the Court. I did not write out of a feeling of ideological loyalty to—or affinity with—the substantive merits of the AU position. I had little time to write a full-blown law journal article. So, I wrote the blog commentary. I attach the commentary as it is written—without the adornment of selective highlights made by learned counsel. Let the fair-minded observer read it in its entirety, against the background provided above.

104. There is nothing whatsoever in the blog commentary about the facts of the *Banda & Jerbo* Case. The *Banda & Jerbo* Case was absolutely not in my contemplation at the time of writing. I was even unaware that such a case was afoot at the ICC.[91] I reject the connection that counsel now make between the case and the blog commentary.

The Message in the Blog Commentary

105. The aim of the commentary was purely to make the procedural point of order, entailing an urge to treat the AU leaders with respect and dignity and to not impute bad faith to them when they requested an article 16 deferral for 12 months in 2009, with the statement that 'Justice is a matter of essence—it must be done, it must be seen to be done. We are simply concerned with the best possible sequencing of measures so that the most immediate matters of saving lives and easing the suffering of the people of Darfur are taken care of first.'

106. It is an elementary point of civility that interlocutors should treat each other with respect and dignity, even when they disagree on the matter on which issue is joined. Reasonable people may disagree; but there is very little that is reasonable in diminishing, disrespecting and imputing bad faith to an interlocutor with whom one disagrees. To disrespect and diminish one's opponent in a debate is to add an unnecessary layer of incident and stress—at the personal level—that has the potential to derail communication and mutual understanding even well beyond the matter under discussion. This is the essential concern addressed in the commentary, however nuanced the delivery.

107. Beyond that basic message—the call to a point of order in the conduct of debate in a civil manner—the article posed a very pragmatic question as to what had been gained by the opposition to the deferral request of the specific indictment discussed in the commentary. It was an academic *quere*. It wondered aloud whether the grant of that request in 2009 might not have closed the issue 12 months from the date of its initial granting, thereby allowing prosecution of the case discussed in the commentary to continue after the initial 12 months; rather than drag on (due to no fault of any of the Court's organs) in a veritable state of animated suspension, well beyond those initial 12

[91] Indeed, the case was under seal at the time and was only unsealed by a decision of Pre-Trial-Chamber I dated 15 June 2010. See "Decision reclassifying certain documents in the record of the Case", ICC-02/05-03/09-43 of 15 June 2010.

months. This was a pragmatic political observation—made at the personal level—that inured to the benefit of more expeditious prosecution of that particular case in the face of the political realities in which it was mired. It is difficult to see in all of this the warrant for counsel's assertion that 'the commentary clearly reveals that Judge Eboe-Osuji is basically advocating for the status quo.'[92]

Respect and Dignity and Presumption of Good Faith as a Professional Standard

108. Learned counsel should not have had difficulty with my urge that the AU be treated with respect and dignity and presumption of good faith. A fair-minded observer fully informed of all the circumstances would know that the call was motivated by the best traditions of the author's profession as a barrister (as he then was). That tradition stresses the need for civilised disagreements as the hall-mark of the lawyer's work. It is expressed in the following guideline: 'We will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that we act in an abusive manner or indulge in any offensive conduct.'[93] That guideline received fuller expression in the following IBA standard of professional conduct for lawyers: 'Lawyers have an obligation to be professional with clients, other parties and counsel, the courts, court personnel, and the public. This obligation includes civility, professional integrity, personal dignity, candour, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution. Lawyers should be mindful that while their duties are often carried out in an adversarial forum, lawyers should not treat the court, other lawyers, or the public in a hostile manner.'[94]

109. The fair-minded observer fully informed of all the facts and circumstances would know that the author's encouragement of civility in the discourse of the subject matter of the commentary was an urge squarely grounded in what the Ontario Court of Appeal (before which the author has argued cases) expressed in the following way: 'It is important that everyone, including the courts, encourage civility both *inside and outside the courtroom*. Professionalism is not inconsistent with vigorous and forcible advocacy on behalf of a client and is as important in the criminal and quasi criminal context as in the civil context.'[95] [Emphasis added.]

110. The fair-minded observer fully informed would recognise that what the author of the blog commentary had urged to be extended to the AU leaders was precisely the same attitude with which the author approached the motion made by learned counsel for the

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[92] Motion paper, para 33.
[93] United States District Court, Central District of California, 'Civility and Professional Guidelines' (Adopted on July 27, 1995), I. Guidelines, A. Lawyers' Duties to Their Clients, Section 4 [available at http://www.cacd.uscourts.gov/cacd/AttyAdm.nsf/Attorney%20Admissions?OpenView]
[94] Excerpt from Section 2.2 of the *IBA International Principles on Conduct for the Legal Profession* (adopted on 28 May 2011 by the International Bar Association).
[95] *Queen v John Bernard Felderhof* [2003] OJ 819.

author's own disqualification as a judge in this case—a motion, which, despite counsel's declarations to the contrary, really is, according to one highly respected judge, an oblique attack on 'the personal integrity of the judge' against whom such a motion is made.[96] Yet, the judge, the subject of the motion treated the motion with respect and dignity and a presumption of good faith. Everyone deserves that presumption, even AU leaders, when they make a request that compels disagreement in a reasonable way, as this author disagrees with the submissions of counsel in their request for recusal.

An Urge for Due Consideration of a Point of View is Not Presumptive of Bias

111. Counsel in their submission confuse an urge for due respect and consideration for a point of view as indication of predisposition for judicial bias towards the holder of that point of view. But this is to misunderstand the legal meaning of bias. To begin with, we have noted the statement of the rule of civility in the US Federal Court for the Central District of California, by virtue of which lawyers are required to 'treat adverse parties and witnesses with fairness and due consideration'. Here, we see that lawyers are even required to treat adverse parties and adverse witnesses with the very same fairness and due consideration that I had urged for the AU point of view.

The Presumption of Good Faith as a Legal Presumption

112. Counsel have indicated obvious difficulty with the presumption of good faith. They assert that 'Judge Eboe-Osuji's prior statement that "good faith" must be presumed on the part of the AU, creates the appearance that he will not judge the evidence on this issue impartially.'[97] As with much else in their submissions, this is a great leap, as conclusions go. The gulf in that erroneous syllogism is readily apparent if the missing parts are read back into the argument. The syllogism in its amplitude really reads as follows: 'Judge Eboe-Osuji's statement that "good faith" must be presumed on the part of the AU—**when, in 2009, the AU requested the deferral of the indictment that the commentary specifically discusses, and some participants in the ensuing global debate accused the AU leaders of requesting the deferral only out of the desire to protect one of their own cronies**—creates the appearance that he will not judge the evidence [that the Defence will present in the *Banda & Jerbo* Case] impartially.' There is no need to belabour the *non sequitur.*

113. It only remains to say that the leap compounds the error of a complaint that ignores applicable principles of law. There are many presumptions that the law recognises which must guide the judge's work. The failure to apply those presumptions,

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[96] As Justice Cory put it: 'Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegation. Yet, this is a serious step that should not be undertaken lightly': *RDS*, *supra*, para 113.
[97] See para 37 of motion paper.

or their incorrect application, is a matter for appellate review of an error of law or of fact, as the case may be. It is not a question of bias properly understood.

114. The error of learned counsel's complaint is palpably demonstrated by a certain famous presumption that a judge in a criminal court must recognise, no doubt to the satisfaction of defence counsel: the presumption of innocence. If there is validity in learned counsel's argument that recognition of a presumption means bias in the judge, it must follow that the prosecution will be entitled to complain about a judge as biased if the judge recognises the presumption of innocence. No doubt, learned counsel will rightly disagree with such a complaint from a prosecutor. They will rightly insist that the judge was correct in recognising what is only a legal presumption.

115. As it were, the presumption of good faith is also a legal presumption,[98] as is the presumption of innocence. In his classic text appositely (for our purposes) entitled *General Principles of Law as Applied by International Courts and Tribunals*, Professor Bin Cheng tells us so. As he put it:

> International tribunals have applied a number of *presumptions founded on general principles of law*. In the first place, international tribunals constantly have recourse to the rebuttable presumption of regularity and validity of acts and recognise that this is a general principle of law. Thus, the Umpire in the German-Venezuelan Mixed Claims Commission (1903) held that:—
>
> > "*Omnia rite acta praesumuntur.* This universally accepted rule of law should apply with even greater force to the acts of a government than those of private persons."
>
> Similarly, *according to another general principle of law, good faith is to be presumed*, whilst an abuse of right is not.[99] [Emphasis added. Internal citations omitted.]

116. Therefore, by a parity of reasoning (with the acceptance of the legal presumption of innocence), a judge who recognises the presumption of good faith cannot be fairly accused of bias against the party who finds the operation of that presumption a little inconvenient for the way he prefers to litigate his own case. He can always appeal the matter as a reviewable error.

The Suggestion of Blind Support of AU Position

117. It is wrong to suggest that Judge Eboe-Osuji has a blind adherence to the positions of the AU. If counsel dig deep enough, they may be able to see that I have in fact disagreed with some AU leaders on some of their positions towards the Court. For

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[98] See *Norwegian Claims Case* (1922) XI RIAA 309 at p 324 ['As the Tribunal is of opinion that the good faith of the United States Emergency Fleet Corporation is to be presumed ...']; *Mavrommatis Jerusalem Concessions Case* (1925) [Permanent Court of International Justice] A 5, p 43 ['it seems hardly permissible to doubt that the British Government ... will loyally take steps to ensure that its promise is respected ...']; *Lighthouses Case* (1934) [Separate Opinion of Judge Séfériadès] A/B 62, p 47.

[99] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* [Cambridge: Cambridge University Press, 1953 reprinted 2006] p 305.

instance, I have had occasion in the past to react to the allegation often heard from some AU leaders that the Court was created—or deliberately inclined—to target Africans. I have treated that concern with respect and understanding. But I have clearly and flatly disagreed with it. I have been known to argue, in relation to that particular debate, that the proper perspective from which to appraise the work of the ICC is the perspective of the humanity of powerless victims of apparent atrocities; not from the wounded dignity of people in power.

118. It is thus a complete misunderstanding of what I stand for to allege, as it were, that I am ideologically beholden to the AU, and so beholden as to forsake my judicial oath.

119. Even if it is granted that the blog commentary was a substantive and an unequivocal defence of AU's position on the specific issue of deferral of the specific indictment discussed in the commentary, it should still not permit learned counsel's effort to graft the lawyer permanently unto a position he or she may have defended as a lawyer on a previous occasion. The implications (to the legal profession) of accepting such permanent grafting is truly astonishing indeed; especially when considered from the perspective of defence counsel in their own work. It will validate the erroneous and cynical views of lawyer-bashers who insist that there is no difference really between defence counsel and the clients whose positions they present and defend as lawyers.

Non-Condonation of Actions and Conducts of AU Peacekeepers in all They Do

120. On no fair-minded and proper view can it also be acceptable to say that urging respect and dignity to AU leaders and presuming good faith to them when they sought an article 16 deferral in 2009 amounts to condonation of actions of AU peacekeepers in Darfur, if those actions were in violation of the law that must guide their conduct.

Defence Case to be Presented

121. In their motion, learned counsel now contend that somehow the commentary has a bearing on their theory of the case. Such a theory was neither known nor apparent to me at the time of the blog commentary.

122. The records of the case, especially the decision on the confirmation of the indictment, which so far define the issues in the case, are a matter of public record.

123. I remain open minded to the case that counsel will present in defence of their clients. It must always be borne in mind, of course, that urging a presumption of good faith in favour of the AU leaders regarding their urge for deferral (of the indictment discussed in the commentary) for 12 months *in 2009* does not mean (a) condonation of any violation to be proved against officials and personnel of the AU in any event; and

(b) that the presumption is rebuttable upon a presentation of proper evidence that displaces it.

124. It remains an open question—and to be seen in time—whether the Defence case on the merits cannot be presented in an atmosphere of respect and dignity, yet resolutely in disagreement with any position of the AU on any matter, noting the obligation of judges to preserve and insist upon respect and dignity between litigating adversaries.[100] This judicial duty squarely coincides with the requisite professional standard for lawyers.[101]

Mixing Politics and Justice

125. Learned counsel complain about a proposition contained in the blog commentary that I made well before my appointment to the bench, in which I stated with candour that 'for obvious reasons, alienation of the AU will not augur well for the Court.' Indeed, I did deliberately and candidly add that such a proposition 'amounts to mixing justice with politics'. It was a candid *personal* view, which I obviously did not expect everyone to share. I considered it a matter of principle and integrity to 'call it as I saw it', in an honest way. It is that candour that I bring to my work—to call the proof in the case and the applicable law as they appear to me, notwithstanding the feelings of friend and foe.

126. But, the remark must be understood within its own context and intended sphere of application. It was made in the context of (a) the debate regarding a *specific* AU request for the deferral of a *particular* indictment when it was *made in 2009*; (b) my own perception that the discussion *regarding the deferral request* in question was not being conducted with due civility by everyone engaged in it and bad faith was being presumed; and (c) the rough passions of that particular debate and the unproven imputation of bad faith that there were contributing to the deterioration of an already bad atmosphere. None of these had anything to do with the work that the judges of the Court have sworn to do in the cases before them. It is particularly to be noted that whether or not an article 16 request is made or granted or denied is a political question that never comes for ruling before the Court. It is regrettable that the point (about 'mixing justice with politics') was so badly misunderstood by learned counsel.

127. The proposition that the reality of the ICC is such that could mix politics with justice is an argument—I repeat, an argument—that was intended to be understood at its correct level of operation. The correct level of application is not at the level of the

[100] See principle 6.6 of the Bangalore Principles of Judicial Conduct: 'A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control': *Strengthening Basic Principles of Judicial Conduct*, Doc No ECOSOC 2006/23.
[101] See section 2.2 of the *IBA International Principles on Conduct for the Legal Profession* (adopted on 28 May 2011 by the International Bar Association).

Court, in its own work. It is rather at the level or plane of interests that concerns what support the Court receives from the powerful political forces that it depended upon for its creation, and still depends upon for its proper functioning, public support and continued existence. A fight at that level or plane is akin to the proverbial fight between elephants. As the saying goes, when elephants fight it is the grass that suffers. The grass will do its job and grow as grass grows. Such growth might, from time to time, trigger fights between elephants. But the fights remain fights between elephants, in spite of the grass.

128. In the blog commentary, I had been careful to separate what belongs to the political province of the international community (comprising States, NGOs, the media, and important personages that influence public opinion) from the legal arena of the courtroom. That separation is clearly evident in the fuller quote which counsel chose not to set out in full in their submission. The fuller quote appears as follows:

> How then do we move forward in order to bridge the gulf of tension between the AU and the ICC? One important consideration in the effort to heal the rift is that the views of the AU must be treated with respect and dignity and given due regard. Failure to do that runs a great risk of alienating one of the—if not the—most important constituencies of this young Court.
>
> For obvious reasons, alienation of the AU will not augur well for the Court. I anticipate here a demurrer to the effect that this amounts to mixing justice with politics. It certainly is. For, it will be a painful show of naïveté to presume otherwise. *But, the presence of restraining politics in the affairs of the Court ought not impede it in substantially achieving the central aim for which it was founded: being the aim of banishing impunity from the minds of persons who abuse humanity and threaten international peace and security in alarming ways. The task for the Court then is to negotiate around these political obstacles and pitfalls and fog-spots, and remain dogged in its pursuit of justice and accountability. Granted, the potential achievements of the Court in those circumstances will be attenuated, as compared to the achievements of a court operating in a political vacuum. Yet, those attenuated achievements will be far superior than would be the lot of modern civilisation in a vacuum of international criminal justice. That is to say, the glass of justice represented by the Court, operating in a political reality, is not an empty glass. It is a glass half full. That is precisely the sort of balance contemplated by article 16 of the Court's Statute.* [Emphases added.]

129. In their submission, counsel chose to quote only the first half of the thought, ignoring the second half that completes the thought. That made their quote unfair.

CONCLUSION

130. The motion for recusal and their arguments engage many points about which there is plenty more to say to show how ill-conceived both the motion and the arguments are. But I have decided to deal only with some of those arguments.

131. In concluding, I must acknowledge counsel's words of compliment, as far as they go, about my qualifications for office, and that they do not question my integrity. But their ultimate point is that all that notwithstanding, they are not prepared to presume

impartiality in the same judge. That is not good enough. Their mere inclination is wholly irrelevant to that presumption. The presumption of impartiality is a legal presumption. They need to show 'cogent evidence' that displaces it. A proper understanding of the jurisprudence would require them to produce evidence tending to show that a fair-minded observer fully informed of the facts and taking a whole view of the matter would reasonably fear that bias exists; and that there is an objective reason to believe that the judge is unable to respect his oath of office. Counsel in this case, in their complaint and submissions, have not produced any such evidence. Fanciful arguments and suppositions are insufficient to achieve recusal.

132. The Plenary should dismiss the complaint as unfounded.

16 April 2012

Chile Eboe-Osuji
Judge

Appendix

(to Judge Eboe-Osuji's Memorandum Concerning
'Defence Motion for Disqualification of a Judge')

Reflexions in International Criminal Law

Saturday, March 20, 2010

Healing the Rift: the Impasse between the African Union and the International Criminal Court

Introduction

There are often in human affairs turbulent occurrences that grate the nerves. And just as often, they are left well alone for want of easy resolution—in hopes that passage of time will dull memory, mollify nerves, and all becomes substantially well again ... eventually. But then, up pops a fresh pebble that lands smack on the still raw nerves.

Such is the story of the rift between the African Union and the International Criminal Court. An impasse was touched off in their relations when the ICC Prosecutor indicted President Omar el Bashir of Sudan in 2008. The AU protested. The trajectory of risen tension continued when an ICC Pre-Trial Chamber in 2009 confirmed the indictment in all other respects, save for the count of genocide. The AU squirmed and grumbled some more. But things came to a head when the AU requested the Security Council later in 2009 to defer the prosecution for 12 months, pursuant to article 16 of the ICC Statute. The Security Council did not act on the request. Feeling slighted and brushed aside, the AU passed a resolution, calling on African States to not cooperate with the ICC on the Bashir prosecution. This was in July 2009. [See Dapo Akande, 'Is the Rift between Africa and the ICC Deepening?': www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/]

The two sides had been carrying on with the tension still between them; perhaps hoping that things would work themselves out. But in early February 2010, the Appeals Chamber of the ICC, ruling on the Prosecutor's appeal, reversed the Pre-Trial Chamber's decision that quashed the genocide count and remanded the matter back to the Pre-Trial Chamber for reconsideration.

This last event is that fresh pebble that popped up and landed on the still sore nerves of the AU. But this latest development affords occasion to reflect upon what has been gained by either side from this stalemate. The occasion is propitious, with the Kampala review conference looming large in the immediate horizon—affording, perhaps, a fresh opportunity of healing the rift.

It must, however, be said from the outset that, as a practical matter, the

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burden of this reflection appears to weigh heavier on the side that resists the AU request for the article 16 deferral.

A presumption of good faith

While some of the opposition to the AU request for deferral has been premised on a reasonable difference of opinions by responsible people, there remain traces of a cynical assumption in some quarters—often unspoken, but not always so—that anyone sympathetic to the AU call for the deferral must be seen as supporting, promoting or condoning impunity for violations of international humanitarian norms. The assumption is idle at best, and particularly foul when it is permitted to rise to the level of implicit or explicit suggestion that the AU leaders are just 'a club of [African] cronies out to protect one of their own'. In fact, one CNN reporter once said as much.

It needs to be clearly said in defence of AU leaders that they must be accorded the presumption of good faith that they deserve, when they insist that justice must be done, but that they are more immediately concerned with securing peace and stability in Darfur and Sudan. Speaking on the Bashir indictment before the UN General Assembly in September 2008, President Jakaya Kikwete of Tanzania, the AU Chairman at the time, stressed the essential matter of justice, but insisted on the best sequencing of justice with the imperatives of security. As he put it: 'Justice is a matter of essence—it must be done, it must be seen to be done. We are simply concerned with the best possible sequencing of measures so that the most immediate matters of saving lives and easing the suffering of the people of Darfur are taken care of first.' www.[illegible].org/[illegible]/english/[illegible]/[illegible].pdf

What President Kikwete, the statesman, was saying late in 2008 finds eminent juristic support in the words of Benjamin Cardozo many years before: 'Justice is not to be taken by storm. She is to be wooed by slow advances.' Cardozo's observation could, of course, be adjusted a little with the qualifier 'some times' or 'when appropriate'. But the point is easy enough to grasp.

In the circumstances, the position of the AU, thus explained, deserves serious regard. It is wrong to drown out this consideration with presumptions of corrupt motive. For the reasons that follow, the opposite presumption is more appropriate. First, AU leaders, more than most of the people who oppose their position, bear the heaviest burden of legitimate worry. Many of those who want nothing more than immediate arrest and prosecution of Bashir will not share with AU leaders the trauma of concrete and immediate chaos that will result from the spiralling out of control of Darfur and Sudan, were Bashir to be immediately and forcibly removed from office and arraigned at The Hague for trial. Leaders of wealthy and able nations will be constrained to consider whether their domestic public opinion will permit them to 'send [their] young men and women in harm's way' in any international military effort to stabilise a nation in chaos in distant Africa. African leaders will not have that luxury.

Perhaps, Iraq must be kept in mind here; for it has become an object lesson

in what happens when well-intentioned people undertake by storm the evidently just cause of removing and prosecuting bad men who hold their peoples stably together even with barbarous strings of tyranny. The prompt removal, capture, trial and execution of Sadam Hussein did not as promptly reward the people of Iraq with the promised dividends of peace and security that they deserve and clamoured for all those years under Sadam. America has now served Iraq a pullout notice, requiring Iraqis to take care of their own security. After the pullout, there will be a distance of continents and oceans and thousands of miles separating America and Iraq. But if Sudan goes the way of Iraq upon a precipitous removal of Bashir, there will be no continent or ocean or a thousand miles to separate AU leaders from Sudan. Their fate in the face of chaos in Sudan is simply that stark.

Notably also, the AU High Level Panel on Darfur, under the Chairmanship of former President Mbeki of South Africa, went to great lengths to stress that the advancement towards peace, justice and reconciliation in Darfur will require an integrated package of solutions which must necessarily balance the requirements of the imperatives of peace, justice and reconciliation. The Panel was 'convinced that any attempt to emphasise the importance of any of these three objectives at the expense of the others, would not bring about the just and stable peace we all desire for the people of Darfur, and which the Darfurians themselves seek.' [See Mr Mbeki's speech to the UN Security Council on 22 December 2006.]

The point of the foregoing is not that tyrants must be allowed to strangle their own peoples forever with vicious cords of relative stability. The point rather is that the available choices are not limited to either (a) perpetual tyranny that promises ostensible social stability or (b) instant removal and prosecution that yields instant chaos to society. There is a middle course. That course is the AU model of sequencing and balancing of the imperatives of justice and social stability. While not a perfect model, it has been known to bring eventual justice, or the immediately realizable promise of it, in certain cases where, as in the Bashir case, the need was seen for prosecution of a malignant dictator. And that brings us to the second reason why good faith must be presumed on the part of AU leaders.

We must not be quick to forget that it is the AU leaders that passed a resolution requiring Hissen Habre (the former President of Chad) to be tried in Senegal for violations of international humanitarian norms. Similarly, the African leaders have tacitly endorsed the prosecution of Charles Taylor. Notably, ECOWAS leaders were visibly embarrassed—and they duly protested—when David Crane (the first Chief Prosecutor of the Special Court for Sierra Leone) surprised them at an ECOWAS peace conference in Accra in June 2003, by showing up unannounced and brandishing an indictment and warrant of arrest against Charles Taylor, who then was the President of Liberia and a fellow participant at the conference. Yet, neither the ECOWAS nor the AU leadership has been known to complain against the eventual arrest and trial of Charles Taylor by the Special Court for Sierra Leone, *sequenced* after his prior, safe tease-

out from Liberia and grant of exile in Nigeria. Indeed, it was his asylum host, Nigeria's President Obansanjo, that eventually arrested him from his refuge in Nigeria and handed him over to the SCSL for trial.

These antecedents are sufficient to demonstrate the folly of the suggestion that it is the motive of protection of a fellow 'old boy'—rather than their seriousness about sequenced measures—that explains the position of the AU leaders in respect of Bashir.

It is for these reasons and more that the AU leaders must be accorded a presumption of good faith, rather than not, when they seek a deferral of the Bashir prosecution. [In his own blogs, Dapo Akande has reviewed other reasons why good faith should be presumed on the part of AU leaders: see for instance, Akande, *supra*. See also Dapo Akande, 'Africa and the International Criminal Court': www.ejiltalk.org/africa-and-the-international-criminal-court/]

So, what was the point of the stalemate?

It is also with the foregoing in mind that we return to the question: What has the impasse between the ICC and the AU achieved that inures to the benefit of the Bashir prosecution? After much reflection, the answer to this question is hardly edifying.

Notably, the current phase of the stalemate resulted from the non-action of the Security Council to the AU request for deferral—a request based on a procedure in the ICC Statute that the AU felt entitled to invoke. This is the procedure under article 16, for deferral of investigation or prosecution. Now, let us pause for a minute and consider that procedure and the reasons for it. In the words of the provision: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.'

Under that procedure then, the resulting deferral has a non-self perpetuating life of 12 months. A fresh resolution would have to be tabled after the 12 months, if a renewal of the deferral were needed. It is difficult to imagine that there would be much appetite (on the part of the Security Council) or conviction (on the part of the AU) for repeated renewals after the initial one.

In addition to inquiring into the practical effects of the resistance to the AU request for deferral of the Bashir prosecution, one cannot help wondering what it was that motivated the resistance to the first AU request in the first place. That question necessarily provokes the underlying inquiry as to why it was considered necessary to have article 16 in the ICC Statute in the first place. Is the AU request wholly outside those reasons? A cursory view of the Rome Statute's *travaux preparatoires* does not support that conclusion. Article 16 is the product of a proposal from Singapore and Canada aimed at balancing two critical interests, to wit: (a) ICC's judicial interest in exerting justice in the face of criminal responsibility; and (b) the

Security Council's political interest in maintaining international peace and security—sometimes in precarious circumstances. That balance was adequately captured by Mr Perrin de Brichambault of France whose remarks were recorded as follows: 'The proposed article [16] provided an excellent working basis as far as the role of the Security Council was concerned. There must be consistency between the actions of the Court and the actions of the Security Council *where there were situations endangering peace*. The Statute should provide for the Security Council to be able to ask the Court to defer action in situations coming under Chapter VII of the Charter of the United Nations ....' [Emphasis added.] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June - 17 July 1998, Official Records, Vol II, Doc No A/CONF.183/13 (Vol. II) p 189]. Similar comments were made by other delegations that spoke in favour of article 16. See, particularly, the comments of Mr Mwangi of Kenya *op cit*, p 317] and Mr Rowe of Australia [*op cit*, p 299]who respectively spoke of the need to strike a 'balance' in the suggested manner.

Justification for the resistance to AU's deferral request must be founded upon the proposition that the request may rightly be seen as unduly tipping that scale. But that would be a hard proposition to sustain, keeping fully in view the case of good faith made above in favour of the AU.

At any rate, the following question still remains: what exactly was the practical value of resisting the AU their first request for deferral, when it should have been obvious to anyone that Bashir could not be arrested and arraigned before the ICC within those initial 12 months, even without the requested deferral? In the absence of a practical value to that resistance, it seems that the only result achieved has been a needless—possibly self-indulgent—aggravation of the nerves of AU's leadership, and a resulting widening of the gulf of damaged relations. It is possible to imagine how the current reality of the product of that treatment, in terms of soured relations with the ICC, so poorly compares with that of a positive consideration of the deferral request. A positive consideration of the request would have stirred in the AU leaders feelings of respect, dignity and high regard to which they are entitled. With the leverage of the deferral, they might have been empowered to *achieve* more in terms of peace and security in Sudan and Darfur, especially if the international community had made steps along those lines conditions of the grant of the deferral request. And the damage in relations with the Court might have been avoided or repaired.

Bridging the Gulf

How then do we move forward in order to bridge the gulf of tension between the AU and the ICC? One important consideration in the effort to heal the rift is that the views of the AU must be treated with respect and dignity and given due regard. Failure to do that runs a great risk of alienating one of the—if not the—most important constituencies of this young Court.

For obvious reasons, alienation of the AU will not augur well for the Court.

I anticipate here a demurrer to the effect that this amounts to mixing justice with politics. It certainly is. For, it will be a painful show of naïveté to presume otherwise. But, the presence of restraining politics in the affairs of the Court ought not impede it in substantially achieving the central aim for which it was founded: being the aim of banishing impunity from the minds of persons who abuse humanity and threaten international peace and security in alarming ways. The task for the Court then is to negotiate around these political obstacles and pitfalls and fog-spots, and remain dogged in its pursuit of justice and accountability. Granted, the potential achievements of the Court in those circumstances will be attenuated, as compared to the achievements of a court operating in a political vacuum. Yet, those attenuated achievements will be far superior than would be the lot of modern civilisation in a vacuum of international criminal justice. That is to say, the glass of justice represented by the Court, operating in a political reality, is not an empty glass. It is a glass half full. That is precisely the sort of balance contemplated by article 16 of the Court's Statute.

Posted by Chile Eboe-Osuji at 6:45 AM

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