



Original: French

No.: ICC-01/04-01/06

Date: 20 February 2013

THE PRESIDENCY

Before:

**Judge Sang-Hyun Song, President
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

**Public document
with public annexes 1-5**

Defence application for the disqualification of Judge Sang-Hyun Song

Source: Defence team for Mr Thomas Lubanga

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

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PURPOSE AND BASIS OF THE APPLICATION

1. This application moves for the disqualification of Judge Sang-Hyun Song as a judge of the Appeals Chamber which has been seized of the appeals entered by Mr Thomas Lubanga against Trial Chamber I's decisions of 14 March 2012,¹ 10 July 2012² and 7 August 2012,³ the Prosecutor's appeal against the decision of 10 July 2012⁴ and the victims' appeal against the decision of 7 August 2012.⁵
2. The legal basis of this application is as follows:
 - article 41(1)(a): "A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground";
 - rule 34(1)(d): "In addition to the grounds set out in article 41, paragraph 2, and article 42, paragraph 7, the grounds for disqualification of a judge, the Prosecutor or a Deputy Prosecutor shall include, *inter alia*, the following:
 - (a) Personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship with any of the parties;
 - [...]
 - (d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned."
 - article 3(2) of the Code of Judicial Ethics : "Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence".

¹ ICC-01/04-01/06-2948-Red.

² ICC-01/04-01/06-2949-tENG.

³ ICC-01/04-01/06-2972.

⁴ ICC-01/04-01/06-2950.

⁵ ICC-01/04-01/06-2970 (OCPV and V02) and ICC-01/04-01/06-2973 (V01).

- article 4(2) of the Code of Judicial Ethics: “Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest”.
- article 9 of the Code of Judicial Ethics:
 1. Judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality.
 2. While judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the Court.
- article 10 of the Code of Judicial Ethics:

Judges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the Court, or that may affect or may reasonably appear to affect their independence or impartiality.

3. The factual basis of this application is as follows:

- firstly, the existence of public statements by Judge Sang-Hyun Song expressing approval of the impugned decisions having regard to the existence of the crimes charged, the individual criminal responsibility of the Appellant and the sentence handed down to him;
- secondly, Judge Sang-Hyun Song’s activities in UNICEF, an organisation accepted as *Amicus Curiae* in the case at bar, which has made representations before the Trial Chamber contradicting the Appellant in respect of matters pending before the Appeals Chamber.

DISCUSSION

1. PUBLIC STATEMENTS ADVERSELY AFFECTING THE OBLIGATION OF IMPARTIALITY

4. The prohibition of acting in a judicial capacity provided for in article 41(1)(a) exists where a judge is driven by demonstrated bias or where there is an appearance of bias on his part,⁶ viz., where “the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias”.⁷

5. On 13 November 2012, at an occasion marking the 10th anniversary of the International Criminal Court, Judge Sang-Hyun Song stated:

This year the ICC issued its first verdict and sentence in the Lubanga Case. This judgement sets a crucial precedent in the fight against impunity and reinforces the Rome Statute growing deterrent effect against the perpetrators of heinous crimes against children. As an illustration of this deterrent effect, the Special Representative to the United Nations Secretary General for Children in armed conflicts cited the reported release of 3000 child soldiers in Nepal during the Lubanga trial.⁸

6. On 10 December 2012, Judge Sang-Hyun Song stated:

This year, the ICC issued a landmark judgment in the case against Thomas Lubanga, concerning the conscription and enlistment of children under the age of 15 into armed forces and using them to participate actively in hostilities. This and other cases before the ICC are having an important impact by bringing the world’s attention to the rights of the most vulnerable members of our society. With the understanding that the use of child soldiers is a crime that will be prosecuted, several nations have taken significant steps towards ending this deplorable practice.⁹

⁶ *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, AC, *Judgment*, 21 July 2000, para. 189; *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-T, *Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge* (TC), 18 May 2000, paras. 9-14; *The Prosecutor v. Nzirorera et al*, Case No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s motion for disqualification of Judge Byron and stay of proceedings*, 20 February 2009, para. 4; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, *Decision of the plenary of the judges on the “Defence request for the Disqualification of a Judge”* of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para. 11.

⁷ *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, AC, *Judgment*, 21 July 2000, para. 189.

⁸ Speech by Judge Sang-Hyun Song, 13 November 2012, at an event marking the 10th anniversary of the International Criminal Court, available at:

http://www.youtube.com/watch?v=IIHuXAXnaoM&list=UU183T5VoMh5wISSdKPaMgRw&index=1&feature=plpp_video [emphasis added].

⁹ Statement of Judge Sang-Hyun Song, President of the International Criminal Court (ICC), on the Occasion of Human Rights Day, 10 December 2012. See http://www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/pages/statement-president-10-12-2012.aspx (Annex 1) [emphasis added].

7. The public statements, which were widely broadcast, show that Judge Sang-Hyun Song has expressed “opinions that, objectively, could adversely affect the required impartiality of the person concerned”:
- He expresses a personal opinion on the impugned judgments, naming the Appellant;
 - He portrays the impugned decisions as “crucial precedents” which will serve as an example to the international community as a whole;
 - He portrays the impugned judgments as having imposed proper penalties for the crimes prosecuted in the case at bar;
 - He portrays the conviction of the Appellant as a “crucial precedent” in the fight against the impunity of “the perpetrators of heinous crimes against children”.
8. A reasonably informed observer would perforce understand from these statements that Judge Sang-Hyun Song unreservedly endorses the impugned judgments, which he describes as crucial “precedents”, specifically in that they impose penalties for the prosecuted crimes and, in convicting the Appellant, put an end to the “impunity” of their perpetrators.
9. A reasonably informed observer would perforce infer therefrom that Judge Sang-Hyun Song is personally convinced of the existence of the crimes charged, the Appellant’s guilt, and, in general, the merits of the impugned decisions.
10. Furthermore, in his statement of 10 December 2012, Judge Sang-Hyun Song added: “The Trust Fund for Victims is rendering assistance to over 80 thousand victims on the ground, and the ICC’s judicial reparations regime has been initiated for the first time in the Lubanga case. As you can see, the

ICC is about much more than just punishing the perpetrators. The Rome Statute and the ICC bring retributive and restorative justice together with the prevention of future crimes.”¹⁰

11. By emphasising that in the case at bar, the Court did not confine itself to punishing the perpetrators of the crimes, Judge Sang-Hyun Song was again unequivocally expressing his personal conviction as to the merits of the guilty verdict and the sentence handed down.
12. What this automatically engenders in the mind of a reasonably informed observer is the fear of a prejudice detrimental to the Appellant’s interests. This fear is all the more serious as the impugned statements speak to essential issues whose determination by the Appeals Chamber is pending, *viz.*, the guilt of the Appellant, the sentence handed down to him and the reparations awarded to the victims, the fact that the judge in question holds the distinguished position of President of the Court; his combined functions as President of the Court and a judge of the Appeals Chamber in the same judicial institution, far from attenuating the obligation of impartiality, make it an ineluctable imperative.
13. Hence, at the very least, these statements have created the appearance of impartiality which is antithetical to fair trial requirements and necessitates the disqualification of Judge Sang-Hyun Song in that “objectively, [they] could adversely affect the required impartiality of the person concerned”.

2. THE EXISTENCE OF PERSONAL INTEREST

14. Applying principles identical to those set forth in the Statute and the Rules of Procedure and Evidence, the International Criminal Tribunal for the former Yugoslavia had occasion to hold that disqualification was required where

¹⁰ Address of ICC President Judge Sang Hyun Song to the opening session of the 7th Consultative Assembly of Parliamentarians for the ICC and the Rule of Law & World Parliamentary Conference on Human Rights, human Rights Day 2012 (Annex2).

See: <http://www.icc-cpi.int/iccdocs/PIDS/statements/121210PGACAP-ICCspeech.pdf>.

“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 [...].”¹¹

15. Where a judge has an interest in a case before him or her, his or her disqualification is required without the need to ascertain whether there is in fact an apparent or suspected bias.¹²
16. In the Pinochet case, the House of Lords accepted that an interest in the case was not limited to purely pecuniary advantages: “if, [...], the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge’s decision will lead to the promotion of a cause in which the judge is involved together with one of the parties”.
17. The House of Lords thus found that a judge’s membership in one of the organisations which joined to support the suit is sufficient for “automatic” disqualification. Based on this precedent, the “interest” exists even if the organisation of which the judge is a member is separate and distinct from the one which is a party in the proceedings if both are “various parts of an entity or movement working in different fields towards the same goals”.
18. In the case at bar, UNICEF was admitted to participate in the proceedings as *amicus curiae*.¹³
19. In a brief filed on 10 May 2010,¹⁴ it expressly stated its position on various matters pertaining to reparations.

¹¹ *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, CA, *Judgment*, 21 July 2000, para. 189.

¹² *Pinochet*, Re [1999] UKHL 52, 15 January 1999.

¹³ ICC-01/04-01/06-2870.

¹⁴ ICC-01/04-01/06-2878.

20. UNICEF argued *inter alia* that the admissibility of applications for reparations should be assessed “as broadly as possible”¹⁵ and that the reparations stage argued for a modification of the understanding of the category of victims in order to allow it to be construed more broadly.¹⁶
21. UNICEF thereby invited the bench not to limit its decisions to the applications of those victims who testified in court or were authorised to participate in the proceedings,¹⁷ or even specifically to the crimes for which Mr Lubanga was found responsible,¹⁸ but to adopt an approach which would encompass “other victims”,¹⁹ the communities to which those victims belonged²⁰ and reparation for the harm suffered as a result of sexual violence.²¹
22. These opinions are at odds with those of the Appellant and are discussed in the grounds of the appeal pending before the Appeals Chamber.²²
23. Furthermore, UNICEF publicly expressed an opinion on the specific crimes with which the Appellant was charged and on his guilt in regard to those crimes.
24. In a press release dated 14 March 2012, UNICEF stated in particular: “As a result of today’s landmark ruling, Lubanga is the first warlord to face international justice for using children as weapons of war”, adding that “thousands of children, some as young as seven, were recruited and used as fighters, as well as other roles such as porters, cooks and slaves, by all sides”.²³

¹⁵ ICC-01/04-01/06-2878, para. 6.

¹⁶ ICC-01/04-01/06-2878, para. 11(c).

¹⁷ ICC-01/04-01/06-2878, paras. 9 and 11(b).

¹⁸ ICC-01/04-01/06-2878, para. 31.

¹⁹ ICC-01/04-01/06-2878, para. 11 (b).

²⁰ ICC-01/04-01/06-2878, para. 16.

²¹ ICC-01/04-01/06-2878, para. 31.

²² See, in particular, ICC-01/04-01/06-2972, paras. 117 *et seq.*

²³ See press release of 14 March 2012: “UNICEF applauds landmark ruling on war crimes against children”, http://www.unicef.org/media/media_61992.html. See also the video dated 15 March 2012: “UNICEF Child Protection Specialist Pernille Ironside discusses conviction of Thomas Lubanga of war crimes for recruiting children” at <http://www.yovisto.com/video/19999> (Annex 3).

25. The Defence recently discovered that Judge Sang-Hyun Song is the Chairman and member of the UNICEF Korea Board of Directors, together with his functions as judge of the International Criminal Court.²⁴
26. That Judge Sang-Hyun Song holds high office in an organisation which, in participating in the proceedings, supports the charges against the Appellant and holds positions antithetical to the Appellant's own case establishes the existence of an "interest" on the part Judge Sang-Hyun Song within the meaning of the above-referenced legal instruments and case law. These circumstances make his disqualification imperative.
27. Furthermore, Judge Sang-Hyun Song's statements to *The Korea Herald*, which appeared in an article published on 19 December 2012, evidence the conflation of his role as a member of the ICC bench of judges and President of UNICEF:

"I work honorably for UNICEF and the ICC whose works are similar since they both protect the rights of children who are in desperate need of help," Song said in an email interview with *The Korea Herald*.

"When I deal with cases involving war criminals and meet the victims, I always think that war atrocities should not be repeated."

In 2009 and 2010 he visited towns in the Democratic Republic of Congo and Uganda to help victimized children of conflict who live there together.

The children were categorized into two groups, Song said. One is comprised of those who had been kidnapped and forced to fight in armed battle countless times, and teenage girls who had given birth after being raped. The other group is those who had been able to avoid such tragedies but suffered from starvation.

"When the kids sang the song 'We Shall Overcome' for me and my colleagues, I was crying with them as we hugged each other," Song said.²⁵

²⁴ Interview granted to *The Korea Herald*, 19 December 2012, "Protector of children and justice" at http://nwww.koreaherald.com/common_prog/newsprint.php?ud=20121219000419&dt=2 (Annex 4); see also "Keynote address by ICC President Song at 2013 Special Olympics Global Development Summit, Pyeongchang, South Korea", 30 January 2013 at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/presidency/statements/Documents/130130ICCPresidentStatement.pdf (Annex 5).

²⁵ See *The Korea Herald*, "Protector of children and justice", 19 December 2012. http://nwww.koreaherald.com/common_prog/newsprint.php?ud=20121219000419&dt=2 (Annex 4).

28. Finally the current situation is manifestly likely to create a conflict of interests in which Judge Sang Hyun-Song's partiality may be reasonably called into question.
29. It follows that for this reason also, Judge Sang-Hyun Song's disqualification is necessary in the case at bar.

FOR THESE REASONS, MAY IT PLEASE THE COURT,

TO DISQUALIFY Judge Sang-Hyun Song as a member of the appellate bench dealing with the parties' and participants' appeals in the case at bar.

[signed]

Ms Catherine Mabilie, Counsel

Dated this 20 February 2013

At The Hague, The Netherlands