

**Cour
Pénale
Internationale**



Les Chambres

**International
Criminal
Court**

The Chambers

Internal memorandum
Memorandum interne

To À	Vice-President Monageng	From De	Judge Sang-Hyun Song <i>SHS</i>
Date	8 March 2013	Through Via	
Ref.	2013/PNES/95-3	Copies	Vice-President Tarfusser
Subject Objet	Written Submissions on Mr Lubanga's application for my disqualification		

1. On 20 February 2013, Mr Thomas Lubanga Dyilo ("Mr Lubanga") filed the "Defence application for the disqualification of Judge Sang-Hyun Song"¹ ("Application"), seeking my disqualification from all pending appeals in the case of *Prosecutor v. Thomas Lubanga Dyilo*. In essence, Mr Lubanga argues that I should be disqualified because of certain statements I made on the occasion of the Court's tenth anniversary and last year's Human Rights Day and because of my involvement with the United Nations Children's Fund ("Unicef").

2. In response to your memorandum of 22 February 2013 and in accordance with article 41 (2) (c) of the Statute and rule 34 (2) of the Rules of Procedure and Evidence, I present today my written submissions on the Application. I take Mr Lubanga's Application very seriously; it is in our all interest that the highest standards of justice are upheld at this Court. Nevertheless, for the reasons that follow, I respectfully invite you to dismiss the Application as unfounded.

I. PUBLIC STATEMENTS MENTIONING THE LUBANGA CASE

3. In support of the Application, Mr Lubanga refers to certain statements that I recently made in my function as President of the Court and which, in his view, create the appearance of bias. First, he discusses my opening remarks at the social event in honour of the Court's tenth anniversary, which took place in the atrium of the city hall

¹ ICC-01/04-01/06-2981-tENG.

of The Hague on 13 November 2012, the eve of the opening of the eleventh session of the Assembly of States Parties. This event was hosted by the City of The Hague, involved music and theatre performances, and was attended by Judges and staff members of this Court, as well as of other courts and tribunals in The Hague, members of the diplomatic community, the city administration, civil society, etc. My opening remarks were rather short, comprising about 2 ½ pages of text. For your reference and convenience, I attach the full text,² as Mr Lubanga refers to the video of the event on YouTube, which shows only excerpts of my opening remarks.

4. Towards the end of my opening remarks, I referred to the fact that, in 2012, the Court issued its first verdict and judgment in the Lubanga case, which set “a crucial precedent in the fight against impunity and reinforce[d] the Rome Statute’s growing deterrent effect against perpetrators of heinous crimes against children”. I also mentioned a statement of the Special Representative of the United Nations Secretary General for Children in Armed Conflict, according to which 3,000 child soldiers in Nepal were reportedly released during the trial of Mr Lubanga. The opening remarks did not go into any details of the *Lubanga* case, nor of the legal or factual issues of the pending appeals, nor of any other judicial matter. My remarks were adapted, in both style and content, to what was a purely social event, not a legal discussion.

5. Second, Mr Lubanga refers to my statements of 10 December 2012, which I made in the context of last year’s International Human Rights Day. He mentions two separate statements: first, he cites to a statement published on the Court’s website, entitled “Statement of Judge Sang-Hyun Song, President of the International Criminal Court (ICC), on the Occasion of Human Rights Day, 10 December 2012”. Mr Lubanga referred to the French version of this statement; I attach the English text for your reference.³ This statement recalled generally the Universal Declaration of Human Rights, its link with the work of the Court, and what has been achieved in the first ten years of the Court’s existence. I also referred to the fact that, in 2012, the Court “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”. The statement continued: “This and

² See Annex 1.

³ See Annex 2.

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". No details of the *Lubanga* case were mentioned, nor were any legal issues discussed in the statement. The purpose of the statement was to recall to a larger public the important role of the Court in protecting fundamental human rights. It was not my intention to comment on pending cases, nor did I do so.

6. In addition, Mr Lubanga refers to my opening remarks at the 7th Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law & World Parliamentary Conference of Human Rights, which took place in Rome, Italy on 10 December 2012. Those opening remarks were general in nature, discussing the Court's history, function and development. I mentioned, *inter alia*, the Trust Fund for Victims and referred to the fact that "the ICC's judicial reparations regime has been initiated for the first time in the *Lubanga* case". I then said that "[...] 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". Thus, I referred to the *Lubanga* case only to illustrate that the Rome Statute also provides for reparations to victims. No further mention of the *Lubanga* case was made, nor did I discuss any judicial or legal matters.

7. The Plenary of the Court has held that in order to determine whether there is an appearance of bias, it will consider "whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the [judge concerned]".⁴ It is for my learned colleagues to decide whether my statements of 13 November and 10 December 2012 would cause a reasonable observer to reasonably apprehend that I am, in relation to the pending appeals in the *Lubanga* case, biased. Nevertheless, I should like to underline that none of the three statements entered into any legal or factual discussion and that they merely recalled facts – notably that Trial Chamber I had convicted Mr Lubanga (even though this conviction had since been appealed). When I made those statements, I was of the view that they remained clearly within what I, in my simultaneous function as Judge and President of

⁴ *Prosecutor v. Banda and Jerbo*, "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.

this Court, may say, particularly when addressing a larger general audience, without in any way compromising my impartiality. I continue to hold this view to date.

II. MY INVOLVEMENT WITH UNICEF/KOREA

8. Mr Lubanga argues furthermore that I should be disqualified because Unicef made submissions before Trial Chamber I on the principles and procedures to be applied with regard to reparations,⁵ given that I am the President of Unicef/Korea and that I therefore have a personal interest in the case. He also avers that there is an appearance of bias on that basis.

9. In this regard, I would like to note that it is factually correct that I have been involved with Unicef/Korea for many years, a fact that was disclosed at the Judges' elections in 2003 and at the subsequent elections in 2006.⁶ At the time of those elections, I was one of the Vice-Presidents of the organization. Since 1 April 2012, I am President of Unicef/Korea. When the former President resigned, I accepted to succeed him. However, in particular because of my obligations as Judge and President of the Court, I made it clear that I could in no way contribute to the actual running of the organization. Therefore, I immediately made one of the Vice-Presidents of Unicef/Korea, Ms D.E. Park, the Acting President of the organization. She runs the organization with the assistance of its Executive Director. I have never received any remuneration from Unicef/Korea, nor have I been involved in making any policies or directions. To the extent that the article in the *Korean Herald*, to which Mr Lubanga refers, states that "Song sets directions and policies for the Korean committee in conducting aid projects, including providing nutritious meals and financing projects such as digging wells", this misrepresents my true involvement with Unicef/Korea. As stated above, I do not participate in any such operational decisions. My role is purely that of a patron.

⁵ See *Prosecutor v. Lubanga Dyilo*, United Nations Children's Fund, "Submission on the principles to be applied, and the procedure to be followed by the Chamber with regard to reparations", 10 May 2012, ICC-01/04-01/06-2878, p. 25.

⁶ See "Statement Submitted in Accordance with Article 36.4(a) of the Rome Statute of the International Criminal Court and Paragraph 7 of the Resolution of the Assembly of States Parties Relating to the Procedure for the Nomination and Election of Judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court" (relevant to the 2003 elections), available at <http://untreaty.un.org/cod/icc/elections/judges/song/statement.pdf>; "Curriculum Vitae Judge Sang-Hyun Song", (relevant to the 2006 elections) available at http://www.icc-cpi.int/NR/rdonlyres/5105F628-9A7B-45D5-BD51-FCABDC41CBC9/141530/ICCASP_ej2_korev.pdf.

10. Furthermore, I should like to underline that Unicef/Korea is one of 36 “National Committees”. The National Committees are not part of the United Nations. Rather, they are independent non-governmental organisations that are established locally in industrialized countries, where the UN’s Unicef programme does not run any of its own projects. While one of the principal aims of the National Committees is to raise funds for the UN’s Unicef programme, the National Committees are not involved in the administration of the Unicef programme. In other words, the National Committees and the UN’s Unicef programme are distinct and separate organizations.

11. The submissions before Trial Chamber I on reparations were made on behalf of the UN’s Unicef programme, not on behalf of the National Committees. The National Committees were not even mentioned in those submissions. Thus, the situation is not comparable to the case *In Re Pinochet*, to which Mr Lubanga refers. In that case, the British House of Lords found that a judge who was one of the directors of the Amnesty International Charity Limited (“AICL”) should not have participated in a case in which Amnesty International (“AI”) had made submissions because “[i]n reality, AI, AICL [and another organization] are a close-knit group carrying out the work of AI”. In contrast, Unicef/Korea and the Unicef programme of the UN are by no means a “close-knit group”. They are independent organizations, and the UNICEF programme of the UN cannot, and does not, speak on behalf of the National Committees.

12. It is for my learned colleagues to determine whether my involvement with Unicef/Korea would cause a reasonable observer to reasonably apprehend that I am, in relation to the pending appeals in the *Lubanga* case, biased, or that I have a personal interest in the case. I would nevertheless like to emphasize that, in my view, there is nothing unusual or improper about Judges of this Court contributing to good causes outside their official functions. I never felt that my – very limited – involvement with Unicef/Korea, outside my official activities at the Court, precludes me from deciding judicial matters impartially, including in respect of the case against Mr Lubanga and the pending appeals, or that I have a personal interest in that case.

III. CONCLUSION

13. In conclusion, I therefore submit that neither my recent statements as President of the Court nor my function as President of Unicef/Korea create an appearance of bias or show that I have a personal interest in the *Lubanga* case. I respectfully invite you to reject Mr Lubanga's Application as unfounded. I gladly provide any further information or clarification that you may require.

Annex 1

10th Anniversary of the Court
Social Event at City Hall in The Hague
Remarks by Judge Sang-Hyun Song, President of the ICC
13 November 2012

Good evening Mr. Mayor, Excellencies, Ladies and Gentlemen.

I would first like to thank the City of The Hague for hosting this wonderful evening of music and theatre to celebrate the International Criminal Court's 10th anniversary. It is my pleasure to be here with you today and to be back in The Hague after a recent trip to the US. Having experienced Hurricane Sandy in New York, I promise not to complain about the Dutch weather ever again!

As one of the earliest States Parties to the Rome Statute, the Netherlands has been a strong supporter of the Court since the beginning. They have also kindly provided us with a home for the past 10 years. The creativity of Dutch architecture was tested when we first moved in. Out of what was originally a parking area, two courtrooms emerged. A gym with its showers and lockers were soon transformed into a conference room.

The Advance Team consisting of three persons received the building on 1st July 2002. Two of them, Phakiso Mochochoko and Claudia Perdomo, still work for the ICC. The team told me how they gave interviews to the media outdoors on the very first day. Their first task was to hide the nudity of the ICC.

It took some time before furniture, computers and telephones arrived. In fact, the first ICC assets were the mobile phones of the Advance Team, which were all paid for using their personal credit cards.

I was among the first judges to arrive in 2003. To be honest, many judges were concerned about the future of the ICC. We seriously wondered whether the Court would survive the hostility it was facing from many sides. It is fair to say that our maiden voyage through uncharted waters has brought its fair share of challenges. However, we have also made great strides in the struggle against impunity.

We quickly filled the empty chairs and the ICC now has more than 800 members of staff representing more than 90 nationalities. Just last month, the ICC signed a contract for the realisation of the Court's Permanent Premises in The Hague, a tailor-made building which should be completed in 2015. To date, 121 States have ratified the Rome Statute demonstrating their commitment to preventing the worst atrocities known to humankind. This is more than 60% of the world's sovereign nations and the number keeps growing.

This year, the ICC issued its first verdict and sentence in the *Lubanga* case. This judgment sets a crucial precedent in the fight against impunity and reinforces the Rome Statute's growing deterrent effect against 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 Conflict cited the reported release of 3,000 child soldiers in Nepal during the *Lubanga* trial.

In 10 years, the ICC has emerged as the centerpiece of a new international legal system, carrying the hope of a future free of large-scale violence and suffering. However, the road ahead remains long and we have much still to learn. As we embark on our second decade, the ICC needs universal cooperation, as well as diplomatic and financial support from the international community to effectively achieve its mission. Such investment is not in vain. The Rome Statute crimes inflict the worst cruelty imaginable and every step toward ending them is worth the effort.

Once again, I would like to thank tonight's hosts for organising this event and I wish everyone a very enjoyable evening.

Thank you.

Annex 2

Statement : 10/12/2012

**Statement of Judge Sang-Hyun Song,
President of the International Criminal
Court (ICC), on the Occasion of Human
Rights Day, 10 December 2012**

Sixty-four years ago today, the United Nations General Assembly adopted the Universal Declaration of Human Rights with the goal of ensuring that all people can live in freedom and with dignity. The rights enshrined in this charter belong to everyone regardless of race, religion, gender or socio-economic status. This groundbreaking list of protections has been a key milestone on the road to securing a world of genuine humanity, respect and equality.

The founding treaty of the International Criminal Court, the Rome Statute, which entered into force ten years ago, serves to defend some of the essential rights enumerated by the Declaration. Violations of the right to life and liberty, and violations of the prohibition of torture and slavery, for instance, form part of the crimes in the ICC's jurisdiction, namely genocide, crimes against humanity and war crimes. By creating an international criminal court of last resort to deliver justice when national systems are unable or unwilling to, the Rome Statute aims at ending impunity for the most serious international crimes.

Today, as the ICC celebrates its 10th anniversary, the Court has 14 cases in 7 country situations, hundreds of witnesses under its protection programme and it has received more than 12,000 applications from victims seeking participation in the judicial proceedings. The Trust Fund for Victims is working with more than 80,000 victims in various countries in Africa. Almost two-thirds of the world's sovereign nations, 121 in total, have become States Parties. As such, the ICC's activities are having an enormous impact not just on individuals prosecuted before the Court, but also on the tens of thousands of direct victims, millions of people in the affected communities and societies, and indeed several billion people under the legal protection of the Rome Statute system.

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.

Human Rights Day provides an excellent opportunity to reflect on the immense progress that we have achieved since the adoption of the Universal Declaration of Human Rights. The ICC may be one of the most recent additions to the body of mechanisms that seek to protect and uphold human rights and dignity, but it is already delivering concrete results and a very credible promise of greater respect for and adherence to the rights of children, women and men everywhere.

Source: Presidency