Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **11 June 2013**

THE PRESIDENCY

Before: **Judge Sanji Mmasenono Monageng, Acting President**
Judge Cuno Tarfusser, Acting First Vice-President
Judge Akua Kuenyehia, Acting Second Vice-President

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public with public annex

Notification of the decision on the Defence Application for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr Fabricio Guariglia

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

Legal Representatives of the Victims
Mr Luc Walleyn
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Paul Kabongo Tshibangu

Legal Representatives of the Applicants

The Office of Public Counsel for Victims
Ms Paolina Massidda

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

REGISTRY

Registrar
Mr Herman von Hebel

Deputy Registrar
Mr Didier Preira

Other
Appeals Chamber

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THE PRESIDENCY of the International Criminal Court ("Court");

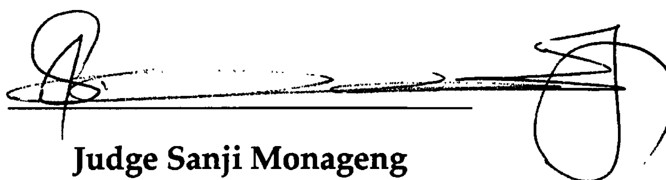
In the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("case");

Noting the "Corrigendum to Defence application for the disqualification of Judge Sang-Hyun Song" dated 20 February 2013 ("Defence Application")[1] and the response thereto;[2]

Noting the 11 March 2013 "Notification concerning the 'Corrigendum to Defence application for the disqualification of Judge Sang-Hyun Song' dated 20 February 2013"[3] in which the Presidency notified the parties and participants that a plenary session would be convened on 21 March 2013 to address the Defence Application;

Hereby orders the Registrar to transmit this notification and its annex (the decision of the plenary on the Defence Application) to all parties and participants in the case.

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



Judge Sanji Monageng

Acting President

Dated this 11 June 2013

At The Hague, Netherlands

[1] ICC-01/04-01/06-2981-tENG-Corr.
[2] ICC-01/04-01/06-2996-Anx3.
[3] ICC-01/04-01/06-2996.

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Cour Pénale Internationale

International Criminal Court

11 June 2013

Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*

I. Procedural history

1. On 14 March 2012, in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("case"), Trial Chamber I ("Trial Chamber") of the International Criminal Court ("Court" or "ICC") found the accused, Mr Lubanga, guilty of war crimes ("Conviction Decision") within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute ("Statute").[1] On 10 July 2012, the Trial Chamber sentenced him to a term of imprisonment of 14 years.[2] Further, on 7 August 2012, the Trial Chamber issued its decision on reparations in the case.[3]

2. The Appeals Chamber of the Court is currently seised of appeals lodged by the Defence against all the above decisions,[4] by the Prosecutor against the 10 July 2012 sentencing decision,[5] and by the Victims against the 7 August 2012 reparations decision ("appeals").[6]

3. On 20 February 2013, the Defence ("Applicant") filed an application before the Presidency ("Defence Application") for the disqualification of Judge Sang-Hyun Song, also President

[1] Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, paragraph 1358.
[2] Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012, paragraph 107.
[3] Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August 2012.
[4] Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre du « Jugement rendu en application de l'Article 74 du Statut » rendu le 14 mars 2012, ICC-01/04-01/06-2948-Red, 3 December 2012; Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la « Décision relative à la peine, rendue en application de l'article 76 du Statut » rendue par la Chambre de première instance I le 10 juillet 2012, ICC-01/04-01/06-2949, 3 December 2012; and Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la « Decision establishing the principles and procedures to be applied to reparations », rendue par la Chambre de première instance le 7 août 2012, ICC-01/04-01/06-2972, 05 February 2013.
[5] Prosecution's Notice of Appeal against Trial Chamber I's "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/04-01/06-2933, 03 October 2012.
[6] Appeal against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparations of 7 August 2012, ICC-01/04-01/06-2909, 24 August 2012 (OCPV and V02) and Appeal against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparation of 7 August 2012, ICC-01/04-01/06-2914, 03 September 2012 (V01).

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of the Court ("the Judge") from the Appeals Chamber currently seised of the foregoing appeals.[7]

4. The Defence Application was based on the following grounds:

   A. That certain public statements made by the Judge adversely affected the appearance of his impartiality,[8] or possibly evinced actual bias on his part.[9]

   B. That the involvement of the Judge in a particular organisation (UNICEF/Korea) gave rise to a personal interest in the outcome of the appeals, which should result in his automatic disqualification from the appeals.[10] In the alternative, it was argued that the Judge's involvement in UNICEF/Korea was "manifestly likely" to create a conflict of interest in which the Judge's impartiality might reasonably be called into question.[11]

5. On 22 February 2013, the Judge was excused from his functions as President of the Court in respect of the Defence Application, pursuant to article 41 of the Statute, following a request for excusal by him on the same date.[12] On 11 March 2013, Judge Kuenyehia was called to serve in place of the Judge as a member of the Presidency in respect of the Defence Application.[13]

6. Noting that article 41(2)(c) of the Statute and rule 34(2) of the Rules of Procedure and Evidence ("Rules") entitle a judge subject to an application for disqualification to present submissions in writing, the Judge was, on 22 February 2013, requested to make any response to the Defence Application by 11 March 2013.[14] Such response was received on 8 March 2013 ("Response").[15]

7. Noting that article 41(2)(c) provides that "[a]ny question as to the disqualification of a judge shall be decided by an absolute majority of the judges", a plenary session of judges was convened on 21 March 2013 to consider the Defence Application. The plenary session

[7] Corrigendum to Defence application for the disqualification of Judge Sang-Hyun Song, ICC-01/04-01/06-2981-tENG-Corr, 20 February 2013 ("Defence Application"). References to the Annexes to the Defence Application are to the French original (Requête de la Défense aux fins de récusation de M. le juge Sang-Hyun Song, ICC-01/04-01/06-2981, 20 February 2013).
[8] Defence Application, paragraphs 3-13.
[9] Defence Application, paragraph 11.
[10] Defence Application, paragraphs 14-15.
[11] Defence Application, paragraphs 28-29.
[12] Notification concerning the "Corrigendum to Defence application for the disqualification of Judge Sang-Hyun Song" dated 20 February 2013, ICC-01/04-01/06-2996, 11 March 2013 ("Presidency Notification") page 3 and Annexes 1 and 2.
[13] Presidency Notification, page 3 and Annex 4.
[14] Presidency Notification, page 3 and Annex 2.
[15] Presidency Notification, page 3 and Annex 3 ("Response").

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was attended in person by Judges Monageng (Acting President), Tarfusser, Kuenyehia, Kourula, Ušacka, Trendafilova, Aluoch, Van den Wyngaert, Fernández de Gurmendi, Ozaki, Morrison and Eboe-Osuji, as well as by Judges Herrera Carbuccia and Fremr via teleconference.

II. Relevant law

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

> [...] the grounds for disqualification of a judge [...] 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.

9. The Court recently noted in a decision on an application for disqualification of a judge in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*[16] ("*Banda/Jerbo*") that it is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; rather, the *appearance* of grounds to doubt his or her impartiality will be sufficient.[17] In that case, it was considered that the relevant standard of assessment was whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge.[18]

10. The majority in *Banda/Jerbo* emphasised further that such standard is concerned not only with whether a reasonable observer *could* apprehend bias, but whether any such apprehension was objectively reasonable.[19] Additionally, they cautioned that there is a strong presumption of impartiality that is not easily rebutted:

[16] Decision of the plenary of the judges on the "Defence Request for the Disqualification of a Judge of 2 April 2012", ICC-02/05-03/09-344-Anx, 5 June 2012 ("*Banda/Jerbo* Decision").
[17] *Banda/Jerbo* Decision, paragraph 11.
[18] *Banda/Jerbo* Decision, paragraph 11.
[19] *Banda/Jerbo* Decision, paragraph 13.

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> The [...] disqualification of a judge [is] not a step to be undertaken lightly, [and] a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.[20]

11. The Defence Application was also based on the following five provisions of the Code of Judicial Ethics of the Court ("Code"), namely: [21]

> Article 3(2): Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
>
> Article 4(2): 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(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.
>
> Article 9(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(1): 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.

12. The principles embodied in the Code, cited above, "serve as guidelines on the essential ethical standards required of judges in the performance of their duties. They are advisory in nature and have the object of assisting judges with respect to ethical and professional issues with which they are confronted", as per article 11(1) of the Code.

[20] *Banda/Jerbo* Decision, paragraph 14.
[21] Defence Application, paragraph 2.

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III. Alleged grounds for disqualification

A. Statements made by the Judge

i. Factual Background

13. On 13 November 2012, at a public occasion in The Hague hosted by the City of The Hague to mark the 10th anniversary of the Court, the Judge, in his capacity as President of the Court, made the opening remarks. The Applicant took issue with the following paragraph of the Judge's speech:

> This year, the ICC issued its first verdict and sentence in the Lubanga case. <u>This judgment sets a crucial precedent in the fight against impunity</u> 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. [Emphasis added by the Applicant].[22]

14. On 10 December 2012, the Court published on its website, as a press release, the statement of the Judge marking Human Rights Day 2012.[23] The Applicant took issue with the following section of that statement:

> This year, the <u>ICC issued a landmark judgment in the case against Thomas Lubanga</u>, 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. [Emphasis added by the Applicant].[24]

15. Finally, on 10 December 2012, the Judge gave the opening remarks at the 7th Consultative Assembly of Parliamentarians for the Court and the Rule of Law & World Parliamentary Conference of Human Rights, in Rome, Italy; with the Applicant taking issue with the following:

> The Trust Fund for Victims is rendering assistance to over 80,000 victims on the ground, and the ICC's judicial reparations regime has been initiated for the first time in the Lubanga case.

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[22] Defence Application, paragraph 5; Response, Annex 1, pages 2-3.

[23] Statement of Judge Sang-Hyun Song, President of the International Criminal Court (ICC), on the Occasion of Human Rights Day, 10 December 2012. See Response, Annex 2 (for the Statement in English) and Annex 1 of the Defence Application, ICC-01/04-01/06-2981-Anx1 (for the Statement in French).

[24] Defence Application, paragraph 6.

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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.[25]

ii. Submissions

16. The Applicant argued that the statements made by the Judge demonstrate an actual lack of impartiality on his part or at least the reasonable appearance thereof, contrary to article 41(2)(a) of the Statute, rule 34(d) of the Rules (cited at paragraph 8 above), and the articles of the Code quoted at paragraph 11 above.[26]

17. It was argued that the public statements made by the Judge express his personal opinion on the judgments currently under appeal, portray them as "crucial precedents" which serve as an example to the international community in the fight against impunity, and depict them as having imposed proper penalties for the crimes prosecuted. It was argued that a reasonably informed observer would understand that the Judge unreservedly endorses the judgments, and is personally convinced of their merits, including on the essential issues facing determination by the Appeals Chamber, *viz.* the Appellant's guilt or innocence, the fitness of sentence, and the reparations awarded to victims.[27] Finally, the Applicant submitted that those public statements created the appearance of partiality and that objectively, they could adversely affect the required impartiality of the Judge.[28]

18. In response, the Judge submitted that his remarks of 13 November 2012 were adapted to what was a purely social event, and not a legal discussion. With respect to the 10 December 2012 statement on the Court's website, he stressed that the purpose of the statement was to recall to a larger public the important role of the Court in protecting fundamental human rights, and that it was not his intention to comment on pending cases. In both situations, he stated that he did not go into any details of the *Lubanga* case, nor into the legal or factual issues of the pending appeals or any other judicial matter.[29] Finally with respect to his 10 December 2012 remarks in Rome, the Judge submitted that those remarks were general and factual in nature, and indicated that the reference to the *Lubanga* case

[25] Defence Application, paragraph 10.
[26] Defence Application, paragraph 2.
[27] Defence Application, paragraphs 7-9 and 12.
[28] Defence Application, paragraph 13.
[29] Response, paragraphs 4-5.

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served only to illustrate that the Statute also provides for reparations to victims. He maintained that there was no further mention or discussion of the *Lubanga* case, or any judicial or legal matters.[30]

19. In sum, the Judge submitted that his statements were made in the context of his role as President of the Court, were merely of a factual nature, did not enter into any legal discussion, and were intended for a general audience. As such, he submitted that he could not reasonably be perceived as lacking impartiality on the basis of such statements.[31]

B. The involvement of the Judge in UNICEF/Korea

20. It was also argued that the Judge's involvement in UNICEF/Korea gives rise to a conflict of interest on his part in the *Lubanga* case.

i. Factual background

21. The Judge is President of UNICEF/Korea and a member of its Board of Directors. The actual running of UNICEF/Korea was delegated by him to one of the Vice-Presidents, Ms D.E. Park, who serves as Acting President.[32]

22. The United Nations Children's Fund ("UNICEF") participated in the reparations proceedings in the case, filing written submissions[33] on issues such as the scope of the assessment of eligibility for applications for reparations,[34] and the scope of the understanding of who would constitute a "victim".[35]

23. The Judge gave an interview published on 19 December 2012 in an article in *The Korea Herald*. The Applicant takes issue with the following excerpt from that article:

> "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.

[30] Response, paragraph 6.
[31] Response, paragraph 7.
[32] Defence Application, paragraph 25. Response, paragraph 9.
[33] Submission on the principles to be applied, and the procedure to be followed by the Chamber with regard to reparations, ICC-01/04-01/06-2878, 10 May 2012 ("UNICEF Submissions").
[34] UNICEF Submissions, paragraph 6, page 6.
[35] UNICEF Submissions, paragraph 11, page 11.

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"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.[36]

ii. Submissions

24. First, the Applicant submitted that where a judge has an interest in a case before him or her, as alleged in the present case, that judge's automatic disqualification is required, without the need to ascertain whether there is in fact an apparent or suspected bias.[37] Second, and in the alternative, the Applicant submitted that contrary to article 41(1)(a) of the Statute and rule 34(1)(d) of the Rules (cited at paragraph 8 above) and the articles of the Code quoted at paragraph 11 above, the factual situation concerning ties with UNICEF/Korea is such that the Judge's impartiality might reasonably be called into question.[38]

25. On the first argument, the Applicant submitted that by virtue of the Judge's position as President of UNICEF/Korea he is in a conflict of interest if he sits on the appeals in the case, since UNICEF tendered written submissions before the Trial Chamber at the reparations proceedings that, in the Applicant's view, are at odds with those of Mr Lubanga, and form part of the grounds of the pending appeal on reparations.[39]

26. The Applicant cited jurisprudence of the International Criminal Tribunal for the former Yugoslavia, in which that Tribunal, applying what the Applicant characterised as "identical principles" to those set out in the Statute and the Rules, found that a conflict of interest must give rise to a judge's automatic disqualification.[40]

[36] Defence Application, paragraph 27 and Annex 4 (ICC-01/04-01/06-2981-Anx4).
[37] Defence Application, paragraph 15.
[38] Defence Application, paragraphs 2 and 28-29.
[39] Defence Application, paragraphs 18-22.
[40] Defence Application, paragraph 14 citing *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, CA, *Judgment*, 21 July 2000, paragraph 189.

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27. The Applicant argued that what constitutes an "interest" in a case need not be pecuniary; if a judge's decision will lead to the promotion of a cause in which that judge is involved together with one of the parties, that is sufficient to give rise to a conflict of interest and an automatic disqualification.[41] Further, with regard to the distinction between UNICEF and UNICEF/Korea, the Applicant submitted that even if the organisation of which the judge is a member is legally separate and distinct from the organisation which is a party to the proceedings, if both are "various parts of an entity or movement working in different fields towards the same goals", this is enough to satisfy the test.[42] The decision of the United Kingdom House of Lords in the *Pinochet* case was cited in support of both of those arguments.[43]

28. On the second argument, the Applicant submitted that the Judge conflates his role with UNICEF/Korea and his role with the Court, illustrated by the statement of the Judge in the *Korea Herald,* set out at paragraph 23 above.[44] The Applicant also points out that UNICEF expressed opinions supporting the charges against the Applicant.[45] In the Applicant's view, the current situation is "manifestly likely to create a conflict of interests in which [the Judge]'s impartiality may be reasonably called into question." In other words, the Judge's involvement in UNICEF/Korea gives rise to a reasonable apprehension of bias.[46]

29. In response, the Judge characterised his role at UNICEF/Korea as that of a "patron", rather than a director.[47] The Judge stated that he became President of UNICEF/Korea when the former President resigned, but because of his obligation as judge and President of the Court, he made it clear that he would not be able to contribute to the actual running of the organization, and "immediately" appointed Ms Park as the Acting President. He further stated that he has never received any remuneration from the organization, nor has he been involved in policy-making. He denied the claim made in the article in the *Korean Herald* that he "sets directions and policies for the Korean committee in conducting aid projects, including providing nutritious meals and financing projects such as digging wells" and

[41] Defence Application, paragraph 16.
[42] Defence Application, paragraph 17.
[43] Defence Application, paragraph 16, citing *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2)* [1999] UKHL 52 (15 January 1999), [2000] 1 A.C. 119 ("*Pinochet*"). In that case, the House of Lords found that one of the Law Lords who was a director of Amnesty International Charity Limited should not have participated in deciding a case in which Amnesty International had made submissions, as the relationship gave rise to an automatic disqualification by virtue of the fundamental principle that no one may sit as a judge in one's own case.
[44] Defence Application, paragraph 27.
[45] Defence Application, paragraphs 23, 24 and 27.
[46] Defence Application, paragraph 28.
[47] Response, paragraph 9.

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stated that this misrepresents his true involvement with UNICEF/Korea.[48] Further, the Judge stated that his involvement in UNICEF/Korea was disclosed at the Judges' elections in 2003 and 2006, when he was one of the Vice-Presidents of the organization.[49]

30. The Judge also provided information regarding the relationship between UNICEF and UNICEF/Korea. He emphasised that UNICEF/Korea is one of 36 non-governmental organizations established locally in industrialised countries that are referred to as "National Committees". In contrast, UNICEF is a programme of the United Nations, and does not run any of its own projects in these locations. According to the Judge, the National Committees are principally aimed at fundraising for UNICEF and are not involved in its administration.[50] The Judge stated that the submissions made before the Trial Chamber on reparations were by UNICEF, and not the National Committees, and that the National Committees were not mentioned in those submissions.[51]

31. Finally, the Judge submitted that *Pinochet* is distinguishable. In that case, it was found that the intervenor, Amnesty International, and the decision-maker's organization, Amnesty International Charity Limited (*i.e.* the organisation of which the judge in question was a member), were a "close-knit group" carrying out the work of the former. The Judge submitted that, in contrast, UNICEF and UNICEF/Korea are by no means a "close-knit group"; rather, they are independent organizations.[52]

IV. Findings of the plenary

32. An absolute majority of the judges, consisting of Judges Monageng, Tarfusser, Kuenyehia, Kourula, Trendafilova, Aluoch, Van den Wyngaert, Fernández de Gurmendi, Ozaki, Morrison, Herrera Carbuccia, Fremr and Eboe-Osuji dismissed the Defence Application on both grounds. Judge Eboe-Osuji, whilst agreeing with the views and conclusions of the majority on both grounds added a separate concurring opinion on the second ground. Judge Ušacka, whilst agreeing with the views and conclusions of the majority on the first ground of the Defence Application, dissented from the majority on the second ground and was of

[48] Response, paragraph 9.
[49] Response, paragraph 9.
[50] Response, paragraph 10.
[51] Response, paragraph 11.
[52] Response, paragraph 11.

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the opinion that the Judge ought to be disqualified by virtue of his involvement with UNICEF/Korea.

A. Statements made by the Judge

33. The plenary of judges unanimously agreed that the Applicant's first argument – that the Judge ought to be disqualified due to his public statements – was without merit.

34. Noting the previous jurisprudence of the Court in the *Banda/Jerbo* case, the plenary reiterated that the question was to be viewed from the objective perspective of whether a fair-minded and informed observer, having considered all the facts and all the circumstances, would reasonably apprehend bias in the judge.

35. Such fair-minded person is an objective observer, not to be confused with the Applicant himself, as was stated by Lord Hope of Craighead in *Helow* before the House of Lords of the United Kingdom:

> 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, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. ... 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.[53]

36. Moreover, the fair-minded and informed observer's consideration of facts and circumstances includes the nature of a judge's profession. As noted by the Constitutional Court of South Africa:

> The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.[54]

[53] *Helow v. Secretary of State for the Home Department and anor. (Scotland)* [2008] UKHL 62, at paragraph 2.
[54] *President of the Republic of South Africa v. South Africa Rugby Football Union* 1999 (7) BCLR 725 (CC) at 753.

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37. The plenary further noted the Court's previous findings in *Banda/Jerbo*, cited at paragraph 9 above, that the disqualification of a judge is not a step to be undertaken lightly and that a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office. Such presumption is a long-standing principle accepted in a number of different jurisdictions. As recounted by a majority of the Supreme Court of Canada in the case of *R. v. S. (R.D.)*:

> [J]udicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because 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": *United States v. Morgan*, 313 U.S. 409 (1941), at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in *Commentaries on the Laws of England*, Book III, cited at footnote 49 in Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995), 18 *Dalhousie L.J.* 408, at p. 417, "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea".[55]

38. The plenary found that in forming a view regarding the appearance of bias, the fair-minded observer should take into account the entire context of the case. As was stated further in *R. v. S. (R. D.)*, "[t]he presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail...The person postulated is not a 'very sensitive or scrupulous' person, but rather a right-minded person familiar with the circumstances of the case."[56]

39. Considering those factors, the plenary found that the Applicant had taken the statements of the Judge out of context. The plenary considered that a reasonable observer, noting the entire content and context of the statements made by the Judge, would neither have considered them to have been comments regarding the merits of the decisions under appeal, nor related to any of the particular legal issues to be decided on appeal. Rather, a reasonable observer would have considered them to be statements regarding the wider implications and precedential significance of the decisions. As expressed in *R. v. S. (R. D.)*, "judicial inquiry into context provides the requisite background for the interpretation and the application of the law...This process of enlargement is not only consistent with impartiality; it may also be seen as its essential precondition. A reasonable observer far

[55] *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at paragraph 32.
[56] *R. v. S. (R.D.)*, *supra*, at paragraph 36.

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from being troubled by this process, would see it as an important aid to judicial impartiality."[57]

40. In sum, the plenary found that the impugned statements, taken in their proper context, would not have led a fair-minded and informed observer, having considering all the factors above, to reasonably apprehend bias. The statements were not of such a nature as to reach the threshold for displacing the presumption of impartiality enjoyed by the judges of the Court.

B. The involvement of the Judge in UNICEF/Korea

iii. Opinion of the Majority

41. The majority (Judge Ušacka dissenting) also dismissed the second ground of the Defence Application.

42. With regard to the Applicant's first argument, for automatic disqualification due to an interest in the appeals based on the UNICEF/Korea connection, the majority found that no automatic disqualification was warranted in the instant case.

43. The majority distinguished the *Pinochet* case, upon which the Applicant largely relied, from the present situation in a number of ways.

44. Recalling the exceptional circumstances that were noted by the House of Lords in *Pinochet*,[58] the majority found that the circumstances of the instant case were not comparable. First, the relationship between the Judge and the intervening party UNICEF was less direct than had been the relationship between Lord Hoffman, the judge concerned in the *Pinochet* case, and Amnesty International, the intervening party in that case. Although, in the instant case, the Judge was nominally the President of UNICEF/Korea, in actual fact, he had appointed Ms Park as Acting President of the organization, who instead ran the organization with the assistance of its Executive Director. Second, Amnesty International, as intervening party in the *Pinochet* case before the House of Lords, had made submissions directly before Lord Hoffman in the House of Lords, whilst in the present case, UNICEF had not made any submissions before the Judge in the Appeals

[57] *R. v. S. (R.D.), supra*, at paragraphs 44-45.
[58] *Pinochet, supra*, at paragraph 136.

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Chamber – UNICEF's involvement had been limited to making submissions at the earlier reparations proceedings before the Trial Chamber.

45. Further, the majority noted that the exceptional principle set out in *Pinochet* was, at the very least, narrowly interpreted in a subsequent decision of the Court of Appeal (Civil Division) of England and Wales.[59] That decision also referred to a growing acceptance in several jurisdictions of a "*de minimis*" exception to the automatic disqualification rule. As stated by the Court of Appeal:

> While the older cases speak of disqualification if the judge has an interest in the outcome of the proceedings 'however small', there has in more recent authorities been acceptance of a *de minimis* exception: *BTR Industries South Africa (Pty) Ltd v. Metal and Allied Workers' Union* 1992 (3) SA 673 at 694; *R. v. Inner West London Coroner, ex parte Dallaglio* [1994] 4 All E.R. 139 at 162; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 NZLR 142 at 148. This seems to us a proper exception provided the potential effect of any decision on the judge's personal interest is so small as to be incapable of affecting his decision one way or the other; but it is important, bearing in mind the rationale of the rule, that any doubt should be resolved in favour of disqualification.

46. In the instant case, the majority had no doubt that the Judge's personal interest in the pending appeals, if any, was so small as to be incapable of affecting his decision one way or the other. Whatever the outcome of the appeals, the Judge's own personal interests in his capacity as a patron of UNICEF/Korea, could not reasonably be said to be affected in a manner which was beyond the *de minimis* threshold. This was by virtue of the Judge's minimal active involvement in UNICEF/Korea, the nature of the connection between UNICEF/Korea and the intervening party UNICEF, the nature of UNICEF's participation in the case, and the nature of UNICEF's interest in the outcome of the appeals.

47. Nor did the majority accede to the Applicant's second argument, *i.e.*, that in the alternative, the circumstances surrounding the Judge's involvement with UNICEF/Korea could give rise to a reasonable apprehension of bias.

48. Whilst the test for automatic disqualification concerned whether or not a judge's position led him to hold an interest in one of the parties to the suit, the relevant test here was whether any of the judge's actions or activities led to a reasonable apprehension of bias in accordance with *Banda/Jerbo*. The majority recalled the need to examine each case on its

[59] *Locabail (UK) Ltd v Bayfield Properties Ltd (Leave to Appeal)* [2000] Q.B. 451 ("*Locabail*"), at page 473, paragraph 10.

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own facts from the perspective of the reasonable observer. The comments of the Supreme Court of Canada in that regard were apposite:

> [The reasonable apprehension of bias test] is an inquiry that remains highly fact-specific... Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.[60]

49. In this case, the question was whether the Judge's work with UNICEF/Korea, including the statements made during the interview with the *Korea Herald*, gave rise to a reasonable apprehension of bias.

50. The majority once again recalled the applicable statutory provisions as well as the test set out in *Banda/Jerbo*, including the requirement that the circumstances reach the threshold required to displace the presumption of impartiality enjoyed by all judges of the Court. At first glance the argument on this point gave cause for concern. However, the majority found that, in the instant case, the circumstances did not meet the threshold that could lead to a reasonable apprehension of bias warranting disqualification. A reasonable observer, having knowledge of all the facts, including the limited nature of the Judge's work with UNICEF/Korea, the context and entire contents of the statements in the article in the *Korea Herald*, and the extent of the involvement of UNICEF in the appeals at hand, would not reasonably apprehend bias.

iv. Separate concurring opinion of Judge Eboe-Osuji

51. Judge Eboe-Osuji agreed with the decision and reasons of the majority above, but added the below additional reasoning in dismissing the Defence Application.

52. A further factor distinguishing the instant case from *Pinochet* was the fact that, the Appeals Chamber would, as a result of the Defence Application and resulting plenary proceedings, be aware of both the nature and extent of the Judge's connection with UNICEF *prior* to the decision-making process in the appeals. Since the Judge was only one member in a panel of five judges in the appeal, the Judge would not be the sole decision-maker. Each of the other judges, who act independently and enjoy a presumption of integrity, would be duly mindful of any potential influence that the Judge's involvement with UNICEF could

[60] *Wewaykum Indian Band v. Canada*, 2003 SCC 45 ("*Wewaykum*"), at paragraph 77.

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possibly have on the Judge's contributions to the decision of the Appeals Chamber or its deliberations. The other judges would thus be able to assess how much weight to attach to those contributions.

53. The need to recognise this further distinguishing factor was warranted by the circumstances of the Court, involving the following pragmatic constraints: (a) the limited number of judges at the Court, *i.e.*, normally 18 at the maximum, in contrast to the plurality of judges that characterizes many national judiciaries; (b) the fact that judges of the Court sit in panels of three or five, which means that all 18 judges are not available at all times to be assigned to a particular case; (c) the further reduction in available judges to try a case or hear particular appeals due to the rule that judges who confirmed charges may not sit on the trials or the appeals of the cases whose charges they confirmed; and (d) the judges that remain after the subtractions that result from the foregoing have too many additional work commitments on other cases to be reasonably assigned to fill vacancies created by judicial disqualifications resulting from a broad, imprecise articulation of the rules governing judicial disqualification.

54. It was stressed, in the separate concurring opinion, that recognizing these distinguishing circumstances for judges of this Court is not wholly incongruent with considerations that already underlie the existing practice and jurisprudence, for the following two reasons.

55. First, the jurisprudence of disqualification hinges largely on the perceptions of the reasonable observer fully informed of the entire circumstances. The reasonable observer would consider the matter differently if the judge being complained against was a single judge hearing an appeal. In contrast, considerations would necessarily be different in the instant case, where the decision is to be made by a panel of judges who enjoy a presumption of integrity and who know that the impartiality of one of them has been questioned. Indeed, the Supreme Court of Canada arrived at a similar conclusion. In *Wewaykum*, it considered the nature of its own decision making process in reviewing whether one of its decisions could have been tainted by a potential conflict of interest in one of the panel members.[61] In doing so, the Supreme Court noted that its decision-making process was "a truly collegial process of revision of successive drafts", in that the reasons "express the individual views of each and every judge who signed them, and the collective

[61] *Wewaykum, supra*, at paragraphs 92-93.

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effort and opinion of them all."[62] Noting that each of its members "prepares independently for the hearing of appeals", that "no member of the Court is assigned the task to go through the case so as to 'brief' the rest of the panel before the hearing", and that after the case is heard, "each judge on the panel expresses his or her opinion independently", the Supreme Court concluded that "even if it were found that the involvement of a single judge gave rise to a reasonable apprehension of bias, *no reasonable person informed of the decision-making process of the Court, and viewing it realistically, could conclude that it was likely that the eight other judges were biased, or somehow tainted, by the apprehended bias affecting the ninth judge*."[63] [Emphasis added.] A similar conclusion applies to the process of this Court, in light of its similar process of decision-making. A reasonable observer fully informed of the independence of mind and the presumption of integrity of each judge would not accept that the decision of the entire panel was corrupted by the taint of participation of one of its members against whom an allegation of impartiality was levelled, especially when the entire panel had been put on notice of that allegation ahead of time.

56. Furthermore, Judge Eboe-Osuji considered the rule of necessity that, in certain cases, allows a judge to sit in a case from which he or she should be objectively and admittedly disqualified, if the disqualification would result in no other judge being available to conduct the case.[64] In Judge Eboe-Osuji's view, the lighter shade of that necessity was implicated by the foregoing constraining considerations existing at the Court. If justice and necessity, in such circumstances, permit a single judge to sit on a case from which he would otherwise be disqualified, no injustice would result from permitting a judge to sit among a plurality of judges who know of the question posed against their impugned colleague, given the constraints outlined above that encumber the Court's judiciary.

v. Dissenting opinion of Judge Ušacka

57. For the following reasons, Judge Ušacka considered the second argument made in the Defence Application, that of the Judge's involvement with UNICEF/Korea, to have merit

[62] *Ibid.*
[63] *Ibid.*
[64] See *The Judges v The Attorney-General for the Province of Saskatchewan* (1937) 53 TLR 464, cited in *Panton and Panton v. Minister of Finance & Anor* (Jamaica) [2001] UKPC 33 (12 July 2001), at paragraph 16.

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and found that he should be disqualified from sitting as a member of the Appeals Chamber on all of the appeals in the case, due to an appearance of bias on his part.

58. Judge Ušacka stressed that the Statute clearly and repeatedly stipulates that judges of the Court must be independent and impartial in the exercise of their functions. These are important prerequisites for guaranteeing the Court's integrity and the conducting of fair trials. Article 40(1) of the Statute states that "judges shall be independent in the performance of their functions". Article 40(2) of the Statute establishes that "[j]udges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence". This obligation applies to the judges as soon as they have given their solemn undertakings, and independently of whether they serve full time.[65] Should a question arise in relation to whether a judge's activity could interfere with his/her independence, it shall be decided by an absolute majority of the judges, as provided for in article 40(4) of the Statute. Article 41(1) of the Statute, read with rules 33, 35 and 24(2)(a) of the Rules, provides that judges are under an obligation to request that the Presidency recuse them "from the exercise of a function" if they know that there are grounds for disqualification. This also applies to a recusal request in respect of sitting as a judge in a specific case. Read together with the Rules[66] and the Code,[67] these provisions establish a coherent and exhaustive framework meant to safeguard the independence and impartiality of judges by establishing guidelines for their conduct.[68] The Judge did not avail himself of any of these safeguards, although this would have pre-empted any issues from arising in relation to an appearance of bias, as has occurred in the case-at-hand, evidenced by the Applicant's request for disqualification filed pursuant to article 41(2) of the Statute.

59. Judge Ušacka disagreed with the analytical approach taken by the majority because, pursuant to article 21(1) of the Statute, they were required to analyse the Court's legal framework regarding the independence of judges and the Code. Instead, the majority looked to the case law of national jurisdictions, and more specifically to common law

[65] Article 35(3) of the Statute that makes article 40 of the Statute fully applicable to all judges of the Court.
[66] Rules 33, 34, 35, 38(1)(b) of the Rules.
[67] Articles 4, 9, and 10 of the Code.
[68] This must also be considered in light of the unique selection criteria of judges of the ICC laid down in article 36(3)(b)(ii) of the Statute; *see also* S. Becker, "The Appearance of Impartiality: The Disqualification of Judges for Pre-Elevation Activities and Opinions – The Tension between Qualification and Bias", in C. Burchard, et al. (eds), *The Review Conference and the Future of the International Criminal Court: Proceedings of the First AIDP Symposium for Young Penalists in Tübingen, Germany, co-organized by the AIDP YP Committee* (Kluwer Law International, 2010) (hereinafter: "S. Becker"), page 225, at page 232.

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jurisdictions.[69] She considered this approach to be problematic in several respects.[70] First, the two cases cited by the majority derive from legal frameworks different from that of the Court, which should have been taken into account. Second, the underlying facts of the cases of *Wewaykum* and *Locabail* are wholly different from those raised in the Defence Application and should have been distinguished.

60. She noted that *Locabail* dealt with several applications that raised common questions concerning disqualification of judges on grounds of bias.[71] All applications, however, related to non-criminal cases, and most of them to a potential financial interest of a judge in the outcome of a case. In respect of the discussion of the "*de minimis*" exception to the "automatic disqualification rule",[72] Judge Ušacka considered that the majority did not show in what manner this standard expressed solely in relation to pecuniary interests of a judge was relevant to analysing the present situation or explain why it chose to apply this standard, which, she noted, is not found in the Court's statutory framework.

61. In respect of *Wewaykum*, Judge Ušacka noted that this case dealt with an allegation of bias stemming from activities which took place more than fifteen years prior during the judge at issue's role as an Associate Deputy Minister of Justice.[73]

62. According to Judge Ušacka, the majority should have explained why they chose to look to national jurisdictions' regulation of the issue of bias, as opposed to applying, in the first place, the Court's statutory framework. Further, she found that, in deciding to rely on the two specific cases, the majority should have compared the factual circumstances therein to those of the situation at hand and clarified why and how this national jurisprudence applies to the present proceedings.

63. Judge Ušacka further noted that the majority cited *Wewaykum* in order to explain the reasonable apprehension of bias test. In this regard, she noted that while this citation adds little to the discussion of the first ground for disqualification,[74] she agreed, in principle, that a reasonable observer should take into account the entire context of the case and that a high threshold must be satisfied to rebut the presumption of impartiality. Judge Ušacka noted

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[69] *Supra*, paragraphs 45 and 48.
[70] Judge Ušacka similarly criticised the approach applied in this decision with respect to the first ground for disqualification (*supra*, paragraphs 34-40), but agreed with the outcome of the deliberations on this issue.
[71] *Locabail, supra*, at paragraph 1.
[72] *Locabail*, *supra*, at paragraph 4.
[73] *Wewaykum, supra,* at paragraphs 4-5.
[74] *Supra,* paragraphs 37-38.

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that this is also justified because there is a danger that ill-founded allegations of bias could be raised against judges of the Court, not least because of the great public interest in the Court and its high profile status. At the same time, however, considering the diverse professional background of the judges of the Court (Lists A and B[75]) and the Court's international character, it is important not to impute "unrealistic amounts of knowledge to the 'fair-minded and well-informed observer'".[76]

64. Judge Ušacka specifically disagreed with the separate concurring opinion that the Appeals Chamber, as a collegial body, could neutralise a possible appearance of bias of one of its judges.[77] Judge Ušacka noted that this argument does not find support within the Statute and its legal instruments, pointing out that the decision-making process of the ICC Appeals Chamber is not a matter of public record as in the Supreme Court of Canada[78] and that the legal framework and structure of the two bodies are different. Nevertheless adopting such an approach would, in her opinion, undermine the rights of the defendant as he/she would be placed in the unenviable position of uncertainty as to his/her right to a fair hearing conducted impartially, as provided for in article 67(1) of the Statute, thereby creating a lack of trust in a fair trial and the Court's integrity.[79]

65. In considering the facts of the case, Judge Ušacka first addressed the Judge's position in UNICEF/Korea. While the national committees of UNICEF are legally separate entities from UNICEF, they are nevertheless the public face and dedicated voice of UNICEF; they act under the same logo and the same name. They are tasked with, *inter alia*, raising funds from the private sector, promoting children's rights, and securing worldwide visibility for children threatened by poverty, disasters, armed conflict, abuse and exploitation.[80] Judge Ušacka noted that the Judge's assumption of the duties of the Presidency of UNICEF/Korea had been in effect since 1 April 2012. Shortly before this, on 14 March 2012, Trial Chamber I had convicted the Applicant of having conscripted and enlisted children under the age of 15 into an armed force in Ituri/Democratic Republic of the Congo ("DRC"), and for having used them actively in armed hostilities, pursuant to article

[75] Article 36(5) of the Statute.
[76] *See C. Forsyth*, "Judges, bias and recusal in the United Kingdom", in: H. P. Lee (ed.) *Judiciaries in Comparative Perspective* (Cambridge 2011), page 378.
[77] *Supra,* paragraphs 54-56.
[78] *Wewaykum, supra,* paragraphs 92-93.
[79] *See also* S. Becker, *supra,* at page 233.
[80] *See* "About UNICEF: Structure and contact information", 11 October 2012, accessed at http://www.unicef.org/about/structure/index_natcoms.html.

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8(2)(e)(vii) of the Statute.[81] The Judge, who, at that time, had been a judge of the Appeals Chamber for nine years and President of the Court for three years, should have been aware that he would be sitting on appeals arising from the Conviction Decision and subsequent final decisions of the Trial Chamber in the case, and should have been aware, in particular, that the subject of child soldiers, including in the DRC, falls within the scope of the activities of UNICEF. This was evident not only from the affirmative press statement of its Executive Director issued on the same day as the Conviction Decision,[82] but also by references in the Conviction Decision to UNICEF and its work.[83]

66. Subsequently, UNICEF made submissions before the Trial Chamber in the reparation proceedings and the Appeals Chamber was seised of appeals against the final decisions of the Trial Chamber in this case. In December 2012, despite these developments, the Judge publicly appeared in an interview in both his roles, that of President of the Court and of President of UNICEF/Korea.[84] In a January 2013 speech, he also discussed both his role as President of UNICEF/Korea and his position as President of the Court.[85] According to Judge Ušacka, the interview and the speech created the impression of an overlap between his roles, on the one hand, as President and judge of the Court and, on the other, as President of UNICEF/Korea. The Judge's two-fold position created confusion in the public sphere as to the links between the different organisations in which he carries out functions, which was shown by other press reports.[86] These facts showed, according to Judge Ušacka, that the Judge had recently actively promoted UNICEF's goals, that this promotion coincided in time with the relevant appeals and that his different roles appeared blurred.

67. Given the exhaustive legal framework regarding the independence of judges and the abundance of relevant facts and events, Judge Ušacka found that a reasonable observer properly informed would have concluded that there was an appearance of bias. She recalled that one of the most demanding justifications of the objective standard of a reasonable appearance of bias is the requirement that "it is not merely of some importance but it is of

[81] *Supra* paragraph 1.
[82] Defence Application, Annex 3, ICC-01/04-01/06-2981-Anx3.
[83] Conviction Decision, paragraph 574 at footnote 1720, paragraphs 656-657, and 738.
[84] Defence Application, Annex 4, ICC-01/04-01/06-2981-Anx4.
[85] Defence Application, Annex 5, ICC-01/04-01/06-2981-Anx5.
[86] *See* e.g. Bloomberg Businessweek, "United Nations Children's Fund Appoints Song Sang-hyun as Head of the South Korean Committee, Effective April 1, 2012", 28 March 2012, accessed at: http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=8373915.

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fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done".[87]

In light of the foregoing, the plenary of judges, by absolute majority of thirteen, with one judge dissenting decided to:

Dismiss the Defence Application.

Judge Sanji Monageng
Acting President

[87] United Kingdom, King's Bench Division, *The King v. Sussex Justices, Ex parte McCarthy,* 9 November 1923, [1924] 1 K.B. 256, at page 259.

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