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Date: **21 May 2019**

**THE *AD HOC* PRESIDENCY**

**Before:** Judge Chile Eboe Osuji, President  
Marc Perrin de Brichambaut, Second Vice-President  
Judge Howard Morrison

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
*THE PROSECUTOR V. BOSCO NTAGANDA***

**Public Redacted Version of "Request for Disqualification of Judge Ozaki"**

**Source:** Defence Team of Mr. Bosco Ntaganda

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

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## **Request for Disqualification of Judge Ozaki**

### **INTRODUCTION**

1. Bosco Ntaganda requests the disqualification of Judge Kuniko Ozaki pursuant to Article 41(2) of the ICC Statute. Judge Ozaki's concurrent service as a senior diplomat of a State Party, while sitting as a Judge on an ongoing case, is not consistent with the appearance of judicial independence or impartiality. Judge Ozaki's subsequent resignation is insufficient to restore the appearance of her judicial independence or impartiality, in particular because she declines to acknowledge that this resignation is required by judicial independence. The negative impact on Judge Ozaki's personal, professional and financial interests arising from her resignation also gives rise to a reasonable apprehension of lack of independence and impartiality. Judge Ozaki's lack of candour, as reflected by various omissions in her communications with her colleagues, further negatively affects confidence in her judicial independence, and undermines the appearance of impartiality.

2. Neither the disruptive consequences of disqualification, nor the purported advanced stage of proceedings, are proper considerations in the present matter. The appearance of impartiality is a necessary condition of a Judge, which must exist on the first day of trial, on the day sentence is pronounced, and every day in between. The wide and diverse audience of the Court, including communities accustomed to governments meddling in the work of judges, requires that the ICC uphold the highest standards of judicial independence and impartiality.

### **PROCEDURAL SUMMARY**

3. On 7 January, apparently knowing of her imminent appointment as Japan's Ambassador to Estonia, Judge Ozaki made a request to the Presidency under Article

35(3) to be excused as a “full-time” Judge “as of 11 February 2019 inclusive’ citing personal reasons and without mention of any future activities or occupation.”<sup>1</sup>

4. This request was, on a date unknown to the Defence, granted. Judge Ozaki asserts that she ceased to be a full-time Judge as of 12 February.<sup>2</sup>

5. On 12 February, apparently without notice to anyone at the ICC, Judge Ozaki was appointed by the Government of Japan [REDACTED] Ambassador of Japan to Estonia [REDACTED].<sup>3</sup> A tweet dated 26 March shows Judge Ozaki handing her diplomatic credentials to Estonia’s Director General of State Protocol.<sup>4</sup> The exact date that Judge Ozaki first started receiving a salary, information, diplomatic briefings and training, privileged information and/or secret instructions from the Ministry of Foreign Affairs of Japan, has not been disclosed to the Defence.<sup>5</sup>

6. On 18 February, Judge Ozaki informed her colleagues for the first time<sup>6</sup> that “she had been appointed” Japan’s Ambassador to Estonia. Judge Ozaki requested that her continued participation in the *Ntaganda* case be approved on the basis that: (i) her duties would be confined to the bilateral relationship between Japan and Estonia; (ii) if ever her diplomatic responsibilities had any implication for the *Ntaganda* case she would “refrain from executing my responsibility to that extent or notify the Court immediately”; and (iii) she was ready to “return to the seat of the Court as necessary to discharge my judicial duties and that, on those occasions, I will not act in any way as the Japanese Ambassador to Estonia.”<sup>7</sup>

7. If her colleagues did not approve her request, Judge Ozaki “respectfully submit[ted] that this letter be treated as [...] alternatively [...] my letter of resignation

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<sup>1</sup> Decision, para.3. This information, though requested based on the properly informed observer test, has not been provided.

<sup>2</sup> Decision, para.5.

<sup>3</sup> [REDACTED].

<sup>4</sup> Annex B.

<sup>5</sup> This information, though requested based on the properly informed observer test, has not been provided.

<sup>6</sup> *Id.*

<sup>7</sup> Decision, para. 5.

as a judge of this Court [...] as of 12 February 2019 when I ceased to be a full-time judge of the Court.”<sup>8</sup>

8. On 4 March, 14 Judges in plenary voted that “Judge Ozaki’s request was not incompatible with the requirements of judicial independence.”<sup>9</sup> Three Judges disagreed.

9. The Defence was notified of this Decision on 22 March, by way of a memorandum.

10. On 1 and 8 April, the Defence requested the Presidency to disclose documents and information relating to the Decision, including the full text of Judge Ozaki’s request.<sup>10</sup> The *ad hoc* Presidency summarily denied the requests as being “a form of fishing expedition” and having “no legal basis.”<sup>11</sup>

11. On 30 April, the Defence requested reconsideration of the Decision.<sup>12</sup>

12. On 1 May, the Presidency circulated a “Notification concerning Judge Kuniko Ozaki,” quoting an email from the Ministry of Foreign Affairs of Japan received on 23 April that states: “the resignation of Judge Ozaki as Japanese Ambassador to Estonia was officially accepted by the Government of Japan on 18 April 2019.”<sup>13</sup>

13. On 2 May, the Defence requested reconsideration of its two previous disclosure requests on the basis of its Reconsideration Request, and requested specific additional information.<sup>14</sup>

14. On 14 May, the Presidency denied all requests for reconsideration and additional disclosure. The Presidency noted the “internal administrative nature of decisions taken by judges acting pursuant to article 40(4), which do not impact upon

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<sup>8</sup> *Id.* para.5.

<sup>9</sup> *Id.* para.8.

<sup>10</sup> First Disclosure Request; Second Disclosure Request. *See* ICC-01/04-02/06-2341.

<sup>11</sup> 18 April Presidency Decision, para.3.

<sup>12</sup> Reconsideration Request. *See also* ICC-01/04-02/06-2340.

<sup>13</sup> ICC-01/04-02/06-2338, para.3.

<sup>14</sup> ICC-01/04-02/06-2339. *See* ICC-01/04-02/06-2341; ICC-01/04-02/06-2345.

the rights of the accused.”<sup>15</sup> However, the Presidency also noted that “[i]n the event that questions pertaining to an activity of a judge may impact on his or her impartiality in a specific case, a clear statutory ground exists for a party to raise such concern: namely, article 41(2)(b) of the Statute.”<sup>16</sup> The Presidency invited the Defence to make any such application by no later than 17:00 on 20 May 2019.<sup>17</sup>

## APPLICABLE LAW

15. Article 41(2)(a) of the Statute prescribes that “[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground.” Article 41(2)(b) permits a person being “investigated or prosecuted” to “request disqualification of a judge under this paragraph.”

16. Article 40 of the Statute, “Independence of the judges” states that:

1. The Judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

17. The ICC Code of Judicial Ethics (“CJE”), a product of the Judges in plenary,<sup>18</sup> declares in Article 3 that Judges “shall uphold the independence of their office” and “shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.” Article 4(1) of the CJE requires Judges to “ensure the appearance of impartiality in the discharge of their judicial functions,” and sub-section (2) requires Judges to “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 10(2) of the CJE states that “Judges shall not exercise any political function.”

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<sup>15</sup> 14 May Decision, para.20.

<sup>16</sup> *Id.* para.21.

<sup>17</sup> *Id.* para.24.

<sup>18</sup> *Lubanga* 11 June 2013, paras.10-12.

18. An applicant seeking a Judge's disqualification need not establish actual bias, but must show that there is an objectively reasonable apprehension of bias, or lack of impartiality, that could be entertained by a reasonable observer properly informed.<sup>19</sup> An "evident risk" of an "objectively reasonable appearance" that a Judge "may be unable to assess the Defence Request in an impartial manner" is also sufficient for disqualification.<sup>20</sup> These tests, based on reasonable apprehension, reflect the "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."<sup>21</sup>

## SUBMISSIONS

19. The Defence respectfully submits that: (1) Judge Ozaki did not (or does not) satisfy the requirements of the appearance of judicial independence of an ICC Judge for as long as she was (or is) serving as a senior diplomat of the Government of Japan; (2) the appearance of impartiality under Article 41(2) cannot exist without the appearance of judicial independence, regardless of the subject-matter of the case; (3) Judge Ozaki's resignation as Japanese Ambassador to Estonia has not restored her judicial independence because of its belated nature and the reasons expressed, and has, on the contrary, resulted in negative personal, professional and financial consequences for her that give rise to a reasonable apprehension of bias; and (4) Judge Ozaki's lack of candour in respect of various relevant matters further undermines her judicial independence and impartiality.

### **I. Concurrent Service in the Diplomatic Service of a State Is Incompatible With Judicial Independence**

20. Article 40(2) declares that ICC judges "shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their

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<sup>19</sup> *Id.* paras.9-10; *Banda* Disqualification Decision, para.11; *Al Bashir* 19 March 2010, pp.4-5; *Katanga*, 22 July 2014, paras.38-39; *Bemba et al*, 20 June 2014, para.16.

<sup>20</sup> Judge Fremr Decision, p.3.

<sup>21</sup> *Sussex Justices*, p.259.

independence.”<sup>22</sup> The French text is “*faire douter de leur indépendance.*” Article 10 of the CJE prohibits Judges from engaging in any “extra-judicial activity that [...] may affect or may reasonably appear to affect their independence or impartiality.”

21. The drafters of Article 40(2) considered it beyond doubt that an ICC Judge could not serve concurrently in the executive branch of a State:

This is why article 9, without ruling out the possibility that the judge may perform other salaried functions (as also contemplated in article 17, paragraph 3), endeavoured to define the criteria concerning activities which might compromise the independence of judges and from the exercise of which the latter should abstain. For instance, **it was clearly understood that a judge of the Court could not be, at the same time, a member or official of the Executive Branch of Government.**<sup>23</sup>

22. The Working Group’s 1994 report on the same text expressed the same view:

For instance, **it was clearly understood that a judge could not be, at the same time, a member of the legislative or executive branch of a national government.**<sup>24</sup>

23. The 1996 Preparatory Committee report demonstrates just how far from employment with the executive of a State was the intended ambit of the language that was ultimately adopted in Article 40(2):

The view was expressed that judges should not engage in any activities that would prejudice their judicial functions. In this connection, activities such as part-time teaching and writing for publication were compatible with such functions.<sup>25</sup>

24. No drafting history supports the view that Article 40(2), by “eschew[ing]” “broad references to abstract categories,”<sup>26</sup> was intended to erode the well-established human rights principle that judges must be independent, in appearance

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<sup>22</sup> Jones, p.256 (“It is not necessary that a Judge’s independence be actually compromised; it is sufficient if confidence in the judge’s independence is compromised.”)

<sup>23</sup> 1993 ILC Report, p.103 (emphasis and underline added); Fernandez *Commentary*, p.1008 (“*Dans l’article 10 de son Projet, la Commission du droit international (CDI) avait retenu la proposition selon laquelle les juges ne devraient pas être actifs dans les institutions étatiques durant leur mandat.*”)

<sup>24</sup> 1994 ILC Report, p.32 (emphasis and underlined added). Schabas *Commentary*, p.724.

<sup>25</sup> 1996 Preparatory Committee Report, v.1, p.13.

<sup>26</sup> Decision, para.10.



and in fact, of the executive.<sup>27</sup> As stated by a Human Rights Council rapporteur on the subject of judicial independence:

The independence of the judiciary is a corollary of the democratic principle of separation of powers, according to which the executive, the legislature and the judiciary constitute three separate and independent branches of Government. According to this principle, different organs of the State have exclusive and specific responsibilities, and it is not permissible for any branch of power to interfere in the others' spheres of control.<sup>28</sup>

25. The degree of separation is reflected in the widespread, if not universal, practice of States. In the UK, “[j]udicial independence is a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. The judiciary must be seen to be independent of the legislative and executive arms of government both as individuals and as a whole.”<sup>29</sup> In The Philippines “Judges shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to be free therefrom to a reasonable observer.”<sup>30</sup>

26. State practice shows, aside from cases involving very limited jurisdiction such as municipal planning or rent disputes,<sup>31</sup> how unthinkable is the possibility of a Judge exercising a permanent criminal jurisdiction while employed by, and serving in, the executive branch of a State.

27. This independence is often secured by a general prohibition on outside employment;<sup>32</sup> but whether there is or is not such an outright prohibition, legislative provisions of most countries also expressly prohibit holding any other public office,

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<sup>27</sup> Draft Universal Declaration on the Independence of Justice, para. 4 (“The judiciary shall be independent of the Executive and Legislative”).

<sup>28</sup> HRC, Report of the Special Rapporteur, para.8. See UN Basic Principles, Art.1 (“The independence of the judiciary shall be guaranteed [...]”); African Principles and Guidelines, para.4(g) (“[a]ll judicial bodies shall be independent from the executive branch”).

<sup>29</sup> UK Guide to Judicial Conduct, p.7.

<sup>30</sup> Philippine CJC, Canon 1, s.5.

<sup>31</sup> *McGonnell*. See also ICC-01/04-02/06-2340, para.52 (citing *Pabla Ky*, an ECHR case involving a housing court judge who was a member of a legislature).

<sup>32</sup> Canada, Judges Act, Art.55.

describing such positions as “incompatible” with judicial office: the Democratic Republic of Congo (“*incompatibles*”);<sup>33</sup> Belgium (“*incompatibles*”),<sup>34</sup> the Dominican Republic (“incompatible”),<sup>35</sup> Switzerland,<sup>36</sup> Korea,<sup>37</sup> Benin (“*incompatible*”),<sup>38</sup> France (“*incompatible*”),<sup>39</sup> the Czech Republic (“not compatible”),<sup>40</sup> Slovakia,<sup>41</sup> Peru (“incompatible”),<sup>42</sup> Portugal,<sup>43</sup> Estonia,<sup>44</sup> and Germany.<sup>45</sup> Article 16 of the ICJ Statute likewise prohibits Judges from undertaking any “other occupation of a professional nature,” but also expressly prohibits members of the Court from exercising “any political or administrative function.”

28. Other countries limit the types of concurrent occupations to those such as teaching, publication or non-profit work (such as in Poland).<sup>46</sup> The Campeche Declaration, which reflects South American practice, provides that “judges [...] shall not be able to perform any public or private service, remunerated or not, with the exception of teaching, social sciences researching, or their participation in non-profit entities for public welfare, activities which could be performed with the proper

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<sup>33</sup> DRC, *Statut des magistrats*, Art.65 (“*Hormis le cas de détachement ou de disponibilité, les fonctions de magistrat sont incompatibles avec toute activité professionnelle, salariée ou non, dans le secteur public ou privé.*”)

<sup>34</sup> Belgium, *Code judiciaire*, Art.293(“*Les fonctions de l’ordre judiciaire sont incompatibles avec l’exercice d’un mandat public conféré par élection; avec toute fonction ou charge publique rémunérée, d’ordre politique ou administratif [...]*”).

<sup>35</sup> Dominican Republic, Constitution, Art.151(“*Service in the Judicial Power is incompatible with any other public or private office, except that of teacher.*”)

<sup>36</sup> Switzerland, *Loi fédérale sur l’organisation des autorités pénales*, Art.44(1) (“*Les juges ne peuvent être membre de l’Assemblée fédérale ou du Conseil fédéral ou juges au Tribunal fédéral ni exercer aucune autre fonction au service de la Confédération.*”)

<sup>37</sup> Korea, Court Organization Act, Art.49(2)(“*No judicial officer shall [...] become a public official in any administrative body.*”)

<sup>38</sup> Benin, *Statut de la Magistrature*, Art.11(“*L’exercice des fonctions de magistrat est incompatible avec l’exercice de toute autre fonction publique et de toute autre activité lucrative, professionnelle ou salariée.*”)

<sup>39</sup> France, *statut de la magistrature*, Art.8(“*incompatible avec l’exercice de toutes fonctions publiques et de toute autre activité professionnelle ou salariée*”) (underline added).

<sup>40</sup> Czech Republic, Courts and Judges Act, para.74(2).

<sup>41</sup> Slovak Republic, Constitution, Art.137(2).

<sup>42</sup> Peru, Constitution, Art.146(“*Judicial office is incompatible with any other public or private activity, except university teaching outside the working hours.*”)

<sup>43</sup> Portugal, Constitution, Art.216(3).

<sup>44</sup> Estonia, Courts Act, para.49.

<sup>45</sup> Germany, Judiciary Act, s.4(1)(“*A judge shall not simultaneously perform duties of adjudication and legislative or executive duties.*”)

<sup>46</sup> Poland, Constitution, Art.178.

arrangement of the determined hourly incompatibility.”<sup>47</sup> The Bangalore Principles, adopted by the UN Human Rights Commission in 2003, declares that a “Judge shall not only be free from inappropriate connections with, and influence by the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.”<sup>48</sup>

29. Judge Ozaki apparently shared this understanding of Article 40 when she wrote, while a candidate to be an ICC Judge, that: “[o]f course, once elected, I will leave the Government of Japan, as requested by the Rome Statute.”<sup>49</sup>

30. The purported guarantees of independence suggested by Judge Ozaki, based on a purported separation of subject-matter between her diplomatic functions and of the *Ntaganda* case, are manifestly insufficient to satisfy the requirements of judicial independence.<sup>50</sup>

31. First, this approach finds no support in the international and national practice discussed above. Judicial independence is “not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.”<sup>51</sup> Independence does not depend on a non-overlap of functions, but on personal and institutional status:

Independence is the necessary precondition to impartiality and is a prerequisite for attaining impartiality. A judge could be independent but not impartial (on a specific case by case basis), but a judge who is not independent cannot, by definition, be impartial (on an institutional basis).<sup>52</sup>

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<sup>47</sup> Campeche Declaration, Art.7(b)(4).

<sup>48</sup> Bangalore Principles, Value 1.3. Concurrent service in a State Party’s judiciary, provided that that position possesses the necessary attributes of judicial independence does not raise the same concerns. See Schabas *Commentary*, pp.681,723 (referring to “independence by ricochet”).

<sup>49</sup> CICC Questionnaire, p.9 (underline added).

<sup>50</sup> *Contra* Decision, para.13.

<sup>51</sup> *Valente*, paras.15,22.

<sup>52</sup> UNODC *Commentary*, para.51 (underline added). See e.g. *Barayagwiza*, Nieto-Navia Declaration, para.9; Roth, p.296.

32. The ICC decisions cited by the Prosecution concerning disqualification based on previous adjudication of the same subject-matter are wholly inapposite to the issue at hand, as is its citation of an ECHR case involving a lay-member of a housing court who was also a member of a legislature.<sup>53</sup>

33. Second, the fundamental importance of this institutional separation is not lessened because the executive that Judge Ozaki joined is that of a State Party instead of the ICC itself. The integrity and authority of the ICC depends on the institutional separation of its Judges from State Parties: the “Court’s whole *raison d’être*” would be compromised without this independence.<sup>54</sup> As one former President of the Court has commented, “[s]on indépendance de toute influence extérieure est essentielle pour assurer son identité, sa crédibilité, et sa légitimité.”<sup>55</sup> As recognized by the MICT, international judges must be “independent of all external authority and influence, including from their own States of nationality or residence.”<sup>56</sup>

34. Third, the function-specific understanding of judicial independence finds no support in the most salient international criminal court precedent, concerning Judge Odio Benito at the ICTY. The disqualification request of Judge Odio Benito was not rejected because the subject-matter of her duties did not overlap with the *Mucić* case but rather, as held by the Bureau and the Appeals Chamber, she had assumed no executive functions at all.<sup>57</sup> Judge Odio Benito had also ensured that this was clear to her colleagues by: (i) seeking the President’s views in advance of standing as a candidate for the position of Vice-President in Costa Rica; (ii) promising not to “assume any of the functions of office” until after her judicial duties were complete; (iii) again consulting with the President after she had been elected, who then informed her that the Judges in Plenary had approved her taking the oath of office; (iv) submitting to her colleagues a letter from the President of Costa Rica confirming

<sup>53</sup> ICC-01/04-02/06-2340, para.32.

<sup>54</sup> Statement by the ICC President 18 November 2015.

<sup>55</sup> Allocution de la Présidente 4 décembre 2017.

<sup>56</sup> *Ngirabatware* 31 January 2017, para.11. See also *Šešelj* Disqualification Decision, paras.3-4; *Banda* Disqualification Decision, Judge Eboe-Osuji Memorandum, para.47.

<sup>57</sup> *Delalić* Appeals Judgement, para.685.

that she would not assume any duties until after the completion of her judicial functions; and (v) refraining in fact from taking up any such duties while still an ICTY Judge.<sup>58</sup> Judge Meron has written that if Judge Odio Benito had assumed office in anything more than name only, the Appeals Chamber would have been much more likely to disqualify her.<sup>59</sup>

35. Judge Ozaki, by contrast, did assume her functions as a diplomatic representative of Japan while at the same time deliberating on the *Ntaganda* case. Open source information [REDACTED] shows that this occurred as early as 13 February,<sup>60</sup> without anyone at the ICC being informed. Judge Ozaki, for any period that she was in the service of Japan, was required to “follow the instruction of the Foreign Minister when pursuing the duties of the ambassadorship.”<sup>61</sup> Judge Ozaki was present in Estonia no later than 26 March engaging in activities as a diplomatic representative of Japan.

36. Judge Ozaki’s concurrent service as a diplomatic representative of the Government of Japan, for as long as it lasted, was incompatible with her judicial independence. This service could not fail, in the mind of a reasonable observer, to “affect confidence” in her independence. The consequence of this service on impartiality, and Judge Ozaki’s subsequent resignation, are discussed below.

## **II. Judicial Independence is an Essential Condition of Impartiality, Properly Considered Under Article 41(2)(b)**

37. The purpose of Article 41(2)(a), as the Presidency has previously recognized, is to provide a mechanism to challenge the impartiality of a Judge, as the provision states, “on any ground.” This includes non-fulfilment of the conditions of judicial independence set out in Article 40. As stated in *Lubanga*:

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<sup>58</sup> *Delalić* Bureau Decision, p.3; *Delalić* Appeals Judgement, paras.684-685.

<sup>59</sup> Meron, Judicial Independence, p.368 (“If she had been serving in an active capacity as vice president while still serving on the *Čelebići* bench, or had drawn any income from her government, the appeals chamber would have been much more likely to find an appearance of impropriety.”)

<sup>60</sup> [REDACTED]

<sup>61</sup> *Id.*

The Presidency considers the overriding purpose of article 41(2)(a) to be the safeguarding of the integrity of proceedings of the Court by ensuring that no judge participates in a case in which his or her impartiality might reasonably be doubted on any ground. Such purpose is manifest in the first sentence of article 41(2)(a) itself, but it is also confirmed by the interrelationship between article 40 and 41, with the broader objective of these provisions being the safeguarding of judicial functions and ensuring confidence in the judiciary.<sup>62</sup>

38. A Judge who is not independent cannot be reasonably perceived as being impartial.<sup>63</sup> Although “independence is desirable in and of itself, its importance really lies in the fact that it creates the conditions for impartiality.”<sup>64</sup> Independence and impartiality are, accordingly, often “closely related” and “presented together.”<sup>65</sup>

39. Judge Odio-Benito’s judicial independence was, accordingly, directly and exclusively addressed as a question of impartiality because Article 13 of the ICTY Statute and Rule 15 of the ICTY RPE require only impartiality.<sup>66</sup> Judge Odio-Benito was not disqualified because she had assumed office “in name only,”<sup>67</sup> and previous administrative decisions on Judge Odio Benito’s qualifications to be a Judge of the ICTY did not curtail the defendant’s right to subsequently seek her disqualification from a particular case on which she sat.

40. Any issue of lack of judicial independence can therefore properly be raised for determination under Article 41(2). The clarification of the procedural relationship between Article 40(4) and 41(2)(b) in the Presidency’s Decision of 14 May does not suggest otherwise.<sup>68</sup>

### **III. The Appearance of Impartiality Has Not Been Restored By Judge Ozaki’s Resignation as Ambassador**

<sup>62</sup> *Lubanga* 29 September 2009, p.5. See *Al Bashir* 19 March 2010, p.4.

<sup>63</sup> UNODC Commentary, para.51; Roth, p.301.

<sup>64</sup> Schabas *Commentary*, pp.724-725.

<sup>65</sup> Schabas *Commentary*, p.724; *Findlay*, para.73; *Incal*, para.65; Santulli, p.225.

<sup>66</sup> *Delalić* Bureau Decision, p.3; *Delalić* Appeals Judgement, para.682. Article 13 of the ICTY Statute also requires its Judges to possess the “qualifications required in their respective countries for appointment to the highest judicial offices.”)

<sup>67</sup> *Delalić* Bureau Decision, p.7.

<sup>68</sup> 14 May Decision, para.21.

41. Judge Ozaki's resignation does not restore her appearance of judicial independence, nor does it render, as the Prosecution argues, the present request moot.<sup>69</sup> The appearance of bias arising from an ICTR Judge cohabiting with a prosecutor was not rendered "moot" when the prosecutor moved out, either for the cohabiting Judge or for the two other Judges who acquiesced in her refusal to recuse herself.<sup>70</sup> All three Judges were disqualified by the ICTR Appeals Chamber, even though the cause of the appearance of bias had come to an end.<sup>71</sup>

42. Judge Ozaki's resignation does little to restore her appearance of independence or impartiality for at least three reasons: (i) the belated timing of the resignation, which resulted from her own lack of candour; (ii) refusal to acknowledge that resignation is required by the dictates of judicial independence; and (iii) the negative impact on Judge Ozaki's interests caused by her resignation, which creates an additional ground to objectively doubt her impartiality.

43. (i) Judge Ozaki did not resign until after she had assumed her position as a senior Japanese diplomat and actively served in that capacity. The untimely resignation is a direct result of Judge Ozaki's lack of candour with her colleagues. When Judge Ozaki requested on 7 January to become a part-time Judge, and thus liberated from the prohibition on other professional employment pursuant to Article 40(3), Judge Ozaki only "cit[ed] personal reasons and without mention of any future activities or occupation."<sup>72</sup> Yet the day on which she requested her full-time service to end, "11 February 2019 inclusive,"<sup>73</sup> coincided precisely with the timing of the Japanese Government's decision (12 February) appointing her [REDACTED] Ambassador of Japan to Estonia [REDACTED].<sup>74</sup> Candour from the outset would have allowed the Presidency to take steps before Judge Ozaki had entered into service as a Japanese diplomat.

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<sup>69</sup> ICC-01/04-02/06-2340, para.15.

<sup>70</sup> *Karemera* Appeals Decision, para.62.

<sup>71</sup> *Id.* paras.66-69.

<sup>72</sup> Decision, para.3.

<sup>73</sup> *Id.*

<sup>74</sup> [REDACTED]

44. Instead, Judge Ozaki waited until after her appointment as Ambassador to Estonia<sup>75</sup> to request that a determination be made under Article 40(4) that this service was not incompatible with her judicial independence. Judge Ozaki then coupled this request with an alternative request to resign as a Judge of the Court effective 12 February, presenting her colleagues with a *fait accompli*. The lack of any advance disclosure of her potential appointment, combined with her threat to resign, shows the existence of conflicting duties and that Judge Ozaki placed the duties of her service to Japan above those owed to the Court as a Judge. It is unclear whether the Judges in plenary knew that Judge Ozaki had been appointed by a decision of 12 February, indicating strongly that Judge Ozaki knew, but did not reveal to the Presidency on 7 January, that the purpose of her request was to become Ambassador. This is information that a reasonable observer would require.

45. (ii) Judge Ozaki does not acknowledge that her resignation was necessary to restore confidence in her judicial independence pursuant to Article 40(2). She instead insists that her concurrent service as Japan's Ambassador and a Judge deliberating on the *Ntaganda* case are entirely consistent with the requirements of Article 40.<sup>76</sup> She considers that her resignation was induced instead by "various criticisms to me personally" that may "also lead to the deterioration in the public confidence in the Court."<sup>77</sup> Judge Ozaki did "not wish for this situation to continue nor do I wish to invite further unnecessary confusion which may cause a delay in proceedings."<sup>78</sup> Personal "criticisms", which may reasonably be interpreted as including Defence submissions, have therefore caused Judge Ozaki to resign her Ambassadorship.

46. (iii) Judge Ozaki's resignation has now occasioned a number of negative professional, financial and personal consequences that give further grounds to doubt whether she can be impartial to the party that has sought her disqualification. None

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<sup>75</sup> Decision, para.5("had been appointed").

<sup>76</sup> 14 May Decision, para. 33.

<sup>77</sup> *Id.* (underline added).

<sup>78</sup> *Id.* para.33



of these negative personal consequences would have arisen but for the interests arising from Judge Ozaki's tenure as a senior Japanese diplomat.

47. First, Judge Ozaki's resignation is contrary to her own wishes as set out in her 18 February letter to her colleagues. These wishes were so strong that Judge Ozaki was prepared to resign from a part-heard ICC case in order to take up her position as Japan's ambassador to Estonia.<sup>79</sup>

48. Second, Judge Ozaki has apparently suffered a substantial loss of ICC salary as a result being reclassified as a part-time Judge,<sup>80</sup> unless this was compensated from some other source. Although the Defence has been notified of Judge Ozaki's resignation as Ambassador, it is unclear whether Judge Ozaki otherwise remains employed by the Japanese Government.

49. Third, Judge Ozaki's career as a Japanese diplomat has presumably now been seriously impacted by her resignation. This may be mitigated by re-joining the Ministry of Foreign Affairs after the end of her service as an ICC Judge, but a reasonable observer would view her resignation as a personal setback.

50. No suggestion is being made that such considerations would, in fact, influence Judge Ozaki in the performance of her judicial duties. The issue is the objectively reasonable appearance. Judge Ozaki's personal interests arising from her Ambassadorship have now been negatively prejudiced, in effect, by legitimate Defence requests protecting Mr. Ntaganda's right to a fair trial. This goes beyond the pre-disposition that may develop over time because of the manner in which a case is conducted, as it implicates the personal, professional and financial interests of the Judge. This perception is reinforced by Judge Ozaki's view that she has been induced to resign because of unfair criticisms of "me personally."

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<sup>79</sup> Decision, para.5.

<sup>80</sup> See ICC-ASP/2/10, para.9 (fixing the annual remuneration of a part-time Judge at 20,000 Euros).

51. In these circumstances, Judge Ozaki's resignation has not restored the objectively reasonable appearance of her judicial independence and impartiality. The resignation did not occur until after Judge Ozaki had assumed her duties as a senior Japanese diplomat. The circumstances of, and reasons given by Judge Ozaki for, that resignation suggest that her personal, professional and financial interests have been negatively impacted in a way that "may reasonably appear to affect [her] independence or impartiality."<sup>81</sup>

#### **IV. Relevant Facts Remain Undisclosed to the Parties, Which Further Undermines the Appearance of Independence and Impartiality**

52. The Defence has still not been informed of salient facts concerning Judge Ozaki's service with the Government of Japan, despite requests for that information.<sup>82</sup> For example, the Defence has still not been provided – subject to any redactions of private information, of course – with the full text of Judge Ozaki's requests of 7 January and 18 February or the date on which she started working for the Ministry of Foreign Affairs of Japan.

53. Judge Ozaki had, and has, an obligation to provide this information to the Parties. As stated by the President of the STL:

I do not discount the duty in some circumstances for judges to make disclosure. Since a judge's first obligation is to avoid bias, any factors that could reasonably be construed as disqualifying must be disclosed unless the judge elects to disqualify him or herself.<sup>83</sup>

54. The Defence does not suggest for a moment that this imposes any far-reaching or burdensome obligation to search through old filing cabinets. The issue here is disclosure of circumstances concerning an obvious, immediate and substantial potential disqualifying circumstance: employment with a State while still a Judge of the ICC. Yet Judge Ozaki:

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<sup>81</sup> CJE, Art.10(1).

<sup>82</sup> First Disclosure Request; Second Disclosure Request.

<sup>83</sup> *Al Jadeed*, para.16. See Schabas, *Commentary*, p.731.

- Has still disclosed nothing to the parties concerning this matter;
- Omitted to disclose to her colleagues her imminent appointment as a senior Japanese diplomat when seeking to be excused as a full-time Judge; and
- Omitted to disclose to her colleagues her appointment until after the fact.

55. Lack of candour contributes to an appearance of bias because “a reasonable observer might wonder whether the judge had done something worth concealing.”<sup>84</sup>

As explained in *Karemera*:

The particular circumstances involved here include, in addition to the admitted association and cohabitation, the fact that Judge Vaz did not disclose these facts until Defence counsel expressly raised this matter in court and that she withdrew from the case after Defence lodged applications for her disqualification on this basis and before the Bureau decided the disqualification motions.<sup>85</sup>

56. The limited disclosure that has been provided concerning the circumstances of Judge Ozaki’s appointment, if anything, reinforces the reasonable appearance of bias. This includes:

- her concurrent service as Japanese Ambassador and ICC Judge [REDACTED];<sup>86</sup>
- her resignation as Japanese Ambassador was subject to prior approval by the Japanese Government;<sup>87</sup>
- Judge Ozaki sought, in the alternative, to resign as an ICC Judge if her concurrent appointment was not accepted by the other Judges;<sup>88</sup> and

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<sup>84</sup> *Al-Nashiri*, p.31.

<sup>85</sup> *Karemera* Appeals Decision, para.67.

<sup>86</sup> [REDACTED].

<sup>87</sup> 14 May Decision, paras.33-34.

<sup>88</sup> Decision, para.5.

- Judge Ozaki considers that her resignation was not required by judicial independence and has instead been induced by “various criticisms to me personally”.<sup>89</sup>

57. The reasonable apprehension of bias arising from Judge Ozaki’s concurrent service as a Japanese diplomat has not been dispelled through proactive, timely and adequate disclosure. On the contrary, the absence of transparency contributes to the apprehension of bias.

#### **V. Neither the Stage of Proceedings Nor the Disruptive Consequences Are Relevant Circumstances, Although the Special Role of the Court Is**

58. Judge Ozaki asserts that “substantive deliberations” in this case are over,<sup>90</sup> implying that this is a relevant factor in assessing the imperative conditions of judicial independence and impartiality.

59. This claim, which was not relied on by the Majority in the Decision, should be expressly rejected. The imperative requirements for the appearance of judicial independence and impartiality extend to all phases of judicial proceedings, from the first day to the last.<sup>91</sup> Sentencing decisions, in particular, involve a “broad discretion,” exercised on the basis of a “weighing and balancing all the relevant factors.”<sup>92</sup> Standards of independence and impartiality must be applied with as much rigour now as during the hearing of evidence.

60. Indeed, greater rigour is required given the communities served by the ICC whose confidence in the independence and impartiality of the Court is essential. Many of communities directly served by the Court do not have long traditions of an impartial judiciary, secured by the highest standards of judicial independence. On

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<sup>89</sup> 14 May Decision, para.33.

<sup>90</sup> Decision, para.5; 14 May Decision, para.33; ICC-01/04-02/06-2340, para.3.

<sup>91</sup> *Gonzalez*, para.5.2.

<sup>92</sup> *Lubanga SAJ*, paras.40,43.

the contrary, they have long traditions of the executive meddling with and influencing the judiciary.<sup>93</sup>

61. Furthermore, “the political environment in which international courts, especially international criminal courts, function brings greater attention to the credibility of the institution, and the performance of the international judge as an independent and impartial arbiter is constantly under scrutiny.”<sup>94</sup> No case better illustrates this scrutiny than the recent decision concerning opening an investigation in Afghanistan.<sup>95</sup> The appearance of a serving Ambassador of a State sitting on the bench of an ongoing case at the ICC profoundly undermines, in the eyes of an objective observer, the judicial character of the Court.

62. Finally, the perspective of the Accused must not be forgotten. Mr Ntaganda has a right to be tried by an impartial tribunal. “What is at stake,” as the European Court of Human Rights has underscored, “is the confidence which the courts in a democratic society must inspire in the public and above all, as criminal proceedings are concerned, in the accused.”<sup>96</sup> The Accused’s subjective perceptions not decisive; but if the Accused has an objectively justified fear that a particular court lacks independence or impartiality, then his right to a fair trial has been violated.<sup>97</sup> The objective justification of this fear is now greater than before in light of the personal consequences for Judge Ozaki arising from Mr. Ntaganda’s requests challenging her impartiality.

## CONCLUSION AND RELIEF REQUESTED

63. Judge Ozaki’s service as a senior Japanese diplomat while also sitting as a Judge on this case has violated Articles 40, 41, 21(3) and 67(1). This concurrent

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<sup>93</sup> Vyas, p.131. *See also* Oko, pp.17-18; Amoah, p.35.

<sup>94</sup> Meron, *Judicial Independence*, p.361.

<sup>95</sup> Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan”, 12 April 2019, ICC-02/17-33.

<sup>96</sup> *Incal*, para.71 (underline added).

<sup>97</sup> *Id.*

service was not consistent with the imperative requirements of the appearance of judicial independence and impartiality, with international recognised human rights, or with a fair trial.

64. The appearance of independence and impartiality has not been restored by Judge Ozaki's subsequent resignation. Quite to the contrary, Judge Ozaki served for some period of time as a Japanese diplomat, creating an association that is not counter-acted by her subsequent resignation, especially because she denies that her resignation was required to restore her judicial independence. She explains instead that her resignation from her diplomatic position have been induced by "criticisms to me personally."<sup>98</sup> She has, on this view, now lost a position without any legal justification that she previously wanted so much that she was willing to resign as an ICC Judge. No reasonable observer could fail to apprehend in these circumstances an appearance of bias against the party who sought her disqualification, which now enhances her lack of judicial independence.

65. Judge Ozaki must, accordingly and with the greatest respect, be disqualified from this case under Article 41(2)(b). The integrity of the Court and of this trial far outweigh any pressures that there may be to proceed to verdict because of the length of proceedings. The procedural consequences of Judge Ozaki's disqualification are matters that can, and must, be addressed separately.

**RESPECTFULLY SUBMITTED OF THIS 20TH DAY OF MAY 2019**



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

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<sup>98</sup> 14 May Decision, para.33.