Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-02/06**
Date: **27 May 2019**

THE *AD HOC* PRESIDENCY

Before: **Judge Chile Eboe-Osuji, President**
Judge Marc Perrin de Brichambaut, 2nd Vice-President
Judge Howard Morrison

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public with Public Annex A

Prosecution Response to the Defence "Request for Disqualification of Judge Ozaki" (ICC-01/04-02/06-2347-Red)

Source: **Office of the Prosecutor**

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Introduction

1. The Defence Request to disqualify Judge Ozaki should be dismissed. There is no appearance of bias for Judge Ozaki.

2. *First*, the Plenary found, by absolute majority, that Judge Ozaki's position would not interfere with her judicial functions or affect confidence in her independence within the terms of article 40(2). The Defence is effectively requesting reconsideration of the Plenary Article 40 Decision a second time, and this should be rejected. And the Defence inaccurately reads the Statute. Article 40(2) does not contain a general prohibition for non-full-time judges to exercise certain professional functions.

3. *Second*, the Defence fails to satisfy the high and fact-specific standard of article 41(2)(a). The Plenary must determine whether the present circumstances would lead a reasonable observer, properly informed, to reasonably and objectively apprehend bias in Judge Ozaki. She or he would not. Judge Ozaki's functions as Japanese Ambassador to the Republic of Estonia ("Estonia") while being non-full-time Judge in the *Ntaganda* case were limited to bilateral relations between two countries which bear no connection to this case. Nor has the Defence suggested the contrary. Judge Ozaki also provided robust assurances to avoid any appearance of partiality or lack of independence. Judge Ozaki is no longer the Japanese Ambassador to Estonia. Her resignation was effective on 19 April 2019. Therefore, Judge Ozaki ultimately held the two positions for a very limited period of time and only after the case was fully briefed, and substantive deliberations regarding the Trial Judgment were completed.

4. *Lastly*, the Defence's suggestion that Judge Ozaki is biased against Ntaganda because of presumed personal, financial and professional losses is wholly speculative, and bereft of any evidence. A well-informed reasonable observer would not make such an assumption.

Procedural History

5. The *Ntaganda* trial began on 2 September 2015. Final oral arguments were heard on 28-30 August 2018.

6. Judge Ozaki's mandate as a judge of the Court had been completed on 10 March 2018, at which point she continued in office to complete the *Ntaganda* trial pursuant to article 36(1) of the Statute.[1]

7. On 7 January 2019, Judge Ozaki requested to resign as a full-time judge of the Court as of 11 February 2019 and to continue as a non-full-time judge sitting on the *Ntaganda* case within the meaning of article 35(3) of the Rome Statute. The request was granted.[2]

8. On 18 February 2019, Judge Ozaki informed the Presidency and all Judges that she had been appointed as the Japanese Ambassador to Estonia and that her duties would commence on 3 April 2109. She explained that her new functions were limited to bilateral relations between Japan and Estonia and her willingness to return to the seat of the Court as necessary. She also provided guarantees to avoid any connection between the two positions. She requested continuing participation in the *Ntaganda* case on the basis set out above, or alternatively, submit her letter of resignation.[3]

9. On 4 March 2019, an absolute majority of 14 judges of the Court decided that Judge Ozaki's assumption of the role of Ambassador of Japan to Estonia while she continues to serve as a non-full time judge of the Court does not violate any aspect of article 40 of the Statute ("Article 40 Plenary Decision").[4]

10. On 1 April 2019, the Defence filed a request for disclosure to the Presidency.[5] On the same date, the Defence filed a request for a temporary stay of proceedings before

[1] ICC-01/04-02/06-2326-Anx1 ("Article 40 Plenary Decision"), para. 2.
[2] Article 40 Plenary Decision, para. 4.
[3] Article 40 Plenary Decision, para. 5.
[4] Article 40 Plenary Decision, paras. 10-14.
[5] ICC-01/04-02/06-2327 ("Defence First Request for Disclosure").

Trial Chamber VI.[6] On 5 April 2019, the Prosecution[7] and the Legal Representatives of Victims[8] responded to the Defence Request for a Stay.

11. On 8 April 2019, the Defence made a second request for disclosure to the Presidency.[9]

12. On 18 April 2019, the Trial Chamber dismissed the Defence request for a temporary stay of proceedings.[10] The Trial Chamber also indicated that it would not render its Trial Judgment pending resolution of any request for disqualification.[11] On the same date, the Presidency rejected both Defence requests for disclosure.[12]

13. On 30 April 2019, the Defence requested reconsideration of the Article 40 Plenary Decision and Judge Ozaki's disqualification under article 41(2)(a) ("Defence Article 40 Reconsideration Request").[13]

14. On 1 May 2019, the Presidency filed the notification that Judge Ozaki had resigned as Japanese Ambassador to Estonia, effective 18 April 2019.[14]

15. On 2 May 2019, the Defence filed the Defence Requests for reconsideration of the Presidency's two disclosure decisions and made a new request for additional disclosure ("Defence Disclosure Reconsideration Request").[15] On 8 May 2019, the Prosecution responded to the requests for reconsideration and additional disclosure.[16]

[6] ICC-01/04-02/06-2328 ("Defence Request for a Stay").
[7] ICC-01/04-02/06-2329 ("Prosecution Response Request Stay").
[8] ICC-01/04-02/06-2330.
[9] ICC-01/04-02/06-2332 ("Defence Second Request for Disclosure").
[10] ICC-01/04-02/06-2335.
[11] ICC-01/04-02/06-2335, para. 14.
[12] ICC-01/04-02/06-2336 ("Presidency Disclosure Decision").
[13] ICC-01/04-02/06-2337.
[14] ICC-01/04-02/06-2338.
[15] ICC-01/04-02/06-2339.
[16] *See* ICC-01/04-02/06-2340 and ICC-01/04-02/06-2341.

16. On 14 May, the Presidency denied all requests for reconsideration and additional disclosure and set out a timeline to resolve any Defence request for disqualification ("Presidency Reconsideration Decision").[17]

17. On 20 May 2019, the Defence requested Judge Ozaki's disqualification pursuant to article 41(2)(a) ("Defence Request").[18]

Submissions

18. The Defence Request should be dismissed. First, the Majority of the Plenary has already found that Judge Ozaki's independence pursuant to article 40(2) was not undermined. This finding remains in force. Second, the Defence fails to show that there is an appearance of bias for Judge Ozaki pursuant to article 41(2)(a).

A. Judicial independence has not been undermined

19. The Defence devotes many paragraphs of the Request to restate that Judge Ozaki's concurrent service as Ambassador was incompatible with her judicial independence under article 40(2).[19] The Defence's arguments should be dismissed.

20. *First*, the Plenary has already decided this matter. On 4 March 2019, the Majority of the Plenary found that, on the facts of this case, Judge Ozaki's independence was not undermined by assuming the role of Ambassador of Japan to Estonia.[20] The Defence sought reconsideration of the Article 40 Decision[21] and the Presidency rejected the request.[22] It is unclear why the Defence challenges the Plenary Article 40 Decision again. It is also unclear why it challenges again the Presidency's decisions rejecting its

[17] ICC-01/04-02/06-2346 ("Presidency Reconsideration Decision").
[18] ICC-01/04-02/096-2347-Red.
[19] Defence Request, paras. 20-36. Section I bears the title "Concurrent Service in the Diplomatic Service of a State is Incompatible with Judicial Independence".
[20] Article 40 Plenary Decision, paras. 12-14.
[21] Defence Article 40 Reconsideration Request.
[22] Presidency Reconsideration Decision.

sweeping requests for disclosure.[23] Since the Presidency only permitted the Defence to file a request for disqualification under article 41(2)(b),[24] the Defence submissions seeking to re-litigate these matters should be dismissed outright.

21. *Second*, to the extent that the Presidency and Plenary consider the Defence's submissions on article 40 relevant to its determination under article 41(2)(a), they should be rejected. The Defence incorrectly interprets the Statute by inserting in the text of article 40 a non-existent absolute prohibition for non-full-time judges to perform certain professional activities. The final text of the Statute does not contain such a blanket prohibition for non-full-time judges.[25] This is in contrast with *full-time judges* who are prohibited from engaging "in any other occupation of a professional nature" under article 40(3) of the Rome Statute, or with article 16(1) of the International Court of Justice ("ICJ") Statute, which prohibits *all members* of the Court from exercising "any political or administrative function, or engage in any other occupation of a professional nature".[26] As commentators have noted, the drafters ultimately chose a more substantive and case-specific standard.[27] This does not erode independence; to the contrary, it enhances it by requiring scrutiny of the concrete facts of each case.[28] The Majority of the Plenary correctly applied this standard in its Article 40 Decision.[29]

22. Moreover, pursuant to article 21(1), the Court shall apply "[i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence". The Code of Judicial Ethics, adopted by the Plenary of Judges in March 2015 in application of regulation 126 of the Regulations of the Court, provides "guidelines for general application", and does not trump the Statute. In addition, domestic legislation is not binding on the Court, and comparisons with domestic practice must be approached with caution on this point. The relationship between the Court and the States Parties

[23] Defence Request, paras. 52-57. The Defence sought reconsideration of the Presidency Disclosure Decision and the Presidency also rejected it: Presidency Reconsideration Decision, paras. 25-37.
[24] Presidency Reconsideration Decision, p. 13.
[25] *Contra* Defence Request, paras. 21-23.
[26] *See* Article 40 Plenary Decision, para. 10 (emphasis added).
[27] Jones, J.R.W.D., in The Rome Statute of the International Criminal Court: A Commentary", Cassese, Gaeta and Jones (ed.) (Oxford University Press) ("Cassese"), p. 243. *See also* pp. 256-257.
[28] *Contra* Defence Request, para. 24.
[29] Article 40 Plenary Decision, paras. 10-14.

cannot be equated with the relation among the different branches within a government. Moreover, the principle of separation of power seeks to avoid the interference (inappropriate connection or influence) of one branch into the other's sphere.[30] There has been no interference, or attempted interference, between Japan and the *Ntaganda* case; nor does the Defence suggest that there has been any. In addition, the Court has its own structure and legal framework, and the qualifications and manner of appointment of its judges, the duration of their term of office and the existence of guarantees against outside pressures, which seek to ensure judicial independence, are specific to this Court.[31] It is unclear what "the political environment" and the Afghanistan Article 15 Decision have to do with the present situation.[32] Certainly, these considerations cannot circumvent the correct application of the law. While the Plenary considered that "there may be particularly close scrutiny from the Court's observers, to issues of independence",[33] it is paramount that judges exercise their functions irrespective of popular acclaim or criticism.[34]

23. Accordingly, the Defence's second attempt to challenge Judge Ozaki's independence under article 40(2)—and the Majority's decision confirming it—should be dismissed.

[30] *See e.g.* Bangalore Principles, value 1.3 ("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") cited in Defence Request, para. 28; UNHCR Basic Principles on the Independence of the Judiciary , principles 2 ("The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason") and 4 ("There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. […]"). The Defence submits without further elucidation that an ICC judge can be a member of the domestic judiciary with the sufficient guarantees. *See* Defence Request, fn. 48.

[31] *See e.g. Findlay v. UK*, Judgment, para. 73 ("In order to establish whether a tribunal can be considered as "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence").

[32] *Contra* Defence Request, para. 61.

[33] Article 40 Plenary Decision, para. 7. The Plenary noted that the article 74 decision in the *Ntaganda* case had not been rendered yet.

[34] UNODC Commentary Bangalore Principles, para. 28 ("A case may excite public controversy with extensive media publicity, and the judge may find himself or herself in what may be described as the eye of the storm. Sometimes the weight of the publicity may tend considerably towards one desired result. However, in the exercise of the judicial function, the judge must be immune from the effects of such publicity").

B. There is no appearance of partiality

24. Even if independence and impartiality are related, this does not eschew the correct application of article 41(2)(a).[35] Neither article 40(2), article 41(2)(a) nor rule 34 contain a blanket prohibition for non-full-time judges to exercise other professional activities. Rather, article 41(2)(a) requires a fact-specific analysis equal to that in article 40(2).

25. Further, there is no appearance of partiality for Judge Ozaki. As set out below, the circumstances of this case would not lead a reasonable and well-informed observer to reasonably and objectively apprehend bias in Judge Ozaki. The Defence does not prove otherwise; instead, it speculates and advances unsupported assumptions.

(a) The Defence Request disregards the high and case-specific standard of article 41(2)(a)

26. The Defence Request disregards the high threshold and fact-specific assessment required in article 41(2)(a).

27. *First*, disqualifying a judge from participating in a proceeding at this Court is not a step to be undertaken lightly. Judges enjoy a presumption of impartiality which attaches to judicial office.[36] They are presumed to be professional judges, who, by virtue of their experience and training, can decide on issues relying solely and exclusively on the evidence before them.[37] Accordingly, any application to disqualify a judge from proceedings must meet a high threshold. Yet, the Defence falls short from showing that a "reasonable observer, properly informed, [would] reasonably

[35] *Contra* Defence Request, para. 38, 40.
[36] *See* *Poblete Vilches y otros vs. Chile*, Judgment, para. 196.
[37] ICC-01/04-01/06-3154-AnxI ("*Lubanga* Sentence Review Disqualification Decision"), para. 29 (citations omitted). *See also* ICC-01/05-01/13-511-Anx ("*Bemba et al.* Disqualification Decision"), paras. 15-18.

apprehend bias" in Judge Ozaki.[38] The Defence does not show Judge Ozaki's bias, or any appearance of bias.[39] There is none.

28. *Second*, appearance of bias requires a case-specific analysis and consideration of the specific circumstances of each case.[40] The ICC Plenary as well as other international criminal tribunals and the ECtHR have adopted this approach.

29. In resolving requests for disqualification on different grounds, the ICC Plenary (with different compositions) has considered whether there is a connection between the different functions of the Judge. For example, despite the explicit language of article 41(2)(a),[41] the previous participation of a judge in the same case has not led to automatic disqualification from sitting on the appeal of that case.[42] The Plenary instead considered whether there was a "direct link" between the previous participation of the Judge and the issue on appeal,[43] or whether there was a "degree of

[38] *Lubanga* Sentence Review Disqualification Decision, para. 28 (further adding that this standard "is concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension is objectively reasonable"). *See also Prosecutor v. Mladić,* MICT-13-56-A, Decision on Defence Motions for Disqualification of Judges Theodor Meron, Carmel Agius and Liu Daqun, 3 September 2018 ("*Mladić* Disqualification Decision"), para. 19 ("A 'reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality […] and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.'"). *See also Poblete Vilches y otros vs. Chile*, Judgment, para. 196. *Contra* Defence Request, paras. 1, 32, 43, 51.

[39] *Mladić* Disqualification Decision, para. 3 ("The requirement of impartiality is violated not only when a judge has an actual bias but also in cases of an *unacceptable appearance of bias*", quoting *Furundžija* AJ, para. 189) (emphasis added).

[40] *See e.g.* ICC-01/05-01/13-1329-AnxI ("*Mangenda* Compensation Excusal Decision"), p.3 (referring to a "fact-specific" and "case-by-case analysis"). *See also Mladić* Disqualification Decision, para. 24 (citing ECtHR cases).

[41] Article 41(2)(a) ("[…]A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court").

[42] ICC-01/04-01/06-2138-AnxIII ("*Lubanga* Presidency Decision"), p. 5; *Mangenda* Compensation Excusal Decision, p. 3. *See also* H. Abtahi *et al.*, 'The Composition of Judicial Benches, Disqualification and Excusal of Judges at the International Criminal Court: A Survey", [2013] 11(2) *Journal of International Criminal Justice* 379 ("Abtahi *et al.*"), p. 381 ("[…] In particular, the Court has developed a pragmatic approach to the interpretation of its key provision on judicial impartiality, Article 41(2)(a) of the Rome Statute […]").

[43] ICC-01/11-01/11-591-Conf-Exp-Anx1 ("*Gaddafi* Excusal Decision"), p. 4 ("The Presidency finds both requests to be well founded. Judge Fernández de Gurmendi's request for excusal is based on her issuance of the Impugned Decision that is the subject of the interlocutory appeal. Judge Monageng's request for excusal is based on her issuance of the First Clarification Decision, which in turn was addressed and clarified in the Impugned Decision. The Presidency takes particular note, in this respect, of Judge Monageng's submission that the relationship between the [Decisions] '*may demonstrate a direct link to the issue certified on appeal*.'"); *See also* ICC-01/04-02/06-162-Anx2 ("*Ntaganda* Interim Release Excusal Decision"), pp. 2-3.

congruence between the legal issues" or whether "the factual determinations" would be "based on the same evidence".[44]

30. Similarly, a Majority of the Plenary considered comments written by a Judge in a blog commentary prior to his election to the Court insufficiently connected to the proceedings and the accused of the case where he sat as a member of the Trial Chamber.[45] The Plenary conducted a similar assessment when it found, by Majority, that the simultaneous but minimal involvement of a Judge with a charitable organisation did not bring his disqualification.[46] The organisation had filed submissions in the reparation proceedings of the same case where the Judge sat as member of the Appeals Chamber deciding on the Defence appeals against the Reparations Order, Trial Judgment and Sentencing Decision.

31. Other international criminal courts have followed the same practice.[47] For example, in the *Taylor* case, the SCSL Appeals Chamber dismissed Defence arguments of lack of judicial independence when one judge was simultaneously appointed as a judge of another international tribunal for 16 weeks of the *Taylor* trial. The Appeals Chamber held that it is "extremely serious" to allege that a judge is not acting independently and "should not be made without ascertainable facts and firm evidence".[48] There were none. The Appeals Chamber concluded that "[t]he Defence contention that

[44] ICC-01/04-02/06-925-AnxI ("*Ntaganda* Excusal Decision"), p. 3; ICC-02/11-01/15-142-AnxI ("*Gbagbo* Excusal Decision"), p. 3; *Mangenda* Compensation Excusal Decision, p. 3; *Lubanga* Sentence Review Disqualification Decision", para. 31.
[45] *See* ICC-02/05-03/09-344-Anx ("*Banda & Jerbo* Plenary Decision"), paras. 17 (noting that the blog commentary "was insufficiently connected to the issues in the case against Messrs. Banda and Jerbo") and 20 (noting "an insufficient link between the case and the blog commentary"). *But see* Minority Opinion, para. 23 (noting "a strong nexus between the expression of opinion in the blog commentary and the case").
[46] ICC-01/04-01/06-3040-Anx ("*Lubanga* Appeal Disqualification Decision"), paras. 44 (noting that "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"), 45 (noting the "growing acceptance in several jurisdictions of a '*de minimis*' exception to the automatic disqualification rule") 46 ("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. […]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") and 50 ("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").
[47] *Contra* Defence Request, para. 31.
[48] *Taylor* AJ, paras. 607, 608, 633-635.

Justice Sebutinde's judicial independence was compromised solely because she was appointed to the ICJ is unsupported, disingenuous and ridiculous".[49]

32. Similarly, in an ECCC case where a judge was simultaneously a serving RCAF (Royal Cambodian Armed Forces) officer, the Pre-Trial Chamber rejected the Defence request for disqualification.[50] The Chamber considered that "Judge Ney Thol's does not occupy his position as a Pre-Trial Chamber Judge of the ECCC in the capacity of an RCAF officer, but in his personal capacity"[51] and noted the particularities and judicial appointment to the ECCC which, "although it is part of the Cambodian court system, is a separate and independent court with no institutional connection to any court in Cambodia".[52]

33. In addition, the *Mucić* Decision cited by the Presidency is highly pertinent. In considering issues related to judicial independence as grounds for disqualification, the ICTY Bureau required "a link between the activity allegedly incompatible with the judicial function and the particular case at issue. It would not be sufficient for that party to claim merely that the Judge in question is exercising a political, administrative or professional activity incompatible with his or her judicial functions".[53]

34. Jurisprudence of the regional human rights courts further confirms this case-specific approach.[54] The Defence's attempt to explain away very pertinent cases is unpersuasive.[55] The domestic courts in *McGonnell* and *Pabla Ky* did not have "very limited jurisdiction" and the ECtHR did not apply a different standard when it assessed the independence and impartiality of the concerned judges in those cases.[56]

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[49] *Taylor* AJ, para. 635.
[50] Judge Ney Thol Disqualification Decision, paras. 23-26.
[51] Judge Ney Thol Disqualification Decision, para. 24.
[52] Judge Ney Thol Disqualification Decision, para. 30.
[53] *Mucić* Bureau Disqualification Decision, para. 10 (also adding that: "If, instead, it can be shown that the activity incompatible with the discharge of judicial functions has *a direct and specific impact upon the impartiality of a Judge in a particular case* before a Chamber, then the matter comes within the purview of the disqualification procedure") quoted in Plenary Reconsideration Decision, para. 16 (emphasis added).
[54] *Contra* Defence Request, paras. 31-32.
[55] *Contra* Defence Request, paras. 26 (fn. 31) and 32.
[56] *Contra* Defence Request, paras. 26 (fn. 31) and 32.

To the contrary, the Court considered whether on the facts of the cases there was a connection or high degree of interference between the different functions.

35. In *Pabla Ky v. Finland*, the impartiality and independence of a judge of the Helsinki Court of Appeal was challenged because he was also member of Parliament.[57] The ECtHR considered whether there was a connection between the two functions and, since there was none, it did not find sufficient basis to doubt the Judge's independence or impartiality.[58] The Court was not persuaded "that the mere fact that M.P. was a member of the legislature at the time he sat on the applicant company's appeal is sufficient to raise doubts as to the independence and impartiality of the Court of Appeal. *While the applicant company relies on the theory of separation of powers, this principle is not decisive in the abstract*."[59]

36. The ECtHR repeated its findings that the principle of separation of powers is not determinative in the abstract. In *McGonnell v. UK*, the Court found that "that neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts as such. The question is always *whether, in a given case, the requirements of the Convention are met*. The present case does not, therefore, require the application of any particular doctrine of constitutional law […]".[60] In *McGonnell*, the substantive conflict was clear since the judge (a deputy bailiff who presided in the in Guernsey Royal Court) had been directly involved (presiding over the States of Deliberation) in the adoption of a development plan at issue in the proceedings.[61]

[57] *See* *Pabla Ky v. Finland*, Judgment, paras. 11-12. Judge M.P. belonged to the Housing Court Division of the Helsinki Court of Appeal (*Hovioikeus hovrätt* is one of the five courts of appeal in Finland, whose decisions are appealable before the Supreme Court). *Contra* Defence Request, para. 32 (suggesting that the judgment is irrelevant because involves "a lay-member of a housing court").
[58] *Pabla Ky v. Finland*, Judgment, para. 34 ("M.P. had not exercised any prior legislative, executive or advisory function in respect of the subject matter or legal issues before the Court of Appeal for decision in the applicant company's appeal. The judicial proceedings therefore cannot be regarded as involving "the same case" or "the same decision" in the sense that was found to infringe [Article 6(1)] in the two judgments cite above").
[59] *Pabla Ky v. Finland*, Judgment, para. 34 (emphasis added).
[60] *McGonnell v. UK*, Judgment, para. 51(emphasis added).
[61] *McGonnell v. UK*, Judgment, paras. 53, 55, 57. *See similarly*: Wettstein v. Switzerland, Judgment, para. 47 (where the Court found lack of impartiality because a part-time administrative judge simultaneously represented, as a private practitioner, the opposing party of the applicant in separate proceedings).

37. Nor does *Findlay v. UK*, a case cited by the Defence, support its request to disqualify Judge Ozaki.[62] In *Findlay*, the ECtHR found that the army court martial was not independent and impartial because all officers were appointed by and directly subordinated to the convening officer[63] who had also decided which charges should be brought against Findley and had appointed the prosecuting and defending officers.[64] The agreement of the convening officer was also necessary before the prosecuting officer could accept a plea,[65] and the decision of the court martial was not effective until ratified by him.[66] The involvement of the convening officer in appointments and in key aspects of the case was far-reaching. Similarly, the Inter-American Court of Human Rights ("IACtHR") has also considered the degree of influence and overlap in functions in assessing impartiality and independence of military courts.[67]

38. Further, in *Kleyn v. Netherlands* the ECtHR expressly refrained from judging constitutional frameworks that provided for dual roles of particular bodies and examined whether on the facts of that particular case, the successive legislative advisory and judicial roles of the Council of State gave the requisite appearances of independence and impartiality. As the advisory opinions given in that case on the general transport infrastructure and the subsequent appeals on a particular routing decision could not be regarded as involving the "same case" or "the same decision", fears of lack of independence and impartiality were not objectively justified.[68]

39. On the other hand, even activities generally presumed as compatible with judicial functions can raise unacceptable appearance of bias.[69] For example, in *Pescador Valero v. Spain*, the ECtHR found that a judge who had regular, close and financially lucrative links as a professor with the university sued by the applicant

[62] Defence Request, fn. 65.
[63] *Findlay v. UK*, paras. 75-76.
[64] *Findlay v. UK*, para. 74.
[65] *Findlay v. UK*, para. 74.
[66] *Findlay v. UK*, para. 77.
[67] *See* Cantoral Benavides vs. Perú, Judgment, para. 114 (""The impartiality of the judge is affected by the fact that the armed forces have the dual function of fighting the insurgent groups militarily and of judging and imposing penalties on the members of said groups."). *See also* Castillo Petruzzi y otros v. Perú, Judgment, para. 230.
[68] *Kleyn v. Netherlands*, Judgment, para. 200.
[69] *Contra* Defence Request, para. 23 quoting the 1996 Preparatory Committee Report.

justified fears that he might lack impartiality.[70] This example shows the potential danger of general assumptions and prohibitions, and reinforces the need for fact-specific assessments.

(b) The Defence's submissions fail to satisfy the standard under article 41(2)(a)

40. The Defence's submissions fail to show any appearance of bias in Judge Ozaki within the terms of article 41(2)(a). The Defence does not even attempt to show a connection between Judge Ozaki's judicial functions in the *Ntaganda* case and her position as Ambassador to Estonia for a limited period of time.[71] The three arguments advanced by the Defence are pure conjecture.

41. *First*, the Defence's arguments regarding Judge Ozaki's "belated timing of the resignation, which resulted from her own lack of candour" are obscure.[72] The Defence suggests that Judge Ozaki deliberately withheld her future position to avoid scrutiny when she requested to become a non-full-time judge on 7 January 2019;[73] yet, the Plenary precisely conducted such scrutiny on 4 March 2019 when Judge Ozaki informed the Presidency of her appointment and requested to continue her participation in the *Ntaganda* case.[74] The Defence further speculates that the Presidency "would have […] taken[n] steps before Judge Ozaki had entered into service as a Japanese diplomat";[75] but it is unclear which steps the Presidency could have taken. The Defence also surmises that Judge Ozaki's actions "show[] the existence of conflicting duties";[76] but it does not explain which are those "conflicting duties". In addition, as the Defence concedes,[77] lack of candour is not sufficient to

[70] *Pescador Valero v. Spain*, Judgment, para. 27 (noting that the judge had "concurrently performed the duties of a judge of the Higher Court of Justice of Castilla-La Mancha and those of an associate professor in receipt of income from the opposing party. In the Court's opinion, this situation could have raised legitimate fears in the applicant that Judge J.B.L. was not approaching his case with the requisite impartiality.").
[71] Defence Request, paras. 41-51.
[72] Defence Request, paras. 43-44. *See also* 54-55.
[73] Defence Request, para. 43.
[74] Article 40 Plenary Decision, para. 5.
[75] Defence Request, para. 43.
[76] Defence Request, para. 44.
[77] Defence Request, paras. 19 (noting that lack of candour "further undermines"), 55 (lack of candour "contributes to" an appearance of bias).

justify disqualification; instead, it has been considered when *there is* an actual bias or potential appearance of bias.[78] There is none in this case.

42. *Second*, Judge Ozaki did not acknowledge that her resignation was necessary to 'restore' confidence in her judicial independence because confidence had not been lost.[79] To the contrary, the Majority of the Plenary confirmed that Judge Ozaki's independence was not undermined.[80] The Defence again speculates when it submits that the "personal 'criticisms'" that Judge Ozaki alludes to in her email of 12 April 2019 to the Presidency announcing her intention to resign as Japanese Ambassador to Estonia "may reasonably be interpreted as including Defence submissions".[81] Judge Ozaki did not say that.

43. Further, and contrary to the Defence suggestion, Judge Ozaki's concern was not placed on the "personal 'criticisms'" against her; rather, they were placed on the impact that those criticisms could have in the public confidence of the Court and the fair and expeditious conduct of the *Ntaganda* case. [82]

44. *Lastly*, the Defence's third argument is beyond speculation.[83] The Defence hazards that Judge Ozaki appears to be biased towards Ntaganda because he is perceived to be responsible for her purported personal, financial and professional setbacks. However, the Defence does not present any specific and concrete evidence on these points.[84] The Defence's multi-layered conjecture does not follow from Judge Ozaki's email or from any other facts. Nothing in Judge Ozaki's email suggests that she acted "contrary

[78] Karemera AD, para. 66 ("where the Appeals Chamber held that "the allegations of appearance of bias are supported by Judge Vaz's admission of association and cohabitation with a Prosecution counsel who was one of the trial attorney' appearing in the present case") and para. 67 ("[t]he 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. The Appeals Chamber finds that these circumstances could well lead a reasonable, informed observer to objectively apprehend bias") (emphasis added). *See also* Defence Request, para. 55.
[79] *Contra* Defence Request, para. 45.
[80] Article 40 Plenary Decision, paras. 12-14.
[81] Defence Request, para. 45. *See* Presidency Reconsideration Decision, para. 33.
[82] *See* Presidency Reconsideration Decision, para. 33 (noting that "I do not wish for this situation to continue nor do I wish to invite further unnecessary confusion which may cause a delay in the proceedings"). *Contra* Defence Request, paras. 45, 50.
[83] Defence Request, paras. 46-50.
[84] *See Duque vs. Colombia*, Judgment, para. 165 (requiring specific and concrete evidence to establish bias).

to her own wishes".[85] What she did not wish was any deterioration of the public confidence in the Court and the further delay of the *Ntaganda* proceedings.[86] Further, the Defence speculates without foundation when it submits that "Judge Ozaki has *apparently* suffered a substantial loss of ICC salary as a result being reclassified as a part-time Judge",[87] and suggests that her "career as a Japanese diplomat has *presumably* now been seriously impacted by her resignation",[88] and that all this results from the Defence requests.[89] However, a reasonable and objective observer, adequately informed, would not make such assumptions and inferences. Instead, a reasonable observer would note that, in resigning as Ambassador, Judge Ozaki decided to put the interests of the Court (where she has worked for over 10 years beyond her original tenure with an unimpeachable record) before any other consideration.

45. In sum, the Defence fails to show that, on the facts of this case, the high threshold for disqualification is met.

(c) There is no appearance of bias

46. Not only does the Defence dispute the fact-specific nature of the standard in article 41(2)(a), but also it disagrees with the relevance of any pertinent fact.[90] The Defence wrongly disregards the circumstances and context of this case, which are relevant in assessing Judge Ozaki's judicial independence and impartiality.

47. *First*, Judge Ozaki's functions as Ambassador were confined to bilateral relations between two countries, Estonia and Japan.[91] Moreover, these two countries have no link or interest to the *Ntaganda* case. There was therefore no connection between Judge Ozaki's functions as Ambassador to Estonia and her judicial functions in the

[85] Defence Request, para. 47.
[86] Presidency Reconsideration Decision, para. 33.
[87] Defence Request, para. 48 (emphasis added).
[88] Defence Request, para. 49 (emphasis added).
[89] Defence Request, para. 50.
[90] Defence Request, paras. 58-62.
[91] Article 40 Plenary Decision, paras. 5, 13.

Ntaganda case. The Defence has not submitted otherwise. A reasonable observer would appreciate this fact.

48. Conversely, Judge Odio-Benito's responsibilities as Vice President of a country were quite different in substance and scope from those of Judge Ozaki's.[92]

49. *Second*, Judge Ozaki provided robust assurances to avoid any appearance of impartiality or lack of independence:

> "If and when it may have any implication on the Ntaganda case, I will refrain from executing my responsibility to that extent or notify the Court immediately. I also assure the Court that I am 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."[93]

50. Thus, not only was there no connection between the two functions, but Judge Ozaki guaranteed that any eventual (and at this stage totally hypothetical) connection would be aborted. Although the Defence considers the guarantees "manifestly insufficient", it does not question their genuineness.[94] A reasonable and objective observer would consider the relevance and weight of these assurances given by a professional and respected Judge.

51. *Third*, Judge Ozaki is no longer Ambassador of Japan to Estonia. Her resignation was effective on 19 April 2019. Therefore, and regardless of the date when she commenced her duties as Ambassador (be it 3 April 2019 as Judge Ozaki indicated[95] and the Estonian Ministry of Foreign Affairs appears to confirm,[96] or be 13 February or 26 March 2019 as the Defence suggests),[97] the period of time when she exercised two functions was very short, in particular, considering the total duration of the trial

[92] *Contra* Defence Request, paras. 34, 39.
[93] Article 40 Plenary Decision, para. 5.
[94] *Contra* Defence Request, para. 30.
[95] Article 40 Plenary Decision, para. 5.
[96] *See* Estonian MFA, The Tallinn Diplomatic List, 3 April 2019, pp. 13 and 77. Judge Ozaki does not appear as Ambassador in the more recent list: *see* Estonian MFA, The Tallinn Diplomatic List, 10 May 2019, p. 77.
[97] Defence Request, paras. 5, 44.

which started in September 2015. A reasonable and objective observer would also consider this fact.

52. *Fourth*, not only did Judge Ozaki exercise the two functions for a very limited period, but also she exercised them after the completion of the briefing of the case (on 28-30 August 2018) and after completion of substantive deliberations regarding the article 74 judgment (at least by 18 February 2019).[98] The Defence surmises that the Plenary did not "rely" on this factor, and disagrees with its relevance.[99] Yet, the Majority considered Judge Ozaki's letter and never indicated that this fact was irrelevant. In any event, the Prosecution submits that this is a relevant factor. There is no doubt that the same standards of rigor, independence and impartiality apply throughout the proceedings,[100] and Judge Ozaki has not suggested the contrary. But a reasonable observer would appreciate a distinction between the current stage of the *Ntaganda* case and, for example, the trial phase (which requires presence in the court room on regular basis to receive and assess the evidence as the case unfolds) and substantive deliberations with respect to the article 74 judgment (which involves regular discussions with fellow members of the Trial Chamber about the evidence submitted and making legal and factual findings).

53. In conclusion, a reasonable and objective observer would consider that Judge Ozaki's functions as non-full-time Judge in the *Ntaganda* case and as Ambassador of Japan to Estonia are unconnected and overlapped for a very short and specific period of time.

54. Finally, the Defence does not establish why Ntaganda has an objectively justified fear that Judge Ozaki would be partial against him in light of the personal consequences that—the Defence speculates—his requests have caused her.[101] The Defence presents no credible basis to support this assertion beyond conjecture. Moreover, while the accused's standpoint may be relevant, it is certainly not decisive. As the ECtHR has confirmed, what is determinant is whether the fear could be considered as objectively

[98] Article 40 Plenary Decision, para. 5 (quoting Judge Ozaki) and Presidency Reconsideration Decision, para. 33 (quoting Judge Ozaki).
[99] Defence Request, paras. 58-59.
[100] Defence Request, para. 59.
[101] Defence Request, para. 62.

justified.[102] And the Defence has not shown that it is. Because it is not. A reasonable and well-informed observer would not reasonably and objectively apprehend bias in Judge Ozaki in the circumstances of this case.

Conclusion

55. Based on the foregoing, the Prosecution requests that the Defence Request be dismissed.

Fatou Bensouda
Prosecutor

Dated this 27th day of May 2019
At The Hague, The Netherlands

[102] *Morel vs. France*, Judgment, para. 44 ("The Court accepts that that situation could raise doubts in the applicant's mind about the impartiality of the Commercial Court. However, it has to decide whether those doubts were objectively justified). *See also Sahiner v Turkey*, Judgment, para. 44 ("In deciding whether in a given case there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified").