

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**

Date: **6 June 2019**

THE *AD HOC* PRESIDENCY

Before: Judge Chile Eboe Osuji, President
Judge 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

Request to provide observations on the submissions 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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Further to the Notification of the Observations of Judge Ozaki in relation to the 'Request for Disqualification of Judge Ozaki' dated 20 May 2019 (ICC-01/04-02/06-2347-Red) ("Judge Ozaki's Observations"),¹ Counsel representing Mr. Ntaganda ("Defence"), hereby submits this:

Request to provide observations on the submissions of Judge Ozaki

INTRODUCTION

1. The Defence requests leave to provide observations on three elements of Judge Ozaki's submissions concerning her potential disqualification under Article 41(2)(b): (i) her claim that lack of appearance of judicial independence is not a basis for lack of impartiality that can be considered by the Judges under Article 41(2)(b); (ii) her claim that the reasonable apprehension of lack of independence and impartiality is based on mere "speculation"; and (iii) her declaration that the information that she can to provide about the circumstances of her employment with the Government of Japan is limited by what the Government of Japan has already disclosed.

2. Judge Ozaki's statement that she is "not in a position to disclose anything other than has been disclosed [...] by the Government of Japan"² directly contributes to the apprehension that her judicial independence from her Government has been irreparably compromised. This apprehension is reasonable, continuing and not compatible with the appearance of impartiality. Judge Ozaki's statement reinforces the reasonableness of this apprehension. The Defence should have the opportunity to provide meaningful observations on this new and important fact.

¹ Notification of the Observations of Judge Ozaki in relation to the 'Request for Disqualification of Judge Ozaki' dated 20 May 2019 (ICC-01/04-02/06-2347-Red), 4 June 2019, ICC-01/04-02/06-2351-Anx ("Judge Ozaki's Observations"); *See also* Request for Disqualification of Judge Ozaki, 20 May 2019, ICC-01/04-02/06-2347-Red ("Motion for Disqualification of Judge Ozaki"); Prosecution Response to the Defence "Request for Disqualification of Judge Ozaki" (ICC-01/04-02/06-2347-Red), 27 May 2019, ICC-01/04-02/06-2349 ("Prosecution Response to Motion for Judge Ozaki's Disqualification").

² Judge Ozaki's Observations, p.3.

PROCEDURAL BACKGROUND

3. The relevant procedural background is set out in the Motion for Disqualification of Judge Ozaki.³

4. On 4 June 2019, pursuant to the invitation of the *Ad Hoc* Presidency, Judge Ozaki provided her views on whether she must be disqualified under Article 41(2)(b) because of an appearance of lack of impartiality arising from her concurrent service as a Japanese diplomat while a Judge of this Court sitting on an ongoing case.

APPLICABLE LAW

5. The *Ad Hoc* Presidency's Decision of 14 May 2019 prescribed a briefing schedule for the filing of any motion for disqualification of Judge Ozaki, responses thereto, and for Judge Ozaki, if she wished, "to present comments on any request for disqualification, pursuant to article 41(2)(c) of the Statute and rule 34(2) of the Rules of Procedure and Evidence [...]."⁴

6. The *Ad Hoc* Presidency's Decision of 14 May 2019 is silent as to whether the Defence may submit observations on Judge Ozaki's submissions. The Defence considers, accordingly, that it must seek leave to do so. This is also supported by past practice.⁵ The standards for granting this request are not governed by Regulation 24(5) of the Regulations of Court, which is limited to replies to "responses." The Judges, accordingly, have a wide discretion in determining whether such additional

³ Motion for Disqualification of Judge Ozaki, paras.3-14.

⁴ Decision on the "Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute" (ICC-01/04-02/06-2337) and the "Request for Reconsideration of 'Decision concerning the "Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki", the "Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019"' (Filing #2336), and for Additional Disclosure" (ICC-01/04-02/06-2339) and related requests, 14 May 2019, ICC-01/04-02/06-2346 ("*Ad Hoc* Presidency's Decision of 14 May 2019"), p. 13.

⁵ See e.g. *Bemba et al.*, Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 20 June 2014, ICC-01/05-01/13-511-Anx, para.8.

submissions are warranted. Furthermore, according to past practice, the decision as to whether leave is granted is to be taken by the Judges, not the *Ad Hoc* Presidency.⁶

SUBMISSIONS

I. Judge Ozaki's legal submissions concerning the limited scope of Article 41(2)(b) would mean that a party is unable to raise most issues of judicial independence, let alone to be heard

7. Judge Ozaki asserts that a party is not permitted to raise any issues of judicial independence under Article 41(2)(b) unless it fits within the narrow scope of "personal bias" as described in the *Mucić et al.* case applying a differently-worded provision.⁷ She interprets the *Ad Hoc* Presidency's Decision of 14 May 2019 concerning procedure as having supported this view. Judge Ozaki disregards most of the Defence's arguments on this basis.⁸

8. The Defence submits that it should be entitled to provide observations on this strictly legal submission. Any acceptance of this legal position would have major implications, including on Mr. Ntaganda personally. It would mean that an Accused has no right to be heard on an issue of judicial independence unless it meets a narrow definition of bias and appearance of bias. Most questions of judicial independence, on this view, could not be initiated by a Party.

9. The Defence wishes to explain why this is an unsound interpretation with unacceptable consequences. This was not the procedure followed at the ICTY when similar issues arose. It is not the procedure of any State, as far as the Defence is aware, with constitutional fair trial rights. And the *Ad Hoc* Presidency's Decision of

⁶ *Id.*

⁷ Judge Ozaki's Observations, p.1.

⁸ *Id.*

14 May 2019 says nothing about this being the consequence of its interpretation that a party has no standing to make an application under Article 40.⁹

10. Since a Judge's view on a point of law will usually be entitled to more weight than the view of a Party, the Defence should be given an opportunity to provide observations to persuade the Judges as to why Judge Ozaki's view, respectfully, is incorrect and would seriously infringe the right to be heard and natural justice. The Defence considers, moreover, that Judge Ozaki's view is an unforeseeably erroneous interpretation of the *Ad Hoc* Presidency's Decision of 14 May 2019.

II. The information that Judge Ozaki says is speculation is within her own knowledge

11. Judge Ozaki submits that the circumstances raised by the Defence that give rise to an appearance of a lack of judicial independence and impartiality "are speculative" and, therefore, warrant no response from her.¹⁰

12. The professional, financial and personal consequences of Judge Ozaki's abrupt resignation as Japan's Ambassador to Estonia are all matters within her own knowledge. The facts in question are not unknowable: they are known, and known by Judge Ozaki. A reasonable observer's questioning of the lack of information is not improper "speculation," but rather a legitimate and unanswered question arising from Judge Ozaki's refusal to provide information within her knowledge.

13. Perhaps most importantly, the start-date of Judge Ozaki's employment with the Ministry of Foreign Affairs remains unanswered. Both the Prosecution¹¹ and the

⁹ *Ad Hoc* Presidency's Decision of 14 May 2019, paras.39-40. The decision does quote the paragraphs from the *Mucić et al.* case, but does not express support for the proposition that questions of bias are to be so narrowly approached at the ICC. Furthermore, the *Ad Hoc* Presidency would have known that the ICTY Bureau had also entertained full submissions on the question of Judge Ohio-Benito's judicial independence from the Defence in that case, and had decided the matter with the benefit of those submissions.

¹⁰ Judge Ozaki's Observations, p.3.

Defence¹² have been driven to hypothesize about the duration of this employment. This employment creates as much of an appearance of bias and lack of independence as does the Ambassadorship itself. Yet Judge Ozaki's submissions provide no clarity on the start date of her employment with the Japanese Ministry of Foreign Affairs, let alone what obligations and/or benefits were associated with this employment.

14. The Defence should be given leave to address the significance of these failures on the appearance of bias and lack of independence. In particular, the Defence should be permitted to address whether sufficient circumstances exist to have expected some factual information from Judge Ozaki relevant to the current matter and whether, as Judge Ozaki asserts, the request is "new."¹³

III. The significance of Judge Ozaki's statement that she is "not in a position to disclose anything other than what has been disclosed or communicated by the Japanese Government"

15. Judge Ozaki submits that she is "not in a position to disclose anything other than what has been disclosed or communicated by the Japanese Government."¹⁴

16. This statement openly confirms that Judge Ozaki believes that she has ongoing obligations to the executive branch of the Japanese Government; that these obligations include — as the Defence previously submitted¹⁵ — obligations of confidentiality; and that these confidentiality obligations impact on what she can say in respect of these very disqualification proceedings.

17. The appearance of Judge Ozaki's lack of impartiality and judicial independence is reinforced by this statement. A reasonable observer could not help

¹¹ Prosecution Response to Motion for Judge Ozaki's Disqualification, para.51.

¹² Motion for Disqualification of Judge Ozaki, para.48.

¹³ Judge Ozaki's Observations, p.3.

¹⁴ *Id.*

¹⁵ Motion for Disqualification of Judge Ozaki, para.48.

but take this statement as evidence of continuing obligations to the executive branch of a State Party that are incompatible with judicial independence. The Defence should be accorded leave to fully address this new circumstance, which could not have been addressed in the Motion for Disqualification of Judge Ozaki.

CONCLUSION AND RELIEF REQUESTED

18. Leave is requested to provide observations on Judge Ozaki's submissions in respect of the three issues set out above. Judge Ozaki's legal observations will likely carry weight with her colleagues, warranting granting the Defence a full opportunity to persuade the Judges that this legal view is erroneous. Judge Ozaki's statement that she is unable to provide more information than that provided by the Japanese Government is new and warrants observations from the Defence. The appearance of Judge Ozaki's independence and impartiality will not be assisted by curtailing the Defence's opportunity to address her submissions.

RESPECTFULLY SUBMITTED OF THIS 6TH DAY OF JUNE 2019

A handwritten signature in black ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel representing Mr. Bosco Ntaganda

The Hague, The Netherlands