



Internal memorandum
Memorandum interne

To À	Judge Chung	From De	Ad hoc Presidency
Date	11 April 2019	Through Via	
Ref.	2019/PRES/00003-29	Copies	
Subject Objet	Decision on request for excusal dated 11 April 2019		

CONFIDENTIAL

The *ad hoc* Presidency of the International Criminal Court (the 'Court'), composed of Judge Chile Eboe-Osuji, Judge Marc Perrin de Brichambaut and Judge Howard Morrison, has before it a request for excusal from Judge Chung of 11 April 2019, in which he seeks to be excused from his functions in any plenary in relation to the 'Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki' before the Presidency ('Defence Request').¹

The *ad hoc* Presidency hereby grants the request for excusal.

Factual background

Judge Chung is a Judge of Trial Chamber VI, which is seized of *The Prosecutor v. Bosco Ntaganda*. He sits in Trial Chamber VI with Judges Fremr and Ozaki.

On 1 April 2019, the Defence for *Ntaganda* filed the Defence Request before the Presidency, seeking the disclosure of information and communication concerning the circumstances of Judge Ozaki's appointment as Ambassador of Japan to Estonia. The Defence for *Ntaganda* simultaneously filed a motion for a temporary stay of

¹ ICC-01/04-02/06-2327.

proceedings before Trial Chamber VI, requesting a temporary stay of deliberations in this case until it has had a reasonable opportunity to litigate whether Judge Ozaki should be disqualified from the present case ('Stay of Proceedings Motion').²

On 5 April 2019, Judge Fremr made a request for excusal, which was granted by an *ad hoc* Presidency composed as at present on 10 April 2019.

On 11 April 2019, the *ad hoc* Presidency transmitted the Request to all judges of the Court who had participated in the 41st plenary session of 4 March 2019 (including Judge Chung), except Judge Fremr, anticipating that a further plenary discussion may be needed on the Defence Request. The *ad hoc* Presidency also transmitted, in the same communication, its decision on the excusal request of Judge Fremr of 10 April 2019.

The Request

The request for excusal of Judge Chung is hereby extracted in its entirety (footnotes omitted), with his consent:

Dear Ad hoc Presidency,

1. On 4 March 2019, pursuant to Article 40(4) of the Statute, the Judges of the Court decided in plenary on a request by Judge Ozaki. As a Judge at this Court, I was part of the plenary.
2. On 1 April 2019, the defence for Mr Ntaganda ('Ntaganda Defence') filed the 'Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki' ('Request'), requesting the Presidency to provide certain information related to the 'circumstances and facts taken into consideration' by plenary when considering Judge Ozaki's request, as well as certain information related to Judge Ozaki's appointment as the Japanese Ambassador to the Republic of Estonia.

² 'Motion for Temporary Stay of Proceedings', 1 April 2019, ICC-01/04-02/06-2328 ('Stay of Proceedings Motion').

3. The same day, the Ntaganda Defence requested Trial Chamber VI, of which I am a member, together with Judge Ozaki, for a temporary stay of proceedings 'until it has had a reasonable opportunity to litigate whether Judge Ozaki should be disqualified from the [Ntaganda] case' ('Request for Stay').

4. I note that the Request and the Request for Stay are closely related. I further note that the Ntaganda Defence indicates in the Request that it potentially intends to bring a request in relation to Judge Ozaki before the Presidency or another 'applicable body'. In the Request for Stay, the Ntaganda Defence similarly foreshadows litigation of 'the issue of whether Judge Ozaki's actions have affected confidence in her independence and/or has given rise to a reasonable apprehension of bias'.

5. In these circumstances, mindful that Judge Ozaki and I are both members of Trial Chamber VI, which is seized of the case in relation to which the Defence has indicated to bring such a motion, I consider it appropriate to recuse myself from the Plenary for the purposes of the decision on the Request as well as any further decisions potentially made by the Plenary on this matter.

6. Pursuant to Rule 33(1) of the Rules of Procedure and Evidence, I hereby the Ad hoc Presidency to excuse me from the Plenary for the pose of the decision on the Request as well as any further decisions potentially made by the Plenary on this matter. Pursuant to Rule 33(2) of the Rules of Procedure and Evidence, I submit this request confidentially.

Decision

The *ad hoc* Presidency considers that the request for excusal is properly before it, in accordance with article 41 of the Rome Statute and rule 33 of the Rules of Procedure and Evidence.

The *ad hoc* Presidency considers that there is an evident risk that there may be an objectively reasonable *appearance* that Judge Chung may be unable to assess the Defence Request in an impartial manner. In particular, his position as a fellow judge of Trial Chamber VI may give rise to an objectively reasonable appearance that his interest in completing the case could be perceived as impacting upon his impartiality when determining the Defence Request (and any subsequent directly related applications).

The *ad hoc* Presidency notes, in this regard, that a distinction must be drawn between the exercise of an internal administrative function connected to questions of the independence of a judge, which is entrusted by article 40(4) of the Rome Statute to all judges other than an individual judge concerned, and the potential judicial matter of the capacity of a judge to sit in a specific case.³ The *ad hoc* Presidency considers that Judge Chung's participation in the internal administrative article 40 deliberations of the plenary in respect of the general question of Judge Ozaki's independence is clearly distinct from the situation in which Judge Chung now finds himself, as a result of the Defence Request having foreshadowed the likelihood of a pending challenge to Judge Ozaki's capacity to continue sitting in the *Ntaganda* case.

Accordingly, the request for excusal is granted by the *ad hoc* Presidency.

Further, the *ad hoc* Presidency notes that Judge Chung has consented to his request and the present Presidency decision thereon eventually being made publicly available, as the Presidency considers necessary.

³ See e.g. *The Prosecutor v. Mucić et. al*, IT-96-21, "Decision of the Bureau to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves", 25 October 1999, paras. 7-10, <http://www.icty.org/x/cases/mucic/acdec/en/91025DQX12987.htm>.