Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-02/06**
Date: **13 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

Prosecution's Response to the Defence "Request for leave to reply to 'Prosecution's Response to the Defence '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)", ICC-01/04-02/06-2342

Source: **Office of the Prosecutor**

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Introduction

1. The Prosecution requests that the Presidency dismiss the Defence request for leave to reply ("Request to Reply").[1]

2. No reply is warranted. The Defence identifies no new issues arising from the Prosecution Response that would merit a reply. Nor would the Judges be assisted by further submissions on any of the issues proposed for reply.

Procedural History

3. On 22 March 2019, the Presidency notified the decision of the plenary of Judges pursuant to article 40 of the Rome Statute.[2]

4. On 1 April 2019, the Defence filed a request for disclosure to the Presidency.[3] On the same date, the Defence filed a request for a temporary stay of proceedings.[4]

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

6. On 8 April 2019, the Defence made a second request for disclosure to the Presidency.[7]

7. On 18 April 2019, the Trial Chamber dismissed the Defence request for a temporary stay of proceedings.[8] On the same date, the Presidency rejected both Defence requests for disclosure.[9]

[1] ICC-01/02-02/06-2342 ("Request to Reply").
[2] ICC-01/04-02/06-2326 ("Article 40 Decision").
[3] ICC-01/04-02/06-2327.
[4] ICC-01/04-02/06-2328.
[5] ICC-01/04-02/06-2329.
[6] ICC-01/04-02/06-2330.
[7] ICC-01/04-02/06-2332.
[8] ICC-01/04-02/06-2335.
[9] ICC-01/04-02/06-2336.

8. On 30 April 2019, the Defence filed a request for reconsideration of the Decision of the plenary under article 40, and for disqualification.[10]

9. On 1 May 2019, the Presidency filed the notification that Judge Ozaki had resigned as Japanese Ambassador to Estonia, effective 18 April 2019.[11]

10. On 2 May 2019, the Defence filed a request for reconsideration of the Presidency's decision on disclosure, and for additional disclosure.[12]

11. On 8 May 2019, the Prosecution responded to the Defence request for reconsideration of the Article 40 Decision.[13] On the same date, the Prosecution responded to the Defence request for reconsideration of the Presidency's decision on disclosure.[14]

12. On 9 May 2019, the Defence filed a request for leave to reply to the Prosecution's response to the Defence request for reconsideration of the Article 40 Decision.[15]

Submissions

7. As the Defence acknowledges,[16] Regulation 24(5) prescribes that a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

8. The Defence identifies ten issues on which it seeks leave to reply. It fails to justify why the Presidency should exercise its discretion to grant leave to reply to the Prosecution Response. The proposed issues for reply either do not arise from the Prosecution response (Issues 1 and 7); are not new and could reasonably have been anticipated by the Defence – or were already addressed by it in its Request

[10] ICC-01/04-02/06-2337 ("Reconsideration Request").
[11] ICC-01/04-02/06-2338.
[12] ICC-01/04-02/06-2339.
[13] ICC-01/04-02/06-2340 ("Prosecution Response").
[14] ICC-01/04-02/06-2341.
[15] ICC-01/04-02/06-2342.
[16] Request to Reply, para. 2.

for Reconsideration – (Issues 2-9); and are not necessary for adjudication of the matter (Issues 2-9).

9. The Defence contends, at the outset, that an applicant must explain why leave to reply should be granted in order to demonstrate why an issue is new and could not reasonably have been anticipated.[17] In the decision cited by the Defence for this point, the Appeals Chamber held that the Defence had failed to demonstrate why the issues for which leave to reply was sought were new and could not reasonably have been anticipated.[18] Nor had the Defence explained why a reply was otherwise warranted.[19]

10. The Prosecution does not contest that a brief explanation as to why an issue is new and could not have been anticipated must be made in an application for leave to reply. This is not the same as providing substantive submissions on the issue itself, under the guise of a request for leave to reply. The Appeals Chamber and other Chambers of this Court have been clear that it is impermissible to make submissions on the merits that go beyond a brief explanation of why the issue is new and could not have been anticipated.[20]

The application should be rejected on its merits

13. The Request to Reply should be dismissed because the points on which the Defence seeks to reply do not fall within the allowable grounds for reply.

[17] Request to Reply, para. 3.
[18] ICC-01/04-02/06-1994, para. 13.
[19] ICC-01/04-02/06-1994, para. 14.
[20] *See*, ICC-01/04-01/06-824, para.68: "According to the Appeals Chamber's jurisprudence, the content of an application for leave to reply may not in fact constitute a substantive reply to issues raised in a response. The Appeals Chamber has deprecated the practice of the filing of a substantive reply prior to leave being granted by the competent Chamber and ruled that such a practice may, in and of itself, give rise to the rejection of an application for leave."; *See also*, ICC-01/05-01/08-2985, para.5, ICC-01/05-01/08-3279, paras.4-5; ICC-01/04-02/06-1994, paras.13 and 14.

The first issue does not arise from the Prosecution Response

14. The Defence seeks to reply to the Prosecution's submissions about the *Taylor* case in paragraph 25 of the Prosecution Response, by incorrectly stating that the Prosecution was referring to Judge Ozaki, or to the Defence's integrity.[21] The entirely of paragraph 25 refers to the Appeals Chamber judgment in the *Taylor* case where the Defence (in that case) failed to put forward ascertainable facts and firm evidence to support its motion for a lack of judicial independence. The Prosecution referred to this precedent to show: (i) that factual assessments for disqualification are done on a case-by-case basis; (ii) that allegations of lack of judicial independence are extremely serious allegations; (iii) that, in that case, the Defence had failed to support its motion with ascertainable facts and firm evidence, leading to the Appeals Chamber finding that the Defence claims (in that case) were "unsupported, disingenuous and ridiculous". The sentence "[t]here were none" summarises the *Taylor* Appeals Chamber's findings *in the Taylor case*. The Defence wrongly contends that the phrase "There were none" in paragraph 25 was referring to the case of Judge Ozaki,[22] or, somehow, to the integrity of the Defence in the *Ntaganda* case.

15. Accordingly, the issue does not arise from the Prosecution's submissions and leave to reply should not be granted.

16. In any event, the Defence argued throughout its Request for Reconsideration that Judge Ozaki lacks independence, lacks candour and should be disqualified.[23] As these arguments were at the very core of its Request for Reconsideration, nothing new arises from the Prosecution Response.[24]

[21] Request to Reply, para. 1, fn. 2 and para. 6, fn. 17.
[22] Request to Reply, para. 7.
[23] Request for Reconsideration, paras. 1-4, 28-44, 51.
[24] The Prosecution already made reference to the *Taylor* case in its 5 April 2019 response to the Defence request for a temporary stay of proceedings: ICC-01/04-02/06-2329, para. 22.

Second issue: the Request for Reconsideration is moot

17. Leave to reply should not be granted on this issue, as there is nothing in the Prosecution Response that is new, that was not anticipated, or that was not already argued by the Defence before the Presidency.

18. While it is correct that the Presidency notified the Parties that Judge Ozaki had resigned as Ambassador of Japan to Estonia after the Defence filed its Request for Reconsideration, the Defence has already briefed the Presidency as to why that notification does not render its Request for Reconsideration moot. The Defence argued the point to the Presidency in its request for reconsideration of the disclosure decisions, by expressly arguing that neither the disclosure decisions nor the Request for Reconsideration of the Article 40 decisions are moot.[25] The Presidency is thus briefed by the Defence on this issue. The Defence *did* anticipate that this would be an issue, and it addressed it. It also extensively argued its position before the Presidency on the alleged relevance of which entity notified the Court of Judge Ozaki's resignation.[26]

19. Further submissions on a point that is not new and that was anticipated - and argued - does not meet the test for leave to reply.

Third issue: substantive deliberations were completed as of 18 February 2019

20. This issue is not new, nor are further submissions on the point warranted. First, on 22 March 2019, the Defence received the text of Judge Ozaki's memorandum to the Presidency and all Judges dated 18 February 2019,[27] where she stated that she would have a dual role as ICC judge and Ambassador to Estonia "for a limited

[25] ICC-01/04-02/06-2339, paras. 2 and 40: "Neither the Request for Reconsideration of the Judges' Article 40 Decision, nor the First and Second Disclosure requests are moot because of the Presidency's public notification on 1 May 2019 concerning Judge Ozaki's purported resignation as Japanese Ambassador to Estonia." (para. 2). A lengthy discussion on this point ensues.
[26] ICC-01/04-02/06-2339, paras. 4, 33-38, 40.
[27] ICC-01/04-02/06-2326.

period after the completion of substantive deliberations on the Article 74 Judgment". The Prosecution is not interpreting the text,[28] it is repeating the exact assertion made by Judge Ozaki.

21. Second, the Prosecution argued in submissions on 5 April 2019 that Judge Ozaki's dual role was for a limited time when substantive deliberations were complete.[29] Nothing in the Prosecution's argument on 8 May 2019 is new or could not have been anticipated.

22. Third, the Defence argues that "deliberations are not over until the Judgement is rendered", which is not even at issue. Judge Ozaki has confirmed that "substantive deliberations" in the *Ntaganda* case are, in fact, over.

Fourth issue: the Defence has no right to be heard

23. Leave to reply should not be granted on this issue as it is not new or unanticipated. The Defence itself conceded that it is unclear whether the Parties have a statutory right to participate in proceedings under article 40.[30] The Defence also argued in its Request for Reconsideration that reconsideration is warranted because the Plenary did not hear submissions from the Parties prior to the Decision.[31] It was not unforeseeable, therefore, that the Prosecution would rely on an ICC decision - dated 18 December 2013 and available to both Parties - that holds that "the right to be heard, whilst indeed a fundamental principle, does not extend so far as to prevent under any circumstances that decisions might be taken *inaudita altera parsi* and that, accordingly, the mere fact that one decision is taken *inaudita altera parsi* cannot per se be held as significantly affecting the fairness of

[28] *Contra*, Request to Reply, para. 13.
[29] ICC-01/04-02/06-2329, paras. 16, 21
[30] Request for Reconsideration, para. 16.
[31] Request for Reconsideration, para. 15.

the proceedings".[32] The Defence, it seems, disagrees with the decision but this is not a basis to grant leave to reply.

Fifth issue: the date on which Judge Ozaki's service with Japan commenced

24. Leave to reply should not be granted on this issue. It is not new. The Defence has made extensive submissions already about when it claims that Judge Ozaki assumed her position as Ambassador of Japan to Estonia, or assumed any functions within the Japanese Government (before 3 April 2019, according to the Defence).[33] The Prosecution did not confuse the Defence position.

Sixth issue: the Judges took into account the drafting history of the Rome Statute

25. This issue is not new and does not warrant a reply. The Defence disagrees with the Prosecution's position, which is not a basis for reply. Nor will the judges be further assisted by arguments on whether or not they took the Statute's drafting history into account when reaching their decision. The Plenary has full access to the drafting history of the ICC and the Defence already advanced lengthy arguments on the drafting history in its Request for Reconsideration.[34]

Seventh issue: article 40 favours flexibility for concurrent employment by an ICC judge

26. Leave to reply is not warranted on this issue. It is not new, nor does it even arise from the Prosecution Response. In paragraph 23 of the Prosecution Response, the Prosecution correctly notes that the text of article 40 "does not contain a blanket prohibition on professional activities by non-full-time judges". This accurately reflects the text of article 40. The Defence incorrectly states that this statement "has no factual basis".[35]

[32] Prosecution Response, para. 20, fn 26.
[33] Request for Reconsideration, paras. 15, 32, 41.
[34] Request for Reconsideration, paras. 21-25.
[35] Request to Reply, para. 18.

27. Critically, the Defence *already agreed with and argued this very fact* in its Request for Reconsideration. It argues strenuously that Judge Ozaki lacked candour by requesting to be excused from full-time judicial service because the request "if granted, would liberate her from the prohibition on any other employment than being an ICC Judge, as prescribed by Article 40(3)".[36]

Eighth issue: the applicability of State practice in the context of the Rome Statute

28. This issue is not new and does not warrant a reply. It was not unforeseeable that the Prosecution would put national practice in context within the framework of this Court, where article 21(1) mandates that the Court first apply the Statute, Elements of Crimes and Rules of Procedure and Evidence. The issue reveals no more than a disagreement with the Prosecution. Moreover, the Defence already put forward lengthy and comprehensive arguments on national (and international) practice in its Request for Reconsideration.[37]

Ninth issue: one ECHR decision and one ECCC decision support the Prosecution's position

29. This issue is not new. The two decisions relied upon by the Prosecution pre-date the Defence's Request for Reconsideration and should have been anticipated. Moreover, the Prosecution made reference to the ECCC case on 5 April 2019, in its response to the Defence request for a temporary stay of proceedings.[38] The Defence was in a position to make arguments about these decisions, if it deemed necessary at the time it filed its original request. It cannot do so now.

Tenth issue: the Defence misstated the test for reconsideration

30. No reply is necessary on this issue. Nothing new arises, nor are further arguments warranted.

[36] Request for Reconsideration, para. 37.
[37] Request for Reconsideration, paras.26-36, 47-49.
[38] ICC-01/04-02/06-2329, para. 22.

31. The Prosecution did not mischaracterise the Defence arguments on the test for reconsideration.[39] In its Request for Reconsideration, the Defence stated that "[t]he traditional grounds for reconsideration, new arguments and new facts, are abundant".[40] In its Prosecution Response, the Prosecution corrected that the test for reconsideration has been consistently held as "exceptional" and should only be done "if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice".[41] New arguments and new facts "*may* be relevant" to assess whether the high test for reconsideration is met, but alone they do not justify reconsideration.[42] This is the correct test.

32. The Defence could have anticipated that the Prosecution would make reference to the test for reconsideration, as set out in the ICC jurisprudence.

Conclusion

33. Based on the foregoing, the Prosecution requests that the Defence Request to Reply be dismissed.

Fatou Bensouda
Prosecutor

Dated this 13th day of May 2019
At The Hague, The Netherlands

[39] *Contra*, Request for Reply, para. 21.
[40] Request for Reconsideration, para. 15.
[41] Prosecution Response, para. 18.
[42] Prosecution Response, para. 18.