

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

**Joint Response of the Common Legal Representatives of Victims to the Defence
"Request for leave to Reply to the Responses of the Prosecution (ICC-01/04-02/06-
2349) and Victims' Legal Representatives (ICC-01/04-02/06-2348)
to Request for Disqualification of Judge Ozaki"**

Source: Office of Public Counsel for Victims

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Former Child Soldiers (jointly the “Legal Representatives”) hereby submit a joint response to the Defence “Request for leave to Reply to the Responses of the Prosecution (ICC-01/04-02/06-2349) and Victims' Legal Representatives (ICC-01/04-02/06-2348) to Request for Disqualification of Judge Ozaki” (the “Request for Leave to Reply”).¹

2. The Legal Representatives oppose the Request for Leave to Reply with regard to the third and the forth issues presented by the Defence concerning directly their previous submissions. The Legal Representatives do not address the first and the second issues presented by the Defence since they do not concern their previous submissions but this should not be understood as a tacit acceptance of the Defence position. The *third issue* on which leave to reply is requested discusses the preparatory works of the Rome Statute.² The issue was addressed explicitly by the Defence in its previous filings under the present litigation³ demonstrating that it was not unforeseeable for the Defence. As regards the *forth issue*,⁴ it constitutes the mere point of disagreement between the Defence and the Legal Representatives as to the interpretation of certain facts. However, further submissions from the Defence on the topic will not assist the *ad hoc* Presidency any further in the adjudication of the Request for Disqualification. Accordingly, the Request for Leave to Reply should be rejected.

¹ See the “Request for leave to reply to the Responses of the Prosecution (ICC-01/04-02/06-2349) and Victims' Legal Representatives (ICC-01/04-02/06-2348) to Request for Disqualification of Judge Ozaki”, [No. ICC-01/04-02/06-2350](#), 31 May 2019 (the “Request for Leave to Reply”).

² *Idem*, para. 9.

³ See the “Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute”, [No. ICC-01/04-02/06-2337](#), 30 April 2019, para. 22. See also the “Request for Disqualification of Judge Ozaki”, [No. ICC-01/04-02/06-2347-Conf](#), 20 May 2019 (the “Request for Disqualification”). A public redacted version was filed on 21 May 2019, [No. ICC-01/04-02/06-2347-Red](#).

⁴ See the Request for Leave to Reply, *supra* note 1, paras. 10-11.

II. PROCEDURAL BACKGROUND

3. On 21 May 2019, the Defence filed the “Request for Disqualification of Judge Ozaki”.⁵

4. On 27 May 2019, the Legal Representatives filed a Joint Response to the Defence Request for Disqualification of Judge Ozaki.⁶ The Prosecution filed its response on the same day.⁷

5. On 31 May 2019, the Defence filed the Request for Leave to Reply.⁸ The Defence requests leave to Reply on four issues, two of which concern the submissions of the Legal Representatives:

- (Third issue) the revisions to the ILC Draft ICC Statute do not imply a tacit acceptance of concurrent service in the executive of a State;⁹ and
- (Forth issue) Judge Ozaki’s statement while a candidate to a judicial vacancy, that she was required by the ICC Statute to resign from the Japanese Government, was predicated on fulltime appointment.¹⁰

III. SUBMISSIONS

6. In accordance with regulation 24(5) of the Regulations of the Court:

“[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated”.

⁵ See the Request for Disqualification, *supra* note 3, paras. 20-24.

⁶ See the “Joint Response of the Common Legal Representatives of Victims to the Defence Request for Disqualification of Judge Ozaki (ICC-01/02-04/06-2347)”, [No. ICC-01/02-04/06-2348-Conf](#), 27 May 2019 (the “Joint Response”).

⁷ See the “Prosecution Response to the Defence ‘Request for Disqualification of Judge Ozaki’ (ICC-01/04-02/06-2347)”, [No. ICC-01/04-02/06-2349](#), 27 May 2019.

⁸ See the Request for Leave to Reply, *supra* note 1.

⁹ *Idem*, para. 9.

¹⁰ *Ibid.*, paras. 10-11.

7. The Legal Representatives submit that the issues identified in the Request for Leave to Reply cannot be characterised as new issues which the Defence could not have reasonably anticipated. The Request for Leave to Reply is entirely without merit and it must therefore be rejected, as were previous requests for leave to reply submitted in the current litigation.¹¹

8. As regards the *third issue*, concerning the drafting history of the Rome Statute, the Defence indicates that it was unforeseeable that the Legal Representatives would argue that the removal of a sentence from a prior version of Article 40 of the Statute implies a “*tacit acceptance*” of the activities addressed in the deleted sentence.¹² The Legal Representatives posit that a line of argument that the removal of the sentence meant a tacit acceptance was entirely foreseeable to the Defence. This remains valid even without entertaining whether the issue, as formulated, reflects accurately the submission of the Legal Representatives.¹³ The reason is that, in fact, the Defence already anticipated this point in its previous filings. Indeed, when discussing the drafting history in one of its requests for reconsideration the Defence argued that: “[t]he absence of an express prohibition on Judges of the Court being employed with the executive branch of a State does not reflect a tacit acceptance that such employment is consistent with Article 40(2)”.¹⁴ It further extensively discussed the corresponding

¹¹ See the “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’”, [No. ICC-01/04-02/06-2346](#), 14 May 2019, para. 11.

¹² See the Request for Leave to Reply, *supra* note 1, para. 9. See the “Report of the International Law Commission on Its Forty-Sixth Session, Draft Statute for An International Criminal Court, 2 May-22 July 1994”, [UN doc. A/49/10\(SUPP\)](#), September 1994, p. 56. The sentence, that was part of the Draft and later deleted, read as follows: “*In particular, [Judges] shall not while holding the office of judge be a member of the legislative or executive branches of the Government of a State, or of a body responsible for the investigation or prosecution of crimes*”.

¹³ See the Joint Response, *supra* note 6, para. 20.

¹⁴ See the “Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute”, [No. ICC-01/04-02/06-2337](#), 30 April 2019, para. 22 (emphasis added).

drafting history in its Request for Disqualification of Judge Ozaki.¹⁵ It follows that a reply on this point should not be granted. The Defence merely seeks to impermissibly repeat and/or supplement its original submissions.

9. As regards the *forth issue*, the Defence reminds that it quoted Judge Ozaki's views while a candidate to a judicial vacancy that "*the Rome Statute would require her to resign from the Government of Japan 'once elected'*"¹⁶ and wishes to reply the Legal Representatives submission that this "*was [...] predicated on [a] full-time appointment*" regime.¹⁷ This constitutes the mere point of disagreement between the Defence and the Legal Representatives. The Joint Response only argued in that regard that the Defence had misinterpreted Judge Ozaki's responses to the questionnaire prepared by Coalition for the International Criminal Court for purposes of the 2009 Election of Judges.¹⁸ The questionnaire is publicly available and the Plenary is in possession of all the material it requires to take an informed decision on the subject.¹⁹

10. Moreover, this line of argument was articulated with the intention to cover, comprehensively, all the contentions advanced by the Defence in the Request for Disqualification. Admittedly however, what is decisive is whether the Plenary considers that Judge Ozaki's concurrent appointments as ICC Judge and Japanese Ambassador to Estonia would "*lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge*".²⁰

¹⁵ See the Request for Disqualification, *supra* note 3, paras. 20-24.

¹⁶ See the Request for Leave to Reply, *supra* note 1, para. 10.

¹⁷ *Idem*, para. 11.

¹⁸ See the Joint Response, *supra* note 6, para. 25.

¹⁹ See the Coalition for the International Criminal Court (CICC), [Reply of Prof. Kuniko Ozaki to the Questionnaire to ICC Judicial Candidates 2009 elections](#).

²⁰ See the "Decision of the Plenary of Judge on the Defence Applications for the Disqualification of Judge CunoTarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*" (Plenary), [No. ICC-01/05-01/13-511-Anx](#), 23 June 2014, para. 17. See also "Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*", [No. ICC-01/04-01/06-3040-Anx](#), 11 June 2013.

11. The Legal Representatives request the *Ad Hoc* Presidency to reject the Request for Leave to Reply insofar it concerns the third and fourth issues.

Respectfully submitted,



Sarah Pellet
Common Legal Representative of the
Former Child soldiers



Dmytro Suprun
Common Legal Representative of the
Victims of the Attacks

Dated this 6th day of June 2019

At The Hague, The Netherlands