



**Internal memorandum
Memorandum interne**

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| To À | Judge Ozaki | From De | The Judges |
| Date | 19 March 2019 | Through Via | |
| Ref. | 2019/PRES/00003-21 | Copies | |
| Subject Objet | Decision on your request of 18 February 2019 | | |

CONFIDENTIAL

I. Procedural History

1. On 18 July 2014, the Presidency constituted Trial Chamber VI, which included Judge Kuniko Ozaki, and referred to it the case of *The Prosecutor v. Bosco Ntaganda*.¹
2. On 10 March 2018, Judge Ozaki's mandate as a judge of the Court was completed, at which point, pursuant to article 36(10) of the Rome Statute ('Statute') she continued in office to complete the *Ntaganda* trial.
3. On 7 January 2019, Judge Ozaki sent an internal memorandum to the Presidency requesting to resign 'as a full-time judge of this Court as of 11 February 2019 inclusive' citing personal reasons and without mention of any future activities or occupation. She indicated her readiness 'to continue as a non-full-time judge sitting on the *Ntaganda* case, if the Court so permits'.²
4. The Presidency of the Court, after consulting with all judges, clarified its understanding that Judge Ozaki was not seeking to resign as a judge, in accordance with rule 37 of the Rules of Procedure and Evidence (a clarification with which Judge Ozaki agreed). Rather, it was understood that she sought to change her status

¹ ICC-01/04-02/06-337.

² 2019/PRES/00003-1.

to that of a non-full-time judge, within the meaning of article 35(3) of the Statute.³ This exceptional request was granted.⁴

5. On 18 February 2019, Judge Kuniko Ozaki sent a memorandum to the Presidency and all Judges communicating that she had been appointed as the Japanese Ambassador to the Republic of Estonia and that she would commence such duties on 3 April 2019. Judge Ozaki indicated as follows:

It is my firm belief that my new responsibility would not in any way interfere with my judicial function, which is solely for the purpose of the Ntaganda case and during a limited period after the completion of substantive deliberations on the Article 74 Judgement and before the completion of the trial. Nor it would affect confidence in my independence in accordance with Article 40(2). My new responsibility is confined to the bilateral relationship between Estonia and Japan. 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.

I would be happy to continue sitting on the Ntaganda case as a non-full-time judge on the above basis until the delivery of judgement pursuant to Article 74, as well as, if necessary, till the end of the sentencing phase.

Therefore, I respectfully submit that this letter be treated as my request to be approved of my continuing participation in the Ntaganda case on the basis as set out above, or, alternatively, in case my request is denied, my letter of resignation as a judge of this Court pursuant to Rule 37 of the Rules of Procedure and Evidence, as of 12 February 2019 when I ceased to be a full-time judge of the Court.⁵

³ 2019/PRES/00003-2.

⁴ *Ibid.*

⁵ 2019/PRES/00003-5.

6. On 26 February 2019, the Presidency sent a memorandum to all judges which, *inter alia*, set out the following:

6. Article 40 of the Rome Statute provides as follows:

Article 40

Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

7. It is evident from article 40 that whilst paragraph 3 of article 40 is applicable only to judges serving on a full-time basis at the seat of the Court, paragraphs 1 and 2 thereof remain applicable to all judges, including non-full-time judges. Accordingly, pursuant to paragraph 4, the question of whether there is a question as to the application of paragraph 2 of article 40 in the present circumstances, must be decided by an absolute majority of judges. It is further noted that, in the present circumstances, where the decision under article 74 is yet to be rendered, there may be particularly close scrutiny from the Court's observers, to issues of independence.⁶

⁶ 2019/PRES/00003-6.

7. A plenary session of judges to discuss the matter occurred on 4 March 2019 and was attended by all judges except Judge Kuniko Ozaki and Judge Cuno Tarfusser.

II. Decision of the Plenary

8. Acting under article 40(4) of the Statute, an absolute majority of the judges decided that Judge Ozaki's request was not incompatible with the requirements of judicial independence established in that article (Judges Eboe-Osuji, Fremr, Morrison, Herrera Carbuccia, Henderson, Hofmański, Mindua, Schmitt, Kovács, Chung, Pangalangan, Bossa, Alapini-Gansou and Prost). A minority of three judges disagreed (Judges Perrin de Brichambaut, Ibáñez, Aitala). One judge (Judge Akane) abstained from participating in the decision.
9. The judges agreed that the applicable standard to be assessed when considering whether an issue of judicial independence arose in these circumstances is that contained in article 40(2) of the Statute, which applies to non-full-time judges. That standard contains two limbs which must be considered: (1) the requirement not to engage in any activity which is likely to interfere with judicial functions, and (2) the requirement not to engage in any activity which is likely to affect confidence in independence. A failure to satisfy either limb would be determinative of the inconsistency of the proposed activity with the principle of judicial independence.

A. Reasoning of the Majority

10. The majority of judges considered that whilst it is also possible to read article 40(2) in the abstract manner, the language of article 40 calls for application in its concrete acceptance. Whilst the overriding general principle is stated in paragraph 1, it is evident in paragraphs 2 and 3 that the provision is concerned with assessing specific activities and occupations which may be performed by judges. Further, paragraph 4 creates a procedure for dealing with questions arising in respect of a specific individual judge. The concern of the provision is thus with the concrete question of whether functions actually being performed by a specific judge could affect judicial independence. The need for a concrete application is also supported by the evident contrast between article 40 of the Rome Statute and equivalent provisions of some other international courts or tribunals. For example, article 16(1) of the Statute of the International Court of Justice provides that 'No member of the Court may exercise any political or administrative function, or engage in any other

occupation of a professional nature'.⁷ Article 40 eschews such broad references to abstract categories of prohibited functions and demonstrates a closer concern with analysing the actual activities or occupations proposed by a judge. Accordingly, the majority considered it necessary that the issue must be approached on a case-by-case basis, emphasising the actual activities to be performed by Judge Ozaki and their compatibility with her status as a non-full-time judge of the Court.

11. The majority focussed also on the language in article 40(2) of the Statute of 'is likely to', which is common to both the abovementioned limbs. The majority considered that likelihood denotes a level of certainty beyond mere speculation or possibility.
12. Commencing with the question of whether the activity of Judge Ozaki as Ambassador of Japan to Estonia is likely to interfere with her judicial functions as a non-full-time judge of the Court, the majority considered that it is evident from the request that this is not the case. It was emphasised that Judge Ozaki had already, due to her own exceptional request, moved to a non-full-time status and her judicial functions were confined to her remaining duties in the *Ntaganda* case. She further commits to making herself available as necessary for her judicial duties, including, if necessary, during any sentencing stage. In these circumstances, the majority accept that there is minimal risk of her activities as Ambassador from 3 April 2019 interfering with her judicial functions as a non-full-time judge of the Court, much less any likelihood thereof.
13. On the question of whether performing the activities of Ambassador of Japan to Estonia is likely to affect confidence in her judicial independence, a majority of judges again considered this not to be the case. In so doing, they considered that article 40(2) of the Statute is concerned not with possibilities but with likelihoods and that this limb must be also be analysed in concrete, rather than abstract, terms. The majority noted that Judge Ozaki's activities as Ambassador would be entirely confined to the bilateral relationship between Japan and Estonia. They noted that neither Japan nor Estonia was connected to any case before the Court. They noted also Judge Ozaki's statement that she could refrain from executing responsibilities if any arose which could impact upon her judicial duties, which were confined to the *Ntaganda* case. She further clarified that when returning to the Court to discharge her judicial duties at the seat of the Court she would not act in any way as the Japanese Ambassador to Estonia. Considering all these factors, a majority of judges was satisfied that it was not likely that performing her functions as Ambassador to Estonia would affect confidence in her independence as a Judge of the Court.

⁷ Article 7 of the Statute of the International Tribunal for the Law of the Sea.

14. Considering, therefore, that it was clear that the prohibitions in article 40(2) of the Statute did not apply in the concrete circumstances, the majority was satisfied that Judge Ozaki's independence would not be undermined by assuming the role of Ambassador of Japan to Estonia.

B. Reasoning of the Minority

15. The minority was unable to accept the above. The minority emphasised that the second limb of article 40(2) of the Statute focussed on a likelihood of affecting confidence in judicial independence. They considered that such question is inevitably concerned with the *appearance* of judicial independence, in the eyes of reasonable outsider observers. For the minority, it was evident that the performance of an executive or political function for a State Party by an individual who remained a Judge of the Court was entirely likely to affect public confidence in judicial independence. They expressed concern that the present situation of Judge Ozaki was dissimilar to potentially similar precedents before other international courts and tribunals, in particular, the swearing of an oath of office as Vice-President of Costa Rica by a judge of the ICTY.⁸ They emphasised that, in that case, Judge Odio Benito sought and received approval from the judges of the Tribunal prior to seeking the nomination as Vice-President of Costa Rica. Further she undertook not to assume *any* functions or duties of her political office prior to the completion of her judicial tenure. The minority noted the absence of such features in the present circumstances. The minority also emphasised the significant risk that approving Judge Ozaki's request could result in an eventual disqualification request under article 41(2)(b) of the Statute in the *Ntaganda* case or could be raised on appeal.

III. Conclusion

16. On 4 March 2019, acting pursuant to article 40(4) of the Rome Statute, an absolute majority of 14 judges of the Court decided in plenary that the assumption by Judge Ozaki 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.

⁸ *Mucić et. al.*, IT-96-21, 'Decision of the Bureau on the Motion on Judicial Independence', 4 September 1998, <http://www.icty.org/x/cases/mucic/tdec/en/80904MSX5309.htm>