



Internal memorandum
Memorandum interne

To À	Judge Fremr	From De	Ad hoc Presidency 
Date	10 April 2019	Through Via	
Ref.	2019/PRES/00003-25	Copies	
Subject Objet	Decision on request for excusal dated 5 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 Judges Fremr of 5 April 2019, sent via email, in which he seeks to be excused from his functions as a member of the Presidency 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 as well as in relation to any further decision potentially made by the Plenary on this matter.

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

Factual background

Judge Fremr is the Presiding Judge of Trial Chamber VI, which is seized of *The Prosecutor v. Bosco Ntaganda*. He sits in Trial Chamber VI with Judges Chung and Ozaki. Judge Fremr is, in addition, the First Vice-President of the Court.

¹ ICC-01/04-02/06-2327.

On 1 April 2019, the Defence for *Ntaganda* filed the Defence Request, 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 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

The Request

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

Dear 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.
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

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

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 Presidency for the purposes of deciding on the Request.

6. Pursuant to Rule 33(1) of the Rules of Procedure and Evidence, I hereby request my colleagues of the Presidency to excuse me from my functions as a member of the Presidency in relation to the Request.

7. For the same reasons I am asking to be excused from any further decision potentially made by the Plenary on this matter.

Decision

The *ad hoc* Presidency considers that the request 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 Fremr may be unable to assess the Defence Request in an impartial manner. In particular, his position as Presiding

Judge of Trial Chamber VI may give rise to an objectively reasonable appearance that his interest in completing the case over which he has presided for several years, particularly when he himself has less than two years remaining in his own judicial mandate, 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 Fremr'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 Fremr 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.

Pursuant to regulation 11(2) of the Regulations of the Court, Judge Fremr will be treated as being unavailable in connection with the Defence Request.

Further, the Presidency notes that Judge Fremr 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>.