Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-02/06**
Date: **30 April 2019**

THE *AD HOC* PRESIDENCY

Before: **Judge Chile Eboe-Osuji, President**
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 - with Public Annexes A, B and C

Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute

Source: **Defence Team of Mr. Bosco Ntaganda**

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

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Further to the Notification of the Decision of the Plenary of Judges pursuant to Article 40 of the Rome Statute ("Decision"),[1] dated 22 March 2019, Counsel representing Mr. Ntaganda ("Defence") submits this:

Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute

INTRODUCTION

1. The Defence requests reconsideration of the Decision. Judge Ozaki's services as a senior Japanese diplomat while a Judge on an ongoing case negatively "affects confidence" in her judicial independence pursuant to Article 40(2). The damage to the appearance of judicial independence arises from the profound incompatibility of judicial independence and executive service, especially as a diplomatic representative. An informed observer would reasonably entertain doubts as to whether Judge Ozaki's new role could influence her to avoid controversy, or to demonstrate the Court's "efficiency" to States. The strong public reaction to recent decisions reinforces the reasonableness of the perception that Judge Ozaki's service as a Japanese diplomat, and therefore subject to the instructions of her government, would influence her willingness to participate in an unpopular decision, such as an acquittal.

2. The drafting history of Article 40(2) shows that "it was clearly understood that a Judge of the Court could not be, at the same time, a member or official of the Executive Branch of Government".[2] This "clear understanding" reflects human rights principles in international and State practice. Judge Ozaki expressed agreement with these principles when, as a candidate to be an ICC Judge, she said that she must "of course" resign from her position with the executive branch of her government upon election. This separation between judiciary and

[1] Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute, 22 March 2019, ICC-01/04-02/06-2326, Annex 1. All further references to "Article" are to the Rome Statute.
[2] 1993 ILC Report, p.103.

executive is particularly necessary given the concrete circumstances of the ICC, which include being a court of (i) criminal jurisdiction, (ii) typically dealing with controversial cases that (iii) often implicate State interests, (iv) but that must assure the appearance of independence from contributing States Party, and (v) that seeks to do justice in communities where the reasonably informed person has strong grounds to mistrust the independence of the judiciary from the executive.

3. Confidence in Judge Ozaki's judicial independence is further undermined by her lack of candour. Judge Ozaki failed to disclose to the Presidency that the underlying reason for seeking to be excused as a full-time judge (thus avoiding the absolute prohibition on outside employment under Article 40(3)). Judge Ozaki then waited to raise any potential problem under Article 40(4) until after having been appointed ambassador, coupled with an alternative request to resign. Judge Ozaki, significantly, was prepared to resign despite sitting on an ongoing case without an alternate Judge, rather than to resign her Ambassadorial appointment. This conduct, so different from that of Judge Odio-Benito at the ICTY, reinforces the reasonable apprehension that Judge Ozaki's diplomatic service could impact upon her judicial duties – because it already has.

4. The Decision should be reconsidered and reversed. Judge Ozaki's service as a diplomatic representative of Japan is not compatible with the appearance of judicial independence, and negatively "affect[s] confidence" in her independence. This lack of appearance of judicial independence, furthermore, creates an appearance that she is lacking impartiality under Article 41(2)(a).

BACKGROUND

5. On 22 March 2019,[3] the Defence was notified of an Internal memorandum dated 19 March from "The Judges" to Judge Ozaki with the subject line "Decision on your request of 18 February 2019."

6. The internal memorandum explains that on 7 January, Judge Ozaki made a request to the Presidency under Article 35(3) to be excused as a "full-time" Judge "'as of 11 February 2019 inclusive' citing personal reasons and without mention of any future activities or occupation."[4]

7. The Presidency "clarified" with Judge Ozaki that she was not seeking to resign, but only to "change her status to that of a non-full-time judge."[5]

8. On 18 February, for the first time, Judge Ozaki apparently informed her colleagues that "she *had been* appointed" Japanese Ambassador to Estonia and that her duties would commence on 3 April 2019.[6] An open-source press release, but not the Decision, indicates that Judge's Ozaki's appointment had been approved by the Japanese cabinet on 12 February:

> The Government decided to appoint Kuniko Ozaki, the Judge of the International Criminal Court, to the Ambassador to Estonia and Takashi Murata, the Former Director General of the Security Bureau of the National Police Agency, to the Ambassador of Japan to Finland, respectively, in the Cabinet meeting held on the 12th. The official announcement of these appointments will be dated on the 13th.[7]

9. The Decision states that Judge Ozaki indicated that she "would be happy" to continue sitting on the *Ntaganda* case as a non-full-time judge "until the delivery of judgement […] as well as, if necessary, till the end of the sentencing phase."[8]

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[3] All further dates refer to the year 2019 unless otherwise indicated.
[4] Decision, para.3.
[5] Decision, para.4.
[6] Decision, para.5 (italics added).
[7] Annex A (Press Release, 12 February).
[8] Decision, para.5.

10. The Decision memorializes that a decision on Judge Ozaki's request was taken pursuant to Article 40(4) at a plenary of the Judges held on 4 March. By 14 votes to 3, the Judges voted that "Judge Ozaki's request was not incompatible with the requirements of judicial independence." Judge Akane abstained; Judge Ozaki was automatically disqualified; and Judge Tarfusser was not present.[9]

11. On 1 and 8 April, the Defence requested the Presidency to disclose documents and information relating to the Decision, including the full text of Judge Ozaki's 18 February memorandum.[10] The *ad hoc* Presidency denied the requests as being "a form of fishing expedition."[11] This decision appended two other decisions granting requests by Judge Fremr and Judge Chung to be excused from participation in either of these disclosure decisions "as well as in relation to any further decision potentially made by the Plenary on this matter" because of "an evident risk that there may be an objectively reasonable appearance that [the two Judges] may be unable to assess the Defence Request in an impartial manner."[12]

APPLICABLE LAW

12. Article 40 of the Statute, "Independence of the judges" states that:

> 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.

[9] Decision, para.7.
[10] First Disclosure Request; Second Disclosure Request.
[11] *Ad Hoc* Presidency Decision, para.3.
[12] *Ad Hoc* Presidency Decision, Annexes 1 and 2, p.3.

> 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.

13. Article 3 of the Code of Judicial Ethics ("CJE") declares that "Judges shall uphold the independence of their office" and that they "shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence." Article 10(2) of the CJE states that "Judges shall not exercise any political function."

14. Article 41(2)(a) of the Statute prescribes that "[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground." Article 4(1) of the CJE requires Judges to "ensure the appearance of impartiality in the discharge of their judicial functions" and sub-section (2) requires Judges to "avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest."

PROCEDURAL BASIS OF THE CURRENT REQUEST

15. This is a request for reconsideration. The Judges in plenary have an inherent power to reconsider decisions already taken,[13] as is conceded by the Prosecution.[14] Reconsideration in general may be *proprio motu* or "prompted by one of the parties."[15] The need for reconsideration is particularly evident here, given that two Judge who participated in the deliberations have been excused on the basis of an "evident risk" of an appearance of bias.[16] Furthermore, no submissions were heard from any party prior to the Decision, which was preceded by an entirely *ex parte* proceeding. The traditional grounds for

[13] *Ruto & Sang*, Decision on Defence Application to Vacate Decision of the Plenary, para.14.
[14] Prosecution Response, fn.26.
[15] Decision on Prosecution request for reconsideration of, or leave to appeal, decision on use of certain material during the testimony of Mr Ntaganda, ICC-01/04-02/06-1973, 23 June 2017, para.14.
[16] *Ad Hoc* Presidency Decision, Annex 1, pp.3-4 and Annex 2, p.4.

reconsideration, new arguments and new facts,[17] are abundant. As set out in more detail below, these include: the coincidence of the date when Judge Ozaki sought to be excused from full-time service and the date of her appointment, showing that Judge Ozaki knew of this appointment at the time of her request; the clear drafting history of Article 40; and the overwhelming practice of States. Declining to consider arguments by an accused disadvantaged by a *proprio motu* decision is a violation of the internationally recognized right to be heard (*audi alteram partem*), especially in respect of a decision of such consequence for his fundamental fair trial rights.[18]

16. Article 40(4) refers to "any question" without limitation as to how the issue may be raised or by whom. Nothing in the drafting history indicates that parties could not raise the "question." Only the third edition of the *Triffterer* commentary[19] – not the second edition,[20] nor other leading commentaries[21] – even questions whether a party could raise a "question" under Article 40(4).

17. Even assuming that there is any obstacle to a party raising a "question" under Article 40(4), an accused always has the right under Article 67(1) to "a fair hearing conducted impartially." A hearing cannot be impartial or fair unless the tribunal is independent.[22] A Trial Chamber has the obligation under Article 64(2) to "ensure that a trial is fair."[23] As all three Judges of the Trial Chamber

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[17] *Ruto & Sang*, Decision on Request for Reconsideration, para.19; *Kenyatta*, Decision on the Prosecution's motion for reconsideration, para.11; *Ntaganda*, Decision on request for reconsideration, para.13.

[18] *Jelisić* AJ, para. 27 ("In the view of the Appeals Chamber, the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial.")

[19] Triffterer *Commentary*, 3rd ed., p.1257.

[20] Triffterer *Commentary*, 2nd ed., p.965.

[21] Cassese *Commentary*, pp.243,256; Schabas *Commentary*, p.727; Fernandez *Commentary*, pp.1011-1012.

[22] UDHR, Art. 10; ICCPR, Art.14(1); ACHR, Art.8(1); ECHR, Art.6(1); *Furundžija* AJ, para.177.

[23] *Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other

are now disqualified from adjudicating the present matter, Article 40(4) is the necessary and more appropriate avenue for vindicating this right, rather than Article 64(2).

18. Finally, issues of impartiality and independence are often "closely related" and "presented together."[24] Although this application is a request for reconsideration of a decision taken under Article 40(4), Judge Ozaki should also be disqualified under Article 41(2)(a), which a party is expressly permitted to raise before the Judges under Article 41(2)(b).

19. The question before the Judges is whether "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 […] violates any aspect of article 40 of the Statute."[25] The Judges decided that it did not by "an absolute majority of 14 judges of the Court."[26] The same voting threshold of "absolute majority" must apply to the reconsideration, which means eleven votes in favour of Judge Ozaki's request for a declaration under Article 40(4) that her appointment as ambassador is not inconsistent with Article 40(2).[27] Decisions on disqualification for bias likewise appear to have been determined on the basis of whether there is a "Majority" in favour of the Judge's non-disqualification.[28]

20. Judge Ozaki's situation needs to be re-assessed by the Judges under Article 40(4) "afresh"[29] – i.e. *de novo* – both because of the absence of prior submissions by the Parties, and the participation of two Judges in previous deliberations for whom there is a reasonable apprehension of bias. In any event, the traditional

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issues raised at the Status Conference on 10 June 2008," ICC-01/04-01/06-1486, 21 October 2008, para.46.

[24] Schabas *Commentary*, p.724; *Findlay v. The UK*, para.73; *Incal v. Turkey*, para.65.

[25] Decision, para.16.

[26] *Id*.

[27] The judiciary of the ICC is currently composed of twenty judges.

[28] *See e.g. Banda* Disqualification Decision, para.33 ("the plenary of judges, by absolute majority of eleven, with two judges in disagreement and three judges abstaining, decided to: Deny the Defence Request"); *Lubanga* Disqualification Decision, para.67.

[29] Prosecution Response, para.14.

"miscarriage of justice" reconsideration standard would be automatically met by any *de novo* finding that Judge Ozaki lacks judicial independence.

SUBMISSIONS

(i) Employment In the Executive Branch of a State Is Not Compatible With Being a Judge of the ICC

21. Non-full-time judges are not categorically prohibited under Article 40(2) from engaging in "any other occupation," but are prohibited from "engag[ing] in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence." All Judges, regardless of full- or part-time status, are prohibited under Article 10 of the CJE from engaging in any "extra-judicial activity that […] may affect or may reasonably appear to affect their independence of impartiality."

22. The 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). On the contrary, the ILC Working Group's 1993 report discussing the same language that now appears in Article 40(2) reflects a consensus that it obviously would not be:

> This is why article 9, without ruling out the possibility that the judge may perform other salaried functions (as also contemplated in article 17, paragraph 3), endeavoured to define the criteria concerning activities which might compromise the independence of judges and from the exercise of which the latter should abstain. For instance, **it was clearly understood that a judge of the Court could not be, at the same time, a member or official of the Executive Branch of Government**.[30]

23. The Working Group's 1994 report on the same text expressed the same sentiments:

[30] 1993 ILC Report, p.103 (emphasis and underline added); Fernandez *Commentary*, p.1008 ("*Dans l'article 10 de son Projet, la Commission du droit international (CDI) avait retenu la proposition selon laquelle les juges ne devraient pas être actifs dans les institutions étatiques durant leur mandat*.")

> For instance, **it was clearly understood that a judge could not be, at the same time, a member of the legislative or executive branch of a national government**.[31]

24. The 1996 Preparatory Committee report demonstrates just how far from employment with the executive of a State was the intended ambit of this language:

> The view was expressed that judges should not engage in any activities that would prejudice their judicial functions. In this connection, activities such as part-time teaching and writing for publication were compatible with such functions.[32]

25. No subsequent drafting history dissents from this "clear understanding" of the meaning of Article 40(2).[33] Judge Ozaki, in answering questions about her candidacy to be an ICC Judge, apparently shared this understanding by stating: "[o]f course, once elected, I will leave the Government of Japan, as requested by the Rome Statute."[34]

26. This "clear understanding" is rooted in the well-established international human rights principle that fairness requires the judicial branch to be independent of, and separate from, the executive branch:

> The independence of the judiciary is a corollary of the democratic principle of separation of powers, according to which the executive, the legislature and the judiciary constitute three separate and independent branches of Government. According to this principle, different organs of the State have exclusive and specific responsibilities, and it is not permissible for any branch of power to interfere in the others' spheres of control.[35]

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[31] 1994 ILC Report, p.32 (emphasis and underlined added).
[32] Preparatory Committee Report, p.13.
[33] Schabas *Commentary*, p.724.
[34] Answers to CICC Questionnaire, p.9 (underline added).
[35] HRC, Report of the Special Rapporteur, para.8. *See* UN Basic Principles on the Independence of the Judiciary, 1985, article 1 ("The independence of the judiciary shall be guaranteed […]"); African Principles and Guidelines, para.4(g) ("[a]ll judicial bodies shall be independent from the executive branch").

27. In the United Kingdom, "[j]udicial independence is a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. The judiciary must be seen to be independent of the legislative and executive arms of government both as individuals and as a whole."[36] The Philippines Code of Judicial Conduct declares that "Judges shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to be free therefrom to a reasonable observer."[37]

28. Few things could be more destructive of this independence than concurrent employment of a Judge in the executive. State practice shows, aside from cases involving local or limited jurisdiction such as municipal planning,[38] how unthinkable is the possibility of a Judge exercising criminal jurisdiction while employed by, and serving in, the executive branch of a State.

29. Sometimes this appearance of independence is secured by a general prohibition, such as is found in Article 40(3), on outside employment;[39] but whether there is or is not such an outright prohibition, legislative provisions of most countries also expressly prohibit holding any other public office, describing such positions as "incompatible" with judicial office: the Democratic Republic of Congo ("*incompatibles*");[40] Belgium ("*incompatibles*"),[41] the Dominican Republic ("incompatible"),[42] Switzerland,[43] Korea,[44] Benin

[36] UK Guide to Judicial Conduct, p.7.
[37] Philippine Code of Judicial Conduct, Canon 1, section 5.
[38] *McGonnell v. The UK*.
[39] Canada, Judges Act, Art.55.
[40] DRC, *Statut des magistrats*, Art.65 ("*Hormis le cas de détachement ou de disponibilité, les fonctions de magistrat sont incompatibles avec toute activité professionnelle, salariée ou non, dans le secteur public ou privé*.")
[41] Belgium, *Code judiciaire*, Art.293 ("Les fonctions de l'ordre judiciaire sont incompatibles avec l'exercice d'un mandat public conféré par élection; avec toute fonction ou charge publique rémunérée, d'ordre politique ou administratif […]").
[42] Dominican Republic, Constitution, Art.151 ("Service in the Judicial Power is incompatible with any other public or private office, except that of teacher.")

("*incompatible*"),[45] France ("*incompatible*"),[46] the Czech Republic ("not compatible"),[47] Slovakia,[48] Peru ("incompatible"),[49] Portugal,[50] Estonia,[51] and Germany.[52]

30. Other countries limit the types of concurrent occupations to those such as teaching, publication or non-profit work (such as in Poland).[53] The Campeche Declaration, which reflects South American practice, provides that "judges […] shall not be able to perform any public or private service, remunerated or not, with the exception of teaching, social sciences researching, or their participation in non-profit entities for public welfare, activities which could be performed with the proper arrangement of the determined hourly incompatibility."[54] The Bangalore Principles, adopted by the UN Human Rights Commission in 2003, declares that a "Judge shall not only be free from inappropriate connections with, and influence by the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom."[55] Sections 4.11.1-4.11.3 give a flavour of how separate from the executive these activities must remain, indicating that it would not be incompatible for a Judge to "write, lecture, teach, and participate in activities concerning the law, the legal system,

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[43] Switzerland, *Loi fédérale sur l'organisation des autorités pénales*, Art.44(1) ("*Les juges ne peuvent être membre de l'Assemblée fédérale ou du Conseil fédéral ou juges au Tribunal fédéral ni exercer aucune autre fonction au service de la Confédération*.")

[44] Korea, Court Organization Act, Art.49(2)("No judicial officer shall engage in the following acts during his or her term of office […] to become a public official in any administrative body.")

[45] Benin, Statut de la Magistrature, Art.11("*L'exercice des fonctions de magistrat est incompatible avec l'exercice de toute autre fonction publique et de toute autre activité lucrative, professionnelle ou salariée*.")

[46] France, Statut de la magistrature, Art.8("*incompatible avec l'exercice de toutes fonctions publiques et de toute autre activité professionnelle ou salariée*") (underline added).

[47] Czech Republic, Courts and Judges Act, para.74(2).

[48] Slovak Republic, Constitution, Art.137 (2).

[49] Peru, Constitution, Art.146 ("Judicial office is incompatible with any other public or private activity, except university teaching outside the working hours.")

[50] Portugal, Constitution, Art.216(3).

[51] Estonia, Courts Act, para.49.

[52] Germany, Judiciary Act, s. 4(1)("A judge shall not simultaneously perform duties of adjudication and legislative or executive duties.")

[53] Poland, Constitution, Art.178.

[54] Campeche Declaration, Art.7(b)(4).

[55] Bangalore Principles, Value 1.3.

the administration of justice or related matters"; "appear at a public hearing before an official body concerned with matters related to the law, the legal system, the administration of justice or related matters"; or serve as "a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge."[56]

31. This widespread State Practice reflects the understanding that judicial independence is secured by "objective conditions or guarantees of judicial independence", not merely by the non-overlap of specific executive and judicial tasks, as appears to have been the reasoning of the Majority in the Decision.[57] As one national court has put it, judicial independence:

> connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees [….] Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation.[58]

32. Judge Ozaki is now an employee of the Government of Japan, serving as its Ambassador to an EU State Party to the Rome Statute. Judge Ozaki has been in acting in some capacity as a Japanese diplomat since before 3 April, as is reflected in her public appearance in Estonia on 26 March 2019.[59] The exact date on which Judge Ozaki entered diplomatic service to Japan has never been revealed; but since that date, Judge Ozaki has been subject to her Government's instructions and duties. Judge Ozaki has undoubtedly received confidential briefings, and is subject to duties of confidentiality to Japan that would include not disclosing the content of those briefings to her colleagues at the Court.

[56] Bangalore Principles, Art. 4.11.1-3.
[57] UNODC Commentary on the Bangalore Principles, para.37
[58] *Valente v. The Queen*, paras.15,22.
[59] Annex B (public appearance in Estonia, 26 March 2019).

Judge Ozaki, as a diplomat, has undoubtedly been instructed to avoid public controversy, and to avoid associating herself with controversial statements. This is an occupational hazard of judges. Finally, Judge Ozaki is a diplomatic representative of Japan at a time when recent decisions have triggered vigorous and undiplomatic public criticisms of the Court, even from reputable commentators in academia and public life. A reasonable observer's confidence in Judge Ozaki's willingness to be associated with yet another unpopular ICC decision, with all the public criticism that that would entail, could not fail to be negatively affected by the fact that she is now a diplomatic representative owing duties of discretion and circumspection to her own State, which also happens to pay 17% of the Court's budget.[60]

33. The incompatibility of Judge Ozaki's diplomatic service is highlighted by comparison with the case of Judge Odio-Benito at the ICTY, who: (i) sought the President's views in advance of seeking political office in Costa Rica; (ii) promised not to "assume any of the functions of office" until after the completion of her judicial duties; (iii) <u>again</u> consulted with the President after she had been elected, who then informed her that the Judges in Plenary had approved her taking the oath of office; (iv) obtained a letter from the President of Costa Rica confirming that she would not assume any duties of her political office until after the end of her judicial functions; and (v) refrained in fact from taking up any such duties while still an ICTY Judge.[61] While Judge Odio Benito remained a Judge of the ICTY, she was Vice-President of Costa Rica, as underscored by the Bureau, "in name only."[62]

34. Judge Meron has written that if Judge Odio Benito had assumed office, the Appeals Chamber would have been much more likely to disqualify her.[63]

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[60] 2016 ICC Financial Statements.
[61] *Delalić* Bureau Decision, p.3; *Delalić* AJ, paras.684-685.
[62] *Delalić* Bureau Decision, p.10.
[63] Meron, Judicial Independence and Impartiality in International Criminal Tribunals, p.368 ("If she had been serving in an active capacity as vice president while still serving on the *Čelibići* bench, or

35. Judge Ozaki's appointment also undermines the fundamental principles that an international Judge's nationality, and the policies of their State of origin, are irrelevant to their judicial service.[64] Judge Ozaki's concurrent service to Japan creates the contrary appearance, and weakens the appearance of that vital separation between international criminal justice and international diplomacy and politics. Indeed, as a diplomatic representative managing international political relations, her appointment directly violates Article 10(2) of the Code of Judicial Conduct.

36. Judge Ozaki's concurrent service as an international diplomatic representative of the Government of Japan to a State Party, and as a Judge of this Court who must still make the most consequential decisions in an ongoing case, is unprecedented,[65] and damages the appearance of her own judicial independence, and that of the Court as a whole.

(ii) Judge Ozaki's Lack of Candour Raises Further Doubt About Her Independence

37. The significance of Judge Ozaki's 7 January request to be excused from full-time service as a Judge cannot be overstated. This request, if granted, would liberate her from the prohibition on any other employment than being an ICC Judge, as prescribed by Article 40(3). Instead of indicating that this request was motivated by a desire to be a Japanese diplomat, Judge Ozaki relied on "personal reasons and without mention of any future activities or occupation."[66]

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had drawn any income from her government, the appeals chamber would have been much more likely to find an appearance of impropriety.")

[64] *Šešelj* Disqualification Decision, paras.3-4; *Ngirabatware* Order for Release of Judge Akay, 31 January 2017, para.11; *Banda* Disqualification Decision, Annex 2, Judge Eboe-Osuji's Memorandum Concerning 'Defence Motion for Disqualification of a Judge', 16 April 2012, para.47.

[65] Concurrent service in a State Party's judiciary, provided that that position possesses the necessary attributes of judicial independence does not raise the same concerns. *See* Schabas *Commentary*, pp.681,723 (referring to "independence by ricochet").

[66] Decision, para.3.

38. Yet the date on which Judge Ozaki specified that she wished for full-time service to end coincides precisely with the day prior to the decision of the Japanese cabinet appointing her Ambassador to Estonia.[67] The only reasonable inference is that Judge Ozaki knew on 7 January that her appointment as Japanese Ambassador to an EU State Party to the Rome Statute was going to be decided on 12 February.

39. Judge Ozaki's non-disclosure of this highly relevant information apparently continued through the Presidency's subsequent requests for clarification[68] to Judge Ozaki.

40. The failure to disclose this information deprived the Presidency of the opportunity, for example, to consult with the Government of Japan, and to make a fully-informed decision about whether to excuse Judge Ozaki from full-time judicial service under Article 35(3), which is supposed to be determined "on the basis of the workload of the Court," not the personal preferences of the Judge concerned.

41. Judge Ozaki said nothing about her appointment as Japanese Ambassador to Estonia until 18 February, five days after it had already occurred. Judge Ozaki's claim that she would not commence duties until 3 April is not consistent with her appearance in Estonia before that date. As far as the record shows, Judge Ozaki could have entered into service in preparation for her ambassadorship as early as 13 February. Furthermore, rather than offering to resign her ambassadorship if it was found incompatible with her judicial service under Article 40(4), Judge Ozaki declared her intention to resign her judicial position,[69] even though she is a member of a bench on an unfinished case with no alternate Judge. This already demonstrates the extent to which Judge Ozaki

[67] Annex B (public appearance in Estonia, 26 March 2019).
[68] Decision, para.4 ("clarified its understanding").
[69] Decision, para.5.

is prepared to privilege her diplomatic responsibilities over the duties that may be incumbent upon her as a Judge.

42. Judge Ozaki's approach could not be more different from that of Judge Odio-Benito who fully and forthrightly advised the ICTY President in advance of both her candidacy and of her oath, and gave her colleagues the opportunity to object to either of these events before they happened.[70]

43. No reasonable observer, properly informed, could fail to infer from these facts that Judge Ozaki withheld information that she should have disclosed to ensure her appointment as Japanese Ambassador. In itself, this damages her appearance of judicial independence and impartiality.

44. As stated in a recent American decision involving a Judge's lack of candour, "a reasonable observer might wonder whether the judge had done something worth concealing."[71] Judge Ozaki's lack of candour for the apparent purpose of avoiding prospective scrutiny of the compatibility of her executive appointment with Article 40(4), combined with her threat to resign her judicial rather than her ambassadorial role, further damages the appearance of judicial independence.

(iii) The Unique Context and Features of the ICC Require Special Consideration in Determining the Concrete Requirements of Judicial Independence

45. The unique environment in which the ICC operates must be considered in concretely applying the requirements of judicial independence.

46. First, the "appearance" of judicial independence assumes particular importance for international criminal courts operating in "the midst of very emotive atmospheres."[72] "What is at stake," as the European Court of Human Rights

[70] *Delalić*, Bureau Decision, p.3
[71] *In re. Al-Nashiri*, p.31.
[72] *Barayagwiza* Decision on Reconsideration, Declaration of Judge Rafael Nieto-Nava, para.18.

has underscored, "is the confidence which the courts in a democratic society must inspire in the public and above all, as criminal proceedings are concerned, in the accused."[73] This is a particular challenge in respect of a "public" that may hold sharply polarized views.

47. Second, most international cases, like this one, implicate State interests. Paradoxically, the ICC must rely to a very significant extent on voluntary cooperation by the executive branches of States. Accordingly, "the political environment in which international courts, especially international criminal courts, function brings greater attention to the credibility of the institution, and the performance of the international judge as an independent and impartial arbiter is constantly under scrutiny."[74] The appearance of a full-time diplomat and part-time Judge amongst the judicial ranks of the ICC does not withstand this scrutiny.

48. Third, the ICC judiciary includes individuals who may have never previously been a judge, or even a lawyer. Scrupulous application of the Code of Judicial Ethics is required in order to ensure that Judges who "have been diplomats, academics, and legal advisers, but not judges […] accept the values, the duties and the instincts of one who holds such an office."[75]

49. Finally, the constituency of the Court is a broad one, encompassing the populations of many States, but most particularly, the populations of the States in which crimes being tried were committed. Evaluations of whether "confidence" is "affected,"[76] and about "reasonabl[e] appear[ances],"[77] must be adapted, first and foremost, to the needs and perceptions of these communities. Unfortunately, many of communities directly serviced by the Court do not have long traditions of independent judiciaries. On the contrary, one of the

[73] *Incal v. Turkey*, para.71
[74] Meron, Judicial Independence and Impartiality in International Criminal Tribunals, p.361.
[75] *Id*. 360.
[76] Art. 40(2).
[77] CJE, Art.10(1).

bitter and lingering legacies of colonial administration is that most individuals presume the opposite:

> The judiciary was an integral branch of the executive rather than an institution for the administration of justice. [….] To an average citizen, the judiciary, as an instrument of control of the executive power, lacked credibility and therefore enjoyed little respect [….] This attitude unfortunately did not change with independence, because in many Third World countries the judiciary has continued to be manipulated, in a variety of ways, by the executive.[78]

50. The ICC can only overcome this legacy, and "command the respect and acceptance that are essential to its effective operation," by adhering to the highest standards of judicial independence. By following those standards, an example will be set that can be "followed by national and regional criminal justice systems with different legal traditions."[79] Conversely, if those high standards are not followed and applied for all to see, then the opposite effect is likely.

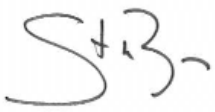
CONCLUSION AND RELIEF REQUESTED

51. The Judges should reverse the Decision and find that Judge Ozaki's service as a diplomatic representative of Japan is not compatible with Article 40(2) of the Statute. The Judges should also find that this service gives rise to reasonable doubt in Judge Ozaki's impartiality under Article 41(2)(a). Her service and position as a diplomatic representative of Japan to an EU State Party to the Rome Statute creates the appearance that she is not independent. A reasonable observer would have grounds to suspect that a diplomatic representative would wish to avoid the type of criticism and controversy that has attended recent decisions of this Court, including recent acquittals. Judge Ozaki's current position, which requires her to decide between conviction or acquittal

[78] Vyas, Independence of the Judiciary: a Third World Perspective, p.131. *See also* Oko, Seeking Justice in Transitional Societies: An Analysis of Nigeria, pp.17-18; Amoah, Independence of the Judiciary and the Legal Profession in Botswana, Lesotho and Swaziland: An Overview," p.35.
[79] Answers to CICC Questionnaire, p.9.

in a high-profile case, and then to pass sentence, can only be viewed, as it was by the drafters of Article 40(2): as clearly incompatible with her judicial duties.

RESPECTFULLY SUBMITTED OF THIS 30TH DAY OF APRIL 2019



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