Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-02/06**
Date: **9 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

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)"

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 "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)" ("Prosecution Response") filed on 8 May 2019,[1] Counsel representing Mr. Ntaganda ("Defence"), hereby submits this:

Request for leave to reply "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)"

INTRODUCTION

1. Pursuant to Regulation 24(5) of the Regulations of the Court ("RoC"), the Defence respectfully seeks leave to reply to the Prosecution Response in respect of its claims that: (i) the Reconsideration Request is improper because unsupported by any "ascertainable facts";[2] (ii) the Reconsideration Request is moot;[3] (iii) deliberations in the *Ntaganda* case were "completed" on 18 February 2019;[4] (iv) the Defence has no right to be heard;[5] (v) non-disclosure by Judge Ozaki is "speculative", based on an erroneous confusion of the date on which Judge Ozaki's ambassadorial credentials were accepted by Estonia and the date on which she entered into service with the Government of Japan;[6] (vi) the

[1] *Ntaganda*, 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), 8 May 2019, ICC-01/04-02/06-2340 ("Prosecution Response"). *See also Ntaganda*, Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute, 30 April 2019, ICC-01/04-02/06-2337 ("Reconsideration Request"); *Ntaganda*, 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 ("Disqualification Decision"). All further references are to filings in the *Ntaganda* case, unless otherwise indicated.
[2] Prosecution Response, para. 25.
[3] Prosecution Response, paras. 1, 18.
[4] Prosecution Response, paras. 3, 27.
[5] Prosecution Response, paras. 2, 16-21.
[6] Prosecution Response, paras. 2, 22.

drafting history of Article 40(2) was already considered;[7] (vii) the drafting history reflects flexibility towards concurrent service of an ICC Judge in the executive of a State;[8] (viii) national case law is of little to no relevance;[9] and (ix) one ECHR decision cited by the Prosecution concerning a lay judge on a housing court who was currently a member of a legislature, and one ECCC decision concerning a military officer, is in any way relevant, let alone supportive, of concurrent employment of an ICC Judge with the executive branch of a State.[10] Leave is also sought to reply to the Prosecution argument that the Defence has misstated the test for reconsideration.[11]

APPLICABLE LAW

2. Regulation 24(5) of the Regulations of the Court prescribes that "[p]articipants may only reply to a response with the leave of the Chamber" and that "[u]nless 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." Although Regulation 24(5) does not expressly indicate when a reply is warranted (as opposed to indicating the scope of a reply), jurisprudence has consistently held that a reply may be appropriate: (i) "in respect of issues raised in the response which the replying participant could not reasonably have anticipated"; and (ii) where it "would otherwise be necessary for the adjudication" of the matter.[12]

3. A request for leave to reply must explain the intended subject-matter of the reply to some extent. As the Appeals Chamber has held, a party seeking leave to reply must: (i) do more than "point […] to issues" to which it wishes to

[7] Prosecution Response, para. 23.
[8] Prosecution Response, para. 23.
[9] Prosecution Response, para. 24.
[10] Prosecution Response, para. 32.
[11] Prosecution Response, para. 18.
[12] Decision on Mr. Ntaganda's request for leave to reply, 17 July 2017, ICC-01/04-02/06-1994, para. 9 ("*Ntaganda* Appeal Decision on Replies").

reply, but must rather "demonstrate […] why they are new and could not reasonably have been anticipated";[13] and (ii) "explain why a reply to the aforementioned issues is otherwise warranted."[14]

4. The Prosecution routinely accuses the Defence of improperly addressing the substance of its prospective reply in requests for leave to reply.[15] The Defence, however, is guided by the Trial Chamber's most recent decision granting leave to reply despite Prosecution submissions that this had occurred.[16] Professional judges can disregard any arguments for which leave to reply is not granted. Any Prosecution arguments concerning the scope of this request for leave to reply should, accordingly, be rejected.

SUBMISSIONS

5. The Prosecution advances a series of propositions and arguments to which a reply is justified. The basis for seeking leave to reply to each of these propositions and arguments is that they were unforeseeable, or is necessary for adjudication of the matter, especially on an issue of this importance.

I. Claim #1: The Defence has acted improperly in bringing the reconsideration request

6. The Prosecution cites passages from the *Taylor* Appeals Judgement that raising an issue of judicial independence is "extremely serious" and should not be made without "ascertainable facts and firm evidence."[17] The Prosecution

[13] *Ntaganda* Appeal Decision on Replies, para. 13.
[14] *Id*. para. 14.
[15] *See e.g.* Prosecution's Response to the Defence "Request on behalf of Mr. Ntaganda seeking leave to reply to 'Prosecution's Response to the Defence "Motion for Temporary Stay of Proceedings'", 7 April 2019, ICC-01/04-02/06-2333.
[16] Decision on Defence Request for Temporary Stay of Proceedings, 18 April 2019, ICC-01/04-02/06-2335, para. 8. *See* Request on behalf of Mr. Ntaganda seeking leave to reply to "Prosecution's Response to the Defence 'Motion for Temporary Stay of Proceedings' (ICC-01/04-02/06-2328)", 8 April 2019, ICC-01/04-02/06-2331.
[17] Prosecution Response, para. 25.

asserts that there "were none" concerning Judge Ozaki, which implies that the Defence has acted improperly, and that the Reconsideration Request is "'unsupported, disingenuous and ridiculous.'"[18]

7. Leave to reply is warranted. It was unforeseeable that the Prosecution would suggest that there were no grounds to question judicial independence when even Judge Ozaki had raised the issue with her colleagues under Article 40(4).[19] Her subsequent resignation as ambassador only reinforces the significance of those grounds. A party whose integrity is attacked, especially without any foundation, should be entitled to reply.

II. Claim #2: The reconsideration request is moot

8. The Prosecution asserts that the Reconsideration Request is "moot" because the Presidency has been notified by Japan (but not by Judge Ozaki herself, apparently) that Judge Ozaki has resigned her ambassadorship.[20]

9. Leave to reply is warranted. This argument was unforeseeable, as was Judge Ozaki's apparent resignation as Ambassador, (although not necessarily from the Ministry of Foreign Affairs of Japan).[21]

10. Japan's notification certainly does not render the Reconsideration Request moot. The Prosecution's presumption that Judge Ozaki's resignation as ambassador reinstates her judicial independence is fundamentally flawed. The Defence must not only be accorded a right of reply, but must also be afforded the opportunity to address this new fact.

11. Furthermore, the appearance of bias has now changed given that Judge Ozaki's personal interests have been directly affected. A reply on this issue is

[18] Prosecution Response, para. 25.
[19] Disqualification Decision, para. 5.
[20] Prosecution Response, para. 15.
[21] Notification Concerning Judge Kuniko Ozaki, 1 May 2019, ICC-01/04-02/06-2338, para. 3.

warranted to explain these matters and to ensure that the unforeseeable argument of mootness is not determined without the Defence having been heard.

III. Claim #3: Deliberations were completed as of 18 February 2019

12. The Prosecution repeatedly asserts that "substantive deliberations were completed by 18 February 2019."[22] This surprising claim is based on a statement in Judge Ozaki's 18 February memorandum to her colleagues 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."[23]

13. The factual claim that deliberations are over, and the interpretation placed on Judge Ozaki's words by the Prosecution, could not have been foreseen. A reply is necessary to explain that deliberations are not over until Judgment is rendered, and to address the implication that ongoing deliberations would be material to assessing judicial independence.

IV. Claim #4: The Defence has no right to be heard

14. Leave to reply is warranted to respond to the unexpected claim that the Defence has no right to be heard. In particular, the Defence could not have foreseen that the Prosecution would rely on a decision denying leave to appeal[24] for the proposition that *audi alteram partem* is not a firm requirement where the rights of the Accused are involved.

[22] Prosecution Response, paras. 4, 27.
[23] Disqualification Decision, para. 5.
[24] Prosecution Response, para. 20.

V. Claim #5: Judge Ozaki's service with the Government of Japan began only once her credentials were accepted by Estonia

15. The Prosecution presupposes that the date on which Judge Ozaki's credentials were accepted by Estonia is the date on which she entered service with the Government of Japan.[25] However, the acceptance of credentials did not mark the beginning of Judge Ozaki's service with the Government of Japan.

16. This is a confusion that is of fundamental importance to the appearance of Judge Ozaki's judicial independence, or absence thereof. It was unforeseeable that the Prosecution would offer submissions confusing these two issues. A reply is otherwise warranted given the fundamental importance of the issue.

VI. Claim #6: The Judges have already taken account of the drafting history of the Rome Statute

17. The Prosecution asserts that the drafting history of the Statute has already been considered by the Judges in plenary and that, accordingly, arguments concerning this drafting history provide no basis for reconsideration.[26] This claim is unsupported by any material available to the Defence. It was unforeseeable that the Prosecution would advance an argument devoid of factual foundation, but whose effect would be to diminish the significance of an important Defence argument. A reply on this claim is, accordingly, warranted.

VII. Claim #7: The evolution of the wording of Article 40 favours flexibility in respect of concurrent employment by an ICC Judge

18. The Prosecution suggests that the drafting history of Article 40(2) reflects a trend towards greater flexibility in respect of concurrent activities.[27] This claim

[25] Prosecution Response, para. 22.
[26] Prosecution Response, para. 23.
[27] Prosecution Response, para. 23.

has no factual basis. The Defence could not have foreseen that an argument so devoid of factual merit needed to be refuted in advance. A reply is warranted to address this suggestion in respect of an argument of substantial importance to the Reconsideration Request.[28]

VIII. Claim #8: Widespread State practice is of little or no relevance

19. State practice is relevant in various ways to the sources of law specified in Article 21. It was unforeseeable that the Prosecution would attempt to dismiss widespread State practice – particularly in light of its failure to cite the practice of a single State to the contrary.[29] A reply is also otherwise necessary to set out expressly the nature of the relationship between this State practice and internationally recognized human rights.

IX. Claim #9: One ECHR decision and one ECCC decision support a finding that there is no appearance of a lack of judicial independence

20. The Prosecution relies on two inapposite decisions, one from the ECHR, and the other from the ECCC,[30] to suggest that concurrent employment with the executive of a State is permissible in the context of the ICC. The Prosecution's reliance on these specific decisions – each involving very different circumstances from those presented by the employment of Judge Ozaki with the executive of her home State – was unforeseeable, and warrants a reply.

X. Claim #10: The Defence has misstated the test for reconsideration

21. The Defence never asserted that a new fact alone, no matter how insignificant, warrants reconsideration.[31] The present request for reconsideration involves substantially new facts (some of which have arisen since the Disqualification

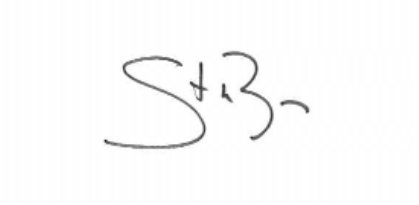
[28] Reconsideration Request, paras. 22-24.
[29] Prosecution Response, para. 24.
[30] Prosecutions Responses, paras. 26, 32.
[31] Prosecution Response, para. 18.

Decision) and substantially new arguments (in respect of an *ex parte* decision) that, if not taken into consideration, would occasion a miscarriage of justice. Few scenarios can be imagined that better illustrate the exceptional circumstances that justify reconsideration. The Prosecution unforeseeably mischaracterizes the Defence arguments, to which a reply is necessary.

CONCLUSION

22. Additional submissions in respect of these issues are necessary for the proper determination of such a serious matter as the independence of an ICC Judge. Judge Ozaki's apparent resignation as ambassador is a new fact that adds to the factual record which has yet to be fully revealed to the Parties and the public. The appearance of judicial independence, which is premised on the perception of a reasonable person fully informed of the relevant facts, requires no less.

RESPECTFULLY SUBMITTED ON THIS 9th DAY OF MAY 2019



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