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

Date: **31 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 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: 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 Responses of the Prosecution (ICC-01/04-02/06-2349),¹ and the Victims' Legal Representatives (ICC-01/04-02/06-2348),² to the Request for Disqualification of Judge Ozaki,³ Counsel representing Mr. Ntaganda ("Defence"), hereby submits this:

Request for leave to reply to the Responses of the Prosecution (ICC-01/04-02/06-2349) and Victims (ICC-01/04-02/06-2348) to Request for Disqualification of Judge Ozaki

INTRODUCTION

1. The Defence, pursuant to Regulation 24(5) of the Regulations of the Court, seeks leave to reply to four limited issues raised in the Responses submitted by the Prosecution and Victims' Legal Representatives: (i) whether the Prosecution has inadequately quoted the *Mucić* Bureau decision of 25 October 1999, thus giving an erroneous impression of the holding in that paragraph,⁴ upon which it relies repeatedly in its Response;⁵ (ii) whether the Prosecution uses the words "speculation" and "conjecture" correctly in the context of evaluating appearance of bias;⁶ (iii) whether the Victims' Legal Representatives interpretation of the elimination of the "[i]n particular" language in a prior version of Article 40 of the Rome Statute implied any tacit approval that a part-time Judges of the Court could become a "member of the legislative or executive branches of the Government of a State";⁷ and (iv) whether Judge

¹ Prosecution Response to the Defence "Request for Disqualification of Judge Ozaki" (ICC-01/04-02/06-2347-Red, 27 May 2019, ICC-01/04-02/06-2349 ("Prosecution Response").

² Joint Response of the Common Legal Representatives of Victims to the Defence Request for Disqualification of Judge Ozaki (ICC-01/02-04/06-2347), 27 May 2019, ICC-01/02-04/06-2348-Conf ("Victims' Response").

³ Request for Disqualification of Judge Ozaki, 20 May 2019, ICC-01/02-04/06-2347-Conf ("Request for Disqualification").

⁴ Prosecution Response, para.33.

⁵ Prosecution Response, paras. 40,46-48,52-54.

⁶ Prosecution Response, para. 44.

⁷ Victims' Response, para.20.

Ozaki's indication that she would resign once "elected" to be an ICC Judge was limited to, or conditional upon, being appointed as a full-time Judge.⁸

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." Jurisprudence applying this Regulation 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.⁹
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 reply, but must rather "demonstrate [...] why they are new and could not reasonably have been anticipated";¹⁰ and (ii) "explain why a reply to the aforementioned issues is otherwise warranted."¹¹

SUBMISSIONS

- I. **First Issue: the selective quotation of the ICTY Bureau decision on the disqualification of Judges Riad, Wang and Nieto-Navia in *Mucić et al.* gives an inaccurate impression of the scope of that decision**

⁸ Victims' Response, para.25.

⁹ Decision on Mr. Ntaganda's request for leave to reply, 17 July 2017, ICC-01/04-02/06-1994, ("*Ntaganda* Appeal Decision on Replies"), para. 9.

¹⁰ *Id.* para. 13.

¹¹ *Id.* para. 14.

4. The Prosecution quotes a passage from an ICTY Bureau decision concerning the disqualification of Judges Riad, Wang and Nieto-Navia in the *Mucić et al.* case¹² in support of the proposition that any request for disqualification for appearance of bias based on lack of judicial independence must show, in addition, a particular type of personal bias.¹³ According to the Prosecution's characterization, this quotation shows that, as a general principle, judicial independence is only disqualifying under Article 40(2)(a) when there is the specific personal bias described in the ICTY Bureau decision.¹⁴
5. The Defence does not submit that the Prosecution has quoted any words incorrectly. The Defence does submit, however, that the way that the quotation was selected removes essential conditions. In particular, the quotation as selected by the Prosecution omits the preceding sentence, which incorporates the much narrower statutory language for disqualification for bias at the ICTY (limited to "personal interest" or "association") than that which appears in ICC Rule 41(2)(a) (allowing disqualification for lack of impartiality "on any ground").
6. The Defence submits that it was unforeseeable that the Prosecution would present the quotation as it has, or that it would seek to use the quotation for the broader purposes set out in the Prosecution Response.
7. Even if it was foreseeable, a reply is otherwise necessary to assist the Judges in understanding the implications of the Prosecution position. ICTY procedures prior to the *Mucić* 25 October Decision ensured that the issue judicial independence as a basis for disqualification had been fully litigated before the Bureau with the benefit of Defence submissions. If the Prosecution's

¹² *Mucić et al.*, Case No. IT-96-21, Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that certain Judges Recuse Themselves, 25 October 1999, para.10 ("*Mucić* 25 October Decision").

¹³ Prosecution Response, para.33.

¹⁴ Prosecution Response, paras 33,46-48,52-54.

interpretation of the quotation is taken at face value, the Accused will be deprived of this right at the ICC. A reply is necessary to avoid this misunderstanding and misapplication of the quotation in question.

II. Second Issue: “speculation” and “conjecture” in the context of evaluating appearance of bias

8. The Prosecution’s assertions that the grounds giving rise to an appearance of bias should be rejected as “speculative” or based on “multi-layered conjecture”¹⁵ were unforeseeable. These submissions ignore the nature of the “appearance of bias” exercise. A reply is necessary to address these standards that would largely conflate the “appearance of bias” standard into a standard of “actual bias.”

III. Third Issue: revisions of Article 10(2) of the Second ILC Draft ICC Statute reflected an “Abandon[ment]” of the prohibition on a Judge also being concurrently a member of the executive branch of a government

9. The Victims’ Legal Representatives unforeseeably argue that the removal of the words “in particular” from a prior version of Article 40 implies tacit acceptance of those activities.¹⁶ The argument is illogical, especially given that the words following “in particular” included activities other than serving in the executive of a State. A reply is warranted to address this unforeseeably erroneous submission, which is necessary for the adjudication of the matter.

IV. Fourth Issue: Judge Ozaki’s view that she was required by the ICC Statute to resign from the Japanese Government was not, and could not have been, limited to full-time service

¹⁵ Prosecution Response, para.44.

¹⁶ Victims’ Response, paras.19-20.

10. The Victims' Legal Representatives call the Defence "disingenuous"¹⁷ for quoting Judge Ozaki's view, while a candidate to be an ICC Judge, that the Rome Statute would require her to resign from the Government of Japan "once elected." The Victims' Legal Representatives make this allegation on the basis that "Judge Ozaki was responding to questions arising from her candidacy as full-time Judge and the Statute requires full-time serving judges not to engage in any other occupation of a professional nature."¹⁸
11. A reply is justified to respond to the suggestion that the Defence was disingenuous in relying on this statement. Addressing whether Judge Ozaki's statement as a judicial candidate was, or could have been, predicated on full-time appointment, is necessary and will assist the Judges in adjudicating the Request for Disqualification.

CONCLUSION

12. The Presidency and the Judges will be assisted by a reply on these limited issues. The interests of justice will be particularly well-served by allowing a reply in respect of the First Issue, given its importance and the apparent plausibility of the quotation as presented to the Judges.

RESPECTFULLY SUBMITTED ON THIS 31st DAY OF MAY 2019



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¹⁷ Victims' Response, para.25.

¹⁸ *Id.*