

# Judge Ozaki's Case

## Moonlighting at the International Criminal Court?

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On March 19, 2019, seventeen of the eighteen judges of International Criminal Court (hereinafter 'the Court') sat to decide on the fate of Judge Ozaki as a judge of the Court. Back in January this year, Judge Ozaki had requested the Presidency to change her status from a 'full-time judge' to a 'non-full-time judge' of the Court. The request was granted. Later, in February, Judge Ozaki informed the Court that she was appointed as Japan's ambassador to Estonia and that her duties as an ambassador shall commence on April 3, 2019. She requested the Presidency to allow her to continue sitting as a 'non-full-time judge' in the case of *The Prosecutor v. Bosco Ntaganda* while serving her duties as an ambassador.

### The Decision

The majority ruled that Judge Ozaki's [request](#) to serve as a 'non-full-time judge' within the meaning of Article 35(3) of the [Rome Statute](#) was compatible with the requirements set out under Article 40 of the Statute.

Article 40 of the Statute reads as:

"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."

The majority acknowledged that the requirements set out under this article were of 'concrete' nature. Further, since Judge Ozaki's role after her request was no longer 'full-time', the majority concluded that the condition relating to 'professional nature' under clause (3) was inapplicable in the present case. It made a distinction between the provision under Article 40 of the Rome Statute and that under Article 16 of the [Statute of International Court of Justice](#) (ICJ).

The latter article lays that: "No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature". In contrast, the requirement set out under clauses (1) and (2) of Article 40 of the Rome Statute are general in nature. The majority opined that such was the case because the drafters of the Rome Statute had deliberately skipped specific

considerations. The Court interpreted the requirements to be applicable in a 'case-to-case' basis by placing strong emphasis on the 'actual occupation' under question.

One of the most essential features of the majority opinion was its interpretation of 'is likely to' mentioned under clause (2). The majority seemed to have made a standalone interpretation of the phrase as it considered the term to denote "a level of certainty beyond mere speculation or possibility". Consequently, the majority ruled that Judge Ozaki's duties as Japan's ambassador to Estonia did not conflict with her duties as a judge in *Ntaganda's* case as both Estonia and Japan had no relation with the case.

It seems clear that the majority applied an isolated interpretation of the requirements mentioned under Article 40 of the Rome Statute. While the interpretation by no means is incorrect, the majority should have considered the matter in a broader spectrum.

On the other hand, the minority opinion rightfully focused on an aspect overlooked by the majority – "the appearance of judicial independence, in the eyes of reasonable outsider observers". A performance of an executive or political function for a state party by a judge of the Court could possibly shake public confidence in judicial independence. In addition to the considerations relating to public confidence, the minority opinion also seemed to be mindful of Judge Ozaki's continuance as an opportunity for the accused to launch a motion for disqualification or maybe a ground for appeal. This concern makes sense as international criminal tribunals have [experienced](#) such [motions](#) before, often, launched to delay the trial, if nothing else.

### **Concluding Remarks**

The present case is not the first instance of moonlighting in the international criminal justice system. The International Criminal Tribunal for Former Yugoslavia (ICTY) was faced with a similar situation during the *Celebici* case. All four of the accused in that case filed a motion for removal of Judge Odio Benito from the case on the ground that she was appointed as the Vice-President of the Republic of Costa Rica thereby failing to fulfil the criteria required for an independent judge under international law.

The case required detailed consideration as Costa Rica was one of the non-permanent members of the Security Council then. Hence, there was a possibility that Judge Benito could influence the decisions made in the Security Council in relation to ICTY and the situation in former Yugoslavia. The bureau, however, noted that Judge Benito had committed to not taking charge of the office of Vice-President until her judicial duties were discharged. Accordingly, the bureau [ruled](#) that she was not disqualified from adjudging the trial under question.

In both the cases, we do not find any deliberation being done on 'public confidence in judicial independence'. While such considerations may not seem significant in the case of an ad-hoc tribunal, the same is not true for the International Criminal Court, a court heavily dependent on the support that it receives from its state parties.

The European Court of Human rights (ECtHR), on various occasions, has remarked on the importance of '[appearance of judicial independence](#)'. The two prong-test [suggested by the ECtHR](#) which included subjective criteria on 'bias' as well as objective consideration on 'appearance of bias' also runs through the ICTY [jurisprudence](#). Hence, it was surprising to see the majority not considering this factor at all. It is equally baffling to see no mention being made of the [Code of Judicial Ethics](#). Maybe it has to do with the [long running tradition](#) of having strong presumption in [favour of the judges](#). Still, in a time where the Court is suffering from [legitimacy crisis](#), where state parties are [not hesitant](#) to [leave](#) the court, jeopardising public confidence in the system will only supply more excuses to the state parties for quitting the Court.

It is unfortunate how international courts do not have much choice left when they are faced with these situations. For example, in the present case, it is notable how Judge Ozaki—as Kevin Jon Heller [puts](#) it—'threatened to resign' as a judge of the Court if her request was not granted. Now, if her request was denied, the Court would have to start the Ntaganda' case from scratch as Article 74(1) of the Rome Statute mandates all judges to be present at all stages of the trial. Thus, it can be conveniently argued that the majority did not have much recourse and went for a pragmatic, albeit, flawed approach to solve the issue. Further, if we are to consider a general scenario, it could be problematic and probably counter-productive to bring a new judge amidst of a complex criminal trial.

While some commentators [preach](#) 'self-regulation' as a measure, it has not worked in other international courts. With all these concerns, the ICJ, quite recently, has shown a way out. It took a massive step in this regard last year when it announced that its judges will not "normally accept to participate in international arbitration". Judges of the ICJ have drawn [criticism](#) for extensively engaging themselves in international arbitration, a practice that does not only distracts them but also raises significant questions on their independence and impartiality. The fact that the Court has decided to fix the problem is worthy of appreciation. With that being said, it would not be unwise for the International Criminal Court to follow a similar path. However, where the judges are filing [lawsuits](#) against the Court for a pay raise, we must not keep high hopes.

The importance of judicial independence cannot be stressed enough in a court which is designed to fix the 'impunity gaps' that arise from unreliable municipal justice systems. In conclusion, such practice should be discouraged by the Court. Perhaps, a good way to do that would be granting such requests in exceptional circumstances only.

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