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

Date: **1 April 2019**

**THE PRESIDENCY**

**Before:** Judge Chile Eboe-Osuji, President  
Judge Robert Fremr, 1st Vice-President  
Judge Marc Perrin de Brichambaut, 2nd Vice-President

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
*THE PROSECUTOR V. BOSCO NTAGANDA***

**Public with Public Annex A**

**Request for disclosure concerning the Decision of the plenary of Judges on the  
judicial independence 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:**

**The Office of the Prosecutor**

Mrs. Fatou Bensouda  
Mr. James Stewart  
Mrs. Nicole Samson

**Counsel for the Defence**

Me Stéphane Bourgon, *Ad.E.*  
Me Christopher Gosnell

**Legal Representatives of Victims**

Mr. Dmytro Suprun  
Mrs. Sarah Pellet

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation / Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr. Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to the Notification of the Decision of the Plenary of Judges pursuant to Article 40 of the Rome Statute, Counsel representing Mr. Ntaganda (“Defence”) submits this:

**Request for disclosure concerning the Decision of the plenary of Judges on the  
judicial independence of Judge Ozaki**

**BACKGROUND**

1. On 22 March 2019, the Defence was notified by the Presidency of the Court that Judge Ozaki had been appointed Japanese Ambassador to the Republic of Estonia, and that a majority of Judges had held that her appointment to this position – without having first sought authorization to do so from the Presidency or the Judges – did not affect confidence in her judicial independence.<sup>1</sup>
2. The chronology of events leading up to this notification appears to be as follows, although the sequence and date and some events has not been made clear:
  - a. On 7 January 2019, Judge Ozaki sent a memorandum asking the Presidency to allow her to resign as a full-time judge of the Court “as of 11 February 2018 inclusive”, citing “personal reasons and without mention of any future activities or occupation”;<sup>2</sup>
  - b. After an exchange of some form of communication or correspondence between Judge Ozaki and the Presidency, Judge Ozaki agreed with the suggestion that she was not seeking to resign completely, but only to “change her status

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<sup>1</sup> *Ntaganda et al.*, Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute, 22 March 2019 (“Notification”), Annex 1 (“Decision”), para. 5.

<sup>2</sup> Decision, para. 3.

to that of a non-full-time judge” within the meaning of article 35(3) of the Statute;<sup>3</sup>

- c. On a date that is not specified, but which Judge Ozaki suggests was 12 February 2019,<sup>4</sup> the Presidency granted this request,<sup>5</sup> which exempted her from the prohibition on assuming any other occupation under Article 40(3);<sup>6</sup>
- d. On a date that is not specified, but which open-source reports indicate was 13 February 2019, Judge Ozaki was appointed to the position of Japanese Ambassador to Estonia, by virtue of a Japanese Government Cabinet decision of 12 February 2019;<sup>7</sup>
- e. On 18 February 2019 – *i.e.* after Judge Ozaki’s appointment had been publicly announced in Japan – Judge Ozaki sent a memorandum to the Presidency and all judges disclosing that “she had been appointed as the Japanese Ambassador to the Republic of Estonia”;<sup>8</sup>
- f. In her 18 February 2019 letter, Judge Ozaki asserts that her appointment would not “affect confidence in my independence,” but that if the Judges decided otherwise, she was resigning as a full-time judge retro-active to 12 February 2019 “when I ceased to be a full-time judge of the Court”;<sup>9</sup>

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<sup>3</sup> Decision, para. 4.

<sup>4</sup> Decision, para. 5 (quoting Judge Ozaki as requesting that her letter of 18 February 2019 be treated, in the alternative, as “my letter of resignation as a judge of this Court pursuant to Rule 37 of the Rules of Procedure and Evidence, as of 12 February 2019 when I ceased to be a full-time judge of this Court.”)

<sup>5</sup> Decision, para. 4.

<sup>6</sup> ICC Statute, Article 40(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.”)

<sup>7</sup> Annex A.

<sup>8</sup> Decision, para. 5 (underline added).

<sup>9</sup> Decision, para. 5.

- g. On 26 February 2019, the Presidency circulated a memorandum to all judges of the Court setting out the issues raised by Judge's Ozaki's memorandum, and apparently scheduling a plenary meeting of the Judges for the purpose of making a determination pursuant to Article 40(4);<sup>10</sup>
- h. On 4 March 2019, a plenary of the Judges was held to discuss the issue;
- i. On 19 March 2019, the Presidency addressed a confidential memorandum to Judge Ozaki memorializing her correspondence with the Presidency on the issue, the Presidency's memorandum to the Judges in advance of the plenary, and the outcome of the deliberations of the plenary of Judges;<sup>11</sup> and,
- j. On 22 March 2019, the Presidency filed a public "Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute," to which was attached the formerly confidential memorandum of 19 March from the Presidency to Judge Ozaki.

### REQUEST FOR DISCLOSURE

- 3. Article 40 (2) states that "Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence." The ICC Code of Judicial Ethics provides that judges "shall uphold the independence of their office and the authority of the Court and shall conduct themselves accordingly in carrying out their judicial

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<sup>10</sup> Decision, para. 6.

<sup>11</sup> Decision, p. 1.

functions.”<sup>12</sup> Article 41(2)(a) of the Statute states that “A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground.” Article 67(1) confers on an accused the right to “a fair hearing conducted impartially.”

4. Article 14 of the International Covenant of Civil and Political Rights, which must be accepted as expressive of internationally recognized human rights under Article 21(3), states that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”
5. As stated by President Meron in circumstances that highlight the importance of not compromising the principle of judicial independence:

It is self-evident that justice and the rule of law begin with an independent judiciary. The right to be tried before an independent and impartial tribunal is an integral component of the right to a fair trial enshrined in Article 19 of the Statute and embodied in numerous human rights instruments. The United Nations Human Rights Committee has stated that the right to an independent and impartial tribunal “is an absolute right that may suffer no exception.” To uphold this right, in the exercise of their judicial functions, the judges of the Mechanism shall be independent of all external authority and influence, including from their own States of nationality or residence.<sup>13</sup>

6. Every right must have a remedy. The right to an independent tribunal would be illusory if an accused had no remedy to enforce it, and denying the opportunity to be heard on such a vital issue would be a denial of natural justice.
7. Accordingly, the lack of independence of judges has been litigated by Accused in respect of both alleged institutional<sup>14</sup> and personal lack of

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<sup>12</sup> Code of Judicial Ethics, ICC-BD/02-01-05.

<sup>13</sup> *Ngirabatware*, Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay, 31 January 2017, para. 11.

<sup>14</sup> See e.g. *Krajišnik*, Decision on Motion Challenging Jurisdiction – With Reasons, 22 September 2000, paras. 14-17; *Tadić*, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 32.

independence.<sup>15</sup> In the *Mucić et al.* case, the Accused litigated the issue of Judge Odio Benito's judicial independence, as in this case, only once the Accused were informed of an *ex parte* decision taken at a plenary of the Judges.<sup>16</sup>

8. The Defence has serious grounds, and intends to bring, a request concerning this issue before the Presidency or other applicable body. In preparation for this request, however, the Defence seeks to be fully informed of the relevant facts, including in particular, the basis of the Judges' decision that was memorialized in the 19 March 2019 document to Judge Ozaki. Although some of the relevant facts and circumstances are set out in the Decision, the memoranda from and to Judge Ozaki are not provided in full. The Decision cites only excerpts of these documents.
9. The facts that have not been disclosed include: the exact date of the Presidency's decision authorizing Judge Ozaki to be a non-full time Judge; whether Judge Ozaki already knew on 7 January 2019 that the Japanese Cabinet was going to meet on 12 February 2019 to discuss her appointment as Japanese Ambassador to Estonia; and whether she disclosed to the Presidency at any time prior to its Decision authorizing her to no longer sit as a full-time Judge of the real reason for no longer wishing to sit in that capacity. The Decision seems to imply that Judge Ozaki withheld this information deliberately. She then apparently waited until after her appointment as Ambassador to indicate that she would be "happy" to continue sitting in the event of a finding of no appearance of bias but, in the alternative, asked to "resign[] as a judge of this Court" retroactive to the date of her appointment as Ambassador.<sup>17</sup>

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<sup>15</sup> See e.g. *Mucić et al.*, Decision of the Bureau on Motion on Judicial Independence, 4 September 1998; *Ngirabatware*, Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay, 31 January 2017.

<sup>16</sup> *Mucić et al.*, Decision of the Bureau on Motion on Judicial Independence, 4 September 1998.

<sup>17</sup> Decision, para. 5.

10. Judge Ozaki's apparent non-disclosure to the Presidency and the Judges of the real reason for seeking to become a non-full-time judge raises serious questions not only about her personal independence, but also whether she has abided by the ICC Code of Judicial Ethics. The extent to which Judge Ozaki's personal interests appear to have guided her conduct also gives rise to a potential reasonable apprehension of such a bias.
11. Non-disclosure by a judge of facts relevant to disqualification, in itself, can be a basis for disqualification. In the *Karemera et al.* case, Judge Vaz's failure to spontaneously disclose her association with a Prosecutor was deemed highly relevant to the Appeals Chamber's determination that she was disqualified.<sup>18</sup> Judge's Vaz's appearance of bias was deemed so substantial in that case that it, "also extended to Judges Lattanzi and Arrey because, although aware of the circumstances of Judge Vaz's association with the Prosecution counsel, they acquiesced in rejecting Nzirorera's motion and, therefore, in continuing the trial with Judge Vaz on the bench."<sup>19</sup>
12. This reasoning underscores the need for full and frank disclosure of all facts relevant to potential disqualification. The absence of full and frank disclosure, once a serious issue of independence or impartiality has arisen, reinforces the reasonable apprehension that neither essential condition for a fair trial exists. A serious issue has clearly arisen in this case, as demonstrated by the compelling views expressed by the minority of three judges.<sup>20</sup> In such a case, the objective tests for disqualification are assessed from the perspective of "a

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<sup>18</sup> *Karemera et al.*, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings With a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004, para. 67 ("The particular circumstances involved here include, in addition to the admitted association and cohabitation, the fact that Judge Vaz did not disclose these facts until Defence counsel expressly raised this matter in court.")

<sup>19</sup> *Id.* para. 69.

<sup>20</sup> Decision, paras. 8,15.

fair-minded and informed observer, having considered all the facts and all the circumstances.”<sup>21</sup>

13. The Defence, in order to ensure that Mr. Ntaganda’s right to a fair trial is protected, must at least be informed of the circumstances and facts taken into consideration by a majority of the Judges.
14. In addition to the specific materials relied on by the Judges, the excerpts from Judge Ozaki’s memoranda are strongly suggestive that she has consulted with the Government of Japan concerning how to handle this issue, which in and of itself would seriously compromise the appearance of her independence. This is a separate category of information that should also be disclosed.
15. The Defence therefore requests disclosure of all facts relevant to the issue of whether Judge Ozaki’s appointment, as well as the manner in which she disclosed her appointment to the Court, compromises her judicial independence and/or raises a reasonable apprehension of bias. In particular, the Defence requests disclosure of:
  - a. Judge Ozaki’s full communications with the Presidency concerning her withdrawal as a full-time Judge;
  - b. Judge Ozaki’s full communications with the Presidency concerning her appointment as Japanese Ambassador to Japan, including the full text of her 18 February 2019 memorandum to all Judges;
  - c. The full text of the Presidency’s memorandum of 26 February 2019 to all Judges concerning this matter, to the

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<sup>21</sup> “Noting the previous jurisprudence of the Court in the *Banda/Jerbo* case, the plenary reiterated that the question was to be viewed from the objective perspective of whether a fair-minded and informed observer, having considered all the facts and all the circumstances, would reasonably apprehend bias in the judge”, Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, 11 June 2013, para. 34.

extent that it contains factual information about the circumstances of Judge Ozaki's appointment; and

- d. Any other communications or correspondence between Judge Ozaki and the Presidency, Judge Ozaki and the other Judges as well as between the Presidency and the Judges concerning the facts relevant to Judge Ozaki's appointment and potential lack of judicial independence; and
- e. Any communications by Judge Ozaki with the Government of Japan concerning her appointment as Ambassador to Estonia, in particular if the Presidency was made aware of such correspondence.

16. The Defence does not request the content of any internal deliberations of the Judges. Any document that contains any such content could be redacted as necessary.

#### **CONCLUSION AND RELIEF REQUESTED**

17. The Defence respectfully requests from the Presidency the disclosure of the information set out in paragraph 15 above as well as any other relevant information in the possession of the Presidency, related to Judge Ozaki's change of status.

**RESPECTFULLY SUBMITTED ON THIS 1ST DAY OF APRIL 2019**



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands