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THE *AD HOC* PRESIDENCY

Before: **Judge Chile Eboe Osuji, President**
Judge 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

Confidential

Joint Response of the Common Legal Representatives of Victims to the Defence Request for Disqualification of Judge Ozaki (ICC-01/04-02/06-2347)

Source: **Office of Public Counsel for Victims**

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Former Child Soldiers (jointly the "Legal Representatives") hereby submit a joint response to the Defence "Request for Disqualification of Judge Ozaki".[1]

2. The Legal Representatives oppose the Request. In the circumstances of the present litigation, a reasonable observer, properly informed, cannot reasonably doubt either the impartiality or the independence of Judge Ozaki. The Defence suggestion that the drafting history of the Rome Statute and a precedent of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") support an abstract prohibition for a Judge to be concurrently a member of the executive branch of a government is misconstrued. The allegation that the Judge's subsequent resignation as Japanese Ambassador to Estonia impacted negatively on the Judge's personal, professional and financial interests such that it may reasonably appear to affect her independence or impartiality is based on unsubstantiated, speculative or inconsequential factual allegations. Finally, disclosure issues have been the subject of ample litigation and the Presidency has already considered, and rejected, requests for further disclosure.

II. PROCEDURAL BACKGROUND

3. On 22 March 2019, the Presidency of the Court issued a "Notification of the Decision of the Plenary of Judges pursuant to Article 40 of the Rome Statute" whereby it made accessible to the public, and thus, the parties and participants in the present case, that, on 18 February 2019 Judge Ozaki had informed the judges of the Court that she had been appointed to the position of Ambassador to the Republic of

[1] See the "Request for Disqualification of Judge Ozaki", No. ICC-01/04-02/06-2347-Conf, 20 May 2019 (the "Request for Disqualification"). A public redacted version was filed on 21 May 2019, No. ICC-01/04-02/06-2347-Red.

Estonia by the government of Japan.[2] A plenary of the judges was convened on 4 March 2019 during which Judge Ozaki's request pursuant to Article 40(4) of the Statute was considered.[3] The decision of the Plenary, issued by majority, was included as an annex to the notification.[4] The Plenary concluded that Judge Ozaki's appointment as Japanese Ambassador to the Republic of Estonia "*was not incompatible with the requirements of judicial independence*".[5]

4. On 1 April 2019, the Defence filed before Trial Chamber VI ("The Chamber") a Motion for Temporary Stay of the Proceedings.[6] The Chamber shortened the response deadlines[7] and accordingly the Prosecution and the Legal Representatives responded on 5 April 2019;[8] the Defence was authorised[9] to file a Reply.[10] On 18 April 2019 the Chamber rejected the Motion.[11]

5. On 1 April 2019, the Defence filed a Request for Disclosure before the Presidency seeking access to memoranda, correspondence and any relevant information in the possession of the Presidency, if necessary in redacted form, related to the decision of the plenary of the judges concerning Judge Ozaki's appointment as

[2] See the "Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute" (Presidency), No. ICC-01/04-02/06-2326, 22 March 2019.
[3] *Idem*.
[4] See the Annex 1 to the "Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute" (Presidency) (the "Article 40 Plenary Decision"), No. ICC-01/04-02/06-2326-Anx1, 22 March 2019, para. 8.
[5] *Idem*., para. 16.
[6] See the "Motion for Temporary Stay of the Proceeding", No. ICC-01/04-02/06-2328, 1 April 2019.
[7] See the Email correspondence from the Trial Chamber to the parties and participants dated 1 April 2019 at 15:59.
[8] See the "Prosecution's Response to the Defence 'Motion for Temporary Stay of Proceedings (ICC-01/04-02/06-2328)'", No. ICC-01/04-02/06-2329, 5 April 2019; and the "Joint Response of the Common Legal Representatives of Victims to the Defence 'Motion for Temporary Stay of Proceedings (ICC-01/04-02/06-2328)'", No. ICC-01/04-02/06-2330, 5 April 2019.
[9] See the Email correspondence from the Trial Chamber to the parties and participants dated 9 April 2019 at 09:22.
[10] See the "Reply to 'Prosecution's Response to the Defence 'Motion for Temporary Stay of Proceedings (ICC-01/04-02/06-2328)'", No. ICC-01/04-02/06-2334, 12 April 2019.
[11] See the "Decision on Defence request for temporary stay of proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-2335, 18 April 2019.

Japanese Ambassador to the Republic of Estonia.[12] On 8 April 2019, the Defence filed another Request for Disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019.[13] On 18 April 2019, the Presidency dismissed both Requests for Disclosure (the "Disclosure Decision").[14]

6. On 30 April 2019, the Defence filed a Request for Reconsideration of the Article 40 Plenary Decision.[15]

7. On 1 May 2019, the Presidency notified the parties and participants of the resignation of Judge Ozaki as Japanese Ambassador to Estonia as from 10 April 2019, which was accepted by the Ministry of Foreign Affairs of Japan on 18 Aril 2019.[16]

8. On 2 May 2019, the Defence filed a Request for Reconsideration of the Disclosure Decision.[17] It averred that its Request for Reconsideration of the Article 40 Plenary Decision had not become moot by virtue of Judge Ozaki's resignation.[18]

9. On 8 May 2019, the Prosecution responded to the Request for Reconsideration of the Disclosure Decision[19] and to the Request for Reconsideration of the Article

[12] See the "Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki", No. ICC-01/04-02/06-2327, 1 April 2019.
[13] See the "Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019", ICC-01/04-02/06-2332, 8 April 2019.
[14] See the "Decision concerning the 'Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki'" and the "Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019" (Presidency), No. ICC-01/04-02/06-2336, 18 April 2019, para. 3.
[15] See the "Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute", No. ICC-01/04-02/06-2337, 30 April 2019.
[16] See the "Notification concerning Judge Kuniko Ozaki" (Presidency), No. ICC-01/04-02/06-2338, 1 May 2019. See also *infra* note 23, para. 33.
[17] See the "Request for Reconsideration of 'Decision concerning the "Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki" and the "Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019"' (Filling #2336), and for Additional Disclosure", No. ICC-01/04-02/06-2339, 2 May 2019.
[18] *Idem*, para. 40.
[19] See the "Prosecution's Response to the Defence 'Request for Reconsideration of "Decision concerning the 'Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki' and the 'Request for disclosure concerning the visit of the Registrar to

40 Plenary Decision.[20] The Defence requested leave to reply to each of these Responses[21] and the Prosecution opposed these leave requests.[22]

10. On 14 May 2019, the Presidency rejected the Request for Reconsideration of the Disclosure Decision and the Request for Reconsideration of the Article 40 Plenary Decision.[23] In relation to the latter, the Presidency recalled the existence of a distinction between, on the one hand, "*the exercise of an internal administrative function connected to questions of the independence of a judge, which is entrusted to all judges other than an individual judge concerned*" pursuant to Article 40(4) of the Rome Statute, and the other hand, "*the potential judicial matter of the capacity of a judge to sit in a specific case*".[24] The Presidency noted that in the event that "*questions pertaining to an activity of a judge may impact on his or her impartiality in a specific case*" such concern should be

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Japan on 21 and 22 January 2019 (Filling #2336)", and for Additional Disclosure, 2 May 2019, ICC-01/04-02/06-2339'", No. ICC-01/04-02/06-2341, 8 May 2019.

[20] See 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)", No. ICC-01/04-02/06-2340, 8 May 2019.

[21] See the "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)"'", No. ICC-01/04-02/06-2342, 9 May 2019; and the "Request for leave to reply to 'Prosecution's Response etc.', (ICC-01/04-02/06-2341) of 8 May 2019 Concerning Disclosure", No. ICC-01/04-02/06-2343, 10 May 2019.

[22] See the "Prosecution's Response to the Defence '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)", ICC-01/04-02/06-2342", No. ICC-01/04-02/06-2344, 13 May 2019; and the "Prosecution's Response to the Defence 'Request for leave to reply to "Prosecution's Response etc, (ICC-01/04-02/06-2341)" of 8 May concerning Disclosure, ICC-01/04-02/06-2343'", No. ICC-01/04-02/06-2345, 13 May 2019.

[23] See the "Decision on the '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)' and the 'Request for Reconsideration of "Decision concerning the 'Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki', the 'Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019 (Filing #2336)', and for Additional Disclosure' (ICC-01/04-02/06-2339) and related requests"'" (Presidency), No. ICC-01/04-02/06-2346, 14 May 2019 (the "Reconsideration Decision").

[24] *Idem*, para. 16 referring to "Annex 1 to the Decision concerning the 'Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki' and the 'Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22'", No. ICC-01/04-02/06-2336-Anx1, 18 April 2019, p. 4 and also referring to "Annex 2 to the Decision concerning the 'Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki'" and the 'Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22'", No. ICC-01/04-02/06-2336-Anx2, 18 April 2019, p. 4.

raised by way of a request for disqualification under Article 41(2)(b) of the Statute.[25] The Presidency underlined that, rather than properly making a disqualification request the Defence "*has engaged in multiple repeated separate, yet inter-related, procedural filings on various issues*"[26] which serves only to "*delay and obfuscate*"[27] causing "*confusion and uncertainty*".[28] Hence, the Presidency set a deadline (20 May 2019) by which it invited the Defence to bring a disqualification request,[29] with responses due on 27 May 2019.

11. On 21 May 2019, the Defence filed the Request for Disqualification of Judge Ozaki.[30] The Defence submits that Judge Ozaki's:

- concurrent service as Ambassador is incompatible with judicial independence;[31]
- lack of independence is an issue properly to be considered as compromising her "impartiality" thus falling under Article 41(2);[32]
- resignation as Ambassador has not restored her appearance of impartiality;[33]
- appearance of independence and impartiality is further undermined because certain relevant facts remain undisclosed to the parties;[34]
- appearance of judicial independence and impartiality does not cease to be required or lessens because of the procedural stage reached in the case where substantive deliberations are over.[35]

[25] *Idem*, para. 21.
[26] *Ibid.*, para. 22.
[27] *Ibid.*
[28] *Ibid.*, para. 23.
[29] *Ibid.*, para. 24.
[30] See the "Request for Disqualification", *supra* note 1.
[31] *Idem*, paras. 20-36.
[32] *Ibid.*, paras. 37-40.
[33] *Ibid.*, paras. 41-51.
[34] *Ibid.*, paras. 52-57.
[35] *Ibid.*, paras. 58-62.

III. CONFIDENTIALITY

12. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court, the present response is classified as "confidential" given the original classification of the Defence Request for Disqualification.[36] However, this filing does not discuss any confidential information and therefore can be reclassified public at the discretion of the *Ad Hoc* Presidency.

IV. SUBMISSIONS

13. Article 40 of the Statute establishes the relevant requirements with respect to the 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*".

14. Article 41(2)(a) of the Statute sets out the standard for the judges of the Court with respect to impartiality:

> "[a] *judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground*".

15. The concepts of independence and impartiality are closely linked. Although it is appropriate to consider the two requirements together, it is also important to underline their main differences. Following the Jurisprudence of the European Court of Human Rights (the "ECtHR"):

> "220. […] [T]*he term "independent", appearing in Article 6 § 1 of the Convention, has been interpreted as meaning that the courts must be independent of the Executive, of the parties, and of Parliament (see Crociani v. Italy, nos. 8603/79, 8722/79, 8723/79 and 8729/79, Commission decision of 18 December 1980, Decisions and Reports 22, p. 147). In order to establish whether a tribunal can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of*

[36] Incidentally, the Legal Representatives note that the factual and legal basis for the chosen classification is not mentioned in the Request for Disqualification.

> *guarantees against outside pressures and the question whether the body presents an "appearance" of independence (see, among many other authorities, Findlay v. the United Kingdom, 25 February 1997, § 73, Reports 1997-I).*
> *221. There are two tests for assessing whether a tribunal is "impartial" within the meaning of that Article: the first consists in seeking to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, for example, Gautrin and Others v. France, 20 May 1998, Reports 1998-III).*
> *222. The personal impartiality of a judge can be presumed unless evidence is adduced to the contrary (see Daktaras, cited above, § 30).*
> *The second test, when applied to a body sitting as a bench, means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. It follows that when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether their fear can be held to be objectively justified (see Gautrin and Others, cited above, and Werner v. Poland, no. 26760/95, § 39, 15 November 2001).*
> *223. The notions of independence and objective impartiality being closely linked, the Court will examine those two questions together (see, mutatis mutandis, Findlay, cited above, § 73, and Hirschorn v. Romania, no. 29294/02, § 72, 26 July 2007)."*[37]

16. Previous Plenary decisions addressing requests for disqualification discussed the relevant standard of assessment; namely whether "*the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge*".[38] Said plenaries established that this standard "*is concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension is objectively*

[37] See ECtHR, amongst many others, *Rywin v. Poland*, Applications Nos. 6091/06, 4047/07 and 4070/07, Judgment of 18 February 2016, paras. 220-223.
[38] See the "Decision of the Plenary of Judge on the Defence Applications for the Disqualification of Judge CunoTarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*" (Plenary), No. ICC-01/05-01/13-511-Anx, 23 June 2014, para. 17 ("*Bemba* et al. Disqualification Decision"). See also "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*", No. ICC-01/04-01/06-3040-Anx.

reasonable".[39] Moreover, they underlined that "*there is a strong presumption of impartiality that is not easily rebutted*".[40]

17. The Legal Representatives are of the view that in the present circumstances, a reasonable observer, properly informed, cannot reasonably apprehend bias in Judge Ozaki.

A. Judge Ozaki's concurrent service as ICC Judge and Japanese Ambassador to Estonia was not incompatible with judicial independence

18. The Defence submits that Judge Ozaki's concurrent service as Ambassador is incompatible with judicial independence.[41] In support of its contentions, the Defence invokes the drafting history of the Statute, in particular the 1993 ILC Report and a 1994 Working Group Report[42] arguing that these documents reflect the understanding of the drafters that a judge could not be at the same time a member of the Executive Branch of a national government.[43]

19. The Legal Representatives submit that the Defence misrepresents the drafting history of the Statute. The excerpts relied upon and quoted by the Defence cannot be evaluated without due regard to, and a proper understating of, the model of an International Criminal Court that was being considered by the International Law Commission when it published the reports quoted by the Defence. Indeed, back in 1993 and 1994, the Court was not conceived as a full-time body and its Judges were *not* meant to serve on a full-time basis.[44] This of course had several implications

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[39] *Idem*.
[40] See the "*Bemba* et al. Disqualification Decision", *supra* note 38, para. 18, which reads as follows: "*The* […] *disqualification of a judge* [is] *not a step to be undertaken lightly,* [and] *a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice*".
[41] See the "Request for Disqualification", *supra* note 1, paras. 20-36.
[42] *Idem*, paras. 21 and 22.
[43] *Ibid*.
[44] See the "Report of the International Law Commission on Its Forty-Fifth Session, Draft Statute for an International Criminal Court, 3 May-23 July 1993", UN doc. A/48/10(SUPP), September 1993, pp. 103

including on the allowances and expenses of the Judges. In this regard, the draft at the time set out that "*the judges shall receive a daily allowance during the period in which they exercise their functions*"[45] and "*may continue to receive a salary payable in respect of another position occupied by them consistently with article 10*".[46] The then Article 10(2) included the following language in respect of the requirement for judicial independence:

> "*Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In particular, they shall not while holding the office of judge be a member of the legislative or executive branches of the Government of a State, or of a body responsible for the investigation or prosecution of crimes*".[47]

20. Clearly, this system has not been adopted in later negotiations. Rather, the negotiators opted for full-time serving Judges that, occasionally, could serve on a part-time basis.[48] The quoted Article 10(2) of the 1994 ILC Draft Statute later became the current Article 40(2) of the Statute. Plainly, only the first sentence in Article 10(2) was retained. The abstract prohibition for a Judge to be concurrently a member of the executive branch of a government was therefore abandoned.

21. Article 40(3) of the Statute provides that full time serving judges shall not engage in any other occupation of a professional nature. With regard to part-time serving judges, what matters is whether the actual occupations and functions

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and 105 and the "Report of the International Law Commission on Its Forty-Sixth Session, Draft Statute for An International Criminal Court, 2 May-22 July 1994", UN doc. A/49/10(SUPP), September 1994, p. 57.

[45] *Idem*. See also the "Report of the International Law Commission on Its Forty-Sixth Session, Draft Statute for An International Criminal Court, 2 May-22 July 1994", *idem*, Article 17 and commentary, pp. 63-64.

[46] See the "Report of the International Law Commission on Its Forty-Sixth Session, Draft Statute for An International Criminal Court, 2 May-22 July 1994, *ibid.*, p. 63.

[47] *Ibid.*, p. 56 (emphasis added).

[48] See the "Ad Hoc Committee on the Establishment of an International Criminal Court 3-13 April 1995", UN doc. A/AC.244/2, 21 April 1995, para 18 according to which "[*i*]*t was suggested that the permanency and independence of the court would be enhanced if some officials, such as the judges, the Presidency, the Registrar and/or the Prosecutor, were appointed on a full-time basis*".

proposed by a specific judge could affect his or her judicial independence.[49] This is not contradicted by the drafting history of the Statute, which the Defence misrepresented.

22. The Defence submits that the function-specific understanding of judicial independence finds no support in the most salient precedent, concerning Judge Odio Benito at the ICTY.[50] Here again, the Defence misconstrues said precedent. Indeed, in the *Delalić* case, the applicants argued that, as a matter of principle, Judge Odio Benito ought to be disqualified because she had been elected as the Vice-President of Costa Rica. The application was supported by reference to the language in the Statute of the International Court of Justice and that of the Statute of the International Tribunal for the Law of the Sea, setting out that "[n]*o member of the* [Court/Tribunal] *may exercise any political or administrative function*".[51] The Bureau rejected the request because the Judge accepted to hold the position of Vice-President on paper only, since she would take office only after she had completed her judicial commitments at the ICTY.[52] What was decisive was that she committed herself not to take up any duties. Hence, contrary to the position of the Defence, the Tribunal resorted to a function-specific understanding of judicial independence.[53]

23. More recently, in the case of *Pabla KY v. Finland*, the ECtHR was seized with a case in which one of the Judges (Judge M.P.) was a member of the Court of Appeal and a member of parliament. The Defence submitted that he lacked the required independence. The ECtHR rejected that "*the mere fact that M.P. was a member of the legislature at the time he sat on the applicant company's appeal is sufficient to raise doubts as*

[49] See in this sense, the "Article 40 Plenary Decision", *supra* note 4, para. 10.
[50] See the ICTY, *The Prosecutor v. Delalić, Mucić and Delić*, Decision of the Bureau on motion on judicial independence, 4 September 1998.
[51] *Idem*.
[52] *Ibid.*
[53] It cannot escape attention that, in the same ICTY Decision, the Bureau referred to the ECtHR's case law and concluded that "*the mere fact that a person who exercises judicial functions is to some extent subject, in another capacity, to executive supervision, is not by itself enough to impair judicial independence*", *ibid*.

to the independence and impartiality of the Court of Appeal".[54] This jurisprudence shows that a function-specific understanding of judicial independence is consistent with internationally recognised human rights and, as such, does not contradict the requirements of Article 21(3) of the Statute.

24. The remaining contentions raised by the Defence under this line of argumentation tend to demonstrate the existence of State practice suggesting that the judicial and the executive branches of Government must be kept separated, as a corollary of the democratic principle of the separation of powers.[55] Since its inception, a tripartite distribution of State power, undoubtedly part of State architecture in modern liberal societies, is intended to avoid concentration of power and tyranny.[56] One could reasonably wonder what the concentration of power and tyranny is that should be prevented by avoiding Judge Ozaki sitting in the *Ntaganda* case concurrently with her functions as Japan's Ambassador to Estonia?[57] This principle is clearly inapplicable to the relationship between Japan's executive branch and the ICC. Rather, as noted by the ECtHR in the *Pabla KY v. Finland* case:

> *"29. although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question is always whether, in a given case, the requirements of the Convention are met. As in the other cases examined by the Court, the present case does not, therefore, require the application of any particular doctrine of constitutional law. The Court is faced solely with the question whether, in the circumstances of the case, the Court of Appeal had the requisite 'appearance' of independence, or the requisite 'objective' impartiality.*
> […]
> *34. M.P. had not exercised any prior legislative, executive or advisory function in respect of the subject matter or legal issues before the*

[54] See the EHCtR, *Pabla KY v. Finland*, Application No. 47221/99, Judgment of 22 June 2004, para. 34.
[55] See the "Request for Disqualification", *supra* note 1, paras. 25-28.
[56] See MONTESQUIEU, *The Spirit of the Laws* (1748), Chapter XI (6).
[57] Seemingly noting this incongruity, the Defence advances that "*the fundamental importance of this institutional separation is not lessened because the executive that Judge Ozaki joined is that of a State Party instead of the ICC itself*". See the "Request for Disqualification", *supra* note 1, para. 33.

> *Court of Appeal for decision in the applicant company's appeal. The judicial proceedings therefore cannot be regarded as involving 'the same case' or 'the same decision'* [...] *While the applicant company relies on the theory of separation of powers, this principle is not decisive in the abstract.*"[58]

25. The Defence quotes, in support of its interpretation of Article 40 of the Statute, the responses provided by Judge Ozaki to a questionnaire prepared by Coalition for the International Criminal Court for purposes of the 2009 Election of Judges.[59] On that occasion, discussing the issue of independence in the performance of functions, Judge Ozaki stated that "[o]*f course, once elected, I will leave the Government of Japan, as requested by the Rome Statute*".[60] The Defence underlines the terms "*as requested by the Rome Statute*" purporting to show that even Judge Ozaki would support the interpretation intended in the Request for Disqualification. This is, however, disingenuous. Judge Ozaki was responding to questions arising from her candidacy as full-time Judge[61] and the Statute requires from full-time serving judges not to engage in any other occupation of a professional nature.

26. The Defence states that the guarantees of independence suggested by Judge Ozaki, based on a separation of subject-matter between her diplomatic functions and of the *Ntaganda* case, are manifestly insufficient to satisfy the requirements of judicial independence.[62] The Legal Representatives posit that it is entirely legitimate to investigate as part of the function-specific inquiry whether the diplomatic functions incumbent upon the Japanese Ambassador to Estonia would have any connection with the *Ntaganda* case. In this respect, as noted by the Plenary, the language of Article 40(2) of the Statute ("*is likely to*") "*denotes a* [required] *level of certainty beyond mere speculation or possibility*".[63]

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[58] See ECtHR, *Pabla KY v. Finland*, *supra* note 54, para. 29.
[59] See the "Request for Disqualification", *supra* note 1, para. 29.
[60] See the Coalition for the International Criminal Court (CICC), Reply of Prof. Kuniko Ozaki to the Questionnaire to ICC Judicial Candidates 2009 elections, para. 20.
[61] *Idem*, para. 21.
[62] See the "Request for Disqualification", *supra* note 1, para. 30.
[63] See the "Article 40 Plenary Decision", *supra* note 4, paras. 11 and 13.

27. In this regard, it is important to recall the assurance made by Judge Ozaki: "*My new responsibility is confined to the bilateral relationship between Estonia and Japan. If and when it may have any implication on the* Ntaganda *case, I will refrain from executing my responsibility to that extent or notify the Court immediately*".[64] Nothing suggests that such a link may exist, not even remotely. As already concluded by the Plenary, "*it is evident* […] *that this is not the case*"[65] and "*neither Japan nor Estonia* [are] *connected to any case before the Court*".[66] The Defence failed to show any such connection. Therefore, the allegation is unsubstantiated and, as such, it cannot inform the assessment of a reasonable observer called to decide on the question of appearance of bias.

B. Even if the "lack of independence" may be properly considered as a disqualification ground pursuant to Article 41(2), the Defence failed to substantiate such a ground

28. The Defence argues that any issue of lack of judicial "independence" as required in Article 40 of the Statute can properly be raised for determination under Article 41(2).[67] Said article addressing the "disqualification of Judges" provides that "[a] *judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground*". The Defence posits that there exists a relationship between the two notions: a Judge who is not independent cannot be reasonably perceived as being impartial.[68] The Legal Representatives have no reason to contest this submission.

29. The Legal Representatives recall that "*there is a presumption of impartiality which attaches to a Judge*", that "[t]*here is a high threshold to reach in order to rebut the presumption of impartiality*" and that "*disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be 'firmly*

[64] *Idem*, para. 5.
[65] *Ibid.*, para. 12.
[66] *Ibid.*, para. 13.
[67] See the "Request for Disqualification", *supra* note 1, paras. 37-40.
[68] *Idem*, para. 33.

established'".[69] Furthermore, *"it is for the appealing party alleging bias to adduce reliable and sufficient evidence to rebut that presumption. No Judge may be disqualified on the basis of sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality"*[70] and *"the decisive question is whether a perception of luck of impartiality is objectively justified*. […] *what is required is an objectively justified apprehension of bias based on knowledge of all the relevant circumstances*."[71]

30. The Legal Representatives submit that the Defence's allegations do not meet the high threshold as required, but are neither substantiated not detailed to rebut the presumption of the impartiality of Judge Ozaki.

31. As noted *supra*[72] and further *infra*,[73] Judge Ozaki's impartiality cannot reasonably be doubted in the circumstances of the present litigation.

C. Judge Ozaki's resignation as Ambassador and the appearance of impartiality

32. The Defence submits that the appearance of impartiality has not been restored by Judge Ozaki's resignation as Ambassador.[74] Under this Chapter the Defence advances a set of allegations to support that the resignation impacted negatively on the Judge's personal, professional and financial interests such that it may reasonably appear to affect her independence or impartiality.[75] These allegations are inconsequential, unsubstantiated or speculative with respect to the Request for

[69] See ICTY, *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Appeal Judgement, 21 July 2000, paras. 196-197.
[70] See ICTY, *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013, para. 7.
[71] See ICTR, *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings, 20 February 2009, para. 5.
[72] See *supra* paras. 18-27.
[73] See *supra* paras. 32 *et seq*.
[74] See the "Request for Disqualification", *supra* note 1, paras. 41-51.
[75] *Idem*, para. 51.

Disqualification. They cannot, individually or taken together, properly substantiate the relief sought by the Defence.

33. Indeed, the Defence submits that Judge Ozaki was first appointed Ambassador and only subsequently requested a determination, under Article 40(4) of the Statute, that this service was not incompatible with her judicial independence. It underlines that this request was coupled with an alternative request to retroactively resign as a Judge of the Court – presenting her colleagues with a *fait accompli*.[76] However, even if these allegations were factually accurate, they would be inconsequential to the Request for Disqualification. The (only) issue to be adjudicated is whether the judicial independence of the Judge was compromised in light, and during the limited period, of her concurrent appointments. This already received a negative answer by the competent organ, the Plenary.[77] The decision of the Plenary cannot be characterised as constitutive of judicial independence. In resolving questions regarding the application of Article 40(2) of the Statute, the Plenary merely declares whether or not the independence of a Judge was compromised. Accordingly, even if Judge Ozaki had never requested the approval of the Plenary this, by itself, would be an insufficient reason to find appearance of bias. Therefore, whether she followed the proper procedure in her 18 February 2019 *memorandum* is immaterial to the determination of the Request for Disqualification.

34. The Defence indicates that Judge Ozaki's resignation has occasioned a number of negative professional, financial and personal consequences.[78] In the view of the Legal Representatives, these are all unsubstantiated and speculative considerations. As such, they cannot inform the assessment of a reasonable observer called to decide on the question of appearance of bias.

[76] *Ibid.*, para. 44.
[77] See the "Article 40 Plenary Decision", *supra* note 4, para. 16.
[78] See the "Request for Disqualification", *supra* note 1, paras. 46-50.

35. The Defence also indicates that it is unclear whether Judge Ozaki remains otherwise employed by the Japanese Government.[79] This is yet another example of an unsubstantiated and speculative allegation; nothing in the case file suggests that the Judge may be employed by the Japanese Government in another capacity. This submission must be rejected outright.

D. The appearance of independence and impartiality and the issue of disclosure of information

36. The Defence submits that relevant facts remain undisclosed to the parties and this undermines the appearance of independence and impartiality.[80] In particular, the Defence would have wished to receive the full text of Judge Ozaki's requests of 7 January and 18 February or the date on which she started working for the Ministry of Foreign Affairs of Japan.[81]

37. In the view of Legal Representatives, these disclosure issues were already the subject of ample litigation and the Presidency rejected requests for further disclosure.[82] This allegation should therefore be rejected.

E. There is no suggestion that Judge Ozaki could be, or appear to be, less independent and impartial given the procedural stage reached in the proceedings in the case

38. The Defence submits that the required appearance of judicial independence and impartiality does not cease or lessen because of the procedural stage reached in the case, where substantive deliberations are over.[83] The Legal Representatives have no reason to contest the principle underlying said submission. There has been no

[79] *Idem*, para. 48.
[80] *Ibid.*, paras. 52-57.
[81] *Ibid.*
[82] *Ibid*.
[83] See the "Request for Disqualification", *supra* note 1, paras. 58-62.

suggestion that these requirements are inapplicable, or less applicable, in view of the stage reached in the *Ntaganda* case.

39. Indeed, Judge Ozaki mentions the pending stages in the proceedings "*completion of substantive deliberations on the Article 74 Judgement and* […] *completion of the trial*"[84] merely to show that the potential for the Ambassadorial incumbencies to interfere with her judicial functions were limited in as much as her time, as an extended ICC Judge, is limited. This does not mean that the appearance of independence and impartiality should be understood to be less significant given the advanced stage of the proceedings. Therefore, even if accurate, this allegation does not support the relief sought by the Defence.

40. The Defence failed to satisfy the standard for disqualification pursuant to Article 41(2)(a) of the Statute. A reasonable and well-informed observer would not apprehend bias in the circumstances of the present litigation. Accordingly, the Request for Disqualification should be denied.

41. Finally, the Legal Representatives wish to underline that the crimes with which Mr Ntaganda is charged are very serious and they occurred more than sixteen years ago. The consequences of the Defence making procedural filings which serve only to delay the proceedings,[85] thereby causing confusion and uncertainty,[86] are prejudicial to the victims participating in the present case – 1 846 victims of the attacks and 283 former child soldiers. The closing briefs in the present trial were submitted more than a year ago and closing arguments were heard in August 2018. Deliberations would, in the ordinary course of events have significantly progressed during this period. The Legal Representatives are of the view that the Request for Disqualification must be rejected expeditiously for the Trial Chamber to be able to complete its work as soon as practicable.

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[84] See the "Article 40 Plenary Decision", *supra* note 4, para. 5.
[85] *Idem*, para. 22.
[86] *Ibid.*, para 23.

Respectfully submitted,

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Dated this 27th day of May 2019

At The Hague, The Netherlands