Cour
Pénale
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International
Criminal
Court

Original: **English**

No.: **ICC-01/04-02/06**
Date: **2 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 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'" (Filing #2336), and for Additional Disclosure

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 submission of the Defence's Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute on 30 April 2019[1] and the *Ad Hoc* Presidency's Notification concerning Judge Kuniko Ozaki issued on 1 May 2019,[2] Counsel representing Mr. Ntaganda ("Defence") submit this:

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'" (Filing #2336), and for Additional Disclosure

("Request for Reconsideration of Disclosure Decision")

INTRODUCTION

1. The Defence requests reconsideration of the *Ad Hoc* Presidency's 18 April 2019 decision ("Disclosure Decision")[3] denying its "Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki" filed on 1 April 2019 ("First Disclosure Request")[4] and denying its "Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019" submitted on 8 April 2019 ("Second Disclosure Request").[5]

2. Neither the Request for Reconsideration of the Judges' Article 40 Decision, nor the First and Second Disclosure Requests[6] are moot because of the Presidency's

[1] 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, 30 April 2019 ("Request for Reconsideration of the Judges' Article 40 Decision").
[2] Notification concerning Judge Kuniko Ozaki, ICC-01/04-02/06-2338, 1 May 2019 ("Japan Notification Concerning Judge Ozaki").
[3] 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", ICC-01/04-02/06-2336, 18 April 2019 ("Disclosure Decision").
[4] Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki, ICC-01/04-02/06-2327, 1 April 2019 ("First Disclosure Request").
[5] 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 ("Second Disclosure Request").
[6] Together "Defence Disclosure Requests".

public notification of 1 May 2019 concerning Judge Ozaki's purported resignation as Japanese Ambassador to Estonia.[7] Reconsideration of the Judges' Article 40 Decision adopted on 4 March 2019 remains necessary as well as highly relevant to Judge Ozaki's lack of independence or appearance thereof. Indeed, whether Judge Ozaki met the independence or appearance of independence requirement as of 4 March 2019 – as a result of her 7 January request to the Presidency ("7 January Request"), her appointment as Ambassador of Japan to Estonia on 12 February 2019 and her 18 February memorandum addressed to the Judges – had to be adjudicated according to appearances, as they existed at the time. These appearances are neither reversed nor erased by Judge Ozaki's subsequent resignation on 18 April. If anything, the fact that Japan, rather than Judge Ozaki, has advised the Court of this resignation, further undermines Judge Ozaki's lack of judicial independence or appearance thereof. Japan's apparent counter-manding of Judge Ozaki's 28 February alternative request to resign as an ICC Judge in the event they refused her request to serve simultaneously as Ambassador of Japan to Estonia and part time ICC Judge, is directly demonstrative of a lack of judicial independence. Not only should the Defence Disclosure Requests be granted in their entirety, additional disclosure is now required, including disclosure of the entire text of Japan's notification to the Presidency, any related correspondence, and Judge Ozaki's purported resignation letter.

3. Reconsideration of the Disclosure Decision in respect of the First Disclosure Request is sought on two grounds. First, although the Defence maintains its request for the full breadth of information sought in the First Disclosure Request, it requests in the alternative, at the least: (i) Judge Ozaki's 7 January Request to be excused as a full-time Judge under Article 35(3); and (ii) Judge Ozaki's 18 February 2019 request in relation to a question under Article 40(4), and the factual summary provided by the Presidency. Second, the Defence

[7] *See* fn.2.

Request for Reconsideration of the Judges' Article 40 Decision demonstrates the legitimate need for this material. A party is entitled to seek material from any source that may be of material assistance to its case, which, in the present instance, includes safeguarding the Accused's right to a fair trial under Article 67(1) of the Statute. This entitlement is reinforced by the importance of full disclosure to the public appearance of judicial independence. The two items identified above, as well as the other categories of information sought in the First Disclosure Request, may materially assist the Defence in substantiating and clarifying arguments relevant to Articles 40(2), 40(4), 41 and Article 67(2) that have been presented in the Request for Reconsideration of the Judges' Article 40 Decision.

4. Reconsideration of the Disclosure Decision in respect of the Second Disclosure Request is sought on the same basis as that in respect of the First Disclosure Request. The question of whether and why Judge Ozaki appears not to have disclosed her candidacy to be a Japanese diplomat when requesting excusal as a full-time Judge is relevant to the Request for Reconsideration of the Judges' Article 40 Decision. Furthermore, whether Japan independently informed the Court of its intention to appoint Judge Ozaki to this position is relevant to its own "duty […] to respect and observe the independence of the judiciary," which is relevant to the determination whether the judicial independence or appearance of judicial independence requirement is met.[8] Full information on these matters will materially assist the Defence in substantiating and clarifying arguments relevant to Article 40(2), 40(4), 41, and 67(2) that have been presented in the Request for Reconsideration of the Judges' Article 40 Decision.

[8] UN Basic Principles on the Independence of the Judiciary, Art. 1 ("The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary".)

PROCEDURAL HISTORY

5. On 22 March 2019, the Defence was notified of an Internal memorandum dated 19 March from "The Judges" to Judge Ozaki with the subject line "Decision on your request of 18 February 2019".[9]

6. The Internal memorandum explains that on 7 January, Judge Ozaki made a request to the Presidency under Article 35(3) to be excused as a "full-time" Judge "'as of 11 February 2019 inclusive' citing personal reasons and without mention of any future activities or occupation."[10]

7. The Presidency engaged in further communications with Judge Ozaki that "clarified" that she was not seeking to resign, but only to "change her status to that of a non-full-time judge"[11] as of the day preceding her appointment as Ambassador of Japan to Estonia by the Cabinet of the Government of Japan.[12]

8. On 18 February, apparently for the first time, Judge Ozaki informed her colleagues that "she *had been* appointed" Japanese Ambassador to Estonia and that her duties would commence on 3 April.[13] Judge Ozaki indicated, however, that she "would be happy" to continue sitting on the Ntaganda case as a non-full-time judge "until the delivery of judgement […] as well as, if necessary, till the end of the sentencing phase."[14]

9. The Decision memorializes that on 4 March 2019, the Judges of the Court sitting in plenary found by 14 votes to three (with one judge not participating,

[9] 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 ("Decision"). All further references to "Article" are to the Rome Statute. All further dates refer to the year 2019 unless otherwise indicated.
[10] Decision, para.3.
[11] Decision, para.4.
[12] Open-source information indicates that Judge Ozaki was appointed by a Japanese Cabinet decision taken the day after the date on which she requested her full-time service to end. *See* Request for Reconsideration of the Judges' Article 40 Decision, Annex A, ICC-01/04-02/06-2337-AnxA, 30 April 2019.
[13] Decision, para.5 (italics added).
[14] Decision, para.5.

one judge abstaining and one judge absent) that "Judge Ozaki's request was not incompatible with the requirements of judicial independence."[15]

10. On 1 and 8 April, the Defence requested the Presidency to disclose documents and information relating to the Judges' 4 March 2019 Article 40 Decision, including the full text of Judge Ozaki's 18 February memorandum, upon the basis of which the Decision was taken.[16] The Presidency denied the requests as being "a form of fishing expedition."[17]

11. On 30 April, the Defence submitted its Request for Reconsideration of the Judges' Article 40 Decision.

12. On 1 May, the Japan Notification Concerning Judge Ozaki was filed as a public document, indicating that the Director of the International Proceedings Division in the Ministry of Foreign Affairs of Japan had emailed an unidentified addressee at the Court that "the resignation of Judge Ozaki as Japanese Ambassador to Estonia was officially accepted by the Government of Japan on 18 April 2019."[18] The email from Japan was purportedly sent on 23 April 2019, eight days before the Parties and Participants were informed by the Presidency.

APPLICABLE LAW

13. A party is entitled to disclosure of any information relevant to establishing facts relevant to the protection of fair trial rights in ongoing proceedings. "A party," according to the consistent and long-standing jurisprudence of the ICTY, "is always entitled to seek material from any source."[19] A party must

[15] Decision, para.7.
[16] First Disclosure Request, para.15; Second Disclosure Request, para.14.
[17] 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", ICC-01/04-02/06-2336, 18 April 2019, para.3.
[18] Japan Notification Concerning Judge Ozaki, para.3
[19] *The Prosecutor v. Simić*, Case No. IT-95-9-A, Appeals Chamber Judgement, 28 November 2006, para. 214; *The Prosecutor v. Boškoski & Tarčulovski,* Case No. IT-04-82-T, Decision on Motion of Boškoski

satisfy three conditions: "specifically identify, to the extent possible, the documents sought; articulate their relevance to the trial; and show that efforts to obtain the documents have been unsuccessful."[20]

14. The sources from whom disclosure may be sought are not limited to the Prosecution. Disclosure may also be sought, for example, from the Registry,[21] the United Nations,[22] or States.[23] The Presidency has previously refused disclosure of information in its own possession not because such information is never subject to disclosure, but because the specific information sought contained "personal information" that, by definition, could not have been relevant to the conduct of trial.[24]

Defence for Access to Registry Minutes of a Meeting Between the Chamber and the Office of the Prosecutor on 10 September 2002 in Case No. IT-02-55-MISC-6, 1 October 2007, para. 4.

[20] *The Prosecutor v. Bagosora et al*., Case No. ICTR-98-41, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 March 2004, para. 4.

[21] *See e.g. Ongwen, Decision on Prosecution Request for Detention Centre Call Data Related to the Accused and D-6,* ICC-02/04-01/15-1388, 2 November 2018, p.10; *Ruto & Sang*, Decision on Ruto Defence Request to access information related to Witness 727, ICC-01/09-01/11-1835.

[22] *The Prosecutor v. Nyiramasuhuko et al*., Case No. ICTR-97-21-T, Decision on the Defence Motion Seeking a Request for Cooperation and Judicial Assistance from a Certain State and the UNHCR Pursuant to Article 28 of the Statute and Resolutions 955 (1994) and 1165 (1998) of the Security Council, 25 August 2004, p. 3; *The Prosecutor v. Bagosora et al*., Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting with One of its Officials, 6 October 2006.

[23] *The Prosecutor v. Ngeze*, Case No. ICTR-97-21-I, Decision on the Defence Motion to Have the Court Request a Subpoena Duces Tecum for the Production of the Defendant's Arrest and Certified Court Records, 10 May 2000, pp. 3-4, where the Chamber denied the motion for an Article 28 request (" [...] there is no evidence to show that the Defence has first made an effort to obtain the documents it needs from the State authority concerned, before requesting the Tribunal"); *The Prosecutor v. Blaškić*, Case No. IT-95-14, Judgement on the request of the Republic of Croatia for review of the decision of trial chamber II of 18 july 1997, para. 31 ("It is therefore to be regarded as sound policy for the Prosecutor, as well as defence counsel, first to seek, through cooperative means, the assistance of States, and only if they decline to lend support, then to request a Judge or a Trial Chamber to have recourse to the mandatory action provided for in Article 29"); *The Prosecutor v. Nzirorera*, Case No. ICTR-98-44-T, Request for Cooperation and Assistance By the Government of Benin Pursuant to Article 28 of the Statute of the Tribunal, 31 January 2003; *The Prosecutor v. Blaškić*, Case No. IT-95-14, Decision on the Prosecutor's Request for the Issuance of a Binding Order to Bosnia and Herzegovina for the Production of Documents, 27 February 1998: The importance of making an initial request is underlined by the changes to the Rules the ICTY in Rule 54 bis, which require the movant to "explain the steps that have been taken by the applicant to secure the State's assistance" and permits the Trial Chamber to reject a request if no reasonable steps have been taken by the applicant to obtain the documents or information from the State".

[24] *Gbagbo*, Decision on the Application of the Defence for Mr Gbagbo of 23 September 2014 (ICC-02/11-01/11-685), ICC-02/11-01/11-690, 7 October 2014, para. 26.

15. Reconsideration of previous decisions is appropriate, in particular, where a new fact has arisen since the time of the original decision.[25] Reconsideration may also be appropriate "to prevent an injustice,"[26] or simply where "there is reason to believe that [a Trial Chamber's] original Decision was erroneous."[27]

SUBMISSIONS

(I) Reconsideration of the First Disclosure Request is Warranted

16. The *Ad Hoc* Presidency rejected the First Disclosure Request on the basis of the following reasoning, which is set out in full:

> The Presidency considers that, on an apparent view, the requests amount to an exercise in a form of fishing expedition. What is more, there is currently no legal basis for the Request or the Request for the Registrar. They are hereby summarily dismissed.[28]

17. The Defence understands "fishing expedition" to mean that the *Ad Hoc* Presidency considered the First Disclosure Request as too undefined or broad. The reference to the absence of any "current" legal basis may be understood as referring to, at that time, the absence of any pending request concerning Judge Ozaki under Articles 40 or 41. These two considerations may have been considered inter-related.

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[25] *Ruto & Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, ICC-01/09-01/11-1813, 10 February 2015, para.19 ("[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment"); *Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr. Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para.11 ("[t]he Chamber finds support, as was also done by Trial Chamber I, in the relevant jurisprudence of the International Criminal Tribunals for the former Yugoslavia ('ICTY') and Rwanda ('ICTR') whose statutory provisions are equally silent as to the power of reconsideration, that those circumstances can include 'new facts or new arguments'"); *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Decision on Motions for Reconsideration, 5 September 2014, p.4.

[26] *Ntaganda*, Decision on the Defence request for reconsideration, ICC-01/04-02/06-611, 27 May 2015, para.12.

[27] *Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Defence Motion to Reconsider the June 15 Decision on the Extremely Urgent Motion for Reconsideration of Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 1 July 2011, para.13.

[28] Disclosure Decision, para.3.

18. The Defence seeks to address the concern about lack of specificity by requesting, in the alternative, limiting its request to the written communications between Judge Ozaki and the Presidency concerning: (i) her request, pursuant to Article 35(3), to be excused from full-time service as a Judge; (ii) her request for a declaration that her service as a Japanese diplomat did not violate Article 40; and (iii) any other written communications by Judge Ozaki in relation to the two foregoing requests.

19. The documents within category (i) more specifically, and most importantly, encompass Judge Ozaki's 7 January 2019 letter to the Presidency, of which the Defence at present has only a brief summary. The fact that the Presidency provided a summary already demonstrates the relevance of the 7 January Request as such. There is no legitimate justification for not disclosing the 7 January Request in its original language, as used by Judge Ozaki. If portions are not relevant to the issue at hand or are private, then these portions can be redacted. Nevertheless, Judge Ozaki's candour is now a matter of vital importance to her judicial independence, and it can only be assessed by examining the precise language that she used and the totality of the information that she provided to the Presidency in favour of her request to become a part-time Judge.

20. As so defined and justified, this request satisfies the three conditions for disclosure. First, the documents sought are identified with specificity. Second, they are highly relevant to the issue at hand, in that they are directly relevant to the determination whether Judge Ozaki meets the judicial independence or appearance of judicial independence and/or impartiality or appearance of partiality requirements, both of which are the object of a pending request before the Judges. In fact, the information sought – which is contained in documents in the possession of the Presidency – is directly relevant to, *inter alia*: propositions in paragraphs 6, 37, 38 and 39 of the Request for Reconsideration of the Judges' Article 40 Decision. Third, since the information

is in the Presidency's possession, the requirement of exhausting previous requests is inapplicable. The third condition is therefore also satisfied.

21. The documents within category (ii) — namely Judge Ozaki's 18 February memorandum and the Presidency's 26 February summary thereof — are defined with precision; are highly material to the determination whether Judge Ozaki meets the judicial independence or appearance of judicial independence requirements, including factual information and legal arguments of which the Defence at the moment only has a summary; and are in the Presidency's possession. The Defence does not seek the Presidency's memorandum to the extent that it contains any reasoning or positions that could be deemed part of "deliberations," but does seek any factual information contained in that motion that was relevant to the Judges' Article 40 Decision. No part of Judge Ozaki's memorandum could properly fall within the scope of deliberations, since she is categorically disqualified from participating in such deliberations under Article 40(4). This information is undoubtedly material, and would provide a necessary inventory and description of the relevant communications between Judge Ozaki and the Presidency. There is no legal basis for not disclosing this information.

22. The Defence also requests, however, all other documents identified in the First Disclosure Request, all of which are material to the pending Request for Reconsideration of the Judges' Article 40 Decision. If incomplete statements, or statements lacking complete candour, were made in other communications of Judge Ozaki with the Presidency, then this is highly relevant to Judge Ozaki's judicial independence and the subordination of her judicial responsibilities to her executive responsibilities when she viewed them to be in conflict.

23. In particular, in referring to "full communications" in requests "a" and "b" of the First Disclosure Request, the Defence sought to ensure that communications in non-written form would be disclosed. One of the most

important claims in the summary of communications from Judge Ozaki in the Decision is that the 7 January Request was based on "personal reasons and without mention of any future activities or occupation."[29] The basis for the Judges' choice of this phrase is highly relevant to her candour which, in turn, is relevant to her judicial independence for the reasons set out in detail in the Request for Reconsideration of the Judges' Article 40 Decision.[30] The Defence needs to know what communication, or lack thereof, caused the Judges to use this particular expression.

24. Communications between Judge Ozaki and other Judges (part "d" of the First Disclosure Request) is a specifically defined category and is highly relevant to the factual basis on which the Judges took their decision. If there were no such communications, then this can be easily indicated. But since Judge Ozaki is automatically disqualified pursuant to Article 40(4) from participating in deliberations on her own judicial independence, it follows that any communications designed to influence other Judges would be relevant to compliance with this provision. Such communications with other members of Trial Chamber VI would be particularly relevant, in particular since the two other judges of Trial Chamber VI, who participated in the deliberations leading to the Judges' Article 40 Decision, have now requested and been authorised *not* to participate in deliberations due to a high risk of an appearance of lack of impartiality.

25. Finally, any communications between Judge Ozaki and her government (Part "e" of the First Disclosure Request) that are in the possession of the Presidency is a narrowly and precisely defined category, that is highly material to the appearance of Judge Ozaki's judicial independence, and that could not have been sought from any other source. Indeed, such communications now assume

[29] Decision, para.3.
[30] Request for Reconsideration of the Judges' Article 40 Decision. See *inter alia* paras. 3, 37-44.

much greater importance in light of the notification by Japan — not by Judge Ozaki's — that Judge Ozaki has resigned as Ambassador of Japan to Estonia.

26. The legal basis for this disclosure request is the relevance of the material requested to the Defence's pending Request for Reconsideration of the Judges' Article 40 Decision. The Request for Reconsideration of the Judges' Article 40 Decision seeks vindication of the Accused's rights under Article 67, which guarantees that a trial must be, and appear to be, conducted by an impartial and independent tribunal. Appearances are important to assurance of these rights. The information sought is manifestly relevant, necessary and, in itself, vital to safeguarding the appearance of independence and impartiality. As previously held by the ICTR Appeals Chamber, non-disclosure of information can contribute to an appearance of a lack of impartiality.[31]

(II) Reconsideration of the Second Disclosure Request is Warranted

27. The Presidency adopted the same reasoning in summarily dismissing the Second Disclosure Request, which sought disclosure of any relevant information conveyed to the Registrar during his meeting with senior Japanese Government officials on 21 and 22 January 2019.

28. Again, appearances are of significant importance in assessing whether the requirements of judicial independence and impartiality, or appearance thereof are met. The meetings between the Registrar and Japanese Foreign Ministry

[31] *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR15bis.2, 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 ("This finding informs the interpretation of Rule 15(A) of the Rules. Rule 15(A) provides, in part, that "[a] Judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or had any association which might affect his impartiality." 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 and that she withdrew from the case after Defence lodged applications for her disqualification on this basis and before the Bureau decided the disqualification motions. The Appeals Chamber finds that these circumstances could well lead a reasonable, informed observer to objectively apprehend bias. The Appeals Chamber emphasizes that this is not a finding of actual bias on the part of Judge Vaz, but rather a finding. made in the interests of justice, that the circumstances of the case gave rise to an appearance of bias.")

officials occurred at the very time that Judge Ozaki had, according to the Judges' Article 40 Decision, omitted to disclose her imminent appointment as a Japanese diplomat by that same Foreign Ministry. Any communications by Japan to the Court purporting to justify this appointment, and on what basis, would be highly relevant to the appearance of Judge Ozaki's judicial independence or lack thereof. More particularly, if any influence was directed at the Court by Japan to ensure that this appointment was not blocked, then this must be disclosed. Hence, if Japan's intention to appoint Judge Ozaki was communicated to the Judges through this channel rather than by Judge Ozaki herself, this would also be relevant and material as to whether the requirements of judicial independence and impartiality, or appearance thereof are met.

29. The Defence has identified the information sought as specifically as it can under the circumstances. If the Registrar does not have a document memorialising the relevant content of his meetings, then he should be requested to provide the information in the form of a signed statement or letter.

30. The information requested is material to the pending Request for Reconsideration of the Judges' Article 40 Decision, which concerns an issue vital to the fairness of Mr. Ntaganda's trial. The Registrar's omission to publicly acknowledge this meeting with the Japanese Foreign Ministry may be purely coincidental and unrelated to Judge Ozaki's situation. Nevertheless, the appearance of independence is undermined by the existence of such an unacknowledged meeting. Furthermore, Japan's attitude as to whether the Court should allow Judge Ozaki to be appointed Ambassador to Estonia is also relevant to Judge Ozaki's judicial independence. Indeed, a press report in *Le Monde* appears to imply that Japan simply presumed that Judge Ozaki should

be free for re-assignment because another full-time Japanese Judge had already taken up her position.[32]

31. Finally, since the Presidency exercises supervisory jurisdiction over the Registrar pursuant to Article 43(2), the exhaustion principle should be deemed inapplicable, especially because the information sought is closely related to the information sought in the Second Disclosure Request.

32. The disclosure sought is more justified than ever in light of the Japan Notification. Japan's perspective on Judge Ozaki's appointment as its Ambassador to Estonia while simultaneously being a Judge of the ICC is directly relevant to of Judge Ozaki's lack of independence or appearance thereof. Expressions by the Government of Japan that Judge Ozaki's appointment was nothing more than a transfer from one international posting to another would be highly relevant to Judge Ozaki's lack of independence or appearance thereof, regardless of the renunciation of that position that has subsequently been communicated by the Government of Japan, but not Judge Ozaki herself.

(III) Request for additional disclosure

33. The Defence has received disclosure of 22 words of the Japan Notification Concerning Judge Ozaki, which was apparently sent by Japan to the Presidency on 23 April. This Notification indicates that Judge Ozaki resigned as Japan's Ambassador to Estonia on 18 April – which was the same date the Defence Disclosure Requests were denied.

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[32] *Le Monde*, A la CPI, une juge devenue diplomate pourrait compromettre le jugement de Bosco Ntaganda, 11 April 2019, https://www.lemonde.fr/afrique/article/2019/04/11/a-la-cpi-une-juge-devenue-diplomate-compromet-le-jugement-de-bosco-ntaganda_5448814_3212.html, ("A l'ambassade du Japon à La Haye, on explique que le mandat de M^me^ Ozaki avait expiré depuis le 10 mars 2018, même si la juge doit siéger jusqu'au prononcé du verdict et, en cas de condamnation, de la sentence. « *Le budget 2019 de la CPI* [dont le Japon assume près de 17 %, en tête des contributeurs] *a été élaboré en partant du principe que l'intervention de la juge Ozaki dans cette affaire s'arrêterait fin mars 2019* », explique la diplomate Yoshiko Kijima.")

34. The appearance of independence of a Judge cannot be remedied by simply taking back an action that, in and of itself, demonstrates a lack of independence. Judge Ozaki's conduct already demonstrates her lack of independence, in appearance if not in fact. The Defence has no notification from the Presidency, Trial Chamber VI, Judge Ozaki, or any other source that Judge Ozaki has, in fact, resigned from all her executive responsibilities within the Japanese Government.

35. Furthermore, the status of Judge Ozaki's alternative request in her 18 February memorandum, that her letter was to be treated as a letter of resignation if the Judges refused her request to serve simultaneously as Ambassador of Japan to Estonia and part time ICC Judge, is unclear. It is possible that Judge Ozaki has already resigned from the Court. The lack of clarity impedes the Defence's capacity to offer full submissions, and undermines Judge Ozaki's judicial independence.

36. The Japan Notification Concerning Judge Ozaki, in and of itself, creates an appearance of Judge Ozaki's lack of independence. Instead of Judge Ozaki notifying the Presidency that she has resigned, it is Japan that has done so. This act, in itself, manifestly creates an appearance that Judge Ozaki is not independent from the Japanese Government. It is nothing short of extraordinary that it is Japan, rather than Judge Ozaki, that would communicate information to the Presidency concerning her judicial independence.

37. Full disclosure is now required of: (i) the Japan Notification Concerning Judge Ozaki; (ii) any communications from the Presidency to the Japanese Government concerning Judge Ozaki's status; (iii) any correspondence from Judge Ozaki to the Presidency concerning her employment with the Japanese Ministry of Foreign Affairs in any capacity, including Ambassador; (iv) any

communications from the Registrar or any other official of the ICC to Japan concerning the situation of Judge Ozaki, and its responses.

38. The information sought is identified with the greatest specificity possible; is highly relevant to the pending Request for Reconsideration of the Judges' Article 40 Decision as well as to whether Mr. Ntaganda is capable of receiving a fair trial, including by a tribunal consisting of independent and impartial Judges; and is appropriately requested from the Presidency, as the entity that appears to possess the information in question.

CONCLUSION AND RELIEF REQUESTED

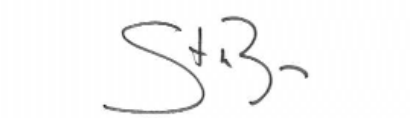
39. The Defence requests reconsideration of the Disclosure Decision. The legal basis for the Defence Disclosure Requests, as described above, is clear and necessary to ensure observance of fundamental rights guaranteed in Article 67(1) of the Statute. The Request for Reconsideration of the Judges' Article 40 Decision further specifies the relevance of the information sought to specific arguments and remedies in relation to those rights.

40. Neither the Request for Reconsideration of the Judges' Article 40 Decision nor the Defence Disclosure Requests are moot because of the Presidency's public notification of 1 May 2019 concerning Judge Ozaki's purported resignation as Japanese Ambassador to Estonia. Reconsideration of the Judges' Article 40 Decision adopted on 4 March 2019 remains necessary as well as highly relevant to Judge Ozaki's lack of independence or appearance thereof. The actions that have been inimical to Judge Ozaki's judicial independence cannot be simply erased. On the contrary, the Japan Notification Concerning Judge Ozaki, offered in the absence of any statement whatsoever from Judge Ozaki herself, is an affront to this appearance. The justification for disclosure is now more compelling than ever, and requires the wider disclosure that is requested above.

41. The full written communications of Judge Ozaki concerning her request to be excused as a full-time Judge, and then concerning her appointment as Japanese Ambassador to Estonia, are relevant, unless there is some specific basis for withholding portions thereof. The summary of those communications by the Presidency, to the extent that it does not contain deliberations, is also relevant as providing a summary of the factual information that was before the Judges in taking the Decision. Disclosure of categories "d" and "e" in the First Disclosure Request should also be reconsidered, as should the request for disclosure of information from the Registrar.

42. If there is any way that the appearance of Judge Ozaki's judicial independence can be restored, it is only by full transparency in respect of relevant facts and information. Attempting to erase that appearance by resignation, or the non-disclosure of relevant information, only further damages the appearance of her lack of judicial independence or appearance thereof.

RESPECTFULLY SUBMITTED ON THIS 2ND DAY OF MAY 2019



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

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