

**Public Redacted Version
of Confidential Annex I**



20 June 2019

Decision of the Plenary of Judges on the Defence Request for the Disqualification of Judge Kuniko Ozaki from the case of *The Prosecutor v. Bosco Ntaganda*

1. The plenary of judges of the International Criminal Court (the ‘Court’) has before it the Defence ‘Request for disqualification of Judge Ozaki’ dated 20 May 2019 (the ‘Disqualification Request’)¹ seeking the disqualification of Judge Ozaki from the case of *The Prosecutor v. Bosco Ntaganda*, pursuant to article 41(2)(b) of the Rome Statute (the ‘Statute’) on the basis that her ‘service as a senior Japanese diplomat while also sitting as a Judge on this case has violated Articles 40, 41, 21(3) and 67(1)’ of the Statute,² which the Defence alleges to be inconsistent with judicial independence and impartiality.

I. Procedural History

1. On 14 May 2019, the Presidency filed a decision, taken partly by the plenary of judges and partly by the Presidency, in consultation with the judges,³ which

¹ ICC-01/04-02/06-2347-Conf (the ‘Disqualification Request’), public redacted version available: ICC-01/04-02/06-2347-Red.

² Disqualification Request, para. 63.

³ *The Prosecutor v. Bosco Ntaganda*, “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” (the ‘Decision on Reconsideration’), ICC-01/04-02/06-2346. The related procedural history prior to this date is set out at paras. 2-10 of the Decision on Reconsideration.

rejected a number of previous procedural motions of the Defence for Mr Ntaganda and, further, in view of the requirement in rule 34(2) of the Rules that disqualification requests must be made promptly, set out a timeline within which any request for disqualification by Judge Ozaki should be made (the 'Decision on Reconsideration').

2. In accordance with the Decision on Reconsideration, the Defence for Mr Ntaganda filed the present Disqualification Request, seeking the disqualification of Judge Ozaki.
3. The Prosecution⁴ (the 'Prosecution Response') and the common legal representatives⁵ (the latter acting collectively) (the 'Victims' Response') each filed a response.
4. On 31 May 2019, Judge Ozaki sent, via email to the Presidency, her written observations on the Disqualification Request (the 'Observations'). These observations were notified in the case record by the Presidency on 4 June 2019.⁶
5. On 31 May 2019, the Defence for Mr Ntaganda requested leave to reply to a number of issues raised in the Prosecution Response and the Victims' Response (the 'First Request for Leave to Reply').⁷ On 6 June 2019, the common legal representatives of the victims jointly replied to the First Request for Leave to Reply.⁸

⁴ *The Prosecutor v. Bosco Ntaganda*, "Prosecution Response to the Defence 'Request for Disqualification of Judge Ozaki' (ICC-01/04-02/06-2347)", 28 May 2019, ICC-01/04-02/06-2349 (the 'Prosecution Response').

⁵ *The Prosecutor v. Bosco Ntaganda*, "Joint Response of the Common Legal Representatives of Victims to the Defence Request for Disqualification of Judge Ozaki (ICC-01/04-02/06-2347)", 27 May 2019, ICC-01/04-02/06-2348-Conf (the 'Victims' Response').

⁶ *The Prosecutor v. Bosco Ntaganda*, Annex to the "Notification of the Observations of Judge Ozaki in relation to the 'Request for Disqualification of Judge Ozaki' dated 20 May 2019 (ICC-01/04-02/06-2347-Red)", ICC-01/04-02/06-2351-Anx (the 'Observations').

⁷ *The Prosecutor v. Bosco Ntaganda*, "Request for leave to reply to the Responses of the Prosecution (ICC-01/04-02/06-2349) and Victims' Legal Representatives (ICC-01/04-02/06-2348) to Request for Disqualification of Judge Ozaki", ICC-01/04-02/06-2350 (the 'First Request for Leave to Reply').

⁸ *The Prosecutor v. Bosco Ntaganda*, "Joint Response of the Common Legal Representatives of Victims to the Defence 'Request for leave to Reply to the Responses of the Prosecution (ICC-01/04-02/06-2349) and Victims' Legal Representatives (ICC-01/04-02/06-2348) to Request for Disqualification'", ICC-01/04-02/06-2352.

6. On 6 June 2019, the Defence for Mr Ntaganda requested leave to provide observations on Judge Ozaki's Observations (the 'Second Request for Leave to Reply').⁹
7. On 17 June 2019, a plenary of judges was held to consider the Disqualification Request. The plenary was attended by Judges Eboe-Osuji, Perrin de Brichambaut, Morrison, Herrera Carbuccia, Mindua, Schmitt, Kovács, Pangalangan, Ibáñez, Bossa, Akane, Alapini-Gansou, Prost and Aitala.

II. The Arguments

A. The Disqualification Request

8. The Disqualification Request submits that 'Judge Ozaki's concurrent service as a senior diplomat of a State Party, while sitting as a Judge on an ongoing case, is not consistent with the appearance of judicial independence or impartiality' and that her 'subsequent resignation is insufficient to restore the appearance of her judicial independence or impartiality'.¹⁰
9. The Disqualification Request submits that concurrent service in the diplomatic service of a State is incompatible with judicial independence, referring, in this regard, to article 40 of the Rome Statute and its drafting history, together with examples of state practice.¹¹ The Disqualification Request submits that a statement made by Judge Ozaki while a candidate to be an ICC Judge itself supports this understanding of article 40.¹² The Disqualification Request submits that judicial independence is concerned with personal and institutional status and not with whether or not there is an overlap of functions.¹³ The Disqualification Request

⁹ *The Prosecutor v. Bosco Ntaganda*, "Request to provide observations on the submissions of Judge Ozaki", ICC-01/04-02/06-2354 (the 'Second Request for Leave to Reply').

¹⁰ Disqualification Request, para. 1.

¹¹ Disqualification Request, paras. 20-28.

¹² Disqualification Request, para. 29.

¹³ Disqualification Request, paras. 31-36.

further emphasises that Judge Ozaki did assume functions as the Ambassador of Japan to Estonia while serving as a judge in the *Ntaganda* case.¹⁴ The Disqualification Request submits that judicial impartiality, within the meaning of article 41(2)(a) of the Statute and judicial independence are closely related, submitting that '[a]ny issue of lack of independence can therefore properly be raised for determination under Article 41(2)'.¹⁵

10. The Disqualification Request argues that Judge Ozaki's resignation as Ambassador of Japan to Estonia has not restored the appearance of impartiality, nor does it render the Disqualification Request moot. In this regard, the Disqualification Request refers to: (i) the allegedly belated timing of the resignation, which the Disqualification Request links to Judge Ozaki's alleged apparent lack of candour; (ii) the alleged refusal to acknowledge that such resignation was required by judicial independence; and (iii) the alleged negative impact on Judge Ozaki's interests caused by her resignation, which, it is submitted, creates an additional ground to objectively doubt her impartiality.¹⁶
11. In addition, the Disqualification Request submits that the Defence has not been informed of salient facts concerning Judge Ozaki's service with the Government of Japan, despite its repeated requests for 'disclosure', suggesting that such lack of candour contributes to a reasonable apprehension of bias on the part of Judge Ozaki.¹⁷
12. The Disqualification Request further makes the general submission that the stage of the proceedings in the *Ntaganda* case is irrelevant, with the requirement of judicial independence and impartiality extending to all stages of judicial proceedings.¹⁸ It further submits that 'greater rigour' is required in respect of the standards of independence and impartiality given the communities served by the

¹⁴ Disqualification Request, paras. 35, 43, 51.

¹⁵ Disqualification Request, paras. 37-40.

¹⁶ Disqualification Request, paras. 41-51.

¹⁷ Disqualification Request, paras. 52-57.

¹⁸ Disqualification Request, paras. 58-59.

ICC, many of whom, the Defence submits, lack long traditions of an impartial judiciary, secured by the highest standards of judicial independence.¹⁹

13. [REDACTED]

B. Prosecution Response

14. The Prosecution submits that the Disqualification Request should be dismissed.²⁰

The Prosecution submits that the decision taken by the plenary of judges on 4 March 2019 and reflected in written form on 19 March 2019 (the 'Plenary's Article 40 Decision')²¹ found that Judge Ozaki's appointment as Ambassador of Japan to Estonia would not affect confidence in her independence within the meaning of article 40 and that the Disqualification Request's arguments in this regard effectively constitute another request for reconsideration and should be rejected.²²

To the extent that the Disqualification Request's submissions concerning article 40 may be relevant to the consideration of article 41(2)(a), the Prosecution argues that the Statute does not create a blanket prohibition for non-full time judges performing certain professional activities²³ and notes that the Code of Judicial Ethics provides guidelines and is subsidiary to, *inter alia*, the Statute and the Rules.²⁴ The references to domestic practice in the Disqualification Request are similarly not binding on the Court and caution is warranted, in any event, in applying any such practice to the distinct context of the Court.²⁵

15. The Prosecution further submits that the Disqualification Request fails to satisfy the high and fact-specific standard of article 41(2)(a) of the Statute of whether the

¹⁹ Disqualification Request, paras. 60-61.

²⁰ Disqualification Request, paras. 1, 55.

²¹ Annex I to "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-Anx1 (the 'Plenary's Article 40 Decision').

²² Prosecution Response, paras. 2, 19-20.

²³ Prosecution Response, para. 21.

²⁴ Prosecution Response, para. 22.

²⁵ Prosecution Response, para. 22.

present circumstances would lead a reasonable observer, properly informed, to reasonably and objectively apprehend bias in Judge Ozaki.²⁶ The Prosecution Response argues that this question requires case-specific analysis, citing previous practice of the ICC, other international criminal courts and the European Court of Human Rights in this regard.²⁷ The Prosecution submits that Judge Ozaki's role as Ambassador of Japan to Estonia while a non-full-time judge in the case was limited to the bilateral relationship between those two States and had no connection to the case.²⁸ The Prosecution Response also submits that the Disqualification Request does not even attempt to demonstrate a connection between Judge Ozaki's judicial functions in the *Ntaganda* case and her position as Ambassador to Estonia for a limited period of time.²⁹ Further, assurances were offered by Judge Ozaki in order to avoid any appearance of partiality³⁰ and, as a result of her resignation as Ambassador to Estonia, Judge Ozaki only held the position for a limited period of time after the case was fully briefed and substantive deliberations of the Trial Chamber were complete.³¹

16. The Prosecution further submits that the suggestion that Judge Ozaki may be biased against Mr Ntaganda due to presumed personal, financial and professional loss she has suffered is speculative.³²

C. Victims' Response

17. The Victims' Response accepts that the concepts of independence and impartiality are closely connected, albeit with important differences, and does not contest the

²⁶ Prosecution Response, para. 3.

²⁷ Prosecution Response, paras. 28-39.

²⁸ Prosecution Response, paras. 3, 47.

²⁹ Prosecution Response, paras. 40, 47.

³⁰ Prosecution Response, para. 49.

³¹ Prosecution Response, paras. 3, 51.

³² Prosecution Response, paras. 4, 44.

Disqualification Request's submission that a judge who is not independent cannot be reasonably perceived as impartial.³³ The Victims' Response contests, however, the characterisation that Judge Ozaki's concurrent service as ICC Judge and Ambassador of Japan to Estonia was incompatible with judicial independence. The Victims' Response submits that the Disqualification Request misrepresents the drafting history of the Statute concerning judicial independence.³⁴ The Victims' Response submits that a function-specific understanding of article 40 of the Statute is appropriate to the circumstances of Judge Ozaki.³⁵ The Victims' Response also recalls assurances offered by Judge Ozaki concerning the lack of any link between her role of Ambassador of Japan to Estonia. It emphasises that the Disqualification Request fails to demonstrate any such link, with an unsubstantiated allegation being insufficient to inform the assessment of a reasonable observer considering the appearance of bias.³⁶

18. The Victims' Response submits that the Disqualification Request's arguments concerning the negative impact on Judge Ozaki's personal, professional and financial interests are 'inconsequential, unsubstantiated or speculative'.³⁷ Concerning the claim of the Defence for Mr Ntaganda that Judge Ozaki acted with a lack of candour and presented her colleagues with a *fait accompli*, the Victims' Response submits that even if accurate, these factors would be insufficient to find an appearance of bias.³⁸
19. The Victims' Response submits that the question of disclosure has already been fully litigated and that the argument that the non-disclosure of relevant facts undermines the appearance of independence and impartiality should be rejected.³⁹

³³ Victims' Response, paras. 15, 28.

³⁴ Victims' Response, paras. 18-20.

³⁵ Victims' Response, paras 21-26.

³⁶ Victims' Response, para. 27.

³⁷ Victims' Response, paras. 32, 34-35.

³⁸ Victims' Response, para. 33.

³⁹ Victims' Response, paras. 36-37.

20. In addition, while not contesting the submission in the Defence Request that the required appearance of judicial independence and impartiality does not cease or lessen based on the procedural stage of the case, there has been no suggestion that these are not applicable, based on the current stage of the proceedings.⁴⁰
21. Finally, the Victims' Response underlines the need for the Disqualification Request to be addressed expeditiously, submitting that ongoing delays to the proceedings are prejudicial to the 1,846 victims of the attacks and 283 former child soldiers participating in the *Ntaganda* case.⁴¹

D. Observations of Judge Ozaki

22. Judge Ozaki observes, in reliance on the plenary's Decision on Reconsideration, that there is a distinction between the procedure concerning the independence of a judge under article 40(4) of the Statute and the procedure for the disqualification of a judge, pursuant to article 41(2)(c) of the Statute. She submits that, in respect of disqualification proceedings, a fact-specific and concrete approach is required.⁴²
23. Judge Ozaki submits that the Disqualification Request does not provide concrete grounds for disqualification related to the *Ntaganda* case. She submits that the Disqualification Request covers matters which have already been deliberated and decided through the article 40(4) procedure, with the only new argument presented in the Disqualification Request concerning the alleged negative impact

⁴⁰ Victims' Response, paras. 38-39.

⁴¹ Victims' Response, para. 41.

⁴² Observations, p. 1.

on her personal interests caused by the Defence actions.⁴³ In this regard, Judge Ozaki observes that such claims are speculative.⁴⁴

24. Judge Ozaki further observes that issues concerning the disclosure of information have been in the hands of the Presidency and that she is not in a position to make any further disclosure. She also observes that one aspect of a request for disclosure appears to be new and that such request cannot, in itself, constitute a ground for disqualification.⁴⁵

III. Requests for leave to reply

25. In respect of the First Request for Leave to Reply, without prejudice to the question of whether regulation 24 of the Regulations is apt in the present circumstances,⁴⁶ the plenary of the judges considers that it would not be aided by further submissions on any of the matters raised in the First Request for Leave to Reply.

26. In respect of the Second Request for Leave to Reply, the plenary of judges notes that this is not a trial procedure and Judge Ozaki is not a party. It is therefore inappropriate and inconsistent with the nature of the proceedings to currently allow an extraordinary mechanism of leave to reply to the observations of a judge, a procedure not envisaged by article 41 of the Statute or rule 34 of the Rules. In any event, the plenary of judges does not consider that it would be aided by further submissions.

⁴³ Observations, pp. 1-2.

⁴⁴ Observations, p. 3.

⁴⁵ Observations, p. 3.

⁴⁶ See *The Prosecutor v. Thomas Lubanga Dyilo*, Presidency, "Decision on 'Requête de la Défense aux fins de solliciter l'autorisation de déposer une réplique à la Réponse de M. le Juge Marc Perrin de Brichambaut notifiée le 20 mai 2019', dated 23 May 2019", 11 June 2019, ICC-01/04-01/06-3456, paras. 10-11.

IV. Relevant Law

27. Article 40 of the Rome Statute provides:

Independence of the judges

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.
4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

28. Article 41 of the Rome Statute provides:

Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.
2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

29. Article 67(1) of the Rome Statute provides, in relevant part,:

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially ...

30. Rule 34(2) of the Rules of Procedure and Evidence provides, in relevant part, that:

... a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based. The request shall state the grounds and attach any relevant evidence, and shall be transmitted to the person concerned, who shall be entitled to present written submissions.

V. Findings of the Plenary

A. Applicable legal standard

31. In previous decisions on requests for disqualification, the plenary of judges has emphasised that the claim that a judge's impartiality might reasonably be doubted, pursuant to article 41(2)(a) of the Statute, is not easily satisfied. The plenary of judges has repeatedly emphasised that 'the disqualification of a judge [is] not a step to be undertaken lightly ... 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'.⁴⁷
32. The Disqualification Request does not allege any actual bias on the part of Judge Ozaki.⁴⁸ To the extent that a claim of impartiality is concerned not with actual partiality but with the appearance of grounds to doubt impartiality, the plenary of judges have consistently considered the relevant standard of assessment to be whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias or a lack of partiality.⁴⁹ Such fair-minded and

⁴⁷ "Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012", 5 June 2012, ICC-02/05-03/09-344-Anx, para. 14 ; 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*", 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 37 ; "Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*", 20 June 2014, ICC-01/05-01/13-511-Anx, para. 18 ; "Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*", 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 29.

⁴⁸ Disqualification Request, paras. 19, 50.

⁴⁹ "Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012", 5 June 2012, ICC-02/05-03/09-344-Anx, para. 11; "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, ICC-01/04-01/06-3040-Anx, para. 34; "Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*", 20 June 2014, ICC-01/05-01/13-511-Anx, para. 17; Decision of the Plenary

objective observer is not to be confused with the views of the person making the complaint.⁵⁰ Further, the fair-minded and informed observer's consideration of the facts and circumstances includes an understanding of the nature of a judge's profession.⁵¹

33. The onus of demonstrating the existence of such objectively reasonable appearance of bias in the eyes of a well-informed observer rests on the party requesting disqualification.

B. Independence and Impartiality

34. The plenary of judges accepts that there is, in the present circumstances, a connection between the issues of judicial independence and impartiality.⁵² Nonetheless, the Disqualification Request may not be used as pretence to seek review of the Plenary's Article 40 Decision.⁵³ The Disqualification Request, in effect, challenges the Plenary's Article 40 Decision by submitting that the role of ICC Judge and that of Japanese diplomat are incompatible *in abstracto*.⁵⁴ The Disqualification Request's submissions to this end need not be further entertained.
35. The plenary of judges notes that the crux of the remainder of the Disqualification Request's submissions pertaining to independence is that the purported separation of subject-matter between Judge Ozaki's diplomatic functions and the *Ntaganda*

of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*", 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 28.

⁵⁰ "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, ICC-01/04-01/06-3040-Anx, para. 35.

⁵¹ *Ibid.*, para. 36.

⁵² See also "Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decisions of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence", 23 September 2009, ICC-01/04-01/06-2138-AnxIII, p. 6.

⁵³ The Decision on Reconsideration rejected the need for such review, p. 13.

⁵⁴ See Disqualification Request, paras. 20-24 on the drafting history of article 40, paras. 25-28 on the separation of powers and state practice.

case are ‘insufficient to satisfy the requirements of judicial *independence*’ (emphasis added).⁵⁵ The plenary of judges considers that the Disqualification Request here misstates the legal issue. The Disqualification Request concerns whether the judges of the plenary are satisfied, to the requisite high threshold, that there is an objectively reasonable appearance that Judge Ozaki may be unable to discharge her judicial duties in the *Ntaganda* case impartially due to her having briefly held the senior diplomatic position of Ambassador of Japan to Estonia, in view of the entirety of the entailing circumstances, before, after and during such appointment.

C. A case-specific analysis of Judge Ozaki’s impartiality

36. A case-specific assessment of impartiality on the basis of functions performed is required in disqualification proceedings. Such requirement is evident in the applicable legal standard itself, which is concerned with the assessment of the overall *circumstances*. In disqualification and excusal requests, both of which apply the legal standard set out in article 41(2)(a) of the Statute, the Court has consistently conducted a detailed and case-specific assessment of the circumstances⁵⁶ and has not relied on general categories or assumptions as themselves supporting disqualification or excusal requests.

⁵⁵ Disqualification Request, para. 30.

⁵⁶ See e.g. “Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decisions of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence”, 23 September 2009, ICC-01/04-01/06-2138-AnxIII; “Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence”, 19 March 2010, ICC-02/05-01/09-76-Anx2; “Decision on the request of Judge Akua Kuenyehia of 18 February 2010 to be excused from participating in the exercise to reclassify documents in the appeals proceedings related to the case of *The Prosecutor v. Bosco Ntaganda* and in all appeals in the case”, 24 September 2010, ICC-01/04-584-Anx4; “Decision on the request of Judge Monageng to be excused from the exercise of judicial functions in the Appeals Chamber pursuant to article 41 of the Rome Statute”, 19 April 2012, ICC-01/11-01/11-118-Anx2; “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, ICC-01/04-01/06-3040-Anx, para. 48; “Decision on the request for excusal from Appeals Chamber in all pending and future appeals in *The Prosecutor v. Jean-Pierre Bemba Gombo*”, 20 March 2015, ICC-01/05-01/08-3245-AnxI;

37. The plenary of judges notes that the Disqualification Request makes no allegations concerning the nature of any potential overlap of the functions of the Ambassador of Japan to Estonia and the work of Judge Ozaki in the *Ntaganda* case. The only specific function performed in the capacity of Ambassador of Japan to Estonia which the Disqualification Request identifies is the transmitting of her credentials as Ambassador.⁵⁷ The Disqualification Request highlights that Judge Ozaki was required 'to follow the instructions of the Foreign Minister when pursuing the duties of the ambassadorship'.⁵⁸
38. The plenary of judges considers that Judge Ozaki assumed the position of Ambassador of Japan to Estonia with the prior approval of a decision of the plenary of judges taken pursuant to article 40(4) of the Statute. Judge Ozaki's ambassadorship concerned only the bilateral relationship between Estonia and Japan.⁵⁹ Judge Ozaki undertook that in the event that any matter arose in such context with implications for the *Ntaganda* case, she would take the appropriate steps to ensure no conflicts exist or to raise any issues with the Court immediately.⁶⁰ The statement of Judge Ozaki's instructional relationship with the Foreign Minister is only applicable when she is '*pursuing the duties of the ambassadorship*', [REDACTED].
39. In view of all the above circumstances, the plenary of judges does not consider that a well-informed, reasonable observer with a proper understanding of the nature of

"Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*", 3 August 2015, ICC-01/04-01/06-3154-AnxI. The need for case-specific analysis of the question of the disqualification of a judge is also well supported beyond the Court itself: See e.g. *The Prosecutor v. Ratko Mladić*, MICT-13-56-A, "Decision on Defence Motions for Disqualification of Judges Theodor Meron, Carmel Agius and Liu Daqun", 3 September 2018, para. 28; Case of *Pabla Ky v. Finland*, Application No. 47221/99, ECtHR, Judgment, 22 June 2004, paras. 29, 34.

⁵⁷ ICC-01/04-02/06-2347-AnxB; Compared to the specific forms of functions relied upon in *Prosecutor v. Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Case No. IT-96-21, "Appeals Judgment", 20 February 2001, paras. 677-691.

⁵⁸ Disqualification Request, para. 35.

⁵⁹ Memorandum of Judge Ozaki of 18 February 2019, as set out at para. 5 of the Plenary's Article 40 Decision.

⁶⁰ *Ibid.*

judicial office would hold concerns as to the potential appearance that Judge Ozaki's impartiality in the *Ntaganda* case could be called into question by virtue of her relationship with Japan in connection with her appointment to a senior diplomatic position.

40. The plenary of judges further noted Judge Ozaki's full availability and capacity to impartially fulfil her remaining duties in the *Ntaganda* case.

D. Whether the circumstances of Judge Ozaki's resignation as Ambassador give rise to an appearance of partiality

41. The plenary of judges recalls, by way of factual context, that Judge Ozaki communicated her credentials as Ambassador of Japan to Estonia on (or around) 26 March 2019⁶¹ and that her resignation from that same position became operational on 19 April 2019. Whilst the precise dates are immaterial, it is undisputed that Judge Ozaki held the role of Ambassador of Japan to Estonia for a period of around one month – at most. The plenary of judges takes note that Judge Ozaki explained her motivation for her decision to resign as connected to the need to safeguard public confidence in the Court, as well as a desire to avoid potential delays in the *Ntaganda* proceedings.⁶²

1. *Alleged lack of candour*

42. The Disqualification Request submits that 'Judge Ozaki's resignation does little to restore her appearance of independence or impartiality' suggesting in support of this submission that Judge Ozaki's allegedly belated resignation was a direct result of her own lack of candour.⁶³

⁶¹ ICC-01/04-02/06-2347-AnxB.

⁶² Decision on Reconsideration, para. 33.

⁶³ Disqualification Request, para. 42.

43. The plenary of judges considers that it is not necessary to consider this candour-related argument further because it accepts that Judge Ozaki's resignation from the position of Ambassador of Japan to Estonia is not determinative of the question of whether her impartiality could be reasonably doubted. To the extent that the Disqualification Request also suggests that an alleged lack of candour can be connected to Judge Ozaki placing 'the duties of her service to Japan above those owed to the Court as a Judge',⁶⁴ the plenary considers this to be hypothetical speculation. Whilst an appearance of bias is not consonant with actual bias, the well-informed reasonable observer is not swayed by every possible speculation.

2. *Alleged refusal to acknowledge that her resignation is required as a matter of judicial independence*

44. The Disqualification Request suggests that Judge Ozaki's resignation improperly failed to acknowledge that she needed to resign in order to 'restore confidence in her judicial independence'.⁶⁵

45. The judges recall that the Plenary's Article 40 Decision determined, by majority, that the assumption by Judge Ozaki of the role of Ambassador of Japan to Estonia while she continued to serve as a non-full-time judge of the Court *does not* violate any aspect of article 40 of the Statute.⁶⁶

46. In such context, the plenary of judges considers it entirely ordinary that Judge Ozaki's resignation expressed the specific view that her concurrent service remained consistent with the requirements of article 40 of the Statute.

⁶⁴ Disqualification Request, para. 44.

⁶⁵ Disqualification Request, para. 45.

⁶⁶ Plenary's Article 40 Decision, para. 16.

3. *Alleged negative professional, financial and personal consequences to Judge Ozaki*

47. It is recalled that the Disqualification Request alleges that a series of specific negative consequences have arisen for Judge Ozaki arising from her tenure as Ambassador of Japan to Estonia and her decision to resign from this position.⁶⁷ The necessary implication is that there may be a reasonable appearance that Judge Ozaki could perceive Mr Ntaganda as responsible for such negative consequences and act with prejudice towards him.
48. The plenary of judges warns that reasoning of this nature must be approached with the greatest of caution. If the raising of concerns of independence or impartiality in the context of the judicial proceedings is itself sufficient to rebut the presumption of judicial impartiality, every disqualification request would be necessarily transformed into a self-fulfilling prophecy, with such being an anathema to the sound administration of justice.
49. The plenary of judges considers that the entirety of the submissions concerning alleged 'negative consequences', be they professional, financial or personal, are entirely speculative and clearly cannot satisfy the high threshold required to rebut the assumption of judicial impartiality.
50. It is further noted that the Defence submits that there is a lack of clarity as to whether Judge Ozaki remains employed by the Japanese Government in a capacity other than as Ambassador of Japan to Estonia.⁶⁸ The plenary of judges notes that no further requests under article 40 of the Statute have been placed before it by Judge Ozaki, who remains a judge of the Court and is bound to ensure compliance with article 40. Further, Judge Ozaki's Observations states that 'I have not been employed by anyone after my resignation was accepted on 19 April [2019]'.⁶⁹

⁶⁷ Disqualification Request, paras. 46-50.

⁶⁸ Disqualification Request, para. 48.

⁶⁹ Observations, p. 3.

E. Non-disclosure of relevant facts

51. The Disqualification Request argues that the appearance of independence and impartiality has been further undermined by relevant facts remaining undisclosed, suggesting that Judge Ozaki has an obligation to provide further information.⁷⁰
52. The Defence for Mr Ntaganda has already raised issues of ‘disclosure’ on multiple occasions.⁷¹ This issue will not be re-opened.
53. Nonetheless, the disclosure decisions *taken by the Presidency, in consultation with judges*, cannot support an allegation of bias or partiality *on the part of Judge Ozaki*.
54. The plenary of judges considers that the Defence for Mr Ntaganda has had ample information before it to enable the present request.

VI. Conclusion

55. The plenary of judges considers that the Disqualification Request fails to demonstrate that the circumstances of Judge Ozaki’s tenure as Ambassador of Japan to Estonia, which had been authorised pursuant to article 40(4) of the Statute, satisfies the high threshold necessary to rebut the presumption of impartiality. The Disqualification Request has failed to demonstrate a reasonable appearance of bias in the *Ntaganda* case, arising from known circumstances of Judge Ozaki’s appointment, ambassadorship or resignation from a senior diplomatic post. The Disqualification Request fails to present specific allegations of the appearance of any potential connection between Judge Ozaki’s responsibilities

⁷⁰ Disqualification Request, paras. 52-57.

⁷¹ See *The Prosecutor v. Bosco Ntaganda*, “Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki”, 1 April 2019, ICC-01/04-02/06-2327; *The Prosecutor v. Bosco Ntaganda*, “Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019”, 8 April 2019, ICC-01/04-02/06-2332; *The Prosecutor v. Bosco Ntaganda*, “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”, 2 May 2019, ICC-01/04-02/06-2339.

as a Judge in the *Ntaganda* case and those of her role of Ambassador. The suggestions presented in the Disqualification Request as to the manner in which Judge Ozaki has allegedly suffered negative consequences which may lead to an appearance of bias against Mr Ntaganda are speculative.

56. In light of the foregoing, the plenary, by absolute majority consisting of Judges Perrin de Brichambaut, Herrera Carbuccia, Mindua, Schmitt, Kovács, Pangalangan, Akane, Alapini-Gansou, Prost and Aitala, decides to dismiss the Disqualification Request.

57. Judges Eboe-Osuji, Morrison, Ibáñez and Bossa abstained from participating in any aspects of the decision of the plenary of 17 June 2019, as they had each reached a conviction that, in the particular circumstances, their participation may place them in a potential situation of conflict *vis-à-vis* their responsibilities as judges of the Appeals Division.



Judge Chile Eboe-Osuji

President