Cour
Pénale
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International
Criminal
Court

Original: **English**

No.: **ICC-01/04-02/06**
Date: **8 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

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)

Source: **Office of the Prosecutor**

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

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Introduction

1. The Defence Request should be dismissed in its entirety. First, the Defence Request is moot. It assumes that Judge Ozaki acts as Japanese Ambassador to Estonia while being a part-time Judge at the ICC. However, the Defence's premise is no longer correct since Judge Ozaki resigned as Ambassador on 18 April 2019. The Request should be dismissed on this basis alone. Second, the Request also fails on its merits: no reconsideration of the Article 40 Plenary Decision is warranted nor is Judge Ozaki's disqualification under article 41(2)(a) justified.

2. The Defence purported "new arguments" and "new facts" are not "new" nor are they relevant: they were available and known to the Plenary on 4 March and do not justify reconsideration of its Article 40 Decision. The Defence merely speculates about the date when Judge Ozaki started working as Japanese Ambassador to Estonia. Judge Ozaki told the Plenary that she would commence her duties on 3 April 2019. The Defence advances no colourable evidence to suggest that this is inaccurate.

3. Further, since independence and impartiality are closely linked, the Plenary already considered Judge Ozaki's impartiality in its Article 40 Decision and found, by absolute majority, that her position would not interfere with her judicial functions or affect confidence in her independence. In any event, there is no appearance of bias for Judge Ozaki pursuant to article 41(2)(a). Judge Ozaki's position as Japanese Ambassador to Estonia — a position she ultimately held for a period of 15 days (11 working days) — was limited to bilateral relations between two countries which have no connection to the *Ntaganda* case. Moreover, the *Ntaganda* case was fully briefed since August 2018, and substantive deliberations were completed by 18 February 2019. In addition, Judge Ozaki

provided robust assurances to avoid any appearance of impartiality or lack of independence.

4. The Defence Request should be therefore dismissed.

Procedural History

5. On 4 March 2019, an absolute majority of 14 judges of the Court decided that Judge Ozaki's assumption of the role of Ambassador of Japan to Estonia while she continues to serve as a non-full time judge of the Court does not violate any aspect of article 40 of the Statute ("Article 40 Presidency Decision").[1]

6. On 1 April 2019, the Defence filed a request for disclosure to the Presidency.[2] On the same date, the Defence filed a request for a temporary stay of proceedings.[3]

7. On 5 April 2019, the Prosecution[4] and the Legal Representatives of Victims[5] responded to the Defence Request for a Stay.

8. On 8 April 2019, the Defence made a second request for disclosure to the Presidency.[6]

9. On 18 April 2019, the Trial Chamber dismissed the Defence request for a temporary stay of proceedings.[7] The Trial Chamber also indicated that it would not render its Trial Judgment pending resolution of any request for

[1] ICC-01/04-02/06-2326, paras. 10-14.
[2] ICC-01/04-02/06-2327 ("Defence First Request for Disclosure").
[3] ICC-01/04-02/06-2328 ("Defence Request for a Stay").
[4] ICC-01/04-02/06-2329 ("Prosecution Response").
[5] ICC-01/04-02/06-2330.
[6] ICC-01/04-02/06-2332 ("Defence Second Request for Disclosure").
[7] ICC-01/04-02/06-2335.

disqualification.[8] On the same date, the Presidency rejected both Defence requests for disclosure.[9]

10. On 30 April 2019, the Defence filed a request for reconsideration of the Article 40 Plenary Decision ("Defence Request").[10]

11. On 1 May 2019, the Presidency filed the notification that Judge Ozaki had resigned as Japanese Ambassador to Estonia, effective 18 April 2019.[11]

12. On 2 May 2019, the Defence filed the Defence Requests for reconsideration of the Presidency's two disclosure decisions and made a new request for additional disclosure ("Defence Disclosure Request").[12] It also indicated that its 30 April Defence Request was not moot, despite Judge Ozaki's resignation as Japanese Ambassador to Estonia.[13]

13. The Prosecution responds to the Defence Requests before the Presidency pursuant to Regulations 24(1) and 34 of the Regulations of the Court ("Regulations").[14]

[8] ICC-01/04-02/06-2335, para. 14 ("The Chamber nonetheless clarifies that it will not render any judgment pursuant to Article 74 of the Statute pending resolution of any request for disqualification. Accordingly, should the Defence file any such request prior to the finalisation of the forthcoming judgment, the Chamber will not schedule, or, if already scheduled, defer, the rendering of the judgment").
[9] ICC-01/04-02/06-2336 ("Disclosure Decision").
[10] ICC-01/04-02/06-2337.
[11] ICC-01/04-02/06-2338.
[12] ICC-01/04-02/06-2339.
[13] ICC-01/04-02/06-2339, para. 2 ("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").
[14] This is consistent with past responses submitted under regulations 24(1) and 34, accepted and considered by the Presidency. *See*, ICC-01/04-01/06-3143.

Submissions

14. The Defence Request should be dismissed.[15] The Defence Request is moot since it assumes that Judge Ozaki remains Japanese Ambassador to Estonia, while she is not. On this basis alone, the Defence Request should be dismissed *in limine*. The Defence Request also fails on its merits. Neither the exceptional standard for reconsideration of the Article 40 Plenary Decision is met, nor is the high threshold for disqualification of Judge Ozaki satisfied.

A. The Defence Request is moot

15. Since the Defence Request was filed prior to the Presidency's notification to the Parties on 1 May 2019 that Judge Ozaki had resigned as Japanese Ambassador on 18 April 2019, it assumes that Judge Ozaki still acts as Ambassador, while being a part-time Judge at the ICC. Instead of withdrawing the Request following the Presidency's notification, the Defence explained in another filing before the Presidency that the Request was not moot, since it should be adjudicated on the basis of the facts as they existed on 4 March 2019 when the Plenary decided on Judge Ozaki's independence under article 40. However, since Judge Ozaki resigned as Ambassador on 18 April, the premise of the Defence Request – and of the core of its arguments[16] – has changed and is no longer correct. The Defence Request, which effectively prevents Trial Chamber VI from rendering its Judgment, is moot and should be dismissed on this basis alone.

B. The Defence Request for Reconsideration must be rejected

16. The Defence Request also fails on its merits. The Defence advances four "new arguments and new facts" to justify reconsideration of the Article 40 Plenary

[15] ICC-01/04-02/06-2337 ("Defence Request").
[16] Defence Request, paras. 1, 32, 43, 51.

Decision: (1) absence of prior submissions;[17] (2) the participation of two Judges in previous deliberations for whom there is a reasonable apprehension of bias;[18] (3) the coincidence of the date when Judge Ozaki sought to be excused from full-time service and the date of her appointment;[19] and (4) the "clear" drafting history of Article 40, and "overwhelming" practice of States.[20]

17. Reconsideration of the Article 40 Plenary Decision is not warranted. First, the Defence's purported test for reconsideration is inaccurate. Second, the Defence's alleged new facts and arguments do not justify reconsideration.

(a) The Defence's test for reconsideration is not accurate

18. Contrary to the Defence's assertion, "new arguments and new facts" do not trigger reconsideration.[21] Rather, consistent jurisprudence indicates that "[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice."[22] New arguments and new facts "*may* be relevant" to assess whether the high test for reconsideration is met,[23] but they – alone – do not justify reconsideration.

(b) The purported new arguments and new facts are neither "new" nor relevant

19. The purported new arguments and new facts advanced by the Defence are neither new nor relevant to the Chamber's determination.

[17] Defence Request, para. 20.
[18] Defence Request, para. 20.
[19] Defence Request, para. 15.
[20] Defence Request, para. 15.
[21] Defence Request, para. 15.
[22] ICC-01/09-01/11-1813 ("Ruto Reconsideration Decision"), para. 19, also cited by the Defence in fn. 17. *See also* ICC-02/04-01/15-1259, para. 12; ICC-02/04-01/15-1210-Red, para. 6; ICC-02/04-01/15-468, para. 4; ICC-01/05-01/13-1896, para. 8; ICC-01/05-01/13-1812, para. 6; ICC-01/05-01/13-1282, para. 8; ICC-01/04-02/06-611, para. 12; ICC-01/04-02/06-483, para. 13.
[23] Ruto Reconsideration Decision, para. 19, also cited by the Defence in fn. 17.

20. First, the absence of submissions from the Parties before the Plenary decided on Judge Ozaki's request does not justify reconsideration. As the Defence acknowledges, it is unclear whether the Parties have a statutory right to participate in proceedings under article 40.[24] Unlike article 41, article 40 does not permit Parties to request the Plenary to act upon this provision.[25] Regardless of this, the Presidency has the power to decide without hearing the Parties, even more in cases where the judges concerned have a better understanding and complete knowledge of their professional activities. Nor does article 64(2), and the Chambers' obligation to ensure a fair trial, justify reconsideration in this case. The Defence wrongly assumes that any judicial decision without hearing the Parties is unfair.[26]

21. Second, that Judges Fremr and Chung recused themselves from the Disclosure Presidency Decision does not mean that they should have recused themselves from the Article 40 Plenary Decision, or that the decision is flawed due to their presence. The Judges explained that their recusal in the subsequent Disclosure Presidency Decision was due to Ntaganda's assertion in the Disclosure Request that he intended to bring a request in relation to Judge Ozaki before the Presidency or another 'applicable body' on whether her actions affected her independence or impartiality. This request would relate to Judge Ozaki's functions as member of Trial Chamber VI in the *Ntaganda* case, in which Judges

[24] Defence Request, para. 16, citing the third edition of Triffeterer commentary.
[25] See Staker/ Abtahi/Young in Triffterer (3rd ed.), p. 1257, mn. 10 ("Unlike article 41, dealing with the related concept of judicial impartiality, article 40 does not include a provision for a Party to make a request for the judges to act under this provision. It is likely, in practice, that as judges themselves have the most complete knowledge of their professional activities, it is the judges concerned themselves who will take the responsibility to approach their colleagues under paragraph 4 where they have any doubt as to the applicability of either paragraphs 2 or 3").
[26] ICC-01/05-01/13-51 (noting that "the right to be heard, whilst indeed a fundamental principle, does not extend so far as to prevent under any circumstances that decisions might be taken *inaudita altera pars* and that, accordingly, the mere fact that one decision is taken *inaudita altera pars* cannot per se be held as significantly affecting the fairness of the proceedings). *Contra* Defence Request, para. 17.

Fremr and Chung are members.[27] There was no such indication when the Plenary issued its Article 40 Decision.

22. Third, the Defence does not substantiate its conjectures on the "coincidence of the date when Judge Ozaki sought to be excused from full-time service and the date of her appointment".[28] It suggests, without any evidence, that Judge Ozaki might have started to exercise her functions before 3 April. The Defence arguments are totally speculative. That she was appointed Ambassador on 12 February 2019, or that she travelled to Estonia on 26 March 2019 to hand over her credentials, does not mean that she assumed ambassadorial functions before 3 April.[29] Judge Ozaki told the Plenary that she would commence her duties on 3 April 2019. The Defence advances no colourable evidence to suggest that this is inaccurate.

23. Finally, the Plenary was aware of the drafting history of Article 40[30] and of the domestic practice when it issued its Article 40 Decision.[31] These are not new arguments or facts but information accessible and known to a Plenary of ICC Judges. Moreover, the drafting history does not support the Defence's position. To the contrary, and as the Defence notes,[32] article 10 of the ILC Draft was ultimately replaced by the more substantive and case-specific test in article 40,[33] which does not include a blanket prohibition on certain professional activities by non-full-time judges. The Plenary applied this provision in its Article 40 Decision.

24. Moreover, pursuant to article 21(1), the Court shall apply "[i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence". Domestic legislation is not binding on the Court, and comparisons with domestic practice

[27] See ICC-01/04-01/06-2336-AnxI and AnxII, paras. 3-5 of the Judges request.
[28] Defence Request, para. 15.
[29] *Contra* Defence Request, paras. 32, 41.
[30] Defence Request, paras. 21-24.
[31] Defence Request, paras. 27-30.
[32] Defence Request, para. 22. See paras. 21-23.
[33] The Rome Statute of the International Criminal Court: A Commentary", Cassesse, Gaeta and Jones (ed.) (Oxford University Press) ("Cassesse"), p. 243. See also pp. 256-257.

must be approached with caution on this point. The Court has its own legal framework, and the qualifications and procedure to appoint its judges are specific to this Court.[34] Nor are comparisons with other judges apposite. Each case is different and requires an individual assessment. For example, the functions of a vice president of a country are quite different in substance and scope from those of Judge Ozaki's as Japanese Ambassador for Estonia, a position that she ultimately held for a period of 15 days (11 working days).[35]

25. Further, the practice of other international courts and tribunals confirm the case-specific nature of this assessment. For example, in the *Taylor* case, the SCSL Appeals Chamber dismissed Defence arguments of lack of judicial independence when one judge was simultaneously appointed as a judge of another international tribunal for 16 weeks of the *Taylor* trial. The Appeals Chamber held that it is "extremely serious" to allege that a judge is not acting independently and "should not be made without ascertainable facts and firm evidence".[36] There were none. The Appeals Chamber concluded that "[t]he Defence contention that Justice Sebutinde's judicial independence was compromised solely because she was appointed to the ICJ is unsupported, disingenuous and ridiculous".[37]

26. Similarly, in an ECCC case where a judge was simultaneously a serving RCAF (Royal Cambodian Armed Forces) officer, the PTC rejected the Defence request for disqualification.[38] The Court considered the particularities and judicial appointment to the ECCC which, "although it is part of the Cambodian court

[34] *Contra* Defence Request, paras. 47-49. The Defence fails to show why the Court's characteristics support its requests for reconsideration and disqualification.
[35] *Contra* Defence Request, paras. 33-34.
[36] *Taylor* AJ, paras. 607, 608, 633-635.
[37] *Taylor* AJ, para. 635.
[38] Judge Ney Thol Disqualification Decision, paras. 23-26.

system, is a separate and independent court with no institutional connection to any court in Cambodia".[39]

27. The Code of Judicial Ethics, adopted by the Plenary of Judges in March 2015 in application of regulation 126 of the RoC, provides "guidelines for general application", and does not trump the Rome Statute. The Defence disregards the circumstances and context of this case, which are pertinent in assessing Judge Ozaki's judicial independence and impartiality.[40] Judge Ozaki's tasks as Ambassador were limited to bilateral relations between two countries which have no link to the *Ntaganda* case. She held this position for 15 days – from 3 April until 18 April 2019. The *Ntaganda* case was fully briefed since August 2018, and substantive deliberations were completed by 18 February 2019.[41] In addition, Judge Ozaki provided robust assurances to avoid any appearance of impartiality or lack of independence:

> "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. I also assure the Court that I am ready to return to the seat of the Court as necessary to discharge my judicial duties and that, on those occasions, I will not act in any way as the Japanese Ambassador to Estonia."[42]

28. Moreover, Judge Ozaki did not hide her appointment. She candidly put the issue squarely before the Presidency for determination before she took up the position. An absolute majority[43] of the Plenary decided that Judge Ozaki's future position as Japanese Ambassador in Estonia, in the circumstances of this case, did not

[39] Judge Ney Thol Disqualification Decision, para. 30
[40] Defence Request, para. 35.
[41] Article 40 Presidency Decision, Anx.1, para. 5.
[42] ICC-01/04-02/06-2326-AnxI, para. 5.
[43] Defence arguments on the voting threshold of "absolute majority" are flawed (Defence Request, para. 19). There are not 20 judges eligible to vote (there are only 18), and the absolute majority is taken from the number of judges who *actually* vote, not the total number of elected judges. Rule 4(3) of the Rules of Procedure and Evidence sets out that a quorum for each plenary session shall be two-thirds of the judges and rule 4(4) provides that "unless otherwise provided in the Statute or the Rules, the decisions of the plenary sessions shall be taken by the majority of the judges present" (emphasis added). Article 41(2) does not create an exception to rule 4(4).

"interfere with [her] judicial functions or […] affect confidence in [her] independence". This Decision remains valid.

C. The Defence Request for Disqualification must be rejected

29. The Defence generally argues that "Judge Ozaki should also be disqualified under Article 41(2)(a)".[44] The Defence arguments are unsupported and wholly speculative. The Defence fails to address - and much less satisfy - the high standard for disqualification of a judge of this Court pursuant to article 41(2)(a). Considering the circumstances of this case,[45] the Prosecution submits that a reasonable and well-informed observer would not reasonably and objectively apprehend bias by Judge Ozaki in the circumstances of this case.

30. First, in deciding on Judge Ozaki's independence under article 40, the Plenary already considered her impartiality or the existence of any appearance of bias. The Defence acknowledges that independence and impartiality are "closely related".[46] Indeed, commentary suggests that an assessment of judicial independence under article 40 entails a determination of judicial impartiality.[47] The Defence Disqualification Request should be dismissed on this basis alone.

31. Second, disqualifying a judge from participating in a proceeding at this Court is not a step to be undertaken lightly. Judges enjoy a presumption of impartiality which attaches to judicial office. They are presumed to be professional judges, who, by virtue of their experience and training, can decide on issues relying

[44] Defence Request, para. 18.
[45] *See above*, para. 27.
[46] Defence Request, para. 18.
[47] *See* Cassesse, p. 256 (stating that article 40(2) prohibiting judges from engaging in "any activity which is likely to interfere with their judicial functions or to affect confidence in their independence" should include "or impartiality"). *See also* Abtahi/Young in "The Rome Statute of the International Criminal Court: A commentary", 3rd ed., Triffterer/Ambos (ed.)(C.H. Beck, Hart,Nomos), p. 1260, nm. 5 (noting that article 41(2)(a) "is closely linked with article 40, as impartiality is closely linked with independence").

solely and exclusively on the evidence before them.[48] Accordingly, any application to disqualify a judge from proceedings must meet a high threshold. Yet, the Defence falls short from showing that a "reasonable observer, properly informed, [would] reasonably apprehend bias" in Judge Ozaki.[49] The Defence does not show Judge Ozaki's *bias*, or an unacceptable *appearance of bias*.[50] There is none.

32. This standard requires a case-by-case examination, taking into account the specific circumstances of each case.[51] Jurisprudence of the European Court of Human Rights ("ECtHR") supports this approach. For example, in a case where the impartiality and independence of a national judge was challenged because he was also member of Parliament, the ECtHR considered whether there was an overlap or link between the two functions.[52] Since there was none, the Court did not find sufficient basis to doubt the Judge's independence or impartiality.[53] The Court was not persuaded "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 to the independence and impartiality of the Court of Appeal.

[48] ICC-01/04-01/06-3154-AnxI ("*Lubanga* Sentence Review Disqualification Decision"), para. 29 (citations omitted). *See also* ICC-01/05-01/13-511-Anx ("*Bemba et al.* Disqualification Decision"), paras. 15-18.
[49] *Lubanga* Sentence Review Disqualification Decision, para. 28. *See also* *Mladić* Disqualification Decision, para. 19 ("A 'reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality […] and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.'"). This standard "is concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension is objectively reasonable." *Contra* Defence Request, paras. 1, 32, 43, 51.
[50] *Prosecutor v. Mladić,* MICT-13-56-A, Decision on Defence Motions for Disqualification of Judges Theodor Meron, Carmel Agius and Liu Daqun, 3 September 2018 ("*Mladić* Disqualification Decision"), para. 3. *See also* Human Rights Committee, *General Comment 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, CCPR/C/GC/32, 23 August 2007, para. 21 ("The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.")
[51] *Mladić* Disqualification Decision, para. 24 (citing ECtHR cases).
[52] In ECtHR Pablaky v. Finland, the Applicant company alleged a court of appeal in domestic proceeding was not independent or impartial because one of the judges on the panel was a member of parliament.
[53] Pablaky v. Finland, para. 34 ("M.P. had not exercised any prior legislative, executive or advisory function in respect of the subject matter or legal issues before the 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" in the sense that was found to infringe [Article 6(1)] in the two judgments cite above").

While the applicant company relies on the theory of separation of powers, this principle is not decisive in the abstract."[54] This fact-specific approach is consistent with the ICC Plenary's practice which, in deciding on recusals and disqualification requests under article 41(2)(a), has considered whether there was a "direct link" between the judge's previous participation in the case and the issue on appeal,[55] or whether there is a "degree of congruence between the legal issues" or whether "the factual determinations" would be "based on the same evidence".[56]

33. Third, contrary to the Defence's assertions, the Plenary considered Judge Ozaki's purported lack of candour.[57] The Defence only speculates when it argues that Judge Ozaki deliberately withheld her future position to avoid the Plenary's scrutiny when it requested to become a non-full-time judge on 7 January 2019. Yet, the Defence disregards that the Plenary precisely conducted such scrutiny on 4 March 2019 when it decided on Judge Ozaki's request to become Japanese Ambassador in Estonia.[58] Moreover, lack of candour is not sufficient to justify

[54] Pablaky v. Finland, para. 34. *Conversely*, when an overlap was found, the Court found a violation of article 6(1): Wettstein v. Switzerland (where the applicant alleged lack of impartiality as to part-time administrative judge engaged in practice of law who had represented parties against applicant in separate proceedings. There was temporal overlap in time that judge served in judicial role and represented opposing party in separate proceeding) and Pescador Valero v. Spain (where the applicant alleged violation of article 6(1) challenging impartiality of judge in proceedings against university, of which the judge was also associate professor. Court noted that judge had "concurrently performed the duties of a judge of the Higher Court of Justice of Castilla-La Mancha and those of an associate professor in receipt of income from the opposing party. In the Court's opinion, this situation could have raised legitimate fears in the applicant that Judge J.B.L. was not approaching his case with the requisite impartiality.").

[55] ICC-01/11-01/11-591-Conf-Exp-Anx1 ("*Gaddafi* Excusal Decision"), p. 4 ("The Presidency finds both requests to be well founded. Judge Fernández de Gurmendi's request for excusal is based on her issuance of the Impugned Decision that is the subject of the interlocutory appeal. Judge Monageng's request for excusal is based on her issuance of the First Clarification Decision, which in turn was addressed and clarified in the Impugned Decision. The Presidency takes particular note, in this respect, of Judge Monageng's submission that the relationship between the [Decisions] '*may demonstrate a direct link to the issue certified on appeal*.'"); *See also* ICC-01/04-02/06-162-Anx2 ("*Ntaganda* Interim Release Excusal Decision"), pp. 2-3.

[56] ICC-01/04-02/06-925-AnxI ("*Ntaganda* Excusal Decision"), p. 3; ICC-02/11-01/15-142-AnxI ("*Gbagbo* Excusal Decision"), p. 3; ICC-01/05-01/13-1329-AnxI ("*Mangenda* Compensation Excusal Decision"), p. 3; ICC-01/04-01/06-3154-AnxI ("*Lubanga* Sentence Review Disqualification Decision"), para. 31.

[57] Defence Request, paras. 37-44. *See* Article 40 Plenary Decision, para. 3.

[58] Article 40 Plenary Decision, para. 3

disqualification; instead, it has been considered when *there is* an actual bias or potential appearance of bias.[59] There is none.

34. Based on the above, the Prosecution requests that the Defence Disqualification Request be dismissed.

Conclusion

35. Based on the foregoing, the Prosecution requests that the Defence Request be dismissed.

36. As the Trial Chamber indicated that it would not render its Trial Judgment pending resolution of any request for disqualification, the Prosecution respectfully requests the Plenary to expedite the resolution of the Defence Request.

Fatou Bensouda
Prosecutor

Dated this 8th day of May 2019
At The Hague, The Netherlands

[59] Karemera AD, para. 66 ("where the Appeals Chamber held that "the allegations of appearance of bias are supported by Judge Vaz's admission of association and cohabitation with a Prosecution counsel who was one of the trial attorney' appearing in the present case") and para. 67 ("[t]he 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") (emphasis added).