Cour
Pénale
Internationale

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 '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

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence
Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims
Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Presidency should reject both the Defence request for reconsideration of its disclosure decision, and its new request for additional disclosure.[1]

2. First, the Defence Requests have no clear forensic purpose, since the Defence has already filed its request for reconsideration and disqualification.[2] No further disclosure is necessary for the purpose of bringing the application, which, as set out below, is now moot in any event. The Defence's pending request is only serving to delay issuance of the Article 74 Judgment, which is not in the interests of an expeditious trial.

3. Second, the Defence Requests – along with its pending request for reconsideration/ disqualification – are moot in light of the notification that Judge Ozaki resigned as the Ambassador of Japan to Estonia as of 18 April 2019. Judge Ozaki is no longer going to be both an ICC judge and an Ambassador, and she held both positions for only 11 working days. The Defence Requests should be dismissed *in limine*.

4. Third, the Defence Requests are flawed on the merits. The Defence fails to demonstrate either a clear error of reasoning, or that an injustice would result from the Presidency's 18 April 2019 decision ("Disclosure Decision").[3] Nor does the Defence raise new facts or arguments arising since the Disclosure Decision that may be relevant to this assessment. Rather, the Defence repeats, supplements and clarifies its initial disclosure requests based on information already available to it at the time of its original requests, which does not meet the exceptional threshold for reconsideration. It also relies on one purported "new" fact in its request for reconsideration of its first request for disclosure:

[1] ICC-01/02-02/06-2339 ("Defence Requests").
[2] ICC-01/04-02/06-2337.
[3] ICC-01/04-02/06-2336 ("Article 40 Decision").

that it has now requested reconsideration of the Judges' Article 40 Decision.[4] This pending request does not demonstrate a clear error of reasoning warranting reconsideration. The Defence presents no new facts in relation to its request for reconsideration of the Disclosure Decision related to its second disclosure request.

5. Fourth, the Defence's new request for additional disclosure is speculative. The Defence hypothesises that Judge Ozaki may not have, in fact, resigned from all her executive responsibilities within the Japanese Government, or that she may have resigned from the ICC.[5] The disclosed record is very clear on both fronts, however, and no new disclosure is required. The Defence also grounds its renewed request for disclosure on its interpretation of a press article in *Le Monde* and what it claims the press article "appears to imply" about Judge Ozaki's appointment.[6] Speculation, particularly based on an interpretation of a press article, is not a proper basis for disclosure.

6. Fifth, the Defence's new disclosure request is immaterial and overly broad. It argues that Judge Ozaki's independence was compromised because of *who* notified the Presidency of Judge Ozaki's resignation, which is irrelevant, and requests disclosure of "any" communications from or to the Presidency, the Registrar or any other ICC official, Japan and Judge Ozaki on the issue of Judge Ozaki's appointment.[7] The Defence request is tantamount to a fishing expedition: it is speculative, too generally formulated and does not present a showing of materiality.

7. Lastly, the Defence's new disclosure request is largely duplicative of its original - and already denied - requests for disclosure.

[4] Defence Requests, para. 3.
[5] Defence Requests, paras. 34-35.
[6] Defence Requests, para. 30 and fn 32.
[7] Defence Requests, para. 37.

Procedural History

8. On 22 March 2019, the Presidency notified the decision of the plenary of Judges pursuant to article 40 of the Rome Statute.[8]

9. On 1 April 2019, the Defence filed a request for disclosure to the Presidency.[9] On the same date, the Defence filed a request for a temporary stay of proceedings.[10]

10. On 5 April 2019, the Prosecution[11] and the Legal Representatives of Victims[12] responded to the Defence Request for a Stay.

11. On 8 April 2019, the Defence made a second request for disclosure to the Presidency.[13]

12. On 18 April 2019, the Trial Chamber dismissed the Defence request for a temporary stay of proceedings.[14] The Trial Chamber also indicated that it would not render its Trial Judgment pending resolution of any request for disqualification.[15] On the same date, the Presidency rejected both Defence requests for disclosure.[16]

13. On 30 April 2019, the Defence filed a request for reconsideration of the Decision of the plenary, and for disqualification.[17]

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

[8] ICC-01/04-02/06-2326 ("
[9] ICC-01/04-02/06-2327 ("Defence First Request for Disclosure").
[10] ICC-01/04-02/06-2328 ("Defence Request for a Stay").
[11] ICC-01/04-02/06-2329.
[12] ICC-01/04-02/06-2330.
[13] ICC-01/04-02/06-2332 ("Defence Second Request for Disclosure").
[14] ICC-01/04-02/06-2335.
[15] 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").
[16] ICC-01/04-02/06-2336.
[17] ICC-01/04-02/06-2337.

15. On 2 May 2019, the Defence filed the Defence Requests.

16. The Prosecution responds to the Defence Requests before the Presidency pursuant to Regulations 24(1) and 34 of the Regulations of the Court ("Regulations").[19]

Submissions

The Defence Requests have no forensic purpose

17. It is well-established in the jurisprudence of the *ad hoc* tribunals that a request for disclosure of confidential information must identify the precise legitimate forensic purpose that would justify disclosure.[20] The Defence fails to do so in these requests. It has already brought a motion for disqualification on the basis of the information disclosed in the record of the case, and no further disclosure is necessary for it to bring the motion. The Defence Requests should be dismissed on this basis.

The Defence Requests are moot

18. The Defence Requests are moot. Judge Ozaki resigned as Ambassador of Japan to Estonia on 18 April 2019, 11 working days after she assumed the post. An absolute majority of judges determined that Judge Ozaki's future role as Ambassador to Estonia and as part-time judge on the *Ntaganda* Trial Chamber, after substantive deliberations had concluded, was not contrary to Article 40 of the Statute. Plainly, therefore, Judge Ozaki's assumption of Ambassadorial duties for a mere 11 working days - now ended entirely - does not meet the

[18] ICC-01/04-02/06-2338.
[19] 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.
[20] *See*, ICTY: *Prosecutor v. Tolimir*, IT-05-88/2-T, Decision on Defence Request for Access to Confidential Materials in the Prosecutor v. Tolimir Case, 2 June 2010.

threshold for reconsideration of the Article 40 Decision or the Disclosure Decision, or warrant any further disclosure. Nor is it a basis for disqualification.

19. For these reasons, the Defence Requests should be dismissed *in limine*.

The Defence requests for reconsideration are without merit

20. The Defence requests for reconsideration of the Presidency's decisions on disclosure must fail on the merits.

21. As previously stated by the Chamber, "[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. New facts and arguments arising since the decision was rendered may be relevant to this assessment."[21]

22. The Defence fails to demonstrate a clear error of reasoning in the Presidency's Disclosure Decision or that an injustice would result from its order. Nor are there any new facts or arguments arising since the decision was rendered that would affect the Chamber's assessment.

23. First, the Defence surmises that the Presidency dismissed its disclosure requests because these were too undefined or too broad, and then seeks to rectify and supplement its original submissions by prioritising items in its original disclosure requests and repeating arguments on the need for disclosure.[22] The Disclosure Decision denies the requests because they amounted to a "fishing expedition",[23] which has also been held by international criminal tribunals to mean that the disclosure requests are speculative and immaterial. International case law consistently holds that the Defence does not have an unfettered right to

[21] ICC-01/04-02/06-483, para. 13.
[22] Defence Requests, para. 17.
[23] Disclosure Decision, para. 3.

disclosure triggered by "unsubstantiated claims of relevance".[24] National courts have similarly considered the term "fishing expedition" to describe "a roving enquiry designed to elicit information which might lead to the obtaining of evidence,"[25] and "an indiscriminate request for production, in the hope of uncovering helpful information".[26]

24. In seeking to specify its disclosure request, the Defence instead merely repeats the same arguments it presented previously on its need to have complete disclosure of certain correspondence by Judge Ozaki, or Japan, to the Presidency.[27] These re-hashed arguments do not address the test for reconsideration; they solely repeat and supplement the Defence's initial arguments requesting disclosure based on the same facts and circumstances.

25. For example, the Defence repeats that disclosure is warranted to allow the Defence to assess Judge Ozaki's alleged lack of candour, which is the same ground it presented in its first, failed request.[28] This is not a basis for the exceptional remedy of reconsideration. In any event, Judge Ozaki's candour is

[24] *See*, **STL**: *The Prosecutor v. Ayyash et al*, STL-11-01/T-TC, Decision Denying Merhi Defence Motion Seeking Disclosure of Material Relation to Potential Users of Purple Phone 231, 13 September 2017, para. 32; *The Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.4, Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records", 2 October 2013, paras. 21-22; *The Prosecutor v Ayyash*, STL-11-01/T-TC, Decision on Prosecution Witness Expenses, 9 May 2014, para 11; **ICTY**: *Prosecutor v. Karadzic*, IT-95-5/18-T, Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case, 8 February 2012, para. 8; *Prosecutor v. Delalic*, IT-96-21, Separate Opinion of Judge David Hunt on Motion by Esad Landzo to Preserve and Provide Evidence, 22 April 1999, para. 4; *Prosecutor v. Milan Martic*, IT-95-11-T, Decision on Ivan Cermak's and Mladen Markac's Joint Motion for Access to Confidential Testimony and Documents in Prosecutor v. Milan Martic Case, 1 March 2007; *Prosecutor v Kordic & Cerkez*, IT-95-14/2-A, Order on Pasko Ljubicic's Motion for Access to Confidential Supporting Materials, Transcripts and Exhibits in the *Kordic and Cerkez Case*, 19 July 2002; **ICTR**: *Nahimana v. The Prosecutor*, ICTR-99-52-A, Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November 2006, para. 11; *Prosecutor v Karemera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para. 7.

[25] UK: Judgment in Re: The State of Norway, House of Lords, 28 ILM 6933.

[26] Canada: *Harvis v. R.*, 2001 FCT 498; R. v. Khan [2004] O.J. No 3811; R. v. Fitch, 2006 SKCA 80. *See also*, Australia: *Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1952) 72 WN (NSW) 250: "A 'fishing expedition', in the sense in which the phrase has been used in the law, means that a person who has no evidence that there are a particular kind of fish in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not."

[27] Defence Requests, paras. 4-5. *See*, Defence First Request for Disclosure and Defence Second Request for Disclosure.

[28] Defence Requests, paras.18-26 as compared to Defence First Request for Disclosure, paras. 10-12.

not a ground for disqualification; she candidly requested a review of her future dual role as part-time ICC judge in a case after substantive deliberations were complete and with a number of guarantees. She did not hide that she was appointed Ambassador. Candour is immaterial to any disqualification request without greater proof of a lack of independence, impartiality or appearance thereof.[29] Consequently, candour alone is not a proper ground for disclosure, particularly when the underlying *future* activities were presented by Judge Ozaki for review by a plenary of judges.

26. Third, the Defence's pending application for reconsideration of the plenary's Article 40 Decision with a request for disqualification in the alternative[30] does not meet the threshold for reconsideration. The pending application neither demonstrates a clear error of reasoning in the Disclosure Decision nor makes reconsideration necessary in order to prevent an injustice. The Defence Requests still amount to a fishing expedition as they are speculative, overly broad and immaterial.

27. Critically, the Defence acknowledges that it has a summary of the relevant information it seeks;[31] in other cases, it admits that it does not know if such information exists.[32] In these circumstances, the request for reconsideration of the Disclosure Decision must fail.

[29] 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).
[30] Defence Requests, para. 17.
[31] Defence Requests, paras. 19, 21, 23.
[32] Defence Requests, paras. 24, 23, 25.

The Defence request for additional disclosure is unsubstantiated

28. The Defence seeks additional disclosure on the basis of conjecture: (i) that the Defence has no notification that Judge Ozaki has, in fact, resigned from all her executive responsibilities within the Japanese Government;[33] (ii) that it is possible that Judge Ozaki has already resigned from the Court;[34] (iii) and that the fact that Japan notified the Presidency of Judge Ozaki's resignation proves that Judge Ozaki is not independent.[35]

29. First, these are speculations that are not established from the record to date, available to the parties, which plainly shows that Judge Ozaki did not resign from the Court and did resign her role as Ambassador to Estonia. Moreover, the vehicle through whom her resignation was communicated is not material or relevant. No further disclosure is warranted.

30. In addition to being speculative and immaterial, the Defence request is overly broad, general and again amounts to a fishing expedition. Wholesale requests for disclosure that fail to identify the precise purpose justifying such disclosure have been considered to constitute a "fishing expedition" and have accordingly been rejected by Chambers of this Court.[36]

31. Indeed, the Defence seeks: Japan's notification concerning Judge Ozaki when it already has the relevant parts; *any* communications from the Presidency to the Japanese Government concerning Judge Ozaki's status; *any* correspondence

[33] Defence Requests, para. 34.
[34] Defence Requests, para. 35.
[35] Defence Requests, para. 36.
[36] See for instance, ICC-01/05-01/08-632, para. 26; ICC-01/04-01/06-103, pp. 2-3. *See also*, SCSL, *Prosecutor v. Sesay et al*, SCSL-04-15-T, Decision on Sesay – Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2 May 2005, paras. 51-65 (concluding in the context of a request for disclosure under SCSL rule 68—analogous to article 67(2) of the Statute—that "*for the Defence to succeed in this Motion, it is not enough to premise its application either on presumptions, on speculations, or on probabilities. […] In the same vein, a mere speculative assertion without specifying or advancing concrete proof of the nature and content of the exculpatory evidence which the Defence is alleging to be in the possession of the Prosecution […] fails to meet the test required to warrant an Order by the Chamber for the Prosecution to disclose under Rule 68* […]).

from Judge Ozaki to the Presidency concerning her employment with the Japanese Ministry of Foreign Affairs *in any capacity*; *any* communications from the Registrar or any other official of the ICC to Japan concerning the situation of Judge Ozaki, and its responses. The Defence's claim that all such documents, which would include written and oral exchanges, notes and emails, are potentially relevant does not establish *prima facie* that the information sought is material to Defence preparation.

32. The Defence's new request for disclosure also duplicates aspects of the First Defence Request for Disclosure. For example, the new request seeks disclosure of "any correspondence from Judge Ozaki to the Presidency concerning her employment with the Japanese Ministry of Foreign Affairs in any capacity, including Ambassador",[37] while the First Defence Request for Disclosure (denied) sought disclosure of the same information: "Judge Ozaki's full communications with the Presidency concerning her appointment as Japanese Ambassador to Japan [*sic*], including the full text of her 18 February 2019 memorandum to all Judges"[38] and "any other communications or correspondence between Judge Ozaki and the Presidency, Judge Ozaki and the other Judges as well as between the Presidency and the Judges concerning the facts relevant to Judge Ozaki's appointment and potential lack of judicial independence".[39]

33. As a second example, the Defence's new request seeks disclosure of "any communications from the Registrar or any other ICC official of the ICC to Japan concerning the situation of Judge Ozaki, and its responses".[40] The Second Defence Request for Disclosure (denied) sought disclosure of the same information: "whether during [the Registrar's] discussions with the Japanese

[37] Defence Requests, para. 37.
[38] First Defence Request for Disclosure, para.15(b).
[39] First Defence Request for Disclosure, para.15(d).
[40] Defence Requests, para. 37.

Government, on 21 and 22 January 2019 or at any other time, the matter of Judge Ozaki's request to resign as a full-time Judge or her potential appointment as Ambassador to Estonia was raised. If so, disclosure of the content of those discussions is requested […]".

34. Duplicate disclosure requests should be denied. They have already been denied by the Presidency, and the test for reconsideration has not been met. Further, the request for additional disclosure remains unwarranted for lack of materiality and for its overly broad scope.

Conclusion

35. Based on the foregoing, the Prosecution asks that the Defence Requests be dismissed.

Fatou Bensouda
Prosecutor

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