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

Date: **10 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 leave to reply to “Prosecution’s Response etc.”, (ICC-01/04-02/06-2341)
of 8 May 2019 Concerning 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 “Prosecution’s Response etc.”, (ICC-01/04-02/06-2341) of 8 May 2019 Concerning Disclosure (“Prosecution Response”) filed on 8 May 2019,¹ Counsel representing Mr. Ntaganda (“Defence”), hereby submits this:

**Request for leave to reply to “Prosecution’s Response etc.”, (ICC-01/04-02/06-2341)
of 8 May 2019 Concerning Disclosure**

INTRODUCTION

1. The Defence, pursuant to Regulation 24(5) of the Regulations of the Court (“RoC”), seeks leave to reply to six limited issues.
2. Two of the issues relate to the request for additional disclosure: (i) whether the information requested is “overly broad”;² and (ii) whether the Defence already has all “relevant parts”³ of the information requested.
3. Three issues relate to the request for reconsideration: (i) whether the filing of the Article 40 Request, seeking Judge Ozaki’s disqualification, substantially changed the factual basis on which the Presidency “summarily dismissed” the

¹ *Ntaganda*, 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, 8 May 2019, ICC-01/04-02/06-2341 (“Prosecution Response”). See also *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 (“Disclosure Reconsideration Request”); *Ntaganda*, 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; *Ntaganda*, Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute, 30 April 2019, ICC-01/04-02/06-2337 (“Article 40 Request”). All further references are to filings in the *Ntaganda* case, unless otherwise indicated.

² Prosecution Response, para. 30.

³ Prosecution Response, para. 31.

Defence's previous requests for disclosure;⁴ (ii) whether any further disclosure is unnecessary because the Article 40 Request has been filed; and (iii) whether the case law cited at footnote 24 supports the Prosecution's claims regarding the definition of an improper "fishing expedition".⁵

4. Leave is also sought in respect of the argument advanced concerning mootness,⁶ which was entirely unforeseeable.

APPLICABLE LAW

5. Regulation 24(5) of the RoC prescribes that "[p]articipants may only reply to a response with the leave of the Chamber" and that "[u]nless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated." Jurisprudence applying this Regulation has consistently held that a reply may be appropriate: (i) "in respect of issues raised in the response which the replying participant could not reasonably have anticipated"; and (ii) where it "would otherwise be necessary for the adjudication" of the matter.⁷
6. A request for leave to reply must explain the intended subject-matter of the reply to some extent. As the Appeals Chamber has held, a party seeking leave to reply must: (i) do more than "point [...] to issues" to which it wishes to reply, but must rather "demonstrate [...] why they are new and could not

⁴ 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", 18 April 2019, ICC-01/04-02/06-2336 ("Disclosure Decision").

⁵ Prosecution Response, para. 23.

⁶ Prosecution Response, para. 18.

⁷ Decision on Mr. Ntaganda's request for leave to reply, 17 July 2017, ICC-01/04-02/06-1994, ("*Ntaganda* Appeal Decision on Replies"), para. 9.

reasonably have been anticipated”;⁸ and (ii) “explain why a reply to the aforementioned issues is otherwise warranted.”⁹

SUBMISSIONS

I. Leave to reply is justified for two issues in respect of the additional disclosure request

7. While the Defence disagrees with almost all of the Prosecution’s submissions in respect of the request for additional disclosure,¹⁰ especially the unsubstantiated claim that the Article 40 Request is moot,¹¹ leave to reply is sought in respect of only two issues.
8. First, leave is sought in respect of the Prosecution’s claim that the information sought is “overly broad” and is a “fishing expedition”.¹² In particular, the Prosecution emphasises the Defence’s use of the word “any.”¹³ A reply is otherwise necessary to address whether the word “any”, within the limits of categories specified, creates any lack of specificity or vagueness. It was unforeseeable that the Prosecution would attempt to characterise the use of the word “any”, within the limited categories of information sought, as a basis for asserting that the request was a “fishing expedition.” Merely because some of the information within the scope of the disclosure request may not be relevant, or is otherwise not subject to disclosure, does not make the request vague or a “fishing expedition”. On the contrary, the scope of the inquiry is justified by the fully-informed reasonable observer test.

⁸ *Ntaganda* Appeal Decision on Replies, para. 13.

⁹ *Id.* para. 14.

¹⁰ Disclosure Reconsideration Request, paras. 33-38.

¹¹ Prosecution Response, paras. 2, 18.

¹² Prosecution Response, para. 30.

¹³ Prosecution Response, para. 31.

9. Second, the Prosecution's claim that the Defence has "already" received all relevant information¹⁴ was unforeseeable and is highly speculative. The Defence could not have foreseen, and could not have addressed in advance, an argument so speculative and unsubstantiated. The claim is also important, as it goes directly to the transparency that a reasonable observer would expect when a serious basis arises to doubt the independence of a Judge from the executive branch of her State of origin. A reply is necessary based on the unforeseeability of the Prosecution's claim, and its potential importance.

II. Leave to reply is justified for three issues in respect of the Disclosure Reconsideration Request

10. (i) Leave to reply is sought in respect of the Prosecution's claim that the Article 40 Request does not amount to a substantial change of circumstance which, if ignored, would amount to an injustice.¹⁵ This ignores the words in the Disclosure Decision that "there is currently no legal basis for the Request or the Request for the Registrar."¹⁶ That basis now exists. Refusing to consider that legal basis would amount to an injustice. The Prosecution argument is so directly contrary to the plain wording of the Disclosure Decision as to have been unforeseeable. A reply is also otherwise necessary. If accepted, the Prosecution submission would imply that the disclosure request would never be fully addressed on its merits: rejected in the first instance as premature, then rejected in the second instance based on an inappropriately stringent "clear error of reasoning" standard.¹⁷ Especially in a context where there does not appear to be any readily available appeal, this would cause an injustice.

¹⁴ Prosecution Response, para. 31.

¹⁵ Prosecution Response, para. 26.

¹⁶ Disclosure Decision, para. 3.

¹⁷ Disclosure Decision, para. 26.

11. (ii) Leave is also sought to reply to the Prosecution's argument that further disclosure serves no purpose because "the Defence has already filed its request for reconsideration and disqualification" and that "no further disclosure is necessary for it to bring the motion."¹⁸ A reply is otherwise necessary to address the unforeseeable claim (for which no support is provided) that disclosure serves no further legitimate forensic purpose once a party brings a motion based on incomplete information. A reply will assist the Judges in placing this claim in an appropriate context, which includes its own rejection of the Defence's disclosure requests because there was "currently" no legal basis for them,¹⁹ which appeared to be an invitation to proceed with the Article 40 Request prior to receiving full disclosure.
12. (iii) Leave to reply is also sought to address the case law cited in footnote 24 of the Prosecution Response.²⁰ This case law, contrary to the Prosecution's claim, supports the disclosure requested by the Defence, especially given the Presidency's summary dismissal of the disclosure requests, and the new fact of the pending Article 40 Request. The suggestion that this case law – or any other international case law – suggests the contrary, was unforeseeable.

III. Mootness

13. A reply is also justified in respect of the Prosecution's unforeseeable argument relating to mootness.²¹ The Prosecution's bold assertion that Judge Ozaki was an ambassador of Japan while also a Judge of this Court for only eleven working days is a claim that can be confirmed or disproven only on the basis of full and proper disclosure. The Prosecution's conjecture in respect of this vital fact, to say nothing of the conspicuous absence of information concerning when

¹⁸ Prosecution Response, paras. 2, 17.

¹⁹ Disclosure Decision, para. 3.

²⁰ Prosecution Response, para. 23.

²¹ Prosecution Response, para. 18.

Judge Ozaki began employment with the Japanese Ministry of Foreign Affairs and whether that employment has ended, demonstrates the need for disclosure. The Defence should be afforded the opportunity to address this issue in a reply.

CONCLUSION

14. The Presidency and the Judges will be assisted by a reply on these limited issues. A reply is particularly appropriate, as previously mentioned, given the absence of any appeal, and the Presidency's previous summary dismissal of the disclosure requests.

RESPECTFULLY SUBMITTED ON THIS 10th DAY OF MAY 2019



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