



Original: English

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

Date: 13 May 2019

**THE AD HOC PRESIDENCY**

**Before:** Judge Chile Eboe-Osuji, President  
Judge Marc Perrin de Brichambaut, 2<sup>nd</sup> 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 leave to reply to  
'Prosecution's Response etc,' (ICC-01/04-02/06-2341) of 8 May 2019 concerning  
Disclosure", ICC-01/04-02/06-2343**

**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 Other  
Section**

## Introduction

1. The Defence request for leave to reply should be dismissed.<sup>1</sup>
2. No reply is warranted. The Defence identifies no new issues arising from the Prosecution Response that would merit a reply. Nor would the Judges be assisted by further submissions on any of the issues proposed for reply.

## Procedural History

3. On 22 March 2019, the Presidency notified the decision of the plenary of Judges pursuant to article 40 of the Rome Statute.<sup>2</sup>
4. On 1 April 2019, the Defence filed a request for disclosure to the Presidency.<sup>3</sup> On the same date, the Defence filed a request for a temporary stay of proceedings.<sup>4</sup>
5. On 5 April 2019, the Prosecution<sup>5</sup> and the Legal Representatives of Victims<sup>6</sup> responded to the Defence Request for a Stay.
6. On 8 April 2019, the Defence made a second request for disclosure to the Presidency.<sup>7</sup>
7. On 18 April 2019, the Trial Chamber dismissed the Defence request for a temporary stay of proceedings.<sup>8</sup> On the same date, the Presidency rejected both Defence requests for disclosure.<sup>9</sup>

---

<sup>1</sup> ICC-01/02-02/06-2343 (“Request to Reply”).

<sup>2</sup> ICC-01/04-02/06-2326 (“Article 40 Decision”).

<sup>3</sup> ICC-01/04-02/06-2327.

<sup>4</sup> ICC-01/04-02/06-2328.

<sup>5</sup> ICC-01/04-02/06-2329.

<sup>6</sup> ICC-01/04-02/06-2330.

<sup>7</sup> ICC-01/04-02/06-2332.

<sup>8</sup> ICC-01/04-02/06-2335.

<sup>9</sup> ICC-01/04-02/06-2336 (“Disclosure Decision”).

8. On 30 April 2019, the Defence filed a request for reconsideration of the Decision of the plenary under article 40, and for disqualification.<sup>10</sup>
9. On 1 May 2019, the Presidency filed the notification that Judge Ozaki had resigned as Japanese Ambassador to Estonia, effective 18 April 2019.<sup>11</sup>
10. On 2 May 2019, the Defence filed a request for reconsideration of the Presidency's decision on disclosure, and for additional disclosure.<sup>12</sup>
11. On 8 May 2019, the Prosecution responded to the Defence request for reconsideration of the Article 40 Decision.<sup>13</sup> On the same date, the Prosecution responded to the Defence request for reconsideration of the Presidency's decision on disclosure.<sup>14</sup>
12. On 9 May 2019, the Defence filed a request for leave to reply to the Prosecution's response to the Defence request for reconsideration of the Article 40 Decision.<sup>15</sup> The Prosecution filed its response on 13 May 2019.<sup>16</sup>
13. On 10 May 2019, the Defence filed a request for leave to reply to the Prosecution's response concerning the Defence request for reconsideration of the Presidency's decision on disclosure.<sup>17</sup>

### **Submissions**

14. As the Defence acknowledges,<sup>18</sup> Regulation 24(5) prescribes that a reply must be limited to new issues raised in the response which the replying participant could

---

<sup>10</sup> ICC-01/04-02/06-2337 ("Article 40 Reconsideration Request").

<sup>11</sup> ICC-01/04-02/06-2338.

<sup>12</sup> ICC-01/04-02/06-2339 ("Disclosure Reconsideration Request").

<sup>13</sup> ICC-01/04-02/06-2340.

<sup>14</sup> ICC-01/04-02/06-2341 ("Prosecution Response").

<sup>15</sup> ICC-01/04-02/06-2342.

<sup>16</sup> ICC-01/04-02/06-2344.

<sup>17</sup> ICC-01/04-02/06-2343.

<sup>18</sup> Request to Reply, para. 5.

not reasonably have anticipated, or would be necessary for adjudication of the matter.

15. The Defence identifies six issues on which it seeks leave to reply. It fails to justify why the Presidency should exercise its discretion to grant leave to reply to the Prosecution Response on these issues. The proposed reply relates to issues that are not new, could reasonably have been anticipated by the Defence, or were already addressed by it in its Disclosure Reconsideration Request. No further submissions are necessary for adjudication of the matter.

16. The Defence notes that an applicant must explain, to some extent, why an issue is new and could not reasonably have been anticipated, rather than merely point to issues.<sup>19</sup> The Prosecution does not contest that a brief explanation as to why an issue is new and could not have been anticipated must be made in an application for leave to reply. This is not the same as providing substantive submissions on the issue itself, under the guise of a request for leave to reply. The Appeals Chamber and other Chambers of this Court have been clear that it is impermissible to make submissions on the merits that go beyond a brief explanation of why the issue is new and could not have been anticipated.<sup>20</sup>

17. The Request to Reply should be dismissed because the points on which the Defence seeks to reply do not fall within the allowable grounds for reply.

---

<sup>19</sup> Request to Reply, para. 3. In the decision cited by the Defence for this point, the Appeals Chamber held that the Defence in that case had failed to demonstrate why the issues for which leave to reply was sought were new and could not reasonably have been anticipated: ICC-01/04-02/06-1994, para. 13. Nor had the Defence explained why a reply was otherwise warranted: ICC-01/04-02/06-1994, para. 14.

<sup>20</sup> See, ICC-01/04-01/06-824, para.68: “According to the Appeals Chamber’s jurisprudence, the content of an application for leave to reply may not in fact constitute a substantive reply to issues raised in a response. The Appeals Chamber has deprecated the practice of the filing of a substantive reply prior to leave being granted by the competent Chamber and ruled that such a practice may, in and of itself, give rise to the rejection of an application for leave.”; See also, ICC-01/05-01/08-2985, para.5, ICC-01/05-01/08-3279, paras.4-5; ICC-01/04-02/06-1994, paras.13 and 14.

*First issue: the additional disclosure request is overly broad and a fishing expedition*

18. The Defence seeks leave to reply to the Prosecution's response that the additional disclosure request is overly broad and amounts to a fishing expedition.<sup>21</sup>
19. Leave to reply should not be granted on this issue, as there is nothing in the Prosecution Response that is new, that could not be anticipated, or that would further assist the Presidency. Indeed, the Defence already argued the specificity of its request for additional disclosure: (i) the Defence canvassed the meaning of the term "fishing expedition", indicating that it can refer to disclosure requests that are "too undefined or too broad";<sup>22</sup> (ii) it provided its grounds in support of this disclosure;<sup>23</sup> and (iii) it argued that "the information sought is identified with the greatest specificity possible; is highly relevant to the pending request for Reconsideration of the Judges' Article 40 Decision".<sup>24</sup>
20. The Defence seeks to repeat and/or supplement its submission that the term "any" is not overly broad and does not amount to a fishing expedition.<sup>25</sup> The Presidency is able to assess, without further submissions, whether the Defence's repeated use of the word "any" in its request for additional disclosure is sufficiently specific and defined, or is undefined and overly broad.

<sup>21</sup> Request to Reply, para. 8, referring to the Prosecution Response, para. 30.

<sup>22</sup> Disclosure Reconsideration Request, para. 17. *See also*, paras. 18-21 for further discussions on the specificity requirement in relation to its first request for disclosure.

<sup>23</sup> Request to Reply, paras. 34-38.

<sup>24</sup> ICC-01/04-02/06-2339, para. 38.

<sup>25</sup> Request to Reply, para. 8.

*Second issue: whether the Defence has already received the relevant part of Japan's notification concerning Judge Ozaki*

21. The Defence seeks leave to reply to the Prosecution response that disclosure of the full email from the Government of Japan to the Court is not required when the relevant part of that communication has already been disclosed.<sup>26</sup>

22. This issue is not new, nor are further submissions on the point warranted. In its Disclosure Reconsideration Request, the Defence extensively argued why it wanted the full text of Japan's email notification concerning Judge Ozaki's resignation as Ambassador to Estonia.<sup>27</sup> The Defence argues, mainly, that *who* notified the Court of Judge Ozaki's resignation makes the full email material for disclosure. The Prosecution argues that the messenger is immaterial and that the relevant information has already been disclosed: that on 18 April 2019, the Government of Japan officially accepted Judge Ozaki's resignation as Japanese Ambassador to Estonia.

23. No further submissions on this issue are warranted, as ultimately the Presidency – who is in possession of the full email – is in the best position to adjudicate whether any other part is material for disclosure.

*Third issue: the article 40 request does not amount to a substantial change of circumstances*

24. The Defence seeks leave to reply to the Prosecution's argument that the pending Article 40 Reconsideration Request does not meet the threshold for reconsideration of the Decision on Disclosure.<sup>28</sup> The Defence then delves into a substantive response on the merits, which is impermissible.

<sup>26</sup> Request to Reply, para. 9, citing Prosecution Response, para. 30.

<sup>27</sup> Reconsideration Disclosure Request, para. 33-37.

<sup>28</sup> Request to Reply, para. 10, citing Prosecution Response, para. 26.

25. First, to be clear, the Prosecution's argument is that the pending Article 40 Reconsideration Request neither demonstrates a clear error of reasoning nor makes reconsideration necessary in order to prevent an injustice. The Defence disagrees, but it has already argued the point (thereby anticipating the Prosecution's response). The Defence uses the Request to Reply to repeat its original submissions that the Article 40 Decision states that "there is currently no legal basis for the Request", and then to repeat and supplement its arguments that this must mean the Presidency rejected the disclosure request until the Article 40 Reconsideration Request was filed.<sup>29</sup>

26. Leave to reply should not be granted on this issue as it is not new or unanticipated, and further submissions would not be of assistance.

*Fourth issue: no clear forensic purpose for the Disclosure Reconsideration Request*

27. The Defence seeks leave to reply to the Prosecution's response that further disclosure is unwarranted because there is no clear forensic purpose now that the Article 40 Reconsideration Request has been filed.<sup>30</sup>

28. Leave to reply should not be granted on this issue, as the arguments could have been reasonably anticipated. Consistent jurisprudence on the test for disclosure of confidential information pre-dates the Defence Disclosure Reconsideration Request, whereby an applicant must identify the precise legitimate forensic purpose that would justify disclosure.<sup>31</sup> As such, the Defence could have addressed this test in its application, but did not.

29. Nor will a reply assist the Judges. The Judges, having drafted its Disclosure Decision, know the bases upon which it rejected the Defence's request for disclosure and are in a position to adjudicate the Defence request on this point.

<sup>29</sup> Request to Reply, para. 10; first raised in the Defence Disclosure Reconsideration Request, paras. 3, 4, 16-17.

<sup>30</sup> Request to Reply, para. 11 citing Prosecution Response, paras. 2, 17.

<sup>31</sup> Prosecution Response, para. 17.

In particular, the Judges are already aware whether the Disclosure Decision was “an invitation to proceed with the Article 40 Request prior to receiving full disclosure”.<sup>32</sup>

*Fifth issue: the Prosecution’s reference to jurisprudence in footnote 24*

30. The Defence seeks to reply to the case law cited by the Prosecution in footnote 24,<sup>33</sup> related to findings by national and international Courts that the term “fishing expedition” can also refer to speculative and immaterial disclosure requests (in addition to overly broad and general requests).
31. These decisions are not new; they pre-date the Disclosure Reconsideration Request by several years. The Defence could reasonably have anticipated that the Prosecution would refer to jurisprudence defining the term “fishing expedition”, since the Presidency referred to this term in its Disclosure Decision and since the Defence chose to interpret the term in a limited way. The Defence opted not to refer to *any* jurisprudence on the term “fishing expedition”, even when advancing its view that this term meant that “the Presidency considered the First Disclosure Request as too undefined or too broad”.<sup>34</sup> Leave to reply is not warranted to supplement original submissions on areas that were entirely foreseeable.
32. Nor would further submissions assist the Presidency. It has access to the decisions and can determine whether the case law assists the Defence, or not.

---

<sup>32</sup> Request to Reply, para. 11.

<sup>33</sup> Request to Reply, para. 12, referring to the Prosecution Response, para. 23 and fn. 24.

<sup>34</sup> Reconsideration Disclosure Request, para. 17.

*Sixth issue: the Disclosure Reconsideration Request is moot*

33. The Defence seeks leave to reply to the Prosecution response that reconsideration is not warranted since the Disclosure Reconsideration Request is moot given Judge Ozaki's resignation as Ambassador to Estonia.<sup>35</sup>
34. Leave to reply should not be granted on this issue, as there is nothing in the Prosecution Response that is new, that was not foreseeable, or that was not already argued by the Defence before the Presidency. Nor are further submissions on the point warranted.
35. First, the Defence has already briefed the Presidency as to why it does not consider the Disclosure Reconsideration Request to be moot.<sup>36</sup> The Presidency is thus briefed by the Defence on this issue. The Defence *did* anticipate that this would be an issue, and it addressed it.
36. Second, the Prosecution takes it as a fact from the disclosed communications by Judge Ozaki and by the Government of Japan, that Judge Ozaki commenced her duties as Ambassador to Estonia on 3 April 2019 and that her resignation took effect on 18 April 2019. This, in fact, means that she occupied the position of Ambassador for 11 working days. It is not conjecture.<sup>37</sup> The Defence's repeated claim that these dates might be wrong has no factual basis.<sup>38</sup> Repeating the same, speculative arguments is neither a permissible ground for leave to reply, nor warranted to assist the Chamber.

<sup>35</sup> Request to Reply, para. 13, citing Prosecution Response, para. 18.

<sup>36</sup> ICC-01/04-02/06-2339, paras. 2 and 40: "Neither the Request for Reconsideration of the Judges' Article 40 Decision, nor the First and Second Disclosure requests are moot because of the Presidency's public notification on 1 May 2019 concerning Judge Ozaki's purported resignation as Japanese Ambassador to Estonia." (para. 2). A lengthy discussion on this point ensues.

<sup>37</sup> *Contra*, Request to Reply, para. 13.

<sup>38</sup> Request to Reply, para. 13. Reconsideration Disclosure Request, paras. 8, 12, 34, 35.

### Conclusion

37. Based on the foregoing, the Prosecution asks the Presidency to dismiss the Request to Reply.



---

**Fatou Bensouda**  
**Prosecutor**

Dated this 13<sup>th</sup> day of May 2019  
At The Hague, The Netherlands