Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-02/06**
Date: **1 April 2019**

TRIAL CHAMBER VI

Before: **Judge Robert Fremr, Presiding Judge**
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public with Public Annex A

Motion for Temporary Stay of Proceedings

Source: **Defence Team of Mr. Bosco Ntaganda**

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

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

Counsel for the Defence
Me Stéphane Bourgon, *Ad.E*
Me Christopher Gosnell

Legal Representatives of Victims
Mrs. Sarah Pellet
Mr. Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants (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

Further to the Notification of the Decision of the Plenary of Judges pursuant to Article 40 of the Rome Statute,[1] Counsel for Mr. Ntaganda ("Defence") submits this:

Motion for Temporary Stay of Proceedings

INTRODUCTION

1. The Defence requests a temporary stay of deliberations in this case until it has had a reasonable opportunity to litigate whether Judge Ozaki should be disqualified from the present case. Allowing a Judge to continue hearing a case where there are substantial grounds to believe that he or she is disqualified from doing so creates a serious risk of irreversible prejudice to the Accused's right to a fair trial. A temporary remedy is required to ensure that no further irreversible prejudice is caused while this issue is decided. The failure to immediately stay the proceedings risks tainting the other two Judges of Trial Chamber VI ("Chamber") by their participation in deliberations with a Judge who may subsequently be found to have been disqualified at the time of their joint deliberations.

BACKGROUND

2. On 22 March 2019, the Defence learned that Judge Ozaki had been appointed Japan's ambassador to Estonia. The Defence also learned that an *ex parte* proceeding had been held involving, apparently, substantial correspondence[2] and a plenary meeting of the Judges on 4 March 2019. The Defence learned these facts from the reclassification of a memorandum that was sent by the Judges to Judge Ozaki on 19 March 2019 informing her that her appointment would not conflict with the prohibition of Article 40(2) that a Judge "not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence."

[1] *Ntaganda et al.*, Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute, 22 March 2019 ("Notification"), Annex 1 ("Decision").
[2] The first document cited in the Decision bears the number "2019/PRES/00003-1" and the last number referred to in the 19 March 2019 internal memorandum is "2019/PRES/00003-21".

3. The Defence also learned from this Decision that Judge Ozaki's appointment did not violate Article 40(3) of the Statute because she had already – without any notice to the Defence – been granted permission under Article 35(3) to no longer sit as a full-time judge "citing personal reasons and without mention of any future activities or occupation."[3]

SUBMISSIONS

I. Serious grounds exist to doubt that Judge Ozaki remains qualified to act as a Judge in this case

4. The grounds to believe that Judge Ozaki should be disqualified, either on the basis of lack of independence or appearance of bias, are now two-fold: (i) her appointment as Japanese Ambassador to Estonia while continuing to participate as a Judge in this case; and (ii) her conduct surrounding the appointment.

5. Candour is of the utmost importance in addressing whether a Judge has engaged in conduct "affect[ing] confidence in their independence."

6. Hence, Judge Odio-Benito disclosed fully to the President of the ICTY her wish to seek the nomination for Second Vice-President of Costa Rica before doing so.[4]

7. Here, based on the partial information available to the Defence, Judge Ozaki appears to have acted quite differently. The appointment of Judge Ozaki as Japanese Ambassador to Estonia would have placed her in violation of Article 40(3) but for the granting of her request by the Presidency to no longer be a full-time Judge. This request however, did not even mention her potential appointment as Japan's Ambassador to Estonia. Yet, the circumstances allows for the inference that Judge Ozaki would have been aware as of that date that

[3] Decision, para. 3.
[4] *Mucić et al*., Decision of the Bureau on Motion on Judicial Independence, 4 September 1998.

her appointment as Japan's Ambassador to Estonia was under consideration. This is compellingly indicated by the fact that she requested the end of her tenure as a full-time judge precisely one day before the Japanese Cabinet met and confirmed her appointment.[5] Accordingly, it appears that Judge Ozaki not only knew and intended to be appointed Ambassador to Estonia, but was apparently also informed of the details of her appointment, including the exact date on which the Cabinet was scheduled to meet and discuss it.

8. This suggests that Judge Ozaki was very well-informed of her potential appointment as of 7 January 2019, but that she nevertheless refrained from mentioning this highly relevant fact to the Presidency for it to determine whether she should be permitted to no longer sit as a full-time judge of the Court.

9. The Decision of the Judges underscores this non-disclosure by Judge Ozaki: "On 7 January 2019, Judge Ozaki sent an internal memorandum to the Presidency requesting to resign 'as a full-time judge of this Court as of 11 February 2019 inclusive' citing personal reasons and without mention of any future activities or occupation."[6]

10. Apparently, Judge Ozaki not only failed to disclose this highly salient fact, she also appears not to have disclosed her appointment until after it had already occurred. This timing was tantamount to an ultimatum, which was reinforced by the language used by Judge Ozaki in her letter to the Judges:

> Therefore, I respectfully submit that this letter be treated as my request to be approved of my continuing participation in the Ntaganda case on the basis as set out above, or, alternatively, in case my request is denied, my letter of resignation as a judge of this Court pursuant to Rule 37 of the Rules of Procedure and Evidence, as of 122 February 2019 when I ceased to be a full-time judge of the Court.[7]

[5] Annex A.
[6] Decision, para. 3 (underline added).
[7] Decision, para. 5.

11. Judge Ozaki thus appears to have denied the Judges of any opportunity to persuade her that she must not accept the Ambassadorship. Judge Ozaki instead appears to have given the Judges the limited choice between disqualification, with all the consequences that would entail, and acquiescing to a *fait accompli*.

12. The damage to the confidence in Judge Ozaki's independence arising from her appointment is one issue; the damage to the confidence in Judge Ozaki's independence arising from her lack of disclosure, possibly in close consultation with the Government of Japan, is likely even more grave.

II. The two remaining Judges of the Chamber should avoid any further deliberations with Judge Ozaki, which renders necessary a temporary stay of deliberations

13. The Defence intends to litigate the issue of whether Judge Ozaki's actions have affected confidence in her independence and/or has given rise to a reasonable apprehension of bias. The resolution of such issues appears to fall to "the judges" of the Court under Articles 40 and 41.

14. The basis of this litigation is far from frivolous. Three Judges of this Court, including one of the members of the Presidency, found that she was disqualified. This determination was made even in the absence of any submissions from the Defence on the matter, including the impact of Judge Ozaki's lack of candour.

15. Allowing deliberations to continue under these circumstances seriously risks violating Mr. Ntaganda's right to a fair trial in the most fundamental way. No trial is fair if any part of it is adjudicated by a judge disqualified based on lack of independence or an appearance of impartiality. As stated by President Meron in circumstances that highlight the importance of jealously guarding the principles of judicial independence:

> It is self-evident that justice and the rule of law begin with an independent judiciary. The right to be tried before an independent and impartial tribunal is an integral component of the right to a fair trial enshrined in Article 19 of the Statute and embodied in numerous human rights instruments. The United Nations Human Rights Committee has stated that the right to an independent and impartial tribunal "is an absolute right that may suffer no exception." To uphold this right, in the exercise of their judicial functions, the judges of the Mechanism shall be independent of all external authority and influence, including from their own States of nationality or residence.[8]

16. A stay is necessary, accordingly, to prevent this violation of rights from happening. As stated in *Lubanga*:

> Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.[9]

17. A stay is also required to prevent the two remaining Judges of the Chamber from being infected by the disqualification of Judge Ozaki, should that occur.

18. In the *Karemera et al*. case, Judges Lattanzi and Arrey's failure to immediately recognize that their colleague Judge Vaz was tainted by a reasonable apprehension of bias led to their own disqualification.[10]

19. Although the prejudice may have already occurred, all possible measures should now be taken to minimize the potential prejudice of this state of affairs.

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[8] *Ngirabatware*, Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay, 31 January 2017, para. 11.

[9] *Lubanga*, Case No. ICC-01/04-01/06 (OA4), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, paras. 37-39.

[10] *Id*. para. 69.

CONCLUSION AND RELIEF SOUGHT

20. The circumstances of this application are truly extraordinary. An extraordinary remedy is required. The partial information available to the Defence already describes a sequence of events that is hard to imagine in any national system of justice. Judge Ozaki's nomination as Ambassador is just one relevant elements amongst others including: (i) Judge Ozaki's possible lack of candour in the 7 January 2019 letter to the Presidency in respect of highly material facts; (ii) the indications of Judge Ozaki's detailed knowledge and possibly consultations with the Government of Japan concerning the present matter; (iii) Judge Ozaki's omission to disclose her appointment until after it had occurred; and (iv) Judge Ozaki's consequential ultimatum issued to the Judges.

21. This Chamber must act quickly to circumscribe the damage that is now being caused, assuming that there is a subsequent decision of the Judges finding that she is, in fact, disqualified. A stay is necessary and justified to preserve, to the extent possible, the fairness of this proceeding and the integrity of the two other Judges hearing this case.

RESPECTFULLY SUBMITTED ON THIS 1ST DAY OF APRIL 2019

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands