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Date: **5 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

Joint Response of the Common Legal Representatives of Victims to the Defence "Motion for Temporary Stay of Proceedings" (ICC-01/04-02/06-2328)

Source: **Office of Public Counsel for Victims**

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Former Child Soldiers (jointly the "Legal Representatives") hereby submit a joint response to the Defence "Motion for Temporary Stay of Proceedings"[1] (the "Request").

2. The Legal Representatives oppose the Request. The Request is confusing insofar as it is not entirely clear whether the Defence seeks in fact a 'stay' or an 'adjournment' of the proceedings. Should the Request be indeed understood as one for a "stay" of the proceedings,[2] such a drastic remedy is subjected to stringent requirements pursuant to the jurisprudence of the Court.[3] Rather than properly substantiating its request, the Defence advances a number of speculations which fail to demonstrate that the "*essential preconditions of a fair trial are missing*".[4]

3. Should the Request be understood as one for an 'adjournment' of the proceedings, any adjournment will unduly impact on the expeditiousness of the proceedings and will prejudice the victims since it would only delay the issuance of the judgment in the present case. Notably, the Defence seeks a "temporary", albeit indeterminate "stay", specifying merely "*until it has had a reasonable opportunity to litigate whether Judge Ozaki should be disqualified from the present case*".[5] However, it fails to demonstrate the existence of any prejudice should the Chamber continue its deliberations leading up to the judgment, in parallel to the hypothetical disqualification proceedings it intends to file at a later stage.

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[1] See the "Motion for Temporary Stay of Proceedings", No. ICC-01/04-02/06-2328, 1 April 2019 (the "Defence Request").
[2] *Idem*, para. 1.
[3] See the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'", No. ICC-01/04-01/06-1486, 21 October 2008, paras. 76 *et seq.*
[4] *Idem*, para. 76.
[5] See Defence Request, *supra* note 1, para. 1.

II. PROCEDURAL BACKGROUND

4. The Legal Representatives and the Prosecution filed their respective Closing Briefs in the present case on 20 April 2018.[6]

5. On 2 July 2018, the Defence filed the "Defence Closing Brief"'.[7]

6. Oral closing arguments were heard between 28 and 30 August 2018.[8]

7. On or about 7 January 2019, the Presidency of the Court accepted Judge Ozaki's request to change her status from full-time to non-full time judge as of 11 February 2019, inclusive.[9] This decision was not notified to the parties and participants in the present case.

8. On 22 March 2019, the Presidency of the Court issued a "Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute", whereby it made accessible to the public, and thus, the parties and participants in the present case, that, on 18 February 2019 Judge Kuniko Ozaki had informed the judges of the Court that she had been appointed to the position of ambassador to the Republic of Estonia by the government of Japan.[10] By virtue of said notification, the parties and participants were informed that a plenary of the judges had been

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[6] See the "PUBLIC REDACTED VERSION of the "CORRECTED VERSION of Closing Brief of the Common Legal Representative of the Victims of the Attacks" (ICC-01/04-02/06-2275-Conf-Corr)", No. ICC-01/04-02/06-2275-Corr-Red, 7 November 2018; the "Closing Brief on behalf of the Former Child Soldiers", No. ICC-01/04-02/06-2276-Corr-Red, 7 November 2018; and the "Public redacted version of "Prosecution's Closing Brief", 20 April 2018, ICC-01/04-02/06-2277-Conf-Anx1-Corr", No. ICC-01/04-02/06-2277-Anx1-Corr-Red, 7 November 2018. The confidential versions thereof were submitted on 20 April 2018).

[7] See the "Defence Closing Brief", No. ICC-01/04-02/06-2298, 2 July 2018.

[8] See the transcripts of the hearings held on 28, 29, and 30 August 2018, respectively: Nos. ICC-01/04-02/06-T-262-ENG ET WT; ICC-01/04-02/06-T-263-Red2-ENG CT WT; ICC-01/04-02/06-T-264-Red2-ENG WT.

[9] See Annex 1 to the "Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute" (Presidency), No. ICC-01/04-02/06-2326-Anx1, 22 March 2019.

[10] See the "Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute" (Presidency), No. ICC-01/04-02/06-2326, 22 March 2019.

convened on 4 March 2019 at which judge Ozaki's request pursuant to article 40(4) of the Statute was considered.

9. At the plenary convened on 4 March 2019, the judges decided by majority that judge Ozaki's appointment as Japanese ambassador to the Republic of Estonia "*was not incompatible with the requirements of judicial independence*".[11]

10. On 1 April 2019, the Defence filed a Request before the Presidency[12] whereby it seeks access to memoranda, correspondence and any relevant information in the possession of the Presidency – if necessary in redacted form[13] – related to the recent decision of the plenary of the judges concerning judge Ozaki's appointment as Japanese ambassador to the Republic of Estonia. Later that day, it filed its Request.[14]

11. On the same day, the Chamber shortened the response deadlines in relation to the Request to 5 April 2019.[15]

III. PRELIMINARY MATTER

12. As a preliminary matter, the Legal Representatives join the Defence in raising, as a matter of concern,[16] that neither the parties nor the participants in the present case have been formally notified in a transparent and timely manner, and given the opportunity to submit observations prior to the decision granting Judge Ozaki permission to no longer sit as a full-time judge in the present case.

[11] See Annex 1 to the "Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute", *supra* note 9, para. 8.
[12] See the "Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki", No. ICC-01/04-02/06-2327, 1 April 2019.
[13] *Idem*, paras. 15-17.
[14] See the Defence Request, *supra* note 1.
[15] See the Email correspondence from the Trial Chamber to the parties and participants dated 1 April 2019 at 15:59.
[16] See the Defence Request, *supra* note 1, para. 3.

IV. SUBMISSIONS

13. The Legal Representatives note, first, that the Request is confusing insofar as it is not entirely clear whether the Defence seeks in fact a 'stay' or an 'adjournment' of the proceedings, the distinction being crucial in terms of legal implications. It is nonetheless submitted that whatever relief is sought, the Defence fails to properly substantiate its Request in order to demonstrate the existence of irreversible harm and/or the impossibility of a fair trial.

14. Should the Request be understood as one for a "stay" of the proceedings,[17] the Legal Representatives posit that neither the Rome Statute nor the Rules of Procedure and Evidence provide for a "stay of proceedings" before the Court. This is a drastic remedy, which brings proceedings to a halt "*potentially frustrating the trial's objective of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Statute*".[18] The relevant criteria are found in the jurisprudence of the Court. The Appeals Chamber has decided as follows:

> *"37.* […] *Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped.*
> […]
> *39. Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in* Huang v. Secretary of State, *it is the duty of a court: 'to see to the protection of individual fundamental rights which is the particular territory of the courts* [...]*'. Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused*

[17] *Idem*, para. 1.
[18] See the "Decision on the defence request for a temporary stay of proceedings" (Trial Chamber IV), No. ICC-02/05-03/09-410, 26 October 2012, para. 80.

> *of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice"*.[19]

15. Accordingly, in the submission of the Legal Representatives, a stay of the proceedings is the appropriate remedy only if (i) the "*essential preconditions of a fair trial are missing*", and (ii) there is "*no sufficient indication that this will be resolved during the trial process*".

16. Thus, a "stay of proceedings" is an exceptional remedy that should be confined to instances in which a fair trial would be impossible. The premise is that it has become *clear* that a fair trial is impossible in light of the concrete circumstances of the case. Indeed, the Appeals Chamber underlined "[i]*f, at the outset, it is* clear *that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary* [...] *that the proceedings should be stayed*".[20]

17. The Legal Representatives posit that the facts supporting the application need to be "*properly substantiated*".[21] Rather than properly substantiating its Request, the core submission of the Defence is based on nothing but speculative arguments. First, the Defence avers that there "<u>are</u> *substantial grounds to believe that* [a judge] *is disqualified*" from hearing a case.[22] It is submitted that at this stage, such assertion is, at the most, premature and ill-founded. Secondly, the Defence asserts that there is a

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[19] See the "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" (Appeals Chamber), No. ICC-01/04-01/06-772, 14 December 2006.

[20] See also "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008' (Appeals Chamber,), No. ICC-01/04-01/06-1486, 21 October 2008, para. 76.

[21] See the "Decision on the Defence Application Seeking a Permanent Stay of the Proceedings", No. ICC-01/04-01/06-2690-Red2, 7 March 2011, para. 169. See also the "Decision on the defence request for a temporary stay of proceedings", *supra* note 18, para. 90.

[22] See the Defence Request, *supra* note 1, para. 1 (emphasis added).

real risk of "*tainting the other two Judges*" of the Chamber[23] if deliberations were proceeding at this stage. It is submitted that since the announced motion for disqualification has neither been filed nor decided upon, this second argument is entirely speculative and premature.

18. The Legal Representatives submit that speculation is insufficient for demonstrating that a fair trial has become impossible. The Defence would have to first show an unacceptable appearance of bias or impartiality[24] on the part of judge Ozaki in order to demonstrate how such appearance would impact her colleagues sitting on the same bench. As held by the ICTR Appeals Chamber in the *Hategekimana* case, "*there is a presumption of impartiality which attaches to any judge of the Tribunal and which cannot be easily rebutted. Accordingly, it is for the* […] *party alleging bias to adduce reliable and sufficient evidence to rebut that presumption*."[25] This holds true for both judge Ozaki and her colleagues of the bench in the present case. Moreover, the mere unsubstantiated assertion that there are circumstances that necessarily extend to the two remaining judges of the bench is entirely insufficient to meet that burden and thus to warrant a temporary stay of the deliberations.[26]

19. Should the Request be understood as one for an 'adjournment' of the proceedings, it is submitted that the Request is equally based on speculations and fails to demonstrate that the suspension is necessary in order to prevent irreparable harm to the proceedings.

20. Indeed, the closing briefs in the present trial were submitted almost a year ago and closing arguments heard in August 2018. Deliberations would, in the ordinary

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[23] *Idem*.
[24] See *e.g.* ICTY, *The Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-A, Judgement, 30 June 2016, para. 32.
[25] See ICTR, *The Prosecutor v. Idelphonse Hategekimana*, Case No. ICTR-00-55B-A, Judgement, 8 May 2012, para. 16.
[26] See ICTR, *The Prosecutor v. Karemera et al*., Case No. ICTR-98-44-AR14bis.2, Reasons for the Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004.

course of events have significantly progressed during this period. It is submitted that suspending the proceedings for an indeterminate period of time at this stage seriously prejudices the fairness of the proceedings and interests of justice as a whole. It must also not be forgotten that in a Court that pledges to render justice for victims, the overall fairness of the proceedings also entails the rights of the participating victims in the present trial. Victims have a right to the truth; they have a right to seeing these proceedings progressing expeditiously, especially against the background of having waited for a judgment in the present case for sixteen years already.

21. At this stage the eventual outcome of any announced litigation on a motion for the disqualification of judge Ozaki are, at the most, entirely hypothetical. Accordingly, there is currently no basis on which the deliberations in the present case could be suspended pending its outcome. It is submitted that ordering the temporary adjournment of deliberations would thus run against the interests of justice and prejudice the interests of victims participating in the present case.

22. The Defence Request should therefore be denied.

RESPECTFULLY SUBMITTED

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Former Child soldiers

Dmytro Suprun
Common Legal Representative of the
Victims of the Attacks

Dated this 5th Day of April 2019

At The Hague, The Netherlands