



Original: **English**

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

Date: **8 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**

**Request on behalf of Mr. Ntaganda seeking leave to reply to “Prosecution’s  
Response to the Defence ‘Motion for Temporary Stay of Proceedings’ (ICC-01/04-  
02/06-2328)”**

**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**

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**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**

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**Registrar**

Mr. Peter Lewis

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to the Prosecution's Response to the Defence "Motion for Temporary Stay of Proceedings" (ICC-01/04-02/06-2328) ("Prosecution Response") filed on 5 April 2019,<sup>1</sup> Counsel representing Mr. Ntaganda ("Defence"), hereby submits this:

**Request on behalf of Mr. Ntaganda seeking leave to reply to "Prosecution's Response to the Defence 'Motion for Temporary Stay of Proceedings' (ICC-01/04-02/06-2328)"**

## INTRODUCTION

1. Pursuant to Regulation 24(5) of the Regulations of the Court ("RoC"), the Defence respectfully seeks leave to reply to the Prosecution Response in respect of three defined issues.

## APPLICABLE LAW

2. A reply may be appropriate: (i) "in respect of issues raised in the response which the replying participant could not reasonably have anticipated"; or (ii) where it "would otherwise be necessary for the adjudication" of the matter.<sup>2</sup>
3. A request for 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 reasonably have been anticipated";<sup>3</sup> and (ii) "explain why a reply to the aforementioned issues is otherwise warranted."<sup>4</sup>

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<sup>1</sup> Prosecution's Response to the Defence "Motion for Temporary Stay of Proceedings" (ICC-01/04-02/06-2328), 5 April 2019, ICC-01/04-02/06-2329 ("Prosecution Response"). See Motion for Temporary Stay of Proceedings, 1 April 2019, ICC-01/04-02/06-2328 ("Motion"); Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki, 1 April 2019, ICC-01/04-02/06-2327, ("Ntaganda Defence Request for Disclosure").

<sup>2</sup> Decision on Mr. Ntaganda's request for leave to reply, 17 July 2017, ICC-01/04-02/06-1994, para. 9.

<sup>3</sup> *Id.* para. 13.

<sup>4</sup> *Id.* para. 14.

4. A request for leave to reply must therefore: (i) identify the issues for which a reply is sought; and (ii) explain why (a) the issue was not foreseeable, and/or (b) a reply is otherwise justified. The following submissions fulfil these criteria.

## SUBMISSIONS

### I. Identification of the issues for which leave is sought

5. The Defence seeks leave reply to the Prosecution's assertions that: (i) the Judges in plenary have already considered all relevant facts and arguments, thus implying that there is no significant chance that the *ex parte* decision of the Judges sitting in plenary could be reconsidered;<sup>5</sup> (ii) the Motion is speculative because no reconsideration request has yet been filed before the Judges;<sup>6</sup> and (iii) the Motion is premature because Judge Ozaki has not yet been disqualified.<sup>7</sup>

### II. A reply is "otherwise necessary," or the Prosecution's submissions were unforeseeable

#### a. Issue #1: The Judges have already considered all relevant facts and arguments

6. The Prosecution Response ignores: (i) the relevance of the pending request for disclosure before The Presidency;<sup>8</sup> and (ii) the issue of Judge Ozaki's candour.<sup>9</sup> The Plenary did not consider, as far as can be seen from the Decision itself, Judge Ozaki's apparent initial lack of candour. More broadly, the *ex parte* and

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<sup>5</sup> Prosecution Response, paras. 13,16,19 ("the facts that the Defence refers to were fully canvassed and considered by the judges in Plenary when deciding that Judge Ozaki 's independence as a judge on the Ntaganda case would not be undermined by assuming her new role. The Defence raises no new evidence or arguments."). See Annex to the 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.

<sup>6</sup> Prosecution Response, paras. 2,14.

<sup>7</sup> Prosecution Response, paras. 2,17.

<sup>8</sup> Ntaganda Defence Request for Disclosure.

<sup>9</sup> Motion, para. 5 ("Candour is of the utmost importance in addressing whether a Judge has engaged in conduct "affect[ing] confidence in their independence").

confidential nature of the proceedings makes it impossible for the Prosecution to assert that all matters raised in the Motion have already been considered and dismissed by the Plenary.

**b. Issue #2: The motion is not premature in the absence of a pending request for reconsideration**

7. The Prosecution expressly concedes that the Judges have the power to reconsider their previous decisions.<sup>10</sup> However, it argues that there are no “pending requests” for such reconsideration, and that the Defence “may never” receive the additional information that it has requested in its Disclosure Motion. On this basis, the Prosecution asserts that the basis of the request for a temporary stay is “premature.”<sup>11</sup>

8. The Trial Chamber will be assisted by submissions correcting the Prosecution’s suggestion that no motion for reconsideration will be filed unless the request for disclosure is granted. The Defence has made no such submission, stating only that it “seeks to be fully informed of the relevant facts”<sup>12</sup> before bringing such a motion. Barring unlikely circumstances, a motion will be filed based on whatever information is made available.

**c. Issue #3: The motion is not speculative merely because Judge Ozaki has not yet been disqualified; on the contrary, waiting until her disqualification would be too late to avert the prejudice**

9. The Prosecution’s submissions dismissing the prospect of irreversible prejudice as “speculative”<sup>13</sup> are predicated on the assumption that the current Decision will stand.

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<sup>10</sup> Prosecution Response, fn. 26.

<sup>11</sup> Prosecution Response, paras. 2,14.

<sup>12</sup> Ntaganda Defence Request for Disclosure, para. 8.

<sup>13</sup> Prosecution Response, paras. 2,17.

10. A reply is “otherwise necessary” to highlight that the Prosecution has ignored the at least serious possibility that Judge Ozaki will be disqualified. If that turns out to be the case, then two Judges who are independent will have engaged in deliberations with a Judge who is not. The Trial Chamber is, accordingly, risking its judicial independence by not staying deliberations until the manifestly serious issues concerning her judicial independence are resolved.
11. The Trial Chamber will be assisted by submissions on these issues. They are highly relevant to the degree of risk that the Trial Chamber’s judicial independence as a whole will be irreversibly tainted by the continued participation of an employee of the Government of Japan in deliberations. Leave is requested accordingly.

**RESPECTFULLY SUBMITTED ON THIS 8<sup>th</sup> DAY OF APRIL 2019**

A handwritten signature in black ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands