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

Date: **12 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 Annexes A and B**

**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:**

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**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) ("Response") filed on 5 April 2019,<sup>1</sup> Counsel representing Mr. Ntaganda ("Defence"), hereby submits this:

**Reply to "Prosecution's Response to the Defence 'Motion for Temporary Stay of Proceedings' (ICC-01/04-02/06-2328)"**

## INTRODUCTION

1. The request for a stay of proceedings is neither premature nor speculative.
2. Motions preliminary to seeking the disqualification of Her Honour Judge Ozaki are already pending, and the Defence intends to file a motion for disqualification once the relevant disclosure is received. Further, there is no procedural obstacle to doing so. The issue, in substance, is pending.
3. The requested stay is not speculative in the absence of a prior disqualification of Judge Ozaki. Deliberating on the guilt or innocence of a person, as the Trial Chamber is now doing in respect of Mr. Ntaganda, is the most solemn and sensitive judicial duty, requiring the most unquestionable impartiality and independence. The grounds to doubt Judge Ozaki's judicial independence are strong, as reflected in the dissenting opinion of three Judges of this Court, and the narrow margin by which Judge Ozaki avoided disqualification under Article 40(4). Allowing a Judge to participate in deliberations under these circumstances, and before the Parties and Participants have been heard on the issue: (i) in itself damages the appearance of judicial independence; and (ii) will impact on the appearance of judicial independence of the remaining two judges if she is subsequently disqualified.

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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 ("Response"). See Motion for Temporary Stay of Proceedings, 1 April 2019, ICC-01/04-02/06-2328 ("Motion for Stay").

## PROCEDURAL HISTORY

4. On 1 April 2019, the Defence filed its Motion for a Temporary Stay of Proceedings before this Trial Chamber. On the same date, the Defence filed a motion before the Presidency requesting disclosure of information concerning the circumstances of Judge Ozaki's appointment by the Japanese Government, effective 13 February 2019, to the position of its Ambassador to Estonia.<sup>2</sup> On 8 April 2019, the Defence filed a motion before the Presidency requesting that he invite the Registrar to disclose whether, during his visit to Japan on 21 and 22 January 2019, at a time when no other Judge was informed of Judge Ozaki's apparent intentions to become Japan's ambassador to Estonia, the matter of Judge Ozaki's prospective employment with the Government of Japan was discussed.<sup>3</sup>
5. On 5 April 2019, the Prosecution and the Legal Representatives of Victims filed their responses to the Temporary Stay Request.
6. On 8 April 2019, the Defence sought leave to reply to the Prosecution's Response in respect of three issues.<sup>4</sup> On 8 April 2019, the Prosecution opposed the Defence's request, seeking that it be dismissed "*in limine*" as a violation of Regulation 24 of the Regulations of Court.<sup>5</sup> The Prosecution also set out its substantive opposition to leave being granted on any of the three issues.<sup>6</sup>

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<sup>2</sup> 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, ("Disclosure Request").

<sup>3</sup> Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019, 8 April 2019, ICC-01/02-04/06-2332.

<sup>4</sup> 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), ("Leave to Reply Request").

<sup>5</sup> Prosecution's Response to the Defence "Request on behalf of Mr. Ntaganda seeking leave to reply to 'Prosecution's Response to the Defence 'Motion for Temporary Stay of Proceedings'", 8 April 2019, ICC-01/04-02/06-2331, 8 April 2019, ICC-01/04-02/06-2333, para. 7.

<sup>6</sup> *Id.* paras. 7-14.

7. On 9 April 2019, the Trial Chamber, Judge Ozaki abstaining, granted by email the request in respect of issues (2) and (3) identified in the Leave to Reply Request.

## SUBMISSIONS

### I. **The motion is not premature in the absence of a pending request for reconsideration**

8. Contrary to the Response,<sup>7</sup> the litigation to seek Judge Ozaki's disqualification has already begun in the form of requests for disclosure of information.
9. The Defence has expressed its intention, once disclosure has been made, to file a motion for Judge Ozaki's disqualification, on the basis that it already "has serious grounds, and intends to bring, a request concerning the issue before the Presidency or other applicable body."<sup>8</sup>
10. This intention was appropriately tempered by a concern for judicial economy in requesting disclosure of all salient facts before bringing the request for disqualification. As stated in the Disclosure Request, "[a]lthough some of the relevant facts and circumstances are set out in the Decision, the memoranda from and to Judge Ozaki are not provided in full."<sup>9</sup> The need for all relevant facts is, in fact, part of the test for disqualification, which is assessed according to the standard of a "reasonable observer, properly informed."<sup>10</sup> The Defence, and the public, are entitled to be "properly informed" before the issue is litigated. In fact, confidence in the independence of the Court's judiciary would be undermined by requiring otherwise, or by suggesting that the

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<sup>7</sup> Response, paras. 2,14.

<sup>8</sup> Disclosure Request, para. 8 (underline added).

<sup>9</sup> *Id.*

<sup>10</sup> *Bemba et al.*, Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, filed on 20 June 2014, ICC-01/05-01/13-511-Anx, para. 17 (underline added).

circumstances of Judge Ozaki's appointment need never be made public. Such a view would, in itself, seriously "affect confidence" in Judge Ozaki's judicial independence.

11. The necessity of the Defence taking these preliminary steps concerning disclosure prior to filing a disqualification request has only been enhanced by information that has come to light since the Decision, including that Judge Ozaki was appointed ambassador as of 13 February 2019;<sup>11</sup> that she has apparently been acting in some capacity as an employee of the Government of Japan prior<sup>12</sup> to the date on which she indicated to the Judges she would "commence such duties;"<sup>13</sup> and that Japan's decision to appoint Judge Ozaki may have been related to its views about budgeting decisions at the Court.<sup>14</sup>
12. Further, the Defence expedited the necessary disclosure by identifying the specific categories of information that are believed to be relevant to the evaluation of whether Judge Ozaki's new position, and the circumstances of her appointment and entry into service in this new employment, "affect confidence in [her] independence" under Article 40(2).<sup>15</sup>
13. Finally, contrary to the Prosecution's suggestion,<sup>16</sup> there is no procedural obstacle to the Defence bringing the motion for disqualification. The Prosecution expressly concedes that reconsideration can be sought,<sup>17</sup> which

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<sup>11</sup> Annex A.

<sup>12</sup> Annex B.

<sup>13</sup> Notification of the Decision of the Plenary of Judges pursuant to Article 40 of the Rome Statute, 22 March 2019, Annex 1, ICC-01/04-02/06-2326-2326-Anx1, ("Decision"), para. 5.

<sup>14</sup> See S. Maupas, "A la CPI, une juge devenue diplomate pourrait compromettre le jugement de Bosco Ntaganda," Le Monde, 11 April 2019, [https://www.lemonde.fr/afrique/article/2019/04/11/a-la-cpi-une-juge-devenue-diplomate-compromet-le-jugement-de-bosco-ntaganda\\_5448814\\_3212.html#xtor=AL-32280270](https://www.lemonde.fr/afrique/article/2019/04/11/a-la-cpi-une-juge-devenue-diplomate-compromet-le-jugement-de-bosco-ntaganda_5448814_3212.html#xtor=AL-32280270).

<sup>15</sup> Disclosure Request, para. 9.

<sup>16</sup> Response, para. 17.

<sup>17</sup> Response, fn. 26.

accords with established jurisprudence of this Court<sup>18</sup> and of the ICTY in almost identical circumstances.<sup>19</sup>

14. Accordingly, the Motion for Stay is not premature. The litigation preliminary to a fully substantiated disqualification request is currently pending, and the Defence intends to bring a disqualification request once this information is forthcoming.

**II. The motion is not speculative merely because Judge Ozaki has not yet been disqualified; on the contrary, waiting until then will be too late**

15. The Prosecution argues that the Motion for Stay is speculative because “the competent body (the Plenary) has definitely ruled on this matter.”<sup>20</sup>

16. The use of the word “definitely” inaccurately suggests that the matter has been fully litigated and finally adjudicated. This is not the case. Neither the Defence, nor the Prosecution or Victims, for that matter, have been heard. As described in the previous section, no procedural obstacle prevents, or could prevent, the parties from being heard on such a vital question as the judicial independence of a Judge. The right to be heard entails, notwithstanding a prior decision taken *ex parte*, that the Judges will keep their minds fully open to new arguments and information as may be presented. As the Prosecution well expresses the exercise, the Judges’ duty is to “consider the issue afresh.”<sup>21</sup>

17. The possibility of Judge Ozaki’s disqualification is not merely theoretical. Three Judges of this Court, even without relying on the circumstances

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<sup>18</sup> *Ruto & Sang*, Decision on the Defence Application to Vacate the Decision of the Plenary of Judges on the “Joint Defence Application for a Change of Place where the Court Shall Sit for Trial” in the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, 6 September 2013, ICC-01/09-01/11-911, para. 14.

<sup>19</sup> *Mucić et al.*, IT-96-21, Decision of the Bureau on Motion on Judicial Independence, 4 September 1998.

<sup>20</sup> Response, para. 17.

<sup>21</sup> *Id.*, para. 14.

surrounding Judge Ozaki's request to become a non-full-time Judge, found that her appointment "was entirely likely to affect public confidence in judicial independence."<sup>22</sup> Incidentally, if only two judges amongst the Majority had changed their mind and joined the Minority, Judge Ozaki would have been disqualified.<sup>23</sup>

18. A stay is justified in these circumstances for two reasons.
19. First, prudence dictates that the requested stay be evaluated not on the basis of the Prosecution's assumption<sup>24</sup> that Judge Ozaki will not be disqualified, but on the basis of the of the serious possibility that she will. If that turns out to be the case, then two Judges who are independent will have engaged in collegial deliberations with a Judge who is not. The Trial Chamber is, accordingly, risking its judicial independence – which could be characterized as an institutional independence<sup>25</sup> – by permitting deliberations to continue with a Judge who, at the time of the deliberations, did not possess judicial independence, *inter alia*, because she was an employee of the executive branch of government of a State. Such employment is forbidden in most States, or subject to conditions that are not satisfied here. The longer that this situation continues, the greater the risk that confidence in this Trial Chamber's

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<sup>22</sup> Decision, para. 15.

<sup>23</sup> Article 40 declares that "Any question regarding the applications of paragraphs 2 and 3 shall be decided by an absolute majority of the judges." As there are now 20 Judges of the Court, an absolute majority is 11, and the Majority consisted of 14. If two Judges had changed their mind, Judge Ozaki would have been disqualified.

<sup>24</sup> Response, para. 17.

<sup>25</sup> United Nations, Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct*, September 2007,

[https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry\\_on\\_the\\_Bangalore\\_principles\\_of\\_Judicial\\_Conduct.pdf](https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf), para. 23 ("Judicial independence refers to both the individual and the institutional independence required for decision-making [...] The former is concerned with the judge's independence in fact; the latter with defining the relationships between the judiciary and others, particularly the other branches of government, so as to assure both the reality and the appearance of independence.").



institutional independence will be affected, and the greater the consequences for the subsequent course of proceedings.<sup>26</sup>

20. Second, allowing Judge Ozaki to continue deliberating in the current circumstances, in itself, risks undermining public confidence in judicial independence. In similar circumstances, the *Prlić* Trial Chamber temporarily stayed proceedings while a substantial challenge to the impartiality of one of the Judges was adjudicated.<sup>27</sup> The Trial Chamber held “in the interests of justice, that a temporary stay of the proceedings is necessary until a decision in response to the Motion for Disqualification Before the Presiding Judge of Chamber III has been rendered.”<sup>28</sup> Justice is likewise served here by the Trial Chamber declaring that the most sensitive and solemn judicial function will not proceed in a situation where a judge’s independence is open to question, and is yet to be fully adjudicated.

## CONCLUSION

21. The request for a stay is not premature or speculative. On the contrary, it seeks to avert immediate and ongoing harm in respect of a pending issue. Not granting a stay will increase the actual and potential prejudice to the integrity of these trial proceedings, and jeopardize the institutional independence of the Trial Chamber in the event that Judge Ozaki is disqualified. The Defence reiterates its request for a stay of proceedings, as set out in its Motion.

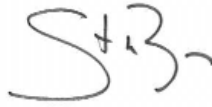
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<sup>26</sup> See e.g. *Karemera et al.*, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings With a Substitute Judge and on Nzirorera’s Motion for Leave to Consider New Material, 22 October 2004, para. 69 (requiring trial proceedings to commence de novo after the disqualification of all judges from the bench.)

<sup>27</sup> *Prlić et al.*, IT-04-74-T, Decision on the Prlić Defence Motion to Stay the Proceedings, 20 September 2010.

<sup>28</sup> *Id.* p. 3.

**RESPECTFULLY SUBMITTED ON THIS 12<sup>th</sup> DAY OF APRIL 2019**

A handwritten signature in black ink, consisting of a stylized 'S' followed by 't', 'B', and a flourish.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands