

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **18 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

Decision on Defence request for temporary stay of proceedings

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Mr James Stewart
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Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
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Legal Representatives of Victims

Ms Sarah Pellet
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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

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, Judge Ozaki abstaining, ('Chamber'), having regard to Articles 64 and 67 of the Rome Statute ('Statute') and Regulation 24(5) of the Regulations of the Court, issues this 'Decision on Defence request for temporary stay of proceedings'.

I. BACKGROUND AND SUBMISSIONS

1. On 1 April 2019, the Defence requested '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' ('Defence Request').¹
2. The Defence Request follows a 22 March 2019 notification of a decision by the Plenary of Judges ('Plenary Decision'),² acting pursuant to Article 40(4) of the Statute and finding, by an absolute majority of 14 judges of the Court, that 'the assumption by Judge Ozaki of the role of Ambassador of Japan to Estonia while she continues to serve as a non-full-time judge of the Court does not violate any aspect of article 40 of the Statute'.³
3. In support of its request, the Defence argues that both Judge Ozaki's appointment and her 'conduct surrounding the appointment' constitute 'grounds to believe that Judge Ozaki should be disqualified, either on the basis of lack of independence or appearance of bias'.⁴ Given its intention to litigate this issue, and considering the possibility of a subsequent decision to disqualify Judge Ozaki, the Defence argues that a temporary stay of deliberations is necessary and justified in order to 'preserve, to the extent possible, the fairness of this proceeding and the integrity of the two other Judges hearing this case'.⁵

¹ Motion for Temporary Stay of Proceedings, ICC-01/04-02/06-2328, paras 1, 20, and 21, and confidential Annex A.

² Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute, ICC-01/04-02/06-2326 and Annex 1.

³ ICC-01/04-02/06-2326-Anx1, page 6, para. 16.

⁴ Defence Request, ICC-01/04-02/06-2328, paras 4 to 12.

⁵ Defence Request, ICC-01/04-02/06-2328, paras 13 to 21.

4. On 5 April 2019, in line with the time limit set by the Chamber,⁶ the Office of the Prosecutor ('Prosecution')⁷ and the LRVs, the latter jointly,⁸ opposed the Defence Request (respectively 'Prosecution Response' and 'LRV Response').
5. According to the Prosecution, the Defence Request is 'unsupported and speculative' on the basis that: (i) there is no statutory provision permitting a temporary stay of proceedings in order to provide the Defence with more time to litigate whether Judge Ozaki should be disqualified; (ii) the requirements for a stay of proceedings are not met; and (iii) Judge Ozaki has been found by the competent judicial body to be 'currently fully qualified to act as an independent Judge in the very final stages of the *Ntaganda* trial'.⁹ It further submits that the Defence has failed to substantiate the existence of a 'serious risk of irreversible prejudice to the Accused's right to a fair trial', and to demonstrate that a stay is necessary and justified to preserve the fairness of these proceedings and the integrity of the two other judges hearing this case.¹⁰ Lastly, the Prosecution submits that the high threshold for disqualification has not been met.¹¹
6. The LRVs aver that, regardless of the actual scope of the Defence Request, the Defence failed to 'properly substantiate its Request in order to demonstrate the existence of irreversible harm and/or the impossibility of a fair trial'.¹² Specifically, the LRVs submit that the Defence Request is based on speculative arguments, which is insufficient to demonstrate that a fair trial has become impossible so that a stay of deliberations is warranted.¹³ They further argue that the Defence failed to demonstrate that a suspension is necessary in order to prevent irreparable harm to the proceedings. Rather, the LRVs submit that suspending the proceedings for an indefinite period of time at this stage 'seriously prejudices the fairness of the proceedings and interests of justice as a whole', including the interests of the victims participating in this case.¹⁴

⁶ Email from the Chamber to the parties and participants on 1 April 2019, at 15:59.

⁷ Prosecution's Response to the Defence 'Motion for Temporary Stay of Proceedings' (ICC-01/04-02/06-2328), ICC-01/04-02/06-2329.

⁸ Joint Response of the Common Legal Representatives of Victims to the Defence 'Motion for Temporary Stay of Proceedings' (ICC-01/04-02/06-2328), ICC-01/04-02/06-2330.

⁹ Prosecution Response, ICC-01/04-02/06-2329, paras 10 to 14.

¹⁰ Prosecution Response, ICC-01/04-02/06-2329, paras 15 to 17.

¹¹ Prosecution Response, ICC-01/04-02/06-2329, paras 18 to 22.

¹² LRV Response, ICC-01/04-02/06-2330, para. 13.

¹³ LRV Response, ICC-01/04-02/06-2330, paras 17 to 18.

¹⁴ LRV Response, ICC-01/04-02/06-2330, paras 19 to 21.

7. On 8 April 2019, the Defence sought leave to reply to the Prosecution Response in relation to three issues ('Request for Leave to Reply'),¹⁵ which the Prosecution opposed on the same day.¹⁶
8. On 9 April 2019, the Chamber, Judge Ozaki abstaining: (i) rejected leave to reply in relation to the first issue identified in the Request for Leave to Reply, on the basis that it would not be assisted by further submissions on this issue; and (ii) granted leave to reply in relation to the second and third issues identified by the Defence ('Decision on Request for Leave to Reply').¹⁷
9. On 12 April 2019, in line with the time limit set by the Chamber,¹⁸ the Defence replied to the Prosecution Response ('Defence Reply'),¹⁹ reiterating its request.²⁰ It argues that the Defence Request is not premature, because there is no procedural obstacle to the Defence bringing a fully substantiated disqualification request, which the Defence intends to bring once the information sought in a pending request to the Presidency for disclosure of information concerning the circumstances of Judge Ozaki's appointment ('Disclosure Request')²¹ is forthcoming.²² It further submits that the Defence Request is not speculative because Judge Ozaki has not yet been disqualified, arguing that: (i) absent any opportunity for the parties and participants in this case to provide their views on the matter underlying the Plenary Decision, the matter has not been fully litigated and finally adjudicated; (ii) the possibility of Judge Ozaki's disqualification is not merely theoretical; and (iii) a stay is justified because by permitting deliberations to continue with a judge, who, at the time of the deliberations did not possess judicial independence, the trial chamber is risking its judicial independence, and because allowing Judge Ozaki to continue deliberating in

¹⁵ 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)', ICC-01/04-02/06-2331.

¹⁶ 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"', ICC-01/04-02/06-2333.

¹⁷ Email on 9 April 2019, at 9:22.

¹⁸ Email on 9 April 2019, at 9:22.

¹⁹ Reply to 'Prosecution's Response to the Defence "Motion for Temporary Stay of Proceedings" (ICC-01/04-02/06-2328)', ICC-01/04-02/06-2334.

²⁰ Defence Reply, ICC-01/04-02/06-2334, para. 21.

²¹ 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.

²² Defence Reply, ICC-01/04-02/06-2334, paras 8 to 14.

the current circumstances, in itself, risks undermining public confidence in judicial independence.²³

II. ANALYSIS

10. The Chamber understands the remedy sought by the Defence to be a temporary stay of the proceedings, in the form of an immediate adjournment of deliberations until the litigation in relation to a request for disqualification of Judge Ozaki, if any, has been completed.²⁴ The Chamber has therefore considered the Request on that basis and according to that standard, as set out previously,²⁵ rather than against the more stringent standard required to obtain a stay of proceedings.
11. As previously emphasised, adjournment is a ‘discretionary remedy arising from the Chamber’s power under Article 64 of the Statute to control the conduct of proceedings in a fair and expeditious manner.’²⁶ In ruling on the Defence Request, the Chamber emphasises that it has focused its analysis on the question whether an *immediate* adjournment is warranted.
12. In the present case, the Defence has indicated that it intends to file a request for disqualification, once it has obtained the information sought in the Disclosure Request. However, while mindful that in its reply, the Defence re-asserted its intention to submit such a request, the Chamber notes that at present, no such request has been filed. While the Defence contends that a stay is warranted already at the present stage, its submissions in support of the necessity of a stay remain, at this stage, mostly speculative, notably because they are premised on the scenario that the pending request for disqualification will, in fact, be granted. The Chamber also observes that the issues related to Judge Ozaki’s appointment as Ambassador of Japan to Estonia referred to in the Defence Request occurred at a very late stage of the proceedings, more than half a year after the presentation of oral closing submissions,

²³ Defence Reply, ICC-01/04-02/06-2334, paras 15 to 20.

²⁴ In this regard, the Chamber notes, in particular, the title and paragraph 1 of the Defence Request as well as paragraph 21 of the Defence Reply, in which the Defence ‘reiterates its request for a stay of proceedings, *as set out in its Motion*’ (emphasis added).

²⁵ See transcript of hearing on 16 November 2016, ICC-01/04-02/06-T-159, page 3, line 14 to page 7, line 24.

²⁶ See ICC-01/04-02/06-T-159, page 3, lines 22 to 24.

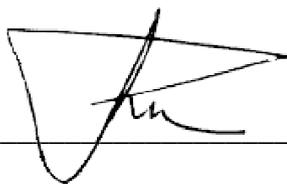
and did therefore not affect the Chamber's management of the trial or its hearing of the evidence.

13. In view of the above, the Chamber considers that the risk of the Chamber's independence being affected by any potential disqualification, or of public confidence in judicial independence being undermined, is insufficiently substantiated when balanced against the severity of the remedy sought by the Defence. As a consequence, the Chamber finds that a temporary stay of the proceeding is not justified at this stage.
14. The Chamber nonetheless clarifies that it will not render any judgment pursuant to Article 74 of the Statute pending resolution of any request for disqualification. Accordingly, should the Defence file any such request prior to the finalisation of the forthcoming judgment, the Chamber will not schedule, or, if already scheduled, defer, the rendering of the judgment.
15. Should the Defence decide not to pursue any litigation on this matter, the Chamber directs the Defence to inform the Chamber accordingly and at the earliest opportunity, in order to contribute to the efficient management of the proceedings in this case.

**FOR THE FOREGOING REASONS, THE CHAMBER, JUDGE OZAKI
ABSTAINING, HEREBY**

- (i) **PLACES** on the record the Decision on Request for Leave to Reply; and
- (ii) **REJECTS** the Defence Request.

Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated 18 April 2019

At The Hague, The Netherlands