

**Cour
Pénale
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**International
Criminal
Court**

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

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

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

Source: Office of the Prosecutor

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Introduction

1. The Defence request for a temporary stay of deliberations “until it has had a reasonable opportunity to litigate whether Judge Ozaki should be disqualified” should be dismissed.¹ A stay of proceedings is an exceptional remedy warranted only when breaches of the rights of the Accused are such as to make it impossible to present a defence within the framework of these rights. This is patently not the case. An absolute majority of judges has already carefully considered and decided the matter. They decided in Plenary that Judge Ozaki’s role as Ambassador of Japan to Estonia for a limited time while she continues to serve as a non-full-time judge of the Court does not violate any aspect of article 40 of the Rome Statute.² Nor, in these circumstances, has the Defence substantiated the existence of a “serious risk of irreversible prejudice to the Accused’s rights to a fair trial”.³

2. Moreover, the request is premature and speculative. No request for disqualification has yet been brought. The Defence has simply stated that it might bring a request concerning this issue before the Presidency or other applicable body at some time in the future when it *may* obtain additional information.⁴ There is no provision in the Rome Statute that permits a temporary stay of proceedings on these grounds.

3. Lastly, contrary to Defence assertions,⁵ the high threshold for disqualification has not been met. While the Prosecution reserves the right to bring full arguments on this point if and when a motion for disqualification is brought,

¹ ICC-01/02-02/06-2328 (“Defence Request”).

² ICC-01/04-02/06-2326-Anx1 (“Plenary Decision”).

³ *Contra* Defence Request, para. 1.

⁴ ICC-01/04-02/06-2327 (“Disclosure Request”), para. 8. *See also* Defence Request, para. 1 (requesting a temporary stay of deliberations “until it has had a reasonable opportunity to litigate whether Judge Ozaki should be disqualified from the present case”).

⁵ Defence Request, para. 4.

there are no substantial - or any - grounds to believe that Judge Ozaki is disqualified from acting as a trial judge on the *Ntaganda* case.

Procedural History

4. On 18 July 2014, the Presidency constituted Trial Chamber VI, including Judge Ozaki, and referred to it the case of *The Prosecutor v Bosco Ntaganda*.⁶
5. The *Ntaganda* trial began on 2 September 2015. Final oral arguments were heard on 28-30 August 2018.
6. Judge Ozaki's mandate as a judge of the Court concluded on 10 March 2018, at which point she continued in office to complete the *Ntaganda* trial pursuant to article 36(1) of the Statute.⁷
7. On 7 January 2019, Judge Ozaki requested to resign as a full-time judge of the Court as of 11 February 2019 and to continue as a non-full time judge sitting on the *Ntaganda* case within the meaning of article 35(3) of the Rome Statute. The request was granted.⁸
8. On 18 February 2019, Judge Ozaki informed the Presidency and all Judges that she had been appointed as the Japanese Ambassador to the Republic of Estonia and that her duties would commence on 3 April 2019.⁹ Judge Ozaki wrote that her new responsibility would not in any way interfere with her judicial function as it is for a limited period of time, solely for the purpose of the *Ntaganda* case and after the completion of substantive deliberations on the Article 74 Judgment. She further stated that it would also not "affect confidence in my independence in

⁶ ICC-01/04-02/06-337.

⁷ Plenary Decision, para. 2.

⁸ Plenary Decision, para. 4.

⁹ Plenary Decision, para. 5.

accordance with Article 40(2)”, as her new role is confined to the bilateral relationship between Estonia and Japan. Judge Ozaki stated that if and when her new duties may have any implication on the *Ntaganda* case, she will refrain from executing her responsibility or notify the Court immediately. She further assured the Court that she will return to the seat of the Court as necessary to discharge her judicial duties and on those occasions “will not act in any way as the Japanese Ambassador to Estonia”.¹⁰

9. On 4 March 2019, an absolute majority of 14 judges of the Court decided that Judge Ozaki’s assumption 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.¹¹ The judges considered both limbs of article 40(2) applicable to non-full time judges: (i) the requirement not to engage in any activity which is likely to interfere with judicial functions; and (ii) the requirement not to engage in any activity which is likely to affect confidence in independence.¹² The majority found that “likelihood” in article 40(2) denotes a level of certainty beyond mere speculation or possibility.¹³

Submissions

- (i) *The Defence request is unsupported and speculative*

10. On 1 April 2019, the Defence filed a request for disclosure to the Presidency.¹⁴ The Defence stated that it “intends to bring” a request before the Presidency or other applicable body regarding Judge Ozaki’s role of Ambassador of Japan to

¹⁰ Plenary Decision, para. 5.

¹¹ Plenary Decision, paras. 10-14.

¹² Plenary Decision, paras. 12-13.

¹³ Plenary Decision, para. 11,

¹⁴ Disclosure Request.

Estonia at some future point,¹⁵ after it considers more information that it does not yet, and may never, have. In its request to stay proceedings filed before this Chamber on the same day, the Defence then stated that a temporary stay of proceedings is required until “it has had a reasonable opportunity to litigate” whether Judge Ozaki should be disqualified.¹⁶

11. There is no provision in the Rome Statute that permits a temporary stay of proceedings on the grounds that the Defence puts forward: to have more time to litigate whether Judge Ozaki should be disqualified for lack of independence or appearance of bias under articles 40 and 41.¹⁷

12. A stay of proceedings is an exceptional remedy warranted only when breaches of the rights of the accused are such as to make it impossible to present a defence within the framework of their rights.¹⁸ The Appeals Chamber has held that “the power of a court of law to stay proceedings should be sparingly exercised”.¹⁹ It is a remedy limited to conduct that would “make it otiose, repugnant to the rule of law to put the accused on trial”.²⁰ This is not the case here, nor is a temporary stay of proceedings otherwise warranted.

13. The Defence’s arguments are also speculative. The Plenary has been aware of all the facts that the Defence now puts forward in its filing, and has ruled on Judge Ozaki’s request. In particular, an absolute majority of judges found that “there is minimal risk of her activities as Ambassador from 3 April 2019 interfering with her judicial functions as a non-full-time judge of the Court, much less any

¹⁵ Disclosure Request, para. 8.

¹⁶ Defence Request, para. 1.

¹⁷ Defence Request, paras. 1, 4, 13. *See also* Disclosure Request, para. 8 (where the Defence requests more information from the Presidency in order “to bring a request concerning this issue before the Presidency or other applicable body”).

¹⁸ Depending on whether a fair trial is possible at a later stage, a stay of proceedings can be temporary (i.e. conditional) or permanent: ICC-02/04-01/15-1147, para. 14 citing ICC-01/04-01/06-1486 OA13, paras. 78-83; ICC-01/04-01/06-772 OA4, para. 39 and ICC-01/04-02/06-1883, para. 60.

¹⁹ ICC-01/04-01/06-772 OA4, para. 31.

²⁰ ICC-01/04-01/06-772 OA4, para. 30.

likelihood thereof”.²¹ They also held that, in light of the guarantees that Judge Ozaki provides, “it was not likely that performing her functions as Ambassador to Estonia would affect confidence in her independence as a Judge of the Court”.²²

14. Accordingly, 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. There are no pending requests to the Presidency to consider the issue afresh. In such circumstances, it is premature to even consider staying the proceedings.

(ii) *The Defence claim of a “serious risk of irreversible prejudice” is unsubstantiated*

15. The Defence has not substantiated the existence of a “serious risk of irreversible prejudice to the Accused’s rights to a fair trial”²³ and that “a stay of proceedings 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”.²⁴

16. As noted above, an absolute majority of judges examined all relevant facts and decided that Judge Ozaki can continue to exercise independent judicial functions in the *Ntaganda* case as a part-time judge while taking the position of Ambassador of Estonia for a limited time after the completion of substantive deliberations. The Plenary’s decision that “Judge Ozaki’s independence would not be undermined”, and that her new position was compatible with her judicial functions in the

²¹ Plenary Decision, para. 12.

²² Plenary Decision, para. 13.

²³ Defence Request, para. 1.

²⁴ Defence Request, para. 21.

Ntaganda case, had to necessarily entail consideration of the Accused's rights to a fair trial and the fairness and integrity of the proceedings.²⁵

17. Moreover, there is no legal basis in the Court's statutory instruments to challenge a decision of the Plenary of Judges.²⁶ The Defence may, at some future time, decide to explore other procedural avenues to litigate whether Judge Ozaki should be disqualified or the impact of the Plenary's Decision on his case. But at this point in time, this is mere speculation. To date, the competent body (the Plenary) has definitely ruled on this matter.

(iii) *The high threshold for disqualification has not been met*

18. The Prosecution reserves its right to respond in full on the merits of any future Defence request for disqualification or any other procedural avenue that the Defence might choose. Yet, within the context of the Defence's current request for a temporary stay of proceedings, the Defence argues that there are either "substantial grounds"²⁷ and/or "serious grounds"²⁸ to believe that Judge Ozaki should be disqualified from the present case, either on the basis of lack of independence or appearance of bias. The Prosecution responds to these assertions below.

²⁵ See e.g. Plenary Decision, paras. 12-13. See also Jones in "The Rome Statute of the International Criminal Court: A Commentary", Cassesse, Gaeta and Jones (ed.) (Oxford University Press), p. 256 (stating that article 40(2) prohibiting judges from engaging in "any activity which is likely to interfere with their judicial functions or to affect confidence in their independence" should include "or impartiality"); Abtahi/Young in "The Rome Statute of the International Criminal Court: A commentary", 3rd ed., Triffterer/ Ambos (ed.) (C.H. Beck, Hart, Nomos), p. 1260, nm. 5 (noting that article 41(2)(a) "is closely linked with article 40, as impartiality is closely linked with independence").

²⁶ ICC-01/09-01/11-911, para. 12. The Plenary of Judges does hold an inherent power to reconsider its previous decisions *proprio motu* if new facts or circumstances have arisen, or if relevant facts or circumstances are brought to its attention by a Party, or if it considers that the decision was erroneous. (ICC-01/09-01/11-911, para. 14).

²⁷ Defence Request, para. 1.

²⁸ Defence Request, paras. 4-12.

19. First, 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.
20. The ICC's Presidency and Plenary have underscored the strong presumption of impartiality and professionalism which attaches to judicial office and is not easily rebutted.²⁹ There is indeed a high threshold to disqualify a judge: "*whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge.*"³⁰ This standard "is concerned not only with whether a reasonable observer could apprehend bias, but *whether any such apprehension is objectively reasonable.*"³¹
21. This high threshold has plainly not been met on the facts of this case, and the facts do not correspond to any of the grounds for disqualification enumerated in article 41 and rule 34. In particular, in light of the guarantees provided by Judge Ozaki that: (i) her simultaneous role as Ambassador of Japan to Estonia is for a limited time after the conclusion of substantive deliberations on the Article 74 Judgment; (ii) will not affect confidence in her independence as her responsibilities are confined to the bilateral relationship between Estonia and Japan; (iii) if any implications arise, Judge Ozaki will refrain from executing her responsibility to that extent as Ambassador or will notify the Court immediately; and (iv) when returning to the seat of the Court to discharge her judicial duties she will not act in any way as the Japanese Ambassador to Estonia.

²⁹ ICC-01/04-01/06-3154-AnxI ("*Lubanga* Sentence Review Plenary Decision"), paras. 29 and 35; ICC-02/05-03/09-344-Anx ("*Banda and Jerbo* Plenary Decision"), para. 14. *See also*, [Celebici Appeal Judgment](#), para 697.

³⁰ *Lubanga* Sentence Review Plenary Decision, para. 28 quoting ICC-01/05-01/13-511-Anx ("Article 70 Plenary Decision"), para. 17 (citing *Banda and Jerbo* Plenary Decision, para. 11).

³¹ *Lubanga* Sentence Review Plenary Decision, para. 28 quoting *Article 70* Plenary Decision, para. 17 (citing *Banda and Jerbo* Plenary Decision, para. 13).

22. Cases where similar arguments were raised have not resulted in disqualification.³²

Conclusion

23. Based on the foregoing, the Prosecution requests that the Defence Request be dismissed in its totality.



Fatou Bensouda
Prosecutor

Dated this 5th day of April 2019
At The Hague, The Netherlands

³² See, [Judge Ney Thol Disqualification Decision](#), paras. 23-26; See also, [Taylor AJ](#), paras. 607, 608, 633-635.