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Original: **English** No.: **ICC-01/04-02/06 A**
Date: **11 November 2019**

THE APPEALS CHAMBER

Before:
Judge Howard Morrison, Presiding
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public with Public Annexes A-E

Defence Appeal Brief – Part I

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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GROUND 1. JUDGE OZAKI LOST THE APPEARANCE OF INDEPENDENCE AND WAS DISQUALIFIED

I. INTRODUCTION

1. Judge Ozaki irrevocably lost the appearance of judicial independence upon assuming her duties as a Japanese diplomat while still serving as an ICC Judge. This service in the Japanese government "affect[ed] confidence in [her] independence" as a Judge under article 40(2). She was thereby disqualified from sitting as an ICC Judge, whether on a part-time or full-time basis. Thereafter, she could neither participate in deliberations, as required by article 74(1), nor was the Chamber properly constituted. Consequently, the Judgment was not validly rendered.

II. THE APPELLANT HAS STANDING TO CHALLENGE JUDGE OZAKI'S INDEPENDENCE

2. The compatibility of Judge Ozaki's service as a Japanese diplomat with article 40 has been addressed only in the Plenary's Decision on Independence. That Decision was rendered without the Defence being heard. The Presidency refused to permit reconsideration in light of the Defence's submissions, and the Plenary's subsequent Decision on Impartiality declared that the Defence's submissions "may not be used as pretence (*sic*) to seek review of the Plenary's Article 40 Decision,"[1] thus treating the Decision on Independence as *res judicata*.

3. If the Decision on Independence was wrongly decided, then the learned Judge was not qualified to sit on the bench; if not so qualified, then the Chamber was not constituted as required under article 74, and no valid Judgment was rendered.

4. The lack of independence of a Judge is a justiciable matter, properly advanced on appeal. The argument, though rejected on the merits, was entertained in the

[1] Decision-2355-Anx1, para.34.

Čelebići appeal, and has been successfully advanced, including on appeal, in domestic and international courts,[2] in particular because it is a *sine qua non* of a fair trial.[3]

5. This ground of appeal, in substance, raises the same issues that were adjudicated in the Plenary's Decision on Independence. It is axiomatic that Judges should not decide appeals from their own decisions, even when initially framed as an administrative matter.[4] The Judges are invited to consider whether the "degree of congruence"[5] between Ground 1 and that Decision – which arises in very different procedural circumstances than *Čelebići*[6] – requires their disqualification.

III. THE PLENARY ADOPTED AN ERRONEOUSLY NARROW VIEW OF JUDICIAL INDEPENDENCE

6. The Decision on Independence observed that the "evident contrast between article 40 of the Rome Statute and equivalent provisions of some other international courts"[7] supported the view that an ICC Judge's appearance of independence was not compromised as long as the subject-matter of concurrent service in the executive of a State did not "impact" judicial functions.[8] According to the Majority, Judge Ozaki's service as a Japanese diplomat did not have such an impact because: (i) those functions were "confined to the bilateral relationship between Japan and Estonia";[9]

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[2] *See* ICTY-*Mucić*-Appeal-Brief (Annex C), paras.1-3; ICTY-*Mucić*-AJ, paras.685-693; *Valente*, paras.2,20, *Whitfield*, paras.45-46; *Campbell*, paras.77-82.

[3] *See* General Comment No.35, p.10 ("[i]t is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial").

[4] *Procola*, para.45.

[5] *See* *Gbagbo-Goudé*-Decision-142-Anx1, p.3.

[6] ICTY-*Mucić*-Bureau-Second-Decision, para.14. Unlike this case, the first instance decision on Judge Odio Benito's independence was taken by the Bureau, not the Plenary. The Bureau squarely addressed and decided the issue of independence. Hence, the appeal primarily challenged the Bureau's decision, not the Plenary's. Accordingly, since none of the appeal Judges had participated in the Bureau decision, none were disqualified. Here, in contrast, the only decision at first instance on Judge Ozaki's independence was taken by the Plenary, in which all the Judges of this appeal bench participated.

[7] Decision-2326-Anx1, para.10.

[8] Decision-2326-Anx1, para.13.

[9] Decision-2326-Anx1, para.5.

and (ii) Judge Ozaki promised that she would not perform any functions impacting her deliberations in the *Ntaganda* case.[10]

7. The supposed "contrast" between article 40 and other statutes shows only that there is no absolute prohibition on concurrent employment, not that concurrent employment with the executive of a State is permissible. That inference is a *non sequitur*.

8. On the contrary, general principles of law, international custom, and internationally-recognized human rights, demonstrate that Judges must remain separate from the influence, and from the appearance of influence, of the executive branch. Absolute prohibitions on concurrent employment achieve this objective,[11] but numerous States specifically prohibit Judges from concurrently holding any other public office,[12] or limit the types of concurrent employment so as to exclude executive office. The Campeche Declaration does both, stating that "judges […] shall not be able to perform any other public or private service, remunerated or not, with the exception of teaching, social sciences researching, or their participation in non-profit entities for public welfare, activities which could be performed with the proper arrangement of the determined hourly incompatibility."[13] The attributes of judicial independence in municipal and international law "are not mere vague nebulous ideas but fairly precise concepts."[14]

9. Exceptions for judges of minor jurisdiction, such as housing disputes,[15] underline the unacceptability of a Judge of serious criminal jurisdiction concurrently serving in the executive of a State. No domestic or State practice – with the exception of the Decision on Independence itself – supports the view that a Judge of serious

[10] Decision-2326-Anx1, para.13.
[11] UK Guide to Judicial Conduct, p.7; Canada, Judges Act, Art.55; DRC, *Statut des magistrats*, Art.65.
[12] *See* Annex D.
[13] Campeche Declaration, Art.7(b)(4).
[14] *Singhvi* Report, para.75.
[15] *Pablaky*, para.34; *Sramek*, para.40; Prosecution-Response-2349. *Cf. McGonnell*, paras.57-58.

criminal jurisdiction could simultaneously serve in the executive of a State based on the "non-overlapping-functions" test.

10. Like the ICC Statute, the ICTY Statute does not expressly prohibit Judges from concurrent service in the executive of a State, and the ICTY Appeals Chamber held that the requirement that Judges be eligible to sit on the highest courts of their own countries referred only to "essential qualifications".[16] Yet the Presidency, the Plenary, the Appeals Chamber, and Judge Odio Benito herself went to great lengths to demonstrate, and ensure, that she was not, and could not be perceived as, exercising any executive powers until after the issuance of the *Čelebići* Trial Judgment.[17] This approach reflects an understanding that such service would not have been compatible with judicial independence, despite the absence of any express statutory prohibition.

11. The Judges of this Court agreed, imposing on themselves the ethical rule that they "shall not exercise any political function."[18]

12. Likewise, the consensus view of the drafters of article 40 was that "it was clearly understood that a judge of the Court could not be, at the same time, a member or official of the Executive Branch of Government."[19] However, the drafters expressed the *caveat* that this should not exclude those "who do not perform ordinary executive functions of government but have an independent role or office"[20] — such as for example, heads of commissions of inquiry, law reform commissions, or human rights commissions.[21] The removal of language categorically excluding concurrent

[16] ICTY-*Mucić*-AJ, paras.659,662.
[17] *See e.g.* ICTY-*Mucić*-Decision, p.10 ("The question, however, is not whether there is a prohibition against the exercise of any political or administrative function, but whether such function is being exercised by Judge Odio Benito. In the circumstances of this case, she is not").
[18] ICC Code of Judicial Ethics, article 10 (underline added).
[19] ICL Report 1993, p.109 (underline added); ICL Report 1994, p.32.
[20] ICL Report 1994, p.32. *See* Schabas Commentary (Annex E), pp.681,723 (referring to "independence by ricochet").
[21] *E.g.*, in 2004, Judge Maureen Harding Clark served simultaneously on the Irish Human Rights Commission.

executive employment is fully explained by this expressed view of the drafters. On the other hand, no indication is provided in any of the drafting history of article 40 that any State dissented or repudiated its understanding that "it was clearly understood that a judge of the Court could not be, at the same time, a member or official of the Executive Branch of Government."[22]

13. The learned Judge's resignation as a full-time Judge also destroyed her appearance of independence by shifting the source of her income primarily to Japan.[23] Judicial remuneration, as is well-established, must be independent of executive control to present the appearance of independence.[24] Yet Judge Ozaki – while still deliberating on the *Ntaganda* case – was paid mainly, at least for a period, by the Government of Japan, and without any publicly-known guarantee of non-reduction of salary that is essential to the reality and appearance of judicial independence.

14. Judge Ozaki's subsequent resignation as Japan's Ambassador to Estonia[25] did not restore her judicial independence. The requirements of article 40 are continuous, and Judge Ozaki had already "engage[d]" in the activity compromising her independence.[26] While the exact date on which Judge Ozaki assumed functions as Japan's Ambassador to Estonia remains undisclosed,[27] it is clear that she "had been appointed" Japanese Ambassador by a Japanese Cabinet decision of 12 February,[28] and was in Estonia by 26 March.[29]

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[22] ICL Report 1993, p.103 (underline added); ICL Report 1994, p.32.
[23] *See* ICC-ASP/2/10, para.9.
[24] *See e.g.* Basic Principles on the Independence of Judiciary, Art.11; Canada, *Reference re. Remuneration of Judges*, paras.147-196; *De Lange*, para.70; *Valente*, p.5; Uganda, Constitution, Art.128(7); ILO, Judgment, para.29.
[25] Decision-2346, para.33; Notification-2338, para.3.
[26] ICTR-*Karemera*-Appeal-Decision, paras.62,66-69.
[27] A second request for disclosure remains pending with the Government of Japan.
[28] Decision-2326-Anx1, para.5.
[29] Defence-Request-2337-AnxB.

15. The learned Judge's failure to inform the Presidency that her purpose in becoming a part-time Judge was to avoid the prohibition on engaging in "any other occupation", which would otherwise have applied, further undermines her appearance of independence. The deliberate nature of this non-disclosure is reflected by the date of her ambassadorial appointment, 12 February, which coincides precisely with the date on which the learned Judge asked to become a part-time Judge for "personal reasons".[30]

16. Once Judge Ozaki lost the appearance of independence required under article 40, the conditions for issuing a decision under article 74(1) could not be fulfilled. The Judgment, accordingly, is a nullity. A re-trial or permanent stay is required.

17. The cost of adhering to principle is high, but the cost of departing from principle can be higher and more enduring. ICC Judges are not, and must not be viewed, as diplomats. If the international judicial community is to retain the respect properly due from the diverse range of peoples and institutions over which it exercises jurisdiction, and if international standards of human rights are to be maintained in the countries that look to this Court for precedent, the principle that Judges may not concurrently serve in the executive of a State must be upheld and applied.[31]

GROUND 3. THE CONVICTION EXCEEDS THE SCOPE OF THE CHARGES

18. The Chamber erred in convicting Mr. NTAGANDA of no less than fifteen "criminal acts"[32] that were not within the scope of the charges.[33]

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[30] Decision-2326-AnxI, para.3 ("as of 11 February 2019 inclusive").
[31] ICTY-*Mucić*-Appeal-Brief (Annex C), p.32.
[32] *Bemba*-AJ-3636, para.74.
[33] The disposition is in very general terms (Judgment, Section VII). Applying *Bemba*-AJ-3636, para.104, regard is had to the criminal acts found established beyond reasonable doubt at TJ, para.1199, Sections IV and V.C.4.

19. Under the Statute, a person is committed for trial "on the charges as confirmed".[34] The confirmation decision "defines the parameters of the charges at trial"[35] and the underlying criminal acts form an integral part of the charges.[36] Therefore, sufficiently detailed information must be provided to permit an effective defence.[37] Simply listing the categories of crimes or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient to comply with regulation 52(b), and does not allow for a meaningful application of article 74(2).[38]

20. Charges are not confirmed on the basis of a sample of criminal acts within a category.[39] Phrases that seek to expand the trial's factual parameters after confirmation without recourse to article 61(9) are impermissible.[40] Criminal acts must be identified exhaustively to allow: a Chamber to manage the trial; an accused to meaningfully prepare; and victims to participate properly.[41]

21. As in *Bemba*, "in the present case, the 'facts and circumstances' were described, in relation to the crimes, at the level of individual criminal acts",[42] save in respect of counts 14-16. Therefore, contrary to the Chamber's approach, simply because a location is identified in the Confirmation Decision as being the locus of a particular crime generally, *e.g.*, murder, this is not sufficient to bring all acts of murder (or any other charged crime) at that locus within the charges.[43] The Chamber's statement to the contrary[44] is unsupported and contradicts the approach taken in *Bemba*. Nor can

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[34] Statute, article 61(7)(a).
[35] *Lubanga*-AJ-3121, para.124.
[36] *Lubanga*-AJ-3121, para.123; *Bemba*-AJ-3636, para.104.
[37] *Lubanga*-AJ-3121, para.123. *Also*, RoC, regulation 52(b).
[38] *Bemba*-AJ-3636, para.110; *Bemba*-AJ-3636, Separate Opinion of Judges Van den Wyngaert and Morrison, para.25.
[39] *Bemba*-AJ-3636, Separate Opinion of Judges Van den Wyngaert and Morrison, para.29.
[40] *E.g.*, "demonstrated by…" (Decision-309, para.49). *See* *Bemba*-AJ-3636, paras.114-115.
[41] *Bemba*-AJ-3636, Separate Opinion of Judges Van den Wyngaert and Morrison, para.29.
[42] *Bemba*-AJ-3636, paras.111,115.
[43] TJ, paras.41,865,868-870.
[44] TJ, para.41.

any reliance be placed on general allegations about the commission of crimes in the UDCC,[45] as facts "must be identified with sufficient clarity and detail".[46]

22. None of the following acts were confirmed and, thus, do not fall within the "facts and circumstances described in the charges":[47]

(i) the murder of nine patients at Bambu hospital and the attempted murder of a tenth, during the Second Operation, which are not amongst the murders enumerated at paragraphs 44 or 51 of the Confirmation Decision, or paragraph 81 of the UDCC; in fact, this gruesome and distinct massacre finds no reference in the PTB or even in the witness's statement taken over the course of three days – a point not even addressed by the Chamber;[48]

(ii) the murder of two children "during the assault" to take over Kobu,[49] whereas the Confirmation Decision enumerates murders that allegedly occurred only "after the UPC/FPLC had taken control of Kobu," in the course of "patrols",[50] with no reference to any killings during the takeover, let alone with any specificity as to where, when or according to which witness's testimony;

(iii) in Kilo, the murder of various individuals, given the absence of any meaningful description in the Confirmation Decision as to time, place or circumstances beyond stating that some indefinite number of killings occurred there – no reliance can be placed on the reference to the killing of those who had first been forced to dig their graves which lacks the necessary detail and was based on anonymous hearsay;[51]

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[45] *E.g.*, UDCC, para.84 regarding the rape of detainees and the killing of those who resisted.
[46] *Lubanga*-Decision-2205, fn.163.
[47] Statute, article 74(2).
[48] PTB, para.277; **P-0863**:T-181, pp.23-26; TJ, paras.587,870.
[49] TJ, para.873 (emphasis added).
[50] Decision-309, para.42.
[51] TJ, paras.869,1199; Decision-309, para.41, fn.151.

(iv) the murder of people in Mongbwalu and Sayo during so-called *ratissage* operations, including a Lendu woman accused of being a 'chieftain' during the First Operation – no reliance can be placed on: the reference to the UPC/FPLC going "door-to-door" because this statement is not linked to any criminal act;[52] nor on the bare reference to the killing of "at least 200 civilians"[53] which lacks the necessary specificity[54] and is contradicted by other Prosecution statements;[55]

(v) the murder of a woman, while she tried to defend herself against rape, and of P-0018's sister-in-law in Sangi, during the Second Operation;[56]

(vi) the murder of men raped by UPC/FPLC soldiers during the Second Operation – these acts are not referred to in the Confirmation Decision and the bare reference therein to Kobu being the locus of murders is not sufficient to bring these acts within the scope of the charges;[57]

(vii) the attempted murder of P-0019 and P-0108 – the reasoning in (vi) above applies equally to these uncharged attempts;[58]

(viii) the targeting, on the order of Mr. NTAGANDA personally, of civilians in Sayo using a grenade launcher,[59] despite: (a) P-0017 (the sole source for this incident) failing to mention any such order in his 2013 statements taken over 5 days, or his testimony in *Lubanga*; or (b) the absence of any description in the Confirmation Decision corresponding to this event, let alone with the personal involvement of Mr. NTAGANDA; in fact, the Confirmation Decision states expressly that the acts charged under Count 3 were based on the "underlying

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[52] UDCC, para.70.
[53] Decision-309, para.38 *contra* TJ, para.865.
[54] The source is an estimate given in a NGO report (EVD-PT-OTP-00782, p.0829).
[55] UDCC, para.63, refers to the killing of at least 28 non-Hema civilians.
[56] TJ, paras.600,873,1199.
[57] TJ, paras.623,870,873,1199.
[58] TJ, paras.870,874,1199.
[59] TJ, paras.508,922,1199.

conduct" otherwise confirmed under counts 2, 5, 11, 17 and 18[60] – which did not include the incident in question;

(ix) the rape of women and girls during and in the immediate aftermath of the UPC/FPLC assault on Mongbwalu, save the rape spoken about by P-0017 at Salumu's camp, and of girls, save P-0022, in Kilo, during the First Operation;

(x) the rape of detained women in Kobu in so far as this finding relies on the findings: (a) that "UPC/FPLC soldiers detained several women and girls, in some instances for hours, in others over the course of several days" and "raped them and otherwise subjected them to sexual violence on one or more occasions";[61] (b) that P-0019 "saw other women being raped inside and outside the house, including with sticks";[62] and (c) paragraph 599, which concerns Sangi;[63]

(xi) the rape of women in Sangi in so far as this finding concerns the rape of P-0018's sister-in-law during the Second Operation;[64]

(xii) the rape and sexual slavery of child soldiers in relation to P-0883 at Camp Bule, and Mave, assigned to Floribert KISEMBO – the continuing nature of being a child soldier does not circumvent the need to plead discrete acts of rape, a principle which was not applied in respect to these criminal acts;[65]

(xiii) the looting of items in Mongbwalu and Sayo during the First Operation;[66] and in Kobu (in so far as this finding exceeds roofs and covers "personal belongings" and "a goat"),[67] Lipri (where only the looting of roofs

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[60] Decision-309, para.48.
[61] TJ, paras.579,940 (fn.2715).
[62] TJ, paras.623,940 (fn.2715).
[63] TJ, para.940 (fn.2715).
[64] TJ, para.600.
[65] TJ, paras.409,411,974.
[66] Decision-309, paras.60-61; UDCC, para.72; TJ, paras.514,526,1032.
[67] Decision-309, para.62; UDCC, para.85; TJ, paras.578,1032.

and the destruction of crops was confirmed)[68] and Bambu (given that the findings do not encompass the events confirmed),[69] during the Second Operation;

(xiv) using children under the age of 15 to participate actively in hostilities in the First Operation in so far as this finding relies on evidence relating to Sayo;[70] and

(xv) destroying the adversary's property in Sayo in so far as this finding relates to the burning down of one house – only burning caused by incendiary grenades was confirmed.[71]

23. The fifteen criminal acts identified above, for which Mr. NTAGANDA was convicted, exceed the scope of the charges. Convictions should not have been entered on the basis of these acts, and the convictions should be quashed. A corresponding narrowing of the findings under count 10 must also be made.[72]

RESPECTFULLY SUBMITTED THIS 11TH DAY OF NOVEMBER 2019

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[68] Decision-309, para.62; UDCC, para.85; TJ, paras.569,1032.
[69] Decision-309, para.62, UDCC, para.81; TJ, paras.589,1032.
[70] TJ, paras.511,1125. Note the evidence at fn.1508 concerns Mongbwalu and Sayo.
[71] Decision-309, para.72; TJ, paras.1153,1156.
[72] TJ, paras.990-1024,1199.