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THE PRESIDENCY

Before: Judge Sang-Hyun Song, Presiding Judge,
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Cuno Tarfusser, Second Vice-President

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR *v.* GERMAIN KATANGA**

Public

**Defence Response to
*Requête sollicitant la récusation de Mme la juge C. Van den Wyngaert***

Source: Defence for Mr Germain Katanga

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Victims Participation and Reparations
Section**

**Other
Trial Chamber II**

1. The defence for Germain Katanga (“defence”) hereby responds to the victims’ legal representative’s *Requête sollicitant la récusation de Mme la juge C. Van den Wyngaert* (hereinafter the “Request”),¹ by which he requests the disqualification of Judge Van den Wyngaert from the reparation proceedings of the *Katanga* case.
2. The Defence objects to the Request. Not only is it inadmissible, but also without merit. Dissenting from the majority, or supporting the acquittal of an accused on one or more charges does not raise doubts as to impartiality.

Procedural background

3. On 30 September 2009, the Presidency assigned Judge Van den Wyngaert to Trial Chamber II.² The *Katanga and Ngudjolo* trial started on 24 November 2009.³
4. On 21 November 2012, the Majority of the Chamber issued the ‘*Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons*,’ notifying the eventual legal recharacterisation of the mode of liability under which Germain Katanga stands charged.⁴ Judge Van den Wyngaert issued a dissenting opinion.⁵
5. On 18 December 2012, Mr Katanga’s co-accused, Mr Ngudjolo, was acquitted by the unanimous decision of Trial Chamber II.⁶
6. On 7 March 2014, the Majority of the Chamber modified the legal characterization of the mode of liability applied to Mr Katanga and found him guilty of five offences, being crimes against humanity or war crimes.⁷ Judge Van den Wyngaert issued a dissenting opinion to this Judgment (hereinafter the “Opinion”).⁸

¹ ICC-01/04-01/07-3487, 30 May 2014.

² ICC-01/04-01/07-1503, Decision replacing a judge in Trial Chamber II.

³ ICC-01/04-01/07-T-80-ENG ET WT 24-11-2009.

⁴ ICC-01/04-01/07-3319-tENG/FRA.

⁵ ICC-01/04-01/07-3319-tENG/FRA.

⁶ ICC-01/04-02/12-3, *Jugement rendu en application de l’article 74 du Statut*.

⁷ ICC-01/04-01/07-3436, *Jugement rendu en application de l’article 74 du Statut*.

⁸ ICC-01/04-01/07-3436-AnxI, Minority Opinion of Judge Christine Van den Wyngaert.

7. On 14 April 2014 the Presidency acceded to the request of Judges Cotte and Diarra to be replaced as Judges in Trial Chamber II, and appointed Judges Fernandez de Gurmendi and Herrera Carbuccia, in their place, with effect from the date of issuance of the article 76 decision.⁹
8. The sentencing hearing was held on 5 and 6 May 2014.¹⁰ On 23 May 2014, the Chamber issued the '*Décision relative à la peine (article 76 du Statut)*' by which it sentenced Mr Katanga to 12 years of imprisonment.¹¹ Judge Van den Wyngaert issued a dissenting opinion.¹²

Submissions

Inadmissibility of the Request

9. The defence submits that the legal representative's Request is *prima facie* inadmissible.
10. To support the admissibility of his Request, the legal representative relies on Articles 21, 41(2), 68 and 82(4) of the Statute and Rule 34 of the Rules of Procedure and Evidence ("RPE").¹³ However, these articles are either not relevant or support a finding of inadmissibility.
11. Article 41 of the Statute states the following:
1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.
 2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.
 - (b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.¹⁴
 - (c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

⁹ ICC-01/04-01/07-3468, Decision replacing two judges in Trial Chamber II.

¹⁰ ICC-01/04-01/07-T-344-Red-ENG WT 05-05-2014 and ICC-01/04-01/07-T-345-Red-ENG WT 06-05-2014

¹¹ ICC-01/04-01/07-3484.

¹² ICC-01/04-01/07-3484-Anx1.

¹³ Request, para. 7.

¹⁴ Emphasis added.

12. It follows from this provision that among the parties and participants, only the prosecution and the person investigated or prosecuted can request the disqualification of a judge on the ground that he or she is partial. There is no provision in the Statute or Rules of Procedure and Evidence which entitles the legal representative of victims to file such a request at any time of the proceedings.
13. The legal representative submits that Article 41(2)(b) should be interpreted in order to be compatible with international human rights.¹⁵ However the defence maintains that it is already compatible with such principles.
14. It should be stressed that the victims are not in the same position as the prosecution or the accused. They are participants, not a party, and as such granted fewer rights and obligations than the prosecution or the accused. The prosecution is deemed to act in the general interest. Therefore it does not appear necessary to grant the victims legal representative the right to request the disqualification of a judge. If the States Parties intended to place the legal representatives of victims on equal footing as the prosecution or defence in respect to requesting disqualification of a judge, they would not have omitted them from Article 41(2)(b). The judges may, to a certain extent, interpret or complete the Statute when it is incomplete or silent, but in the present case there is no ambiguity. Only the prosecution and the defence can request the disqualification of a Judge. It was clearly not necessary to add explicitly that the victims legal representatives and other non-parties, such as a State or an *amicus curiae*, were not granted this right.
15. The legal representative of victims further argues that the admissibility of his Request follows from the role of victims as defined by the Appeals Chamber and the Presidency.¹⁶ He relies on an Appeals Chamber's decision, in the *Lubanga* case, according to which «[...] under article 82 (4) of the Statute, victims are entitled to bring an appeal. They are therefore parties to the proceedings and not, as is the case at other stages of the proceedings, participants who, under article 68 (3) of the Statute, may present their views and concerns where their personal interests are affected. »¹⁷ However this decision confers the role of parties to the victims only in an appeal against a decision on reparation, and not

¹⁵ Request, para. 11.

¹⁶ Request, para. 15.

¹⁷ ICC-01/04-01/06-2953, Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, 14 décembre 2012, para. 67.

in the reparation proceedings themselves. This is clear because it relies on article 82(4) of the Statute which explicitly grants victims the right to appeal a reparation decision. This decision does not imply that the victims should be considered as parties during the proceedings leading to a reparation decision by the Trial Chamber.

16. The legal representative also quotes the Presidency decision which replaced two judges in the *Katanga* case for the reparation stage, which considered that for reparations, "victims receive an enhanced procedural role in that they become parties to the proceedings."¹⁸ However, the title of "party", even if attributed to the victims by the Appeals Chamber or the Presidency in certain, limited, circumstances, does not grant them the right to request the disqualification of a Judge, since Article 41(2)(b) does not refer to the "parties" but to "the prosecution" and to "the person being investigated or prosecuted".
17. Therefore the defence submits that the legal representative is not entitled to request the disqualification of Judge Van den Wyngaert and that the Presidency cannot go beyond the explicit wording of Article 41(2)(b) of the Statute in this regard.

Lack of merit of the Request

18. The defence submits that even if the Presidency considers that the Legal Representative's Request is admissible, it should be dismissed as being without merit.
19. The legal representative of victims argues that Judge Van den Wyngaert should be disqualified for the reparation proceedings in light of her dissent from the majority Article 74 judgment. He argues that her dissent raises doubts as to her impartiality in that she would have acquitted Mr Katanga and would not have relied on the testimony of some victims, such as P-132 and P-161. He also adds that she did not find it proved that there was an attack against the civilian population and that crimes against humanity were committed. He further notes that she questioned the number of persons killed. He interprets her dissent as a dismissal of the crimes committed against the victims. Consequently, the legal representative considers that she would not be able to assess the reparation requests of victims.¹⁹ He relies, *inter alia*, on Rule 34(c) to request her

¹⁸ ICC-01/04-01/07-3468-AnxI, p. 4.

¹⁹ Request, paras 31-48.

disqualification.²⁰

20. The defence submits that the legal representative interprets the conditions of disqualification of a judge erroneously. Rule 34(c) refers to a bias demonstrated by the judge “prior to taking office” at the Court; however Nsita alleges the occurrence of a bias from Judge Van den Wyngaert after she took office, *i.e.* after the Article 74 Judgement was issued; therefore Rule 34(c) is not applicable. A minority opinion supporting an acquittal after a Judge has listened to and reviewed all the evidence in a case does not raise doubts as to his or her impartiality.

21. Trial Chamber judges are appointed from the confirmation of charges until the end of proceedings, including the reparations phase. Their decision must be based on their evaluation of the entire case file, including all the evidence and filings. The Statute explicitly envisages that the judges of the same Chamber may disagree with each other, and offers them the possibility of issuing a Majority decision containing minority opinions, such as Judge Van den Wyngaert’s Opinion. Indeed, Article 74 of the Statute states that:

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.
2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
4. The deliberations of the Trial Chamber shall remain secret.
5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.²¹

22. Thus, the departure of two judges is the exception rather than the rule. In its decision of 14 April 2014, the Presidency considered that “reparations need not be addressed by the Trial Chamber that issued the conviction and sentence,”²² but it ordered the replacement of two judges of Trial Chamber II for the reparation stage only because the request emanated from the judges themselves and in light of the particular circumstances of the

²⁰ Request, para. 24.

²¹ Emphasis added.

²² ICC-01/04-01/07-3468-AnxI, para. 8.

case, where “Judges Cotte and Diarra were serving pursuant to an extended mandate under Article 36(10)” from 11 March 2012. In addition, their request was supported by all the Judges of the Court.²³ Judge Van den Wyngaert is not in the same situation since she does not serve pursuant to an extended mandate.

23. In addition, and in light of Article 74 quoted above, it cannot be maintained that a Judge shows bias because he or she writes a minority opinion. On the contrary, such dissent is part of a fair trial, given that this dissent can *de facto* support or contest the point of view of any party or participant.

24. The defence further stresses that Judge Van den Wyngaert participated in the sentencing stage. She signed the sentence decision and issued a dissent. Nobody considered that she was impartial. This demonstrates that for both sentence and reparation, it is irrelevant that she dissented on the question of Mr Katanga’s liability. At the sentencing and reparation stage, both the parties and the judges must proceed on the basis that the Article 74 decision was correct. If the legal representative’s reasoning were to be applied, Judge Van den Wyngaert should have been excluded from the sentencing stage as well, and any judge issuing a dissent in favor of an acquittal would have to be excluded from the sentence and reparation proceedings. This was clearly not the intention of the drafters of the Statute. The defence notes that in civil law countries, such as France, it is the same bench in the criminal courts which rule on the “*action pénale*” and on the “*action civile*”. This means that a victim can obtain compensation from the bench even if the accused has been acquitted.²⁴

25. Lastly, the defence notes that in the circumstances of the present case, where two judges have already withdrawn, it would be detrimental to the rights of the accused to have a Trial Chamber composed of three judges who did not attend any part of the trial.

²³ ICC-01/04-01/07-3468, Decision replacing two judges in Trial Chamber II.

²⁴ Cf. Article 372 of the French Code of Criminal Procedure: “The civil party, in the case of an acquittal and of exemption from penalty, may apply for compensation for the damage caused by the fault of the accused in so far as it derives from the matters of which he was accused” (@ <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>).

Conclusion

26. The defence requests the Presidency to dismiss the legal representative's Request to disqualify Judge Van den Wyngaert.

Respectfully submitted,



David HOOPER Q.C.

Dated this 4 June 2014

At The Hague