Cour Pénale Internationale

International Criminal Court

Internal Memorandum

From:	Christine Van den Wyngaert
To:	Presidency
Date:	11 June 2014
Subject:	**Written Submission pursuant to article 41(2)(c)**

I. Introduction

1. This is my written submission in relation to the *Requête sollicitant la récusation de Mme la juge C. Van den Wyngaert,* ICC-01/04-01/07-3487 ("Request"), submitted by the Victims Legal Representative in the case against Germain Katanga on 30 May 2014. It is not my intention to respond to all the points raised in the Request. However, I think it is important to rectify a few incorrect statements that are made in the Request, which do not reflect what I said in the Minority Opinion in the Katanga case.[1]

2. I also want to make it clear from the outset that I would not take it personally if the Plenary decided that I should be recused from further participation in the reparations proceedings in the Katanga case. I have carefully reflected about the propriety of my continued role in the reparations proceedings and have, in the end, decided, for the reasons explained in this memo, that there was no need for me to recuse myself in accordance with article 41(1) of the Statute.

[1] Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3436-AnxI ("Minority Opinion")

3. As far as the distribution of this memorandum is concerned, I can see no reason why it should be confidential or why it could not be circulated to all parties and participants concerned.

II. The Request misrepresents the Minority Opinion

4. At several points in the Request, it is suggested that I would have denied the grave nature of the crimes committed against the civilian population of Bogoro. The Request even goes so far as to claim that I would have "singularly minimised" the prejudice suffered by the victims of the case.[2] This is unequivocally untrue. Although I have expressed serious misgivings about the evidentiary standard that was applied by the Majority in making certain findings concerning particular instances of crimes, I have *never* denied that serious and horrible crimes were committed against civilians during and after the attack on Bogoro.

5. The Request also suggests that I have argued that the civilian casualties were only "collateral damage" of an otherwise legitimate military attack.[3] Again, this is manifestly untrue. The concept of collateral damage is nowhere mentioned in the Minority Opinion, either explicitly or implicitly. On the contrary, my position is that the crimes against civilians were committed *incidentally* to the main attack,[4] i.e. that they were committed for (largely opportunistic) reasons that were independent from the objectives of the main attack. This point is made in relation to Germain Katanga's individual criminal responsibility under article 25(3)(d)(ii) of the Statute. An important element of my argumentation in this regard is that I challenge the Majority's finding that the crimes committed against civilians were *planned* beforehand.

[2] Request, para. 41
[3] Request, paras 45, 46, 52
[4] Minority Opinion, para. 5.

However, the fact that the commission of crimes against civilians was not, in my view, pre-planned or otherwise previously agreed upon by the physical perpetrators, in no way denies the fact that an unknown number of civilians *were* intentionally harmed during and after the attack by an unknown number of attackers, as I have stated several times throughout the Minority Opinion.[5]

6. In short, I strongly reject the insinuation of the Request that I would somehow deny that a number of civilians of Bogoro were the victims of actual crimes or that I would attempt to minimise their suffering. Nothing could be further from the truth.

III. Standing of the Legal Representative

7. I will not express any view on whether the Victims Legal Representative has standing to bring this recusal request under article 41(2)(b) of the Statute.

IV. The position taken on the merits after an adversarial criminal trial does not give rise to bias or partiality

8. Turning now to the question as to whether my position on the merits of the criminal case against Germain Katanga affects my impartiality as a judge, I have come to the conclusion that it does not.

9. First, given the staggered nature of the proceedings, it is unavoidable that trial judges have to express their opinion on the merits of the criminal case *before* they decide on the merits of reparations. If this mere fact were enough to disqualify judges, the same bench could never rule on both guilt/sentencing and reparations. Indeed, my colleagues of the Majority in the Katanga case have equally taken clear positions on a number of issues that

[5] See, e.g., paras 4, 6, 175, 182, 260.

could directly affect a ruling on reparations. If they were still part of Trial Chamber II, they would therefore also have to recuse themselves, on the basis that they already expressed a clear point of view (albeit one that favours the victims and disadvantages Germain Katanga). Accepting such a position would amount to saying that ruling on the criminal merits constitutes "previous involvement" in the sense of article 41(2)(a) of the Statute. Whereas such a position might be maintained from a purely substantive point of view, it is clearly not what the Statute envisages.

10. Second, I do not believe that my position on the criminal merits actually affects my ability to rule impartially on any reparations award. As there is no precedent in the Court's jurisprudence, it remains to be seen how trial chambers will conduct reparations proceedings. Two broad possible scenarios emerge: First, the reparations proceedings could be conceptualised as a largely separate procedure, where all relevant findings – including the accused's liability for reparations – must be decided *de novo* on the basis of a different standard. Second, the reparations proceedings could be conceptualised as an integral part of the same criminal/civil trial, in which case any findings made in the criminal trial that are relevant for a reparations order – including the criminal responsibility of the accused – would be binding for the reparations proceedings.

11. In the first scenario, it could be argued that positions expressed in the criminal trial might affect the impartiality of the judge in the 'civil trial'. However, one could also argue that it is perfectly possible for a judge to find the same evidence insufficient to meet the criminal standard, but sufficient for the – presumably lower – standard of proof for reparations.

12. In the second scenario, minority positions taken in the criminal trial are irrelevant, as the findings of the Majority will bind the 'reparations chamber'.[6] In my view, the second scenario is most in line with the Statute.[7] In fact, I believe that the current complication is mainly a consequence of the fact that the composition of the Trial Chamber had to be changed before the reparations proceedings were completed, which made it impossible to comply with the terms of article 76(3) of the Statute.

13. In any event, I am prepared to accept that I am bound by the Majority Opinion with regard to any findings that are relevant for the reparations proceedings. In particular, I accept that I am bound by the Majority's determination that Germain Katanga is criminally responsible for certain crimes committed by the Ngiti fighters of Walendu-Bindi.[8]

14. The only point where I can see a potential complication concerns the question of the evaluation of the credibility of a number of witnesses who are also participating victims.[9] It is true that my opinion about their credibility in the criminal proceedings may influence my appraisal of their testimony in the reparations proceedings. However, had colleagues Diarra and Cotte remained on the bench for the reparations proceedings, they would equally have had a predetermined opinion regarding the credibility of these witnesses. Unless it is argued that this would have been a reason for their recusal as well, I do not see how it could be a ground for my disqualification.

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[6] It could hardly be otherwise, as any other view would imply that the newly composed bench could – implicitly – overrule Germain Katanga's conviction.

[7] This also seems to be the point of view of the Victims, see Request, para. 55.

[8] I do not agree with the argument made in paragraph 58 of the Request that, because I decided to distance myself from the reasoning adopted by the Majority in the sentencing decision, I am inevitably bound to take a similar position when it comes to reparations. In my view, these are two completely different issues and there is nothing to prevent me from fully participating in the deliberations about reparations.

[9] Request, paras 34-40

V. Conclusion

15. Although I have argued against the criminal conviction of Germain Katanga, I have never argued that there were no civilian victims from the attack on Bogoro. To the extent that I was in the minority on the question of Germain Katanga's criminal responsibility, I accept that the victims of the crimes for which Germain Katanga was convicted potentially have a viable claim for reparations.

16. For the rest, I am serene about my position and I consider myself entirely capable of acting in an impartial and unbiased manner in these reparations proceedings. However, I would be equally unperturbed should a majority of colleagues consider that it is wiser for me to be disqualified and for an entirely new bench to conduct the reparations proceedings in this case.

[END]