

ANNEX I



**Cour
Pénale
Internationale**
**International
Criminal
Court**

**La Présidence
The Presidency**

**Internal memorandum
Memorandum interne**

To À	Judge Bruno Cotte Judge Fatoumata Dembele Diarra	From De	The Presidency <i>Shs</i>
Date	16 April 2014	Through Via	
Ref	2014/PRES/115	Copies	All Judges

**Subject |
Objet** **Decision on conclusion of term of office of Judges Bruno Cotte and
Fatoumata Dembele Diarra**

The Presidency, composed of the President (Judge Sang-Hyun Song), the First Vice-President (Judge Sanji Mmasenono Monageng) and the Second Vice-President (Judge Cuno Tarfusser), hereby decides upon the requests of Judges Bruno Cotte and Fatoumata Dembele Diarra to leave the Court before the reparations proceedings in the case of *The Prosecutor v. Germain Katanga*. The mandates of Judges Cotte and Diarra were extended on 11 March 2012 in accordance with article 36(10) of the Rome Statute of the International Criminal Court ("Statute").

The requests are granted.

Factual Background

1. On 7 March 2014, by memorandum to the Presidency, Presiding Judge Cotte made a request to leave the Court before the reparations stage in the case of *The Prosecutor v. Germain Katanga*. Judge Cotte stated:

I do not wish to continue my service at the Court beyond the sentencing phase, which it is, naturally, incumbent upon the three judges who tried the case to bring it to completion *en banc*. The "Reparations" phase, however, can, in my opinion, be carried out by a differently composed chamber, and I therefore feel that at this stage of the proceedings, my term of office should be duly ended.

2. Judge Cotte submitted that:

[T]here is no statutory provision against such a *caesura* in the trial, since the article on “Reparations to victims” (article 75) speaks not of the Chamber, as do all others in Part 6 on the trial, but of the Court itself. Likewise, continuation of a judge in his or her position beyond the end of his or her term, as provided for by article 36(10) of the Statute, would appear to apply only to the trial phase, which includes, of course, issuance of any sentence but not the, quite separate, victim reparations phase.

3. Judge Cotte further considered that:

[I]t would seem important to note that an extension to a judge’s term of office, a situation which should be an exception, must have a strict limit on its duration. In May or June 2014, when the sentencing phase will probably come to an end, my term, originally of four years, will have been extended by two years to six years: it should now be brought to a close.

4. On 11 March 2014, Judge Diarra, who also sits on the *Katanga* trial bench, confirmed to the Presidency that she also wishes to leave the Court after the conclusion of sentencing proceedings.

5. On 18 March 2014, the Presidency informed all judges of the requests and indicated that it had considered whether, in the circumstances of a judge serving pursuant to an extended mandate, a bench other than the one that issued the conviction may hear reparations proceedings. The Presidency stated that:

Given the limited jurisprudence [on reparations at the Court], the requests of the two *Katanga* judges, and the lack of express guidance in the Statute and Rules of Procedure and Evidence (“Rules”) on the composition of the bench for reparations purposes, it is necessary to consider the governing texts and Court practice to (i) assess any restrictions on the composition of the bench, and (ii) clarify, as necessary, the meaning of the words “trial” and “Court” in the relevant provisions of the Statute, to determine whether a bench other than the one that issued the conviction may hear reparations proceedings.

As the provisions in articles 74, 75 and 76 each relate to the concluding stages or phases of a case and cross-reference each other in relation to usage of the term “trial”, a brief discussion of the provisions is required before consideration of reparations. Finally, it is necessary to assess the ambit of article 36(10) pursuant to which a judge assigned to the Trial Chamber is to “continue in office to complete any trial [...] the hearing of which has already commenced in that Chamber”.

6. Upon consideration of the governing texts, Court practice, and the theory and conduct of criminal proceedings, the Presidency viewed the sentencing phase (article 76) as part of the trial. The Presidency then considered whether reparations proceedings should be viewed as part of the trial, in particular, with regard to the extension of mandate mechanism in article 36(10). The Presidency noted the following:

Article 75 is placed in Part VI of the Statute entitled “The Trial”. Pursuant to this article, the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims based on the scope and extent of any damage, loss or injury. If such order is made, the Court shall provide the principles underlying the order. The purpose of a reparations award is to provide an effective remedy to victims. Several rules, including rules 99, 143 and 144, pertain to the Trial Chamber and relate to reparations. However, neither

these rules nor the placement alone of article 75 in Part VI of the Statute are dispositive of whether reparations proceedings are part of the “trial”. To understand the relationship between reparations proceedings and the criminal proceedings, it is necessary to examine (i) the fundamental differences between each type; and (ii) Court practice and interpretation of the word “trial” in the governing texts.

The differences between reparations proceedings and criminal proceedings are numerous, spanning many aspects of substance and procedure. While the Court’s jurisprudence on reparations is limited, some differences, such as the participants and evidentiary standards, are evident. Notably, victims receive an enhanced procedural role in that they become parties to the proceedings, thereby altering the nature and focus of proceedings from punitive to reparative. The Appeals Chamber has held that “reparations proceedings are a distinct stage of the proceedings”.¹

This difference is reflected in the Statute. Unlike articles 74 and 76, which are directed to the Trial Chamber, article 75 describes actions to be taken by “the Court”. Notwithstanding this distinction, article 76 expressly foresees the Trial Chamber hearing evidence relevant to reparations during a sentencing hearing. Pursuant to article 76(3), “...any representations under article 75 shall be heard during the further hearing [for additional evidence or submissions on sentence]”. This provision, which acknowledges the need for judicial economy, must be without prejudice to the distinctly different purposes of sentencing and reparations. The remainder of article 76(3) foresees the possibility that additional hearings on reparations may be held, “if necessary”, regardless of whether sentencing hearings are continuing. The application of this provision is not time-limited. Therefore, a newly constituted bench (of a different constitution than the bench that heard the criminal case), convened for reparations proceedings after sentencing, could hear any additional relevant submissions before making a reparations order.

7. The Presidency considered Court practice in the areas of constitution of chambers and in relation to the adoption of rule 132 *bis*. The Presidency found that the term “trial” in articles 36(10) and 74(1) has been interpreted by considering the context and in light of the objective of fair, efficient and expeditious proceedings.

8. The Presidency concluded that:

[h]aving considered the governing texts, jurisprudence, Court practice and the difference in kind between criminal proceedings and reparations, there is no requirement for reparations proceedings to constitute a stage of the “trial” *stricto sensu*. As such, reparations need not be addressed by the Trial Chamber that issued the conviction and sentence. Consequently, article 36(10) does not apply to reparations proceedings.

9. In light of the foregoing and given the novelty of the issue of constitution of a chamber conducting reparations proceedings before the Court, on 18 March 2014, the Presidency informed all judges that it intended to grant the requests

¹ Appeals Chamber, 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 December 2012, ICC-01/04-01/06-2953 A A2 A3 OA 21, para. 64.

and invited the judges to provide their views, if any, by 25 March 2014. No judges disagreed with granting the requests made by Judges Cotte and Diarra.

Decision

10. As the Presidency is responsible for the proper administration of the Court in accordance with article 38, including the assignment of judges to chambers in accordance with article 39(1) and rule 4 *bis*, the present requests, which are made in relation to article 36(10), are properly before the Presidency.

11. The Presidency recalls the extension of mandate of Judges Cotte and Diarra that commenced on 11 March 2012. The Presidency further recalls that to date, the duration of the proceedings in the *Lubanga*, *Katanga* and *Bemba* trials has led to an extension of mandate of three judges, two judges and one judge, respectively.

12. With respect to the current requests, the Presidency has considered the relevant provisions of the governing texts, including articles 75, 36(10) and 74(1), jurisprudence, Court practice and the difference in kind between criminal proceedings and reparations. All judges have considered the requests, including in relation to the requirements of the Statute and the future conduct of reparations proceedings, and all judges concur with the Presidency that the requests should be granted.

13. In these circumstances, in particular with consideration given to the fact that Judges Cotte and Diarra currently serve pursuant to an extended mandate under article 36(10), the requests are granted.

14. Noting that Judges Cotte and Diarra have indicated that the fact that they have requested to leave the Court at the conclusion of article 76 proceedings in the *Katanga* case may be made public, and considering that this decision does not contain any specific information which could merit confidentiality, and further considering that the issue determined in this decision may be of broader interest, this decision will be annexed to the subsequent decision of the Presidency replacing the judges in this case.