

Dissenting opinion of Judge Christine Van den Wyngaert

1. For the same reasons as expressed in my dissenting opinion of 26 June 2013,¹ I dissent from the current decision. I remain of the view that the Chamber should immediately render its decision under Article 74 of the Statute on the basis of the legal characterisation of the charges as set out in the confirmation decision.
2. Moreover, under the present circumstances, I consider it improper to ask the Defence to submit additional observations on the basis of the existing evidence.² In my view, the Chamber must first decide on the questions (a) whether or not the Defence can reasonably conduct an effective investigation in the DRC under the current circumstances, and (b) whether or not it is possible for Mr Katanga to meaningfully defend himself against the charges under article 25(3)(d) without further investigations.
3. In order to resolve these issues as expeditiously as possible, I would have scheduled the requested status conference³ at the earliest possible moment in order to give the parties an opportunity to fully litigate the practical obstacles faced by the Defence as well as the legal consequences thereof.
4. Until these questions have been resolved, I consider any decision on further procedural steps to be premature. I note, in this regard, that asking for the defence submissions on the basis of the existing evidence is unlikely to assist the Chamber in finding an answer to the question as to whether it would be fair to recharacterise the charges without further investigations. The Defence has already argued that it needs further investigations in order to be able to

¹ ICC-01/04-01/07-3388-Anx

² Majority Decision, para. 17.

³ "Réponse de l'Accusation aux 'Defence Second Observations following the Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013) ICC-01/04-01/07-3397-Conf", 25 September 2013, ICC-01/04-01/07-3402-Conf, para. 25-26.

properly defend Mr Katanga against the 25(3)(d) charge. I was under the impression that the Majority had already – as a matter of principle – accepted this need in its decision of 26 June 2013, at least in relation to three major topics.⁴ It appears that the Majority is now backtracking from its previous position. Indeed, by compelling⁵ the Defence to submit a (provisional?) defence brief on the basis of the existing evidence, the Majority seems to want to put the Defence’s argument (i.e. that no meaningful defence is possible without further investigations) belatedly to the test – presumably in the hope that such a brief will somehow reveal whether or not it is possible to mount a meaningful defence even without further investigations. However, unless the Defence manages to persuade the Majority that Mr Katanga cannot be convicted under article 25(3)(d), this exercise will not prove whether or not the defence was able to meaningfully defend itself *without* additional investigations, because nobody can know at this stage how much more persuasive the defence might have been *with* additional evidence.

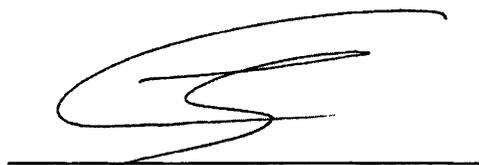
5. In sum, I believe that by asking the Defence to submit its – provisional - defence brief on the basis of the existing evidence, the Majority is putting the cart before the horse. Instead, the Chamber should hold a status conference as soon as possible and decide (a) whether or not the Defence can reasonably conduct an effective investigation in the DRC under the current circumstances, and (b) whether or not it is possible for Mr Katanga to meaningfully defend himself against the charges under article 25(3)(d) without further investigations. Only if the answer to the second question is positive should the Defence be asked to submit a brief on the basis of the existing evidence. However, if the answer to both questions is negative, the

⁴ “Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013”, 26 June 2013, ICC-01/04-01/07-3388, para. 18

⁵ The Majority Decision is couched as an ‘invitation’ but it is clear from the wording of para. 18 that this is the Defence’s last chance.

Chamber will have no choice but to refrain from recharacterising the charges and to proceed immediately to rendering judgment on the basis of article 25(3)(a).

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of several fluid, overlapping strokes that form a stylized, somewhat abstract shape. The signature is positioned above a solid horizontal line.

Judge Christine Van den Wyngaert

Dated this 2 October 2013

At The Hague, The Netherlands