

Dissenting opinion of Judge Christine Van den Wyngaert

1. Once again, I see myself constrained to dissent from the Majority. There is no need for me to repeat what I have already said in previous opinions about why I think the Majority's approach is not only unfair, but also wrong as a matter of law.¹ However, I am of the view that today's Majority decision is particularly problematic because it deprives the accused from the possibility of seeking recourse before the Appeals Chamber in order to protect his rights.
2. Indeed, the present decision is misleading because it poses as a non-decision, whereas in fact it constitutes a rejection of the Defence's alternative request to have additional time to investigate further. Significantly, the Majority does not say that the issue raised by the Defence – i.e. whether it should have the possibility to investigate further *in case the Majority decides to go ahead with its intention to change the legal characterisation of the form of criminal responsibility* – is moot or unfounded. Instead, the Majority pretends that it is simply repeating previous decisions in which it has already rejected the Defence's request for further investigations.
3. What is particularly troubling, in this regard, is that the Majority is once again backtracking from one of its previous positions. As I already pointed out in my dissenting opinion of 2 October 2013, I had been under the impression until then, when reading the Majority's decision of 26 June 2013,² that the Majority had accepted – as a matter of principle – that the Defence was entitled to a meaningful opportunity to conduct further investigations on a limited but important number of topics, i.e. the attack on Nyankunde and/or other attacks predating the one on Bogoro, the identity of the physical

¹ ICC-01/04-01/07-3319, ICC-01/04-01/07-3371-Anx, ICC-01/04-01/07-3388-Anx, ICC-01/04-01/07-3406-Anx ; ICC-01/04-01/07-3412-Anx.

² "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. 17-18.

perpetrators of crimes committed at Bogoro, and the link between the weapons delivered to the Ngiti combatants and the crimes committed at Bogoro.³

4. The Majority's decision of 2 October seemed to retract this principled recognition of the Defence's right to investigate, but at least it left open the possibility that the Chamber might still authorise further investigations, once all the relevant submissions had been received. Today, however, the Majority seems to abandon even this option.
5. Indeed, when the Majority decided on 2 October 2013 to 'invite' the Defence to submit a provisional Defence brief on article 25(3)(d), it expressly left open the possibility that it might still give the Defence a further opportunity to investigate. At least, this is the only reasonable way in which I can read the last two sentences of paragraph 18 of the said decision:

*Si, d'aventure, des éléments de preuve complémentaires devaient être ultérieurement produits, la Défense pourra, cela va de soi, déposer de nouvelles observations à la lumière des éléments ainsi recueillis. Une telle adjonction demeure toutefois encore hypothétique ce qui explique pourquoi la Chambre, dans un souci de célérité, demande dès maintenant les observations précitées.*⁴

6. Now, however, the Majority tells us that what it really intended to say with the above-quoted language was that it did not want to exclude the hypothesis whereby the Defence would want to submit further evidence that it *had already gathered* during previous investigations.⁵ With all due respect for my

³ "Décision relative aux observations de la Défense (document 3397-Conf du 17 septembre 2013) – Dissenting Opinion of Judge Christine Van den Wyngaert", 2 October 2013, ICC-01/04-01/07-3406-Anx.

⁴ ICC-01/04-01/07-3406, para. 18.

⁵ The exact words of the Majority are: "si la chambre a, dans sa décision du 2 octobre 2013, envisagé un hypothétique dépôt d'éléments de preuves complémentaires, il ne s'agissait d'évidence pour elle que d'éléments de preuves recueillis à l'occasion d'enquêtes déjà effectuées et dont le dépôt lui paraissait désormais indispensable à sa cause."

colleagues, this 'reinterpretation' is less than persuasive, as it clearly goes against reason and the wording of their own paragraph. Indeed, it would have made no sense whatsoever for the Majority to instruct the Defence to submit a 40 page document on the basis of the "preuve existant au dossier" but to leave open the possibility for the Defence to later add further evidence *that it already had* when submitting its brief. Frankly, such a suggestion would be absurd. The only reasonable interpretation of paragraph 18 of the decision of 2 October 2013 is, therefore, that the Majority explicitly left open the possibility that it might still give the Defence more time to conduct further investigations. Accordingly, it is plainly incorrect to suggest that today's decision merely repeats what was decided on 2 October 2013. To the extent that today's decision reverses the Majority's previous decision, it therefore constitutes a new decision, which may be subject to appeal on the basis of article 82(1)(d).

7. As the Majority is now effectively deciding that the Defence will not be allowed to conduct further investigations, I feel compelled to express my deep concern in this regard. Although I still remain of the view that the only appropriate course for this Chamber is to render its verdict under article 25(3)(a) without further delay, I strongly believe that, if the Majority were minded to ignore my position and the reasons for it and to proceed on the basis of article 25(3)(d), the Defence should be given an opportunity to conduct further investigations. This view is entirely in line with the Appeals Chamber's judgment of 27 March 2013, in which the Appeals Chamber went out of its way to *emphasise* and *underscore* the necessity of guaranteeing the accused's fair trial rights.⁶ In particular, the Appeals Chamber stressed the

⁶ Appeals Chamber, "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons'", 27 March 2012, OA13, ICC-01/04-01/07-3363, paras 85-105.

need for this Chamber to ensure Mr Katanga's right to have adequate time and facilities for the *effective* preparation of his defence.⁷

8. It seems self-evident to me that the Chamber must rule on these matters now, when it is still possible to implement the fair trial rights of the accused. Once there is a judgment on the merits, it will be too late to protect the accused's rights. This is why I insist that the Majority should have ruled today on the twin questions of (a) whether it is necessary for the Defence to conduct further investigations and (b) whether it is possible for the Defence to conduct such further investigations within a reasonable time in the foreseeable future. If the Majority, after finding that further investigations were required as a matter of fairness, had concluded that such investigations would be impossible because of security concerns in the region, I would understand if the Majority decided to reserve its opinion on the *legal consequences* of such a finding for the article 74 decision. However, it is not possible, in my view, to skip the first step, namely: making a principled decision as to whether further investigations are necessary and, if so, whether it is feasible to conduct them within a reasonable delay.
9. By refusing to rule on these issues now, the Majority is effectively shielding itself from appellate review. This is because the Appeals Chamber will never be able to meaningfully review the reasons which led the Majority to reject the Defence's request to have additional time for further investigations. If the Majority were to ultimately decide in the article 74 decision that further investigations were not necessary, it will not be possible for the Appeals Chamber to reverse this decision in a manner that safeguards the Defence's rights, because the Chamber will already have rendered its final judgment without having seen the additional evidence that the Defence might have

⁷ ICC-01-04-01/07-3363, para. 95.

presented after additional investigations. If the Appeals Chamber were to reverse the Majority on the question of necessity, the only possible conclusion therefrom would be that the conviction must be quashed, with the possibility of a retrial. However, this option will undoubtedly seem extremely unattractive to the Appeals Chamber, especially in terms of the time and cost implications. Even though it cannot be assumed that the Appeals Chamber will be guided by such considerations, it is undisputable that these concerns would not be on the minds of the Appeals Chamber's judges at all if they could review the question of necessity before and separately from the article 74 decision. Moreover, this is the only way to avoid irreparable damage to the rights of the Defence at this stage, as the Appeals Chamber cannot retroactively order further investigations.

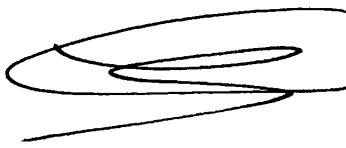
10. In the scenario where the Majority were to rule that further investigations were not possible within a reasonable amount of time, it will be even more difficult for the Appeals Chamber to exercise meaningful appellate oversight. Indeed, it is hard to see how the Appeals Chamber will be able to evaluate several months after the article 74 decision was rendered whether it was reasonable to say at the time when the article 74 decision was issued whether the facts and circumstances in November 2013 were such that it was unrealistic to expect that additional investigations would be possible within a reasonable amount of time. *Now* is the only appropriate moment to make such an assessment, not within several months, when the article 74 decision will be rendered. I note, in this regard, that recent developments in eastern DRC may have a profound impact in this regard.⁸ However, my colleagues seem to have already made up their minds on this point without much concern for the

⁸ I refer, in this regard, to the widely reported defeat and surrender of the M23 rebel group in eastern Congo. It would have been incumbent upon the Chamber to at least analyse the impact of these events on the situation in Ituri and the prospect of further investigations.

actual situation on the ground, as was demonstrated by their regrettable refusal to hold a status conference on this question.⁹

11. In the interest of not being misunderstood, I want to make it clear that I am not saying that the Defence should be given more time to investigate. I think there is no need for such investigations, simply because I believe it is impermissible to recharacterise the charges under article 25(3)(d) at this stage of the proceedings. What I *am* saying, however, is that, if the Majority is still contemplating this possibility, it is incumbent upon it to render a decision *now* on whether it is necessary and feasible for the Defence to conduct further investigations in order to allow meaningful appellate review and to avoid irreparable harm to the accused's interests. Indeed, for Mr Katanga this may mean the difference between having to argue before the Appeals Chamber to set aside a conviction because the Trial Chamber erred in not giving his Defence additional time to investigate and not being convicted at all because the additional evidence convinced the Trial Chamber that the charges under 25(3)(d) were subject to a reasonable doubt.

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



Judge Christine Van den Wyngaert

Dated this 19 November 2013
At The Hague, The Netherlands

⁹ "Ordonnance relative aux Observations de la Défense sur les Observations du Greffier, du Procureur et des Représentants légaux (document 3407-Conf du 4 octobre 2013", 10 October 2013, ICC-01/04-01/07-3412, and my dissent thereto, "Dissenting opinion of Judge Christine Van den Wyngaert" ICC-01/04-01/07-3412-Anx.