

Concurring opinion of Judges Fatoumata Diarra and Bruno Cotte

1. We have taken note of the dissenting opinion filed by Judge Christine Van den Wyngaert and of course leave her with full responsibility for what she has written. We will confine ourselves to a number of brief but necessary observations.
2. In the dissenting opinion, reference is made to “the Majority’s case” not unlike what is often referred to as “the Prosecution case”. There is even a suggestion that by changing the characterisation on the basis of article 25(3)(d)(ii) of the Statute, the Majority in some way assumed the function of the Prosecution. We should not find ourselves compelled to make clear that we in no wise sought to appropriate a “case”, and even less, to take the place of the Prosecution. Indeed, we are fully aware of its role and prerogatives and have no intention of encroaching on its authority. We understand, and have understood for a long time, our own role and the limits in which we must operate. As is the duty of any judge, we merely conducted, with objectivity and without preconceived ideas, as careful and thorough an examination of the evidence in the record as possible. Far from seeking to demonstrate our own creativity, we have done no more than observe that the factual allegations supporting recharacterisation under article 25(3)(d)(ii) of the Statute were identical to those on which the Prosecution originally presented its case under article 25(3)(a) of the Statute.
3. We wish to express our astonishment at reading in the conclusion of the dissenting opinion that the charges against Germain Katanga under article 25(3)(d) of the Statute are a creation of the Majority alone for the probable purpose of arriving at a conviction not possible under article 25(3)(a). In this regard we would merely recall that when a case has been referred to it by a Pre-Trial Chamber, the Trial Chamber must examine its every aspect, must refrain from forming an opinion prematurely and must apply all the

texts available. We understand the principle of legality as well as that of fair and impartial proceedings, which have informed our approach throughout this case.

4. The dissenting opinion also implies that we encountered difficulty in complying with the standard of proof required by the Court's founding texts and the demands of dispassionate rigour they prescribe. The opinion even suggests that we have ruled on the basis of our own intimate conviction. We merely recall that the evidentiary standard based on a proof *beyond reasonable doubt* cannot imply that judges have reached "certainty". Moreover, the approach whereby the probative value of each piece of evidence is evaluated in a fragmentary manner or one which would lead to the application of the beyond reasonable doubt standard to *all* the facts in the case, and even to those not indispensable for entering a conviction, would not, in our view, be consistent with the requirements of the Statute.
5. More generally, the dissenting opinion is critical of the quality of the evidence presented. We wish to emphasise the need for a distinction between the necessary rigour which must be shown – as was the case here as regards several witnesses considered not credible and for different charges – and excessive rigidity which we find incompatible with the functions of the judge in general and cases of the kind brought before the Court in particular. In this regard, we must not forget that Ituri is a district which for years has lived with war or, at the very least, in a climate of permanent insecurity. The witnesses called in this case have in fact all directly or indirectly witnessed or experienced war. Such a situation had to have been the cause of the genuine difficulties they experienced in associating their memories with places and dates and, for some, in explaining acts and words which form part of survival strategies. Nonetheless, some witnesses were able to speak credibly about specific memories sometimes referring to the events which Bogoro experienced on 24 February 2003 and which were at the heart of the

proceedings. There were, it must be recalled, several such witnesses in this case, and it was, in particular, on the basis of their testimony, that we ruled on the criminal responsibility of Germain Katanga.

Dated this 7 March 2014, at The Hague

[signed]

Judge Bruno Cotte

[signed]

Judge Fatoumata Dembele Diarra