

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-01/07

Date: 3 March 2010

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Confidential, Ex Parte available to the Defence for Mr. Katanga and Registrar only

**Defence Additional Information to Motion for Cooperation of the DRC
Government**

Source: Defence for Mr Germain Katanga

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

**Counsel for the Defence for Germain
Katanga**

Mr David Hooper

Mr Andreas O'Shea

**Counsel for the Defence for Mathieu
Ngudjolo Chui**

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. By email on 1st March 2010, the Chamber requested the Defence for Mr. Katanga ("Defence") to provide further details on the requirements set out in articles 96(2)(d) and (e) in addition to the details set out in Annex 5 of the Defence Urgent Request for Cooperation of the DRC Government dated 23rd February 2010 ("Motion for Cooperation").¹
2. As a preliminary observation, the Defence points out that all necessary information is contained in the Motion for Cooperation. The DRC authorities are best placed to provide the requested additional information on the mechanisms and legislation in place in the DRC to execute cooperation requests. Given that the Defence has no direct communication channel with the DRC, it is difficult for the Defence to submit all details requested in article 96(2). In their commentary on article 96 in Triffterer, Kress and Prost refer to an obligation on the Court, not the Defence, "to provide sufficient information as may be required by the law of the requested State for the request to be executed".² The Defence, therefore, takes the view that the burden of providing all details under article 96(2) is not on the Defence but on the Court. The Defence merely provided the Chamber with this information as a matter of courtesy and to accelerate the proceedings. In addition, the Defence notes that, in respect of a previous request for cooperation, the Pre-Trial Chamber considered similar information under articles 96(2)(d) and (e) sufficient.³
3. The difficulties of providing all information in support of a request have been acknowledged.⁴ Therefore, the Defence proposes that the Court makes a request to the DRC to consult with it, in accordance with article 96(3), "either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law."

¹ ICC-01/04-01/07-1900-Conf-Exp, filed on 24th February 2010.

² C Kress and K Prost 'Article 96' Commentary on the Rome Statute of the International Criminal Court (Triffterer ed. 2008), pages 1595-1596.

³ Decision on the "Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)", ICC-01/04-01/07-444, rendered on 25 April 2008.

⁴ C Kress and K Prost 'Article 96' Commentary on the Rome Statute of the International Criminal Court (Triffterer ed. 2008), page 1598.

4. With these observations in mind, the Defence hereby submits the following additional details.

Article 96(2)(d): reasons for and details of the essential facts underlying the request

5. The Defence submits that its request for documents is a simple and straightforward one. The success of its implementation mostly depends on the willingness of the DRC authorities to provide the Defence with the requested information. According to Kress and Prost, the information under article 96(2)(d) should be given only if there is a request for special measures or a particular procedure to be put in place.⁵ The Defence does not have any specific request for special measures to be taken or a certain procedure to be followed in executing its request. The Defence has no particular preference in how the request should be complied with and leaves it in the hands of the DRC authorities to determine the most effective and speedy way to implement the request.

Article 96(2)(e): information as may be required under the law of the DRC in order to execute the request

6. The Defence is not aware of any specific requirements under the DRC national law that need to be met in order to execute the Defence request for cooperation. Article 96(2)(e) would be applicable where, for instance, the information sought can only be obtained through a search. In such a situation, it would be necessary to abide by the applicable DRC national legal provisions.⁶ Such is not the case in the present situation. The information sought is in possession of the DRC Government itself and does not, therefore, require the application of any specific DRC legal provisions. The Defence is unaware of any DRC legal provision preventing the DRC authorities to provide it with the information sought.
7. The Defence submits that, in order to safeguard the principle of equality of arms, its request should be treated similarly to Prosecution's requests for cooperation under the agreement on cooperation between the Prosecution and DRC. It is noteworthy that the

⁵ C Kress and K Prost 'Article 96' Commentary on the Rome Statute of the International Criminal Court (Triffterer ed. 2008), page 1597.

⁶ *Ibid.*

Prosecution has no obligation under its agreement of cooperation with the DRC to provide it with any documentation. Further, pursuant to article 25 of this agreement, the DRC has an obligation, where necessary for the investigations and prosecution by the Court, to provide the Prosecution with access to the national archives and official documents.⁷ The Defence submits that, similarly, the DRC should provide the Defence with access to the national archives and official documents.

8. The Defence further notes that the agreement on mutual assistance in criminal matters with SADC States, signed and ratified by the DRC, sets out the following requirements in relation to requests for mutual assistance.⁸

ARTICLE 5: CONTENTS OF REQUESTS

In all cases, requests for assistance shall indicate:

- the competent authority in the Requesting State conducting the investigation, prosecution or proceedings to which the request relates;
- the nature of the investigation, prosecution or proceedings, and include a summary of the facts and a copy of the applicable laws;
- the purpose of the request and the nature of the assistance sought;
- the degree of confidentiality required and the reasons therefor; and
- any time limit within which the request should be executed.

In the following cases, requests for assistance shall include:

- in the case of requests for the taking of evidence, search and seizure, or the location, restraint or forfeiture of proceeds of crime, a statement indicating the basis for belief that evidence or proceeds may be found in the Requested State;
- in the case of requests to take evidence from a person, an indication as to whether sworn or affirmed statements are required and a description of the subject matter of the evidence or statement sought;
- in the case of temporary transfer of exhibits, the current location of the exhibits in the Requested State and an indication of the person or class of persons who will have custody of the exhibits in the Requesting State, the place to which the exhibit is to be removed, any tests to be conducted and the date by which the exhibit will be returned; and
- in the case of ensuring the availability of detained persons an indication of the person or class of persons who will have custody during the transfer, the place to which the detained person is to be transferred and the date of that person's return.

Where possible, requests for assistance shall include:

- the identity, nationality and location of a person who is the subject of the investigation, prosecution or proceedings;
- details of any particular procedure or requirement that the Requesting State wishes to be followed and the reasons therefor.

If the Requested State considers that the information is not sufficient to enable the request to be executed, it may request additional information.

A request shall be made in writing. In urgent circumstances, a request may be made orally but shall be confirmed in writing promptly thereafter.

⁷ ACCORD DE COOPERATION JUDICIAIRE ENTRE LA REPUBLIQUE DEMOCRATIQUE DU CONGO ET LE BUREAU DU PROCUREUR DE LA COUR PENALE INTERNATIONALE.

Article 25 provides : « En vertu des dispositions du present accord, et sous réserve de la protection de renseignements touchant à la sécurité nationale, conformément au Statut de Rome, la République Démocratique du Congo assurera et facilitera l'accès aux archives et documents officiels lorsque de telles informations sont nécessaires aux enquêtes et aux poursuites. »

⁸ <http://www.sadc.int/index/browse/page/156#5>.

9. According to Kress and Prost, requests for cooperation with the ICC cannot be more burdensome than requests from States for cooperation or mutual assistance.⁹ Accordingly, the Defence submits that similar criteria apply to the present request for cooperation.

Respectfully submitted,



David HOOPER

Dated this 3rd March 2010

At The Hague, Netherlands

⁹ C Kress and K Prost 'Article 96' Commentary on the Rome Statute of the International Criminal Court (Triffterer ed. 2008), page 1560.