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Date: **25 August 2011**

**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***

**Public**

**Redacted version of  
Urgent Defence 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:

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**Amicus Curiae**

**REGISTRY**

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**Registrar**

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Introduction

1. The Defence for Mr. Katanga ("Defence") requests the Chamber to assist in obtaining the cooperation of the DRC authorities on the matter of certain defence investigative inquiries. The Defence has made these inquiries to the DRC authorities directly, but to no avail. Given that the inquiries in question are crucial to the preparation of Mr. Katanga's defence, the Defence stresses the importance of having them answered as soon as possible. Therefore, the Defence requests the Chamber's assistance on these issues as a matter of urgency. The Defence understands the procedure in place to be that, if the Chamber grants this request for assistance, the Chamber will then issue an order to the Registrar to prepare and transmit a cooperation request in accordance with articles 87, 93 and 96 of the Rome Statute and rule 177 of the ICC Rules of Procedure and Evidence.<sup>1</sup>
2. The issues concerned exclusively relate to defence inquiries. To secure the confidentiality of the defence investigations made on behalf of Mr. Katanga, the Defence submits this Motion on an *ex parte* and confidential basis, available only to the Chamber and Registrar.

## Procedural History

3. In the course of the defence investigations, members of Mr. Katanga's defence team have spoken to DRC military and civilian officials on matters including the various programs put in place by the government to demobilise militia in Ituri and reintegrate them into civilian life or the army, as well as Mr. Katanga' role therein. The Defence also made inquiries into the role of the Central Government at Kinshasa, the *Etat-Major Opérationnel Intégré* (EMOI), RCD-K/ML, APC and other armed or political groups in offering training, delivery of weapons and other supplies, or providing assistance in any other way to the Lendu and Ngiti militia in Ituri. While the Defence has received some information, it was unsuccessful in obtaining any documents. The Defence did not succeed in obtaining even the least controversial documents, such as documents relating to CONADER operations,<sup>2</sup> the DDR programme,<sup>3</sup> or lists of

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<sup>1</sup> As was done by the Pre-Trial Chamber in respect of a similar defence request for cooperation: see the Pre-Trial Chamber's *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.

<sup>2</sup> CONADER was a Government-run organisation in charge of implementing demobilization, reinsertion and reintegration programs in collaboration with MONUC.

combatants who participated in the various programmes put in place. The Defence has been informed that such information is in possession only of the army intelligence service and the Ministry of Defence. The Defence has been advised to write an official letter to the DRC government to request such documents.

4. The Defence has also requested the Prosecution for information, *inter alia*, on the role and involvement of the UPC, UPDF, APC and RCD-KML. The Prosecution responded that it has provided the Defence with all relevant information in its possession in relation to the UPC, UPDF, APC and the RCD-K/ML (see Annex 1).
5. Accordingly, on 6 October 2009, the Defence sent a letter by post addressed to certain DRC authorities, notably the '*Ministre de la Défense et Démobilisation des Anciens combattants*', the '*Ministre de la Justice et Garde des Sceaux*' and the Ambassador of the DRC based in Brussels (see Annex 2). In this letter, the Defence requested the cooperation of the DRC government in obtaining information and documents concerning the involvement and role, if any, of the DRC government, as well as the various other political and military groups in the conflict in Ituri between January 2002 and August 2003. It also requested documents relating to the demobilization, reinsertion and reintegration programs, Mr. Katanga's role in their implementation and lists of participants.
6. On 7 October 2009, the Defence sent that same letter by email to the email addresses of the Ministry of Defence, the Ministry of Justice and the DRC Embassy in Brussels (see Annex 3). The Defence did not receive any acknowledgement of receipt, notwithstanding its request to receive an answer within 21 days of receipt of the letter.
7. On 27 October 2009, Mr. Logo, the resource person in the defence team of Mr. Katanga, personally delivered copies of this letter to Ministry of Justice and the Ministry of National Defence. On that occasion, a stamp was placed on both copies as an acknowledgement of their receipt (see Annex 4).

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<sup>3</sup> DDR stands for *Démobilisation, Désarmement et Réinsertion*.

8. The Defence has received no answer. Accordingly, on 28 and 29 December 2009, Mr. Logo paid a visit to both Ministries to inquire about any initiatives taken by either or both Ministries to respond to the requests from the Defence. On this occasion, Mr. Logo spoke to the Secretaries at both Ministries. They informed him that the responses to these letters were not yet finalized but that they were currently being dealt with. Mr. Logo unsuccessfully sought to receive further details as to the time limit within which an answer was to be expected, but was merely told to be patient. He further requested to see the Ministers, one of their advisors or other members of their cabinets to discuss the matters set out in the letter, but this was refused.
  
9. Today, 23 February 2010, over four months after the initial letter was sent, the Defence is still waiting for an answer to all its inquiries. Despite its best efforts, the Defence has no indication as to when such answer, if any, is to be expected. The matter is now urgent, given that the trial is advancing. To accelerate this process, the Defence requests that the Chamber order the Registrar to prepare and transmit urgently a cooperation request to the relevant DRC authorities using her usual channels of communication, and that such request emphasise the importance of its prompt execution.

### **Legal Basis**

10. In making this request, the Defence relies on article 64(6)(b) and part IX of the Rome Statute.
  
11. Pursuant to article 64(6)(b), the Chamber may, as necessary, require the production of documents and other evidence “by obtaining, if necessary, the assistance of States as provided in this Statute”.
  
12. Part IX of the Statute deals with State cooperation. Article 86 sets out the general obligation on States Parties, in accordance with the provisions of this Statute, to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”

13. Article 87 authorises the Chamber to make requests to States Parties for cooperation. Rules 176 to 180 sets out details regarding the modalities in making such requests.
14. Pursuant to article 93(1)(d), (i) and (l), States Parties shall comply with requests by the Court to provide assistance in ‘[t]he service of documents, including judicial documents’ (d); ‘[t]he provision of records and documents, including official records and documents’ (i); and ‘[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.’
15. In accordance with article 96(2), a request for cooperation must contain or be supported by:
- (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
  - (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
  - (c) A concise statement of the essential facts underlying the request;
  - (d) The reasons for and details of any procedure or requirement to be followed;
  - (e) Such information as may be required under the law of the requested State in order to execute the request; and
  - (f) Any other information relevant in order for the assistance sought to be provided.

### **Application of legal provisions**

16. In accordance with article 64(6)(b), the Chamber may, where necessary, call upon States for their cooperation in obtaining documents and other evidence. Part IX of the Statute specifies that States Parties have an obligation to cooperate with the Court in the collection of information with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.
17. The Defence submits that these provisions must be read in conjunction with the Chamber’s mandates to ascertain the truth and to safeguard the fairness of the proceedings as set out in articles 69(3) and 64(2), respectively. To fulfill the truth-ascertaining mandate satisfactorily, Chambers should have the greatest access possible to any available evidence that is relevant to the charges. Where one or both parties are hindered in obtaining information relevant to their case, the Chamber is deprived of an opportunity to review such information, which hampers its truth-ascertaining mandate.

18. In order to ascertain the full and objective truth and not a one-sided truth presented largely by one party, it is important that both parties have a fair and equal opportunity to present their case before the bench. Investigations are the main tool to prepare and present a case adequately. The investigation referred to in Part IX must, therefore, necessarily include defence investigations. If not, the investigation may not be complete as certain information relevant to the Defence may not have been fully explored.
19. In addition, for the proceedings to be fair, it is important that the Defence has the greatest possible access to any information which is relevant to the charges against the accused. Only if the Defence is in possession of all or, at least, most of such information can it adequately prepare a defence. The Defence appreciates the Prosecution's efforts to search for and disclose all incriminating and exonerating evidence in accordance with its obligation to do so under articles 54(1)(a) and 67(2), and rule 77. However, the Defence should not have to rely on the Prosecution only to obtain such evidence.
20. The duty of the Prosecution to disclose to the Defence any information in its possession which appears to be relevant to the preparation of the defence case is to be distinguished from the duty to investigate incriminating and exonerating circumstances equally and to obtain any evidence relevant to the defence case. It appears from the communication between the parties that the Prosecution in the present proceedings does not perceive its role to be to conduct defence investigations, but rather to disclose any relevant information in its possession.<sup>4</sup>
21. Despite its best intention and efforts, the Prosecution, which has a mandate to prove the case against the accused, may not be best placed to look equally and simultaneously for any evidence that may undermine its opportunity to prove its case. The Defence is in a better position to appreciate the relevance of material to the preparation of its case.

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<sup>4</sup> See Annex 1.

22. It is for these reasons of importance that the Defence is given a full and equal opportunity to investigate the case against the accused independently of the party that is seeking to incriminate him. It should be appreciated that the Prosecution and Defence are from the outset not on an equal footing in conducting investigations. The Prosecution enjoys clear advantages over the Defence in obtaining legal assistance from the State, which is essential to conducting investigations efficiently. For instance, article 54(3)(c) authorises the Prosecution to issue requests for assistance to States directly, which States Parties must carry out pursuant to articles 86 and 93. The Prosecution may also enter into arrangements or agreements with States to facilitate their cooperation pursuant to article 54(3)(d) of the Statute. The Prosecution has entered into such an agreement with the DRC and may, therefore, count on its cooperation. The Defence, on the other hand, does not benefit from this agreement and does not enjoy a similar cooperation from the DRC government, as is illustrated by this present request.

23. The Defence requests the Chamber's full assistance to rectify this inequality. This is in line with the spirit of other international criminal courts and tribunals where the need for assistance is fully recognised. In the Tadic case, for instance, the ICTY Appeals Chamber held:<sup>5</sup>

(...) the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses.

24. The Pre-Trial Chamber in the present proceedings has previously recognized the difficulties of the Defence in obtaining the cooperation from the DRC government, and granted a Defence request for assistance in seeking the cooperation of the DRC government.<sup>6</sup> The Pre-Trial Chamber relied on article 57(3)(b) of the Statute in conjunction with rule 116, which provide an explicit basis upon which the Pre-Trial Chamber may grant a Defence request for assistance in seeking the cooperation of a

<sup>5</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber's Judgment, 15 July 1999, para. 52 (available at <http://www.un.org/icty/tadic/appeal/judgement/index.htm>).

<sup>6</sup> 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.

State, provided that this “would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person's defence”.<sup>7</sup>

25. The Defence recognizes that there is no such explicit basis upon which the Trial Chamber may rely to grant the present request. The Chamber may, however, exercise its judicial discretion and rely on article 64(6)(b) and Part IX of the Statute to grant the present request. In compliance with article 96(2), the Defence has sought to provide sufficient details in this Motion about the purpose of the request, the assistance sought, and the essential facts underlying the request. In addition, the Defence includes as Annex 5 a concise statement addressing each specific requirement under article 96(2) (a-f). The Defence will further explain below the relevance of the information sought to the proper determination of the issues being adjudicated and to the proper preparation of Mr. Katanga’s defence.

#### **Relevance of the information sought**

26. The Defence submits that the information sought is crucial for the preparation of Mr. Katanga’s defence and the proper determination of the case. The level of involvement of political and armed groups other than the FRPI and FNI forces in the crimes charged is clearly relevant, [REDACTED]. Such information would put the case in a different light and assist the truth-ascertaining task of the judges.

27. In addition, MONUC as well as a number of Prosecution witnesses refer to the presence of FAC, APC and, or UPDF soldiers in Bogoro during the attack on 24 February 2003.<sup>8</sup> [REDACTED].

28. As for the demobilization programme, the Defence has been informed that Mr. Katanga played a significant role in the implementation thereof. His role in restoring peace and security in Ituri should be fully explored [REDACTED].

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<sup>7</sup> *Ibid*, page 5.

<sup>8</sup> See, for instance, MONUC Report DRC-OTP-0202-0785, as well as the interviews with PW-28, PW-166, and PW-323.

29. The Defence has an interest in receiving information about the demobilization programme in order to learn about the benefits offered to those participating in the programme. Such benefits may have been a motive for people to present themselves as combatants even if they were not combatants. The Defence has information that this frequently occurred or that combatants demobilized twice. For that same reason, the Defence would like to have access to the criteria that were used to assess whether a person who wanted to participate in the demobilization programme was, in fact, a combatant.

30. The Defence also wishes to have sight of the lists of combatants who have participated in the demobilization programme to verify whether the names of certain Prosecution witnesses who claim to have been combatants appear on those lists.

### **Relief Sought**

On these grounds, the Defence requests the Trial Chamber to issue an order to the Registrar to prepare and transmit a cooperation request to the DRC government in accordance with articles 87, 93 and 96 of the Rome Statute and rule 177 of the ICC Rules of Procedure and Evidence, asking it to urgently provide the answers and information sought by the Defence in its letter of 6 October 2009, attached as Annexes 2 and 4, and set out in Annex 5.

Respectfully submitted,



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David HOOPER Q.C.

Dated this 25 August 2011

At The Hague