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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 the
Urgent
Second 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:

The Office of the Prosecutor

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A. Introduction

1. The Defence for Mr. Katanga (« Defence ») has previously approached the Chamber for assistance in obtaining the cooperation of the Democratic Republic of Congo (“DRC”), as set out below. The matter was adjourned in order to give the Defence a further opportunity to secure the cooperation of the DRC without judicial intervention, in particular with the facilitation of contact through the Prosecutor. These initiatives have not been successful. Accordingly, the Defence again seizes the Chamber of the matter and refers to its previous requests in the matter.

2. The Defence has now given every reasonable opportunity to the DRC authorities to cooperate with Defence investigations without the intervention of the Chamber. The Defence believes that the time has come again when it has no alternative but to turn to the Chamber for assistance in order to protect the rights of the accused in the necessary preparation of his case. The assistance sought relates to potentially relevant and exculpatory matters. The trial is at a sufficiently advanced stage to cause the Defence to have reasonable concern that were this application to be made at a later date the rights of the accused might be prejudiced by delay in the trial or the loss of evidence relevant to the innocence of the accused or the mitigation of any sentence.

3. The issues concerned relate exclusively to defence inquiries. These matters do not, at this investigative stage of Defence, concern any other party to the proceedings. For this reason and to secure the confidentiality of the defence investigations made on behalf of Mr. Katanga, the Defence submits this Motion and its Annexes on an *ex parte* and confidential basis, available only to the Chamber. It should be noted that the discussions with the Chamber on the 3rd May 2010 on the nature of the Defence inquiries and steps taken by the Defence took place *ex parte* all parties save the Katanga Defence. Counsel only gave a limited summary of the issue in that part of the hearing with the presence of the Prosecution, where the Chamber sought certain clarifications from the Prosecution. The motion and its annexes generally reveal the Defence case and strategy. Annexes 5 and 6 include highly confidential material, to inform the Chamber of matters in relation to which it previously requested clarification. Annex 5 includes the identities of persons spoken to by the Defence and a summary of what they said about the issues relevant to this request for cooperation. Annex 6 provides details of contacts between the Defence and other organizations. The Defence has agreed to keep confidential the identities of,

and information from the persons concerned, many of whom are concerned that they will be deeply prejudiced in relation to the DRC authorities were it known that they have provided information to the Defence.

B. Procedural History

4. On 23 February 2010, the Defence submitted its original Motion for Cooperation of the DRC Government.¹ In this Motion, the Defence had set out the steps it had taken to obtain the documents sought, albeit to no avail. On 6 and 7 October 2009, it had sent a letter by post and email addressed to 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.²
5. 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. Having received no acknowledgement of receipt or answer to any of the questions, Mr. Logo, the resource person in the defence team of Mr. Katanga, personally delivered copies of this letter to the Ministry of Justice and the Ministry of National Defence on 27 October 2009, and returned to both Ministries on 28 and 29 December 2009 to inquire about any initiatives taken to respond to the requests from the Defence. He spoke to the secretaries and courier services at both Ministries and was simply informed that the letter was in the process of being addressed.
7. Since none of the Defence initiatives were successful, on 23 February 2010, the Defence requested the assistance of the Chamber in this matter. The Chamber then invited the Katanga Defence for an *ex parte* hearing, attended by the Katanga Defence

1 ICC-01/04-01/07-1900-Conf-Exp, Urgent Defence Motion for Cooperation of the DRC Government, notified on 24 February 2010. A redacted confidential version was made available to the Prosecution and Defence for Mr. Ngudjolo on 23 April 2010 (ICC-01/04-01/07-1900-Conf-Exp-Red).

2 ICC-01/04-01/07-1900-Conf-Exp-Anx2.

only,³ followed by an *ex parte* hearing, attended by the Prosecution and Katanga Defence,⁴ both of which took place on 3 May 2010.

8. At this hearing, the Prosecution informed the Chamber and Defence of meetings it had recently had with the DRC authorities where the Defence request for cooperation had been discussed and the DRC authorities had expressed willingness to assist.⁵ The Prosecution offered its assistance in facilitating contact between the Defence and the DRC authorities regarding the Defence inquiries.⁶ The Defence gratefully took up that opportunity and the Motion was set aside pending new attempts from the Defence to obtain the information directly from the DRC authorities.⁷
9. The Office of the Prosecutor informed the Defence on the 12th May 2010 that it had from the previous Monday 10th May liaised with the [REDACTED] and [REDACTED]. From the explanations offered by the Prosecution at the *ex parte* hearing of the 3 May, it was apparent that the procedure was that the matter passed first through the Ministry of Justice then onto the Ministry of Defence, and that the matter having reached the Ministry of Justice the person to contact was [REDACTED].
10. On 19, 24 and 26 May 2010, and on 18 June 2010, the Defence sent emails regarding its inquiries to [REDACTED], who the Prosecution suggested as the contact person.⁸ In addition, counsel for the Defence has sought to contact [REDACTED] by telephone on several occasions, two of which were successful. On 26 May, [REDACTED] informed Defence counsel on the telephone that he would receive an official response the following week as soon as possible. The only e-mail response to the above e-mails was on the 21st June 2010, where [REDACTED] indicated that the letter was awaiting a signature.⁹
11. On 16 July 2010, the Defence counsel sent a new letter to the DRC government reiterating its initial request for information regarding the involvement and role, if any, of the DRC government, as well as the various other political and military groups in the

³ ICC-01/04-01/07-T-133-CONF-EXP-ENG.

⁴ ICC-01/04-01/07-T-134-CONF-EXP-ENG.

⁵ ICC-01/04-01/07-T-134-CONF-EXP-ENG, pages 7-12.

⁶ ICC-01/04-01/07-T-134-CONF-EXP-ENG, pages 13-14.

⁷ ICC-01/04-01/07-T-134-CONF-EXP-ENG, pages 17-19.

⁸ Annex 1.

⁹ Annex 1

conflict in Ituri between January 2002 and August 2003.¹⁰ In this letter, counsel requested for an answer by 6 August 2010.

12. On 19 July 2010, the Defence received copy of a correspondence from [REDACTED] to the President of the DRC concerning the Defence request, asking the President for instructions given that the inquiries concern matters potentially affecting the security of the State under article 72 of the Rome Statute.¹¹
13. On 21 July 2010, counsel wrote a letter to the President of the DRC inviting him to lift confidentiality, given the time lapse since the events.¹²
14. On 1 September 2010, counsel wrote another email to [REDACTED] asking whether the President had made his decision yet and informing him that, if the issue would not be resolved by 15 September 2010, the Defence would seek the assistance from the Court in obtaining the DRC cooperation.¹³ There was an immediate answer from [REDACTED] indicating that he could not impose deadlines on the President or to ask him to speed up the decision-taking proces.¹⁴
15. The time suggested to the DRC authorities within which to respond was reasonable in the circumstances and has now passed by two weeks and the Defence still has not received any indication as to when, if any, answer to its inquiries can be expected. Given that the trial is approaching the end of the Prosecution's case, the Defence are very concerned and therefore addresses itself once again to the Chamber. The Defence refers to and relies on the principles and submissions as set out its original Motion for Cooperation. In the following sections and associated annexes, the Defence provides the additional information sought by the Chamber in the hearing of 3 May 2010, then sets out and applies the applicable principles before concluding on the relief it seeks.

¹⁰ Annex 2.

¹¹ Annex 1 Bis

¹² Annex 3.

¹³ Annex 1.

¹⁴ Annex 1.

C. Specific Requests from the Chamber

16. In its original Motion the Defence had explained that DRC military and civilian officials had provided it with information concerning the various demobilisation programs in Ituri, Mr. Katanga's role therein, as well as the role of the Central Government at Kinshasa, the *Etat-Major Opérationel 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.¹⁵
17. During this hearing the Chamber sought more detailed information than that provided in the Motion. The Chamber particularly asked the Defence to provide it with a list of the military and civilian authorities it had spoken to about the relevant subjects, indicating their position in the hierarchy.¹⁶ The Chamber further requested the Defence to inform the Court of the material already at its disposal concerning demobilization and any potential links between the central Government of Kinshasa and the RCD-K/ML and the FRPI.¹⁷
18. Annex 4 provides a list of documents in the possession of the Defence regarding these subjects and short summaries of them. Annex 5 provides a list of military and civilian authorities spoken to by the Defence regarding these subjects and summaries of the information given by them. As aforementioned, for reasons of security and preservation of defence strategy, the present clarifications as well as Annex 5 is made available to the Chamber only.
19. In addition, the Chamber asked the Defence to specify how and why it is of the view that the information it has at its disposal is manifestly insufficient.¹⁸ The Chamber also wanted to know whether the Defence seeks an official confirmation from the DRC authorities of what is already known to the Defence or whether it seeks new information to fill gaps in the defence case and possibly undertake new avenues.¹⁹ The Chamber further asked whether the Defence was sure that the documents it is seeking to obtain actually exist and are indeed in the possession of the DRC Government.²⁰ Finally, the

¹⁵ Original Motion.

¹⁶ ICC-01/04-01/07-T-133-CONF-EXP-ENG, pages 3, 12, 13, 19.

¹⁷ ICC-01/04-01/07-T-133-CONF-EXP-ENG, pages 3, 7.

¹⁸ ICC-01/04-01/07-T-133-CONF-EXP-ENG, pages 7-8.

¹⁹ ICC-01/04-01/07-T-133-CONF-EXP-ENG, page 9.

²⁰ ICC-01/04-01/07-T-133-CONF-EXP-ENG, page 14.

Chamber inquired into the efforts made by the Defence to try to obtain the information sought through other channels, *e.g.* MONUC, NGOs or local airlines.²¹

20. In asking all these details, the Chamber highlighted the difficulties in implementing a request for cooperation and the need for very precise information.²² Thus, the Defence submits the following additional details in addition to those given by counsel during the *ex parte* hearing of 3 May 2010.
21. The Defence seeks the information to establish [REDACTED].
22. As is apparent from the Annexes to this Motion, various witnesses have informed the Defence [REDACTED]. However, some of this information is based on hearsay. Other sources of this information comes from direct witnesses most of whom are fearful of testifying as their evidence concerns the involvement of government and those associated with it, most of whom are still in place.
23. According to some of these sources, intelligence papers exist which demonstrate the strategy and its implementation. [REDACTED].
24. The Defence further seeks to obtain information on the demobilization programmes and Mr. Katanga's role in them, [REDACTED]. The Defence also wishes to demonstrate that many alleged (child) combatants who participated in the programmes were not militia but participated for financial or similar reasons.
25. The Defence has heard from various witnesses that ample CONADER documents exist, setting out the different programs, their objectives and participants. The Defence has been informed that these documents are currently in the possession of the DRC Government. This appears to be the least controversial request made by the Defence. However, even as to this aspect, the Defence has not managed to secure simple lists of combatants who participated in the demobilization programs.
26. As for the details regarding attempts made to obtain the said information through other channels, in Annex 6, the Defence has set out the steps it has taken to secure the receipt

²¹ ICC-01/04-01/07-T-133-CONF-EXP-ENG, pages 15-18.

²² ICC-01/04-01/07-T-133-CONF-EXP-ENG, pages 11, 19.

of the information sought through other channels and the reasons for which these attempts have failed. As aforementioned, to safeguard the confidential nature of the defence investigations, Annex 6 is made available to the Chamber only.

D. Application of Legal Principles

27. The Defence relies on the legal provisions set out in detail in the original Defence Motion for Cooperation. The Defence relies on Articles 57, 64(6)(b), and part IX of the Rome Statute, as well as Rules 116 and 176 to 180 of the Rules of Procedure and Evidence. It also submits that it has met all criteria under Article 96(2) on the grounds set out in the Defence Additional Information to Motion for Cooperation of the DRC Government.²³
28. The Defence requests the Chamber to dismiss any attempt of the DRC Government to escape its duty to cooperate fully with the ICC by relying on Article 93(4) of the Rome Statute pursuant to which a State Party « may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security. »
29. The Defence submits that the information sought, relating to events which occurred in 2002 / 2003, cannot affect the present national security of the DRC. In particular, the disclosure of official CONADER documents seems benign. However, even the disclosure of other documents, such as intelligence papers, eight years after the events should not affect the national security of the DRC. Alternatively, if exceptional national security interests do arise, the Defence is willing to treat any information provided as confidential. The information would then only be disclosed for the specific purpose of determining the guilt or innocence of Mr. Katanga and not for any other purpose. Nobody other than those involved in the proceedings against Mr. Katanga and Mr. Ngudjolo would be privy to the information sought.
30. If the Chamber does not share this view and accepts that disclosure of at least some of the information would potentially affect national security interests, the DRC would still have to take all reasonable steps to make disclosure possible notwithstanding its

²³ ICC-01/04-01/07-1931-Conf-Exp, 3 March 2010.

national security concerns. Failure to do so may lead the Chamber to order disclosure of the information or documents sought.

31. Article 93(4) must be read in conjunction with Article 72 of the Statute. Pursuant to Article 72, a State has a right to intervene in order to obtain resolution of the issue. In accordance with Article 72(5), in cases where disclosure of information would in the opinion of a State prejudice its national security interests, that State must take all reasonable steps to seek to resolve the matter. Such steps may include :

- (a) Modification or clarification of the request;
- (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
- (c) Obtaining the information or evidence from a different source or in a different form; or
- (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

32. If a State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it must inform the Court and also of its specific reasons justifying the non-disclosure (Article 72(6) of the Rome Statute). If the Court determines that the information sought is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions (Article 72(7) of the Rome Statute):

- (a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

- (i) The Court may, before making any conclusion referred to in subparagraph 7 (a)(ii) request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;
- (ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and
- (iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

- (b) In all other circumstances:
 - (i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

33. Accordingly, the Defence submits that if the Chamber determines that the information and documents sought is relevant to the case, the DRC Government has an obligation under the Statute to disclose these documents and other information to the Defence.

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 provide, on a urgent basis, the answers and information sought by the Defence by its letter of 6 October 2009. That letter is attached as Annexes 2 and 4, and set out in Annex 5 to the original Defence Motion for Cooperation.

Respectfully submitted,



David HOOPER Q.C.

Dated this 25 August 2011
At The Hague