



Original: **French**

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

Date: 6 December 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 THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Redacted Version

**Decision on the second motion of the Defence for Germain Katanga seeking the
cooperation of the Democratic Republic of the Congo**

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

Office of the Prosecutor

Counsel for Germain Katanga

Mr David Hooper

Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court”), pursuant to articles 57(3)(b), 61(11), 64(6)(a), 72, 86, 87, 93, 96 and 97 of the Rome Statute (“the Statute”) and rules 116 and 176 of the Rules of Procedure and Evidence (“the Rules”), decides the following.

I. BACKGROUND

1. On 23 February 2010, the Defence for Germain Katanga (“the Defence”) filed an urgent motion (“the First Motion”) seeking the Chamber’s assistance to obtain the cooperation of the Democratic Republic of the Congo (“the DRC”).¹

2. Germain Katanga’s Defence stated therein that, in the course of its investigations, it had endeavoured to obtain information, firstly on the various programs implemented by the government to demobilise militias in Ituri and reintegrate their members into civilian life or the army, as well as Mr Katanga’s role in this process, and secondly, on the military or other assistance provided to the Lendu and Ngiti militias in Ituri by the Kinshasa central government, the *Etat-Major Opérationnel Intégré* (EMOI), RCD-K/ML, the APC and other armed or political groups.² It explained that it had received some information but was unsuccessful in obtaining any documents at all, and that it had been informed that only the army intelligence service and the Ministry of Defence held such information.³

3. It stated that it had sent a letter to the DRC authorities seeking information and documents (“the Letter of 6 October 2009”)⁴ and that it had not received any

¹ Defence for Germain Katanga, “Urgent Defence Motion for Cooperation of the DRC Government”, 23 February 2010, ICC-01/04-01/07-1900-Conf-Exp, *ex parte*, only available to the Defence for Germain Katanga and the Registry (see also ICC-01/04-01/07-1900-Conf-Exp-Red, confidential redacted version, *ex parte* only available to the Defence for Germain Katanga, the Defence for Mathieu Ngudjolo, the Office of the Prosecutor and the Registry).

² ICC-01/04-01/07-1900-Conf-Exp, para. 3.

³ *Idem*.

⁴ *Ibid.*, para. 5 and ICC-01/04-01/07-1900-Conf-Exp-Anx2.

response either to the letter or to its repeated reminders.⁵ It emphasised that the matter had become urgent and requested that the Chamber order the Registrar to prepare and transmit a request for cooperation to the DRC authorities.

4. At the Chamber's request, the Defence filed a supplemental brief on 3 March 2010⁶ wherein it stated, *inter alia*, that it considered the success of its request for documents to be mostly dependent on the willingness of the DRC authorities.⁷ It also argued that consistent with the principle of equality of arms the obligations and conditions under the agreement on cooperation between the DRC and the Prosecutor should apply to the Defence's requests for cooperation and that the Defence should thus be given access to the official archives and documents in order to pursue its investigations.⁸

5. On 1 April 2010, the Chamber issued an order explaining that it would treat this Motion on the basis of article 57(3)(b) of the Statute and rule 116 of the Rules.⁹ Given that the information sought could be material to the preparation of the Defence case,¹⁰ it deemed it was appropriate to seek the view of the Prosecutor in accordance with rule 116(2).¹¹ Accordingly, the Chamber invited the Defence to file its Motion, redacted where necessary, and convened an *ex parte* hearing.

6. At that hearing on 3 May 2010, the Defence briefly outlined the material at its disposal and afterwards provided particulars of the material it sought,¹² emphasising that the material was, by nature, of government origin.¹³ It also stated that it did not

⁵ *Ibid.*, paras. 6-9.

⁶ Defence for Germain Katanga, "Defence Additional Information to Motion for Cooperation of the RDC Government", 3 March 2010, ICC-01/04-01/07-1931-Conf-Exp.

⁷ ICC-01/04-01/07-1931-Conf-Exp, para. 5.

⁸ *Ibid.*, para. 7.

⁹ *Order on the 'Urgent Defence Motion for Cooperation of the DRC'*, 1 April 2010, ICC-01/04-01/07-2019-Conf-Exp (see also ICC-01/04-01/07-2019-Conf-Exp-Red, confidential redacted version, *ex parte*, only available to the Office of the Prosecutor, the Defence for Germain Katanga and the Defence for Mathieu Ngudjolo), paras. 7 to 9. To this effect, the Chamber recalled that article 61(11) authorises a Trial Chamber, once the charges have been confirmed, to exercise the functions of the Pre-Trial Chamber.

¹⁰ ICC-01/04-01/07-2019-Conf-Exp, para. 13.

¹¹ *Ibid.*, paras. 14-16.

¹² ICC-01/04-01/07-T-133-CONF-EXP-FRA ET, 3 May 2010, pp. 5-10.

¹³ *Ibid.*, p. 15.

wish the Prosecutor to be involved in the request to the DRC authorities for cooperation, since the request fell within the ambit of the Defence's investigations.¹⁴

7. The *ex parte* hearing was then continued with the Prosecutor in attendance.¹⁵ The Prosecutor explained that he had discussed the Defence's request with the Office of the Prosecutor's contacts at the Ministry of Justice, the Ministry of Defence and the National Programme for Disarmament, Demobilisation and Reintegration (DDR) of the DRC.¹⁶ He explained that all requests for cooperation had to be channelled through the Ministry of Justice, which would then transmit them to the relevant authorities, in this case the Ministry of Defence.¹⁷ He stated that he had learned that it was only on 1 March 2010 that the Letter of 6 October 2009 had reached the office of the person responsible at the Ministry of Defence. He added that this person informed him that some of the requests submitted were too general or vague and that some of the information concerned was difficult to gather due to the geopolitical changes that had occurred since 2002-2003 and the lack of records.¹⁸ The Prosecutor also explained that sometimes several months sometimes elapsed before a response to a request for cooperation sent to this ministerial department was received.¹⁹ He expressed his willingness to help the Defence to get in touch with his contact person at the Ministry, the contact person having told him that he was willing to discuss with the Defence the outcome of its request.²⁰ Finally, he opined that intervention by the Chamber could add further weight to this request.²¹ The Defence accepted the Prosecutor's offer to play a facilitating role and decided to suspend its Motion and to lay the matter before the Chamber again should the new approach fail.²²

¹⁴ *Ibid.*, p. 11.

¹⁵ ICC-01/04-01/07-T-134-CONF-EXP-FRA ET, 3 May 2010.

¹⁶ *Ibid.*, pp. 7 and 8.

¹⁷ *Ibid.*, p. 8.

¹⁸ *Ibid.*, pp. 8 and 9.

¹⁹ *Ibid.*, pp. 9 and 10.

²⁰ *Ibid.*, pp. 12 and 13.

²¹ *Ibid.*, p. 15.

²² *Ibid.*, pp. 16-20.

8. On 27 September 2010, the Defence re-submitted the same motion to the Chamber (“the Second Motion”).²³ In this motion the Defence explained that the Prosecutor approached his contacts at the Ministries of Justice and Defence to inquire about the outcome of the Defence’s requests, and that the Defence itself then wrote on several occasions to the Office of the Prosecutor’s contact at the Ministry of Defence.²⁴ The Defence stated that, on 19 July 2010, it received a copy of a letter sent to the President of the DRC requesting instructions on how to treat the Defence request, given that the request concerned matters potentially affecting the security of the State under article 72 of the Statute.²⁵ The Defence added that, on 21 July 2010, it had written to the Congolese Head of State advancing the view that the information sought was not a matter of national security.²⁶ It explained that the contact at the Ministry of Defence informed it, on 1 September 2010, that he was not in a position to demand a prompt response on this point from the President of the DRC.²⁷ Lastly, the Defence emphasised that, at the time of submitting its Motion, it had still not received a response.²⁸

9. In support of this Second Motion and in response to a request from the Chamber at the *ex parte* hearing of 3 May 2010, the Defence provided a list of the documents currently in its possession and a summary of their contents.²⁹ It also provided a list of the persons with whom it had talked and a summary of the information thus obtained.³⁰

²³ Defence for Germain Katanga, “Urgent – Second Defence Motion for Cooperation of the DRC Government”, 27 September 2010, ICC-01/04-01/07-2418-Conf-Exp.

²⁴ ICC-01/04-01/07-2418-Conf-Exp, paras. 9-11, ICC-01/04-01/07-2418-Conf-Exp-Anx1 and ICC-01/04-01/07-2418-Conf-Exp-Anx2.

²⁵ ICC-01/04-01/07-2418-Conf-Exp, para. 12, and ICC-01/04-01/07-2418-Conf-Exp-Anx1bis.

²⁶ ICC-01/04-01/07-2418-Conf-Exp, para. 13, and ICC-01/04-01/07-2418-Conf-Exp-Anx3.

²⁷ ICC-01/04-01/07-2418-Conf-Exp, para. 14, and ICC-01/04-01/07-2418-Conf-Exp-Anx1.

²⁸ ICC-01/04-01/07-2418-Conf-Exp, para. 15.

²⁹ ICC-01/04-01/07-2418-Conf-Exp-Anx4.

³⁰ ICC-01/04-01/07-2418-Conf-Exp-Anx5.

II. Discussion

10. The Chamber would first recall that the Defence's Motion must be treated as a request under article 57(3)(b) of the Statute and that the condition laid down by rule 116(1)(a) of the Rules has been fulfilled, as the material sought would appear necessary for the preparation of the Defence case.³¹ At this juncture, it is for the Chamber, in accordance with rule 116(1)(b), to determine whether this is indeed a request for cooperation under Part IX of the Statute and, if so, whether "sufficient information to comply with article 96, paragraph 2, has been provided".

11. The Defence explained the nature of its request in Annex 5 of its First Motion in the following terms: "[TRANSLATION] The type of assistance sought is to obtain responses from the government on specific matters [...]. Furthermore, the Defence wishes to obtain any material or information in the possession of the DRC authorities or appropriate institutions on these matters".³² It then explains the various points of its request, which are reproduced below³³ with numbering to facilitate analysis.

[REDACTED]

12. The Chamber notes that article 93(1) of the Statute sets forth the various forms of request for assistance issued by the Court, apart from requests for arrest and surrender, with which the States Parties are obliged to comply. Accordingly, the Chamber must ascertain whether the Defence's requests are consistent with these forms of cooperation. In this regard, the Chamber considers that a request for cooperation cannot take the form of questions put to a government about the facts concerning a case currently before the Chamber. Therefore, it considers that points 2(a), 3(b), 5(a), 6(a), 7(a) and 8(a) are all purely factual questions which cannot fall within the scope of a request for cooperation under Part IX of the Statute.

³¹ ICC-01/04-01/07-2019-Conf-Exp, paras. 6-13.

³² ICC-01/04-01/07-1900-Conf-Exp-Anx5, p. 2.

³³ *Ibid.*, pp. 2-4.

Nonetheless, the other points raised by the Defence are in fact consistent with a request for the provision of records and documents, including official records and documents, a form of cooperation which is expressly provided for in article 93(1)(i) of the Statute.

13. Concerning the stipulations of article 96(2) of the Statute, the Chamber considers that they require requests for cooperation to be sufficiently precise to enable the requested State to implement the request, implying that, where a request is made for the provision of documents, as in the instant case, it must target specific and identifiable items or categories of item. This requirement of precision is also intended to ensure that the request for cooperation demonstrate precisely what it has become necessary to ask the State to provide assistance with: thus, the Court cannot merely request a government's assistance in obtaining all types of unidentified or unidentifiable documents that might be in the government's possession.

14. The Chamber notes that the Defence does not specify which documents, or even which categories of document, are sought at points 1, 2(b), 3(a), 4, 5(b), 6(b), 7(b), 8(b), 10(a) and 10(b). It is therefore sometimes impossible to ascertain whether it is truly necessary to seek assistance from government sources, particularly with the vaguer questions. It further notes that the period concerned, namely between ten and twenty months for points 1, 2(b), 3(a), 4 and 7(b), far from adequately circumscribes the Defence's request and that no time particulars have even been provided for points 5(b), 6(b), 10(a) and 10(b). Finally, the particulars provided in paragraphs 23 and 25 of the Second Motion are lacking in this regard. The Chamber cannot, therefore, grant the Defence's request on all of these points.

15. However, the Chamber considers that the request formulated at point 9, inasmuch as it concerns a specific category of document, namely the lists of combatants in the militias in Ituri who have been integrated into the Congolese army as part of the reintegration programme launched in Bunia in April 2003, and a list of proposed ranks, is sufficiently precise to be included in a request for cooperation.

16. The Chamber notes that, in the instant case, the Defence has shown that it has made every reasonable effort to obtain these documents from the DRC authorities. It emphasises that the Defence must be able to obtain a response, regardless of form, to its request for assistance from the DRC authorities as soon as possible. The Defence must, in effect, be able to obtain information in good time that will enable it to determine how to pursue its investigations. The Chamber is, therefore, satisfied that its intervention is necessary here.

17. It is appropriate, therefore, that the Chamber seek the cooperation of the DRC in order to obtain lists of the combatants in the militias who had been active in Ituri and were later integrated into the Congolese army as part of the reintegration programme launched in Bunia in April 2003, together with an indication of the proposed ranks.

FOR THESE REASONS, the Chamber

GRANTS the Motion in part and **DECIDES** to seek the cooperation of the DRC in order to obtain the documents described at paragraph 17 of the present decision;

REJECTS the other submissions of the Motion; and

ORDERS the Registrar, in accordance with article 87 of the Statute and rule 176 of the Rules, to:

- a. prepare, as a matter of urgency, a request for cooperation in accordance with the terms of the present decision, emphasising that it must be implemented as soon as possible and ordering the competent authorities of the DRC, where necessary, to consult the Chamber no later than 14 January 2011 in order to resolve any difficulties concerning implementation in accordance with articles 72 and 97 of the Statute,
- b. transmit this request for cooperation to the said authorities via the appropriate channel no later than 13 December 2010.

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

[signed]
Judge Bruno Cotte
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed]
Judge Christine Van den Wyngaert

Dated this 6 December 2010

At The Hague, the Netherlands