

Ex Parte - Katanga Defence Only (Closed Session)
(*Reclassified into Public)

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1 International Criminal Court
2 Trial Chamber II - Courtroom 1
3 Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra and
4 Judge Van den Wyngaert
5 Situation in the Democratic Republic of Congo - ICC-01/04-01/07
6 In the case of the Prosecutor v. Germain Katanga and
7 Mathieu Ngudjolo Chu
8 Ex Parte - Katanga Defence Only- Reclassified Public.
9 Monday, 3 May 2010
10 The hearing starts at 2.33 p.m.
11 (Closed session) (*Reclassified into Public)
12 COURT USHER: All rise. The International Criminal Court is now
13 in session.
14 PRESIDING JUDGE COTTE: (Interpretation) The court is in
15 session. Please be seated.
16 So, we are having an ex parte hearing, initially only with you,
17 Mr. Katanga and his Defence team. Before handing over to Counsel O'Shea,
18 the Chamber would like to recall that as concerns this request for
19 cooperation, we intended to use as a basis Article 57(3)(b) of the
20 Statutes read in conjunction with Article 61(11) and Rule 116 of the Rules
21 of Procedure and Evidence; in other words, assistance with the
22 preparation of the Defence. The Chamber would also like to recall that
23 today it must decide whether it is necessary to issue an order whose
24 object would be to seek cooperation pursuant to part 9, and if I look at
25 article -- that article, I would use the terminology of that. The

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1 Chamber would also like to state that if such an order is to be issued,
2 it should own be to permit the collection of necessary evidence which
3 would be useful to the Defence, and the Chamber recalls that we are
4 currently involved in discussions on the merits.

5 Before handing over to you, Counsel O'Shea, the Chamber would
6 like to state to you that it has noted the steps already undertaken by
7 your team vis-a-vis the IDC authorities of which you stipulated in
8 paragraph 3 of your request 1900 of the 23rd of February, 2010. You told
9 us that members of the Defence team, of your team, met with or had
10 contact with civilian and military representatives of the authorities
11 about the programs set up by the government to demobilise the militias in
12 Ituri and to reintegrate them into civilian life or the army and also the
13 role of Germain Katanga in this matter. You also state in paragraph 3
14 that your team also sought information about the role of the Kinshasa
15 central government, the EMOI, the RCD-K/ML, the UPC, and other political
16 or armed groups in the training, provision of arms, and other equipment
17 or provision of other assistance of any kind in these Lendu Ngiti
18 militias in Ituri.

19 We have also taken note of the correspondence that you have
20 addressed to ministerial authorities in RDC, minister of justice,
21 ministry of -- minister of the defence and other ministry, and the
22 ambassador of the DRC in Brussels, in the Ministry of Justice.

23 There are three types of clarification that we require as concern
24 the elements in this request for cooperation. The first series of
25 clarifications, additional clarifications that we require are the

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1 following: Can you please tell us what you have at your disposal
2 currently, precisely, given what the Prosecutor has disclosed to you
3 during the preparatory phase of the case, whether it be Prosecution
4 elements or evidence, documents obtained pursuant to Article 54(3)(e), or
5 elements disclosed by the Prosecution in inter partes disclosure. To be
6 even more clear, are you able to tell us at this stage of proceedings,
7 since we are one to one, what documents and/or depositions you currently
8 have at your disposal as concerns demobilisation, and then as concerns
9 the links that existed or could have existed between the central
10 Government of Kinshasa, the RCD-K/ML, and the FRPI. So this is a
11 two-pronged question. First I will ask you to answer the first part,
12 which documents or depositions do you currently have about the whole
13 demobilisation process? You have the floor, Counsel O'Shea.

14 MR. O'SHEA: Good morning, Mr. President, your Honours. Let me
15 take this opportunity to apologise to your Honours for any inconvenience
16 caused by my difficulties arising out of the natural disaster we all know
17 about. I had some difficulties of transport but also of communication in
18 the end, as I was driving through your lovely country la France. So I
19 apologise for the inconvenience caused in respect of that.

20 I'm -- I'm pleased to hear that your Honours have studied the
21 documents, and since we're not in public session there's no need for me
22 to go through a chronology. Let me, however, draw the Chamber's
23 attention to one point which does not fall within the immediate
24 chronology. This is, as the Chamber might be aware, is not the first
25 time that this Defence has requested cooperation from the government of

1 the DRC. There was a previous occasion in relation to other matters
2 where we sought cooperation on the 25th of January and the 27th of
3 February of 2008, and the reason why I mention this, because this -- the
4 Pre-Trial Chamber gave us permission to have the assistance of the
5 Registry and a request for cooperation was made and effected, but your
6 Honours may be aware that on the 27th of February there was a fax from
7 the Attorney General stating that the DRC had no obligation to cooperate
8 with the Defence while it had an obligation to cooperate with the Office
9 of the Prosecutor. And the reason I mention this is because the
10 Pre-Trial Chamber, during the course of those pleadings, deemed it
11 appropriate not to decide that specific issue as to whether there was
12 obligation on the state to cooperate with the Defence.

13 So that is an issue which remains open, and at this stage we
14 don't know why it is that the DRC is not responding. That view expressed
15 by the government may or may not have an impact on the government's
16 current attitude. We simply don't know. But it may be that during the
17 course of these proceedings it may be that your Honours may feel it
18 appropriate proprio motu to consider what might be said or what your
19 Honour -- who your Honours might invite, including the Defence, and in
20 what way to act with a view to facilitating difficulties in the future,
21 because obviously we don't want to be in a situation where every time we
22 seek the cooperation of the government that we have to literally exhaust
23 all remedies before we get anywhere, including a preliminary response.

24 It may be that there needs to be a legal finding with regard to
25 the meaning of Article 89 of the Statute. It may be that there could be

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1 an internal procedure put in place whereby the Registry themselves will
2 write to the government without needing the intervention of the Chamber
3 in preliminary stages.

4 I just raise this as a -- as an issue which is worth considering
5 during the course of this specific issue.

6 The Pre-Trial Chamber in respect of that suggested that the --
7 that the Defence would have to start inter partes proceedings, but, of
8 course, we are not really in a position to file motions in the abstract.
9 We file motions with regard to specific problems. We're not -- not here
10 to waste the time of the Court. So it may be the kind of area where some
11 kind of guidance proprio motu is appropriate.

12 Now, coming to the specific issue at hand, I'll begin by
13 attempting to answer --

14 PRESIDING JUDGE COTTE: (Interpretation) Excuse me,
15 Counsel O'Shea. I'll just interrupt you for a moment.

16 You know that it's very difficult for us at the moment to find a
17 hearing scheduled times. This afternoon we have organised this ex parte
18 hearing, and it's vital that this time is used wisely so that everything
19 will be as useful as possible. We do not have a lot of time at our
20 disposal, so I would encourage you to get to the vital information,
21 because we will be hearing from the Prosecution next to enable the
22 Chamber to create its opinion under Rule 116. So could I ask you please
23 to be as precise and concise as possible and answer the question that the
24 Chamber has put to you. You were about to get into this. In other
25 words, the first question, the question as to which documents you have

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1 concerning demobilisation. Thank you.

2 MR. O'SHEA: We have several Defence statements on the question

3 of demobilisation, including with respect to Germain Katanga's

4 involvement in demobilisation. (Expunged)

5 (Expunged)

6 (Expunged)

7 (Expunged)

8 (Expunged)

9 (Expunged)

10 (Expunged)

11 We do have some Rule 77 pexo statements mentioning that the FRPI

12 received arms supply through the RCD-K/ML, (Expunged)

13 (Expunged)

14 (Expunged)

15 (Expunged)

16 (Expunged)

17 (Defence counsel confer)

18 MR. O'SHEA: -- as well as MONUC reports which make reference to

19 the supply of arms, and these have been provided by the Prosecution.

20 (Defence counsel confer)

21 MR. O'SHEA: Other than that we have, of course, information

22 which we've received through Defence witnesses with regards to the

23 possible existence of documents that they were either aware of or were

24 not in a position to disclose to us.

25 PRESIDING JUDGE COTTE: (Interpretation) So you have answered

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1 the two branches of the first question, and then the documents and
2 depositions that you currently have either on demobilisation, if I've
3 understood correctly, and also about any potential links between the
4 central Government of Kinshasa and RCD-K/ML and FRPI. You've just listed
5 those items. Now, that list of items that you can see in the
6 transcript - and I've been trying to take notes from it - could be put
7 into writing by you so that we know exactly very clearly what you have at
8 your disposal on these two items, the issue of demobilisation and the
9 links that had existed or could have existed between the central Kinshasa
10 government and the RCD-K/ML and FRPI. So I would like you to create a
11 list of what you have just cited and itemise it as clearly as possible
12 and hand that us. This would be to inform the Chamber.

13 Yes, that's possible? Thank you. So could you please put that
14 in writing by tomorrow, 4.00 p.m. That would be the best thing.

15 So we have taken note of what you have of said, even though it
16 was rather rapid. We have taken note of what you have at your disposal,
17 (Expunged)

18 (Expunged) there are documents that came either through MONUC reports or
19 through newspaper articles or through declarations made by Defence
20 witnesses. I'm simplifying this, but that's what I have understood.

21 The Chamber would also like to know also within the framework of
22 this same question why do you believe that (Expunged)

23 (Expunged)? What do

24 you require in addition?

25 (Defence counsel confer)

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1 MR. O'SHEA: Well, it is as your Honour has indicated a matter of
2 degree in the sense that much of the information we have is through our
3 own potential Defence witnesses. We're obviously not -- we're obviously
4 not in a position yet to know which Defence witnesses we're going to
5 call. There are a number of factors that we'll have to take into account
6 in selecting our Defence witnesses, and we'll have to consider, of
7 course, questions of reliability and credibility as well.

8 (Expunged)

9 (Expunged)

10 (Expunged)

11 (Expunged)

12 (Expunged)

13 (Expunged)

14 (Expunged)

15 (Expunged)

16 (Expunged)

17 (Expunged)

18 (Expunged)

19 (Expunged)

20 (Expunged)

21 (Expunged)

22 (Expunged)

23 (Expunged)

24 We should also indicate that when it comes to these kinds of
25 matters, they are to a degree of political sensitivity, and this can

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1 cause witnesses who feel able to talk upon these subjects perhaps fearful
2 to do so in practice.

3 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
4 Counsel O'Shea. We shall come back to this issue of question -- of
5 information that could be given by witnesses called by the Defence.

6 The Chamber would like to have more clarification from you still
7 within the framework of this first series of questions. With this
8 request for cooperation that you have submitted to us, would you like --
9 and (Expunged)

10 (Expunged)

11 (Expunged)

12 (Expunged)

13 (Expunged)

14 (Expunged)

15 (Expunged)

16 (Expunged)

17 (Expunged)

18 (Expunged) So two questions, and we would

19 like to have an answer to this, please, to better understand this request
20 for cooperation and to better understand what is to happen next.

21 MR. O'SHEA: (Previous translation continues) ... double
22 question, Mr. President, has to be both. In the first place, as
23 indicated, we have Defence witnesses who are in a position to talk --
24 talk about some of these subjects. (Expunged)

25 (Expunged)

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1 So with regard to the first part of your Honour's question, (Expunged)
2 (Expunged)
3 However, as I indicated earlier, we don't know at this stage the full
4 parameters or details of what we are talking. It's not that we're going
5 on a fishing expedition. We have a basis for what we're asking for, but
6 we don't know the nature of the responses that we're going to receive
7 from the DRC. (Expunged)
8 (Expunged)
9 (Expunged)
10 (Expunged)
11 (Expunged)
12 (Expunged)
13 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
14 Counsel O'Shea. (Expunged)
15 (Expunged)
16 (Expunged)
17 (Expunged)
18 (Expunged)
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11 (Expunged)

12 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. O'Shea.
13 This is an issue that the Chamber will determine itself. You fully
14 aware -- you're fully aware, and you made it known at the beginning of
15 your submission that the request for cooperation is something that is
16 difficult, and for the Chamber, we need to have the maximum amount of
17 information regarding what you have in your possession, what you intend
18 to do, and how you wish to use the information in the possession of the
19 witnesses that you intend to call. That is necessary.

20 Now, regarding the possible role of the Prosecutor, this is
21 something that the Chamber will decide, but under Rule 116, we for the
22 moment are seeking the opinion -- we will seek the opinion of the
23 Prosecutor to determine whether there are sufficient grounds to issue
24 that order under 116 and whether that assistance is necessary under
25 57(3)(b).

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1 There is another series of questions. Maybe I'm going a bit far,
2 but in your initial application, 1905 of the 23rd February 2010 -- that
3 is 1900, you talked about the steps that your team have taken with regard
4 to the authorities of the DRC. You said that the members of the team
5 discussed with civilian and military representatives of the DRC.

6 The Chamber would like to know who your Defence team was able to
7 meet, and what was the level of the hierarchy of your contacts, be they
8 civilians or military officers.

9 (Defence counsel confer)

10 MR. O'SHEA: Well -- well, I think we'll need to get in contact
11 with our resource person to get exact precision with regards to
12 individuals he spoke to, and we can include that in the information that
13 we provide tomorrow.

14 I know that we have been in contact (Expunged).

15 PRESIDING JUDGE COTTE: (Interpretation) Mr. O'Shea, if you're
16 not in a position to give us precise information right now, we accept
17 that you complete the document that you are supposed to give us tomorrow
18 to the extent possible with a list of the military and civilian contacts
19 that members of your team present here or local correspondents were able
20 to meet, and I'm talking about the military and civilian representatives
21 mentioned in paragraph 3 of your request for cooperation of the 23rd of
22 February, 2010.

23 What is also necessary is whether, according to you, that is in
24 the Defence team, the people that you met with in the DRC can considered
25 as high-level authorities that are able to give authoritative information

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1 and speak on behalf of their hierarchy, whether these were officials who
2 are speaking only on their own behalf rather than speaking on behalf of
3 the authorities or of senior officers if they were soldiers.

4 So it is important for the Chamber to have additional information
5 on that so as to determine the merits of this request for cooperation.

6 MR. O'SHEA: (Previous translation continues) ... spoken to both
7 categories, as it were, because we've spoken to people who are within the
8 government structure but who are not speaking in the name of the
9 government when they're speaking to us. But the reference in our motion
10 to the person of resource approaching the ministries with regards to
11 finding out what the position is with respect to our request for
12 cooperation, at least outwardly the attempt was to speak with people who
13 were in a position to give information with authority. But sometimes
14 it's not very clear whether people actually have authority to speak. I
15 mean, I've been in another case in a situation where I spoke to a
16 minister and it turned out that the minister didn't have authority to
17 speak from an internal point of view. So that's a different difficulty.

18 PRESIDING JUDGE COTTE: (Interpretation) Well, understood. We
19 understood the difficulties that you can come up against and the problems
20 that you can also come up against.

21 Given that the hierarchy is contacted with a lot of
22 circumspection, it is necessary for us that we have this list and the
23 information about their exact positions.

24 There is another important question, Mr. O'Shea. Are you
25 absolutely sure that there are notes, memos, instructions and documents

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1 on what you would like to obtain? You have information that is coming
2 from your witnesses, and you are not yet sure whether you are going to
3 call those witnesses. (Expunged)
4 (Expunged) You are looking for written documents. Are you sure that
5 those written documents exist on demobilisation and the relationship
6 between the central government of the Congo and the RCD-K/ML? Are you
7 sure of that information? So this is something that you are doing as
8 part of the Defence to close all the doors, so to speak, but you are not
9 absolutely sure.

10 MR. O'SHEA: (Previous translation continues) ... (Expunged)
11 (Expunged)
12 (Expunged)
13 (Expunged)
14 (Expunged)
15 (Expunged)
16 (Expunged)
17 (Expunged)
18 (Expunged)

19 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. O'Shea,
20 for that answer.

21 Before we bring in the Prosecutor, there is a third series of
22 questions that we would like to ask you. Have you tried to obtain that
23 information from sources other than the government authorities of the
24 DRC, that is the information that you wish to have today? And we are
25 not, of course, referring to the witnesses because you have just talked

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1 about those, but have you tried to knock on doors other than the DRC
2 government authorities or military authorities? Have you tried to
3 contact the various organisations, NGOs? Have you tried to find out
4 whether there are archives that you can consult?

5 (Defence counsel confer)

6 MR. O'SHEA: Well, I mean naturally we've --

7 PRESIDING JUDGE COTTE: (Interpretation) Mr. O'Shea, you will
8 understand that this question goes hand-in-hand with what I said a short
9 while ago. A request for cooperation is difficult. It is burdensome,
10 and we really never know what the outcome will be. So have you tried to
11 knock on other doors? Which ones and how?

12 MR. O'SHEA: Yes. There aren't many other doors that one can go
13 through. Because of the nature of this information, your Honours will
14 understand that it's the kind of information which would be kept tightly
15 within government corridors. (Expunged)

16 (Expunged)

17 (Expunged)

18 (Expunged)

19 (Expunged)

20 (Expunged)

21 (Defence counsel confer)

22 PRESIDING JUDGE COTTE: (Interpretation) Mr. O'Shea,
23 independently of NGOs, humanitarian organisations and others, have you
24 tried to have access to archives, whether they are DRC archives or
25 archives of researchers who were interested in what happened in the DRC

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1 during that period? (Expunged)

2 (Expunged)

3 (Expunged) Are there no other people you can contact? Have you

4 tried every other possibility before submitting this request for

5 cooperation? You thought that everything had come to a dead end and

6 there was actually no other possibility at all?

7 MR. O'SHEA: Well, it's difficult in the DRC. (Expunged)

8 (Expunged)

9 (Expunged)

10 (Expunged)

11 (Expunged)

12 (Expunged)

13 PRESIDING JUDGE COTTE: (Interpretation) And regarding NGOs and
14 private researchers such as experts who come from time to time to testify
15 before this court, there was no attempt on your part to contact them?

16 (Expunged)

17 (Expunged)

18 (Expunged)

19 (Expunged)

20 (Expunged)

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9 PRESIDING JUDGE COTTE: (Interpretation) Very well. We
10 understand you very well. We also understand that the financial aspect
11 of that research is not unimportant for a Defence team such as yours.
12 (Expunged)
13 (Expunged)
14 (Expunged)
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1 (Expunged)

2 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. O'Shea.

3 I have been told that the representatives of the OTP have
4 arrived, and Madam Court Officer, you have told us that we have to
5 suspend for 30 minutes for a different party to come into the courtroom.

6 Mr. O'Shea, do you have anything that you would like to add as
7 long as we are here now before the Prosecutor comes in? Later on, after
8 the arrival of the Prosecutor, we will have two hours, and let me briefly
9 summarise the procedure.

10 The two hours have to be used in as rational a manner as
11 possible. You will first be given leave to present your request for
12 cooperation, Mr. O'Shea, given that the Prosecutor has received a
13 redacted version of your request number 1900. He has received a
14 partially redacted annex, that is number 5, and other unredacted annexes,
15 that is Annexes 1 and 3. Two and 4 are redacted. So in the time
16 allocated to you, you will have to specify the information that you would
17 like to have and the difficulties that you have come up against in
18 obtaining such information. So you can summarise what you said at the
19 beginning of your presentation regarding the pre-trial proceedings and
20 your difficulties. And before that, we will suspend for 30 minutes.

21 MR. O'SHEA: The -- we have, of course, an unredacted and a
22 redacted version of our motion. So at least we won't be referring to any
23 issues which fall under the redacted rubric insofar as the Prosecution is
24 concerned. And I know that your Honours will know what questions to put
25 and the appropriate manner to put them, but I won't be referring to

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1 anything which is in a redacted version of a document. Thank you.

2 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. O'Shea.

3 So tomorrow you will submit to us the list of what you already have with
4 you, the list of the military and civilian contacts that you were able to
5 meet with in the DRC, and to the extent possible, you will precise their
6 position in the hierarchy and their capacity to commit the government.

7 You also told us that your witnesses have some information, and
8 if you are in a position to isolate some of that information based on
9 specific documents, please kindly include that in the document that you
10 will submit to us.

11 Once again, it is very important for the Chamber, within the
12 framework of this ex parte, to be able to know precisely what you have in
13 your possession in order to enable the Chamber to assess the decision to
14 take regarding your request for cooperation.

15 And so, Court Officer, we are going to suspend the hearing. It
16 is 3.25 p.m. After 30 minutes, we will resume at five minutes to 4.00,
17 right up to 5 minutes to 6.00.

18 The hearing ends at 3.24 p.m.

19 RECLASSIFICATION REPORT

20 Pursuant to Trial Chamber II's email instructions dated 19th August 2011,
21 the redacted version of the transcript is reclassified into Public.

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