

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 25 April 2008

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Germain Katanga and Mathieu Ngudjolo Chui***

**Public Document
Redacted Version**

**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)"**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor

Mr Éric MacDonald, Senior Trial Lawyer

Counsel for the Defence

Mr David Hooper

Ms Caroline Buisman

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

Mr Jean-Pierre Kakengi Kilenda Basila

Ms Maryse Alié

Legal Representatives of the Victims

Ms Carine Bapita Buyagandu

Mr Joseph Keta

Mr J.L. Gilissen

Legal Representatives of the 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

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court”, respectively);

NOTING the “Decision on the Joinder of the cases against Germain KATANGA and Mathieu NGUDJOLO CHUI”¹ issued by the Chamber on 10 March 2008 and by which the Chamber decided that the hearing on the confirmation of the charges in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* would commence on 21 May 2008;

NOTING the “Defence Application pursuant to Article 57(3) (b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)”² (“the Application”) filed by the Defence for Germain Katanga on 7 April 2008, in which the Defence for Germain Katanga requested the Chamber to:

- (i) “decide this application *ex parte* and confidential;”³
- (ii) “declare that a functional interpretation of Part 9 of the ICC Statute obliges the DRC to cooperate in good faith with the Defence, alternatively, that the Pre-Trial Chamber is requested to offer its widest degree of assistance to the Defence in obtaining cooperation;”⁴
- (iii) “seek the cooperation of the DRC, pursuant to Part 9 of the Statute, by requesting the DRC to comply with the requests set out in Annex I, and to consult with the Pre Trial Chamber promptly in respect of any problem the DRC encounters in implementing the requests, in accordance with Article 97”;⁵ and

¹ ICC-01/04-01/07-257

² ICC-01/04-01/07-371-Conf-Exp.

³ ICC-01/04-01/07-371-Conf-Exp, p 18

⁴ ICC-01/04-01/07-371-Conf-Exp, p 18

⁵ ICC-01/04-01/07-371-Conf-Exp, p. 18

- (iv) “instruct the Registrar to transmit the request in Annex I promptly and to ensure its correct reception by the DRC and to inform the PTC and the Defence weekly of the progress made in its effective implementation.”⁶

NOTING the confidential *ex parte* hearing⁷ held on 17 April 2008 with the Defence for Germain Katanga and representatives of the Registry, in which the Single Judge requested the Defence to reformulate their request for cooperation;

NOTING the “Revised Request for Cooperation”⁸ (“the Revised Defence Application”), filed by the Defence for Germain Katanga on 17 April 2008;

NOTING articles [REDACTED], 57(3)(b), [REDACTED], 86, 87, 93, 96 and 97 of the *Rome Statute* (the Statute”) and rules 116, 122, 176 and 177 of the *Rules of Procedure and Evidence* (“the Rules”);

CONSIDERING that, rule 116 (3) of the Rules, grants the Chamber discretion whether to seek the views of the Prosecution before deciding upon the Defence’s Application; that, given the nature of some of the documents referred to in such application, the Chamber agrees with the Defence that the Defence’s Application should be dealt with on an *ex parte* basis;

CONSIDERING that, according to article 57 (3)(b) of the Statute, the Pre-Trial Chamber may, upon the request of a person who has been arrested, “seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence”;

⁶ ICC-01/04-01/07-371-Conf-Exp, p 18

⁷ ICC-01/04-01/07-T-24-Conf-Exp-ENG ET 17-04-2008.

⁸ ICC-01/04-01/07-406-Conf-Exp

CONSIDERING that article 57 (3) (b) of the Statute is complemented by rule 116 of the Rules, which establishes that the Pre-Trial Chamber shall seek cooperation under article 57, paragraph 3(b) of the Statute, where it is satisfied that:

- (i) 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”; and
- (ii) sufficient information to comply with article 96 (2) of the Statute has been provided in the Defence’s Application and the Defence’s Revised Application;⁹

CONSIDERING further that the type of cooperation that the Defence of Germain Katanga is requesting the Chamber to seek from the DRC is provided for in article 93 (1) of the Statute;

CONSIDERING that the Defence of Germain Katanga sought the cooperation of the relevant authorities of the DRC [REDACTED]¹⁰ and [REDACTED];¹¹

CONSIDERING that, according to the Defence, the only response received to date by the Defence of Germain Katanga is a fax from [REDACTED];¹²

CONSIDERING that, in the above-mentioned fax, the [REDACTED] informed the Defence of Germain Katanga: (i) [REDACTED]; and (ii) that therefore the DRC

⁹ Both cumulative conditions are applicable to article 57 (3) (b) Defence’s requests to the Chamber to seek the cooperation of a State Party pursuant to Part 9 of the Statute. See Friman, H, “Investigation and Prosecution”, in Lee, R. S., (Editor), “The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence” (Transnational Publishers, Inc., Ardsley, New York, 2001), p. 509. The application of both rule 116 cumulative conditions to this type of requests by the Defence is also acknowledged by the Defence of Germain Katanga (See ICC-01/04-01/07-371-Conf-Exp, p. 14).

¹⁰ [REDACTED]

¹¹ [REDACTED]

¹² [REDACTED]

authorities could not proceed with the cooperation request made by the Defence of Germain Katanga;¹³

CONSIDERING that under these circumstances - and regardless of whether or not Part 9 of the Statute imposes on the DRC the obligation to cooperate in good faith with the Defence¹⁴ - the intervention of the Chamber at this stage, pursuant to article 57 (3)(b) of the Statute, will be necessary to assist the Defence of Germain Katanga in obtaining those documents contained in Items 1, 2, 6, 7 and 8 of the Defence's Revised Application as long as the two cumulative conditions provided for in rule 116 of the Rules are met;

CONSIDERING nevertheless that, under the above-mentioned circumstances, the intervention of the Chamber at this stage appears not to be necessary in relation to the documents contained in Items 3 and 4 of the Defence's Revised Applications; that the Chamber reaches this conclusion on the basis that these are documents and information likely to be in the possession or control of the Prosecution; and that the Defence of Germain Katanga must first request these documents and information in accordance with rule 77 of the Rules;

CONSIDERING that in order to obtain the documents and information included in Items 3 and 4 of the Defence's Revised Application, the Defence of Germain Katanga can, pursuant to rule 77 of the Rules:

¹³ ICC-01/04-01/07-371-Conf-Exp, para 3, ICC-01/04-01/07-371-Conf-Exp-Anx5

¹⁴ The Chamber is not addressing this issue in the present decision. In the view of the Chamber, it is not necessary to address this issue in order to decide on the Defence's Request pursuant to article 57 (3)(b) of the Statute and rule 116 of the Rules. Furthermore, before a decision can be taken on this matter, the Chamber considers that the submission of the Parties and the DRC will have to be sought. Hence, the Defence of Germain Katanga will have to file an *inter partes* motion if it wishes to request from the Chamber a decision on this issue.

- (i) give the Prosecution specific directions on what the Defence of Germain Katanga considers to be documents and information material for the preparation for the confirmation hearing;¹⁵ and
- (ii) request from the Prosecution:
 - a) the document expressly referred to in [REDACTED];
 - b) any other document that could be included in Items 3 and 4 of the Defence's Revised Application but that is not an internal Prosecution report, memorandum or document within the scope of rule 81 (1) of the Rules,;

CONSIDERING further that the intervention of the Chamber at this stage is also not necessary in relation to the documents referred to in Item 5 of the Defence's Revised Application; and that the Chamber reaches this conclusion on the basis that: (i) the Registry is the competent organ of the Court for the execution of the Court's warrants of arrest;¹⁶ and (ii) the Defence of Germain Katanga can file a motion requesting the Chamber to order the Registry to provide the relevant information on the execution of the warrant of arrest for Germain Katanga;

CONSIDERING therefore that in relation to Items 3, 4 and 5, which refer to documents or information that have been generated by or concern the Prosecution and/or the Registry, there is no need, at this stage, for the intervention of the Chamber in the manner requested by the Defence of Germain Katanga; and that the Chamber will thus not enter into the analysis of whether the two conditions provided for in rule 116 of the Rules, and in particular that are contained in

¹⁵ As the Prosecution reiterated at the Status Conference held on 22 April 2008, the Defence for Germain Katanga has not provided yet the Prosecution with any guidance on what it considers to be material for its preparation for the confirmation hearing, ICC-01/04-01/07-T-26-ENG ET, p 32, lines 6-8. This matter had also been raised during other status conferences and had been acknowledged by the Defence for Germain Katanga, ICC-01/04-01/07-T-12-ENG ET, p 21, lines 7-25, and ICC-01/04-01/07-T-21-ENG ET, p 23, lines 7-23

¹⁶ ICC-01/04-01/07-55, ICC-01/04-01/07-262, ICC-01/04-01/06-8-Corr

paragraph 1(b), which constitute the main safeguard against general and non-specific requests by the Defence, are met;¹⁷

CONSIDERING that, in light of submissions of the Defence for Germain Katanga at pages 14 to 16 of the Defence's Request, the Chamber considers that seeking, pursuant to article 57(3)(b) of the Statute, the cooperation of the DRC to obtain the documents contained in:

- (i) Items 1 and 2 of the Defence's Revised Application would facilitate the collection of evidence that may be material to the proper preparation by the Defence for Germain Katanga on the issue of [REDACTED]; and
- (ii) Items 6, 7 and 8 of the Defence's Revised Application would facilitate the collection of evidence that may be material to the proper preparation by the Defence for Germain Katanga on the issues raised by the Defence [REDACTED];

CONSIDERING further that the Defence's Application and the Defence's Revised Application provide sufficient information to comply with article 96 (2) of the Statute in order to seek the cooperation of the DRC to obtain the documents contained in Items 1, 2, 6, 7 and 8 of the Defence's Revised Application;

CONSIDERING that the Chamber is satisfied that the two conditions provided for in rule 116 of the Rules are met in relation to Items 1, 2, 6, 7 and 8 of the Defence's Revised Application; and that therefore, the Chamber shall seek under article 57(3)(b) of the Statute, the cooperation of the DRC - pursuant to its obligations under articles 86, 87 and 93 *et seq* of the Statute - for the transmission of the documents included in the said items;

¹⁷ This type of request is commonly known a "fishing expedition"

CONSIDERING that, in accordance with articles 87, 93 and 96 of the Statute, rules 176 (2) and 177 of the Rules and the practice of this Chamber in relation to the preparation and transmission of cooperation requests to States Parties,¹⁸ the Registrar shall, as soon as practicable:

- (i) prepare the necessary cooperation request, which shall include all information required by articles 93 and 96 of the Statute; and
- (ii) transmit to the relevant authorities of the DRC such cooperation request through the proper channels of communication as provided for in article 87 of the Statute and rule 177 of the Rules;

CONSIDERING that, according to article 97 of the Statute, if the relevant authorities of the DRC identify problems which may impede or prevent the execution of the cooperation request, the DRC shall consult with the Chamber “without delay to resolve the matter;”

CONSIDERING that the Defence of Germain Katanga highlights the urgency of the execution by the DRC of the cooperation request because:

- (i) according to [REDACTED];¹⁹ and
- (ii) the requested documents are necessary to substantiate certain of the Defence’s allegations relating [REDACTED];²⁰

CONSIDERING that the cooperation request to be sent to the DRC should emphasise the importance of a prompt execution in light of the nature and purpose of the requested documents;

¹⁸ ICC-01/04-01/07-7 (Reclassified as public pursuant to Decision ICC-01/04-01/06-42), ICC-01/04-01/07-266

¹⁹ [REDACTED]

²⁰ [REDACTED]

CONSIDERING nevertheless that, at this stage, the Chamber finds it necessary to draw the attention of the Defence to the following:

- (i) the time limits provided [REDACTED]; and
- (ii) as already stated by this Chamber,²¹ and confirmed by the Appeals Chamber:²²
 - i. [REDACTED];²³ and therefore,
 - ii. [REDACTED];

FOR THESE REASONS

DECIDES UNANIMOUSLY:

- (i) to grant the Defence's Request, and seek, under article 57 (3)(b) of the Statute, the cooperation of the DRC, pursuant to its obligations under articles 86, 87 and 93 *et seq* of the Statute, for the transmission of the documents included in Items 1, 2, 6, 7 and 8 of the Defence's Revised Application; and
- (ii) to order the Registrar to, as soon as practicable:
 - a. prepare the necessary cooperation request, which shall include all information required by articles 93 and 96 of the Statute and which will emphasise the importance of its prompt execution; and
 - b. transmit to the relevant authorities of the DRC such cooperation request through the proper channels of communication as provided for in article 87 of the Statute and rule 177 of the Rules;
- (iii) to recall that, according to article 97 of the Statute, if the DRC identifies problems which may impede or prevent the execution of the cooperation

²¹ [REDACTED].

²² [REDACTED]

²³ [REDACTED]


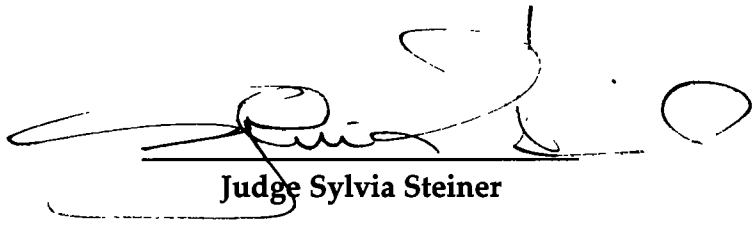
request, the DRC shall consult with the Chamber “without delay to resolve the matter;”

DECIDES BY MAJORITY:

- (i) that, at this stage, the Defence’s Request in relation to the documents included in Items 3, 4 and 5 of the Defence’s Revised Application is rejected;
- (ii) to give the Defence for Germain Katanga until Tuesday 6 May at 16h00 to request the Chamber to issue an order to the Registrar, as the competent organ of the Court for the execution of the Court’s warrants of arrest, to provide the documents and information contained in Item 5 of the Defence’s Revised Application.

A partly dissenting opinion by Judge Anita Ušacka is appended to the present decision.

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

 _____ Judge Akua Kuenyehia Presiding Judge	 _____ Judge Sylvia Steiner
--	--

Dated this Friday 25 April 2008
At The Hague, The Netherlands

Partly Dissenting Opinion of Judge Anita Ušacka

A. Introduction

1. In the application¹ presently before the Chamber, the Defence for Mr. Katanga requests that the Chamber seek cooperation from the DRC under article 57(3)(b) of the Statute, in order for it to collect information material to the preparation of the Defence. The Defence's Revised Application² lists eight items that the Defence seeks to obtain. In the decision, we unanimously decide to grant the Defence's request as to Items 1, 2, 6, 7 and 8, but my esteemed colleagues decide to reject the Request in relation to Items 3, 4 and 5.

2. The basis for the majority's decision to reject Items 3, 4, and 5 is that, pursuant to article 57(3)(b) of the Statute, "the intervention of the Chamber at this stage appears not to be necessary."³ As to Items 3 and 4, this is because since "these documents and information are likely to be in the possession or control of the Prosecution", "the Defence of Germain Katanga must first request these documents and information in accordance with rule 77 of the Rules."⁴ As to Item 5, the majority explains that since "the Registry is the competent organ of the Court for the execution of the Court's warrants of arrest", "the Defence of Germain Katanga can file a motion requesting the Chamber to order the Registry to provide the relevant information on the execution of the warrant of arrest".⁵ The majority therefore concludes that Items 3, 4 and 5 "appear not to be necessary" because the Defence can request these Items from another source.

¹ ICC-01/04-01/07-371-Conf-Exp + Annexes and ICC-01/04-01/07-406-Conf-Exp

² ICC-01/04-01/07-406-Conf-Exp

³ Majority decision, p 6 and 7

⁴ Majority decision, p 6

⁵ Majority decision, p. 7

3. Article 57(3)(b) of the Statute (Functions and Powers of the Pre-Trial Chamber) provides that the Pre-Trial Chamber may, upon the request of a person who has been arrested, “seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence”. As explained in this partly dissenting opinion, in my view, the conclusion of the majority that the specific information requested could be obtained from another source is not only not supported by the record, but also sets the threshold too high for granting a cooperation request, and appears to create an unnecessary additional requirement for article 57(3)(b) requests. The conclusion of the majority seems to be that if there is any other source of the information besides the State, the Defence is not entitled to seek cooperation from a State.

4. As explained below, the drafting history demonstrates that the criteria the Chamber should apply in determining whether to grant an article 57(3)(b) request is located in rule 116 of the Rules. Rule 116(1) is clear – the Chamber shall issue an order or seek cooperation if the relatively low threshold set forth in the rule is met. As explained in more detail below, the Defence’s application for each of the items more than meets the criteria of rule 116(1), and in my view, the request of the Defence should have been granted in its entirety.

5. Thus, while I agree with the majority’s decision as to Items 1, 2, 6, 7 and 8, I dissent with the decision of the majority to reject the Request as to Items 3, 4, and 5. I also dissent with the portions of the reasoning related to these items. In my view, the majority’s decision infringes unnecessarily on the suspect’s right to have adequate facilities for the preparation of his Defence, pursuant to article 67(1)(b) of the Statute. However, I agree with the remainder of the majority’s decision in the dispositive.

B. Application of article 57 (3)(b) of the Statute and Rule 116 of the Rules

6. In my view, article 57(3)(b) of the Statute gives effect to the right of the person prosecuted, pursuant to article 67(1)(b) of the Statute, to have adequate

facilities for the preparation of his or her defence. The power granted to the Pre-Trial Chamber to assist the Defence and the procedural right given to the Defence to obtain such assistance from the Chamber is meant to balance, at the Pre-Trial stage, the situation of the Defence with that of the Prosecution in the collection of evidence. This includes requests for cooperation of States pursuant to Part 9 of the Statute. Article 57(3)(b) of the Statute provides some degree of "equality of arms" in the collection of evidence at the Pre-Trial stage. Therefore, applying article 57(3)(b) in the correct way is essential, because it is an important mechanism in the Statute to safeguard the rights of the Defence.

7. Article 57(3)(b) of the Statute provides that upon request, the Pre-Trial Chamber may seek such cooperation pursuant to Part 9 of the Statute "as may be necessary" to assist the person in the preparation of his or her defence. The majority rejects the request as to Items 3, 4, and 5 on the grounds that since there is another source of the information requested, i.e. the Prosecution or the Registry, the Items appear not to be necessary for the Defence's preparation.

8. However, it is my view that the criteria for a Chamber in determining whether to seek cooperation from a State on behalf of a person under article 57(3)(b) of the Statute is set forth in rule 116(1) of the Rules (Collection of evidence in the territory of a State Party under article 57(3)(b)). Rule 116(1) states:

The Pre-Trial Chamber shall issue an order or seek cooperation under article 57 paragraph 3 (b), where it is satisfied: (a) that such an order would facilitate the collection of evidence that may be material to the proper determination of issues being adjudicated, or to the proper preparation of the person's Defence; and (b) in a case of cooperation under Part 9, that sufficient information to comply with article 96, paragraph 2 has been provided.

9. It should be noted that the standard set forth in this rule was based on nuanced negotiations by the drafters. The original proposal for this rule was made by the French delegation, and was that "the Pre-Trial Chamber shall accede" to a

person's request for cooperation.⁶ Written this way, the Chamber would have granted any request made by the Defence. The draft subsequently circulated in the Preparatory Commission would have established a much higher threshold for granting such a request. Under this draft, "[t]he Pre-Trial Chamber shall issue an order under article 57, paragraph 3 (b), where it is satisfied: (i) that such an order *will* facilitate the collection of Defence that *is* material to the proper determination of the issues being adjudicated, or otherwise *necessary* to the proper presentation of the person's Defence"⁷ (emphasis added).

10. This draft was reviewed again in the Fifth Session, and the draft was rejected in part because it was noted that the requirement that the request is "necessary" would be too cumbersome for the Defence and the standard for satisfying the Chamber was too high.⁸ Thus, in the final version of Rule 116 of the Rules which was adopted, "is material" was changed to "may be material", "will facilitate" was changed to "would facilitate" and the word "necessary" was eliminated altogether. Thus, while the drafters did not intend for the Chamber to grant any request of the Defence, the standard the Chamber should apply in rule 116(1) of the Rules is relatively low. However, in determining that Items 3, 4 and 5 appear not to be necessary, the majority never applies the standard set in rule 116(1) of the Rules.

11. Therefore, the majority's analysis as to whether the information requested is "necessary" for the Defence, in my view, overlooks the important standard set in rule 116 of the Rules for the application of article 57(3)(b) of the Statute.

C. The requirement that the Defence first addresses its Request to organs of the Court

12. The majority also appears to establish an additional element that must be satisfied by the Defence in a request under article 57(3)(b) of the Statute. According

⁶ PCNICC/1999/WGRPE/DP 5, 99-20219(E), 6 July 1999, Proposal by France concerning the Rules of Procedure and Evidence, Rule 57 6 Collection of evidence at the request of the Defence

⁷ PCNICC/1999/WGRPE/RT 6, 99-22978(E), 5 August 1999, Revised discussion paper proposed by the Coordinator, Rule 5 14 Collection of evidence at the request of the defence

⁸ See Friman H., Chapter 7 Investigation and Prosecution, in *The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence*, Roy Lee (ed.), (2001, Transnational Publishers, Inc., Ardsley, NY) at 510-11

to the majority, if the Defence is requesting cooperation from a State on documents and information which concern the Prosecution or may be provided by the Registry, there is an extra step: it must first address the request to the Prosecution or file a motion asking the Chamber to order the Registry to provide the information.

13. Not only does this requirement not exist in the Statute or Rules, but also the purpose of rule 116(2) of the Rules⁹ was to give the Pre-Trial Chamber discretion in deciding whether to involve the Prosecution, in the event that the Defence did not wish to reveal how it was preparing its case.¹⁰ If the Defence is required to seek its evidence from the Prosecution prior to making a cooperation request, it renders rule 116(2) meaningless. In addition, it subordinates the Defence's right to seek cooperation from a State pursuant to article 57(3)(b) of the Statute under Defence inspection of Prosecution materials pursuant to rule 77 of the Rules. Finally, the majority's decision does not take into consideration the Defence's submissions in the *ex parte* hearing held before the Single Judge on 17 April 2008 that the Defence has already requested the information in Items 3 and 4 from the Prosecution twice¹¹ and received no response.

D. Application of rule 116(1) of the Rules

14. As to the three items for which the Defence seeks cooperation which the majority rejects, it is my view that the Defence has met the criteria set out in the Statute and Rules.

15. The Defence has provided documentary support indicating that an order would facilitate the collection of evidence, because [REDACTED].¹² Thus, the first element of rule 116 of the Rules has been met as to all of the Items requested.

⁹ Rule 116(2) of the Rules states: "Before taking a decision on whether to issue an order or seek cooperation under article 57, paragraph (3) (b), the Pre-Trial Chamber may seek the views of the Prosecutor "

¹⁰ See Friman H, Chapter 7 Investigation and Prosecution, in *The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence*, Roy Lee (ed.), (2001, Transnational Publishers, Inc , Ardsley, NY) at 511

¹¹ ICC-01/04-01/07-T-24-Conf-Exp-Eng, p 19, line 12 to p 20, line 1

¹² ICC-01/04-01/07-371-Conf-Exp-Anx5

16. As to Item 3, the Defence requests [REDACTED].¹³

17. In Item 4, the Defence requests [REDACTED].¹⁴ The Defence explains that [REDACTED].¹⁵

18. As to both items, the Defence is requesting cooperation in gathering evidence which would be material to its preparation, in order to demonstrate that [REDACTED].¹⁶

19. The Chamber would make a decision on the merits should the Defence make a formal challenge on these or other grounds. However, the Defence should without a doubt have the assistance of the Chamber under article 57(3)(b) of the Statute to collect evidence which may be material to its preparation of such a challenge.

20. As to Item 5, the Defence seeks information from the DRC concerning [REDACTED].¹⁷ In particular, the Defence requests an explanation as to [REDACTED]. This request also meets the relatively low threshold set out in rule 116(1)(a) of the Rules, because the information “may be material” to the issues raised by the Defence [REDACTED].

21. The majority explains that since the Defence will request this information as to the three above-mentioned items from the relevant organs of the Court, it is not necessary to seek cooperation from the DRC.

22. However, with regard to Items 3 and 4, the Defence emphasised at the 17 April 2008 *ex parte* hearing held before the Single Judge that it specifically wanted [REDACTED].¹⁸ With regard to Item 5, the Defence also emphasised that it specifically wanted [REDACTED].¹⁹ The majority’s solution does not appear to take

¹³ ICC-01/04-01/07-406-Conf-Exp, p 4 [REDACTED]

¹⁴ ICC-01/04-01/07-406-Conf-Exp, p 4 [REDACTED]

¹⁵ ICC-01/04-01/07-371-Conf-Exp, p 15

¹⁶ ICC-01/04-01/07-371, para 15(g)

¹⁷ ICC-01/04-01/07-406-Conf-Exp, p 4 [REDACTED]

¹⁸ ICC-01/04-01/07-T-24-Conf-Exp-Eng, p 19, line 12 to p 20, line 1

¹⁹ [REDACTED]. ICC-01/04-01/07-T-24-Conf-Exp-Eng, p 21, lines 11-17

into account that even if the Prosecution and the Registry provide information relevant to these items, it would not satisfy the Defence's interest in also receiving the DRC's version of the information.

23. Just as there is no requirement that the Defence must first request information from organs of the Court before requesting that the Chamber issue an order on cooperation from States, there is no indication in the Statute, Rules or Regulations that the Defence may not seek cooperation from a State if there is a better or simply another source for the information requested. Rather, under rule 116 of the Rules, the Defence, in the course of its preparation, should be able to seek the same information from several sources in order to compare or corroborate.

24. Thus, a request under article 57(3)(b) of the Statute should not be rejected on the grounds that another source may also have access to the information. Clearly, the Chamber may grant the request under article 57(3)(b) and rule 116(1) of the Rules and at the same time direct the Defence to any additional source(s) of the information. In my view, the majority appears to create an extra step for article 57(3)(b) requests, the practical consequence of which is to restrain and delay the Defence's preparation.

25. As a final matter, I agree with the majority that Items 1, 2, 6, 7 and 8 of the Defence's Revised Application, as applicable, meet the requirements set forth article 96(2), but in my view, Items 3, 4, and 5 also meet these requirements.

E. Conclusion

26. In rejecting the request for cooperation on Items 3, 4, and 5, the majority, in my opinion, unnecessarily interfered with the Defence's strategy in preparing its case in contravention of the legal framework for granting cooperation requests set

forth in article 57(3)(b) of the Statute and rule 116 of the Rules. Because I cannot agree with the majority for the reasons set forth above, I respectfully dissent.

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

A handwritten signature in black ink, appearing to read 'A. Ušacka', written over a horizontal line.

Judge Anita Ušacka

Dated this Friday 25 April 2008

At The Hague, The Netherlands