

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 August 2011

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI

Confidential

Prosecution's response to « *Requête de la Défense de Mathieu Ngudjolo en vue de solliciter des garanties de non-incrimination au profit des témoins DRC-D03-P-0066, DRC-D03-P-0088, DRC-D03-0480 et DRC-D03-0707* »

Source: Office of the Prosecutor

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Victims**

**The Office of Public Counsel for the
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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

1. On 20 July 2011, the Defence for Mathieu Ngudjolo submitted a request to obtain assurances against self-incrimination pursuant to Article 93(2) of the Statute and Rules 74(2) and (3)(c) and 191 of the Rules of Procedure and Evidence for witnesses DRC-D03-P-0066, DRC-D03-P-0088, DRC-D03-0480 and Mathieu Ngudjolo himself ["Request"].¹
2. The Prosecution does not submit any observations regarding the Request made on behalf of Witnesses DRC-D03-P-0066, DRC-D03-P-0088 and DRC-D03-P-0480.
3. However, the Prosecution objects to assurances being given to Mathieu Ngudjolo and submits that the availability of statutory protections against self-incrimination should not apply to an accused person. These protections are available to enable the Court to compel witnesses to answer questions. The Court has no authority to compel an accused person to testify. As an Accused, Mathieu Ngudjolo has the right to remain silent or to give an unsworn statement in which he would not be bound to tell the truth. Should Mathieu Ngudjolo testify, it will be by his choice, and if he chooses to testify under oath, he will thereby renounce his right to silence under Article 67(1)(g) of the Statute and all evidence he provides can be used against him in his case before the Court. There is no statutory basis to authorise a grant of use immunity to shield him from the consequences of his voluntary choice. It would additionally be inconceivable for the Court to allow Mathieu Ngudjolo to testify on his own behalf and shield him from the Prosecutor's and the Chamber's ability to use any of that testimony as evidence against him in "any [hypothetical] subsequent prosecution".²

Confidentiality

4. This document is submitted as confidential, in response to the confidential Request from the Defence for Mathieu Ngudjolo.

¹ ICC-01/04-01/07-3079-Conf.

² Rule 74(3)(c)(2).

Submission

5. Article 93(2) states that the Court may provide assurances to a witness appearing before the Court that he “will not be prosecuted, detained or subjected to any restriction of personal freedom *by the Court* in respect of any act or omission that preceded the departure of that person from the requested State” (emphasis added). Even if no assurances were previously given under Article 93(2), pursuant to Rule 74 the Chamber may provide assurances to a witness that self-incriminatory testimony will be “kept confidential and not be disclosed to the public or any State”, and will “not be used either directly or indirectly against that person *in any subsequent prosecution* by the Court except under articles 70 and 71” (emphasis added). Rule 74(2)(b) and (c) provide that the Court can compel a witness who has been assured of use immunity to answer questions that, without this assurance, he might otherwise refuse to answer on the ground of self-incrimination. It is also clear that this protection is limited to the use of such evidence “in any subsequent prosecution” and thus not in the case currently being prosecuted.
6. These provisions exist in order to facilitate the appearance before the Court of *witnesses*, to respect their right to not be compelled to incriminate themselves, and to enable the Court to compel them to answer questions without fear of prosecutorial reprisal. Article 93(2) involves a means of securing the attendance of a witness and is not applicable to persons charged by the Court; the appearance of a person charged with a crime is secured through surrender or the person’s willing compliance with a summons to appear. Rule 74 involves a means of compelling the witness to testify and is not applicable to an accused person; pursuant to Article 67(1)(g) of the Statute, an accused person cannot be compelled to testify, even if he makes an unsworn statement. It is thus clear that neither of these provisions is applicable to the Accused.

7. Moreover, Article 93(2) and Rule 74 use the term *witness*. The Prosecution submits that upon a closer analysis of this Article and Rule, including references to Rules 190 and 191, the use of the term *witness* (and exclusion of any reference to the person charged) is another signal that these provisions are not intended to encompass an Accused.
8. The Chamber has ruled in its *Directions for the conduct of the proceedings* ("Directions") that, although the Accused cannot be compelled to testify, if he "*consents to giving evidence, he or she becomes subject to the same rules as outlined below that are applicable to other witnesses (emphasis added)*."³ In other words, he must consent. His consent cannot be compelled, including through the mechanism of use immunity. Once the Accused consents to testify, he waives his right to silence under Article 67(1)(g), and thereby accepts that anything he does say can be used as evidence in his favor or against him -- in this case or in other proceedings.
9. The Prosecution submits that when the Chamber states in paragraph 51 of its Directions that "... he or she becomes *subject to the same rules as outlined below* that are applicable to other witnesses (emphasis added)" that should be interpreted in the context of "where applicable". Other rules would clearly be applicable to the Accused who testified.⁴ But since the provision of use immunity under Rule 74 is not applicable to accused persons and does not provide immunity against use in the pending prosecution, the Court's directive should not be read to override that provision and authorize the granting of use immunity to an Accused who voluntarily waives his right against self-incrimination and consents to appear as a witness.
10. Finally, public interest dictates that the testimony of an accused be accessible to the public in its entirety. In particular, victims have a special interest in hearing what an accused person has to say in response to the charges leveled against him.

³ ICC-01/04-01/07-1665-Corr, para. 51.

⁴ See for instance, Section IV regarding the scope and mode of questioning of witnesses and section V and the introduction and use of documentary evidence through or for the purpose of the examination of a witness.

Moreover, if the Chamber was to acquit Mathieu Ngudjolo on the basis of, *inter alia*, his testimony given in closed or private session, it could find itself in a position where it could not reveal portions of his testimony in a public judgment. This would be contrary to Regulation 20 of the Regulations of the Court which dictates, to all extent possible, the public nature of the proceedings. Finally, it could also be difficult for the Chamber to envisage which portions of the Accused's testimony should be made confidential, since some portions not beforehand considered incriminating could very well thought to be and consequently used by national jurisdictions. This could lead to the undesirable consequence that the entirety of Mathieu Ngudjolo's testimony could be given in private session, which would be contrary to the interests of justice.

Conclusion

11. For all the foregoing reasons, the Prosecution does not submit any observations regarding the Request made on behalf of Witnesses DRC-D03-P-0066, DRC-D03-P-0088 and DRC-D03-P-0480 and opposes the Request, in relation to assurances sought by Mathieu Ngudjolo and submit they should be denied.



Luis Moreno Ocampo, Prosecutor

Dated this 11th day of August 2011

At The Hague, The Netherlands