

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07
Date: 13 September 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

Public

**Decision on the request of the Defence for Mathieu Ngudjolo to obtain
assurances with respect to self-incrimination for the accused**

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
Mr Eric MacDonald

Counsel for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika
Mr Jean-Louis Gilissen

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”), pursuant to articles 67(1) and 93(2) of the Rome Statute (the “Statute”), rules 74 and 191 of the Rules of Procedure and Evidence (the “Rules”), and regulation 23 *bis* of the Regulations of the Court, decides as follows:

I. PROCEDURAL HISTORY

1. On 19 July 2011, the Defence for Mr. Ngudjolo (the “Defence”) filed a motion requesting the Chamber to provide assurances with respect to self-incrimination to a number of Defence witnesses, including the accused himself.¹ Pursuant to article 93(2) of the Statute and rules 74 and 191 of the Rules, the Defence requested the assurance that the witnesses concerned, including Mathieu Ngudjolo, would not be prosecuted, detained or subjected to any restriction of personal freedom for any act or omission that preceded their departure from the Democratic Republic of the Congo, and that any statement that might tend to incriminate them will not be disclosed to the public, any state, or any third parties.²

2. On 11 August 2011, the Prosecution responded and objected to such assurances being given to Mr. Ngudjolo³ The Prosecution submitted that the statutory protections against self-incrimination should not apply to an accused person as these protections exist to enable the Court to compel witnesses to answer questions.⁴ The Prosecution further argued that the Court does not have the authority to compel an accused person to testify, and that if Mathieu

¹ "Requête de la Défense de Mathieu Ngudjolo en vue de solliciter des garanties de non-incrimination au profit de témoins DRC-D03-P-0066, DRC-D03-P-0088, DRC-D03-0480 et DRC-D03-0707", 19 July 2011, ICC-01/04-01/07-3079-Conf

² ICC-01/04-01/07-3079-Conf, para. 22

³ "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 »", 11 August 2011, ICC-01/04-01/07-3100-Conf, para. 3

⁴ ICC-01/04-01/07-3100-Conf, para. 3 and 6 to 7

Ngudjolo voluntarily testifies, he thereby waives his right to remain silent and accepts that all evidence he gives can be used against him in this case or in any subsequent prosecution.⁵ Moreover, the Prosecution noted that article 93(2) of the Statute is meant to secure the attendance of a witness and is not applicable to persons charged by the Court, whose appearance is secured through other means.⁶

3. Finally, the Prosecution submitted that the interests of justice and, in particular the interests of victims, as well as the principle of the public nature of the proceedings dictate that the testimony of an accused should be accessible to the public in its entirety.⁷ In this regard, the Prosecution noted that the difficulty to identify which portions of the testimony of the accused could be found incriminating, and consequently used, by national jurisdictions could lead to the undesirable consequence that the entirety of his evidence ought to be given in private session.⁸

4. On 11 August 2011, the Chamber informed the parties and participants that a separate decision would be issued with respect to the specific situation of the accused.⁹ The present decision only addresses this matter.

II. ANALYSIS

5. As a preliminary remark, the Chamber wishes to clarify that, although the Directions for the conduct of the proceedings and testimony stipulated that “if an accused consents to giving evidence, he or she becomes subject to the same rules

⁵ ICC-01/04-01/07-3100-Conf, para. 3, 6 and 8

⁶ ICC-01/04-01/07-3100-Conf, para. 6

⁷ ICC-01/04-01/07-3100-Conf, para. 10

⁸ ICC-01/04-01/07-3100-Conf, para. 10

⁹ Email communication from the Chamber to the parties and participants through a Legal Officer of the Trial Division on 11 August 2011 at 18:23

(...) that are applicable to other witnesses”,¹⁰ it is clear that the position of an accused who chooses to testify in his own defence cannot be systematically equated to that of any other witness. In particular, there are provisions in the Statute and the Rules relating to the testimony of witnesses that are inapplicable to an accused who appears as a witness in his own trial, as they are incompatible with the rights of the defence.

6. The Chamber recalls that, as rightly pointed out by the Prosecution, the assurance provided for in article 93(2) of the Statute is meant to facilitate the appearance of witnesses before the Court.¹¹ The Chamber concludes that providing such assurances would be irreconcilable with the status of accused.

7. As regards the assurances provided for in rule 74 of the Rules, the Chamber considers that the accused do not require them, as they benefit from protection against self-incrimination. Indeed, according to article 67(1)(g) of the Statute, the accused has the right to remain silent and cannot be compelled to testify. However, once an accused voluntarily testifies under oath, he waives his right to remain silent and must answer all relevant questions, even if the answers are incriminating.

8. The testimony of the accused may thus be used as evidence against them in the present case. Moreover, if they decline to answer a permissible question, the Chamber may draw any adverse inferences as appropriate.

9. Further, as correctly stated by the Prosecution, the assurances under Rule 74 are meant to compel witnesses to answer questions when they object to

¹⁰ “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, 1 December 2009, ICC-01/04-01/07-1665-Corr, para. 51

¹¹ See “Ordonnance relative à la mise en œuvre de l'article 93-2 du Statut et des règles 191 et 74 du Règlement de procédure et de preuve au profit de témoins de la Défense de Germain Katanga”, 28 February 2011, ICC-01/04-01/07-2748-Conf and ICC-01/04-01/07-2748-Red (public redacted version), at para. 20, in which the Chamber specified that such assurance is meant to assure witnesses that the sole *purpose* of their appearance before the Court is to give evidence (unofficial translation) : “les assurances énoncées à l'article 93-2 du Statut, qui visent à garantir aux témoins que leur venue devant la Cour a pour seul *objectif* de recueillir leur déposition”

do so on the ground that answering might tend to incriminate them. The Chamber is of the view that it would thus be inappropriate to apply this rule to an accused who has knowingly chosen to commit himself to answer all questions falling within the scope of cross-examination.

10. In this regard, the Chamber recalls that, as outlined in the Directions for the conduct of the proceedings and testimony, cross-examination shall be limited to matters raised during examination in chief, matters affecting the credibility of the witness and matters relevant to the case for the cross-examining party.¹² The Chamber sees no reason to depart from those rules in the situation of an accused testifying in his defence.

11. Questions relevant to the case for the cross-examining party must be strictly related to the charges. The cross-examining party will be entitled to ask questions in relation to the contextual elements of the offences charged but only to the extent strictly necessary to prove its case. This may include questions about the accused's awareness of the contextual circumstances and how their conduct was related to those circumstances. However, such questions should not merely be aimed at incriminating the accused in relation to facts and circumstances falling outside the scope of the current case.¹³

12. Finally, with regard to the risk of self-incrimination in respect of other proceedings before the Court or other jurisdictions, the Chamber emphasises that the finding that Rule 74 is not applicable to the accused does not prejudice the question whether any incriminating evidence the accused may have given in the present case would be admissible against them in any future proceedings. The Chamber also refers to the *ne bis in idem* principle enshrined in article 20 of the

¹² ICC-01/04-01/07-1665-Corr, para. 69

¹³ In this respect, the Chamber recalls that before putting questions about contextual circumstances, counsel must state the purpose behind the question and explain how the evidence sought is relevant to the confirmed charges. See ICC-01/04-01/07-1665-Corr, para. 71

Statute. The Chamber recalls that the accused also have the right to make an unsworn statement in their defence pursuant to article 67(1)(h) of the Statute.

FOR THESE REASONS,

THE CHAMBER,

REJECTS the request for the Chamber to provide the assurances under article 93(2) of the Statute and rule 74 of the Rules to the accused;

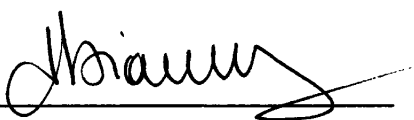
ORDERS the reclassification as public of document ICC-01/04-01/07-3100-Conf; and

INSTRUCTS the Defence to file a public redacted version of document ICC-01/04-01/07-3079-Conf after submitting, by 10 October 2011, proposed redactions to the Chamber for approval.

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



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 13 September 2011

At The Hague, The Netherlands