

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-01/06  
Date: 23 January 2009

**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
THE PROSECUTOR  
*v. THOMAS LUBANGA DYILO***

**Public  
with Confidential, Prosecutor, Defence & Legal Representatives Annex A**

**Prosecution's submission of list of witnesses  
who potentially face risk of self-incrimination**

**Source:** [Office of the Prosecutor]

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

**The Office of the Prosecutor**

**Counsel for the Defence**

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Joseph Keta Orwinyo

Mr Jean Louis Gilissen

Mr Jean Chrysostome Mulamba

Nsokoloni

Mr Paul Kabongo Tshibangu

Mr Hervé Diakiese

Ms Paoline Massidda

**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**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Mr Simo Vaatainen

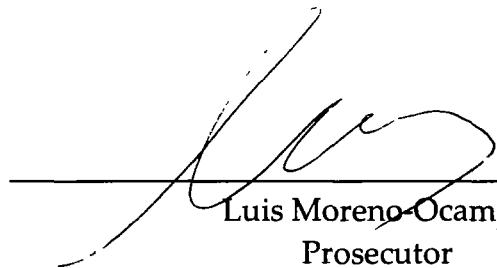
**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. In response to an inquiry by the Chamber on 22 January 2009, the Prosecution submits its list of witnesses who it believes may face potential issues of self-incrimination, along with a very brief explanation of their anticipated testimony and value to the Prosecution's case.
2. Rule 74(1) provides that the Court shall notify a witness of the provisions of Rule 74 before his or her testimony.
3. Rule 74(2) provides that if the Court determines that an assurance with respect to self-incrimination should be provided to a particular witness, it shall provide the assurance before the witness attends.
4. If a witness has been given an assurance, the witness's testimony may take place in open court unless the witness also faces the possibility of self-incrimination in connection with criminal proceedings in another State.
5. Rule 74(4) provides that the Chamber shall seek the views of the Prosecutor, *ex parte*, before giving an assurance.
6. The Prosecution is of the view that, as to each of the witnesses identified herein, assurances should be given. During its investigation, the Prosecution identified these witnesses as individuals as to whom there were grounds to believe they may have committed a crime within the jurisdiction of the Court. But the Prosecution also determined that their particular conduct or involvement, if criminal at all, did not reach the level of gravity to merit prosecution by this Court. Accordingly, the Prosecution does not intend to pursue criminal charges against any of the persons on the attached list.
7. The Prosecution further submits that if the Chamber agrees in advance that assurances should be given, there may be no need for closed sessions for the witnesses (apart from the elicitation of preliminary identification evidence) to explore issues of potential self-incrimination, unless answering a question might additionally subject the witness to potential prosecution by a State.
8. At this point, the Prosecution believes that the witnesses it identifies do not potentially face criminal liability in the Democratic Republic of the Congo for any in-court testimony related to the recruitment or use of child soldiers.

9. Article 224 of the Loi modifiant et complétant certaines dispositions du Code Pénal, du Code de l'Organisation et de la Compétence Judiciaires du Code Pénal Militaire et du Code Judiciaire Militaire, en application du Statut de Rome de la Cour Pénale Internationale contains criminal proscriptions similar to the child soldier provisions in the Rome Statute. The statute was not even drafted before September 2005. The acts about which the witnesses will testify predated the existence of that statute. Thus, it is the Prosecution's belief that the witnesses could not be held criminally liable for acts that occurred at a time before the conduct was criminalized.<sup>1</sup>
10. Finally, while the Prosecution believes its list of witnesses presenting potential self-incrimination issues is complete, it does not discount the possibility that other prosecution witnesses may be asked unanticipated questions that would pose the possibility of incrimination in a national criminal justice system.



Luis Moreno-Ocampo  
Prosecutor

Dated this 23rd day of January 2009  
At The Hague, Netherlands

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<sup>1</sup> The prohibition of criminal ex post facto laws is non-derogable under the International Covenant on Civil and Political Rights, Article 15. The DRC (then Zaire) ratified the Covenant on 1 November 1976.