

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06

Date: 30 January 2009

TRIAL CHAMBER I

Before: Judge Adrian Fulford, President
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

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

Public Prosecution's submissions regarding issues related to potential self-incrimination at trial

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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Other

Introduction

1. In response to an inquiry by the Court,¹ the Prosecution submits this analysis of the potential for self-incrimination arising at the pending trial.
2. Our analysis is divided into the following categories: Self-incrimination in the International Criminal Court (ICC), self-incrimination in the Democratic Republic of the Congo (DRC) and self-incrimination in other countries.
3. As we show below, Rule 74 authorizes the Court to give effective assurances – backed in this instance by the Prosecution’s assessment as to these witnesses – that the evidence will not be used against the witness in a criminal proceeding in the ICC.
4. The protection against self-incrimination can be further enhanced by protective measures. Thus, even if a witness were to provide self-incriminating information, the ability of a national criminal court to identify the witness is limited.
5. Turning to the specific legal questions posed, our analysis first leads us to conclude that the children, by virtue of their age at the time of the facts, do not face the possibility of prosecution in the DRC or elsewhere. Consequently, it is submitted that it is not necessary to notify this category of witnesses (former child soldiers) of the provisions of Rule 74 before their testimony.

¹ ICC-01/04-01/06-T-111-CONF-ENG RT, page 30, lines 12-21.

6. Nor do we believe, based on the information at our current disposal, that any witness may be subject to the jurisdiction of some state other than the DRC for offences committed within the DRC; to our best information, the witnesses who may be confronted with issues of self incrimination and their potential victims would all be nationals of the DRC, and any acts about which the witness may testify do not appear to reach the threshold for the exercise of universal jurisdiction under the national judicial systems where such provisions exist.

7. One or more of the prospective adult witnesses – insiders subject to military jurisdictions -- might face a remote possibility of prosecution in the DRC. But, because of a guarantee of immunity in the Agreement on Privileges and Immunities of the Court (APIC), none of these witnesses risks self-incrimination by providing testimony in this Court.²

8. In the event that the Court retains residual concerns about potential self-incrimination by any witness, Rule 74 (7) requires the Court to give effect to an assurance by receiving potentially incriminating information *in camera* and ordering that the potentially incriminating testimony be sealed, in addition to other protective measures.

² The Office of the Prosecutor is, however, seeking assurances from the competent authorities in the DRC that evidence given before this Court will not be used against any witness in any criminal or military tribunal proceeding in the DRC. We will update the Court on its progress in obtaining these assurances.

9. Finally, though the Court has the power to grant a request from a state party for assistance (see Article 93(10)), it is not obligated to do so, and indeed if it were to provide the incriminating testimony despite the assurance it would violate its obligation set out in Rule 74(7).

Self-incrimination in the ICC

10. The ICC does not authorize the prosecution of persons who were under the age of 18 when they committed their crimes. See Article 26.³

11. For other persons, the Court has the power to provide assurances to any witness before it, that the witness's testimony will not be used against him or her in any proceeding before the ICC.

12. Rule 74 addresses self-incrimination by witnesses. It authorizes the Court, if it deems it appropriate, to provide assurances to any witness that the witness's testimony will not be used against him or her in a criminal proceeding before this Court.

13. In accordance with that provision, the prosecutor notified the Court as to witnesses, all adults, who were at some point persons as to whom there were grounds to believe they may have committed a crime within the jurisdiction of the Court. An assurance of non-prosecution by the Court will enable

³ Article 26 - Exclusion of jurisdiction over persons under eighteen "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."

the witnesses to testify without the need for a caution, at least vis-à-vis ICC prosecution.

14. Should the possibility of self-incrimination with respect to crimes within the jurisdiction of this Court occur with respect to other witnesses, the Rule makes clear that the Chamber can seek the views of the Prosecutor and that the Chambers can give assurances.

15. The Prosecution submits that the assurance obviates the need to caution witnesses about the potential for self-incrimination, unless there exists the possibility of incrimination in a state.

Self-incrimination in the DRC

16. A number of documents bear on the issue whether an ICC witnesses may, when testifying in court, face the possibility that their testimony might be used against them in the DRC.

17. First is the Agreement on Privileges and Immunities of the Court (APIC). The DRC ratified the APIC on 3 July 2007.

18. Article 19 of the APIC states:

“Witnesses shall enjoy the following privileges, immunities and facilities to the extent necessary for their appearance before the Court for purposes of giving evidence, including the time spent on journeys in connection with their appearance before the Court, subject to the production of the document referred to in paragraph 2 of this article:

[...] (c) Immunity from legal process of every kind in respect of words spoken or written and all acts performed by them in the course of their testimony, which immunity shall continue to be accorded even after their appearance and testimony before the Court[.]”

19. The language of this provision provides immunity for testimony given before this Court. The evidence they give cannot be used against them in a subsequent prosecution.

20. Second is the DRC law which may also provide immunity to some of our witnesses for some of the crimes.

21. The DRC enacted an Amnesty Law that applies to all acts specifically enumerated that were committed between 20 August 1996 and 30 June 2005. See *Loi n° 05/023 du 19 décembre 2005 portant amnistie pour faits de guerre, infractions politiques et d'opinion*⁴, which replaced *Décret-Loi n° 03-001 du 15 avril 2003*.

22. Article 2 states:

«Aux termes de la présente Loi, on entend par:

1. faits de guerre, les actes inhérents aux opérations militaires autorisés par les lois et coutumes de guerre, qui, à l'occasion de la guerre, ont cause un dommage à autrui ;

⁴ *Loi n° 05/023 du 19 décembre 2005 portant amnistie pour faits de guerre, infractions politiques et d'opinion* [Democratic Republic of the Congo]. 05/023. 19 December 2005, available online in UNHCR Refworld at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47305d032>.

2. infractions politiques, les agissements qui portent atteinte à l'organisation et au fonctionnement des pouvoirs publics, les actes d'administration et de gestion ou dont le mobile de son auteur ou les circonstances qui les inspirent revêtent un caractère politique ;
3. infractions d'opinion, les faits commis à l'occasion de l'exercice de la liberté de pensée ou d'expression.»

23. Article 3 of the amnesty law, however, explicitly excludes amnesty for the crime of genocide, crimes against humanity and war crimes. It states: « La présente amnistie ne concerne pas les crimes de guerre, les crimes de génocide et les crimes contre l'humanité.» There is thus the residual power of the DRC to prosecute war crimes, genocide, and crimes against humanity in the military courts. Insider witnesses may, accordingly, face the hypothetical prospect of prosecution in the military justice system for offences that fall under those proscriptions.

24. Concerning children, Article 114 of the *Loi No023/2002 du 18 novembre 2002 portant Code Judiciaire Militaire* states that “les juridictions militaires sont incompétentes à l’égard des personnes âgées de moins de dix-huit ans”. The crimes of genocide, war crimes and crimes against humanity fall under the jurisdiction of the military code. Since the military code does not apply to children under 18 years of age, it follows that children cannot be prosecuted for the crimes that might emerge in testimony in the ICC.

25. By virtue of these provisions, children under 18 years of age cannot be prosecuted in the DRC for war crimes because they are underage. Nor can they be prosecuted for the same conduct when charged as ordinary criminal acts. For example, a child who looted property while a child soldier would receive amnesty – irrespective of issues regarding whether the child could be prosecuted despite his or her age – from prosecution for offences under the criminal code.

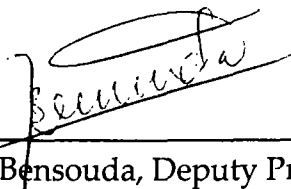
Self-incrimination in other national jurisdictions

26. The Prosecution does not believe that the acts about which our witnesses will testify constitute crimes that may be subject to criminal punishment outside the DRC. None of the witnesses are nationals of other countries, and the victims similarly – to the best of our information – are DRC nationals as well.

27. It is conceivable, though more theoretical than real, that offences about which our witnesses may testify could be deemed to fall within the limited range of crimes that some suggest are subject to universal jurisdiction. Some commentators assert that universality applies to all “serious crimes under international law,” including piracy; slavery; war crimes; crimes against peace; crimes against humanity; genocide; and torture. The Prosecution does not know at this juncture how many states have adopted these principles, or whether the actual acts about which one or

more witnesses may testify would reach the degree of gravity to merit a prosecution based on such jurisdiction.

28. However, the protective measures in place for some of the witnesses, and the availability of these measures for other witnesses if necessary, would provide protection to a witness who might otherwise fear that his incriminatory testimony would be used against him in a hypothetical third state prosecuting on the basis of universality. Primarily, the public anonymity of the witnesses will provide a baseline protection; distorting the voice and facial features adds further protection; and if the risk is still present, the use of in camera procedures will provide a complete guarantee.



Eatou Bensouda, Deputy Prosecutor
on behalf of
Luis Moreno-Ocampo,
Prosecutor

Dated this 30th day of January 2009

At The Hague, The Netherlands