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THE APPEALS CHAMBER

Before: Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Navi Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

**Prosecution's Document in Support of Appeal against the Decision on the
Evidentiary Scope of the Confirmation Hearing and Preventive Relocation**

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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Introduction

This Appeal concerns the proper interpretation of the mandate and authority of the Prosecution under Articles 68(1) and 54(3)(f) of the Statute *vis-à-vis* the protection of witnesses, and in particular whether the Prosecution has the authority to assess and decide on the need for protection of a witness whose testimony the Prosecution intends to rely on at trial, and to take provisional protective measures. This includes the question of the Prosecution's role in defining both the level of risk acceptable for witnesses, and when this level of risk is in fact reached.

The impugned Decision considers that the provisions of the Statute and the Regulations of the Registry should be interpreted as attributing to the Registry the exclusive power to decide the standard of risk for the witnesses, and to do so for the entire Court. In addition, the decision considers that the VWU has the exclusive authority to assess the risk on the ground and to decide which witnesses can benefit from the Court's protective measures. According to the Decision, the Statute does not provide the Prosecution with the authority to decide on the need for protection of a witness, or even to take provisional measures. In this regard, the Decision states that

“the Prosecution's mandate pursuant to article 68(1) of the Statute, is limited to, *inter alia*, (i) advising the witnesses as to what they can expect from the Court in terms of protection, as well as the competent organ of the Court for the adoption and implementation of the different protective measures; (ii) requesting the inclusion of witnesses in the ICCPP, as well as providing the Registrar with the necessary information to facilitate the assessment process; and (iii) requesting procedural protective measures such as redactions of identifying information from the Chamber”.¹

In its submissions before the Single Judge, the Prosecution stated that, in accordance with the Statute, it has a duty to protect witnesses, and relies on the VWU to implement the measures required for the protection of its witnesses. The Prosecution has stated that it could neither replace nor duplicate the mandate and responsibility of the VWU to implement protective measures for witnesses.² The Prosecution noted in this regard that it seeks to provide, and has provided, all its assistance to the VWU, including contact with national and international institutions,³ and in this context it also carries out emergency measures, including the preventive relocation of witnesses, whenever the VWU cannot or will not proceed within the timeframe required.⁴

¹ Decision, para. 25(iii).

² See for instance Prosecution Application, p. 3; ICC-01/04-01/07-398, 16 April 2008, para. 8.

³ “Prosecution's Submission of Information on the 29 February 2008 Disclosure of Incriminatory Evidence and Request for Protection” ICC-01/04-01/06-1212-Conf-Exp-AnxA, March 7, 2008, para. 8

⁴ *Id.*

In the current case, the Prosecution informed the Single Judge that it had provided for the provisional relocation of four witnesses: witnesses 132, 163, 238 and 287. As one witness, witness 163, finally decided not to cooperate with the Prosecution, and the Single Judge had specifically requested the Registry to report on the protection of witness 238, the Prosecution asked that the Single Judge direct the VWU to relocate witnesses 132 and 287, so that their statements might be disclosed to the Defence.

Instead of granting that request, the Decision expressed “the view that in implementing the practice of preventive relocation, as defined by the Prosecution, the latter is not only exceeding its mandate under the Statute and the Rules but it is also misusing its mandate in order to de facto shift the power to decide on the relocation of a given witness from the Registry to the Prosecution”. However, the Single Judge did not challenge the preventive relocation of witness 238 implemented by the Prosecution and ordered the Registry to take over the protection of this witness.

The Prosecution submits that the Decision has misinterpreted the system of witness protection established *inter alia* by Articles 68(1), 54(3)(f) and 43(6) of the Statute. In particular, the Decision is in error inasmuch as it:

- i) limits the authority of the Prosecution to determine the acceptable level of risk and the need for protection of the witnesses it intends to rely on; and
- ii) denies the Prosecution any ability to implement provisional protective measures. As a consequence, neither the Prosecution nor the Court itself can properly fulfill their protective duties under the Statute. Further, the Prosecution ability to approach, interview and subsequently rely on witnesses is undermined; and its duties and powers to independently conduct objective investigations under article 54, and to lead cases at trial, are directly affected. The lack of protection for witnesses 132 and 287, now solved, affected the ability of the Prosecution to present certain charges (rape and sexual slavery) in this case.⁵

The Decision’s flawed interpretation of the critical provisions of the Court’s Basic Documents has multiple detrimental consequences: it confers exclusive powers of protection to the Registry while at the same time recognizing the dysfunctions of such a system, noting in particular that “despite the Decision of the Single Judge of 12 March 2008, the Registrar continues to completely disregard the findings of the Single Judge on the seriousness of the threats received by Witness 238. The Single Judge is very

⁵ See para 39, below

concerned about Registrar's behaviour, in relation to Witness 238, which has created a serious risk for the witness's safety and has also created a further delay”.

It directly impacts the ability of the Prosecutor to secure the cooperation of new witnesses and to preserve the willingness of existing witnesses to cooperate in the present case as the Prosecution – or the Court – cannot guarantee their adequate protection. This is particularly serious as the Decision itself recognizes that “in the present case most of the witnesses on whom the Prosecution intends to rely at the confirmation hearing live in the province of Ituri. The security situation in this area remains volatile as described by the Single Judge in the First Decision on Redactions, including several instances of intimidation of witnesses on whom the Prosecution intends to rely at the confirmation hearing by alleged members of the FNI and the FRPI”.⁶

The Decision can further impact generally the ability of the Court to protect witnesses and to achieve fair and expeditious proceedings by impairing the Prosecution’s ability to present its best case at trial. In the ICTY case of *Prosecutor v Haradinaj et al.*, tangible threats to prosecution witnesses led to a high proportion of them expressing fear of appearing before the Trial Chamber to give evidence.⁷ As a consequence, some “witnesses who were expected to give evidence on central aspects of the case were never heard”.⁸ Two of the accused were acquitted.⁹ In this context, it is important to recall that in four years of investigations in ongoing conflicts, during which the Court applied a high and concerted standard of protection, no witness of the ICC has been seriously harmed or killed.

Finally, as other decisions, in particular by Trial Chamber I, diverge entirely from the impugned Decision – requesting the Prosecution to proactively engage in the implementation of alternative protective measures – there is a need to establish clarity and certainty for all participants.

On all those grounds, corrective action by the Appeals Chamber is warranted.

⁶ Decision, para. 16.

⁷ Protective measures aimed at concealing the identity of witnesses pursuant to Rule 69 of the ICTY’s Rules of Procedure and Evidence include the granting of a pseudonym to witnesses, while the real name of the witness will be known to the defence, as well as the imposition of technical devices to distort the image and the voice of witnesses during their testimony and the giving of testimony in closed session (see John R.W.D. Jones, *Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, Second Edition, Transnational Publishers, Inc. 2000, p. 348).

⁸ *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Judgment, 3 April 2008, paras. 22, 23 and 28. See also *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, 20 July 2007, para. 24.

⁹ *Ibid.*, para. 28. “The difficulty in obtaining evidence was a prominent feature of this trial.” In its notice of appeal, the Prosecution argued that “[t]he Trial Chamber denied the Prosecution a fair trial by not granting it the additional time necessary to exhaust all reasonable steps to obtain the testimony of witnesses”. See *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Notice of Appeal, 1 May 2008, para. 3.

Procedural Background

1. Following an *ex parte*, closed session hearing held with the Prosecution and the VWU on 21 January 2008,¹⁰ on 24 January 2008 the Prosecution filed the “Prosecution’s Submission of Information on Witness Protection”,¹¹ in which it requested that a number of witnesses be accepted into the ICCPP.
2. On 25 January 2008, the Registry filed a report¹² informing the Prosecution that its request for admission of certain witness into the ICCP program had been rejected. Following unsuccessful consultations with VWU, the Prosecution, on 10 March 2008, filed a “Request for the Issuance of an Order to Protect Witnesses 238 and 163”.¹³
3. Due to the circumstances of the case, the Prosecution relocated four of its witnesses of its own accord and on 7 April 2008, the Prosecution filed the “Prosecution’s Submission of Information on the Preventive Relocation of Witnesses 132, 163, 238, and 287”,¹⁴ in which it provided information regarding the preventive relocation of the four witnesses.
4. On 18 April 2008, the Single Judge issued the “Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” (the “Decision”).¹⁵
5. On 28 April 2008, the Prosecution applied for leave to appeal against the Decision in respect of two issues.¹⁶ On 20 May 2008, the Single Judge certified two issues for which the Prosecution had sought leave to appeal.¹⁷

The Issues Certified for Appeal and the Discontinuance of the Second Issue

6. The Single Judge certified the following two issues for appeal:
 - Whether the Single Judge erred in its interpretation of the provisions of the Statute on witness protection, as well as of Regulation 96 of the RoR, when prohibiting the

¹⁰ ICC-01/04-01/07-T-14-Conf-Exp-ENG.

¹¹ ICC-01/04-01/07-162 (public redacted version of ICC-01/04-01/07-161-Conf-Exp).

¹² ICC-01/04-01/07-168 and ICC-01/04-01/07-199 (giving notice of ICC-01/04-01/07-165-Conf-Exp).

¹³ ICC-01/04-01/07-255-Conf-Exp.

¹⁴ ICC-01/04-01/07-374-Conf-Exp. The Prosecution filed confidential (ICC-01/04-01/07-397-Conf) and public redacted (ICC-01/04-01/07-398) versions on 16 April 2008. On 17 April 2008, the Prosecution filed a further “Prosecution’s Submission of Information regarding the Preventive Relocation of Witness 132” (ICC-01/04-01/07-404-Conf-Exp).

¹⁵ ICC-01/04-01/07-411-Conf-Exp. Confidential redacted and public redacted versions of the Decision were issued on 21 April 2008 (ICC-01/04-01/07-423-Conf; ICC-01/04-01/07-428-Corr).

¹⁶ ICC-01/04-01/07-453 (“Prosecution Application”). On 2 May 2008, the Defence filed a response to the Prosecution Application (ICC-01/04-01/07-462). The Defence also applied for leave to appeal against the Decision (ICC-01/04-01/07-456), to which the Prosecution responded on 2 May 2008 (ICC-01/04-01/07-464).

¹⁷ ICC-01/04-01/07-483 (“Decision Granting Leave”).

Prosecution's practice of preventive relocation both prior to a decision by the Registrar on the inclusion of the relevant witness in the Court's Witness Protection Program and after the Registrar's Decision rejecting such inclusion ("First Issue"); and

- Whether the appropriate remedy for the Prosecution's unlawful preventive relocation of witnesses 132 and 287 is the exclusion of their evidence for the purpose of the confirmation hearing ("Second Issue").

7. In respect of the First Issue, the Prosecution submits that the Single Judge erred in law in her interpretation of the Statute and the RoR.
8. The Second Issue related solely to the Single Judge's exclusion of the evidence of witnesses 132 and 287 and has in the meantime become moot. In the Decision Granting Leave, the Single Judge affirmed that the evidence of these two witnesses had been excluded for the purposes of the confirmation hearing because the witnesses were, at that time, unprotected.¹⁸ After the Prosecution filed its Application for Leave to Appeal, the Registry admitted the two witnesses into the ICCPP.¹⁹ The Prosecution subsequently presented an application requesting that the statements of these two witnesses be declared admissible by the Single Judge. As a result, on 28 May 2008 the Single Judge ruled that "there is currently no impediment based on such security concerns for the inclusion in the Prosecution List of Additional Evidence of the statements, interview notes and interview transcripts of Witnesses 132 and 287".²⁰
9. The Prosecution thus considers that the Second Issue has been rendered moot by the Single Judge's decision of 28 May 2008. The Prosecution therefore discontinues the appeal, in respect of the Second Issue only, pursuant to Rule 157.²¹

¹⁸ Decision Granting Leave, p. 10. As a result, the statements of the two witnesses could not be disclosed to the Defence within the time limits prescribed in Rule 121 – see ICC-01/04-01/07-523, 28 May 2008, pp. 5-6.

¹⁹ ICC-01/04-01/07-523, 28 May 2008, p. 6, referring to ICC-01/04-01/07-482-Conf-Exp, 19 May 2008. In addition, the date of the confirmation hearing had been postponed from 21 May 2008 until 27 June 2008.

²⁰ ICC-01/04-01/07-523, 28 May 2008, p. 8.

²¹ The Prosecution submits that, in general and in the absence of special circumstances, a party may withdraw or discontinue one or more grounds of appeal, without affecting its appeal in respect of the remaining grounds – see e.g. *Prosecutor v. Krajisnik*, IT-00-39-A, Order Regarding Amicus Curiae's Motion to Withdraw Sub-Ground of Appeal, 23 August 2007, and authorities cited therein.

The Prosecution recalls that the Appeals Chamber has previously ruled that a notice of discontinuance should deal exclusively with the discontinuance of the appeal (*Prosecutor v. Lubanga*, ICC-01/04-01/06-393 OA2, 6 September 2006, para. 12). Therefore if the Appeals Chamber considers that the Prosecution may not include the discontinuance of an issue for which leave to appeal was granted in its document in support of appeal, or a party may not discontinue only one issue pursuant to Rule 157, then the Prosecution informs the Appeals Chamber that, in light of the Single Judge's decision of 28 May 2008, it does not intend to present any arguments or seek any relief in respect of the Second Issue and that it hereby abandons its appeal in respect of that issue only.

**The background to this appeal: the system of witness protection adopted by the
Decision**

10. The instant case demonstrates the need for the Prosecution to be in a position to assess the risks to its witnesses, determine the need for protection and, where necessary, take protective measures including preventive relocation. After the Registrar rejected the Prosecution's request to have three witnesses (132, 238 and 287) admitted into the ICCPP,²² the Prosecution proceeded to preventively relocate those witnesses.²³ The Single Judge acknowledged that at least one of these witnesses was exposed to risks and that as a result of the Registrar's determination they were all left unprotected.²⁴
11. In relation to witness 238, the Single Judge found that the Registrar had completely disregarded the Single Judge's findings on the seriousness of the threats received by that witness, and stated that the Registrar's behaviour in relation to the witness 238 had "created a serious risk for the witness' safety".²⁵ The Single Judge therefore directed the Registrar to immediately include witness 238 into the ICCPP.²⁶ However without the Prosecution's preventive relocation of that witness, based on its assessment of the risk and need for protection, this witness who the Single Judge concluded was at serious risk would have been left totally unprotected for a number of weeks. In relation to witnesses 132 and 287, as a result of the Decision the witnesses were left without any clear protective scheme for a period of one month,²⁷ and were only brought back under the protection of the Court pursuant to a discretionary decision from the Registrar.
12. These events show, on the one hand, that the emerging system of protection, based upon the concentration of exclusive authority in the VWU and the discretionary nature of its decisions does not provide the required degree of protection required by the Statute, including Article 68 (1). Further, the flaws in the effective functioning of the system are putting at risk those who should be protected and are also affecting the ability of the Prosecution to efficiently investigate and prosecute cases. It is against this particular background that the Decision made the impugned findings, and that the Prosecution will discuss the relevant errors.

²² ICC-01/04-01/07-199 (giving notice of ICC-01/04-01/07-165-Conf-Exp).

²³ See ICC-01/04-01/07-398 (public redacted version of ICC-01/04-01/07-374-Conf-Exp); ICC-01/04-01/07-404-Conf-Exp.

²⁴ For witnesses 132 and 287, see Decision Granting Leave, p. 10; for witness 238, see Decision, paras. 41-52.

²⁵ Decision, para. 51.

²⁶ Decision, para. 52.

²⁷ The Single Judge considered that witnesses 132 and 287 "were to be considered at the time that the Decision was issued as being unprotected" (Decision Granting Leave, p. 10).

The System of Witness Protection as established by the Statute

13. The Prosecution submits that to analyze the Decision of prohibiting the Prosecution's practice of provisional protective measures, it is pertinent to first discuss the system of witness protection as established by the Rome Statute, including:

- i. Article 68(1), and in particular the duty of the Prosecution to protect the witnesses and the level of risk.
- ii. Article 54, that includes, as part of the Prosecution's investigative mandate, the ability to take and request measures to protect any persons, including witnesses.
- iii. Article 43(6), which confer to the Registry and VWU the mandate to implement the protection scheme envisioned by the Rome treaty for all the witnesses of the Court.

(i) Article 68(1) defines the duty of the Prosecution to protect the witness, and establishes the standard of protection of witnesses.

14. Under Article 68(1), the Court as a whole has a duty and responsibility to take appropriate measures to protect witnesses, and within this framework, the Prosecution has a particular duty during investigations and prosecutions.²⁸ Beyond this, the Prosecution submits that, pursuant to Article 68(1) of the Statute which provides that "[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses", the standard of protection of the Court ought to be "the elimination of all foreseeable risk". This is the standard agreed upon by the Presidency, the Registry and the Prosecution which committed in the Strategic plan of the Court to "put in place a system to address all security risks, striving for maximum security of all participants."²⁹ The Prosecution submits that this standard is also consistent with the recent judgement of the Appeals Chamber, which "observes that there are other provisions of the Statute and the Rules that are aimed at ensuring that persons are not put at risk through the activities of the Court".³⁰

15. The determinations to be made to reach this goal have to be done in accordance with consistent and transparently applied criteria.³¹ For these purposes, specific criteria were agreed by the Prosecution and the Registry. However, and as the Decision recognizes

²⁸ Article 68(1) – "The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes."

²⁹ See Strategic Plan of the Court, ICC-ASP, 4 August 2006, para. 31 and Annex, page 14.

³⁰ See the recent Judgement of the Appeals Chamber - ICC-01/04-01-475 OA, 13 May 2008, para. 43.

³¹ The Single Judge stated that "the success of the ICCPP and of the model of witness protection embraced by the Statute and the Rules is fully dependent on the clear pre-determination and transparent application of the criteria for inclusion in the programme" (Decision, para. 49).

“Subsequently, the Registrar appears to have increased the threshold for inclusion in the ICCPP insofar as he has highlighted in his filings in the present case that the inclusion in the programme is based on a new standard: “[t]he fundamental principle that we have is that the acceptance of an individual to the ICCPP will have to be threat based”. This new standard was also noted by the Single Judge in the 1 April 2008 hearing, where she stated that according to previous practice, “the threat was not the basis for their relocation but the real possibility, the concrete likelihood that they would be threatened [...]”.

16. The change of these criteria and the consequent rejection of protective measures by the VWU forced the Prosecution to implement provisional measures for witnesses 132, 163, 238 and 287 in order to fulfil its duties of protection and to disclose the evidence to the defence. The Prosecution further submits that the measures implemented by the Prosecution, including preventive relocation, are a direct consequence of the standard of protection applied by VWU. The Prosecution finally notes that the obligations under Article 68(1) of the Statute, and the standard of risk to which they relate should not be defined unilaterally by the VWU.

(ii) The Prosecution’s ability to take measures to protect witnesses under Article 54(3)(f).

17. The ability of the Prosecution to take measures to protect witnesses is also based on Article 54(3)(f), which specifically provides the Prosecution with the authority to “take necessary measures, or request that necessary measures be taken, to ensure [...] the protection of any person or the preservation of evidence”. Article 54(3)(f) thus clearly provides, by its plain terms, that the Prosecutor may “take necessary measures” to protect witnesses – included in the formula “any person” - as well as to “request that necessary measures be taken”.³²

³² The autonomous power of the Prosecution under Articles 54(3)(f) and 68(3) is also confirmed by the preparatory work to the Rome Statute and by commentaries. See for example, the Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, A/AC.249/1998/L.13, 4 February 1998, in which, Article 47(2)(d) states that “the Prosecutor may: [...] (d) take necessary measures to ensure the confidentiality of information or the protection of any person [, including witnesses]”. Article 61[43](2) states that: “The Prosecutor shall, in ensuring the effective investigation and prosecution of crimes, respect and take appropriate measures to protect [...] victims and witnesses”. See also the Report of the Preparatory Committee on the Establishment of an International Criminal Court from 15 June – 17 July 1998 in Rome, Italy, A/CONF. 183/2/Add.1, 14 April 1998, in which Article 68(2) states: “The Prosecutor shall, in ensuring the effective investigation and prosecution of crimes, respect and take appropriate measures to protect [...] victims and witnesses”. See further M. Bergsmo and P. Kruger in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, 1999: “all three powers listed [in Article 54(3)(f)] must have been considered inherent insofar as they are essential to the functioning of an independent office of the Prosecutor” (p. 724, para 29); [...] “The Prosecutor’s *obligation* to take protective measures rests on article 68 para. 1, whilst the discretionary *power* of the Prosecutor to take such measures is expressed by article 54 para. 3 (f). The Prosecutor is granted a witness protection authority alongside that of the Court and [VWU]” (p. 725, para 30).

18. The Prosecution is implementing its duties, performing an ongoing assessment of the risks to its witnesses, of the protection needed and relying on VWU to implement the protective measures required. Best practices for the assessment of risk and need for protection require input from those closest to the relevant witnesses and their individual circumstances. The Prosecution respectfully submits that it is well placed to make this assessment in the context of its investigative activities. The Prosecution has permanent support staff in Bunia. Further, members of its Operational Support Unit are designing and executing the necessary security procedures relating to the investigations in liaison with the Registry's Security and Safety Section and national and international authorities. In addition, the investigators of the case are travelling through the region collecting information about the situation of the witnesses and those involved in the crimes. The information collected is analyzed in The Hague and conveyed to the Registry including VWU.³³

(iii) VWU has the mandate and responsibility for implementing protective measures

19. VWU has the mandate and responsibility for implementing protective measures³⁴ and the Prosecution relies on the VWU to implement the range of measures required for the protection of its witnesses. In this sense, the Prosecution notes that the ICCPP is a measure of last resort, and that a range of other protective measures must be considered in each case, including, but not limited to, best practices in the field (while always necessary, these may not always be sufficient), availability of the so-called Initial Response System (IRS) and providing temporary relocation of a witness.
20. The Prosecution further notes that it can take measures to assist VWU in the implementation of protective measures, including establishing contact with national and international institutions. Further, the Prosecution is willing to carry out emergency measures, including the preventive relocation of witnesses, whenever the VWU is unable to do it within a tight timeframe. But it can neither replace nor duplicate the mandate and responsibility of the VWU to protect witnesses. Further, it also recognises the expertise of the VWU in the implementation of protective measures and the provision of support to victims and witnesses. However, the Prosecution has also consistently emphasized that,

³³ "Prosecution's Application for Leave to Appeal the Decision on the Evidentiary Scope of the Confirmation hearing and Preventive relocation", ICC-01/04-01/07-453, 28 April, 2008, para.11

³⁴ According to Tolbert (in Triffterer, p. 645), the VWU should not be the body deciding on protective measures; it should – in the light of art. 68(4) - advise the Prosecution and the Court on appropriate measures; "the power to provide protection measures rests with the Court."

in the strict fulfilment of its duty of protection, it will take adequate provisional protective measures when the witnesses are at risk and the VWU cannot or will not protect them.

The Relevant Findings in the Decision

21. In the Decision, the Single Judge decided that “the Prosecution shall immediately put an end to the practice of preventive relocation of witnesses”,³⁵ providing, among others, the following reasoning for this ruling:
22. In this regard, the Single Judge recalls that article 43(6) of the Statute and regulations 96 (1), (2) and (4) of the RoR:....
 - (iii) expressly regulate the role to be played by the Prosecution and the Defence within the framework of the programme [ICCPP], which is limited to making applications to the Registrar for the inclusion of witnesses into the programme;
23. As a consequence, in the view of the Single Judge, there is no provision in the Statute, the Rules, the Regulations or the RoR, which expressly confers upon the Prosecution the power to preventively relocate witnesses until they are included in the ICCPP. Any such power could only be recognised as a result of an interpretation by the Prosecution of its mandate, pursuant to article 68(1) of the Statute in accordance with the interpretative criteria provided for in the Vienna Convention of the Law of Treaties ("the Vienna Convention");
24. In this regard, the literal interpretation of article 68(1) of the Statute does not expressly grant the Prosecution any power to preventively relocate witnesses insofar as it only refers to the general mandate of the Prosecution - as well as the other organs of the Court - to take "appropriate measures to protect the safety, the physical and psychological well-being, dignity and privacy of victims and witnesses" in particular during the investigation and prosecution of crimes.
25. The contextual interpretation of article 68(1) of the Statute in light of the other provisions concerning the competent organ of the Court to adopt and implement protective measures, and in particular article 43(6) of the Statute and regulations 96(1), (2) and (4) of the RoR, requires that the Prosecution's mandate under article 68(1) of the Statute not be extended to the preventive relocation of witnesses for the following reasons: [...]
 - (iii) Article 68(1) of the Statute should be interpreted in a manner which is fully consistent with the attribution to the Registrar of the power to decide which witnesses of the Court can be included in the ICCPP and to implement their relocation. In this regard, the Prosecution's mandate, pursuant to article 68(1) of the Statute, is limited to, inter alia, (i) advising the witnesses as to what they can expect from the Court in terms of protection, as well as the competent organ of the Court for the adoption and implementation of the different protective measures; (ii) requesting the inclusion of witnesses in the ICCPP, as well as providing the Registrar with the necessary information to facilitate the assessment process; and (iii) requesting procedural protective measures such as redactions of identifying information from the Chamber.
26. Finally, the teleological interpretation of article 68(1) of the Statute also requires that the Prosecution's mandate under this provision not be extended to the preventive relocation of witnesses. Article 68(1) of the Statute is a provision of a general nature, which aims at placing on all organs of the Court, including the Prosecution, the obligation to take “appropriate measures” for the protection of witnesses.

³⁵ Decision, p. 54.

27. The object and purpose of this provision is not to attribute to any of the organs of the Court, including the Prosecution, the power to take whichever protective measure the relevant organ may consider necessary to protect a given witness. On the contrary, this provision aims at placing on every organ of the Court the obligation to pay particular attention to the needs of the witnesses in performing their functions and to cooperate, whenever necessary, with those organs of the Court that are competent to adopt specific protective measures such as the relocation of witnesses.
28. [...] The decision of the drafters to create a single Victims and Witnesses Unit within the Registry constitutes a clear endorsement of a system of witness protection in which the core role is played by the Registry and a limited mandate is given to the Prosecution which, in the view of the Single Judge, is consistent with the attribution to the Registrar of the overall competence for the operation of the ICCPP.
22. The Decision effectively denies the Prosecution the special duty established by the Article 68(1), and the ability to take measures established by Article 54(3)(f). The system enshrined by the Decision expressly confers a “core role” to the Registry and a “limited mandate” to the Prosecution.³⁶ This “limited mandate”, under the terms of the Decision, is confined to the provision of advice to witnesses and the making of requests to other organs of the Court.³⁷ Under the Single Judge’s interpretation of Article 68(1), the Prosecution is precluded from taking protective measures; it can only trigger, by means of request, a process by which such protective measures may be taken by others. The Prosecution must remain passive while those requests are being processed, or if they have been rejected,³⁸ even if there is a situation of clear and present danger to victims or witnesses.³⁹

The Ground of Appeal – the Single Judge Erred in Law When Prohibiting the Prosecution from Preventively Relocating Witnesses

23. The Prosecution submits that the Single Judge erred in law when interpreting the provisions of the Statute on witness protection – in particular Articles 54(3)(f), 68(1) and (4), and 43(6) – to prohibit the Prosecution’s practice of preventive relocation of witnesses.⁴⁰ The Prosecution submits that the Statute places upon the Prosecution specific duties and powers to determine the necessity of protective measures, and take such measures itself when required. This is evident in the ordinary meaning, and context

³⁶ Decision, para. 28.

³⁷ Decision, para. 25(iii).

³⁸ See Decision, para. 25.

³⁹ The Decision does provide for an “extended initial response system” to deal with situations of urgency, which must be implemented by the Registrar. Even in the context of this system the role of the Prosecution does not go beyond making applications to the Registrar. See Decision, paras. 35-36.

⁴⁰ In light of the Prosecution’s powers to take necessary measures to ensure the protection of any person including witnesses, discussed below, no distinction need be made for the purposes of this appeal between preventive relocation prior to a decision by the Registrar on the inclusion of the relevant witness in the ICCPP and preventive relocation after the Registrar’s decision rejecting such inclusion.

provided by, key provisions of the Statute and the Rules, as well as the existing jurisprudence from the Appeals Chamber. The rejection of the authority of the Prosecution to take necessary protective measures is also inconsistent with the object and purpose of those provisions, and the overall architecture of the Court, as highlighted by the Court's experience to date.

The plain reading of the Statute provides power to the Prosecution to take necessary protective measures, including preventive relocation

24. Article 68(1), places a duty of protection on the Prosecution in particular during investigations and prosecutions.⁴¹ This duty on the Prosecution is in turn implemented through Article 54(3)(f), which clearly provides, by its plain terms, that the Prosecutor may “take necessary measures” to protect witnesses, as well as to “request that necessary measures be taken”.⁴²

25. This is consistent with a recent judgement of the Appeals Chamber, in which it recognised the existence of protective powers vested upon the Prosecution in equally clear terms: according to the Chamber, under Article 54(3)(f),

“[t]he Prosecutor has the [...] express power either to take necessary measures or to request that necessary measures be taken to ensure the protection of individuals who are at risk”.⁴³

This key finding from the Appeals Chamber demonstrates that the Prosecution's sphere of authority in matters of protection includes both the taking of protective measures and the request for protective measures being taken by other organs of the Court.

The Decision failed to properly consider the relevant context provided by the provisions of the Statute and Rules on witness protection

26. The Single Judge's conclusion was based, among other things, on a “contextual interpretation of article 68(1) of the Statute in light of other provisions concerning the competent organ of the Court to adopt and implement protective measures”.⁴⁴ The context considered, however, appears to be limited to Article 43(6) and Regulation 96 of

⁴¹ Article 68(1) – “The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes.”

⁴² The autonomous power of the Prosecution under Articles 54(3)(f) and 68(3) is also confirmed by the preparatory work to the Rome Statute and by commentaries. See footnote 32, above.

⁴³ *Prosecutor v. Katanga*, ICC-1/04-01/07-475 OA, 13 May 2008, para. 47. See also para. 44, stating that Article 54(3)(f) “demonstrates an intention that protection should, in principle, be available to anyone put at risk by the investigations of the Prosecutor”. See further Dissenting Opinion of Judge Pikis, stating that “Article 54(3)(f) of the Statute articulates the powers of the Prosecutor in the investigatory process and steps that may be taken for the sustenance of its efficacy” (para. 11).

⁴⁴ Decision, para. 25.

the RoR.⁴⁵ The Prosecution submits that the Single Judge erred by failing to also consider the context provided by Articles 54(3)(f) and 68(4); and by an erroneous interpretation of Regulation 96 of the RoR.

27. First and foremost, the Single Judge failed to consider, as part of the relevant context for the interpretation of Article 68(1), that Article 54 (3)(f) of the Statute expressly grants the Prosecution the authority to take action to implement its protective duties.
28. In addition, Article 68(4) states that the VWU “may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6”.⁴⁶ Similarly, Rule 17(2)(a)(ii) provides that the VWU shall “recommend[...] to the organs of the Court the adoption of protection measures and [...]”.⁴⁷ This advisory function allocated to the VWU must necessarily relate to the exercise of protective functions by other organs of the Court, including the Prosecution; otherwise, the provision would be void of any meaningful purpose.
29. In contrast to the relevant articles above, the Decision relied primarily on Article 43(6) and Regulation 96 of the RoR to come to the relevant conclusion.⁴⁸ The Prosecution submits that Article 43(6) does not regulate the role to be played by the Prosecution within the framework of protection, or limit its role in any other way.⁴⁹ The relevant parts of Article 43(6) state that the VWU, which is established within the Registry “shall provide, in consultation with the Office of the Prosecutor, protective measures [...] for witnesses [...]”.⁵⁰ This provision provides that the VWU is the unit of the Court charged

⁴⁵ While the Decision states that the Single Judges in this context considered “in particular” Article 43(6) and Regulation 96 of the RoR, there is no indication in the relevant parts of the Decision, that the Single Judge also considered other provisions from the Statute or the Rules (see Decision, paras. 22 and 25).

⁴⁶ Emphasis added. The Prosecution acknowledges that protection by way of relocation will be provided by Registry; however the Prosecution retains a residual power to implement protection, including “preventive” relocations, if in the particular circumstances it deems such measure “necessary” for the protection of a particular person.

⁴⁷ The Prosecution notes that Rule 17(2)(a)(ii) uses the plural of the term “organs of the Court” and is therefore not limited to a particular organ, but extends to all its organs, including the Prosecution. The Prosecution further notes Rule 18(b), which refers to the VWU as a service provided of prosecution and defence witnesses. See also Rule 17(2)(a)(i) referring to the VWU’s ability to also provide protection to witnesses itself. This is consistent with the Prosecution’s power under Article 54(3)(f) to request that protection measures be taken by others on the Prosecution’s behalf.

⁴⁸ See Decision, paras. 22 and 25(iii).

⁴⁹ Decision, para. 22(iii).

⁵⁰ The phrase “in consultation with the Office of the Prosecutor” included in Article 43(6) represents a compromise reached in locating the VWU in the Registry, rather than in the Office of the Prosecutor. It requires the VWU to consult with the Prosecution for the purposes of the implementation of protective measures. By no means, however, does the provision imply that the Prosecution has no autonomous powers to take protective measures, such as the preventive relocation of witnesses (see Decision, para. 28). Some delegations, and in particular the U.S Ambassador at large for war crimes issues, David Scheffer, argued that the VWU should be located within the OTP because “witness protection is not a bureaucratic function; it is very serious business that directly involves the Prosecutor, who needs the trust of witnesses and who has a very direct stake in protecting them.” See “Witness and Victim Protection in International Criminal Courts”, address by D.J. Scheffer, US

with implementing protective measures for victims.⁵¹ It does not, in any case, grant the VWU the sole authority to decide on the need for protection of witnesses; nor could it exclude the Prosecution's responsibilities and authority under Article 54(3)(f). To interpret Article 43(6) as granting to the VWU the sole authority to decide on the need for protection would affect the responsibility of the prosecution to protect witnesses and its ability to conduct investigations and would, furthermore, circumvent the powers of a Chamber under Rules 81(4) and 87 to provide for the protection of victims and witnesses.⁵²

30. In relation to the Single Judge's reliance on Regulation 96 of the RoR, the Prosecution submits that this provision regulates the way in which the Registry implements the protection scheme, not the role of the Prosecutor in relation to protection. According to Rule 14 of the Rules of Procedure and Evidence, the Regulations of the Registrar are an instrument to regulate the organization and the management of the Registry. This Regulation governs the procedures by which the Registry fulfils its mandate to implement protective measures. However it has no bearing on the powers or the activities of the Prosecution under the Statute. In addition, the Regulations of the Registry are subject to the Statute, the Rules of Procedure and Evidence and the Regulations of the Court, and thus cannot infringe upon a statutory power of the Prosecution.⁵³
31. The Single Judge accordingly erred in finding that the general requirement in Article 68(1) that all organs of the Court "take appropriate measures" is limited to "pay[ing] particular attention to the needs of the witnesses in performing their functions and to cooperate, whenever necessary, with those organs of the Court that are competent to adopt specific protective measures, such as the relocation of witnesses".⁵⁴ On the contrary, the requirement in Article 68(1), when read in the context of other provisions of the Statute on witness protection, and in particular Articles 54(3)(f) and 68(4), must be interpreted to

Ambassador at Large for War Crimes Issues, at Fordham University School of Law, New York, 28 January 1998. Available at: http://www.state.gov/www/policy_remarks/1998/980128_scheffer_icc.html. See also Preparatory Committee's Report on the Establishment of the International Criminal Court (1998), U.N. Doc: A/CONF.183/2/Add.1, available at <http://www.un.org/law/n9810105.pdf>, suggesting in Article 43(10) that "The Office of the Prosecutor shall be responsible for providing protective measures to witnesses to be called by the Prosecution".

⁵¹ Insofar, the Prosecution agrees with the Single Judge that the Registry plays a central role in the protection of witnesses (see Decision, paras. 29-30).

⁵² The Prosecution also submits that the manner in which the Appeals Chamber has referred to Article 43(6) in the context of the Prosecution's autonomous powers under Article 53(3)(f) further demonstrates that there is no incompatibility between the latter and the competence of the Registrar under the Court's basic documents as held by the Single Judge. On the contrary, the Appeals Chamber's analysis of the applicable circle of provisions demonstrates that they ought to be approached as a harmonic scheme (see *Prosecutor v. Katanga*, ICC-01/04-01/07-475 OA, 13 May 2008, para. 48).

⁵³ See Regulation 1(1) of the RoR.

⁵⁴ Decision, paras. 26-27.

include the Prosecution's power to take adequate protective measures, which may in turn include the preventive relocation of witnesses.

The object and purpose of the Statute, along with its underlying principles, also demonstrate that the Prosecution must have the power, when necessary, to take measures to ensure the protection of witnesses, including preventive relocation

32. The Prosecution submits that its power to preventively relocate witnesses is an essential component of the statutory framework in order to: a) allow the Prosecution, and the Court, to adequately discharge its duties of protection; b) maintain fairness to witnesses; and c) permit the Prosecution to carry out its duties and powers to investigate under Article 54, lead cases at trial and preserve its independence.

a. Discharging the Prosecution's, and the Court's, duties of protection

33. As noted above, the Prosecution has always endeavoured to implement its key obligations of protection, placed upon it by Articles 54(3)(f) and 68(1), *through* VWU. However this does not detract from the fact that the Prosecution has the authority, under Article 54(3)(f), to determine when protection is necessary, and to react accordingly. Indeed, the Prosecution will generally be best placed to make such a determination: the investigators of the Prosecution have extensive contact with the witnesses, are most familiar with their individual circumstances, and are thus best placed to assess the risk to a given witness. Furthermore, while the Prosecution will already be in possession of the necessary information, VWU's requirement to make a further independent assessment will often take a significant period of time.⁵⁵

34. Further, there have been and will continue to be situations, especially when protection is needed on an urgent basis or pending the implementation of the decision, where the Prosecution must immediately take appropriate measures in order to provide effective protection to witnesses.⁵⁶ This objective of this authority would be to ensure that witnesses at risk are not left unprotected, and with a view to facilitating a more sustainable solution in any given case.⁵⁷

⁵⁵ In the past, some assessments and determinations on admission into the ICCPP have taken 6 to 12 months. There can be many reasons for such delays, including the security and logistical difficulties in arranging additional assessments; however it remains a reality in the context of the Court's operations.

⁵⁶ See also Decision, para. 35.

⁵⁷ In this regard, the "extended initial response system" proposed in the Decision (para. 36) will likely be inadequate to react to certain imminent threats, as it still requires the Prosecution to prepare and submit an application to the Registry, and the Registry to assess and decide on the application, even if on an expedited basis, before any protection can be provided with witnesses. Such a system thus does not obviate the need for,

35. Under the terms of the Decision, there will be situations in which witnesses who are at risk as a result of their cooperation with the Court will be left without protection. Such a situation arose in this case, where two witnesses were left without any clear protective scheme for approximately one month.⁵⁸ This time would have been longer, and an additional witness who had suffered from serious threats would have been left unprotected, were it not for the Prosecution's preventive relocations.⁵⁹ In contrast of the exclusion of the Prosecution from any protective activity in the Decision, Trial Chamber I expressly established responsibility and authority for the Prosecution "to decide whether to secure any other protective solution, as it considers appropriate"⁶⁰ for witnesses if they require protection but are not accepted into the ICCPP.

36. By denying the Prosecution any powers of protection, and in particular by prohibiting the practice of preventive relocation, the Decision thus significantly impairs the Prosecution's ability to adequately discharge its duties of protection under Article 68(1).

b. Fairness to witnesses

37. Under the terms of the Decision, witnesses who have trusted the Court and have assumed risks in order to cooperate with the Prosecution's investigations and prosecutions may be left to their own devices, despite the fact that under the Prosecution's judgment they are at risk, if the Registrar decides that inclusion in the ICCPP or other protective measures are not justified or that the risk identified does not amount to a situation of "urgency".⁶¹ Such a situation could impact on the fairness of the proceedings, which the Prosecution submits incorporates an element of fairness to witnesses,⁶² and the consequences could manifestly impact on the integrity of those proceedings.⁶³

and in any event could not displace, the Prosecution's statutory rights and duties to independently take protective measures.

⁵⁸ While the Single Judge considered that in the particular circumstances of this case, the risks to witnesses 132 and 287 could be avoided by excluding the evidence of those witnesses for the purposes of the confirmation hearing, this option will not always be sufficient (for example where a witness has already provided evidence at an earlier stage, and as a result the threats have arisen or intensified).

⁵⁹ See Decision, paras. 41-52. In addition, in recent instances the VWU has taken a highly and inappropriately restrictive approach to granting effective protection through relocation – see *Prosecutor v Lubanga*, ICC-01/04-01/06-1332-Anx, 15 May 2008, and in particular paras. 7, 12-16. The Prosecution submits that the continually changing nature of the standards applied by VWU, and the present highly restrictive approach, further underscores the need for the Prosecution to retain the power to implement the protective measures that it considers necessary, including through preventive relocation.

⁶⁰ *Prosecutor v Lubanga*, ICC-01/04-01/06-1311-Anx2, 8 May 2008, para. 80.

⁶¹ As explained at paras. 35-37 of the Decision (exceptional situations of imminent harm).

⁶² Pursuant to Article 64(2), provided that these aspects are not prejudicial to or inconsistent with the rights of the accused (see e.g. *Prosecutor v Tadic*, IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paras. 55, 72. See also D.K. Piragoff, 'Article 69 : Evidence', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p. 907.) The Prosecution's power to independently take protective

c. Duty and power to investigate and lead cases at trial, and the independence of the Prosecutor

38. An independent power of the Prosecution to take protective measures, including preventive relocation, is crucial to the effective conduct of investigation in compliance with Article 54(1)(b), to establish the truth within the terms of Article 54(1)(a),⁶⁴ and to the ability to present what it believes to be its best possible case at the confirmation hearing or at trial.⁶⁵ The strictures that the Decision imposes on the Prosecution fail to take account of the unique context in which the Court operates, where investigation and protection of witnesses go hand-in-hand, and the success of the former is dependent on the ability to provide the latter.
39. Witnesses may often not be willing to give a statement to the Prosecution or to otherwise cooperate with it unless the Prosecution can guarantee appropriate protection to them. The Decision thus has serious implications on the Prosecution's ability to investigate and prosecute. The Prosecution will be unable to provide witnesses with any assurances regarding their protection by the Court because the Registry defines the standards under which protection is granted, the application of those standards, and has changed them without prior consultation or notification.⁶⁶ As a consequence, the Prosecution may be unable to bring critical evidence to prove charges at trial, as illustrated by the recent events regarding witnesses 132 and 287.⁶⁷

measures, and in particular the power to preventively relocate witnesses, is an important aspect to guarantee the fairness to witnesses.

The Prosecution notes that the Single Judge raised concerns regarding possible impacts on the credibility of the witnesses (Decision, para. 31). The Prosecution submits that this is a matter which could properly be explored by the parties at trial, and that even assuming, *arguendo*, that relocation by the parties might in some cases impact on the weight accorded to the evidence (a bold proposition that has not been properly substantiated in the Decision), this does not render such preventive relocations inconsistent with the requirements of a fair and expeditious trial.

⁶³ The Prosecution submits that this unfairness and the continued exposition to risk by the witness significantly outweighs the inconvenience of a witness and his or her family members described in para. 25(i) of the Decision.

⁶⁴ Given the duty of the Prosecution under Article 68(1) to protect witnesses and the duty to investigate objectively under Article 54(1)(a), the Prosecution submits that the power to independently take protective measures, including the power to preventively relocate witnesses, does not affect the principle of equality of arms (see Decision, paras. 31 and 34).

⁶⁵ Limiting the Prosecution's ability to decide on the need for protective measures for witnesses, has consequences that go beyond the investigation phase or the confirmation hearing and extend to subsequent proceedings, including preparation of the case for trial and trial itself, all areas where supplementary investigative activities may be undertaken, and, more importantly, where disclosure duties reach their peak (see *Prosecutor v Lubanga*, ICC-01/04-01/06-568 OA3, 13 October 2006, paras. 49-57).

⁶⁶ See e.g. Decision, paras. 44-49.

⁶⁷ For instance, as a result of the initial exclusion of witnesses 132 and 287 (see Decision para. 39), the Prosecution was unable to bring charges of sexual slavery against Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07-422, see also ICC-01/04-01/07-523, p. 6).

40. Under the terms of the Decision, the Registrar has the sole power to effectively determine whether a witness will receive protection. As shown above, this affects the Prosecution's ability to investigate, select witnesses and present its cases. The Prosecution submits that its ability to investigate and present cases cannot be subjected to the decisions of another organ, i.e. the Registrar, which can effectively exercise a decisive influence under the terms of the Decision by having the sole and final say on the protection afforded to witnesses and therefore the Prosecution's ability to lead evidence.⁶⁸ The problems, in part identified in the Decision,⁶⁹ arising from the manner in which some assessments and determinations have recently been carried out make this subordination of the Prosecution's protective role to the VWU's independent authority particularly serious. This case demonstrates that in the absence of effective protection of witnesses, the Prosecution will be unable to effectively investigate and present cases at trial and to establish the truth.⁷⁰
41. The Prosecution submits that, pursuant to Article 68(1) of the Statute, protective measures ought to strive to address all identifiable security risks and provide maximum security to all participants.⁷¹ These objectives require that the full range of protective tools be available to all organs, and that determinations be made in accordance with consistent and transparently applied criteria.⁷²
42. Finally, it is crucial to build upon the experience of the last four years of activities of the Court, during which time the Prosecution has been able to minimize different threats to life and well-being of witnesses. The security of witnesses simply cannot be compromised. Reducing the standards of acceptable risk and the available protective measures would not permit the Court, or the Prosecution, to discharge its obligations to protect witnesses and victims as mandated by Article 68(1).

⁶⁸ In this sense, the Prosecution stresses that its independence as an organ operates not only *vis-à-vis* any external influence, but also *vis-à-vis* other organs of the Court.

⁶⁹ See, for instance, Decision, paras. 45-51.

⁷⁰ In an ICTY case, the Trial Chamber noted the fear expressed by a number of witnesses who were called to testify and the fact that some witnesses only gave evidence in response to a subpoena issued by the Chamber - *Prosecutor v. Limaj et al*, IT-03-66-T, Trial Judgement, 30 November 2005, paras 15, 23 and 26.

⁷¹ The starting point for this standard of protection is the elimination of all foreseeable risks. This is the standard based on which the Prosecution made its applications in this case (Decision, para. 20) and is the standard agreed by the Presidency, the Registry and the Prosecution (*Strategic Plan of the Court*, "to put in place a system to address all security risks, striving for maximum security of all participants consistent with the Rome Statute". ICC-ASP, 4 August 2006, paragraph 31 and Annex, page 14).

⁷² The Single Judge stated that "the success of the ICCPP and of the model of witness protection embraced by the Statute and the Rules is fully dependent on the clear pre-determination and transparent application of the criteria for inclusion in the programme" (Decision, para. 49).

Relief Sought

43. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber grant the appeal and reverse the Decision in respect of the Prosecution's prohibition to preventively relocate witnesses both prior to a decision by the Registrar on the inclusion of the relevant witnesses in the ICCPP and after the Registrar's Decision rejecting such inclusion.



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

Dated this 2nd day of June, 2008

At The Hague, The Netherlands