

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 12 June 2008

THE APPEALS CHAMBER

Before: Judge Georgios M. Pikis, Presiding Judge
Judge Philippe Kirsch
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 MATTHIEU NGUDJOLO CHUI***

Public Document

Victims and Witnesses Unit's considerations on the system of witness protection and
the practice of "preventive relocation"

Source: Registrar

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

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Victims Participation and Reparations Section

-

Other

-

The Registrar of the International Criminal Court (the Court);

NOTING the "Decision on Prosecution's Request for the Issuance of an Order to Protect Witnesses 238 and 163", issued by the Single Judge on 12 March 2008¹;

NOTING 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", issued by the Single Judge on 18 April 2008²;

NOTING the "Prosecution's Application for Leave to Appeal the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation" filed by the Prosecution on 28 April 2008³;

NOTING the "Decision on the Requests for leave to appeal 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 on the requests for leave to appeal"), issued by the Single Judge on 20 May 2008⁴;

NOTING the "Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287", issued by the Single Judge on 28 May 2008⁵;

NOTING the "Prosecution's Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation" ("Document in support of the appeal") filed on 2 June 2008⁶;

¹ ICC-01/04-01/07-317-Conf-Exp.

² ICC-01/04-01/07-411-Conf-Exp.

³ ICC-01/04-01/07-453.

⁴ ICC-01/04-01/07-484.

⁵ ICC-01/04-01/07-543.

NOTING articles 43(6), 54(3)(f) and 68(1) and (4) of the Rome Statute (“the Statute”), and rules 16-19, 87 and 88 of the Rules of Procedure and Evidence (“the Rules”); regulations 24 *bis*, 41 and 65 of the Regulations of the Court and regulations 79, 80 and 96 of the Regulations of the Registry;

CONSIDERING that the Single Judge, in the Decision on the requests for leave to appeal , granted leave to appeal in relation to the two following issues:

1. “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 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.
2. 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”⁷;

CONSIDERING that the Prosecution in its Document in support of the appeal, filed on 2 June 2008, discontinued its appeal in respect of the second of the issues for which leave to appeal was granted;⁸

CONSIDERING that pursuant to Article 68(4) of the Statute the Victims and Witnesses Unit may advise the Prosecutor and the Court *inter alia* on appropriate protective measures and security arrangements;

⁶ ICC-01/04-01/07-541.

⁷ ICC-01/04-01/07-484, page 12.

⁸ ICC-01/04-01/07-541, paras 8-9.

SUBMITS the Victims and Witnesses Unit's considerations on the system of witness protection and the practice of "preventive relocation".

I) Scope of the considerations on the system of witness protection and the practice of "preventive relocation"

1. The Appeals Chamber is seized with an issue directly relating to the system of witness protection in the legal framework of the Court. More specifically, the Prosecution submitted that its appeal

"concerns the proper interpretation of the mandate and authority of the Prosecution under Article 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."⁹

2. Any decision by the Appeals Chamber taken on this matter will directly affect how the system of protection is constructed and consequently on the whole system of witness protection. It is in this context that the Victims and Witnesses Unit ("VWU") wishes to submit its considerations on how such a system of witness protection would work best in the unique environment of the Court and to draw the Appeals Chamber's attention to a number of implications that arise from the current approach of "preventive relocation" chosen by the Prosecution. The VWU notes that these considerations do not address all the issues raised by the Prosecution in its Document in support of the appeal. Should the Appeals Chamber so wish, the VWU will file a separate reply to the Document in support of the appeal.
3. In fulfilling its mandate as stipulated in Article 43(6) of the Statute to provide protective measures and security arrangements for witnesses, victims who

⁹ ICC-01/04-01/07-541, p. 3.

appear before the Court, and others who are at risk on account of testimony given by such witnesses, the Registry, and more specifically the VWU, has established a fully functional and operational system of witness protection in close cooperation with the Prosecution. An integral part of this system is the Court's protection programme (ICCPP) as foreseen in Regulation 96 of the Regulations of the Registry.

4. The Prosecution's practice of "preventive relocation" has a significant impact on the current system of witness protection in the Court. The VWU draws the attention of the Chamber to two major areas of concern in this regard:

- (1) The independent assessment and recommendation by the VWU and the subsequent decision by the Registrar on the participation in the Court's protection programme (ICCPP) is circumvented, particularly so, when and if the Prosecution continues to conduct "preventive relocation" after the Registrar' decision rejecting a witness's inclusion in the ICCPP;

- (2) If the Prosecution continues its current practice of "preventive relocation", by extension the Prosecution *de facto* establishes its own parallel witness protection program.

5. In order to facilitate a fair and expeditious trial the Court needs a protection regime that adequately addresses the risk faced by witnesses, victims appearing before the Court and others at risk on account of testimony due to their interaction with the Court. It is therefore of crucial importance for the Court as a whole to determine how such risks are identified, assessed and mitigated. Predictability and transparency of the applied measures are an important factor in ensuring a fair and impartial system of witness protection.

II) System of witness protection with particular focus on the ICCPP

6. The Court's operations are mainly conducted in demanding conflict or post-conflict areas where the law-enforcement structures are generally weak or

developing and the general security situation is often subject to sudden changes. Consequently, any operation carries an inevitable and inherent risk. The establishment and implementation of a comprehensive and appropriate system of witness protection therefore aims at addressing those challenges in the best possible manner.

1) Outline of the overall system of protection

7. Protection of witnesses is not the sole responsibility of a particular organ or a particular unit, but it requires a unified and coherent approach of the whole Court.
8. Protection in the context of the Article 68 of the Statute is not only related to physical protection, but also needs to take into consideration the psychological wellbeing, dignity and privacy and should have due regard to all relevant factors, such as age, gender and health and the nature of crime, in particular where the crime involves sexual or gender violence or violence against children.
9. Any measure taken to protect a witness must be based on a standardized assessment of the risk that carefully evaluates and tests the information that is put forward as a basis for conducting such a risk assessment. The proposed measures must be proportional to the risk and be least intrusive to the wellbeing of the witness. Relocation should always be a measure of last resort as it significantly impacts and disrupts the life of the individual, not least due to the dramatic impact of being uprooted from his or her normal surroundings and family ties and cut off from social contacts and networks.
10. The system of protection, regardless of the measure taken, is based on limiting the exposure of the witnesses to the threats, providing an adequate response if required and as last resort hiding them from the threats. The very foundation of the Court's protection system lies on the application of good practises by

any representative of the Court who interacts with witnesses. These practices are aimed at hiding a witness's interaction with the Court from the community where the witness resides, from potential threats and the public.¹⁰ These practices are enhanced by an Initial Response System (IRS) which enables the Court to extract witnesses who are afraid of being immediately targeted or who have been targeted to a safe location in the field. A protective measure of last resort is the entry to the ICCPP and subsequent relocation of the witness and his or her close relations away from the source of the threat.

11. In addition to the operational protection measures, the procedural in-court measures granted by a Chamber will have to be applied in a coherent and complementing manner.
12. Any protection measure implemented by the VWU will adhere to the basic principles of neutrality of the Unit, providing support at all times and acting only upon request and with the consent of the beneficiary.

2) System of effective cooperation and reciprocal control

13. The system of witness protection has to ensure that the entities tasked with the responsibility for witness protection work together effectively. Such a system should allow for extensive and effective cooperation by all the entities involved. At the same time the system must provide for the necessary control mechanisms to ensure the highest possible standard of witness protection.
14. For this purpose, the powers and responsibilities of all the entities involved have to be clearly defined. Ambiguity in this respect can only be detrimental for those who are to benefit from the Court's support and protection.

¹⁰ A more detailed description of the good practices is attached in a confidential Annex (Annex 1).

3) Procedures for participation in the ICCPP¹¹

15. The Prosecution by default is the entity establishing the first contact with its witnesses. It is therefore in a position to initially identify a potential need for an individual to participate in the ICCPP. The VWU invites and encourages the Prosecution at this early stage to hold informal discussion to identify the protection needs of an individual. During this initial contact the full range of possible protection measures are discussed with the referral body.
16. It is also possible at this point in the process that the VWU and the Prosecution agree to place a witness temporarily in a safe house while the assessment is being completed. Such a decision is based on an interim assessment which indicates the serious and immediate nature of threat.
17. Following these initial discussions, the Prosecution as the referral body makes a decision whether to proceed with the application for participation in the ICCPP. This application process provides the Prosecution with the opportunity to present all the information that has led them to believe that the applicant should be considered for the ICCPP. The Prosecution plays an important role in providing the necessary information for the assessment of the VWU. The Prosecution can provide further information and thereby trigger a new assessment process at any given time.
18. The VWU assesses the risk independently, bearing in mind the best interest of the individual involved, and only if the witness gives his informed consent to be assessed. The risk assessment model adopted by the VWU corresponds to the models used and approved widely amongst witness protection programmes.¹² In cases where the level of risk indicates that an alternative risk management approach will suffice, it gives the opportunity for other protection strategies to be discussed.

¹¹ The same principles would apply to all potential referral bodies.

¹² A more detailed description of the risk assessment model is attached in a confidential Annex (Annex 2).

19. Any measure recommended to protect an individual is based on a careful evaluation of the information provided by the referral body, extensive interview of witness and the family members as well as analysis of other information available to the VWU. The recommended measure is proportional to the level of risk and aims at being least intrusive in the life of the individual. Participation in the ICCPP requires the informed consent of the witness to be included and the acceptance of the conditions of the ICCPP.
20. The Registrar receives the respective VWU reports and recommendations including the information provided by the referral body. The Registrar makes a final decision on the appropriate protection measure. The Prosecution can seek a review of this decision by the Registrar. Should the Registry and the Prosecution fail to agree on the appropriate protection measure, the Prosecution can request the competent chamber to order protection measures, thus allowing a judicial control of the actions taken by the VWU and the Registry.
21. Such internal or judicial review is not a sign of a dysfunctional system, but indeed proves that the control mechanisms in place are fully functional and thereby ensures transparency and quality control.
22. It should be noted that the rejection of an application for admittance to the ICCPP does not equate to an absence of protection for the witness. In reality it means that the VWU considers that the person is adequately protected without the intrusion of the ICCPP, and on that basis, any review process can be undertaken with the knowledge that the witness is not exposed to an unacceptable level of risk.¹³

¹³ A more detailed description of the assessment procedure can be found in a confidential Annex (Annex 3).

III) The Prosecution's current practice of "preventive relocation"

23. The Prosecution suggests that there may be cases where witnesses have to be preventively relocated by the Prosecution.¹⁴ Indeed, the Prosecution has already conducted such "preventive relocation". This practice has raised a number of concerns with the VWU reaching beyond the case at hand.
24. Whereas the term "preventive relocation" seems to indicate that the relocation of a witness is somewhat less permanent or different in nature from "normal relocation", the VWU wishes to emphasize the following: Any relocation is preventive in nature, however, will have a long term impact. Once a witness has been moved from his original location of residence, this will have serious effect on his life and will limit other avenues of protection that might have been available at an earlier stage.

1) Impact on the system of effective cooperation and reciprocal control

25. The Prosecution's practice has detrimental effect on the system of effective cooperation and reciprocal control and indeed causes the whole system of cooperation and control to be compromised.
26. As already indicated above, the VWU has two major areas of concern in relation to the current practice of the Prosecution of "preventive relocation":
- (1) The independent assessment and recommendation by the VWU and the subsequent decision by the Registrar on the participation in the ICCPP is circumvented, particularly so, when and if the Prosecution continues to conduct "preventive relocation" after the Registrar's decision rejecting a witness's inclusion in the ICCPP;
 - (2) If the Prosecution continues its current practice of "preventive relocation", by extension the Prosecution *de facto* establishes its own parallel witness protection program.

¹⁴ ICC-01/04-01/07-541, para. 35-40.

(a) Consequences of undermining the independent assessment of the VWU

27. The independent assessment by the VWU is not an end in itself but serves to ensure that the drastic measure of relocation is applied in a fair and impartial manner and only as a measure of last resort.
28. If Prosecution can relocate witnesses without or against the assessment of the VWU, the Court would lose its ability to assess independently the need for participation in the ICCPP and would instead rely on the untested assessment of the referral party who might have a biased interest in the witness's testimony.
29. The overall consideration to the wellbeing and the best interest of the witness would be affected by the primary consideration of obtaining the witness's testimony. Equally, the witness would not receive independent advice and information to allow for an informed decision on his or her participation in the ICCPP. It would also be questionable how a decision by the Prosecution to "preventively relocate" a person could be internally or judicially reviewed.¹⁵
30. The nature of the VWU's role would be confined to implementing the Prosecution's requests. All witnesses referred to the VWU would participate in the ICCPP. The VWU, as a neutral service provider, would need to apply this practice to all witnesses referred by the Chambers, Defence or legal representatives. Such effect would not be in the interest of the proper administration of justice and would create an unmanageable situation.
31. The Prosecution would have unchallenged discretionary powers to determine the participation in the ICCPP. The very foundation of the Court's protection system in place would be circumvented, ultimately causing it to be compromised.

¹⁵ This could be of potentially of high importance where a relocated witness does not give testimony at trial and where Defence would like to have access to that person but is unaware of his whereabouts.

(b) Consequences of “preventive relocation”

32. Any relocation, including “preventive relocation”, will have a detrimental effect on the individuals involved and will therefore require intensive psychosocial support to compensate for the loss of their social ties and support network.
33. Likewise, any relocation, including “preventive relocation”, has a long term impact from an administrative point of view and will require extended involvement including maintenance and management strategies to deal with the impact relocation has on the individuals concerned.
34. It is also important to note that “preventive relocation” in itself increases the level of risk not only in the area of origin but also in the new location as it potentially exposes a witness’s involvement with the Court.
35. “Preventive relocation” as envisaged by the Prosecution would automatically require the establishment of a parallel witness protection programme within the Prosecution.
36. Establishment of this parallel programme, however, would seriously jeopardize the system of protection as envisaged in the legal framework of the Court. Indeed, any appearance that the system of witness protection might not adhere to the highest standards of fairness and impartiality should be avoided.
37. If such a parallel program were to be implemented, it is of particular concern whether the Prosecution's approach could sufficiently address witnesses' needs for protection and support in an unbiased manner. Participation in a protection programme requires not only thorough preparation to facilitate an informed decision of the applicant, but also proper follow-up mechanisms for the witness and his or her family. Adequate psycho-social support, education and long-term exit strategies should be provided with full consideration to the overall wellbeing of the individuals concerned.

38. Furthermore, the integrity of the ICCPP will be compromised if the Prosecution has discretionary powers to effect that the VWU is forced to accept witnesses into the ICCPP. The integrity and the reputation of the ICCPP is of crucial importance for the VWU's cooperation with respective witness protection units of States Parties. The Court cannot afford that the threat assessments conducted by the VWU are compromised as this will result in negative responses for requests to relocate witnesses to third countries under the care of national witness protection units.

2) Impact on concrete cases

39. Those effects are already illustrated by the measures the Prosecution provoked by its practice of preventive relocation of witnesses 132 and 287. Originally, the VWU had recommended that both witnesses 132 and 287 should be left in their original location of residence, within a supportive environment, and that adequate protection could be afforded to them at that location. Despite this recommendation, the Prosecution moved these witnesses to new locations.

40. Upon the order of the Single Judge for the Registry to supervise the security of witnesses 132 and 287, the VWU's initial aspiration was, to act in accordance with the original recommendation and return the witnesses to original location of residence, in order to resume their day-to-day lives and reinstate the supportive mechanisms previously in place. Such a move would also have been consistent with the VWU's belief that the inclusion of witnesses into the ICCPP should be a measure of last resort in the adequate protection of witnesses of the Court. Thus, ensuring that the disruption, inevitably caused to the family of a witness participating in the ICCPP, is avoided if possible.

41. However, as a result of the Prosecution's removal of these witnesses such a move back to the original location of residence was not possible anymore as witnesses 132 and 287 had already been exposed to a heightened level of risk,

due to their “preventive relocation” by the Prosecution and taking into account the unknown result of the current legal proceedings before the Court.

42. Therefore, the VWU, now assessing an unnecessarily created and increased risk, recommended that witnesses 132 and 287 should be accepted into the ICCPP. Subsequent to this recommendation, the Registry has accepted witnesses 132 and 287 for participation in the ICCPP.

IV) The system of protection as implemented by the VWU is foreseen in the legal framework of the Court

43. Article 68 of the Rome Statute puts an obligation on the Court in general, the Chambers, the Prosecution, the Registry including the VWU to take appropriate measures to protect victims and witnesses.

1) Independent assessment by the VWU

44. The legal framework of the Court including its drafting history, supports the independent and neutral role the VWU as an integral part of the Court’s discharge of the duty to protect witnesses. This entails that, upon receiving a referral for participation in the ICCPP, the VWU conducts an independent assessment of the risk the individual is exposed to.

45. The drafters of the Statute carefully considered whether a separate unit for Prosecution witnesses should be created within the Office of the Prosecutor, or whether there should be only one unit located in the Registry.¹⁶ The proposal

¹⁶ The issue of the creation of a Victims and Witnesses Unit has been raised for the first time in 1996 during the Preparatory Committee. Based on the precedent of the ICTY, the Victims and Witnesses Unit was envisaged “[...] under the supervision of the office of either the Registrar or the Prosecutor”. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, UN Doc. A/51/22[VOL. I](SUPP), March-April and August 1996, para. 281.* On a later stage of discussions, in February 1998, it was noted that the question of the Victims and Witnesses Unit should be addressed in the part on the Registry. *See Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, UN Doc. A/AC.249/1998/L.13, 4 February 1998, p. 79.* In the Preparatory Committee’s Final Draft, it was however noted that “[s]ome delegations were of the view that there should be a separate unit for prosecution witnesses in the Office of the Prosecutor; others were of the view that there should be only one unit located in the Registry.” *See Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc.*

to put in place a separate VWU in the Office of the Prosecutor emerged in the Preparatory Committee's Final Draft.¹⁷ However, this view did not prevail, and the drafters of the Statute consciously decided to create a single VWU within the Registry.

46. Bearing in mind the discussions that took place during the preparatory works, and the final wording of the relevant provisions of the Statute, it is clear that the intention of the drafters was to put in place an independent VWU within a neutral body of the Court.
47. According to Article 43(6) of the Statute, the VWU "shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses."¹⁸ This wording clearly suggests that the VWU cooperates with the Prosecution on a consultative basis, and that the VWU's role is not reduced to the implementation of protective measures upon the Prosecution's request.
48. Furthermore, it would be inappropriate for the VWU to consult the Prosecution on protective measures provided, for example, to Defence witnesses.
49. The assessment of the need for participation in the ICCPP should also be conducted by the VWU fully independently from the Prosecution in order to avoid, *inter alia* "[...] actions that are more in the interests of Prosecution strategy rather the interests of the [...] witness."¹⁹ In particular in light of the

A/CONF.183/2/Add. 1, 14 April 1998, Article 44, footnote 24. The establishment of the Victims and Witnesses Unit within the Registry was further officially proposed by the Republic of Congo and Niger on 3 July 1998 and agreed by the Working Group on Part 4 of the Statute a day later: *See* Proposal submitted by the Republic of Congo and Niger: Article 44. The Registry, UN Doc. A/CONF. 183/C. 1/L. 43, 3 July 1998; Recommendations of the Coordinator: Part 4. Composition and Administration of the Court, UN Doc. A/ CONF. 183/C. 1/L. 45, 4 July 1998, pp 8-9.

¹⁷ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add. 1, 14 April 1998, Article 44, footnote 24

¹⁸ Article 43(6) of the Rome Statute.

¹⁹ *See* Triffterer O.(ed.), *Commentary on the Rome Statute of the International Criminal Court observer's notes, article by article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 644.

most extreme protection measure, namely that of participation in the ICCPP, the neutral and independent role of the VWU will ensure that for example defence witnesses have equal access to this measure and thus the requirements of the principle of equality of arms are met.

50. Participation in the ICCPP assessed and implemented by an independent and neutral body are indeed in the interests of all parties and participants as they protect the parties from allegations of unduly influencing, inducing or rewarding the witnesses for their testimony.
51. Moreover, independence and impartiality of the VWU is explicitly reflected in the Rules of Procedure and Evidence. Rule 18(b) requires that the VWU “[w]hile recognizing the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, [...] and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers [...].” The particular role and the expertise of the VWU within the system of protection is further stressed in Rule 19 of the Rules, which emphasizes that the VWU shall include staff with expertise *inter alia* in witness protection and security. These rules enhance the connotation that the VWU because of its specific expertise is best placed in the Court to conduct assessments on risks witnesses are exposed to.
52. Additionally, according to Rules 87(1) and 88(1) of the Rules of Procedure and Evidence upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the VWU, as appropriate, a Chamber may order protective or special measures, including the inclusion of a witness into the ICCPP. These rules enhance the concept of the active and independent role of the VWU as established under the Rome Statute.
53. Furthermore, Rule 16(4) of the Rules provides that “[a]greements on relocation [...] on the territory of a State of traumatized or threatened [...] witnesses [...] may be negotiated with the States by the Registrar on behalf of the Court”.

This explicit duty that has been entrusted to the Registrar clearly implies that the Registry is the entity within the Court that is envisaged to care for the relocation of witnesses.

54. In addition and in terms of the use of Court's resources, the establishment of a parallel program would require unnecessary duplication of services and inefficient use of Court's limited resources.

55. It should also be noted that Trial Chamber I has confirmed the independent role of the VWU, stating that "[t]he [Victims and Witnesses] Unit has been entrusted with the discretion to consider these applications [for participation in the ICCPP] pursuant to Articles 43 and 68 of the Statute and Regulation 96 of the Regulations of the Registry, and the Court may review its decisions either *proprio motu* or upon an application by the parties or participants, applying judicial review principles".²⁰

56. Moreover, the results of the independent assessment and the appropriateness of the standard followed by the VWU has been confirmed in this decision. Prosecution had referred a large number of witnesses to the VWU for participation into the ICCPP, all of which applications were rejected. After having reviewed each of the disputed applications, the Chamber concluded that "[a]s regards these disputed applications, the approach of the [Victims and Witnesses] Unit has been faultless".²¹

2) Protective measures by the Prosecution

57. Whereas Articles 68(1) and 54(3)(f) of the Statute charge the Prosecution with a duty to take appropriate measures to protect witnesses, and empower the Prosecution to take necessary measures, or request necessary measures to be taken, to protect any person, this does not entail that the Prosecution is given the authority to conduct "preventive relocations" and consequently to

²⁰ ICC-01/04-01/06-1311-Anx2, 24 April 2008, para. 82.

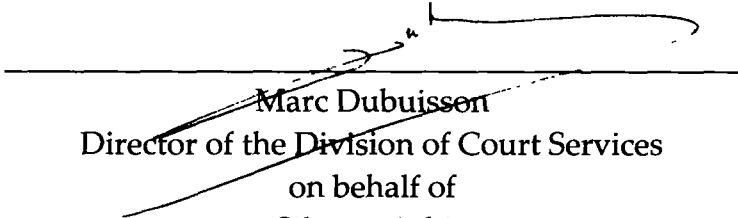
²¹ ICC-01/04-01/06-1311-Anx2, 24 April 2008, para. 82.

establish a parallel witness protection programme. For the reasons as outlined above, the sole organ of the Court with the power to establish and maintain such a programme is the Registry.

58. Article 68(1) of the Statute further stipulates that the protective measures taken by the Prosecution shall "not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". It is highly questionable whether a parallel protection programme conducted by the Prosecution would adhere to this principle. As other parties and participants do not have the logistical and operational means to conduct such a parallel programme and would thus still have to rely only on the Registry's ICCPP, this could seriously jeopardise the proper administration of justice and be detrimental to the principle of equality of arms.
59. At the same time, the Prosecution still has a range of measures which it can apply in order to fulfill the obligation, imposed by the Statute, of protecting witnesses: The application of good practices when contacting witnesses is an efficient protection measure that the Prosecution must utilize. The effective application of good practices will influence the extent of other protective measures required to address potential risk. In addition to adherence to good practices the Prosecution may, based on their own assessment, enhance personal security situation of witnesses by educating witnesses on the importance of confidentiality and cover stories, giving clear instructions how to activate the IRS, providing access to communications, agreeing on an emergency back up plan and regular contact, enhancing the physical security of the residence of witness (providing locks, solid doors, fencing, lighting, alarm system and other practical measures appropriate to the individual circumstances of the witness). Furthermore the Prosecution may apply for appropriate procedural measures under Rule 87 of Rules or apply for inclusion of a witness in the ICCPP.

IV) Concluding remarks

60. In order to ensure fair and expeditious proceedings the Court needs a comprehensive and appropriate system of witness protection that all entities involved adhere to. The integrity of the ICCPP, effective cooperation and reciprocal control are key factors in such a system of witness protection. Given the ongoing dispute about the general mandate and scope of protection, clarity and inambiguity will be of utmost importance for the Court's successful discharge of its mandate in relation to victims and witnesses.
61. The legal framework of the Court provides the Registry, including in particular the VWU, the clear mandate to conduct the ICCPP and to assess the need for inclusion to the ICCPP independently. The VWU has the necessary expertise and independence to provide professional and impartial service to all entities in need of witness protection, particularly in those cases where drastic measures such as participation in the ICCPP are deemed necessary.
62. The VWU's and ultimately the Court's ability to provide fair and impartial witness protection will be seriously undermined, if not brought to a standstill, should the Prosecution continue to conduct its "preventive relocation".



Marc Dubuisson
Director of the Division of Court Services
on behalf of
Silvana Arbia
Registrar

Dated this 12 June 2008

At the Hague, the Netherlands