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**THE APPEALS CHAMBER**

**Before:** Judge Philippe Kirsch, Presiding Judge  
Judge Georgios M. Pikis  
Judge Navanethem Pillay  
Judge Sang-Hyun Song  
Judge Erkki Kourula

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

**Public**

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

**Source:** Defence for Mr Germain Katanga

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

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**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

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**States Representatives**

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**REGISTRY**

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**Registrar**

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## Introduction

1. In response to the *Prosecution's Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation* ("Prosecution Appeal"),<sup>1</sup> the Defence for Mr Germain Katanga ("Defence") submits that the Prosecution's arguments contained in this Document and the relief sought should be rejected on the ground that the Prosecution failed to identify an error that warrants the Appeals Chamber to reverse the Single Judge's *Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation* ("impugned Decision")<sup>2</sup> in respect of the issue of relocation of witnesses.
2. More specifically, the Defence submits that the impugned Decision is entirely reasonable and thereby relies on the following considerations: (1) the Prosecution Appeal misconstrues the impugned Decision; (2) the Single Judge has correctly interpreted the relevant provisions; (3) the Single Judge correctly held that the VWU is best placed to make decisions regarding the safety of witnesses due to its expertise and neutrality and with full consideration for the principle of equality of arms. Hence, the Appeals Chamber's intervention is not warranted.

## The Prosecution Appeal misconstrues the impugned Decision

3. The Defence submits that the Prosecution Appeal has incorrectly interpreted the Decision of the Single Judge. Contrary to the Prosecution's submissions,<sup>3</sup> the Single Judge did not decide that the VWU is the sole entity responsible for determining the level of risk to a witness, and for determining which protective measures should be applied. On the contrary, the Single Judge makes clear that the Registrar is not the ultimate arbiter of such matters, but at the same time, neither is the Prosecution, as such matters are ultimately subject to the Chamber's judicial determination.<sup>4</sup> In situations where the Prosecution disagrees with the Registrar's assessment of risk, the appropriate procedure is to seek

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<sup>1</sup> ICC-01/04-01/07-541

<sup>2</sup> ICC-01/04-01/07-423-Conf. A Public Redacted version was issued on 21 April 2008 (ICC-01/04-01/07-428).

<sup>3</sup> See page 3: "The impugned Decisions considers that the provisions of the Statute and 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"

<sup>4</sup> "the Chamber is also responsible for the witnesses' protection, so it's not just something that is just VWU or the Prosecution in charge of that. The Chamber is in charge of ensuring that witnesses are protected". ICC-01/04-01/07-T-22-Conf-Exp-Eng p29, lines 8-11, cited in the Decision granting leave to appeal, at page 9.

judicial relief,<sup>5</sup> rather than bypassing the authority of the Chamber by implementing the measures themselves.

4. The Prosecution appears to have incorrectly conflated the responsibility for ultimately determining the level of risk and the protective measures which should be granted, which rests with the Chamber, and the responsibility for implementing these measures, which rests with the Registry. The Prosecution does not dispute the latter point.<sup>6</sup>
5. In the context of the scenario of reactive relocation, the Defence submits that the Prosecution has incorrectly framed the issue as an either/or situation; either the Prosecution preventatively relocates the witness, or the witness would be unprotected and in danger. The Prosecution has posed a false dilemma, particularly in the situation which caused this appeal to be brought. The Defence had not yet received disclosure of the identities and statements of the witnesses who were preventively relocated by the Prosecution. As such, the witnesses were not in need of protection at the time of preventive relocation as nobody was aware that these witnesses had made statements to the Prosecution on which it intended to rely for confirmation.
6. The Prosecution Appeal also poses a false dilemma since it does not address alternative measures which would achieve the objective of ensuring the necessary protection of the person in question, in a manner consistent with the Statute.<sup>7</sup> For example, the Prosecution refers to the fact that witness 238 was allegedly unprotected for several weeks as a result of the Registry's Decision not to relocate this witness. The Prosecution has failed, however, to provide any explanation as to why it took them several weeks to seek judicial relief. Similarly, at paragraph 22, the Prosecution submits that it "must remain passive while those requests are being processed, or if they have been rejected, even if there is a situation of clear and present danger to victims or witnesses". Their complaint thus seems more to be directed at the celerity of the Registry decision making process and the timing of judicial review, rather than the proper delegation of powers. This, it is respectfully submitted, may be a reason to adopt proper modalities, but is unrelated to the issue subject to this appeal.

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<sup>5</sup> The defence notes that both the Pre-Trial Chamber and the Appeals Chamber have confirmed that manner in which the Registry executes its duties is ultimately subject to judicial review (insert citation)

<sup>6</sup> Indeed, at para. 19 the Prosecution states: "VWU has the mandate and responsibility for implementing protective measures [...]"

<sup>7</sup> The Defence observes in relation to the Haradinaj case, which is relied upon by the Prosecution, the Trial Chamber expressly noted that the fact that one of the central witnesses didn't testify was occasioned by the failure of the Prosecution to provide the Victims and Witnesses unit with a proper threat assessment (at para 26 of the Trial Judgement).

7. In any event, there are many possible actions which are within the power of the Prosecution which would in practice expedite and facilitate the ability of the Registrar to implement relocation requests in an expeditious manner, such as referring relocation requests to the VWU in a timely manner; ensuring that the relocation requests are properly substantiated so that the VWU is in possession of all necessary information which would expedite the review process; prioritising the submission of such requests to ensure firstly, that the VWU is not overloaded by unmeritorious requests, and secondly, that the requests are not all submitted at the same time which could generate a backlog; and seeking immediate and urgent judicial intervention in case of disagreement, or in case of any delays in processing the requests.
8. It is also for this reason that the Trial Chamber has stated that “[i]t is to be stressed that if the Unit properly assesses and rejects referrals to its protection programme, thereafter it is for the referring party to decide whether to secure any other protective solution, as it considers appropriate.”<sup>8</sup> The Defence notes firstly that the reference to ‘properly assesses and rejects’ implies that the Prosecution should first seek judicial review as to the propriety of the assessment, and secondly, that the reference to *other* solutions implies that if the Registrar’s assessment is upheld, the Prosecution must proactively and expeditiously explore protective options other than relocation.
9. In the present circumstances, it must be mentioned that the tension between the decision of the Registrar not to relocate and the objectives of the Prosecution were exacerbated by the fact that the Prosecution had, in contrast to its practice in previous cases, sought the relocation of almost all of its witnesses,<sup>9</sup> and moreover, had submitted relocation requests in a tardy manner, and had failed to seek judicial intervention in a timely manner.<sup>10</sup>
10. Thus, the Prosecution has misconstrued the entirely reasonable impugned Decision and its arguments should be dismissed on that basis. A proper reading of the impugned Decision leads to the conclusion that the protection of witnesses is a matter for the Court as a whole, not solely for the VWU or the Prosecution. The Prosecution’s complaints are

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<sup>8</sup> *Lubanga*, ‘Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters’, ICC-01/04-01/06-1311-Anx2 08-05-2008, at para. 80.

<sup>9</sup> Impugned decision at para. 20.

<sup>10</sup> See Prosecutor v. *Lubanga*, ‘Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters’, ICC-01/04-01/06-1311-Anx2 08-05-2008 at para 81 “It is apparent that the prosecution, until the very recent past, had not commenced the process of identifying and creating alternative protective arrangements; as rehearsed elsewhere,<sup>185</sup> it referred a significant portion of the witnesses to the Unit for protective measures excessively late, and, in the result, it failed to raise for the Chamber’s consideration the differences of approach between itself and the Unit on what is a highly significant issue until this markedly advanced stage in the case. If the prosecution had acted timeously, this issue would have been identified, listed for hearing and resolved during the second half of 2007.”

therefore not subject to the certified issue for appeal; and there are more appropriate ways to seek their resolution, e.g. by adopting clear and transparent modalities to be respected by all organs involved.

## **The Single Judge's interpretation of the relevant provisions was correct**

### **11. The Defence submits that the Single Judge correctly interpreted Articles 68.....**

**Argument 2.1** – The Prosecutor's position is based on a misreading of the relevant provisions of the Rome Statute (article 68(1) and 53(3)(f)). When read as a whole and in conjunction with the intentions of the drafters, the correct framework to be applied excludes the Prosecutor from taking the proposed actions.

- The OTP argument is based on a misinterpretation of Articles 68(1) and 54(3)(f),<sup>11</sup> which produces an unjustifiably unbalanced outcome, whereas a reading of these provisions taking into account all relevant issues produces an outcome more reconcilable with the purpose of the Victims and Witnesses Unit (VWU) and equality of arms.
- According to the Pre-Trial Chamber's initial decision, "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."<sup>12</sup> This "teleological"<sup>13</sup> interpretation is accurate given the general nature of the Prosecutor's obligation to take measures under article 68(1), *versus* the existence of more specific provisions elsewhere, such as article 43(6) and Rule 17, which place the responsibility for implementing specific measures within the VWU. Whilst Article 68(1) then goes on to state that "[t]he Prosecution shall take such measures particularly during the investigation and prosecution of such crimes", this again only refers to a *general* mandate. In contrast, Rule 17(2)(a)(i) states first (and foremost) that the VWU shall provide witnesses and victims with protective and security measures. Article 43 and Rule 17 offer the most specific granting of such a power, to the VWU; at no point in the Statute or Rules is the Prosecutor granted a similar power. Applying the principle of *lex specialis* - "that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general"<sup>14</sup> - the more specific provisions applicable to the VWU should take priority over more general provisions.
- Both article 68(1) and article 54(3)(f) are ultimately subject to the 'rights of the accused', which encompasses the right to a fair trial and equality of arms. Article 68(1) states that "[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial", whilst Article 54(3)(f) is subject to subparagraph (1)(c), by virtue of which the OTP is bound to 'fully respect the rights of persons arising under this Statute'. Notably, the Preparatory Committee Report reveals that "the point was made that the Statute must contain a balance of rights ... and that any protections bestowed on victims and witnesses should not undermine the right of the accused to receive a fair trial".<sup>15</sup>

<sup>11</sup> Para. 24 provides the crux of the argument: "Article 68(1) places a duty of protection on the Prosecution in particular during investigations and prosecutions. 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". See also Paras 14 and 17.

<sup>12</sup> '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', public redacted version ICC-01/04-01/07-428-Corr, issued 21 April 2008, at para. 26.

<sup>13</sup> Para. 26.

<sup>14</sup> Hugo Grotius, *De Jure belli ac pacis*. Libri Tres, Book II Sect. XXIX; see also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Reports 1996, para 25.

<sup>15</sup> At para. 280; cited in John R.W.D. Jones, 'Protection of Victims and Witnesses' in Cassese, Gaeta and Jones, *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford: OUP, 2002) 1355, at 1356.

- In this regard one commentator notes that “[a]t the investigation stage, the Prosecutor should be reasonably free to take measures for prospective witnesses and not to divulge the witness’ names or other identifying details to the accused ... Once the Prosecution stage has been reached, however ... it cannot be left entirely to the Prosecutor unilaterally to take measures to protect victims and witnesses. At that point, the issue of protection of victims and witnesses becomes one for the Court to decide. This is ... because under Article 68’s own terms ‘these measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’, and only a Chamber, not the Prosecutor, is competent to judge whether protective measures are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The Prosecutor cannot be entrusted with the task of deciding whether or not given protective measures would prejudice the accused’s right to a fair trial because the Prosecutor is a party seeking the accused’s conviction, not an impartial arbiter asked to decide between competing concerns.”<sup>16</sup> If the implementation of these measures were not subject to a neutral third party, the Court would have no mechanism for monitoring this practice.
- In this connection, the Defence submits that the Prosecution’s reliance on article 54(3)(f) of the Statute is misplaced. To the extent that preventative relocation falls within the general category of protective measures, it should be implemented in the same manner as other such categories, for example redactions, which are subject to judicial supervision. In this regard, the in same manner, the relocation of a witness also deprives the defence of a potential source of information that in the normal scope of investigative activities and inquiries concerning person who may possess information concerning the events in the charging document, it would be likely to come across. Judicial supervision is therefore required to ensure that relocation is only employed where necessary, and that it is not utilized to deprive the defence of access to potential defence witnesses on the ground. Granting the Prosecution the power to both determine and implement its own relocation scheme would also fall foul of ICC’s judicial findings that there is no property in a witness,<sup>17</sup> since in practice the Prosecutor could unilaterally control the Court’s access to the witnesses in question.
- Thus, whilst the Appeals Chamber recognized in its recent judgement that article 54(3)(f) in conjunction with article 81(4) equated to a right to seek protective measures for such persons who may be at risk due to the judicial activity of the Court, at the same time, the Appeals Chamber underscored the fact that the Chamber must retain the ability to regulate their imposition and at the same time, implement appropriate counterbalancing measures for the defence. As such, the prosecution was required to seek authorization for such measures from the Chamber.<sup>18</sup> Thus, article 54(3)(f) did not give the Prosecution an autonomous right to decide upon and implement protective measures, particularly if such measures could be prejudicial to the defence.
- The OTP also misconstrues the significance of the fact that Article 68(4) and Rule 17(2)(a)(ii)<sup>19</sup> refer an advisory role of the VWU. In this regard, it is submitted that this role merely supplements the VWU’s power under article 43(6) in the sense that in addition to being the sole entity responsible for implementing these measures, the VWU may also provide advice to the parties and the Chamber as to the range of available measures and the appropriateness of such measures. As noted above, the issue certified for appeal is limited to the question as to whether the right to implement relocation is vested solely within the Registry, or whether, in the circumstances referred to, the Prosecution possesses an independent right to implement its own measures.
- In this regard, the drafting history of the Statute indicates that “[t]he letter of Article 68(4) seems to be at variance with the broad mandate given to the VWU by Article 43(6) and to the Registrar by Article 68(1). The source of the dilemma can be traced back to the Rome Conference, where a compromise had to be reached between those delegates who insisted on placing the VWU within the Registry and those who preferred to have it placed within the OTP.”<sup>20</sup> Nonetheless, despite this superficial tension

<sup>16</sup> John R.W.D. Jones, ‘Protection of Victims and Witnesses’ in Cassese, Gaeta and Jones, *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford: OUP, 2002) 1355, at 1362.

<sup>17</sup> See Prosecutor v. Lubanga, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049; ‘Decision on the Practices of Witness Familiarisation and Witness Proofing’ 8 November 2006, ICC-01/04-01/06-679

<sup>18</sup> Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements ICC-01/04-01/07-475, 13 May 2008, at para 60.

<sup>19</sup> Para. 28.

<sup>20</sup> Thordis Ingadottir, Francoise Ngendahayo, Patricia Sellers, ‘The Victims and Witnesses Unit: A Discussion Paper’ Under the auspices of the Project on International Courts and Tribunals (PICT), [http://www.pict-pcti.org/publications/ICC\\_paprs/VWU.pdf](http://www.pict-pcti.org/publications/ICC_paprs/VWU.pdf), at 13.

between the provisions, the underlying intention of the drafters was to vest the implementation of such measures within the Registry, and not to vest the Prosecutor with an independent power to do so.

- Thus, “[w]hereas most states wanted a VWU to be placed within the Registry, the USA and some other states insisted that such a unit should be placed within the OTP. [...] [T]he position of the US neglects the interests of Defence witnesses. Furthermore [...] the interests of the party calling a witness and the interests of the witness do not always coincide.” The compromise was therefore to insert the words “in consultation with the Office of the Prosecutor” in Article 43(6), so as to address the concerns of those States which initially wished for the Prosecution to possess an independent power to implement these measures: “[a]lthough the solution agreed upon is to be preferred to placing the VWU in the OTP, this compromise resulting in a reference to the OTP is unfortunate. [...] [It] appears to undermine the neutral position of the VWU within the Registry. It may give the unfortunate impression that the Rome Statute is biased towards witnesses of the OTP [...]”.<sup>21</sup>

12. As the Prosecution acknowledges, “the drafters of the Rome Statute carefully considered whether there should be a separate unit for prosecution witnesses in the Office of the Prosecutor or whether there should be only one unit located in the Registry”.<sup>60</sup> 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.

**The Single Judge correctly held that the VWU is best placed to make decisions on relocation of witnesses**

#### *Expertise and Neutrality of VWU*

13. The Defence does not agree with the Prosecution that the Prosecution is “best placed to assess the risk to a given witness”.<sup>22</sup> On the contrary, the Defence agrees with the Single Judge that the VWU is best placed to make determinations on safety measures, at least in respect of relocation. It is still up to the Prosecution to seek authorisation of the Chamber to redact the identities and identifying information of witnesses in public and, where considered necessary to withhold the information from the Defence, in confidential documents. The appeal is confined to the measure of relocation, which has far-going consequences for the lives of the witnesses who are being relocated and their families.

14. The VWU is set up with the core aim to ensure that victims and witnesses are appropriately protected. The VWU has employed persons with expertise in trauma,

<sup>21</sup> Åsa Rydberg, ‘The Protection of the Interests of Witnesses – The ICTY in Comparison to the Future ICC’ (1999) 12 *Leiden Journal* 455 at 461.

<sup>22</sup> Prosecution Appeal, para. 33.

medical and psychological care.<sup>23</sup> and specific role.<sup>24</sup> As one scholar put it, the ICC has “[a] rather obvious advantage with one witness unit dealing with all witnesses is that it is more efficient and that both parties should be able to benefit from the expertise gained within the unit.”

15. The importance of this expertise was highlighted in the context of the ICTY. According to Justice Cassesse, the then President of the Tribunal, “the creation of the Unit in the Registry shifted the emphasis of its work from ensuring effective investigation and prosecution of a sensitive case to the more human concern of providing counselling and support services to victims and witnesses.”<sup>25</sup>

16. The Prosecution recognises “the expertise of the VWU in the implementation of protective measures and the provision of support to victims and witnesses”<sup>26</sup>; however, fails to recognise that its practice of preventive relocation of witnesses effectively denies the support of the VWU. The Prosecution is unlikely to be able to address all the aspects of witness involvement that the VWU is equipped to deal with; but in situations of preventive relocation the Prosecution will be unable to avail itself of the VWU’s expertise.

17. Moreover, given the adversarial nature of the proceedings and the appearance of fairness, it is important to vest the authority to decide upon relocation with a neutral body. As already established in *Lubanga*, witnesses do not belong to either party, but are all “witnesses of the Court”.<sup>27</sup> The Single Judge held that, in this light, it is understandable that the main role in respect of their protection is granted to the Registry, “as the main administrative body of the Court which is characterised by its impartiality and takes no part in the proceedings”.<sup>28</sup>

18. In respect of the neutrality of the Registry, the Single Judge held:<sup>29</sup>

The central role given to the Registry and the limited mandate of the Prosecution in terms of witness protection, is also consistent with the fact that the Statute embraces an accusatorial system of criminal procedure -in the sense that it is the Prosecution who exercises the penal action - which is not a purely adversarial system because it includes a mixture of procedural features from the Romano-Germanic and common law traditions.

19. The Prosecution, on the other hand, is mandated to prove its cases beyond any reasonable doubt. In light of this mandate, the Prosecution seeks to secure absolutely the attendance

<sup>23</sup> See the VWU website: <http://www.icc-cpi.int/victimsissues/witnessprotection.htm>

<sup>24</sup> See Åsa Rydberg, (1999) 12 *Leiden Journal* 455 at 460.

<sup>25</sup> Åsa Rydberg, p459, citing Judge Antonio Cassesse, UN Doc. IT/29 (1994).

<sup>26</sup> Prosecution’s Appeal, para. 20.

<sup>27</sup> ICC-01/04-01/06-1049, para 34 and 01/04-01/06-679, para 26.

<sup>28</sup> Impugned Decision, para. 30.

<sup>29</sup> Impugned Decision, para. 29.

of witnesses and may relocate witnesses without giving due consideration to what is in the best interests of the witnesses and their families. Commentators have correctly highlighted the divergence between the needs of the witnesses and the needs of the Prosecution, saying that:

The interests of a witness in his or her personal security and safety do not necessarily coincide with the interests of either party in protecting the witness. The interests of a party will usually be limited to a witness' role in 'winning' the case. For this reason, from a witness' point of view, it is also preferable to place a witness within the Registry rather than having a witness unit within the OTP [...].<sup>30</sup>

20. As David Tolbert put it in *Triffterer*,<sup>31</sup> “there may be instances in which the OTP will take actions that are more in the interests of prosecution strategy than the interests of the victim/witness, and surely the VWU must be able to act independently in such situations.”<sup>32</sup> Thus, it is the VWU's *neutrality* that is crucial to its role, being able to implement measures without being influenced by prosecutorial strategy.

21. It seems from the facts underlying this appeal that this difference in roles between the VWU and the Prosecution was the cause of the disagreement between them on the question of relocation of the witnesses concerned. The Defence is not privy to any of the *ex parte* discussions on the safety concerns of witnesses and how to best protect such witnesses. The Defence can, therefore, not make any assessment of whether the measure of relocation is necessary in a particular situation. It does, however, fully endorse the Registrar's belief that the inclusion of witnesses into the Court's Protection Programme (“ICCPP”) should be the last resort measure in the adequate protection of witnesses of the Court.

22. The VWU is very concerned with the safety of the witnesses. At the same time, the VWU seeks to ensure, as much as possible, that witnesses can continue their day-to-day lives as far as normal. Disruption caused by the fact that witnesses provide their cooperation with the Court should be avoided to the greatest extent possible. On this consideration, the VWU views the inclusion of witnesses into the ICCPP as the last resort measure because such inclusion inevitably causes disruption to the witnesses and their families (para. 2 Registrar's report).

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<sup>30</sup> Åsa Rydberg, pp 459-460. See also Thordis Ingadottir, Francoise Ngendahayo, Patricia Sellers, ‘The Victims and Witnesses Unit: A Discussion Paper’ Under the auspices of the Project on International Courts and Tribunals (PICT); [http://www.pict-pcti.org/publications/ICC\\_paprs/VWU.pdf](http://www.pict-pcti.org/publications/ICC_paprs/VWU.pdf)

<sup>31</sup> Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, at page 645.

<sup>32</sup> The OTP cites Tolbert as authority for the statement that “the VWU should not be the body deciding on protective measures” (without quoting directly) – in fact, Tolbert states that it is “not within the power of the VWU to *order* protection measures for witnesses”; this cannot be disputed, as only the competent Chamber would have the power to ‘order’ such measures. Tolbert does not however concede any such responsibility to the Prosecution.

23. The Defence submits that these are entirely reasonable considerations and demonstrate that the VWU truly seeks to have the best interests of the witnesses at heart.
24. The Prosecution, on the other hand, seems to want to use relocation as the rule, rather than the exception. In the present circumstances, the Prosecution had sought the relocation of almost all of its witnesses.<sup>33</sup>
25. It is respectfully submitted that safety measures should only be taken where absolutely necessary. This is not so only to protect the rights of the Defence but also because if the conditions of testimony are good, they may induce persons to give false statements.
26. This is particularly so if witnesses are being relocated. It is one thing to relocate a witness from Bogoro to Bunia; quite another if a witness is being relocated to Kinshasa; and a wholly different matter if a witness is being relocated to another State, particularly Europe or North America. Undoubtedly, witnesses who are being relocated to another country will be assisted financially at least until they have found a way to re-build their lives elsewhere and to earn their own income. The perspective of being relocated to another State may, therefore, frequently be considered to be an opportunity to build a more prosperous future. Clearly, the more being offered to witnesses, the more their credibility is questionable. Also in this light, it is only proper to treat relocation as a last resort.
27. On the same consideration, the Defence does not accept the Prosecution's argument that it is unfair to the witnesses if the Prosecution cannot make promises as to the implementation of protective measures because the ultimate decision thereupon is made by another organ. The Prosecution should engage in a proper dialogue with anyone who they contact in order to adequately explain the possibilities offered by the ICC. However, a practice where a witness can dictate the conditions under which he or she is willing to testify should be discouraged because that may increase the risk that witnesses have ulterior motives for testifying.
28. Indeed, the Single Judge explained that, placing the power to decide on relocation matters with the VWU "prevents the credibility of the relocated witnesses from being affected by the fact that they are receiving financial assistance from one of the parties in the proceedings".<sup>34</sup> The Single Judge also held that, unless the Prosecution immediately puts an end to the practice of taking relocation matters in its own hands, "the credibility of the

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<sup>33</sup> Impugned decision at para. 20.

<sup>34</sup> Impugned Decision, para. 31.

relevant witnesses could be affected.”<sup>35</sup> It is respectfully submitted that the Single Judge’s observations on those issues are entirely reasonable.

### *Equality of Arms*

29. Further consideration should be given to the fact that the Defence witnesses may have an equal need for protection as the Prosecution. The Defence is not authorised, neither does it have the means to relocate its witnesses. For such a measure to be implemented, the Defence fully depends on the VWU. The Defence can, therefore, not promise witnesses that measures will be taken to protect their safety and, or that they will be relocated. It is equally important for the Defence to be able to call witnesses. The Defence has no burden of proof but has a right and indeed a duty to the defendant to prepare a vigorous defence. Failing to guarantee the presence of a witness because it is not in a position to fully protect such witness may be equally disadvantageous to the Defence. For example, where the Defence offers an alibi defence, securing the appearance of witnesses may be crucial. It is important not only for the defendant but also for the judges to get the full picture out and hear the evidence of the Defence in order to “ascertain the truth”.
30. Indeed, the Prosecution argues that it should be able to relocate witnesses *proprio motu because it can* and because it has sufficient staff, in the right places:<sup>36</sup> these ought not to be relevant arguments. The Defence lacks these capabilities and it would be inequitable for the OTP to benefit from its greater field presence. There is a flagrant inequality of arms here if the Prosecution is permitted to relocate its witnesses while the Defence cannot, as it is ill-equipped, structurally and financially, to do so.
31. Thus, for reasons of fairness and integrity, it is important that Prosecution and Defence witnesses are treated in an equal manner. Again, this was properly considered by the Single Judge. She held that “[t]he central role given to the Registry and the limited mandate of the Prosecution in terms of witness protection also ensure, as the Prosecution acknowledges, equality of arms between the parties as well as the effective use of the Court’s resources”.<sup>37</sup>

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<sup>35</sup> Impugned Decision, para. 34.

<sup>36</sup> At para. 18, “[t]he 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. ... 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.”

<sup>37</sup> Impugned Decision, para. 31; see also para. 34, where she holds that the Prosecution’s practice of preventive relocation could infringe the principle of equality of arms.

## Adoption of Clear and Transparent Modalities

32. If the Appeals Chamber finds that it is proper for the Prosecution to determine whether witnesses should be relocated, the Defence still requests the Appeals Chamber to dismiss the Prosecution's relief sought, namely to allow the Prosecution "to preventively relocate [sic] 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".
33. The relief sought renders decisions of the VWU void of any meaning, given that in the proposed arrangement, the Prosecution may ignore any decision of the VWU which rejects a request for relocation by relocating the witness itself post the decision of the VWU; or may force the VWU to accept the inclusion of a witness in the ICCPP by relocating a witness prior to the VWU thereby adding a factor of risk and, thus, imposing on the VWU to reconsider its earlier decision that relocation of the witness was not warranted.
34. It was such a situation which triggered the Single Judge to issue a decision disallowing the Prosecution to "preventively relocate", or better termed "reactively relocate" witnesses. The Single Judge expressed disapproval of such practice as it *de facto* removes the power from the VWU to make decisions on relocation by presenting the relocation of the relevant witness as a "fait accompli".<sup>38</sup> In allowing the Prosecution to do so, the Prosecution will, *de facto*, have exclusive power to decide on the relocation of witnesses. As aforementioned, the Defence maintains that such a complete power shift would be in violation of the Statute and the Rules. The Defence has also indicated that there are very compelling reasons for the VWU to decide whether a witness, be it a Prosecution or Defence witness, should be relocated.
35. The Defence, therefore, fully endorses the Single Judge's proposed modalities; namely, that in normal circumstances, 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."<sup>39</sup>

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<sup>38</sup> Impugned Decision, para. 25.

<sup>39</sup> Impugned Decision, para. 25.

36. The Single Judge has, however, held that, in exceptional situations, the Court as a whole must be in a position to respond immediately to within the framework of the system of witness protection provided for in the Statute and the Rules, which requires:<sup>40</sup>

- (i) as soon as the Prosecution is aware that a witness or a potential witness is subject to a serious threat of imminent harm related to his or her cooperation with the Court, the Prosecution must make an application to include the relevant witness in the ICCPP, and must request the Registrar to adopt the necessary provisional measures while the Registrar makes a decision on the Prosecution's request;
- (ii) the Prosecution must also provide the Registrar with all information requested by the latter with regard to the relevant witness on an expedited basis;
- (iii) the Registrar must consider as an urgent priority the setting up of an extended initial response system, which would provide, inter alia, for the possibility of temporarily removing witnesses or potential witnesses from their ordinary places of residence while he decides on the Prosecution's requests for their inclusion in the ICCPP in these types of exceptional situations;
- (iv) the Registrar shall decide immediately on the necessary provisional measures on the basis of the existence of such a threat, unless the Prosecution's allegations are, on their face, fully unsupported. In other words, in these types of exceptional situations, the need for immediate provisional measures of protection prevails over the need for a comprehensive reassessment by the Registrar of the Prosecution's statement relating to the existence of a serious threat of imminent harm to a witness or potential witness.

37. The Defence fully endorses these modalities. However, in the event that the Appeals Chamber grant's the Prosecution's relief sought, the Defence requests that clear and transparent modalities be adopted that accurately address the power shift. In order to avoid that the work relationship between the Prosecution and VWU becomes tense as a result of such a *de facto* removal of power from the VWU to do what it has been set up to do, namely to decide on and implement witness protection measures, it is submitted that the *de facto* power shift should be acknowledged and must become official and complete. The VWU should be left with the sole role of implementing measures as ordered by the Prosecution. With full consideration for the principle of equality of arms, the VWU should then have the same relationship with the Defence. Thus, the Defence would make the decisions as to the necessity of relocation and the VWU would implement those decisions.

38. It is respectfully submitted that the proposed power shift will only work under circumstances where relationships between different organs are clear and consistent. It is therefore essential to adopt modalities in line with the above suggestions. Indeed, the Prosecution also acknowledged the importance of determinations being made "in accordance with consistent and transparently applied criteria". In the event that the

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<sup>40</sup> Impugned Decision, para. 36.

Appeals Chamber grants the relief sought, the Defence therefore requests that the Appeals Chamber adopts such modalities with full consideration of the principle of equality of arms, or refers the matter back to the Single Judge.

### **Conclusion**

39. On these grounds, the Defence prays the Appeals Chamber to dismiss the Prosecution's Appeal on all grounds and to confirm the impugned Decision. In the alternative, the Defence requests that clear and transparent modalities be adopted either by the Appeals Chamber or the Single Judge which fully reflect the reversal of the impugned Decision on this issue and with full consideration for the principle of equality of arms.

Respectfully submitted,



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David HOOPER

Dated this 13<sup>th</sup> June 2008

At The Hague