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THE APPEALS CHAMBER

Before: Judge Georghios 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 MATHIEU NGUDJOLO CHUI***

Public Document

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

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Introduction

1. On 12 June 2008, VWU filed a set of observations purportedly explaining how “the system of witness protection would work best in the unique environment of the Court”.¹ The Prosecution considers that a number of the factual and legal arguments advanced by VWU are misplaced. The Prosecution has a duty and the authority to protect witnesses under Articles 68(1) and 54(3)(f), and is uniquely placed to assess and determine the need for protection of a witness on whose testimony the Prosecution intends to rely at trial. Further, adequate protection is an integral part of an independent investigation under Article 54; its absence can effectively defeat the Prosecution’s efforts to properly investigate and prosecute: if one witness were to be harmed, the Prosecution could lose a number of essential witnesses.
2. The Prosecution relies on the VWU to ensure such protection. The Prosecution only takes provisional urgent measures, such as the preventive and provisional relocation within the territory of the same country (“in-country relocations”), when the VWU does not do so within the appropriate timeframe, so as to avoid the witnesses being exposed to risk. If the VWU is able to freely overrule the Prosecution’s risk assessment, and even to unilaterally change the protection criteria, this effectively results in a situation in which the OTP’s ability to investigate and present its case, pursuant to its statutory mandate, becomes subject to the decisions (and resource constraints) of another organ.
3. The Prosecution hereby provides the Appeals Chamber with relevant information pertaining to the Prosecution’s practice regarding preventive relocation of witnesses, and further specifically addresses some additional submissions advanced in the VWU’s Observations. The Prosecution notes that certain issues that the VWU refers to – notably, the fact that the VWU should not consult with the Prosecution on Defence witnesses – are not under contention and have been

¹ VWU’s Observations, para. 2.

repeatedly dealt with in previous submissions. Accordingly, the Prosecution will not advance any further arguments, or repeat past ones, on this point.²

Procedural Background

4. On 18 April 2008, the Single Judge of Pre-Trial Chamber I ("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" ("Decision").³
5. On 28 April 2008, the Prosecution applied for leave to appeal against the Decision in respect of two issues.⁴ On 20 May 2008, the Single Judge certified the two issues for which the Prosecution had sought leave to appeal.⁵
6. On 2 June 2008, the Prosecution filed the "Prosecution's Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation" ("Prosecution Appeal").⁶ On 13 June 2008, the Defence filed a response to the Prosecution Appeal.⁷
7. On 12 June 2008, the Registrar filed the "Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation'" together with three confidential annexes ("VWU's Observations").⁸

² See VWU's Observations, para. 48.

³ *Prosecutor v. Katanga et al.*, 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).

⁴ *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-453 ("Prosecution Application for Leave to Appeal"). On 2 May 2008, the Defence filed a response to the Prosecution Application (*Prosecutor v. Katanga et al.*, ICC-01/04-01/07-462). The Defence also applied for leave to appeal against the Decision (*Prosecutor v. Katanga et al.*, ICC-01/04-01/07-456), to which the Prosecution responded on 2 May 2008 (*Prosecutor v. Katanga et al.*, ICC-01/04-01/07-464).

⁵ *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-483 ("Decision Granting Leave"). The second issue for which leave to appeal was granted related solely to the Single Judge's exclusion of the evidence of two witnesses. By the time the Prosecution filed the Prosecution Appeal, this issue had become moot and the Prosecution therefore discontinued the appeal with respect to the second issue (see Prosecution Appeal, paras. 8-9).

⁶ *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-541 OA 7, 2 June 2008.

⁷ *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-591 OA 7, Defence Response to Prosecution's Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation, 13 June 2008.

⁸ *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-585 OA 7; ICC-01/04-01/07-585-Conf-Anx1 OA 7; ICC-01/04-01/07-585-Conf-Anx2 OA 7; and ICC-01/04-01/07-585-Conf-Anx3 OA 7, 12 June 2008.

8. Upon a request filed by the Prosecution on 16 June 2008,⁹ the Appeals Chamber, on 27 June 2008, granted the Prosecution leave to file a response to the VWU's Observations.¹⁰
9. The Prosecution hereby files its response to the VWU's Observations.

Arguments

A. The Prosecution's ability to determine the need for protection of witnesses

10. The Prosecution, in order to discharge its protective duties under Article 68, and to fulfil its obligations under Article 54(3)(f), performs an ongoing assessment of the risks to its witnesses, and of the protection needed. While the Prosecution will consult VWU as a matter of course, the Prosecution has consistently argued that it has a duty to conduct its own assessment, and also that it is best placed to decide on the need for protection of a witness. The Prosecution routinely performs assessments of this kind. Contrary to the assertions in VWU's Observations, such assessments do not generally trigger a request for inclusion into the ICCPP: as described by VWU, the system of protection within the Court covers a wide range of potential measures, judicial measures (redactions), or non judicial measures from best practices on the ground in contacts with witnesses to reliance on an Initial Response System, to inclusion into the ICCPP.¹¹ These were the parameters originally agreed by the Prosecution and VWU.¹²
11. When the Prosecution concludes that judicial measures, or best practices, cannot mitigate the risks to a witness, then the Prosecution requests the VWU for protective measures and relies on the VWU to implement the protective measures

⁹ *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-594 OA 7, Prosecution's request for leave to file a response to "Victims and Witness Unit's considerations on the system of witness protection and practice of 'preventive relocation'", 16 June 2008.

¹⁰ *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-654 OA 7, Decision on "Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation'" and "Prosecution's request for leave to file a response to 'Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation'", 27 June 2008.

¹¹ VWU's Observations, para. 10.

¹² See Prosecution Appeal, para. 15-16.

required.¹³ The mandate and responsibility to implement protective measures primarily lies with the VWU.¹⁴ The Prosecution agrees with the VWU's own assessment that it is a "neutral service provider" to the Prosecution and to other organs of the Court.¹⁵

12. The Prosecution's adequate discharge of its legal obligations effectively means that it must necessarily have the responsibility to determine the need for protection. Furthermore, in practice, the Prosecution notes that best practices for the assessment of risk and need for protection require input from those closest to the relevant witnesses and their individual circumstances.¹⁶ As stated in the VWU's Observations, the Prosecution is, by default, the entity establishing the first contact with its witnesses.¹⁷ Being in charge of conducting the investigations, the Prosecution will also have the most complete information at its disposal and a full understanding of the individual circumstances of a witness and the broader context within which the particular witness lives and interacts with the surrounding environment. The Prosecution's investigators are the first point of contact and have ongoing contact with the witnesses and are thus most familiar with their individual circumstances and any change in these circumstances.¹⁸

13. In addition, the Prosecution has permanent support staff in the field. Members of its Operational Support Unit are designing and executing necessary security procedures relating to the investigations in liaison with the Registry's Security and Safety Section and national and international authorities. Further, the investigators of the relevant case travel through regions where the witnesses reside, collecting information about the situation of the witnesses and those

¹³ See Prosecution Appeal, para. 18.

¹⁴ Prosecution Appeal, para. 29. See also ICC-01/04-01/06-1212, 7 March 2008, paras. 5-6.

¹⁵ See VWU's Observations, para. 30.

¹⁶ See for instance *Prosecutor v Kordic & Cerkez*, Decision of 13 October 2003, where the Chamber found that "due to their relationship with [its] witnesses, each party is in a much better position to contact the witnesses which the party called and to ascertain their security concerns, if they have any" (para. 21).

¹⁷ VWU's Observations, para. 15.

¹⁸ Contact between the Prosecution and its witnesses is established not only on the field, but also maintained up-to-date by both the investigators and the field staff.

involved in the crimes. The information collected is analyzed in The Hague and conveyed to the Registry, including the VWU.¹⁹

14. Hence, the Prosecution is not only in a position to assess the general level of risk in a certain area, but also in a unique position to determine the real level of risk to which an individual is exposed, which may be different from the general level of risk in the situation area or the individual's subjective perception or account of that risk.²⁰ The Prosecution submits that the point of departure must be the VWU's deference to the Prosecution's professional and well-informed assessment of the situation, absent cogent reasons not to do so.²¹

15. The Prosecution is also in a unique position to take an *expeditious* decision on the need for protection, which in a number of cases will be essential for the timely execution of appropriate measures to avoid the situation where a person who is at risk on account of the activities of the Court is without effective protection.²² Again, the Prosecution will then rely on the VWU to implement immediate measures, if VWU acts within the timeframe required for the witness' safety. When referring a witness to the VWU for protection, the Prosecution provides comprehensive information on the security situation of each individual witness.²³ The VWU's requirement to make a further independent and more complete assessment will often take a significant period of time.²⁴ The procedures for participation in the ICCPP outlined in the VWU's Observations,²⁵ and in Annex 3

¹⁹ See Prosecution's Application for Leave to Appeal, para. 11. See also Prosecution Appeal, para. 18.

²⁰ See for example, *Prosecutor v. Brdjanin*, IT-99-36-PT, Decision on Third Motion by Prosecution for Protective Measures, 8 November 2000, para. 13(2).

²¹ This is without prejudice to VWU's authority to independently conduct all subsequent steps, including an interview with the witnesses, in order to prepare for an efficient implementation of appropriate measures within the ICCPP.

²² Such a situation arose in the case at hand with respect to Witness 238, and it was addressed by the Single Judge (see *Decision*, para. 35; see also *Prosecution Appeal*, paras. 10-12 and 34-36).

²³ ICC-01/04-01/06-1212, 7 March 2008, paras. 12-14.

²⁴ 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. For instance, after the OTP requested the insertion of witnesses 0031 and 0038 into the ICCPP, the VWU assessment procedure lasted over a year and resulted in the rejection of these two witnesses from the ICCPP, after the Prosecution had extracted them from immediate risk by preventively relocating them.

²⁵ VWU's Observations, paras. 15-20.

thereto,²⁶ demonstrate that the assessment procedure conducted by the VWU can be complex and time-consuming.²⁷ In order to avoid that witnesses remain unprotected pending a decision by the Registrar to include witnesses into the ICCPP, there is a need for residual measures by the Prosecution.

B. The Prosecution's practice regarding preventive relocation of witnesses

16. The Prosecution is exercising its duty under Article 68(1) to take appropriate measures to protect witnesses with the aim of eliminating all foreseeable risks.²⁸ In so doing, the Prosecution has always endeavoured to implement its key obligations of protection placed upon it by Articles 54(3)(f) and 68(1), *through* the VWU.²⁹ The Prosecution could neither replace nor duplicate the mandate and responsibility of the VWU to implement adequate protective measures.³⁰
17. Contrary to the suggestion of the VWU, the Prosecution does not intend to set up a system of witness protection parallel to that of the VWU, as it is not the system established by the Statute, nor is that the necessary consequence of deferring to the Prosecution's independent assessment of the need for protection of a witness.³¹ However, the adequate discharge of the Prosecution's protective duties necessarily entails that, should the Prosecution conclude that a witness is at risk, and that such risk is not being addressed by VWU, action be taken by the Prosecution to prevent such risk from materializing. The opposite interpretation would mean that the Prosecution could be placed in a position where it is derelict in its duties as a result of an assessment made by another organ of the Court, which the Prosecution considers, on the basis of its own information and expertise, is in error.

²⁶ ICC-01/04-01/07-585-Conf-Anx3 OA 7, 12 June 2008.

²⁷ ICC-01/04-01/07-585-Conf-Anx3 OA 7, 12 June 2008, para. 2. The Prosecution does not contest that delays in the implementation have also been caused by its own witnesses.

²⁸ *Prosecution Appeal*, para. 14. See also *Strategic Plan of the Court*, ICC-ASP, 4 August 2006, para. 31 and Annex, page 14.

²⁹ *Prosecution Appeal*, pars. 33.

³⁰ *Prosecution Appeal*, p. 3.

³¹ VWU's Observations, paras. 4(2), 26(2), 35-37, 54 and 58.

18. It is important to stress that the Prosecution does not understand the VWU's protective functions to be limited to applying the measure of relocation. In fact, the Prosecution does not request that witnesses be relocated, but that they be adequately *protected*.³² The Prosecution has consistently advocated that the VWU should be able to protect witnesses also with measures other than relocation, when these are sufficient to eliminate all foreseeable risks.³³ The Prosecution submitted that a broad range of measures must be considered in each case and that alternative measures must be employed creatively, and in combination.³⁴
19. The Prosecution further stresses that it has not "chosen" the practice of preventive relocations. It has preventively relocated witnesses only in exceptional circumstances, concerning one specific region, when, according to its professional assessment, immediate action was required to avoid that a witness who is at risk on account of the activities of the Court remains without any effective protection,³⁵ and where the particular measure of in-country relocation³⁶ was the only measure available to eliminate all foreseeable risks.³⁷ As a matter of course, the Prosecution has strived to act in agreement with VWU, or, when such agreement could not be reached, after previous consultation with and notification to the VWU. The Prosecution has preventively relocated witnesses either a) pending a decision by the Registrar on the Prosecution's request to have a witness included into the ICCPP, sometimes in agreement with the VWU or, b) in the event of rejection of an application by the Registrar, pending a decision by a Chamber on the Prosecution's request for review of the decision of the Registrar.³⁸

³² See the Prosecution's previous filing on that same issue: ICC-01/04-0/06-1212, 7 March 2008, para. 7.

³³ Alternative to the ICCPP proposed by the VWU are the Initial Response System (ICR), and generally accepted professional practices in the field (VWU's Observations, para. 10). In addition, the VWU could also engage the authorities of a State to protect witnesses on the basis of a request for referral of a witness to the ICCPP by the Prosecution.

³⁴ See for instance ICC-01/04-0/06-1212, 7 March 2008, para. 15.

³⁵ See also Decision, para. 35. See also Prosecution Appeal, paras. 10-12 and 34-36.

³⁶ For the sake of clarity, the Prosecution recalls that it does not engage in third country relocations, a measure left entirely to the discretion of the Registrar.

³⁷ The Prosecution agrees with the VWU that protective 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" (VWU's Observations, para. 9).

³⁸ In *Katanga* case, see ICC-01/04-01/07-255-Conf-Exp, 10 March 2008. In the *Lubanga* case, see ICC-01/04-0/06-1212, 7 March 2008, para. 19.

20. As set out above, the assessment procedure by the VWU is time consuming.³⁹ The implementation of interim measures during the assessment period may be essential to eliminate all foreseeable risks. The VWU suggests that, while the assessment is being completed, the VWU and the Prosecution may “agree to place a witness temporarily in a safe house”.⁴⁰ This can be one solution if it allows the Court to act urgently. But the process suggested by the VWU would still require an “interim assessment [presumably by the VWU which indicates the serious and immediate nature of the threat]”.⁴¹ During this interim assessment period the persons at risk remain unprotected.⁴² In addition, it would prevent the Prosecution from independently taking provisional protective measures, as the Prosecution would have to seek the consent of the VWU first.

21. As already outlined in the Prosecution Appeal, in the case against KATANGA and NGUDJOLO, after the Registrar rejected the Prosecution's request to have three witnesses (132, 238 and 287) admitted into the ICCPP, the Prosecution proceeded to preventively relocate those witnesses.⁴³

- 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”. The Single Judge therefore directed the Registrar to immediately include witness 238 into the ICCPP. However, without the Prosecution's preventive relocation of that witness, based on its assessment of the risk and need for

³⁹ See para. 14 above.

⁴⁰ VWU's Observations, para. 16.

⁴¹ VWU's Observations, para. 16.

⁴² In this regard, as the Prosecution has already submitted, the “extended initial response system” proposed in the Decision (para. 36) will also 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, and in any event could not displace, the Prosecution's statutory rights and duties to independently take protective measures (Prosecution appeal, para. 34 and footnote 57).

⁴³ See Prosecution Appeal, para. 11. A fourth witness (witness 163) has also been preventively relocated, but that witness finally decided not to cooperate with the Prosecution (see Prosecution Appeal, p. 4).

protection, this witness, whom the Single Judge concluded was at serious risk, would have been left totally unprotected for almost three weeks.⁴⁴

- In relation to witnesses 132 and 287, as a result of the Decision ruling that the Prosecution's preventive relocation was unlawful, the Chamber found that the witnesses were left without any clear protective scheme for a period of one month, which caused the Single Judge to exclude their evidence for the purposes of the Confirmation Hearing.⁴⁵ They were only brought back under the protection of the Court pursuant to a discretionary decision from the Registrar.⁴⁶
- In the *Lubanga* case, the Trial Chamber ordered that witnesses 298 and 299, who had been initially admitted, and then removed from the protection program by VWU in spite of requests from both the Prosecution and the legal representatives of victims, be readmitted into the ICCPP.⁴⁷

22. These examples demonstrate the necessity for the Prosecution to independently assess the need for protection. They also demonstrate the need for the Prosecution to take exceptional provisional measures, when necessary.

23. The Prosecution wishes to stress that it has only exercised its authority to preventively relocate witnesses in a limited number of cases, counting all situations and cases under investigation. In total, the Prosecution has preventively relocated 14 witnesses (nine in the LUBANGA case and five in the KATANGA case). In the KATANGA case, out of these five witnesses, the Prosecution preventively relocated three witnesses (132, 287, 238) after the Registrar rejected the Prosecution's request, and the other two witnesses pending the decision by the Registrar and with the consent of VWU. On the basis of this

⁴⁴ The Prosecution preventively relocated witness 238 on 1 April 2008.

⁴⁵ Decision Granting Leave to Appeal, p. 10; Decision, para. 39 and p. 55 of the *dispositif*.

⁴⁶ Prosecution Appeal, para. 11.

⁴⁷ ICC-01/04-01/06-1311-Anx2, 24 April 2008 (public redacted version issued on 8 May 2008), para. 60(a). The Prosecution recalls that in the *Lubanga* case, Trial Chamber I expressly established responsibility and authority for the Prosecution "to decide whether to secure any other protective solution, as it considers appropriate" for witnesses if they require protection but are not accepted into the ICCPP (*Prosecutor v Lubanga*, ICC-01/04-01/06-1311-Anx2, 8 May 2008, para. 80).

marginal use of preventive relocation, any suggestion that the Prosecution is developing a parallel protection program is misconceived.

C. Response to additional submissions included in the VWU's Observations

*Consequences of undermining the independent assessment of the VWU:*⁴⁸

24. The Prosecution opposes the suggestion that when exercising its power of protection it may pursue "a biased interest in the witness' testimony".⁴⁹ When acting pursuant to Articles 68(1) and 54(3)(f) to protect witnesses, the Prosecution's duty is to eliminate all foreseeable risks to which a person cooperating with the Prosecution is exposed. In so doing, the Prosecution fully takes into account the effect that protective measures have on witnesses and endeavours to put in place the least intrusive measures necessary to eliminate all foreseeable risks and relocates witnesses only with their consent.
25. Where the Prosecution is not satisfied that it can provide adequate protection to persons offering their cooperation, the Prosecution will not make use of their testimony, and will change its case accordingly. Any other approach could constitute a violation of Article 68(1). In addition, if the Prosecution has provided protection to a witness, it has a duty under Article 67(2) to disclose any relevant exculpatory information surrounding the provision of protection to the defence and the defence can, during cross-examination, test whether the provision of protective measures has had an impact on the evidence of that witness.
26. The Prosecution further submits that a potential witness' interests to receive effective protection are not served by requiring or authorizing the VWU to test or overrule the assessment made by the Prosecution.⁵⁰ According to Article 68(1) all organs of the Court have a duty of protection, and the Prosecution has a specific duty during the investigation of the crimes. It is in the interest of a person

⁴⁸ VWU's Observations, paras. 27-31 ; see also paras. 25 and 26.

⁴⁹ VWU's Observations, para. 28. See also paras. 49-50.

⁵⁰ VWU's Observations, para. 28, 29 and 31.

exposed to risk that decisions on the need for protection and provisional measures are triggered, and where necessary implemented, by the organ of the Court that is best placed to do so. As shown above, the Prosecution is the organ best placed to assess the need for protective measures, and there are circumstances where it must provisionally implement them, if the VWU is not in a position to do so. In these circumstances, the Prosecution's action cannot affect VWU's integrity and reputation.⁵¹

Consequences of "preventive relocation":⁵²

27. As stated above, the Prosecution has always endeavoured to implement its key obligations of protection *through* VWU, and it does not intend to set up a system of victim protection parallel to that of the VWU. The Prosecution will only proceed to preventively relocate witnesses in rare instances and with a view to ultimately hand them over to the VWU to provide them with effective protective measures.⁵³
28. The VWU's suggestion that "'preventive relocation' in itself increases the level of risk",⁵⁴ is baseless. The Prosecution will preventively relocate a person only if that person is exposed to such an extent that preventive relocation is the only available measure to immediately eliminate all foreseeable risks. The necessity for the Prosecution's preventive relocations is illustrated by the fact that of all the witnesses OTP has relocated (14 in total) only three have subsequently not been accepted into the ICCPP, while the decision is still pending with respect to two.
29. The transfer back of witnesses to their original location of residence may create risks. These risks are to be balanced against the original level of risk to which the person would be exposed if he or she were not preventively relocated in the first place.

⁵¹ See VWU's Observations, para. 38.

⁵² VWU's Observations, paras. 32-38.

⁵³ See paras. 16, 18 and 22 above.

⁵⁴ VWU's Observations, paras. 34 and 41.

*Impact on concrete cases:*⁵⁵

30. The Prosecution notes that the current appeal does not concern whether certain witnesses should be granted inclusion into the ICCPP, but “whether the Single Judge erred in its interpretation of the Statute on witness protection, as well as of Regulation 96 of the ROR, when prohibiting the Prosecution’s practice of preventive relocation [...]”. In the specific case referred to by VWU, the need to maintain the Prosecution’s independent power to assess the need for protection and if necessary to take provisional measures has been clearly demonstrated. The Single Judge acknowledged that witness 238 was exposed to serious risk and directed the Registrar to immediately include this witness into the ICCPP.⁵⁶ In addition, the Single Judge confirmed that, upon the decision of the Registrar not to include witnesses 132 and 287 into the ICCPP, they were left without protection, which prompted the Single Judge to consider inadmissible the evidence of these two witnesses for the purposes of the confirmation hearing.⁵⁷

*Independent assessment by the VWU:*⁵⁸

31. The Prosecution has already submitted to the Appeals Chamber its arguments pertaining to the system of witness protection as established by the Statute and the role and power of the Prosecution.⁵⁹ The Prosecution’s position does not detract from the VWU’s status as a “neutral service provider”.⁶⁰

⁵⁵ VWU’s Observations, paras. 39-42.

⁵⁶ Decision, paras. 41-52.

⁵⁷ Decision Granting Leave, p. 10. See also Decision, para. 39 and p. 55 of the *dispositif*. 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” for witnesses if they require protection but are not accepted into the ICCPP (*Prosecutor v Lubanga*, ICC-01/04-01/06-1311-Anx2, 8 May 2008, para. 80).

⁵⁸ VWU’s Observations, paras. 44-56.

⁵⁹ See Prosecution Appeal, paras. 24-42.

⁶⁰ VWU’s Observations, para. 30.

32. The Prosecution acknowledges that the Statute creates a single unit for protection within the Registry.⁶¹ However, 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 way. 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 [...]”.⁶² This provision provides that the VWU is the unit of the Court charged with implementing protective measures for victims.⁶³ It does not grant the VWU the exclusive 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) and 68 (1).⁶⁴
33. The Prosecution further submits that the suggestion that the defence ought to be granted equal possibility to preventively relocate witnesses in order to preserve the principle of equality of arms is legally misconceived.⁶⁵ The Prosecution has specific duties. The principle of equality of arms does not entail a system of complete symmetry between the parties, regardless of their specific statutory duties and rights. Contrary to the Prosecution, the defence does not have a duty to protect witnesses, equivalent to the Prosecution’s duty under Article 68(1), nor does it have a duty to investigate objectively under Article 54(1)(a); finally, the defence also lacks protective powers equivalent to those under Article 54(3)(f).

*Protective measures by the Prosecution:*⁶⁶

34. The VWU also submits that the Prosecution has a range of measures which it can apply in order to fulfil the obligation of protecting witnesses.⁶⁷ The Prosecution

⁶¹ VWU’s Observations, para.s 45-46.

⁶² 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. The provision does not imply that the Prosecution has no autonomous powers to assess protective needs and take protective measures, such as the preventive relocation of witnesses (see Decision, para. 28).

⁶³ 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).

⁶⁴ Prosecution Appeal, para. 29.

⁶⁵ VWU’s Observations, para. 49. See also para. 58.

⁶⁶ VWU’s Observations, paras. 57-59.

agrees that the protective measure applied must be proportional to the risk and be the least intrusive to the wellbeing of the witness. Relocation, especially in third countries, should always be a measure of last resort as it significantly impacts and disrupts the life of the individual.⁶⁸ As stated above, the Prosecution will only proceed to preventively relocate a witness – in-country - if, pursuant to the Prosecution’s professional assessment, this is the only available measure to eliminate all foreseeable risks.⁶⁹

35. The application of good practices when contacting witnesses as suggested by the VWU form the core of the Prosecution’s interaction with witnesses and other contacts; they are in place and implemented from the beginning of any investigation. However, this measure will not always be sufficient to exclude all foreseeable risks and will, therefore, not make preventive relocation or other measures by the Prosecution redundant.⁷⁰ The same applies to protective measures sought pursuant to Rule 87 and other alternative measures suggested by VWU in its Observations.⁷¹ In some cases, the risk to which a person is exposed will require the Prosecution to apply for other measures such as preventive relocation or to directly apply for inclusion into the ICCPP. As shown above, there will be cases where the level of risk is so immediate that the Prosecution is forced to take provisional measures itself, including through preventively relocation of witnesses, to ensure that all foreseeable risks are eliminated. In all cases, it is the wish of the Prosecution that the VWU, as service provider, take over as soon as possible with the same or other adequate measures.

Relief sought

⁶⁷ VWU’s Observations, para. 59.

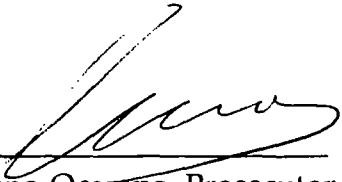
⁶⁸ VWU’s Observations, para. 9.

⁶⁹ The Prosecution will at all times continue to find creative, individual approaches to protection and tailor-made solutions that take the particular needs of each witness or group of witnesses into account.

⁷⁰ In particular, such measures are appropriate to avoid creating or exacerbating risks, but have limited utility in reducing existing risks.

⁷¹ The Prosecution also submits that measures enhancing the physical protection of the residence of witnesses as proposed in the VWU’s Observations, would in some instances increase the level of risk, as it would further expose the witness in his or her community. Moreover, implementing such measures is in some instances also plainly impractical: A solid door inserted into a mud hut would not increase the level of protection.

36. The Prosecution respectfully requests the Appeals Chamber to take the above arguments into consideration and to grant the Prosecution Appeal.


Luis Moreno-Ocampo, Prosecutor

Dated this 7th day of July, 2008

At The Hague, The Netherlands