



Original: **French**

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

Date: 3 July 2008

THE APPEALS CHAMBER

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

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

Public Document

**Observations of the Defence for Mr Mathieu Ngudjolo on the Prosecution Appeal
relating to the *Decision on the Evidentiary Scope of the Confirmation Hearing and
Preventive Relocation***

Source: Defence Team of Mr Mathieu Ngudjolo

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

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I. BACKGROUND AND PURPOSE OF THE APPLICATION

1. On 21 April 2008, the Pre-Trial Chamber issued its *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*.¹ The Prosecutor applied for leave to appeal the said decision² under article 82(1)(d) of the Rome Statute (hereinafter the “Statute”).
2. On 20 May 2008, the Pre-Trial Chamber granted the Prosecutor leave to appeal two specific issues.³ The two issues relate respectively to the Prosecutor’s power in respect of the preventive relocation of witnesses 132 and 287 and to the exclusion of their testimony from the evidence in view of the confirmation hearing.
3. On 2 June 2008, the Office of the Prosecutor submitted its appeal to your Honourable Court.⁴ The Defence for Mr Mathieu Ngudjolo (hereinafter “the Defence”) takes particular note of the Prosecutor’s decision not to exercise his right to appeal the issue of witnesses 132 and 287, now legally relocated.
4. On 12 June, the Registry submitted observations on the system of witness protection and the preventive relocation effected by the Prosecutor.⁵ The Defence for Mr Germain Katanga submitted its observations on 13 June 2008.⁶

¹ ICC-01-04-01-07-423-Conf.

² “Prosecution’s Application for Leave to Appeal the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation”, Pre-Trial Chamber I, 28 April 2008, ICC-01/04-01/07-453.

³ “Decision on the Requests for leave to appeal the Decision on the Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules”, Pre-Trial Chamber I, 20 May 2008, ICC-01/04-01/07-483-Conf.

⁴ “Prosecution’s Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation”, Appeals Chamber, 2 June 2008, ICC-01/04-01/07-541.

⁵ “Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of ‘preventive relocation’”, Appeals Chamber, 12 June 2008, ICC-01/04-01/07-585.

5. As the Defence seeks an extension of time limit to exercise its right to reply pursuant to regulation 65(5) of the *Regulations of the Court* (RoC), it submitted an application to this end⁷ which your Honours granted in your decision of 20 June 2008.⁸ Pursuant to the said decision, the Defence was given a deadline of 3 July 2008 to respond.
6. Moreover, on 16 June 2008, the Prosecutor sought leave from the Appeals Chamber to reply to the observations of the Registry.⁹ The Appeals Chamber granted this request and extended its scope to the Defence teams.¹⁰
7. Accordingly, these observations take account of the Prosecution Appeal, the observations submitted by the Defence Team for Germain Katanga, and the observations of the Registry on preventive relocation by the Office of the Prosecutor.

II. OBSERVATIONS

8. The Defence notes that in relation to preventive relocation, the relevant provisions are:

- Article 43(6) of the Statute, which states:

⁶ "Defence Response to the Prosecution's Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation", Appeals Chamber, 13 June 2008, ICC-01/04-01/07-591.

⁷ "Application for Extension of Time Limits Pursuant to Regulation 35 of the *Regulations of the Court* to allow the Defence to Submit its Observations on the Prosecutor's Appeal regarding the *Decision on Evidentiary Scope of the Confirmation Hearing and Preventive Relocation*", Appeals Chamber, 12 June 2008, ICC-01/04-01/07-586.

⁸ *Decision on the "Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to allow the Defence to Submit its Observations on the Prosecutor's Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventive Relocation"*, Appeals Chamber, 20 June 2008, ICC-01/04-01/07-614.

⁹ "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''", 16 June 2008, ICC-01/04-01/07-594.

¹⁰ *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'"*, Appeals Chamber, 27 June 2008, ICC-01/04-01/07-654.

“The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit 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. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence”.

- Article 68(1) of the Statute, which states:

“The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.

- Regulation 96 of the Regulations of the Registry which states:

1. *“The Registry shall take all necessary measures to maintain a protection programme for witnesses, including accompanying support persons, and others considered to be at risk of harm and/or death on account of a testimony given by such witnesses or as a result of their contact with the Court.*
2. *An application for inclusion in the protection programme may be filed by the Prosecutor or by counsel.*
3. *In assessing admission to the protection programme, in addition to the factors set out in article 68, the Registry shall consider, inter alia, the following:*

- (a) *The involvement of the person before the Court;*

(b) Whether the person himself or herself, or his or her close relatives are endangered because of their involvement with the Court; and

(c) Whether the person agrees to enter the protection programme.

4. Inclusion in the protection programme shall be subject to the decision of the Registrar after the assessment made under sub-regulation 3.

5. Before being included in the protection programme, the person or – where the person is under the age of 18 or otherwise lacks the legal capacity to do so – his or her representative, shall sign an agreement with the Registry.”

9. In light of these provisions, the Defence holds that the Honourable Single Judge provided appropriate grounds to find that the preventive relocation of witnesses by the Office of the Prosecutor was unlawful.

10. As a preliminary comment, Mr Ngudjolo’s Defence states that it is in complete agreement with the arguments put forward by Mr Germain Katanga’s Defence.¹¹ We recall that the said observations are based on the following arguments: (1) the Prosecution appeal incorrectly interprets the impugned decision; (2) the Honourable Single Judge’s correct interpretation of the applicable legal provisions relating to relocation; (3) the Honourable Single Judge’s correct reference to the body responsible for witness relocation, namely the Victims and Witnesses Unit because of its specific expertise, its neutrality, and the guarantee that any relocation will respect the principle of equality of arms.

¹¹ “Defence Response to Prosecution’s Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation”, Appeals Chamber, 13 June 2008, ICC-01/04-01/07-591.

11. Moreover, the Defence would highlight a number of similar or complementary arguments in light of the report submitted by the Registrar in the context of the appeals proceedings pending before your Chamber.
12. The Defence considers that the VWU's independent assessment and recommendations, followed by a decision thereon by the Registrar, are the only way to relocate witnesses or any other persons requiring such a measure.
13. As noted by the Registry, the Prosecutor seeks to establish his own system of witness protection. The Defence considers not only that such a policy contravenes the Statute and the provisions governing how the Court operates, but also that this system is unclear and subjective insofar as it has not been independently verified by the relevant section of the Court. Accordingly, such a system gives rise to inequality of arms, with obvious consequences for Mr Ngudjolo's right to a fair and impartial trial.
14. In this respect the Defence concurs with the observations of the Registry insofar as they recall the reason for and the correctness of the Victims and Witnesses Unit's involvement, but also the negative consequences for the system of Prosecution involvement beyond its initial contact with the potential witnesses. The Registry rightly submits that *"[i]f the 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. 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"*.¹²

¹² "Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation'", Appeals Chamber, 12 June 2008, ICC-01/04-01/07-585, paras. 28-29.

15. The Defence, like the Registry, submits that authorisation of *proprio motu* relocation by the Office of the Prosecutor could seriously undermine the system of protection established in the provisions governing the Court. Such relocation by the Office of the Prosecutor is not only structurally inadmissible because of the ensuing consequences (see above), but also because the Office of the Prosecutor lacks specific expertise in this area. Indeed there may be reason for concern that the objective of Office of the Prosecutor (which is to gather evidence) will prevail over the merits of witness relocation.

16. Moreover, the Defence considers that the Prosecutor's purely advisory role cannot mutate into a proactive role, which would amount to the Prosecutor's taking decisions with regard to witness relocation. Though the Prosecutor is assigned certain responsibilities in relation to witness protection under article 68(1) of the Statute, the Defence pointedly observes that, in accordance with article 43(6) of the Statute, the Prosecutor has a purely advisory role in respect of the final decision on measures to take with a view to ensuring the best possible protection of the person in question whilst also preserving the best possible equilibrium in the life of that person. In its observations, the Registry does point out that "[t]his 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".¹³ The Registry adds that "[f]urthermore, it would be inappropriate for the VWU to consult the Prosecution on protective measures provided, for example, to Defence witnesses".¹⁴

17. The issue of preventive relocation by the Prosecutor is unacceptable because it also has repercussions for the equality of arms between the Defence and the Prosecutor. Again, the Defence would highlight the passages in the Registry's observations with which it concurs. In paragraphs 49 and 50 of its report, the Registry rightly states that "[t]he assessment of the need for participation in the

¹³ *Ibidem*, para. 47.

¹⁴ *Ibidem*, para. 48.

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.' In particular in light of the 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. 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."

18. If, as noted above, the Defence wishes to refer to the report of the Registry, it is because of the clear impact of preventive relocation by the Office of the Prosecutor on Mr Ngudjolo's rights to a fair and impartial trial. In this regard it should be recalled that article 68(1) of the Statute clearly states that "[t]hese [protective] measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". However, as the Registry points out: "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."¹⁵

IN CONCLUSION

19. With a view to guaranteeing fair and expeditious proceedings, the Defence considers that the preventive relocations by the Office of the Prosecutor must be found inconsistent with the provisions governing the Court. The Office of the Prosecutor must be prohibited from taking such measures, as only the

¹⁵ *Ibidem*, para. 58.

Registry has the power to do so and, more particularly, only the Victims and Witnesses Unit.

20. Any preventive relocation decided by the Prosecutor will necessarily have an impact on the credibility of the witness and victims benefiting from that programme.

21. Accordingly, the Defence requests that your Honourable Court dismiss the Prosecutor's appeal.

22. In the alternative, in the event your Honourable Court considers that the Prosecution appeal is well-founded, the Defence for Mr Mathieu Ngudjolo, like the Defence for Mr Germain Katanga, requests the adoption of clear and transparent procedures governing relocation, and that such procedures be fully consistent with the principle of equality of arms between the Prosecutor and the Defence.

Dated this 3 July 2008

At The Hague

[signed]

Mr Jean-Pierre Kilenda Kakengi Basila
Permanent Defence Counsel for Mr Mathieu Ngudjolo