

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/07 OA 7

Date: 11 July 2008

THE APPEALS CHAMBER

Before:

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI

Public document

Reasons for the “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’””

Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for Mr Katanga

Mr David Hooper
Mr Goran Sluiter

Counsel for Mr Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

REGISTRY

Registrar

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision entitled “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” (ICC-01/04-01/07-411-Conf-Exp),

In the matter of “Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of ‘preventive relocation’” (ICC-01/04-01/07-585) (“Registrar’s Considerations”),

In the matter of “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’” (ICC-01/04-01/07-594) (“Prosecutor’s Request”),

Provides the following reasons, signed by Judge Kirsch, for its decision taken by majority, namely Judges Kirsch, Pillay, Song and Kourula, issued on 27 June 2008 and entitled “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’” (ICC-01/04-01/07-654), with Judge Pikis’ reasons being given in a dissenting opinion,

1. The Prosecutor filed the “Prosecution’s Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation” on 2 June 2008 (ICC-01/04-01/07-541) and on 12 June 2008 the Registrar filed the Registrar’s Considerations. The Registrar noted various provisions in the Court’s legal texts, including articles 43 (6) and 68 (4) of the Rome Statute (“Statute”) and regulation 24 *bis* of the Regulations of the Court. She considered “that pursuant to Article 68(4) of the Statute the Victims and Witnesses Unit [“VWU”] may advise the Prosecutor and the Court *inter alia* on appropriate protective measures and security arrangements” (page 4). She submitted that “[t]he Appeals Chamber is seized with an issue directly relating to the system of witness protection in the legal framework of the Court” (paragraph 1) and that “[a]ny decision by the Appeals Chamber taken on this matter will

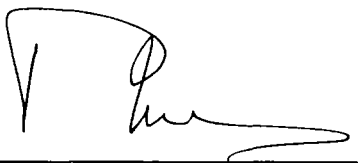
directly affect how the system of protection is constructed and consequently on the whole system of witness protection” (paragraph 2). She submitted that “[i]t is in this context that the [VWU] wishes to submit its considerations on how such a system of witness protection would work best in the unique environment of the Court and to draw the Appeals Chamber’s attention to a number of implications that arise from the current approach of ‘preventive relocation’ chosen by the Prosecution” (paragraph 2).

2. On 16 June 2008, the Prosecutor filed the Prosecutor’s Request in which he sought “leave to file a response to VWU’s Considerations and/or to be given a time limit to file its response” (paragraph 5). The Prosecutor noted that the VWU had not sought leave to make its filing but rather had “relied on its advisory functions under Article 68(4) as a basis for the filing” (paragraph 6). It noted “that the Appeals Chamber had not sought VWU’s advice on the matters before it” and “that VWU’s Considerations go beyond the provision of advice on ‘appropriate protective measures, security arrangements, counselling and assistance’ for victims and witnesses, within the terms of Articles 43(6) and 68(4), but rather includes submissions on the merits of the legal and factual arguments presented by the Prosecution in its appeal. Thus, the procedural basis for the filing is questionable, as is the scope of the arguments presented” (paragraph 6). In the event that the submissions were properly filed, the Prosecutor asks for a chance to respond within a time-limit set by the Appeals Chamber (paragraph 7). If it is decided that the filing is properly before the Chamber, he submits that “then VWU has effectively become a participant in the present proceedings” and the Prosecutor could file a response under regulation 24 (1) of the Regulations of the Court (paragraph 8). “[D]ue to the residual ambiguity of the situation at hand”, however, he sought leave to make the filing. He submitted that “it is in the interests of fairness and of a proper determination of the issues on appeal that the parties be given an opportunity to react to filings made by a third party in the context of appellate proceedings” while in addition the Registrar’s Considerations “contain a number of factual assertions pertaining to the matters on appeal that warrant a specific response by the Prosecution. It would be unfair if the Prosecution, as an appellant, is deprived of an opportunity to address issues raised *ex improviso* by a third party to the appellate proceedings that may have an impact on the outcome of those proceedings” (paragraph 9).

3. Pursuant to regulation 24 *bis* (1) of the Regulations of the Court (regulation 24 *bis* entitled “Submissions by the Registrar”) “[t]he Registrar, when necessary for the proper discharge of his or her functions, in so far as they relate to any proceedings, may make oral or written submissions to a Chamber with notification to the participants”. Article 43 (6) of the Statute (article 43 entitled “The Registry”) provides that “[t]he 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”. Furthermore, article 68 (4) of the Statute (article 68 entitled “Protection of victims and witnesses and their participation in the proceedings”) provides that “[t]he Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6”.

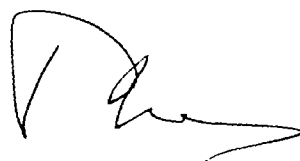
4. Reading articles 43 (6) and 68 (4) of the Statute together with regulation 24 *bis* (1) of the Regulations of the Court, and in light of the subject-matter of the instant appeal, the Appeals Chamber considered that the filing by the Registrar was legitimately made. In this regard, the Appeals Chamber considered it appropriate and of assistance to it in the circumstances of this appeal to hear from the Registrar. In these circumstances, the Appeals Chamber also considered it appropriate to provide the Prosecutor and the Defence with a time-limit within which they could respond to the Registrar’s Considerations. Hence, a deadline of 7 July 2008 was fixed.

Done in both English and French, the English version being authoritative.



Judge Philippe Kirsch

Dated this 11th day of July 2008
At The Hague, The Netherlands

A handwritten signature in black ink, consisting of a large, stylized 'V' or 'D' shape followed by a series of loops and a long horizontal stroke.

No.: ICC-01/04-01/07 OA 7

Dissenting Opinion of Judge G.M. Pikis

1. With the leave of Pre-Trial Chamber I, the Prosecutor appealed 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” in relation to two issues certified by the Chamber as proper subjects of appeal, the following: 1) “whether the Single Judge erred in its interpretation of the provisions of the Statute on witness protection, as well as of regulation 96 of the RoR, when prohibiting the Prosecution’s practice of preventive relocation both prior to a decision by the Registrar on the inclusion of the relevant witness in the Court’s Witness Protection Program and after the Registrar’s Decision rejecting such inclusion”¹, and 2) “whether the appropriate remedy for the Prosecution’s unlawful preventive relocation of witnesses 132 and 287 is the exclusion of their evidence for the purpose of the confirmation hearing”². On 12 June 2008, the Registrar filed, in the cause of the appeal, a document entitled “Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of ‘preventive relocation’”³. This was lodged without the prior leave or authorisation of the Appeals Chamber. The Prosecutor responded on 16 June 2008 to this filing by the submission of a document entitled “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’”⁴. He contests, in the first place, the acceptability of the document, filed, as he points out, without the prior permission of the Chamber. He draws attention to the fact that the advice of the Registrar was not sought by the Chamber under article 68 (4) or any other provision of the Statute. On the contrary, the document, as submitted, “[...] includes submissions on the merits of the legal and factual arguments presented by the Prosecution in its appeal. Thus, the procedural basis for the filing is

¹ *Prosecutor v Katanga and Ngudjolo Chui* “Decision on the Requests for leave to appeal the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” 20 May 2008 (ICC-01/04-01/07-484), page 12

² *Ibid*

³ *Prosecutor v Katanga and Ngudjolo Chui* “Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of ‘preventive relocation’” 12 June 2008 (ICC-01/04-01/07-585).

⁴ *Prosecutor v Katanga and Ngudjolo Chui* “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)

questionable, as is the scope of the arguments presented.”⁵ If the document is deemed acceptable, as the Prosecutor submitted, “[...] then VWU has effectively become a participant in the present proceedings before the Appeals Chamber. In that case, the Prosecution would have a right to file a response to VWU’s Considerations pursuant to Regulation 24(1)”⁶.

2. What must first be addressed is whether the Registrar has a right to participate in the proceedings. If so, the document must be deemed to emanate from a legitimate source. To that we shall now turn our attention.

3. In her opening statement, the Registrar seeks to justify her participation in the proceedings by the following statement: “NOTING articles 43(6), 54(3)(f) and 68(1) and (4) of the Rome Statute (“the Statute”), and rules 16-19, 87 and 88 of the Rules of Procedure and Evidence (“the Rules”); regulations 24 *bis*, 41 and 65 of the Regulations of the Court and regulations 79, 80 and 96 of the Regulations of the Registry”⁷. Thereafter, no effort is made to justify her participation in the proceedings, or correlate it to any one of the articles, rules and regulations cited above, save for reference made in the course of her argumentation on the merits of the appeal to article 68 (1) and the protection and support that may be afforded to victims and witnesses.

4. The document filed by the Registrar is a direct response to the Prosecutor’s document in support of the appeal, in fact an answer to the appeal, questioning its sustainability. The appeal was taken under article 82 (1) (d) of the Statute. In accordance with the introductory statement of paragraph one of article 82, an appeal under its provisions may be raised by either party to the proceedings, that is, the Prosecution and the defence. The counter-party to the appeal, the respondent, is the other party to the proceedings. The Registrar is not a party to or a participant in the proceedings. She claims that status, as can be surmised, from the citation of regulation 65 of the Regulations of the Court, paragraph 5 of which reads, “Participants may file a response

⁵ *Ibid*, para. 6

⁶ *Ibid*, para 8

⁷ *Prosecutor v Katunga and Ngudjolo Chui* “Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of ‘preventive relocation’” 12 June 2008 (ICC-01/04-01/07-585), page 4.



within ten days of notification of the document in support of the appeal. Regulation 64, sub-regulation 4, shall apply *mutatis mutandis*.” Who may participate in proceedings before the Appeals Chamber other than the parties? The answer is persons to whom such status is acknowledged either by the Statute or by the Rules of Procedure and Evidence⁸. Article 68 (3) of the Statute confers a right upon victims whose personal interests are affected by the proceedings before a Chamber to participate. A series of decisions of the Appeals Chamber establishes the prerequisites and modalities of participation.⁹ To participate, victims must justify, by a specific application, their right to do so. If the application is sanctioned by a decision of the Chamber, they may participate and express their views and concerns in relation to matters affecting their personal interests. Instances of participation of non-parties in proceedings, in a prescribed manner, may be traced in the Statute, such as the right of States referring a situation to the Prosecutor under article 13 of the Statute, or victims to submit observations on challenges to the jurisdiction of the Chamber and the admissibility of a case (article 19 (3)). Nowhere in the Statute is a right conferred upon the Registrar or the Registry to participate as of right in any proceedings before the Court.

5. Article 43 (6) of the Statute envisages the establishment of a Victims and Witnesses Unit within the framework of the Registry for the purpose of providing, “[...] in consultation with the Office of the Prosecutor,” protective measures, security arrangements and other support to victims and witnesses. Article 68 (1) of the Statute defines the powers of the Court in relation to such measures, whereas paragraph 4 of the same article provides, “The Victims and Witnesses Unit may advise the Prosecutor and the Chamber on appropriate protective measures, security arrangements, counselling and

⁸ Hereinafter “the Rules”.

⁹ *Situation in Darfur, Sudan* “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 6 December 2007” 18 June 2008 (ICC-02/05-138); *Prosecutor v Lubanga Dyilo* “Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”” 13 February 2006 (ICC-01/04-01/06-824); *Prosecutor v Lubanga Dyilo* “Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007” 13 June 2007 (ICC-01/04-01/06-925).



assistance as referred to in article 43, paragraph 6.” The role of the Unit is confined to rendering advice to the Chamber with regard to protective measures that may be taken. Such advice must be sought by the Chamber. Article 68 (4) of the Statute does not confer a right to the Registrar or authority to participate in judicial proceedings, appellate proceedings in this case. On the other hand, article 54 (3) (f) of the Statute, also cited by the Registrar as legitimising her participation, is wholly irrelevant to the question before the Appeals Chamber. The provision in question enumerates the measures that may be taken by the Prosecutor in relation to the sustenance of the confidentiality of information, the protection of any person, or the preservation of evidence.

6. Rules 17 to 19 of the Rules itemise the responsibilities of the Registrar in relation to victims and witnesses and define the functions and responsibilities of the Unit, including “recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures”¹⁰. Nowhere is power bestowed on the Registrar, directly or indirectly, to participate in proceedings in relation to the compass of authority of the department of the Registry. Rules 87 and 88 of the Rules deal with protective measures that may be taken upon the motion of either the Prosecutor or the defence. In this connection, the Chamber may decide upon such matters “after having consulted with the Victims and Witnesses Unit.” This is an advisory role on a matter within the expertise of the Unit. In no way does this provision entitle the Registrar to participate in proceedings. A sequel to these rules is regulation 41 of the Regulations of the Court, trusting the Unit to “draw any matter to the attention of a Chamber where protective or special measures under rules 87 and 88 require consideration.”

7. The only provision of the Regulations of the Court that provides a semblance of justification for the step taken by the Registrar in this case is regulation 24 *bis* (1) of the Regulations of the Court. It reads, “The Registrar, when necessary for the proper discharge of his or her functions, in so far as they relate to any proceedings, may make oral or written submissions to a Chamber with notification to the participants.” The ambit of the aforesaid regulation is confined to the “proper discharge” of the functions of the Registrar. The functions of the Registrar and range of authority are defined by the Statute,

¹⁰ See rule 17 (2) (a) (ii) of the Rules



and their discharge is procedurally regulated by the Rules. Authority for taking any steps before the Chamber must derive therefrom. The Regulations of the Court are, in accordance with article 52 (1) of the Statute, designed to facilitate the routine functioning of the Court, in other words to regulate the conduct of the judicial process. They cannot confer power to take part in judicial proceedings when none is given by the Statute or the Rules. As stated in regulation 1 (1), the Regulations “shall be read subject to the Statute and the Rules” that define the framework within which the Regulations must be interpreted and applied. Legitimation for taking any step in the judicial process can only be derived from those sources.

8. The mandate of the Registry and the Registrar, as the officer in charge, is, in accordance with article 43 (1), confined to the “[...] non-judicial aspects of the administration and servicing of the Court [...]”. The “Decision of the Appeals Chamber upon the Registrar’s Requests of 5 April 2007”¹¹ illuminates the scene with regard to the position and powers of the Registrar. In that case, the Registrar petitioned the Appeals Chamber to issue, *inter alia*, two orders in relation to legal aid, “I – State that the requests for additional means cannot be examined at this stage in the proceedings when the appointed counsel has not yet accepted the appointment. II – Invite the counsel appointed by Mr. Thomas Lubanga Dyilo to comply with the procedure which applies before the Court and to make a decision without delay regarding her appointment.” The application was dismissed, with the Chamber drawing attention to the fact that the legal premise founding the request was not identified. Furthermore, the remedies sought were found to be outside the range of powers of the Appeals Chamber, as defined by the Statute and the Rules. Attention is drawn to the fact that the “Registrar shall exercise his or her functions under the authority of the President of the Court.” as laid down in article 43 (2) of the Statute. “Authority” in this context denotes a person or body under whose direction the Registrar operates¹², and from whom, as pointed out in the above-mentioned decision, the Registrar may seek necessary advice and guidance. The Appeals Chamber underlined that the functions of the Registrar are confined to the non-judicial aspects of the

¹¹ *Prosecutor v. Lubanga Dyilo* “Decision of the Appeals Chamber upon the Registrar’s Requests of 5 April 2007” 27 April 2007 (ICC-01/04-01/06-873)

¹² See Shorter Oxford Dictionary, Fifth Edition, page 154; Concise Oxford Dictionary, Eleventh Edition, page 88



administration and servicing of the Court. If power was vested upon the Registrar to participate in judicial proceedings that would make the President of the Court, be it indirectly, a participant in judicial proceedings. Contemplating the implications of such participation does persuade that it could not have been in the contemplation of the makers of the Statute to cast the President of the Court, in one way or another, as a participant in judicial proceedings; more so in proceedings before the Appeals Chamber, of which he is a member. These are some of the institutional implications of the proposition that the Registrar may, as of right, take part in judicial proceedings. It is no coincidence that neither directly nor indirectly does the Statute confer or acknowledge a right to the administrative organ of the Court to participate in the proceedings as a litigant.

9. I conclude, for the reasons given in this opinion, that the Registrar is not legitimised to participate in the proceedings. Sequentially, the document filed by her should be disregarded.

Done in both English and French, the English version being authoritative.



Judge Georghios M. Pikis

Dated this 11th day of July 2008

At The Hague, The Netherlands