

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 26 November 2008

**THE APPEALS CHAMBER**

**Before:**

**Judge Georgios M. Pikis, Presiding Judge  
Judge Philippe Kirsch  
Judge Sang-Hyun Song  
Judge Erkki Kourula  
Judge Daniel David Ntanda Nsereko**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI**

**Public document**

**Judgment**

**on the appeal of the Prosecutor against 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” of Pre-Trial Chamber I**

**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

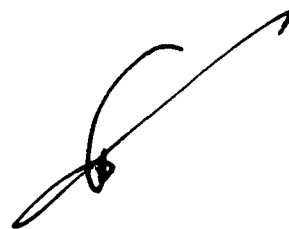
**Counsel for Mr Katanga**  
Mr David Hooper  
Mr Goran Sluiter

**Counsel for Mr Ngudjolo Chui**  
Mr Jean-Pierre Kilenda Kakengi Basila  
Ms Maryse Alié

**REGISTRY**

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**Registrar**  
Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against 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” of 18 April 2008 (ICC-01/04-01/07-411-Conf-Exp),

After deliberation,

By majority, Judge Pikis and Judge Nsereko dissenting,

*Delivers the following*

## JUDGMENT

The decision of Pre-Trial Chamber I of 18 April 2008 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” is confirmed. The appeal is dismissed.

*The reasons of the majority, namely Judges Kirsch, Song and Kourula follow hereafter and are signed by Judge Kourula. The reasons of Judges Pikis and Nsereko are given in a dissenting opinion signed by Judge Pikis.*

## REASONS

### I. KEY FINDINGS

1. The Prosecutor cannot unilaterally “preventively relocate” witnesses either before the Registrar has decided whether a particular witness should be relocated or after the Registrar has decided that an individual witness should not be relocated.
2. In cases of disagreement between the assessment of the Victims and Witnesses Unit of the Registry (hereinafter: “VWU”) and the Prosecutor, the ultimate arbiter of whether the serious measure of relocation should be undertaken is the Chamber.



## II. PROCEDURAL HISTORY

3. On 18 April 2008 Pre-Trial Chamber I (hereinafter: “the Pre-Trial Chamber”) rendered 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” (ICC-01/04-01/07-411-Conf-Exp; hereinafter: “Impugned Decision”). A public redacted version of this decision dated 25 April 2008 was filed under the number ICC-01/04-01/07-428-Corr. In this judgment, references are to the public redacted version of the Impugned Decision.

4. The Prosecutor and Mr. Katanga sought leave to appeal the Impugned Decision (ICC-01/04-01/07-453 and ICC-01/04-01/07-456, respectively). On 20 May 2008, the Pre-Trial Chamber rendered the “Decision on the Requests for leave to appeal the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” (ICC-01/04-01/07-483-Conf; hereinafter: “Decision Granting Leave to Appeal”). A public redacted version of this decision was filed under the number ICC-01/04-01/07-484. In this judgment, references are to the public redacted version of the Decision Granting Leave to Appeal. The Pre-Trial Chamber, at page 12 of the Decision Granting Leave to Appeal, granted leave to appeal only to the Prosecutor in respect of the following two issues:

1. [W]hether the Single Judge erred in its interpretation of the provisions of the Statute on witness protection, as well as of regulation 96 of the [Regulations of the Registry], when prohibiting the Prosecution’s practice of preventive relocation both prior to a decision by the Registrar on the inclusion of the relevant witness in the Court’s Witness Protection Program and after the Registrar’s Decision rejecting such inclusion.

2. Whether the appropriate remedy for the Prosecution’s unlawful preventive relocation of witnesses 132 and 287 is the exclusion of their evidence for the purpose of the confirmation hearing.

5. On 2 June 2008, 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” (ICC-01/04-01/07-541; hereinafter: “Document in Support of the Appeal”).



6. On 13 June 2008, Mr. Katanga filed the “Defence Response to Prosecution’s Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation” (ICC-01/04-01/07-591); this document was replaced on the same day by a corrigendum (ICC-01/04-01/07-591-Corr; hereinafter: “Response of Mr. Katanga”). In this judgment, references are to the corrigendum.

7. On 3 July 2008, and after having requested (ICC-01/04-01/07-586) and having been granted (ICC-01/04-01/07-614 and ICC-01/04-01/07-653) an extension of the time limit, Mr. Ngudjolo Chui filed the “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” (ICC-01/04-01/07-659-tENG; hereinafter: “Response of Mr. Ngudjolo Chui”).

8. 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’” (ICC-01/04-01/07-585; hereinafter: “Submission of the Registrar”). By decision of 27 June 2008, the Appeals Chamber decided that the Registrar was legitimised in filing the Submission of the Registrar and gave the Prosecutor as well as Mr. Katanga and Mr. Ngudjolo Chui an opportunity to respond to it (ICC-01/04-01/07-654); the reasons for this decision were filed on 11 July 2008 (ICC-01/04-01/07-675). On 7 July 2008, the Prosecutor filed the “Prosecution’s Response to ‘Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of ‘preventive relocation’” (ICC-01/04-01/07-664; hereinafter: “Response to the Submission of the Registrar”).

### III. PRELIMINARY PROCEDURAL ISSUES

#### A. Late filings

9. The Appeals Chamber notes that the Document in Support of the Appeal was filed at 16:03 hours, three minutes after the end of the filing hours stipulated in regulation 33 (2) of the Regulations of the Court. The Appeals Chamber notes furthermore that the corrigendum to the Response of Mr. Katanga was filed at 17:58 hours, almost two hours

after the end of these filing hours. None of the parties to the present proceedings has raised this issue, and given the short period of the delay the Appeals Chamber has decided to accept the two documents on an exceptional basis. The participants are nevertheless reminded that failure to comply with time-limits may entail the rejection of a document that is filed late.

### **B. The second issue on appeal**

10. As stated above at paragraph 4, the Pre-Trial Chamber granted leave in respect of two issues. The Appeals Chamber notes that the Prosecutor does not raise any arguments in relation to the second issue in respect of which the Pre-Trial Chamber granted leave to appeal.

11. The Prosecutor submits that the decision of the Pre-Trial Chamber in the Impugned Decision to exclude the evidence of witnesses 132 and 287 for the purposes of the confirmation hearing was altered by the Pre-Trial Chamber on 28 May 2008, allowing the evidence to be included (Document in Support of the Appeal, paragraph 8). The Prosecutor “thus considers that the Second Issue has been rendered moot by the Single Judge’s decision of 28 May 2008. The Prosecution therefore discontinues the appeal, in respect of the Second Issue only, pursuant to Rule 157” (Document in Support of the Appeal, paragraph 9). In a footnote, recalling that the Appeals Chamber had previously decided that a notice of discontinuance must deal exclusively with discontinuance, the Prosecutor submits that if the Appeals Chamber finds that he cannot discontinue the second issue, then he “does not intend to present any arguments or seek any relief in respect of the Second Issue and that [he] hereby abandons [his] appeal in respect of that issue only” (Document in Support of the Appeal, footnote 21).

12. In light of the above, the Appeals Chamber has decided not to consider the second issue in respect of which leave to appeal has been granted.

#### IV. MERITS

13. The Prosecutor pursues one ground of appeal against the Impugned Decision, namely that the Pre-Trial Chamber erred in law when prohibiting him from preventively relocating witnesses.

##### **A. Context and relevant part of the Impugned Decision**

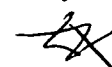
14. The Impugned Decision was rendered in the following context: the VWU maintains a protection programme for witnesses appearing before the Court (hereinafter: “Protection Programme”). Pursuant to regulation 96 (2) of the Regulations of the Registry, the Prosecutor and counsel, as defined in regulation 2 of the Regulations of the Registry, may file applications for the inclusion of witnesses in the Protection Programme. Regulation 96 (3) of the Regulations of the Registry provides that the Registry shall make an assessment as to whether the persons concerned should be included in the Protection Programme; the decision as to their inclusion is taken by the Registrar (regulation 96 (4) of the Regulations of the Registry).

15. Prior to the confirmation hearing in respect of Mr. Katanga and Mr. Ngudjolo Chui, the Prosecutor had requested that several of the witnesses upon whom he intended to rely at that hearing be included in the Protection Programme and that they be relocated as part of their protection (Impugned Decision, paragraph 20). Following an assessment pursuant to regulation 96 (3) and (4) of the Regulations of the Registry, the Registrar rejected the applications of the Prosecutor in respect of three witnesses (Impugned Decision, paragraph 25). Following this decision of the Registrar, the Prosecutor proceeded to “preventively relocate” the three witnesses himself (Impugned Decision, paragraph 25). According to the Prosecutor, “[w]hen the Prosecution assesses that a witness for whom protective measures have been rejected is at risk, the [Office of the Prosecutor] organises for the relocation of the witness [REDACTED] and assists the witness to [REDACTED]. These measures are temporary and put in place, pending the provision of protection by the VWU, which is the proper Unit to implement adequate protective measures on the longer term” (see Impugned Decision, paragraph 14, footnote omitted).



16. In the Impugned Decision, the Pre-Trial Chamber concluded that this practice of the Prosecutor to “preventively relocate” witnesses who were not included in the Protection Programme was exceeding the mandate of the Prosecutor and decided that the Prosecutor “shall immediately put an end to the practice of preventive relocation of witnesses” (Impugned Decision, paragraph 32 and page 54). The Pre-Trial Chamber reasoned that article 43 (6) of the Statute and regulation 96 of the Regulations of the Registry establish a single Protection Programme, which is run by the Registry and in which the roles of the Prosecutor and the defence are limited to the making of applications to the Registrar (Impugned Decision, paragraph 22). The Pre-Trial Chamber noted that there was no provision in the Statute, the Rules of Procedure and Evidence, the Regulations of the Court or the Regulations of the Registry that expressly provides the Prosecutor with the authority to relocate witnesses preventively (Impugned Decision, paragraph 23). The Pre-Trial Chamber opined that such authority could also not be derived from the general mandate of the Prosecutor pursuant to article 68 (1) of the Statute to take “appropriate measures to protect the safety, the physical and psychological well-being, dignity and privacy of victims and witnesses” (Impugned Decision, paragraph 24). According to the Pre-Trial Chamber, a contextual interpretation of that provision indicates that the Prosecutor does not have the power to relocate witnesses preventively: if the Prosecutor were allowed to relocate witnesses preventively, the decision of whether a person should be included in the Protection Programme would effectively shift from the Registrar to the Prosecutor, as the decision to relocate a witness, once taken, cannot be easily undone (Impugned Decision, paragraph 25). The Chamber noted furthermore that once the Registrar has refused to include a witness in the Protection Programme and the Prosecutor nevertheless proceeds to relocate the witness, the Prosecutor is “infringing the decision of the competent organ of the Court to decide upon the relocation of a witness” (Impugned Decision, paragraph 25). In the view of the Pre-Trial Chamber, the Statute therefore established a witness protection system in which the Registry plays a core role, and in which the mandate of the Prosecutor in respect of the protection of witnesses is limited (Impugned Decision, paragraph 28).

17. The Pre-Trial Chamber acknowledged that there may be “exceptional circumstances” in which a witness on whose testimony the Prosecutor intends to rely or a





potential witness “is facing a serious threat of imminent harm related to his or her cooperation with the Court” (Impugned Decision, paragraph 35) and that the “Court as a whole must be in a position to respond immediately to these types of exceptional situations within the framework of the system of witness protection provided for in the Statute and the Rules” (Impugned Decision, paragraph 36). According to the Pre-Trial Chamber, the Prosecutor, while prohibited from preventively relocating the person in question, must immediately make an application to the Registry for his or her inclusion in the Protection Programme, and the Registrar must decide immediately on the necessary provisional measures (Impugned Decision, paragraph 36).

## **B. Arguments of the Prosecutor**

18. The Prosecutor submits that “the [Impugned] Decision has misinterpreted the system of witness protection established *inter alia* by Articles 68(1), 54(3)(f) and 43(6) of the Statute”; in particular, the Impugned Decision was wrong as it “limits the authority of the Prosecution to determine the acceptable level of risk and the need for protection of the witnesses it intends to rely on” and it “denies the Prosecution any ability to implement provisional protective measures. As a consequence, neither the Prosecution nor the Court itself can properly fulfil their protective duties under the Statute” (Document in Support of the Appeal, page 4). The Prosecutor argues that the decision “confers exclusive powers of protection to the Registry while at the same time recognizing the dysfunctions of such a system” (Document in Support of the Appeal, page 4). He submits that “[i]t directly impacts the ability of the Prosecutor to secure the cooperation of new witnesses and to preserve the willingness of existing witnesses to cooperate in the present case as the Prosecution – or the Court – cannot guarantee their adequate protection” (Document in Support of the Appeal, page 5). He argues that the Impugned Decision “can further impact generally the ability of the Court to protect witnesses and to achieve fair and expeditious proceedings by impairing the Prosecution’s ability to present its best case at trial” (Document in Support of the Appeal, page 5).

19. The Prosecutor argues that the case in hand “demonstrates the need for the Prosecution to be in a position to assess the risks to its witnesses, determine the need for



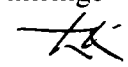
protection and, where necessary, take protective measures including preventive relocation” (Document in Support of the Appeal, paragraph 10). Regarding one of the three witnesses he relocated (see paragraph 15 above), in relation to whom the Pre-Trial Chamber “found that the Registrar had completely disregarded the Single Judge’s findings on the seriousness of the threats received by the witness”, the Prosecutor argues that if he had not preventively relocated that witness that witness “would have been left totally unprotected for a number of weeks” (Document in Support of the Appeal, paragraph 11). He states that the other two witnesses had no “clear protective scheme for a period of one month”, only later being protected by a discretionary decision of the Registrar (Document in Support of the Appeal, paragraph 11). These events illustrate that allowing the VWU to have exclusive authority “does not provide the required degree of protection required by the Statute, including Article 68(1)” and that “the flaws in the current functioning of the system are putting at risk those who should be protected and are also affecting the ability of the Prosecution to efficiently investigate and prosecute cases” (Document in Support of the Appeal, paragraph 12).

20. Referring to article 68 (1) of the Statute, the Prosecutor submits that he has a particular duty to take appropriate measures to protect witnesses during investigations and prosecutions (Document in Support of the Appeal, paragraphs 14 and 24). He submits that the Court’s standard of protection should be “the elimination of all foreseeable risk” (Document in Support of the Appeal, paragraph 14; see also paragraph 41). In the Prosecutor’s view, the Registry has changed this standard and increased the threshold to be admitted in the Protection Programme, now applying a threat based standard, which “forced [the Prosecutor] to implement provisional measures for [four witnesses] in order to fulfil [his] duties of protection and to disclose the evidence to the defence”. He argues that the measures he implemented were a direct consequence of the VWU’s standard (Document in Support of the Appeal, paragraph 16).

21. The Prosecutor submits that the VWU “has the mandate and responsibility for implementing protective measures” and he relies on it to implement the various measures needed to protect his witnesses. He refers to the Protection Programme being “a measure of last resort” (Document in Support of the Appeal, paragraph 19). The Prosecutor states

that he can assist the VWU in implementing protective measures and “is willing to carry out emergency measures, including the preventive relocation of witnesses, whenever the VWU is unable to do it within a tight timeframe” (Document in Support of the Appeal, paragraph 20). However, he submits that he “can neither replace nor duplicate the mandate and responsibility of the VWU to protect witnesses” and that he recognises its expertise in implementing protective measures and providing support (Document in Support of the Appeal, paragraph 20).

22. The Prosecutor argues that the plain reading of the Statute provides him with power to take necessary protective measures including preventive relocation. He also submits that recent Appeals Chamber jurisprudence “demonstrates that the Prosecution’s sphere of authority in matters of protection includes both the taking of protective measures and the request for protective measures being taken by other organs of the Court” (Document in Support of the Appeal, paragraph 25). He argues that the Pre-Trial Chamber, when considering the context, failed to consider articles 54 (3) (f) (which expressly grants the Prosecutor power to take action), article 68 (4) and rule 17 (2) (a) (ii) (which provide, respectively, that the VWU may advise and recommend in relation to protective measures, an advisory function that “must necessarily relate to the exercise of protective functions by other organs of the Court, including the Prosecution; otherwise, the provision would be void of any meaningful purpose”) (Document in Support of the Appeal, paragraphs 27 and 28). Noting that the Pre-Trial Chamber relied mainly on article 43 (6) and regulation 96 of the Regulations of the Registry, the Prosecutor submits that the former does not regulate his role regarding protection or limit his role in any other way. It provides that the VWU is the unit responsible for implementing protective measures for victims, without giving it the sole authority to decide on the need for protection (Document in Support of the Appeal, paragraph 29). In the submission of the Prosecutor, giving the VWU the sole responsibility to decide on the need for protection would also circumvent the Chamber’s powers to provide for the protection of victims and witnesses under rules 81 (4) and 87 of the Rules of Procedure and Evidence. Regulation 96 of the Regulations of the Registry “has no bearing on the powers or the activities of the Prosecution under the Statute”; also, as those regulations are subject to the Statute, the Rules of Procedure and Evidence and the Regulations of the Court, they “cannot infringe



upon a statutory power” of the Prosecutor (Document in Support of the Appeal, paragraph 30). Reading the provisions together, the Prosecutor submits that he has the power to take adequate protective measures including the preventive relocation of witnesses (Document in Support of the Appeal, paragraph 31), an interpretation which, the Prosecutor argues, is also confirmed by the preparatory works of the Rome Statute and by academic commentators (Document in Support of the Appeal, paragraph 17 and footnote 32).

23. The Prosecutor submits that he will generally be best placed to determine when protection is necessary and to act accordingly: investigators have extensive contact with witnesses and are most familiar with individual circumstances. In addition, he submits that the “VWU’s requirement to make a further independent assessment will often take a significant period of time” (Document in Support of the Appeal, paragraph 33), noting that some assessments and decisions on admission to the Protection Programme have taken six to twelve months (Document in Support of the Appeal, footnote 55).

24. The Prosecutor argues that there have been and will be situations where he must act immediately to provide effective protection to witnesses (Document in Support of the Appeal, paragraph 34). He submits that the proposal in the Impugned Decision, the extended initial response system, “will likely be inadequate to react to certain imminent threats, as it still requires the Prosecutor 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” (Document in Support of the Appeal, footnote 57). The Prosecutor argues that based on the Impugned Decision there will be situations where witnesses will be left without protection, as arose in the instant case; he submits that the time period in the instant case would have been longer were it not for the Prosecutor’s preventive relocations (Document in Support of the Appeal, paragraph 35).

25. The Prosecutor also submits that witnesses who have trusted the Court and taken risks to cooperate with the Prosecutor may be “left to their own devices despite the fact that under the Prosecution’s judgment they are at risk” if the Registrar considers that they



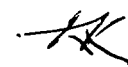
should not be included in the Protection Programme. In his view, this could impact on the fairness of the proceedings which includes an element of fairness to witnesses (Document in Support of the Appeal, paragraph 37). Regarding the Pre-Trial Chamber's concerns as to the "possible impacts on the credibility of the witnesses", he states that this could be dealt with by the parties at trial "and that even assuming, *arguendo*, that relocation by the parties might in some cases impact on the weight accorded to that evidence ..., this does not render such preventive relocations inconsistent with the requirements of a fair and expeditious trial" (Document in Support of the Appeal, footnote 62).

26. The Prosecutor argues that an independent power to take protective measures is crucial to the effective conduct of investigations and to the ability to present his best possible case at the confirmation hearing or at trial, submitting that the Impugned Decision fails to take into account the context in which the Court operates (Document in Support of the Appeal, paragraph 38). He states that witnesses will often not give statements or cooperate unless the Prosecutor can guarantee appropriate protection (Document in Support of the Appeal, paragraph 39). He submits that as a result of the Impugned Decision he will be unable to give witnesses such guarantees, as a result of which he may be unable to bring critical evidence to prove charges at trial (Document in Support of the Appeal, paragraph 39). In the view of the Prosecutor, the Impugned Decision therefore incorrectly subordinates his ability to investigate to the decisions of another organ (Document in Support of the Appeal, paragraph 40).

### **C. Arguments of Mr. Katanga**

#### *1. The Prosecutor's appeal misconstrues the Impugned Decision*

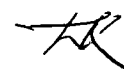
27. Mr. Katanga submits that the Pre-Trial Chamber did not find that the VWU is the sole entity responsible for determining the level of risk to a witness and which protective measures should be applied. It found that this is neither the VWU nor the Prosecutor, but rather, the Chamber. Where the Prosecutor disagrees with the Registrar's assessment of risk, the appropriate procedure is to seek judicial relief rather than bypassing the Chamber's authority by implementing measures himself (Response of Mr. Katanga, paragraph 3).



28. Mr. Katanga submits that the Prosecutor has incorrectly stated that witnesses would be unprotected and in danger unless the Prosecutor relocated them, following the Registrar's decision not to include them in the Protection Programme. Mr. Katanga submits that this is a false dilemma in particular in the instant case as the witnesses who were preventively relocated did not need protection when they were preventively relocated since no-one was aware that they had made statements to the Prosecutor on which he intended to rely for confirmation (Response of Mr. Katanga, paragraph 5).

29. Mr. Katanga also submits that the Prosecutor does not address alternative measures which would provide necessary protection in a manner consistent with the Statute (Response of Mr. Katanga, paragraph 6). He submits that in relation to the Prosecutor's reference to a witness being unprotected for several weeks because the Registry decided not to relocate, the Prosecutor does not explain why it took him several weeks to seek relief from a Chamber (Response of Mr. Katanga, paragraph 6). He submits that "[t]heir 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" (Response of Mr. Katanga, paragraph 6) and submits that there are many things the Prosecutor could do to speed up and assist the Registrar in implementing relocation requests expeditiously (Response of Mr. Katanga, paragraph 7).

30. Mr. Katanga submits that the tension between the decision not to relocate and the Prosecutor's objectives in the instant case was aggravated by the fact that the Prosecutor had requested relocation of nearly all of his witnesses, had submitted his requests late and had not sought timely relief from a Chamber (Response of Mr. Katanga, paragraph 9). He submits that a correct 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 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" (Response of Mr. Katanga, paragraph 10).



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

31. Mr. Katanga argues that the Single Judge correctly interpreted articles 68 (1) and 54 (3) (f) of the Statute. He states that “[w]hen read as a whole and in conjunction with the intentions of the drafters, the correct framework to be applied excludes the Prosecution from taking the measures of preventive relocation” (Response of Mr. Katanga, paragraph 11). Mr. Katanga submits that the reference in article 68 (1) of the Statute to the Prosecutor refers only to a general mandate in contrast to rule 17 (2) (a) (i) of the Rules of Procedure and Evidence, pursuant to which the VWU shall provide witnesses and victims with protective and security measures. He submits that “[a]rticle 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” (Response of Mr. Katanga, paragraph 12).

32. Mr. Katanga submits that articles 68 (1) and 54 (3) (f) of the Statute are subject to the rights of the accused (Response of Mr. Katanga, paragraph 13). He submits that “[t]o 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” (Response of Mr. Katanga, paragraph 14). He emphasises that judicial supervision is required because the relocation of a witness potentially deprives the defence of a source of information in its investigations (Response of Mr. Katanga, paragraph 14). He argues that giving the Prosecutor power to decide on and implement relocation is also contrary to the Court’s findings that there is no property in a witness (Response of Mr. Katanga, paragraph 14).

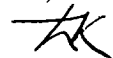
33. Regarding the fact that article 68 (4) of the Statute and rule 17 (2) (a) (ii) of the Rules of Procedure and Evidence refer to an advisory role of the VWU, Mr. Katanga submits that “[t]his role merely supplements the VWU’s power under article 43 (6): in addition to being the sole entity responsible 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” (Response of Mr. Katanga, paragraph 15). Mr. Katanga submits that the Statute and Rules of Procedure and



Evidence confer no power on the Prosecutor to preventively relocate witnesses (Response of Mr. Katanga, paragraph 15).

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

34. In the submission of Mr. Katanga, the VWU is also best placed to make decision on the relocation of witnesses, emphasising the unit's neutrality and expertise (Response of Mr. Katanga, paragraph 18). He submits that the Prosecutor fails to recognise that a witness who is relocated by the Prosecutor will not benefit from the expertise of the VWU (Response of Mr. Katanga, paragraph 20). As to neutrality, he submits that "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" (Response of Mr. Katanga, paragraph 21). He submits that the Prosecutor wishes to prove his case beyond a reasonable doubt and therefore may not give due consideration to the interests of the witnesses and their families (Response of Mr. Katanga, paragraph 23). He submits that only VWU is "able to implement measures without being influenced by prosecutorial strategy" (Response of Mr. Katanga, paragraph 24). In Mr. Katanga's submission, the VWU is best placed to take the interests of the witnesses into account (Document in Support of the Appeal, paragraph 27). In contrast, the Prosecutor "seems to want to use relocation as the rule, rather than the exception", referring to the fact that in the instant case he asked for the relocation of nearly all of his witnesses (Response of Mr. Katanga, paragraph 28). Mr. Katanga submits that "safety measures should only be taken where absolutely necessary. This is not 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" (Response of Mr. Katanga, paragraph 29). Referring to witness relocation outside the country, he submits that "[c]learly the more being offered to witnesses, the more their credibility is questionable" (Response of Mr. Katanga, paragraph 30). Referring to the Prosecutor's submissions that it is unfair to witnesses if he cannot promise protective measures, Mr. Katanga submits that witnesses should not be in a position to dictate under what conditions they are willing to testify (Response of Mr. Katanga, paragraph 31).



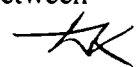


35. As a second argument, Mr. Katanga raises the issue of equality of arms. He submits that consideration should be given to the fact that the defence witnesses may equally need to be protected (Response of Mr. Katanga, paragraph 33). He submits that the defence fully depends on the VWU and cannot promise witnesses that they will be protected or relocated (Response of Mr. Katanga, paragraph 33). He argues that “there is a flagrant inequality of arms ... if the Prosecution is permitted to relocate its witnesses while the Defence cannot, as it is ill-equipped, structurally and financially, to do so” (Response of Mr. Katanga, paragraph 34). He submits that “for reasons of fairness and integrity, it is important that Prosecution and Defence witnesses are treated in an equal manner” (Response of Mr. Katanga, paragraph 35).

#### **D. Arguments of Mr. Ngudjolo Chui**

36. Mr. Ngudjolo Chui was granted an extension of time to file his observations and therefore filed them after the Registrar had submitted the Submission of the Registrar (see paragraph 7 above). Consequently, he stated that his filing took into account the Document in Support of the Appeal, the Response of Mr. Katanga, with which he agrees, and the Submission of the Registrar (Response of Mr. Ngudjolo Chui, paragraphs 7 and 10).

37. Mr. Ngudjolo Chui submits that in light of articles 43 (6) and 68 (1) of the Statute and regulation 96 of the Regulations of the Registry, the Pre-Trial Chamber put forward appropriate grounds to find that the Prosecutor’s preventive relocation was unlawful. He submits that the Prosecutor seeks to establish his own system of witness protection, in contravention of the Statute and to the detriment of the defence (Response of Mr. Ngudjolo Chui, paragraph 13). He underlines that the Prosecutor lacks specific expertise in the area of witness protection and that his interests in the collection of evidence may prevail over the witnesses’ interests (Response of Mr. Ngudjolo Chui, paragraph 15). Mr. Ngudjolo Chui submits that the Prosecutor has an advisory role regarding protection, which cannot mutate into a proactive role where he would take decisions on witness relocation (Response of Mr. Ngudjolo Chui, paragraph 16). He argues that preventive relocation by the Prosecutor cannot be accepted as it impacts on equality of arms between



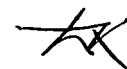
the Prosecutor and the defence (Response of Mr. Ngudjolo Chui, paragraph 17). He also refers to the “clear impact of preventive relocation by the [Prosecutor] on [his] rights to a fair and impartial trial” (Response of Mr. Ngudjolo Chui, paragraph 18). Only the Registry has the power to preventively relocate and he submits that “[a]ny preventive relocation decided by the Prosecutor will necessarily have an impact on the credibility of the witness and victims benefiting from that programme” (Response of Mr. Ngudjolo Chui, paragraph 20).

### **E. Submissions of the Registrar**

38. The Registrar submits that an Appeals Chamber decision on this issue “will directly affect how the system of protection is constructed and consequently on the whole system of witness protection” (Submission of the Registrar, paragraphs 1 and 2). She submits that in fulfilling her mandate under article 43 (6) of the Statute, the VWU “has established a fully functional and operational system of witness protection in close cooperation with the Prosecution”, of which the Protection Programme under regulation 96 of the Regulations of the Registry, is an integral part (Submission of the Registrar, paragraph 3). In the case of preventive relocation, she submits that the VWU’s independent assessment and recommendation and the Registrar’s decision is circumvented in particular if the Prosecutor acts after the Registrar’s rejection of admission into the programme and that if the Prosecutor continues his current practice he establishes his own parallel witness protection program (Submission of the Registrar, paragraph 4). The Registrar submits that:

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

39. The Registrar submits that protection of witnesses “requires a unified and coherent approach of the whole Court” (Submission of the Registrar, paragraph 7). She submits



that protection under article 68 of the Statute not only concerns physical protection, but also must take account of “the psychological wellbeing, dignity and privacy and should have due regard to all relevant factors” (Submission of the Registrar, paragraph 8). She submits that “[r]elocation should always be a measure of last resort as it significantly impacts and disrupts the life of the individual, not least due to the dramatic impact of being uprooted from his or her normal surroundings and family ties and cut off from social contacts and networks” (Submission of the Registrar, paragraph 9).

40. The Registrar submits that the system of protection in general is “based on limiting the exposure of the witnesses to the threats, providing an adequate response if required and as last resort hiding them from the threats” (Submission of the Registrar, paragraph 10). She submits that “[t]he very foundation of the Court's protection system lies on the application of good practises by any representative of the Court who interacts with witnesses”. Such practices “are enhanced by an Initial Response System (IRS) which enables the Court to extract witnesses who are afraid of being immediately targeted or who have been targeted to a safe location in the field. A protective measure of last resort is the entry to the [Protection Programme] and subsequent relocation of the witness and his or her close relations away from the source of the threat” (Submission of the Registrar, paragraph 10). She submits that “[a]ny protection measure implemented by the VWU will adhere to the basic principles of neutrality of the Unit, providing support at all times and acting only upon request and with the consent of the beneficiary” (Submission of the Registrar, paragraph 12).

41. The Registrar argues that there is a need for extensive and effective cooperation while the system must also provide for the necessary control mechanisms to ensure the highest possible standard of witness protection, emphasising that the powers and responsibilities must be clearly defined (Submission of the Registrar, paragraph 14).

42. The Registrar then sets out the procedure for the inclusion of a witness into the Protection Programme and the decision-making process, underlining that if the Registry and Prosecutor disagree, the Prosecutor can move the Chamber to order protection “thus allowing a judicial control of the actions taken by the VWU and the Registry”

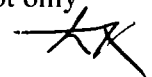


(Submission of the Registrar, paragraph 20). She submits that “rejection of an application for admittance to the [Protection Programme] does not equate to an absence of protection for the witness. In reality it means that the VWU considers that the person is adequately protected without the intrusion of the [Protection Programme], and on that basis, any review process can be undertaken with the knowledge that the witness is not exposed to an unacceptable level of risk” (Submission of the Registrar, paragraph 22).

43. On the Prosecutor’s practice of preventive relocation, the Registrar submits that “[a]ny relocation is preventive in nature, however, will have a long term impact. Once a witness has been moved from his original location of residence, this will have serious effect on his life and will limit other avenues of protection that might have been available at an earlier stage” (Submission of the Registrar, paragraph 24).

44. As to the independent assessment by the Registrar, the Registrar submits that this assessment ensures that the drastic measure of relocation is applied fairly and impartially and only as a measure of last resort (Submission of the Registrar, paragraph 27). If the Prosecutor could relocate individuals himself, there would be no such independent assessment (Submission of the Registrar, paragraph 28). She argues that “[t]he 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” and the witness would not obtain independent advice and information to be able to make an informed decision” (Submission of the Registrar, paragraph 29). The Registrar submits that without such an independent assessment, all witnesses would eventually participate in the Protection Programme, arguing that “[s]uch effect would not be in the interest of the proper administration of justice and would create an unmanageable situation” (Submission of the Registrar, paragraph 30). She submits that the Prosecutor would have unchallenged discretionary powers to determine participation in the programme, which could compromise the Court’s protection system (Submission of the Registrar, paragraph 31).

45. As to the consequences of preventive relocation, the Registrar submits that relocation has a detrimental impact on individuals and requires intensive psychosocial support, it has a long term administrative impact and it increases the level of risk not only



in the original location but also in the new location as it exposes a witness's involvement with the Court (Submission of the Registrar, paragraphs 32 to 34). The Prosecutor's practice would automatically require creation of a parallel witness protection programme and the Registrar finds "it is of particular concern whether the [Prosecutor's] approach could sufficiently address witnesses' needs for protection and support in an unbiased manner" (Submission of the Registrar, paragraph 37). The Registrar submits that participation in the programme "requires not only thorough preparation to facilitate an informed decision of the applicant, but also proper follow-up mechanisms for the witness and his or her family. Adequate psycho-social support, education and long-term exit strategies should be provided with full consideration to the overall wellbeing of the individuals concerned" (Submission of the Registrar, paragraph 37).

46. The Registrar submits that the programme's integrity would be affected if the end result is that the VWU is forced to accept people into the programme, affecting its integrity and reputation (Submission of the Registrar, paragraph 38).

47. In terms of concrete cases, the Registrar submits that she originally recommended that the two witnesses in question should be left in their original location where adequate protection could be provided. Nevertheless they were moved by the Prosecutor. When ordered by the Pre-Trial Chamber to supervise their security, the VWU wished to return them to their original location and to reinstate the supportive mechanisms that had been in place, in line with the principle that relocation should be the last resort (Submission of the Registrar, paragraph 40). She submits that such a move was not possible anymore as the witnesses in question "had already been exposed to a heightened level of risk due to their 'preventive relocation' by the [Prosecutor] and taking into account the unknown result of the current legal proceedings before the Court" (Submission of the Registrar, paragraph 41). As a result, "now seeing an unnecessarily created and increased risk", the VWU recommended that the witnesses be accepted into the programme (Submission of the Registrar, paragraph 42).

48. The Registrar refers to the drafting history of the Statute and states that the drafters "consciously decided to create a single VWU within the Registry" and that it was clear

that they intended “to put in place an independent VWU within a neutral body of the Court” (Submission of the Registrar, paragraphs 45 and 46). Referring to article 43 (6) of the Statute, she submits that it “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” (Submission of the Registrar, paragraph 47).

49. She states that allowing the VWU to carry out the assessment independently avoids action that is more in the interest of the Prosecutor’s strategy than in the interest of witnesses and that the neutral and independent role of the VWU will ensure that e.g. defence witnesses have equal access to “the most extreme protection measure, namely that of participation in the [Protection Programme]”, in line with the requirements of the principle of equality of arms (Submission of the Registrar, paragraph 49).

50. In the submission of the Registrar, the assessment by the VWU protects the parties from allegations of unduly influencing, inducing or rewarding the witnesses for their testimony (Submission of the Registrar, paragraph 50). The independence and impartiality of the VWU is explicitly referred to in the Rules of Procedure and Evidence, e.g. rule 18 (b), while the particular role and expertise of the VWU within the system of protection is further stressed in rule 19, which emphasises that the VWU shall include staff with expertise *inter alia* in witness protection and security. “These rules enhance the connotation that the VWU because of its specific expertise is best placed in the Court to conduct assessments on risks witnesses are exposed to” (Submission of the Registrar, paragraph 51). Rules 87 (1) and 88 (1), referring to consultation with the VWU, enhance the concept of the active and independent role of the VWU as established under the Rome Statute (Submission of the Registrar, paragraph 52). The explicit duty in rule 16 (4) on relocation agreements that has been entrusted to the Registrar implies that the Registry is the entity within the Court that is envisaged to care for the relocation of witnesses (Submission of the Registrar, paragraph 53).

51. She also submits that the establishment of a parallel programme would require unnecessary duplication of services and inefficient use of the Court’s limited resources.

She refers to Trial Chamber I jurisprudence where it is stated that the Court may review decisions by the VWU either *proprio motu* or on application. She states that in that decision, the Chamber reviewed disputed applications and found that the VWU's approach had been faultless, stating that the results of the independent assessment and the appropriateness of the standard followed by the VWU was confirmed (Submission of the Registrar, paragraph 56).

52. Referring to articles 68 (1) and 54 (3) (f) of the Statute, the Registrar underlines that the Prosecutor has responsibilities in respect of the protection of witnesses, but that he is not given authority to conduct preventive relocations and to establish a parallel witness protection programme (Submission of the Registrar, paragraph 57). She submits that it is highly questionable whether a parallel programme run by the Prosecutor would adhere to the principle that protective measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial because the other parties could not establish their own protection programme (Submission of the Registrar, paragraph 58).

53. The Registrar submits that at the same time the Prosecutor has a range of measures which it can use to fulfil the obligation under the Statute of protecting witnesses, referring to good practices when contacting witnesses and enhancing the security situation of witnesses. She submits that he may also apply for procedural measures under rule 87 or for inclusion in the Protection Programme (Submission of the Registrar, paragraph 59).

#### **F. Response by the Prosecutor to Submission of the Registrar**

54. In the Response of the Prosecutor to the Submission of the Registrar, the Prosecutor repeats many of the arguments made in his Document in Support of the Appeal.

55. Contrary to the Registrar's submissions, the Prosecutor submits that he does not refer all witnesses in respect of whom he has carried out a risk assessment to the Protection Programme. It is only when he decides that judicial measures and best practices cannot mitigate the risks to a witness that he requests the VWU for protective

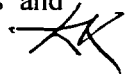
measures and relies on it to implement the measures required (Response to the Submission of the Registrar, paragraph 11).

56. Contrary to the suggestion of the VWU, the Prosecutor submits that he 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 Prosecutor's independent assessment of the need for protection of a witness (Response to the Submission of the Registrar, paragraph 17). In his view, "[o]n the basis of this marginal use of preventive relocation, any suggestion that he is developing a parallel protection program is misconceived" (Response to the Submission of the Registrar, paragraph 23).

57. The Prosecutor stresses that he does not see the VWU's protective functions to be limited to relocation, that he asks that witnesses not be relocated but be adequately protected, and that the VWU should be able to use other measures than relocation when they suffice to eliminate all foreseeable risks. He further stresses that he has not chosen the practice of preventive relocation and has preventively relocated "only in exceptional circumstances, concerning one specific region, when, according to [his] 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, and where the particular measure of in-country relocation was the only measure available to eliminate all foreseeable risks" (Response to the Submission of the Registrar, paragraph 19, footnotes omitted).

58. Regarding the suggestion that the VWU may place a witness temporarily in a safe house, he submits that this can be one solution if it allows the Court to act urgently, but the process suggested by the VWU still requires an interim assessment presumably by the VWU and during this interim assessment period the persons at risk remain unprotected (Response to the Submission of the Registrar, paragraph 20).

59. He rejects the suggestion that he would pursue a biased interest in witness testimony when exercising his power to protect. In eliminating all foreseeable risks, he "fully takes into account the effect that protective measures have on witnesses and



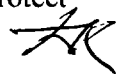


endeavours to put in place the least intrusive measures necessary to eliminate all foreseeable risks and relocate witnesses only with their consent” (Response to the Submission of the Registrar, paragraph 24).

60. In the submission of the Prosecutor, the argument of the VWU “that ‘preventive relocation’ in itself increases the level of risk’, is baseless” (Response to the Submission of the Registrar, paragraph 28, footnote omitted). He submits that “[t]he transfer back of witnesses to their original location of residence may create risks. These risk 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” (Response to the Submission of the Registrar, paragraph 29).

61. The Prosecutor acknowledges that the Statute creates a single unit for protection within the Registry. Article 43 (6) of the Statute, however, does not regulate or limit the role of the Prosecutor. It provides that the VWU is the unit in the Court charged with implementing protective measures for victims. It does not grant the VWU the exclusive authority to decide on the need for protection of witnesses; nor could it exclude the Prosecutor’s responsibilities and authority under articles 54 (3) (f) and 68 (1) of the Statute (Response to the Submission of the Registrar, paragraph 32). He submits that the phrase “in consultation with the Office of the Prosecutor” 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 (Response to the Submission of the Registrar, footnote 62).

62. The argument that the defence should have an equal opportunity to preventively relocate because of equality of arms is, in the view of the Prosecutor, legally misconceived. He states that he has specific duties and equality of arms does not mean complete symmetry between the parties, irrespective 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), not 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)" (Response to the Submission of the Registrar, paragraph 33).

63. As to the Registrar's submission that the Prosecutor has a range of measures it can apply to fulfil the obligation to protect witnesses, the Prosecutor agrees that protective measures "must be proportional to the risk and be the least intrusive to the wellbeing of the witness" (Response to the Submission of the Registrar, paragraph 34). Relocation, especially in third countries, should always be a measure of last resort as it significantly impacts and disrupts the life of the individual and the Prosecutor will only preventively relocate in country if, in his professional assessment, it is the only available measure to eliminate all foreseeable risks (Response to the Submission of the Registrar, paragraph 34). He underlines that good practices by the Prosecutor form the core of the Prosecution's interaction with witnesses and other contacts and are practiced from the beginning of any investigation. However, this will not always be enough to exclude all foreseeable risks and will not make preventive relocation redundant. The same applies to protective measures under rule 87 and other alternative measures the Registrar suggests (Response of the Prosecutor to the Submission of the Registrar, paragraph 35).

### **G. Determination by the Appeals Chamber**

64. The question to be resolved by the Appeals Chamber in this appeal is, in essence, whether the Prosecutor can unilaterally "preventively relocate" witnesses. The question is in two parts: whether the Prosecutor can relocate a witness (i) before the Registrar has decided whether a particular witness should be relocated; and (ii) after the Registrar has decided that an individual witness should not be relocated.<sup>1</sup>

65. It is important to stress at the outset that the question on appeal relates to the practice of "preventive relocation" only and is not a general consideration of protective

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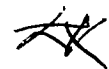
<sup>1</sup> The Appeals Chamber notes that the issue refers to a witness being included by the Registrar in the Protection Programme of the Court. For present purposes, it is sufficient to note that a witness is admitted to the Protection Programme in order, *inter alia*, to be granted relocation.

measures that can be taken in relation to witnesses. As set out at paragraph 15 above, in the proceedings before the Pre-Trial Chamber the Prosecutor defined “preventive relocation” as a provisional measure, whereby the Prosecutor organises the relocation of a witness for whom protective measures have been rejected by the Registrar where the Prosecutor assesses that the witness is at risk. Those were the circumstances that gave rise to the instant case.

66. The Appeals Chamber emphasises that relocation is a serious measure that can, as argued by the Registrar, have a “dramatic impact” and “serious effect” upon the life of an individual, particularly in terms of removing a witness from their normal surroundings and family ties and re-settling that person into a new environment. It may well have long-term consequences for the individual who is relocated – including potentially placing an individual at increased risk by highlighting his or her involvement with the Court and making it more difficult for that individual to move back to the place from which he or she was relocated, even in circumstances where it was intended that the relocation should be only provisional. Where relocation occurs, it is likely to involve careful and possibly long-term planning for the safety and well-being of the witness concerned (see the Submission of the Registrar, paragraphs 9, 24, 32 to 34 and 39 to 41).

67. The Appeals Chamber notes, in this context, that the Prosecutor also recognises that relocation “significantly impacts and disrupts the life of the individual”. While the Prosecutor states that this is particularly the case where the individual is relocated to “third countries” – and that he will only preventively relocate a witness “in-country” – he does not dispute the seriousness of the measure of relocation for the individual witness (see the Response to the Submission of the Registrar, paragraph 34). In addition, and recognising the above impact that relocation may have on the life of an individual witness, the Appeals Chamber is not persuaded that “preventive relocation” measures taken by the Prosecutor will necessarily always be capable of being merely provisional or temporary, as the Prosecutor asserts.

68. Against the above background, the Appeals Chamber refers to the relevant statutory provisions that apply to this question.



69. Article 54 (3) (f) of the Statute provides, in relevant part, that the Prosecutor may:

Take necessary measures, or request that necessary measures be taken, to ensure ... the protection of any person ...

70. Article 68 (1) of the Statute provides, in relevant part:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. ... 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.

71. Article 68 (4) of the Statute provides:

The 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.

72. Read in isolation, the above provisions could be seen to permit the Prosecutor unilaterally to take any protective measure – including relocation, whether “preventive” or otherwise – to protect any person during the course of an investigation or prosecution.

73. However, those provisions are not conclusive when read in light of the statutory scheme as a whole. As set out above, reference is made in article 68 (4) to article 43 (6) of the Statute. Article 43 (6) provides as follows:

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.

74. It is of note that article 43 (6) is the sole provision of the Statute that deals with the setting up of a unit specifically to provide protective measures to victims and witnesses. The VWU is the responsibility of the Registrar and is situated within the Registry. There is no similar provision that establishes a unit for the provision of protective measures within the Office of the Prosecutor; nor is there therefore any provision which places the responsibility for such a unit under the authority of the Prosecutor.

75. The functions of, and responsibilities relating to, the VWU are expressly regulated by rules 16 to 19 of the Rules of Procedure and Evidence.

76. Those rules contain the only specific provision on relocation to appear in the statutory scheme of the Court. Rule 16 (4) provides that agreements on relocation may be negotiated with States *by the Registrar* on behalf of the Court.

77. In addition, the specific provisions regulating the functions of the VWU are of note in this context. Rule 19 (a) provides that the VWU may include, as appropriate, persons with expertise, *inter alia*, in witness protection and security. It was therefore foreseen that experts in witness protection and security would be located within the VWU. Given the serious consequences of relocation, as referred to above, it is appropriate that questions of relocation be considered by those with appropriate expertise.

78. Among the provisions regulating the functions of the VWU is rule 17 (2) (a) (i), which refers to the VWU, in consultation with the Chamber, the Prosecutor and the defence, as appropriate, providing all witnesses, victims and others at risk on account of testimony given by such witnesses with “adequate protective and security measures and formulating long- and short-term plans for their protection”. The responsibility for the formulation of plans for the adequate protection of witnesses falls within the mandate of the VWU. The formulation of such plans is likely to be of particular relevance in cases where questions of relocation arise, in light of the seriousness of the measure and its potentially long-term duration, as referred to above.

79. Also of note in the context of the rules outlining the responsibilities of the VWU is rule 18 (b), which specifically mandates the VWU to “respect the interests of the witness” and to “act impartially when cooperating with all parties”, while recognising the specific interests of the Office of the Prosecutor, the defence and the witnesses.

80. It can be seen from the above that the Prosecutor undoubtedly is responsible under the Statute to ensure that appropriate measures are taken to protect the safety of victims and witnesses. At the same time, article 43 (6) of the Statute and rules 16 to 19 of the Rules of Procedure and Evidence envisage the VWU as a unit with specific expertise in

protection matters, which has a responsibility, *inter alia*, to provide protective measures and to take particular care of the interests of the individuals who require protection.

81. The Appeals Chamber has noted the contents of regulation 96 of the Regulations of the Registry, providing for an application to be made by the Prosecutor or by counsel for inclusion in the Protection Programme of the Court, with the Registrar deciding this issue, following an assessment. However, for the purposes of determining the present appeal, the Appeals Chamber has not placed reliance upon this regulation, given that the Regulations of the Registry are in place “to govern the operation of the Registry” (rule 14 of the Rules of Procedure and Evidence) and that they “shall be read subject to the Statute, the Rules and the Regulations of the Court” (regulation 1 (1) of the Regulations of the Registry). As such, regulation 96 cannot alter the scheme otherwise contained within the Statute and the Rules of Procedure and Evidence.

82. Furthermore, in interpreting the statutory scheme set out above, the Appeals Chamber has had recourse to the history of the drafting of article 43 (6) of the Statute in determining the issue before it (see article 32 of the Vienna Convention on the Law of Treaties of 23 May 1969<sup>2</sup>).

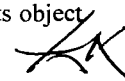
83. From that drafting history it is clear that there was a debate as to whether the VWU should be established within the Office of the Prosecutor or within the Registry prior to the adoption of the Statute. As demonstrated by the ultimate text of article 43 (6), this debate was resolved in favour of establishing the VWU within the Registry.

84. Draft article 43 of the Statute had contained, in square brackets, a draft paragraph 10, which had read as follows:

The Office of the Prosecutor shall be responsible for providing protective measures to witnesses to be called by the Prosecution. The Office of the

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<sup>2</sup> 1155 United Nations Treaty Series 331. Article 32 of the Vienna Convention on the Law of Treaties provides: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” Article 31 of the same Convention requires a treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose



Prosecutor shall include staff with expertise in trauma, including trauma related to crimes of sexual violence. [Footnote omitted.]<sup>3</sup>

85. Conversely, draft article 44 contained a draft paragraph 4 in square brackets, which was eventually to become article 43 (6) of the Rome Statute. This paragraph read as follows:

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide counselling and other assistance to victims, [defence] witnesses, their family members and others at risk on account of testimony given by such witnesses and shall advise the organs of the Court on appropriate measures of protection and other matters affecting the rights and the well-being of such persons. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence. [Footnote omitted.]

86. Footnote 24 to this provision, which was included after the word “defence” in the second sentence, stated that:

Some delegations were of the view that there should be a separate unit for prosecution witnesses in the Office of the Prosecutor, as reflected in the bracketed language in article 43, paragraph 9; others were of the view that there should be only one unit located in the Registry.<sup>4</sup>

87. At the Rome Conference, the debate continued. At the 15<sup>th</sup> meeting of the Committee of the Whole on 24 June 1998, several delegates addressed the question of whether the VWU should be established within the Office of the Prosecutor or within the Registry.<sup>5</sup> All bar one of those delegates submitted that the VWU should be within the Registry.<sup>6</sup> Of the reasons given for this, one delegate expressed the view that “[o]nly the Registry would be sufficiently neutral to provide that protection.”<sup>7</sup> Another delegate stated that the VWU should be “in a neutral location in the Registry”.<sup>8</sup> A further delegate

<sup>3</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, p. 69.

<sup>4</sup> *Ibid.* at 70. It appears that the reference to draft article 43 (9) and not to draft article 43 (10) was incorrect. Draft article 43 (9) stipulated that “The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.”

<sup>5</sup> See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Volume II, UN Doc. A/CONF.183/13 (Vol II), pp. 237 et seq.

<sup>6</sup> *Ibid.* at 238-242.

<sup>7</sup> *Ibid.* at 240.

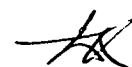
<sup>8</sup> *Ibid.* at 242.

expressed the view that the VWU should be located within the Registry, “since victims or witnesses might be required to testify for either the prosecution or the defence.”<sup>9</sup>

88. In contrast, one delegate submitted that “[p]aragraph 4 [of draft article 44] should be moved to article 43. It was the Prosecutor who had direct contact with the victims and the witnesses and who should arrange for assistance for them.”<sup>10</sup> It is clear from the ultimate wording of article 43 (6) of the Statute that this proposal was not adopted. The VWU was to be established by the Registrar and located within the Registry.

89. It is also of note that draft article 44 (4) stipulated that the VWU should only provide advice in relation to protective measures. It appears that it may have been envisaged that any decision on appropriate protective measures for prosecution witnesses was to be taken and implemented by the Prosecutor, as per draft article 43 (10). In any event, the final version of the Statute took a different approach. Draft article 43 (10) was not adopted; and the role of the VWU was augmented from what had appeared in draft article 44 (4) in the following respect: under article 43 (6) of the Statute, the VWU is responsible not merely for giving advice on protective measures, but for the actual provision of protective measures and security arrangements.

90. The Appeals Chamber draws the following conclusions from the drafting history that it has set out above: (1) The question of where the VWU should be located was specifically debated at the time that the Statute was drafted. The question was resolved in favour of locating the VWU within the Registry, as opposed to within the Office of the Prosecutor. (2) The neutrality of the Registry was expressly raised as a reason for the VWU to be placed there rather than within the Office of the Prosecutor. (3) The role of the VWU in relation to protective measures was not limited to the provision of advice alone. Those conclusions are relevant to the resolution of the present appeal. In the context of the current appeal, the intention of the drafters of the Statute – as reflected in the above paragraphs – cannot be overlooked.




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<sup>9</sup> *Ibid* at 242.

<sup>10</sup> *Ibid* at 238.



91. It is clear that the drafters made an express choice that the VWU should be established by the Registrar and that its functions and responsibilities would be carried out within the Registry. In the present case, the Registrar had already decided that certain individuals should not be relocated. The Prosecutor thereafter proceeded unilaterally to “preventively relocate” the individuals concerned. The Appeals Chamber finds such a practice to be contrary to the statutory scheme set out above. First, it would effectively amount to a parallel witness protection programme in relation to relocation being carried out under the auspices of the Office of the Prosecutor, running alongside and conflicting with decisions of the Registrar in relation to the same set of circumstances. Second, decisions on, and implementation of measures in relation to, relocation by the Prosecutor would be carried out in the absence of any statutory scheme that regulates the provision of such measures; and in circumstances in which those staff with specific expertise in witness protection and security are located within the VWU (see rules 16 to 19 of the Rules of Procedure and Evidence, referred to above).

92. Furthermore, the fact that certain representatives to the Rome Conference referred to the neutrality of the Registry in deciding to locate the VWU within it, as set out above, is also of relevance. The function of the VWU is to provide, *inter alia*, appropriate protective measures and security arrangements, respecting the interests of the witness and acting impartially.<sup>11</sup> This is of particular relevance in relation to the protective measure of relocation, given its significant and potential long-term consequences on the life of an individual witness. Assigning responsibility for relocation to the VWU ensures that all witnesses, whether ultimately appearing for the Prosecutor, the defence or otherwise, are treated equally – and by those with relevant expertise – in matters that will significantly affect their interests. Those interests are to be specifically respected by the VWU,<sup>12</sup> which will not be influenced, even unintentionally, when deciding upon whether relocation is appropriate to protect a particular witness, by the additional pressing interest of a party to the case of needing itself to secure the evidence of the witness concerned. This could, in certain circumstances, render the longer term well-being of that witness to

<sup>11</sup> See article 43 (6) of the Statute and rules 17 (2) (a) (i) and 18 (b) of the Rules of Procedure and Evidence

<sup>12</sup> Rule 18 (b) of the Rules of Procedure and Evidence.

be a secondary concern. At the same time, the VWU must recognise the specific interests of, and cooperate with, the parties.<sup>13</sup>

93. The Appeals Chamber finds that any disagreement between the VWU and the Prosecutor about the relocation of a witness should ultimately be decided by the Chamber dealing with the case – and should not be resolved by the unilateral and un-checked action of the Prosecutor.

94. The Registry is a neutral organ of the Court which is not a party to the proceedings. As such, in circumstances in which the VWU rejects an application for an individual witness to be relocated, the party making the request can apply to the Chamber for a review of that decision. In ruling on the matter, the Chamber will have the benefit of the views of those involved before it, including the party seeking relocation, the observations of the VWU and any other appropriate party or participant. In other words, in circumstances where a party – in the present case, the Prosecutor – disagrees with the assessment of the VWU, it is always open to the Prosecutor to come before the Chamber to review that assessment.

95. The Chamber has a general power to provide for the protection and privacy of victims and witnesses where necessary, pursuant to article 57 (3) (c) of the Statute. There is nothing to prevent the Prosecutor seeking relocation from the Chamber pursuant to that article, in particular when read with article 68 (1) and (4) of the Statute, in circumstances in which the VWU has not agreed to relocate a particular witness.

96. Prior to a decision by the Registrar, the same would apply if the Prosecutor was of the view that the application for relocation needed to be decided with greater expedition and wished to make an application to the Chamber in that regard. Decisions in relation to relocation must be taken expeditiously. There is the need for expedition on all sides – both by those bringing an application for relocation and by those deciding upon it – to ensure that effective witness protection can be put in place.




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<sup>13</sup> Rule 18 (b) of the Rules of Procedure and Evidence.

97. Understood in the above way, the statutory provisions ensure that, in cases of disagreement between the assessment of the VWU and the Prosecutor, the ultimate arbiter of whether the serious measure of relocation should be undertaken is the Chamber. In circumstances in which the Prosecutor is of the view that the VWU was wrong to reject the request for relocation that matter can be ruled upon by the relevant Chamber. For that reason, finding that the Prosecutor cannot unilaterally relocate witnesses following a determination by the VWU that a witness should not be relocated does not, contrary to the submissions of the Prosecutor, result in a situation where the VWU is the “sole authority to decide on the need for protection”, nor does the Impugned Decision grant the Registrar “the sole power to effectively determine whether a witness will receive protection”, or the “sole and final say” on the protection of witnesses (see paragraphs 29 and 40 of the Document in Support of the Appeal). As submitted by counsel for Mr Katanga, “In situations where the Prosecution disagrees with the Registrar’s assessment of risk, the appropriate procedure is to seek judicial relief, rather than bypassing the authority of the Chamber by implementing the measures themselves” (Response of Mr. Katanga, paragraph 3, footnote omitted).

98. The Appeals Chamber emphasises that what it has said above relates specifically to the protective measure of relocation which is the subject of this appeal. While the VWU is responsible for specific aspects of witness protection, the Prosecutor has a more general mandate in relation to protection matters under articles 54 (3) (f) and 68 (1) of the Statute. The Appeals Chamber interprets those provisions as ensuring that the Prosecutor takes general measures that ordinarily might be expected to arise on a day-to-day basis during the course of an investigation or prosecution with the aim of preventing harm from occurring to victims and witnesses. Such measures could include meeting witnesses in discrete locations rather than in public and keeping their identities confidential. Paragraph 59 of the Submission of the Registrar refers to the need for the Prosecutor to apply good practices when contacting witnesses and, in addition, to the ability of the Prosecutor to enhance the personal security situation of a witness or the physical security of their residence. The obligation of the VWU to advise the Prosecutor on,<sup>14</sup> and recommend the

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<sup>14</sup> See article 68 (4) of the Statute, set out above.

adoption of,<sup>15</sup> appropriate protective measures makes sense. It is a reality that the Prosecutor is in the field and will need to take protective measures during the course of his investigations. Consultation, cooperation and advice are all part of ensuring that individuals are not put at risk during the course of the investigations and prosecutions of the Prosecutor (see paragraph 18 of the Document in Support of the Appeal and paragraphs 12 and 13 of the Response to the Submission of the Registrar).

99. However, for the reasons set out above, the Appeals Chamber agrees with the Pre-Trial Chamber that the general mandate of the Prosecutor pursuant to article 68 (1) of the Statute does not extend to the preventive relocation of witnesses. The Appeals Chamber therefore resolves both parts of the question on this appeal (see paragraph 64 above) in the negative: the Prosecutor cannot unilaterally “preventively relocate” witnesses either before the Registrar has decided whether a particular witness should be relocated or after the Registrar has decided that an individual witness should not be relocated.

100. Notwithstanding the above, the Prosecutor still has a significant role to play in relation to matters of relocation. As set out at paragraph 25(iii) of the Impugned Decision, one measure that the Prosecutor can take pursuant to article 68 (1) of the Statute is that of making an application for relocation to the Registrar on behalf of a particular witness. This would include providing the Registrar with all necessary information to assess that application, based at least in part upon the knowledge that the Prosecutor has of the situation on the ground.

101. Indeed, in the context of the present appeal, cooperation between the Prosecutor and the VWU will be essential to ensure, as a matter of the highest priority, that witnesses are appropriately protected. This is, pursuant to article 68 of the Statute, a responsibility of the Court as a whole. The VWU has specific expertise in protection matters; and the Prosecutor is close to the relevant witnesses on the ground and in a position to see where a need for protection may arise. The Appeals Chamber emphasises the vital importance of cooperation on all matters of witness protection, including relocation. Given the need

<sup>15</sup> See rule 17 (2) (a) (ii) of the Rules of Procedure and Evidence, referred to at paragraph 28 of the Document in Support of the Appeal, which provides that the VWU shall perform the function of: “Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures”.



for, and expectation of, cooperation in relation to matters of relocation, disagreement between the VWU and the Office of the Prosecutor on relocation matters should be rare. The effect of the current judgment is that, if instances do occur where the VWU has rejected an application for a witness to be relocated and the Prosecutor disagrees with that assessment, the matter should not be resolved by the unilateral action of the Prosecutor in “preventively relocating” the witness, but by an application to the relevant Chamber for a ruling on the matter.

102. In relation to emergency situations, the Impugned Decision recognised, at paragraphs 35 and 36, that there might be exceptional circumstances in which a witness is facing a serious threat of imminent harm that requires an immediate response. In such circumstances, the protection of the individual concerned is necessarily paramount. The Appeals Chamber approves generally the scheme set out by the Pre-Trial Chamber at paragraph 36 of the Impugned Decision in this regard, while recognising that, by the very nature of emergency situations, there may need to be some degree of flexibility in this regard. The Appeals Chamber envisages that, in an urgent situation in relation to a person for whom relocation is sought, the Prosecutor may request the VWU to take a temporary emergency measure to protect the safety of a witness while the overall application for relocation is under consideration. The Appeals Chamber notes, in this context, the reference to a witness being placed temporarily in a “safe house” while the VWU completes its assessment of whether a witness should be relocated (Submission of the Registrar, paragraphs 10 and 16).

103. The Appeals Chamber also cannot rule out that there may be situations in which temporary emergency measures may have to be taken by the Prosecutor in relation to a person for whom relocation is sought, in a situation of urgency. However, in the abstract and without a specific set of factual circumstances before it, the Appeals Chamber would not envisage such temporary measures to include the preventive relocation of a witness.

104. In the present case, it was not argued by the Prosecutor that the nature of the emergency was such that he was precluded even from approaching the Chamber on an urgent basis, prior to relocating the witnesses himself by way of a temporary emergency

measure, once the Registrar had rejected the application to relocate the witnesses; nor are the facts of the present case ones that involve a situation in which it has been argued that the Prosecutor had to relocate witnesses, by way of a temporary emergency measure, prior to a decision by the Registrar on the Prosecutor's application for relocation, in circumstances in which the Prosecutor was precluded from either contacting the VWU or applying to the relevant Chamber on an urgent basis before doing so. If such a situation were alleged to have arisen, it would have to be determined on its own specific facts. However, as set out above, relocation, whether "preventive" or otherwise, involves removing a witness from their normal surroundings and family ties and re-settling that person in a new environment. As such, the organisation of the relocation is likely to involve assessment and planning. The Appeals Chamber therefore regards relocation by the Prosecutor as a protective measure that is unlikely to be necessary or appropriate to protect a witness from a situation that requires an immediate response.

## V. APPROPRIATE RELIEF

105. On an appeal pursuant to article 82 (1) (d) of the Statute the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence).

106. The Prosecutor requests that the Chamber reverse the Impugned Decision to the extent that it prevents the Prosecutor from preventively relocating witnesses both prior to a decision by the Registrar on the inclusion of the relevant witnesses in the Protection Programme and after the Registrar's decision rejecting such inclusion (Document in Support of the Appeal, paragraph 43).

107. Mr. Katanga submits that the Chamber should dismiss the appeal and confirm the Impugned Decision. Alternatively, he asks that "clear and transparent modalities be adopted either by the Appeals Chamber or the Single Judge which fully reflect the reversal of the [I]mpugned Decision on this issue and with full consideration for the principle of equality of arms" (Response of Mr. Katanga, paragraph 43).



108. Mr. Ngudjolo Chui asks that the appeal be dismissed. In the alternative, he “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” (Response of Mr. Ngudjolo Chui, paragraphs 21 and 22).

109. On an appeal pursuant to article 82 (1) (d) of the Statute the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, and for the reasons set out above, it is appropriate to confirm the Impugned Decision.

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

  
**Judge Erkki Kourula**

Dated this 26th day of November 2008

At The Hague, The Netherlands

## **Dissenting opinion of Judge Georghios M. Pikis and Judge Daniel David Ntanda Nsereko**

### **I. THE BACKGROUND TO THE APPEAL**

1. Following 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”<sup>1</sup>, the Pre-Trial Chamber (its jurisdiction being exercised by a Single Judge) granted to the Prosecutor leave to appeal the aforesaid decision in relation to the following two issues:

1. Whether the Single Judge erred in its interpretation of the provisions of the Statute on witness protection, as well as of regulation 96 of the RoR, when prohibiting the Prosecution’s practice of preventive relocation both prior to a decision by the Registrar on the inclusion of the relevant witness in the Court’s Witness Protection Program and after the Registrar’s Decision rejecting such inclusion.

2. Whether the appropriate remedy for the Prosecution’s unlawful preventive relocation of witnesses 132 and 287 is the exclusion of their evidence for the purpose of the confirmation hearing.<sup>2</sup>

2. The decision of the Single Judge on the issues raised on appeal may be summed up as follows: The Prosecutor cannot decide upon or take measures for the relocation of witnesses in the interests of their safety. Such measures may be taken only by the Victims and Witnesses Unit, established as a department of the Registry pursuant to the provisions of article 43 (6) of the Statute. The Unit functions according to regulation 96 (1), (2) and (4) of the Regulations of the Registry<sup>3</sup>. Power resides solely with the Unit to offer protection to victims and witnesses. Consequently, no witnesses can be relocated at the instance of the Prosecutor outside the Unit’s protection programme, known by the acronym ICCPP. According to the Single Judge, “[...] there is no provision in the Statute,

<sup>1</sup> *Prosecutor v. Katanga and Ngudjolo Chui* 18 April 2008 (ICC-01/04-01/07-411-Conf-Exp); a confidential version of the decision was issued on 21 April 2008 (ICC-01/04-01/07-433-Conf) and the corrigendum to a public redacted version was filed on 25 April 2008 (ICC-01/04-01/7-428-Corr); hereinafter “Impugned Decision”.

<sup>2</sup> *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.

<sup>3</sup> Hereinafter “RoR”.





the Rules, the Regulations or the RoR, which expressly confers upon the Prosecution the power to preventively relocate witnesses until they are included in the ICCPP"<sup>4</sup>. Juxtaposing the provisions of article 68 (1) of the Statute on the one hand and those of article 43 (6) of the Statute and regulation 96 of the RoR on the other, the Single Judge affirms, "requires that the Prosecution's mandate under article 68(1) of the Statute not be extended to the preventive relocation of witnesses [...]"<sup>5</sup>. Article 68 (1) of the Statute, making provision for the safety, dignity and privacy of victims and witnesses, is, according to the decision of the Pre-Trial Chamber, "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>6</sup>. The mandate of the Registry over measures of preventive relocation is, as the Single Judge stated, "consistent with the attribution to the Registrar of the overall competence for the operation of the ICCPP"<sup>7</sup>. Elsewhere in the decision of the Pre-Trial Chamber, it is explained that assignment of overall responsibility to the Registrar for the relocation of witnesses does ensure that their credibility will not be affected "by the fact that they are receiving financial assistance from one of the parties in the proceedings"<sup>8</sup>. The decision of the Single Judge on the interpretation and application of articles 68 (1) and 43 (6) of the Statute and regulation 96 of the RoR to the facts of the case gave rise to the certification of the first issue as a proper subject for appeal.

3. The second issue arose from the decision of the Single Judge to exclude the statements of two witnesses as evidence on which the Prosecutor could rely at the

<sup>4</sup> Impugned Decision, para. 23.

<sup>5</sup> Impugned Decision, para. 25.

<sup>6</sup> Impugned Decision, para. 25.

<sup>7</sup> Impugned Decision, para. 28.

<sup>8</sup> Impugned Decision, para. 31.



confirmation hearing because of “the Prosecution’s unauthorised preventive relocations”<sup>9</sup> of the witnesses in question.

4. Both issues one and two were certified by the Pre-Trial Chamber as the subjects of an appeal. The Prosecutor confined his appeal to issue one, explaining in his document in support thereof that issue two is discontinued as the subject of the appeal, signified by the following statement:

The Prosecution thus considers that the Second Issue has been rendered moot by the Single Judge’s decision of 28 May 2008. The Prosecution therefore discontinues the appeal, in respect of the Second Issue only, pursuant to Rule 157.<sup>10</sup>

Evidently the word “moot” is used according to its American usage, denoting something that has ceased to be of practical significance or relevance; becoming an abstract issue of academic interest.<sup>11</sup> The reason rendering the appeal on issue two redundant, as recounted in the Prosecutor’s document, is that the ban on the use of the evidence of the two witnesses at the confirmation hearing was lifted by a subsequent order of the Single Judge, following the inclusion of the two witnesses in the Witness Protection Programme of the Victims and Witnesses Unit, the ICCPP. Sequentially, the defendants do not touch upon this issue in their response to the document in support of the appeal.

5. Rule 157 of the Rules of Procedure and Evidence<sup>12</sup> makes provision for the discontinuance of an appeal by notice given to that effect to the Registrar. Whether such notice may be confined to part of the appeal we do not have to determine in the present proceedings, for no such notice was filed with the Registrar in the instant case. A statement to that effect in the document in support of the appeal is no substitute for the notice itself. On a previous occasion, in “Decision on Thomas Lubanga Dyilo’s Application for Referral to the Pre-Trial Chamber / in the Alternative, Discontinuance of

<sup>9</sup> Impugned Decision, para. 39.

<sup>10</sup> *Prosecutor v. Katanga and Ngudjolo Chui* Prosecution’s Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation” 2 June 2008 (ICC-01/04-01/07-541), para. 9.

<sup>11</sup> See Shorter Oxford English Dictionary, Fifth Edition, page 1828.

<sup>12</sup> Hereinafter “the Rules”.



Appeal”<sup>13</sup>, the Appeals Chamber found that a notice of discontinuance that does not conform with the requirements of rule 157 of the Rules does not have the effect attached to it by the relevant rule. The Appeals Chamber added, “[a] notice under rule 157 does not require any action by the Chamber and should deal exclusively with the discontinuance”<sup>14</sup>. Nonetheless, the Appeals Chamber in that case dismissed the appeal as abandoned, as the appellant was disinclined to pursue it. The abandonment of part of the appeal in this case coincides with the disappearance of the reasons that led the Pre-Trial Chamber to certify issue two as the subject of appeal. The substratum to the statement of the issue has disintegrated, in that the order excluding the reception of the evidence of the two witnesses at the confirmation hearing was overridden by a subsequent decision, reducing the question raised to a theoretical one. It is no longer a live issue in the proceedings. Issue two is treated as abandoned. It is unnecessary in these proceedings to explore the implications of rule 157 of the Rules, and whether need for discontinuance does arise in a case like the present, where a matter in relation to which leave to appeal was granted is not made the subject of an appeal.

6. Consequently, matters calling for resolution in this appeal are confined to those raised by issue one.

## II. ARGUMENTS OF THE PROSECUTOR

7. In the submission of the Prosecutor, the construction placed by the Single Judge on articles 68 (1), 54 (3) (f) and 43 (6) of the Statute is erroneous, whereas the importance attached to regulation 96 of the RoR is wholly misplaced. The decision that the Registrar has exclusive responsibility for the approval and implementation of protective measures for witnesses flies in the face of the unequivocal provisions of article 68 (1) and article 54 (3) (f) of the Statute on the matter. The passage in article 68 (1), “The Prosecutor shall take such measures [referring to the safety, dignity and privacy of victims and witnesses] particularly during the investigation and prosecution of such crimes,” is in no way qualified. The tenor of article 54 (3) (f) of the Statute, identifying measures that the

<sup>13</sup> *Prosecutor v. Lubanga Dyilo* “Decision on Thomas Lubanga Dyilo’s Application for Referral to the Pre-Trial Chamber / in the Alternative, Discontinuance of Appeal” 6 September 2006 (ICC-01/04-01/06-393).

<sup>14</sup> *Ibid.*, para. 12.



Prosecutor may take in the conduct of his investigations, is likewise unambiguous. The establishment of the Victims and Witnesses Unit within the Registry in no way diminishes the authority of the Prosecutor to take protective measures, nor does it subordinate the exercise of his power to the Victims and Witnesses Unit. Lastly, regulation 96 of the RoR is an administrative provision, regulatory of the functioning of the Victims and Witnesses Unit. In substance, the Prosecutor argues, “[t]he Decision effectively denies the Prosecution the special duty established by the Article 68(1), and the ability to take measures established by Article 54(3)(f)”<sup>15</sup>. A passage cited below from the majority decision of the Appeals Chamber of 13 May 2008<sup>16</sup> is invoked in support of his stance.

The Prosecutor has the above express power either to take necessary measures or to request that necessary measures be taken to ensure the protection of individuals who are at risk. Furthermore, article 54(3)(f) is not the only provision of the Statute and the Rules that provides for the protection of any person who might be at risk on account of the activities of the Court.<sup>17</sup>

Reference is also made to the following extract from the dissenting opinion in the above case:

Article 54 (3) (f) of the Statute articulates the powers of the Prosecutor in the investigatory process and steps that may be taken for the sustenance of its efficacy.<sup>18</sup>

### III. THE POSITION OF MR KATANGA

8. In his document in response to the appeal<sup>19</sup>, and in his “CORRIGENDUM to the Defence Response to Prosecution’s Document in Support of Appeal against the Decision

<sup>15</sup> *Prosecutor v. Katanga and Ngudjolo Chui* “Prosecution’s Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation” 2 June 2008 (ICC-01/04-01/07-541), para. 22.

<sup>16</sup> See *Prosecutor v. Katanga and Ngudjolo Chui* “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’” 13 May 2008 (ICC-01/04-01/07-475).

<sup>17</sup> *Ibid.*, para. 47.

<sup>18</sup> *Ibid.*, dissenting opinion of Judge Pikis, para. 11.

<sup>19</sup> *Prosecutor v. Katanga and Ngudjolo Chui* “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 (ICC-01/04-01/07-591).



on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation”<sup>20</sup>, filed on the same day (identical in almost every material respect with the document sought to be corrected), Mr Katanga supports the decision of the Pre-Trial Chamber on every count. He contends that the Prosecutor misconstrues the decision of the Pre-Trial Chamber and fails to appreciate the unique position of the Victims and Witnesses Unit in relation to the provision of support to victims and witnesses. The ultimate determiner of protective measures is neither the Registrar nor the Prosecutor but the Chamber. The witnesses relocated by the Prosecutor were not, at the time that such measure was taken, in need of protection, “as nobody was aware that these witnesses had made statements to the Prosecution on which it intended to rely for confirmation”<sup>21</sup>. Articles 68 (1) and 54 (3) (f) of the Statute, interpreted in their proper perspective, exclude, “[...] the Prosecution from taking the measures of preventive relocation”<sup>22</sup>. Both articles must be read subject to the rights of the accused, agreeing in this respect with the Single Judge, adding that “[...] 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”<sup>23</sup>. Equality of arms, an element of a fair trial, is also invoked, suggesting that “[f]urther 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”<sup>24</sup>. The Prosecutor’s mandate under article 68 (1) of the Statute, according to Mr Katanga, is limited in the way portrayed by the Pre-Trial Chamber.<sup>25</sup>

#### IV. THE POSITION OF THE REGISTRAR

9. The Registrar contends that the Victims and Witnesses Unit is the body trusted by the Statute with the protection and support of victims and witnesses, including preventive relocation. Adoption of the position of the Prosecutor and acknowledgment of power to

<sup>20</sup> *Prosecutor v Katanga and Ngudjolo Chui* “CORRIGENDUM to the 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 (ICC-01/04-01/07-591-Corr).

<sup>21</sup> *Ibid.*, para. 5.

<sup>22</sup> *Ibid.*, para. 11.

<sup>23</sup> *Ibid.*, para. 21.

<sup>24</sup> *Ibid.*, para. 33.

<sup>25</sup> See *ibid.*, para. 39.



him to effect, at his discretion, preventive relocation, would circumvent the programme established to offer protection and support to these two classes of persons. It is explained that the programme evolved has taken account of every eventuality. The Unit is the body solely responsible for the assessment of the risks confronting victims and witnesses and the approval of measures for their protection. Any decision on the matter may be reviewed by the Registrar on the motion of the Prosecutor.<sup>26</sup> If the Prosecutor could decide upon the relocation of witnesses without the prior assessment or against the assessment of the Victims and Witnesses Unit, "[...] 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"<sup>27</sup>. Preventive relocation, as envisaged by the Prosecutor, the Registrar suggests, "[...] would automatically require the establishment of a parallel witness protection programme within the Prosecution"<sup>28</sup>. The Court's protection programme, as comprehended and applied by the Victims and Witnesses Unit, is in conformity with the Statute, in particular with the provisions of article 68 (1) and (4) and article 43 (6). Rule 18 (b) of the Rules, identifying the responsibilities of the Unit, lends further support to this view.<sup>29</sup> According to its provisions, services rendered to prosecution and defence witnesses should be kept separate. Lastly, the Registrar submits that neither article 68 (1) of the Statute nor article 54 (3) (f) of the Statute confer power or authority on the Prosecutor to take protective measures for the relocation of witnesses, independently of or outside the Victims and Witnesses Unit.<sup>30</sup>

## V. THE POSITION OF MR CHUI

10. Following the extension of time granted to Mr Chui for the submission of his response,<sup>31</sup> his document<sup>32</sup> was filed after the submissions of the Prosecutor and the

<sup>26</sup> See *Prosecutor v. Katanga and Ngudjolo Chui* "Victim 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), para. 20.

<sup>27</sup> *Ibid.*, para. 28.

<sup>28</sup> *Ibid.*, para. 35.

<sup>29</sup> See *ibid.*, para. 51.

<sup>30</sup> See *ibid.*, paras. 57 to 59.

<sup>31</sup> See *Prosecutor v. Katanga and Ngudjolo Chui* "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



Registrar. Mr Chui adopts the positions espoused by Mr Katanga and the Registrar in their respective documents.<sup>33</sup> He supports the decision of the Single Judge as correct in every respect. He emphasises, like his forerunners in the cause, the need to sustain neutrality in affording protection to victims and witnesses and sustaining equality of arms between Prosecution and defence.<sup>34</sup> The Victims and Witnesses Unit fulfils the attributes of neutrality, and as such it is rightly trusted with making decisions on the relocation of witnesses.<sup>35</sup> He concludes by submitting that preventive relocation by the Prosecutor is illegal.

## VI. RESPONSE OF THE PROSECUTOR TO THE DOCUMENT OF THE REGISTRAR

11. The Prosecutor responded to the document of the Registrar, pursuant to the decision of the Appeals Chamber of 27 June 2008<sup>36</sup>, but not so the defendants, although given the same right. In large measure, the Prosecutor repeats the position put forward in his document in support of the appeal. In essence, he says that by virtue of the provisions of articles 68 (1) and 54 (3) (f) of the Statute, the Prosecutor is vested with power to take protective measures, including preventive relocation of witnesses, independently of the Victims and Witnesses Unit, a power that he exercises as a rule when the necessitous circumstances for protection make this absolutely necessary. In this connection, the Prosecutor is, as he suggests, "[...] 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

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Observations on the Prosecutor's Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation"".

<sup>32</sup> *Prosecutor v. Katanga and Ngudjolo Chui* "Observations of the Defence of Mr. Ngudjolo on the Prosecution Appeal relating to the *Decision on the Evidentiary Scope of the Confirmation Hearing and Preventative Relocation*" 3 July 2008 (ICC-01/04-01/07-659-tENG).

<sup>33</sup> See *ibid.*, paras. 10 and 11 to 18.

<sup>34</sup> See *ibid.*, para. 17.

<sup>35</sup> See *ibid.*, para. 18.

<sup>36</sup> *Prosecutor v. Katanga and Ngudjolo Chui* "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 (ICC-01/04-01/07-654).



which an individual is exposed [...]”<sup>37</sup>. In some such circumstances, the Prosecutor, as claimed, “[...] 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”<sup>38</sup>. He dismisses the suggestion that the exercise of the power to preventively relocate a witness involves a breach of the principle of equality of arms.<sup>39</sup> No comparable duty is cast upon the defence to take measures for the protection of witnesses or to collect, without distinction, inculpatory as well as exculpatory evidence, as article 54 (1) (a) of the Statute obliges him to do.

## VII. DETERMINATION OF THE ISSUE BEFORE THE APPEALS CHAMBER

12. The basic question is whether the Prosecutor is empowered by the Statute to take measures for the protection of victims and witnesses outside the framework of the Victims and Witnesses Unit, a department of the Registry of the Court. It is helpful to identify the status of the two organs of the Court, the Office of the Prosecutor and the Registry. In accordance with article 34 of the Statute, the Office of the Prosecutor and the Registry are separate organs of the Court. Their powers, duties and responsibilities are defined by the Statute. They are principally outlined in the case of the Prosecutor in article 42 and instantiated by many other provisions of the Statute. The Prosecutor is entrusted with power to carry out investigations relevant to a crime referred to him or coming to his notice upon information received (see Article 15 of the Statute) and to prosecute those against whom a case of involvement in the commission of crimes within the jurisdiction of the Court is made out. The duties and responsibilities of the Registrar are set out in article 43 of the Statute and detailed in other provisions of it and the Rules. The Registrar is responsible for the non-judicial aspects of the administration and servicing of the Court. “without prejudice to the functions and powers of the Prosecutor

<sup>37</sup> *Prosecutor v Katanga and Ngudjolo Chui* “Prosecution’s Response to ‘Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of ‘preventive relocation’” 7 July 2008 (ICC-01/04-01/07-664), para. 14.

<sup>38</sup> *Ibid.*, para. 15.

<sup>39</sup> See *ibid.*, para. 33.





in accordance with article 42". In the discharge of their functions, both the Prosecutor and the Registrar are bound by the provisions of the Statute, no less by those of article 21 (3), binding each organ of the Court, in the sphere of its responsibilities, to apply the law in accordance with internationally recognised human rights.

13. The interpretation of the Statute is governed by the Vienna Convention on the Law of Treaties<sup>40</sup>, as pronounced in "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal"<sup>41</sup>. The principal rule of interpretation is the one set out in article 31 (1) of the Vienna Convention on the Law of Treaties, which reads:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The following passage from the above-mentioned judgment sets the parameters for the interpretation of the Statute:

The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.<sup>42</sup>

Recourse to supplementary means of interpretation, including the travaux préparatoire, may be had, "in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable"<sup>43</sup>.

<sup>40</sup> 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.

<sup>41</sup> *Situation in the Democratic Republic of the Congo* "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" 13 July 2006 (ICC-01/04-168)

<sup>42</sup> *Ibid*, para. 33.

<sup>43</sup> Article 32 of the Vienna Convention on the Law of Treaties, 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.



14. As declared in the introductory sentence of article 42 (1) of the Statute, “[t]he Office of the Prosecutor shall act independently as a separate organ of the Court”. The Statute envisages, by the provisions of article 43 (6), the establishment by the Registrar of a Victims and Witnesses Unit within the Registry. It reads:

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, counseling 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.

It is no coincidence that the services to be provided for the protection and security of victims and witnesses should be rendered in consultation with the Office of the Prosecutor, considering that he is in a singular position to appreciate the need for such protection. Neither directly nor by necessary implication does article 43 (6) of the Statute establish the Victims and Witnesses Unit as the only authority with power to take measures for the protection of the two classes of persons.

15. Article 68 (1) of the Statute is the main statutory provision definitive of the powers, authority and responsibilities for providing protection to victims and witnesses. It defines, in the first place, the powers of the Court in the matter, and in the second, specifically those of the Prosecutor. The Prosecutor, in mandatory terms, is required to take protective measures such as those in the power of the Court, especially during the investigation. After prescribing the powers of the Court, it lays down:

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.

The use of the word “shall” in the above context underlines the mandatory nature of the duty, casting an obligation upon the Prosecutor to take the protective measures envisaged by paragraph 1 of article 68 of the Statute. The word “particularly”, in the same context, stresses the Prosecutor’s especial duty to take the protective measures he deems necessary during the investigation and the prosecutorial process. The power of the Prosecutor to take protective measures is in no way subordinated to that of any other



organ of the Court. As stated in article 42 (1) of the Statute, earlier referred to, the Office of the Prosecutor carries out its duties independently of any other organ of the Court, including, no doubt, the Registry. To the same effect are the provisions of article 54 (3) (f) of the Statute, empowering the Prosecutor to take, in the course of the investigatory process, measures necessary for the protection of any person, including, of course, victims and witnesses.

16. The provisions of article 68 (4) of the Statute remove any doubt as to the competence of the Prosecutor to take protective measures. They provide:

The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance as referred to in article 43, paragraph 6.

How could the Victims and Witnesses Unit advise the Prosecutor on protective measures to be taken without the Prosecutor having power to take protective measures? The statement from the judgment of the Appeals Chamber of 13 May 2008<sup>44</sup>, cited by the Prosecutor, “[t]he Prosecutor has the above express power either to take necessary measures or to request that necessary measures be taken to ensure the protection of individuals who are at risk”<sup>45</sup>, distinctly acknowledges the power of the Prosecutor to take measures for the protection of victims and witnesses whenever necessary. The decision revolved around the interpretation and application of the provisions of article 54 (3) (f) of the Statute and rule 81 (4) of the Rules. Addressing the powers vested in the Prosecutor under article 54 (3) (f) of the Statute, the Appeals Chamber in the same case (majority judgment) affirmed:

Article 54 (3) (f), in relation to which the issue on appeal is specifically framed, expressly authorises the Prosecutor to take necessary measures, or to request that necessary measures be taken, to ensure ‘the protection of *any person*’ [emphasis added]. This article demonstrates an intention that protection should, in principle, be available to anyone put at risk by the investigations of the Prosecutor.<sup>46</sup>

<sup>44</sup> *Prosecutor v. Katanga* “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’” 13 May 2008 (ICC-01/04-01/07-475).

<sup>45</sup> *Ibid.*, para. 47.

<sup>46</sup> *Ibid.*, para. 44.

The approach of the dissenting member of the Chamber on the subject, again cited by the Prosecutor and referred to earlier on<sup>47</sup>, is to the same effect.

17. The determination of the Appeals Chamber that article 54 (3) (f) of the Statute expressly authorises the Prosecutor to take necessary measures for the protection of any person is the inevitable interpretation of the unambiguous provisions of this article. Express power, as acknowledged in the judgment of the Appeals Chamber, is conferred upon the Prosecutor to take or request the taking of necessary measures in order to ensure the protection of individuals at risk. The judgment of the Appeals Chamber addresses the very issue we are addressing in the present appeal, and provides the obvious answer as to the meaning of the unequivocal provisions of article 54 (3) (f) of the Statute.

The provisions of article 68 (1) and (4) are no less clear as to their meaning, object and purpose. They confer and acknowledge power on the Prosecutor to take protective measures for victims and witnesses, including, no doubt, relocation whenever their safety so requires.

18. The submission that the taking of protective measures, preventive relocation of witnesses in particular, may pollute the evidence of such persons owing to their financial assistance from the Office of the Prosecutor overlooks the nature of the Office of the Prosecutor, the power he is vested with, and his obligation to safeguard the purity of the investigatory and prosecutorial process. The Prosecutor is duty-bound to assure that the evidence collected is free from the influence of any person. Moreover, he is duty-bound to respect and observe the rights of the person under investigation or the accused, as the case may be. The collection of evidence in the form of witness statements is governed by the strict provisions of rule 111 (1) of the Rules, and by the terms of rule 111 (2) of the Rules, providing:

When the Prosecutor or national authorities question a person, due regard shall be given to article 55.

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<sup>47</sup> "Article 54 (3) (f) of the Statute articulates the powers of the Prosecutor in the investigatory process and steps that may be taken for the sustenance of its efficacy." See *supra*, para 7.

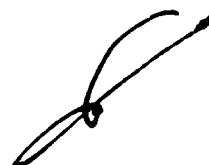


19. The Prosecutor is bound, by the terms of the Statute (article 54 (1) (a)), to collect not only incriminatory, but exculpatory evidence too. More than that, he is required to disclose to the accused or to the person facing a confirmation hearing both inculpatory and exculpatory evidence, the latter understood in the broad sense prescribed by article 67 (2) of the Statute. He is, by the provisions of article 54 (1) (c) of the Statute, bound to “fully respect the rights of persons arising under this Statute”. Their rights are specifically assured by the provisions of article 55, read in conjunction with rule 121 of the Rules, and article 67 of the Statute, respectively. These provisions, like every provision of the Statute, must be interpreted and applied in accordance with article 21 (3) of the Statute. There is no suggestion, it must be noticed, that in effecting relocation of witnesses, the Prosecutor either exceeded or abused the powers given him by the Statute.

20. Moreover, not only is the Prosecutor bound to collect, in the same spell, every piece of evidence having a bearing on the case, but he is also trusted, by virtue of the provisions of article 81 (1) (b) of the Statute, to appeal, on behalf of the convicted person, a decision finding the accused guilty. The power of the Prosecutor in this respect extends to the sentence imposed upon the convicted person. Any suggestion that the relocation of witnesses at the instance of the Prosecutor may prejudice witnesses against the accused can find no justification.

21. In relation to equality of arms between the two sides, a subject also touched upon, we can only remind of the provisions of article 57 (3) (b) of the Statute, that assure an equal opportunity to both sides to seek the approval of measures under article 56, and the cooperation of State Parties pursuant to Part 9 of the Statute, including, significantly, the collection of evidence, examination of sites, identification of the whereabouts of persons, the location of items, the provision of records and documents, and other steps envisaged by article 93.

22. The very fact that the Victims and Witnesses Unit may take measures in consultation with the Prosecutor denotes the special position of the Prosecutor in relation to protective measures. The Victims and Witnesses Unit is intended to provide facilities for the protection of victims and witnesses, and by the expertise it develops, to comfort



them in the best possible way, facilitating, in a proper case, the carrying out of the measures of protection deemed necessary by the Prosecutor.

Regulation 96 of the RoR makes provision for the establishment of the protection programme for victims and witnesses and its functioning. It has no bearing on the issue raised for resolution concerning the powers vested in the Prosecutor to take protective measures for victims and witnesses. The Regulations of the Registry were issued in the context of rule 14 of the Rules for the purpose, as stated therein, to “[...] put in place regulations to govern the operation of the Registry.” They in no way override or have a bearing on the interpretation and application of the Statute. Regulation 1 (1) of the RoR reads:


These Regulations have been adopted pursuant to rule 14 and shall be read subject to the Statute, the Rules and the Regulations of the Court.

23. The provision of protection and support to victims and witnesses is a cause common to the Victims and Witnesses Unit and the Prosecutor. Cooperation between the two in the pursuit of this goal is envisioned by the provisions of articles 43 (6) and 68 (4) of the Statute. The Prosecutor duly acknowledges this need in his document in support of the appeal, informing that he resorts to protective measures outside the Unit only when the urgency for protection is compelling.

24. In conclusion, the answer to the questions raised by issue one is that the Single Judge erred in the interpretation and application of the provisions of the Statute on witness protection and that of regulation 96 of the RoR. The decision of the Pre-Trial Chamber that the Prosecutor lacks power to take protective measures on his own accord, particularly to relocate witnesses for their safety, and that in so doing he acted outside the bounds of his authority, is wrong. As such, in our opinion it ought to be reversed.



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



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**Judge Georghios M. Pikis**

Dated this 26th day of November 2008

At The Hague, The Netherlands