

1 International Criminal Court

2 Appeals Chamber

3 Situation in the Democratic Republic of Congo – case ICC-01/04-01/07

4 Hearing - Open Session

5 Wednesday, 26 November 2008

6 The hearing starts at 3.29.

7 COURT USHER: All rise. The International Criminal Court is now
8 in session. Please be seated.

9 SINGLE JUDGE PIKIS: (Microphone not activated)

10 COURT OFFICER (interpretation): The case of the Prosecutor
11 against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07.

12 SINGLE JUDGE PIKIS: (Microphone not activated)

13 MS. CRISCITELLI: Sara Criscitelli for the Prosecutor with
14 Eric MacDonald, Ben Batros, Reinhold Gallmetzer, and Carmen Garcia Ramos.
15 Thank you.

16 SINGLE JUDGE PIKIS: (Microphone not activated)

17 MR. KILENDA (interpretation): Thank you. I would like to
18 introduce Mr. Jean-Pierre Fofe who joined our team on the 1st of November
19 as associate counsel. And to my left, Madam Helene Gorkiewez, who is an
20 intern at the Paris bar and an intern here in our office just now. Thank
21 you. That was the Defence. And me, myself, Jean-Pierre Kilenda, I'm a
22 lawyer at the Brussels Bar.

23 MR. HOOPER: Good afternoon. David Hooper representing
24 Germain Katanga and assisted by Caroline Buisman. Thank you.

25 SINGLE JUDGE PIKIS: The Appeals Chamber, by majority, myself and

1 Judge Nsereko dissenting, delivers the following judgement: Decision of
2 the Pre-Trial Chamber I of 18th April, 2008, entitled, "Decision on
3 Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and
4 Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules"
5 is confirmed. Sequentially the appeal is dismissed. The reasons by the
6 majority -- of the majority, namely Judges Kirsch and Song and Kourula,
7 as signed by Judge Kourula. The reasons of myself and Nsereko are given
8 in a dissenting opinion signed by myself.

9 I shall read a summary of the majority judgement and sequentially
10 a summary of the dissenting opinion. Meantime, the judgement and
11 dissenting opinion will be filed with the Registry. I begin with a
12 summary of the majority prepared by the majority noting, to begin with,
13 that the present is a summary of the judgement that is delivered today.
14 Only the judgement itself is authoritative.

15 The present appeal relates to the relationship between the
16 Prosecutor and the Victims and Witnesses Unit of the Registry on matters
17 concerning the relocation of witnesses. The victims and witnesses unit
18 maintains a protection programme which provides for the relocation of
19 witnesses. The relocation of a witness involves his or her transfer to a
20 new location and the resettlement of the witnesses in the new location.
21 The relocation of a witness is likely to have serious consequences for
22 his or her life. Pursuant to Regulation 96 of the Regulations of the
23 Registry, the Prosecutor, as well as counsel for other participants, may
24 apply for the inclusion of witnesses in the Victims and Witnesses Unit
25 Protection Programme. Prior to the confirmation hearing in respect of

1 Mr. Katanga and Mr. Ngudjolo Chui, the Prosecutor had referred the
2 witnesses to the protection programme requesting that they be relocated.
3 In respect of three of these witnesses, the Registrar rejected the
4 Prosecutor's application. The Prosecutor then proceeded to preventively
5 relocate the witnesses himself.

6 In the division -- Decision on Evidentiary Scope of the
7 Confirmation Hearing, Preventive Relocation and Disclosure under Article
8 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence
9 the impugned decision in this case, the Pre-Trial Chamber ruled inter
10 alia that the Prosecutor should immediately put an end to the practice of
11 preventive relocation. The Trial Chamber found that the Prosecutor did
12 not have the authority to relocate witnesses himself and that he must
13 rely on the Victims and Witnesses Unit for that purpose.

14 The Pre-Trial Chamber granted leave to appeal in this respect.
15 The issue on appeal comprises of two questions. First of all, whether
16 the Prosecutor may relocate witnesses before the Registrar has taken a
17 decision to include a given witness into the protection programme
18 maintained by the unit; and second, whether the Prosecutor may relocate a
19 witness once the Registrar has decided not to include the witness in the
20 victims protection programme.

21 The Appeals Chamber has decided by majority to answer the two
22 questions in the negative and to confirm the impugned decision. The
23 reasons found in the Appeals Chamber decision may be summarised as
24 follows: Article 54(3)(F) of the Statute provides that the Prosecutor
25 may "take necessary measures or request that necessary measures be taken

1 to ensure ... the protection of any person ..." Article 68(1) of the
2 Statute stipulates that "the Court shall take appropriate measures to
3 protect the safety, physical and psychological well-being, dignity, and
4 privacy of victims and witnesses ... The Prosecutor shall take such
5 measures particularly during the investigation and prosecution of such
6 crimes." And Article 68(4) provides that the unit, Victims and Witnesses
7 Unit I mean, "may advise the Prosecutor and the Court on appropriate
8 protective measures."

9 Read on their own, these provisions of the Statute appear to
10 support the argument of the Prosecutor in this appeal that he may
11 preventively relocate witnesses independent of the unit and even contrary
12 to a decision of the Registrar. The Appeals Chamber considers, however,
13 that these provisions are not conclusive when read in light of the
14 statutory scheme as a whole. Article 43(6) of the Statute provides that
15 the Victims and Witnesses Unit "shall provide, in consultation with the
16 Office of the Prosecutor, protective measures and security arrangements."
17 The same provision also provides that the unit must employ staff with
18 certain expertise. The functions of and responsibilities relating to the
19 Victims and Witnesses Unit are expressly regulated by Rule 16 to 19 of
20 the Rules of Procedure and Evidence. Among those provisions pursuant to
21 Rule 17(2)(a)(i), the unit shall provide witnesses with "adequate
22 protective and security measures and formulate long- and short-term plans
23 for their protection." Rule 18(b) underlines that the unit must "respect
24 the interests of the witnesses" while recognising the specific interests
25 inter alia of the Office of the Prosecutor.

1 In interpreting the relevant provisions the Appeals Chamber also
2 has had recourse to the history of the Rome Statute. From this drafting
3 history it appears that the question of whether the unit should be
4 located in the Office of the Prosecutor or in the Registry was discussed
5 at the Rome Conference. It was decided that the Victims and Witnesses
6 Unit should be established as part of the Registry with several
7 delegations underlining the neutrality of the Registry in coming to that
8 decision.

9 The Appeals Chamber notes furthermore that the unit is the most
10 appropriate body to take decisions on the relocation of witnesses. The
11 Victims and Witnesses Unit is not a party to the proceedings and
12 therefore will be able to assess the need for the relocation of a witness
13 neutrally. This is particularly important, because the relocation of a
14 witness is likely to have a great impact on the life of the person
15 concerned. The statutory framework ensures that the Victims and
16 Witnesses Unit has the necessary expertise to carry out this assessment.

17 The Appeals Chamber is not persuaded by the Prosecutor's argument
18 that finding that the Prosecutor cannot unilaterally relocate witnesses
19 results in the Registrar and the unit having the sole and final say in
20 matters of relocation. If the Prosecutor disagrees with the decision of
21 the Registrar not to relocate a given witness, he may approach the
22 relevant Chamber and request a review of the Registrar's decision.

23 The Appeals Chamber finds that any disagreement between the
24 Victims and Witnesses Unit and the Prosecutor about the relocation of a
25 witness should ultimately be decided by the Chamber dealing with the

1 case. It should not be resolved by the unilateral and unchecked action
2 of the Prosecutor.

3 Moreover, were the Prosecutor allowed to preventively relocate
4 witnesses, this is likely to result in the establishment of a parallel
5 system of witness protection for the relocation of witnesses, one by the
6 Victims and Witnesses Unit and one by the Office of the Prosecutor. This
7 is not the system envisaged by the Rome Statute.

8 Rather, this system established by the Statute requires
9 cooperation between the Prosecutor and the Victims and Witnesses Unit.
10 This will be essential to ensure that witnesses are appropriately
11 protected. The unit has specific expertise in protection matters, and
12 the Prosecutor is close to the relevant witnesses on the ground and in a
13 position to see where need for protection may arise. The Appeals Chamber
14 emphasises the vital importance of cooperation on all matters of witness
15 protection including relocation. Given the need for and expectation of
16 cooperation in relation to matters of relocation, disagreement between
17 the unit and the Office of the Prosecutor on relocation matters should be
18 rare.

19 The Appeals Chamber notes the procedure for exceptional
20 situations or extreme urgency which the Pre-Trial Chamber outlined in the
21 impugned decision. Pre-Trial Chamber requires the Prosecutor to approach
22 the Victims and Witnesses Unit as soon as he becomes aware of a threat to
23 the witness and the Registrar as quickly as possible. The Victims and
24 Witnesses Unit should also take any provision or protection measures that
25 may be necessary.

1 The Appeals Chamber agrees with the procedure envisaged by the
2 Pre-Trial Chamber, noting that it may have to be applied with some
3 flexibility. The Appeals Chamber cannot rule out that there may be
4 situations in which temporary emergency measures may have to be taken by
5 the Prosecutor in relation to a person for whom relocation is sought in a
6 situation of urgency. However, in the abstract and without a specific
7 set of factual circumstances before it, the Appeals Chamber would not
8 envisage such temporary measures to include the relocation of a witness.

9 This concludes the summary of the reasons for which the Appeals
10 Chamber by majority decided to confirm the impugned decision.

11 I shall now proceed to deliver a summary of the dissenting
12 opinion. The summary, it is repeated again, in no way qualifies the
13 dissenting opinion, the only authoritative text of which is the opinion
14 itself.

15 The question raised for determination in this appeal is whether
16 the Prosecutor has the power to take on his own initiative measures of
17 preventive relocation of witnesses in the interests of their safety. The
18 Pre-Trial Chamber decided otherwise, holding that the Prosecutor cannot
19 take measures for the relocation of witnesses and that he can do so only
20 within the context of the Victims and Witnesses Unit.

21 The first issue raised on appeal is whether the Prosecutor can
22 take measures for the protection of witnesses outside the framework of
23 the unit. The second issue certified as an appealable subject concerned
24 the rejection of the evidence of witnesses who were relocated by the
25 Prosecutor in the interests of their safety. The decision giving rise to

1 the certification of the second issue forfeited its importance as it
2 ceased to be a live issue owing to the subsequent inclusion of the two
3 witnesses in the ICC Protection Programme of the unit and sequential
4 admission of their evidence for the purposes of the confirmation hearing.
5 The second issue was not pursued by the Prosecutor, nor was it touched
6 upon by the respondents. It was treated as abandoned.

7 The Prosecutor challenged the correctness of the decision giving
8 rise to the appealable issue on the ground that (a) it contradicts the
9 specific provisions of the Statute, notably Article 68(1), and 54(3)(f),
10 whereas Regulation 96 of the Regulations of the Registry relied upon by a
11 Trial Chamber for its decision is irrelevant.

12 Mr. Katanga in his submissions supported the decision of the
13 Pre-Trial Chamber in every respect arguing inter alia that equality of
14 arms as an element of a fair trial would, in itself, rule out any right
15 on the part of the Prosecutor to take protective measures on his own
16 accord.

17 The Registrar also argued that responsibility for the assessment
18 of the risks that may befall victims or witnesses and the approval of
19 measures for their protection rests with the unit. If power was
20 acknowledged to the Prosecutor to take measures for the protection of
21 witnesses, the Court would forfeit ability to make an independent
22 assessment of needs arising for participation on the witnesses in the
23 protection programme.

24 Preventive relocation at the instance of the Prosecutor the
25 Registrar submitted "would automatically require the establishment of a

1 parallel witness protection programme within the Prosecution."

2 In her contention, no power vests in the Prosecutor to relocate
3 witnesses independently or outside the unit. Mr. Chui likewise supports
4 the decision of the Pre-Trial Chamber.

5 The basic question confronting the Appeals Chamber is whether the
6 Prosecutor is empowered by the Statute to take measures for the
7 protection of victims and witnesses outside the framework and without the
8 approval of the Victims and Witnesses Unit. To answer the question, the
9 Appeals Chamber must identify, to begin with, the status and position of
10 the two organs of the Court, namely the Office of the Prosecutor and the
11 Registry. Both are classified by the provisions of Article 34 of the
12 Statute as separate organs of the Court. The mandate of the Prosecutor
13 is principally defined by Article 42, whereby he is entrusted with the
14 investigation and prosecution of crimes. The duties and responsibilities
15 of the Registry, headed by the Registrar, are defined by Article 43. The
16 Registry is responsible for the non-judicial aspects of the
17 administration and servicing of the Court, but "without prejudice to the
18 functions and powers of the Prosecutor in accordance with Article 42."

19 Article 42(1) provides that the Office of the Prosecutor "shall
20 act independently as a separate organ of the Court."

21 Article 43(6), making provision for the establishment by the
22 Registrar of the Victims and Witnesses Unit as a section of the Registry
23 expressly provides that the unit shall provide protective measures and
24 make security arrangements for victims and witnesses in consultation with
25 the Office of the Prosecutor. It is no accident that this is so,

1 considering that the Prosecutor is in a singular position to appreciate
2 the need for the protection of victims and witnesses.

3 The Statute expressly confers power upon the Prosecutor to take
4 protective measures. Article 68(1) expressly authorises, or more
5 accurately still, requires the Prosecutor in mandatory terms to take
6 protective measures for the safety, dignity and privacy of victims and
7 witnesses during both the investigation and prosecution of crimes.

8 Article 54, defining the duties and powers of the Prosecutor with
9 respect to investigations expressly empowers him by the provisions of
10 subparagraph 3(f) to take measures for the protection of inter alia any
11 person.

12 The determination of the Appeals Chamber in its judgement of
13 Prosecutor versus Katanga and Chui of 13th May 2008 that Article 54(3)(f)
14 of the Statute expressly authorises the Prosecutor to take necessary
15 measures for the protection of any person is the inevitable
16 interpretation of the unambiguous provisions of this Article. Express
17 power is acknowledged in the judgement of the Appeals Chamber is
18 conferred upon the Prosecutor to take "necessary measures or to request
19 that necessary measures be taken to ensure the protection of individuals
20 who are at risk." The judgement of the Appeals Chamber addresses the
21 very issue we are addressing in the present appeal and provides the
22 obvious answer as to the meaning of the unequivocal provisions of Article
23 54(3)(f).

24 The provisions of Article 68(1) and (4) are no less clear as to
25 their meaning, object and purpose. They confer and acknowledge power on

1 the Prosecutor to take protective measures for victims and witnesses,
2 including, of course, relocation whenever their safety so requires.
3 Moreover, Article 68(4) provides that "the Victims and Witnesses Unit may
4 advise the Prosecutor and the Court on appropriate protective measures.
5 It lays down the Victims and Witnesses Unit may advise the Prosecutor and
6 the Court on appropriate protective measures, security arrangements,
7 counselling, and assistance as referred to in Article 43(6)."

8 How could the unit advise the Prosecutor on protective measures
9 to be taken without the Prosecutor having power to take such measures?
10 The answer is that the Prosecutor is invested with power to take such
11 measures by the foregoing provisions of the Statute. The statutory
12 provision is premised on the fact that power is bestowed upon the
13 Prosecutor to take measures for the protection of victims and witnesses
14 in his own right. The suggestion that the acknowledgement of power to
15 the Prosecutor to take measures for the protection of victims and
16 witnesses may pollute the process or defy the principle of equality of
17 arms associated therewith with a fair trial cannot find support. The
18 Prosecutor is equally bound by the terms of Article 54(1)(a), to collect
19 incriminatory as well as exculpatory evidence. Moreover, the Prosecutor
20 is duty-bound by the terms of Article 67(2) to disclose to the person or
21 the accused, as soon as practicable, exonerating evidence in the wide
22 sense that the notion of such a term carries under Article 67(2).

23 In the opinion of the minority, the Pre-Trial Chamber erred in
24 holding that the Prosecutor has no power to take on his own accord
25 measures for the protection of victims and witnesses. In this case

1 measures of preventive relocation. Such a power is expressly conferred
2 upon him by the Statute as explained. The decision of the Pre-Trial
3 Chamber can find no justification in law. Consequently, it ought to be
4 reversed.

5 We're here brought to the end of the proceedings. The Court will
6 withdraw.

7 COURT USHER: All rise.

8 The hearing ends at 3.55 p.m.

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