

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06

Date: 7 March 2008

TRIAL CHAMBER I

**Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann**

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR vs. THOMAS LUBANGA DYILO**

**Public
with Confidential, Ex Parte - Prosecution Only Attachment A**

**Prosecution's Submission of Information on the 29 February 2008 Disclosure of
Incriminating Evidence and Request for Protection**

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1. Introduction

1. By 29 February 2008, as ordered by the Trial Chamber during an *ex parte* hearing, the Prosecution disclosed the evidence of eight witnesses.
2. To this effect, the Prosecution, in fulfilment of its responsibilities under Article 68(1) of the Rome Statute (Statute), arranged for the interim protection of those eight witnesses, at least until such time as the Chamber rules on the 29 January 2008 Prosecution request.
3. As of the date of this filing, VWU has declined to take protective measures for the eight witnesses at issue.
4. The Prosecution submits that, under Article 68.1 of the Statute, the Court, including the Prosecution, bears responsibility to “protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”¹ Under Article 43.6 of the Statute, the Registry through the establishment of the VWU, is mandated “to 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.”² The VWU is also empowered to “advise the Prosecutor and the Court on appropriate protection measures”.³ In accordance with those provisions, the Prosecution relies on the VWU to implement the measures required for the protection of its witnesses.⁴

¹ Article 68(1).

² Article 43(6).

³ Article 68(4).

⁴ The drafters of the Rome Statute carefully considered whether there should be a separate unit for prosecution witnesses in the Office of the Prosecutor or whether there should be only one unit located in the Registry. See Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, Draft Statute, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, art. 44(4), footnote 24. Eventually, the drafters consciously decided to create a single Victims and Witness Unit within the Registry, as advocated by Richard Goldstone, the former ICV prosecutor, who reportedly indicated that the Prosecutor should not have to manage the entire witness support unit, and several NGOs that argued that “to place the protection obligation exclusively with the Prosecutor could compromise the responsiveness to witnesses and those at risk on account of their testimony. It could result in the diversion of resources from protection to investigation (...)” See On the RECORD, Volume 1, Issue 6, 22 June 1998, p. 7; Gender Justice and the ICC, paper submitted by the Women’s Caucus for Gender Justice in the International Criminal Court to the Rome Conference, 15 June-17 July 1998, p. 48 and TERRAVIVA, UN Conference on the Establishment of an International Criminal Court, issue no. 2, 25 June 1998, p. 7.

The establishment of the Victims and Witness Unit outside the Office of the Prosecutor and within the Registry was officially proposed by the Republic of Congo and Niger on 3 July 1998 and agreed by the Working Group on Part 4 of the Statute a day later. See Article 44, The Registry: Proposal submitted by the Republic of Congo and Niger, UN

5. The Prosecution assesses and defines the need for protection of each of its witnesses. Adequate protection is an integral part of an independent investigation.
6. The Prosecution submits that the mandate and the responsibility to implement protective measures lie with VWU. The Prosecution brings all its assistance to the VWU, including contact with national and international institutions. The Prosecution is also willing to carry out emergency measures whenever the VWU is unable to do it within a tight timeframe, but the Prosecution can neither replace nor duplicate the mandate and responsibility of the VWU to protect witnesses.
7. Based on those considerations, the Prosecution respectfully requests that the Trial Chamber order the VWU, in compliance with its statutory duties under Article 43(6), to protect the eight witnesses whose identity has now been disclosed.

II. Background

8. On 25 January 2008, the VWU filed a report on the status of referrals for witness protection (the VWU Report).⁵
9. On 29 January, in its response to the VWU Report,⁶ the Prosecution stated that it had thoroughly assessed the security of certain witnesses (the total of the then pending and rejected referrals) and determined that there were specific grounds to believe their security would be compromised as soon as their identities were disclosed. The Prosecution requested the Trial Chamber to order the Registry to protect the witnesses concerned.
10. During an *ex parte* hearing on 13 February, the Trial Chamber ordered that the evidence of nine Prosecution trial witnesses be disclosed on 29 February.⁷ On 29 February, the

Doc. A/CONF.183/C.1/L.43, 3 July 1998; Part 4, Composition and Administration of the Court: Recommendations of the Coordinator, UN Doc. A/CONF.183/C.1/L.45, 4 July 1998, art. 44(4); Article 68, Protection of the Victims and Witnesses and Their Participation in the Proceedings: Proposal submitted by Canada, UN Doc. A/CONF.183/C.1/WG/PVI.1/88, 6 July 1998, art. 68(4), footnote 2; Article 68, Protection of the Victims and Witnesses and Their Participation in the Proceedings: Proposal submitted by Canada, UN Doc. A/CONF.183/C.1/WG/PVI.1/88 REV.1, 6 July 1998, art. 68(4); Report of the Working Group on Procedural Matters: Addendum, UN Doc. A/CONF.183/C.1/WG/PVI.1.2/ADD.6, 11 July 1998, art. 68(4).

⁵ "Victims and Witnesses Unit report on the status of referrals", 25 January 2008, ICC-01/04-01/06-1131-Conf-Exp. ICC-01/04-01/06-1138-Conf-Exp. and Annex A.

⁷ Transcript, ICC-01/04-01/06-T-76-Conf-Exp-Eng, 13 February 2008.

Prosecution informed the Trial Chamber that it was removing one witness from the Prosecution's trial witness list.⁸ The Prosecution simultaneously disclosed the incriminatory evidence of the remaining eight witnesses.

III. Considerations Applicable to All Witnesses

11. The Prosecution respectfully submits there are general considerations relevant to the particular circumstances of each of the above witnesses.

The assessment of acceptable risk

12. The Prosecution submits that, pursuant to Art 68.1 of the Statute, the starting point for protective measures ought to be the elimination of all foreseeable risks. Any lower standard of risk would not permit the Court, or the Prosecution, to discharge its obligations to protect victims and witnesses as mandated by Article 68(1). It is this standard which underlay the Prosecution's referral requests for each of the eight witnesses at issue. It is the standard agreed by the Presidency, the Registry and the Prosecution⁹ which committed to "put in place a system to address all security risks, striving for maximum security of all participants" consistent with the obligations imposed under the Statute.¹⁰

13. This was the standard applied by the VWU. Yet, in its report 25 January 2008 VWU advanced a different position. This means, in practice, that the Court and the Prosecutor cannot fulfil their responsibilities under Article 68(1).

Ituri is a high risk area for Prosecution witnesses

14. The assessment of risk is an individualized process as to the security of each witness, in full recognition of the overarching environment in which the Court's investigations occur. The current situation in Ituri creates a foreseeable risk to any Prosecution witness.

⁸ ICC-01/04-01/06-1203 with Confidential, *ex parte* Attachment A and Annexes. The witness is DRC-01P-WWWW-0110. The filing was notified on 3 March 2008.

⁹ ICC-ASP, 4 August 2006

¹⁰ ICC-ASP, paragraph 31 and Annex, page 14.

Protective measures must be varied

15. The Prosecution maintains that a broad range of measures must be considered in each case. Alternative measures must be employed creatively, and in combination.

IV. Conclusion

16. The Prosecution submits that the conditions necessary to protect witnesses are present in this case.

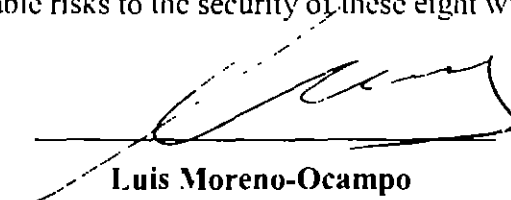
V. Ex Parte Filing

17. The Prosecution submits that the classification of Attachment A to the present filing as *Confidential-Ex Parte – Prosecution Only* is necessary.¹¹ The Attachment provides information on the security and protection arrangements of Prosecution trial witnesses.

18. The rights of the Accused are maintained to the extent that he has been made aware of the filing and its legal basis, but cannot be privy to the specifics of the information that needs to be addressed. The Prosecution submits that no alternative procedures exist to deal with this filing.

VI. Relief Requested

19. The Prosecution respectfully requests that the Trial Chamber order VWU, in compliance with its statutory duties under Article 43(6), to take the protective measures necessary to address all foreseeable risks to the security of these eight witnesses.



Luis Moreno-Ocampo
Prosecutor

Dated this 7th day of March 2008
At The Hague, The Netherlands

¹¹ Decision on the procedures to be adopted for *ex parte* proceedings. 7 December 2007, ICC-01/04-01/06-1058 at para. 12. On 6 December 2007, the Trial Chamber determined that *ex parte* procedures are only to be used exceptionally when other procedures are not available. The Court must ensure that the use of the *ex parte* procedure is proportionate given the potential prejudice to the Accused.