

FURTHER DELAYS IN THE CASE OF THE PROSECUTOR V. THOMAS LUBANGA DYILO AT THE ICC

On July 8, 2010 Trial Chamber I ordered a stay in the proceedings in the case *The Prosecutor v. Thomas Lubanga Dyilo*.¹ The Chamber decided that the fair trial of Lubanga was no longer possible because the prosecution failed to disclose to the defense the identity of an intermediary, as the Chamber had ordered. The intermediary has been assisting the activities of the Prosecutor in the Democratic Republic of the Congo (DRC).

The issues surrounding the disclosure of the identity of intermediary 143 result from the competing legal interests and obligations of the Prosecutor and the judges. The Prosecutor feels that disclosing the identity of the intermediary in question would put that person's safety at risk, and that guaranteeing the safety of intermediary 143 is a paramount obligation the Rome Statute directly imposes on him. On the other hand, the statute requires the judges to ensure that the trial of Lubanga is fair. In order to conduct a fair trial, the evidence must be available to both the prosecution and the defense. The judges believe that the statute also gives them the final word on the treatment of evidence in a trial.

These are very common legal issues for courts must be resolved by the ICC now. The ICC is a very young institution, and it is important that these issues be resolved, through appeals now even at the cost of delay, in order for the Court to operate effectively in the future.

Background: Intermediary 143

Intermediaries are persons who have been asked to provide assistance to the Office of the Prosecutor (OTP) in discrete aspects of its investigations, for example by identifying leads or potential witnesses. Intermediary 143 assisted the Prosecution in finding witnesses. It is alleged by the defense that intermediary 321 paid witnesses to come forward and testify before the Court. It is also alleged that there is a connection between intermediary 143 and intermediary 321 which warrants the disclosure of 143's identity to the defense.

In May 2010, the defense alleged that certain intermediaries had paid or coached witnesses to testify before the Court, and applied to call two intermediaries (intermediaries 321 and 316) before the Court. The defense did not request to call intermediary 143 as a witness, but the Court ordered that his identity be disclosed to the defense for the purpose of questioning another intermediary who had been called as a witness. The Court found that the allegations against 143 did not merit calling him to testify in Court but that his identity should be revealed because he had had contact with intermediary 321.

Safety and Security Measures for Intermediary 143

In May, the Chamber ordered the prosecution to disclose the identity of intermediary 143. The prosecution refused, arguing that the disclosure of intermediary 143's name could put his safety in jeopardy. However, in

¹ Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, July 8, 2010, available at <http://www.icc-cpi.int/iccdocs/doc/doc906146.pdf>.





June, the Chamber was informed by the Victims and Witnesses Unit (VWU) that the necessary protective measures to ensure intermediary 143's safety could be implemented. It seemed then that these measures were about to be implemented, but in July intermediary 143, concerned about his safety, requested alternative and more extensive protective arrangements.

On July 6, the Chamber ruled that intermediary 143's identity should be revealed to the defense (exclusively to counsel and their assistants, and the defense's "resource person" in the DRC). However, the prosecution did not disclose the identity of intermediary 143 to the defense. The prosecution reemphasized their previous arguments that even unlimited disclosure of the identity of intermediary 143 could jeopardize his safety. Due to the current situation in Bunia, an individual is at risk of being killed if the Hema community considers him or her to be a traitor. Since intermediary 143 is a link to evidence against Lubanga, his safety may therefore be in jeopardy.

The judges, after careful consultation with the Court's protection experts, were satisfied that disclosure of intermediary 143's name under the strict conditions they had set would not endanger him. The Court therefore upheld its decision and ordered the prosecution to reveal the identity of intermediary 143 to the defense. The prosecution still refused to comply with the judgment, arguing that "the Prosecutor accordingly has made a determination that the Prosecution would rather face adverse consequences in its litigation than expose a person to risk on account of prior interaction with this office. This is not a challenge to the Chamber; it is instead a reflection of the Prosecution's own legal duty under the statute."²

The Significance of the Prosecutor's Actions

Had the prosecution revealed the name of intermediary 143 to the defense, the questioning of 321 could have continued. However, the Chamber felt as though it had no option but to stay proceedings, in order to ensure the fair trial of Lubanga. Without the name of intermediary 143, the defense would not be able to fully cross-examine a witness linked to a very serious allegation: that the prosecution has knowingly employed, or made use of, intermediaries who influenced individuals to give false testimony.

However, there could be a slightly more worrying problem for the ICC. The judges have hinted that the Prosecutor's actions suggest that he does not consider himself bound to comply with judicial decisions. The Prosecutor may feel that he is responsible for the safety of intermediary 143 under Article 68 of the Rome Statute. Yet, the judges have made it clear that it is not for the Prosecutor to decide this for the Court. Legally, it is ultimately for the Chamber to determine whether protective measures are necessary during trials. However, the Prosecutor has explained that he did not ignore court orders intentionally; he believed that he was using available legal procedures to prevent putting a person at risk while still respecting the Court's authority under the Rome Statute.³ Thus, the Prosecutor's actions may have resulted from a genuine legal concern for intermediary 143's safety rather than a feeling that he is somehow not bound by court orders. However, the

² Redacted Decision, supra note 1, at para. 14.

³ Urgent Prosecution's Application for Leave to Appeal the Trial Chamber I's decision of 8 July 2010 staying the proceedings for abuse of process, July 14, 2010, para. 7, available at <http://www.icc-cpi.int/iccdocs/doc/doc908167.pdf>.





judges issued a warning to the prosecution and indicated that they may later consider disciplinary sanctions against the prosecution for intentionally refusing to implement court orders.⁴

Delay in the Lubanga Trial

Delay has been an issue in the Lubanga trial before. In June 2008, the Court ordered a stay in proceedings because the Prosecutor had failed to disclose certain material to the defense which had been the subject of confidentiality agreements with NGOs the United Nations. The trial was delayed in order to secure the fair trial of Lubanga. The Appeals Chamber eventually upheld the Court's order. In November 2008, the Prosecutor eventually provided the Chamber with all the required information. The obstacles to a fair trial were therefore removed, so the Court decided to lift the stay in proceedings and the trial began on January 26, 2009.

The decision to stay proceedings will therefore draw many critics of the Court to once again voice old arguments that the ICC is slow and ineffective. Developments in the Lubanga trial are followed closely around the world. Lorraine Smith of the International Bar Association in The Hague referred to the delay as "a PR nightmare" since it is the Court's first case.⁵ While a stay in proceedings is not ideal, it is by no means a "nightmare" for the Court. Above all, it shows how committed the Court is to conducting fair trials. In particular, it demonstrates that ICC judges will not automatically defer to the Prosecutor.

The ICC's Commitment to Justice and Due Process

The decision to stay proceedings highlights the ICC's commitment to conducting fair trials. The trial of those accused of terrible crimes is a sensitive issue. It is important that the rights of the accused are upheld in order to prevent any potential attempt to hurry court proceedings in order to secure a conviction as quickly as possible. It shows that the Court will not be influenced by any pressure to rush proceedings in order to sentence Lubanga, but rather elevate the need for due process above all other concerns.

The stay in proceedings also shows that the Prosecutor does not enjoy unchecked power. It shows that he is not superior to judicial decisions, and reveals the checks and balances which ensure that his power is effectively scrutinized by the Court. The judges emphasized that "no criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations."⁶

It should be pointed out that decisions to stay legal proceedings are extremely common in criminal trials everywhere. It may be easy to forget that the Court is still extremely young, and that this is its first case. Many precedents and procedures still need to be worked out so the Court must create that as they emerge in early trials. It is encouraging that the Court has acted with caution in these issues, rather than disregarding them and

⁴ Court transcript, July 8, 2010, p. 2, line 18-p. 5, line 1, available at <http://www.icc-cpi.int/iccdocs/doc/doc906382.pdf>; oral decision, court transcript, July 16, 2010, p. 22, line 9-p. 23, line 4.

⁵ BBC News, ICC's first case - DR Congo's Lubanga - is suspended, July 9, 2010, available at <http://www.bbc.co.uk/news/10571522>.

⁶ Redacted Decision, supra note 1, at para. 27.





continuing with the trial. If the Court had continued the trial without properly dealing with these issues now, current and future trials could be tainted uncertainty and the appearance of unfairness.

Conclusion

Case precedents and accepted practices evolve over a long period of time. The ICC is a new institution with innovative pre-trial procedures and a clear recognition of the right of victims to participate in proceedings. Since the Lubanga trial is the first one before the Court, there will inevitably be stumbling blocks as these procedures are worked out in practice. The legal system in the US has had more than two hundred years to develop, and it is easy to forget that during its development there have been extremely contentious issues, especially about the nature and practice of “due process,” which took a long time to be resolved. There will doubtless be instances in the future where correct procedure at the ICC is debated or must be resolved through appeals. However, this is inherent, and essential, to a fair legal system.

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