

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER I

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

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

Public

Decision on the "Prosecution's application to take testimony while proceedings are stayed pending decision of the Appeals Chamber"

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

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Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Thomas Lubanga Dyilo* issues the following Decision on the “Prosecution’s application to take testimony while proceedings are stayed pending decision of the Appeals Chamber”, submitted on 14 September 2010.¹

I. Background

1. On 8 July 2010, the Chamber issued the “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” (“Decision”).² In essence the Chamber stayed the proceedings as an abuse of the process of the Court because:

31. [...] of the material non-compliance with the Chamber's orders of 7 July 2010, and more generally, because of the Prosecutor's clearly evinced intention not to implement the Chamber's orders that are made in an Article 68 context, if he considers they conflict with his interpretation of the prosecution's other obligations. Whilst these circumstances endure, the fair trial of the accused is no longer possible, and justice cannot be done, not least because the judges will have lost control of a significant aspect of the trial proceedings as provided under the Rome Statute framework. Whilst the stay of the proceedings is in place, the Chamber will deal with any application for leave to appeal on this or any related issue that is filed.³

2. The Chamber found, first, that the Prosecutor had unequivocally refused to implement its repeated order to disclose the identity of intermediary 143 to the defence,⁴ and, second, that the Prosecutor, by his refusal to implement the orders of the Chamber, and in his filings, had revealed that he does not consider that he is bound to comply with judicial decisions that relate to

¹ Prosecution’s application to take testimony while proceedings are stayed pending decision of the Appeals Chamber, 14 September 2010, ICC-01/04-01/06-2565-Conf. A public redacted version of this application was notified on 20 September 2010, ICC-01/04-01/06-2565-Red.

² 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, 8 July 2010, ICC-01/04-01/06-2517-Conf. A public redacted version of this Decision was notified on the same day, ICC-01/04-01/06-2517-Red.

³ ICC-01/04-01/06-2517-Red, paragraph 31.

⁴ ICC-01/04-01/06-2517-Red, paragraph 20.

Article 68 of the Rome Statute (“Statute”), namely the protection of those who have been affected by their interaction with the Court. The Prosecutor maintains that he has autonomy to comply with, or disregard, the orders of the Chamber, depending on his interpretation of the responsibilities of the Office of the Prosecutor (“prosecution”) under the Rome Statute framework.⁵

3. On 14 July 2010, the Chamber issued its Order on the “Victims and Witnesses Unit’s submission relevant to the stay of proceedings”,⁶ following the Victims and Witnesses Unit’s (“VWU”) request for guidance as to whether following the imposition of the stay it should implement the proposed protective measures for intermediary 143.⁷ The Chamber decided:

6. Now that the proceedings have been stayed, it would be illogical and inconsistent to take steps to further the trial proceedings, in this instance by implementing these protective measures, and for the purposes of this case only, the *status quo* is to be maintained. If additional protective measures are required in other proceedings, this Order does not act as any kind of limitation on their implementation following a Decision by another Chamber.⁸

4. On 15 July 2010, the Chamber granted the prosecution leave to appeal.⁹
5. Intermediary 143 is of relevance to the trial currently proceeding before Trial Chamber II (*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*), and on 13 September 2010 the Registry filed before that Chamber “The Victims and Witnesses Unit’s report on the implementation of protective measures for intermediary 143”.¹⁰ In summary, the Registry indicated that protective

⁵ ICC-01/04-01/06-2517-Red, paragraph 21.

⁶ Order on the “Victims and Witnesses Unit’s submission relevant to the stay of proceedings”, 14 July 2010, ICC-01/04-01/06-2519-Conf.

⁷ Victims and Witnesses Unit’s submission relevant to the stay of proceedings, 13 July 2010, ICC-01/04-01/06-2518-Conf. This filing was reclassified from ‘Confidential *ex parte* only available to the Victims and Witnesses Unit’ to confidential, pursuant to the Chamber’s order on 15 July 2010.

⁸ ICC-01/04-01/06-2519-Conf, paragraph 6. The Chamber has included this quotation from a confidential transcript because this particular section does not require continued protection.

⁹ Transcript of hearing on 15 July 2010, ICC-01/04-01/06-T-314-ENG ET WT, page 14, line 5 to page 16, line 25.

¹⁰ The Victims and Witnesses Unit’s report on the implementation of protective measures for Intermediary 143, ICC-01/04-01/07-2383-Conf with a confidential *ex parte* VWU, OTP and Trial Chamber I Annex; ICC-01/04-01/07-2383-Conf-Exp-Anx1.

measures had been implemented such as to enable “full disclosure of the identity of Intermediary 143” to the defence. The Chamber interpolates to observe that these protective measures (which both Chambers considered necessary for full disclosure of 143’s identity) are to be distinguished from the limited and defined disclosure ordered by Trial Chamber I, which required no additional protective measures.

6. The prosecution indicates that on 13 September 2010, it attempted – notwithstanding the stay of proceedings that is in place – to comply (for the first time) with the Chambers order of 7 July 2010, by offering to supply the defence with the identity of intermediary 143.¹¹
7. As set out above, the present application was filed on the following day, 14 September 2010.¹²
8. On 15 September the Chamber ordered the parties and participants to file any responses to the prosecution’s application prior to 16.00 on 20 September 2010.¹³
9. The responses from the defence¹⁴ and the Office of Public Counsel for Victims (“OPCV”)¹⁵ were filed on 20 September 2010. A response from one of the teams representing victims was sent on 20 September 2010 but due to a technical error, it was received on 21 September 2010.¹⁶

¹¹ ICC-01/04-01/06-2565-Red, paragraph 12.

¹² ICC-01/04-01/06-2565-Red.

¹³ Email communication from the Legal Advisor to the Trial Division to the parties and participants, 15 September 2010, entitled “Trial Chamber I’s instruction for responses to doc. 2565-Conf”.

¹⁴ Réponse de la Défense à la «Prosecution’s application to take testimony while proceedings are stayed pending decision of the Appeals Chamber», déposée le 14 septembre 2010, 20 September 2010, ICC-01/04-01/06-2567.

¹⁵ Observations du BCPV en tant que représentant légal des victimes a/0047/06, a/0048/06, a/0050/06 et a/0052/06 relatives à la requête de l’Accusation du 14 septembre 2010, 20 September 2010, ICC-01/04-01/06-2566-Conf.

¹⁶ Réponse à la demande du Procureur d’entendre un témoin durant la suspension de la procédure, pour les victimes a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, a/0404/08, a/0610/08, a/0611/08, a/0149/07, 21 September 2010, ICC-01/04-01/06-2569-Conf.

The prosecution's submissions

10. The prosecution submits that the Chamber has “inherent authority” to effect “a partial lifting” of the stay.¹⁷ It is suggested that there is nothing in the Rome Statute framework that prohibits “interim activity notwithstanding the stay”.¹⁸ Additionally, it is argued that the power to order a stay is “intertwined with the Chamber’s inherent authority to prevent further or more intrusive breaches of the parties’ fundamental rights”.¹⁹
11. Against that background, the prosecution argues that the Chamber has the power to allow provisional evidence to be called during the currency of the stay. In support of this contention, the prosecution relies on Articles 18(6) and 19(8) of the Statute as examples of situations when evidence can be given in the absence of ongoing proceedings (for instance, when considering admissibility or jurisdictional issues). The prosecution refers to Article 56 of the Statute which enables evidence to be taken during a unique investigative opportunity.²⁰
12. The prosecution submits that this proposed measure would enhance the rights of the accused, by contributing to an earlier conclusion of these proceedings than otherwise will be the case;²¹ it would be to the advantage of the parties and the victims; and the pending witnesses would similarly benefit from this measure because of the “continuing stress [of] the indefinite postponement of their testimony”.²² Accordingly, it is suggested that the Chamber should now

¹⁷ ICC-01/04-01/06-2565-Red, paragraph 9.

¹⁸ ICC-01/04-01/06-2565-Red, paragraph 9.

¹⁹ ICC-01/04-01/06-2565-Red, paragraph 9.

²⁰ ICC-01/04-01/06-2565-Red, paragraph 10.

²¹ ICC-01/04-01/06-2565-Red, paragraph 10.

²² ICC-01/04-01/06-2565-Red, paragraph 11.

hear “provisional” evidence, which can later be incorporated into the trial proceedings if the stay is lifted by the Appeals Chamber.²³

The defence submissions

13. The defence indicated in its response that when it was contacted by the Prosecutor on 13 September 2010 by telephone in order to disclose the identity of intermediary 143, it responded (on 14 September 2010) by indicating that it “intends to conform strictly with the terms of the decision of the Trial Chamber, which declared the permanent stay of proceedings”. The defence suggested to the prosecution that whilst the stay of proceedings is in place, the Prosecutor is disabled from continuing with the proceedings in any way, including by an attempt to disclose fresh items of evidence.²⁴

14. The defence submits that the statutory provisions relied on by the prosecution are unrelated to the present circumstances, and accordingly they are of no assistance. They concern, first, the pre-investigation stage, when there is a risk that evidence may become unavailable (Article 18(6) of the Statute); second, securing statements or testimony in the context of an admissibility challenge, or completing evidential steps that had commenced prior to an admissibility challenge (Article 19(8) of the Statute); and, third, the role of the Pre-Trial Chamber in enabling the prosecution to take advantage of unique investigative opportunities (Article 56 of the Statute). It is suggested that these provisions do not contribute to an analysis of whether it is appropriate for the Chamber to hear provisional evidence when the trial has been permanently stayed,²⁵ particularly since they do not relate to the present circumstances: oral evidence before the Chamber in the context of a trial.²⁶

²³ ICC-01/04-01/06-2565-Red, paragraphs 10 and 12.

²⁴ ICC-01/04-01/06-2567, paragraphs 5 and 6.

²⁵ ICC-01/04-01/06-2567, paragraph 11.

²⁶ ICC-01/04-01/06-2567, paragraph 12.

15. It is argued that the application is tantamount to asking the Chamber to lift the stay, without formally applying. It is suggested that the Appeals Chamber alone now has authority to take this substantive step.²⁷
16. Finally, the defence observes that the prosecution has failed to address the second basis for imposing the stay, namely the Prosecutor's clearly evinced intention not to implement the Chamber's orders if he considers that they conflict with this interpretation of his other obligations.²⁸

The OPCV's submissions

17. The OPCV submits that the Chamber decided that once disclosure of the identity of intermediary 143 is effected, the obstacles to continuing the trial will have been removed.²⁹ Accordingly, it is argued that the procedure suggested by the prosecution is appropriate.³⁰
18. Furthermore, the OPCV suggests that given the offer by the prosecution to disclose the identity of intermediary 143, the Chamber should lift the stay of proceedings and resume the trial.³¹ It is argued that this step will accord with the interests of justice and the multiple interests engaged by the present case.³²

The submissions of the legal representatives (Team VO1)

19. Essentially, the legal representatives submit that as the identity of intermediary 143 can now be disclosed, it is unnecessary to maintain the stay

²⁷ ICC-01/04-01/06-2567, paragraphs 13 and 14.

²⁸ ICC-01/04-01/06-2567, paragraphs 15 – 21.

²⁹ ICC-01/04-01/06-2566-Conf, paragraph 11.

³⁰ ICC-01/04-01/06-2566-Conf, paragraph 12.

³¹ ICC-01/04-01/06-2566-Conf, paragraph 13.

³² ICC-01/04-01/06-2566-Conf, paragraphs 14 and 15.

of proceedings.³³ It is suggested that the prosecution's proposed provisional testimony is appropriate.³⁴ The representatives request that they also receive details of his identity.³⁵

II. Analysis and conclusions

20. As set out *supra* (paragraphs 1 and 2), the Chamber imposed the stay of proceedings for two reasons. The Chamber recognised that the first basis (the failure of the Prosecutor to comply with its order to disclose forthwith the identity of intermediary 143 to the defence only) was likely to be time-limited, in that once protective measures acceptable to the prosecution are in place, the Prosecutor would no doubt agree to disclosure.³⁶ However, the Chamber set out the second basis, as follows:

21. The second problem, however, reveals a more profound and enduring concern. The Prosecutor, by his refusal to implement the orders of the Chamber and in the filings set out above, has revealed that he does not consider that he is bound to comply with judicial decisions that relate to a fundamental aspect of trial proceedings, namely the protection of those who have been affected by their interaction with the Court, in the sense that they have had dealings with the prosecution. Essentially, for the issues covered by Article 68 in this way, he appears to argue that the prosecution has autonomy to comply with, or disregard, the orders of the Chamber, depending on its interpretation of its responsibilities under the Rome Statute framework. [...]

[...]

27. 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. The judges, not the Prosecutor, decide on protective measures during the trial, once the Chamber is seized of the relevant issue, as regards victims, witnesses and others affected by the work of the Court, and the prosecution cannot choose to ignore its rulings. It is for the Chamber to determine whether protective measures are necessary (following consultation with the VWU under Article 68(4) of the Statute); their nature; and whether they are consistent with the accused's right to a fair trial. These are issues for the Court, and the Court alone, to determine, having heard submissions and having considered all the information the judges consider necessary and relevant. The Prosecutor now claims a separate authority which can defeat the orders of the Court, and which

³³ ICC-01/04-01/06-2569-Conf, paragraph 1.

³⁴ ICC-01/04-01/06-2569-Conf, paragraph 2.

³⁵ ICC-01/04-01/06-2569-Conf, paragraphs 4 and 5.

³⁶ ICC-01/04-01/06-2517-Red, paragraph 20.

thereby involves a profound, unacceptable and unjustified intrusion into the role of the judiciary.

28. The Prosecutor has chosen to prosecute this accused. In the Chamber's judgment, he cannot be allowed to continue with this prosecution if he seeks to reserve to himself the right to avoid the Court's orders whenever he decides that they are inconsistent with his interpretation of his other obligations. In order for the Chamber to ensure that the accused receives a fair trial, it is necessary that its orders, decisions and rulings are respected, unless and until they are overturned on appeal, or suspended by order of the Court.³⁷

21. This second element of the Chamber's Decision has not been addressed at all in the submissions of the prosecution (instead it receives a passing reference, as part of the procedural history),³⁸ and the OPCV has misrepresented the Decision of the Chamber, by suggesting that the stay of proceedings related solely to the "temporary" issue of intermediary 143's identity.³⁹

22. In light of the submissions of the prosecution and the OPCV, it is necessary to repeat and emphasise that justice can no longer be done in this case whilst the Prosecutor continues to reserve to himself the right not to implement the Chamber's orders if he is of the view that they conflict with his interpretation of his other obligations: as a result, the judges will have lost control of a significant aspect of the trial proceedings. Indeed, the Chamber may not even be aware of instances when its Decisions are not being implemented if this approach is permitted. This serious infringement of the Rule of Law applies equally to proceedings in which "provisional" evidence is received as it does to a resumed trial. The guarantees of a fair hearing would be absent in both situations. By Article 64 (2) of the Statute, the Chamber is enjoined to ensure that the trial of the accused is conducted with full respect for his rights. The Chamber is unable to discharge this obligation whilst the Prosecutor refuses to accept the authority of the Court. Compliance with judicial orders lies at the heart of the principle of the rule of law – it is an irremovable and fundamental

³⁷ ICC-01/04-01/06-2517-Red, paragraphs 21, 27 and 28.

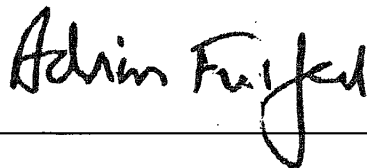
³⁸ ICC-01/04-01/06-2565, paragraph 4.

³⁹ ICC-01/04-01/06-2566-Conf, paragraph 11.

ingredient of a fair criminal trial, absent which the proceedings are *ipso facto* vitiated.

23. For these reasons, the application is refused.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 24 September 2010

At The Hague, The Netherlands