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I. International Criminal Court

Four years into *Prosecutor v. Thomas Lubanga Dyilo*, it is apparent that the Office of the Prosecutor ("OTP") and the Court still have vastly different ideas about the use of confidential information. For the second time,[1] the Trial Chamber has ordered the case dismissed for prosecutorial misconduct[2] and the Appeals Chamber has set aside the order.[3]

A. THE PROSECUTOR AND THE TRIAL CHAMBER ON A COLLISION COURSE

The dispute arose after the Court ordered the identity of a confidential informant (an "intermediary") disclosed to the defense. In common domestic criminal cases, it occasionally occurs that the judge, usually after an in camera hearing with the informant or his/her "handler" present, will conclude that the informant has exculpatory evidence that is necessary to the defense.[4] In such cases, the prosecution must either disclose the identity of the

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1. The first time occurred on June 13, 2008. "In a high-level and rare difference of opinion with the UN" on the eve of trial, Trial Chamber I suspended the proceedings indefinitely and ordered Lubanga released after finding that "the widespread use by the Prosecution of confidentiality agreements under Article 54(3)(e) [went well] beyond the limited use delineated in the statute made it impossible" for Lubanga to receive a fair trial under such circumstances. The Appeals Chamber affirmed the Trial Chamber decision, but reinstated the case since the issues had been resolved in the meantime. Don Shaver, *International Criminal Court Begins First Trial: Case was Nearly Dismissed Earlier for Prosecutorial Abuse*, 3 INT'L CRIMINAL L. COMM. NEWSL., 1, 4 n.45 (2009), *available at* http://meetings.abanet.org/webupload/commupload/IC935000/newsletterpubs/International.Criminal.Law.NewsletterJan.2009.pdf.

2. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Trial Chamber Redacted Decision on Intermediaries, ¶ 150 (May 31, 2010).

3. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 entitled '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,' (Oct. 8, 2010) [hereinafter Judgment].

4. *See* People v. Hobbs, 873 P.2d 1246 (Cal. 1994).

informant or suffer a dismissal of the case.[5] The question indirectly raised by this case was the extent to which this procedure applies on the international level.

The matter came about after the defense recalled certain alleged child soldier witnesses and their parents who recanted their earlier testimonies, stating that they had been pressured by investigators for the OTP.[6] To rebut these statements, the Prosecution called OTP investigators and a previously confidential "intermediary" (number 321) who described how "intermediaries," who were usually local residents or involved with NGOs, would locate former child soldiers and bring them to the OTP investigators, who would then interview them and determine if they would be good witnesses. However, this testimony led to the disclosure of unspecified new information involving another intermediary (number 143), who was still confidential and still working in the field.[7] In a closed session, the defense set forth to the Court why they could not adequately cross examine number 321 until they knew who number 143 was, and the Court apparently accepted this proposition.[8] On May 12, the Court ordered disclosure of number 143's identity only (no appearance required) to the defense once the necessary protective measures were implemented by the Victim Witness Unit of the Court ("VWU").[9] The Prosecution balked, fearing that number 143's safety would still be jeopardized, and it requested a stay in the proceedings to appeal the Court's order.[10] On June 2, the Court denied this request.[11]

On July 5, the VWU notified the Court that appropriate protective measures had been worked out with number 143, and the trial and cross exam of number 321 was set to resume the next day.[12] However, prior to resuming the next day, the Prosecution reported that number 143 was having second thoughts about the adequacy of the protective measures and was requesting an additional delay until the end of the week so that number 143 could further review the measures in writing.[13] The Defense objected to any further delays, and the Trial Chamber agreed with the Defense. The Court feared that the delay could "inevitably be substantial, and that delay has to be seen in the context of the very considerable delays that have already been experienced in relation to this trial."[14] The Court denied the request and ordered the Prosecution to immediately disclose the identity of number 143.[15] To alleviate the fears of the Prosecution, the Court imposed a protective order preventing dissemination beyond counsel and their agents.[16] The Prosecution re-

5. *Id.* at 972.

6. Wairagala Wakabi, *Lubanga Trial At ICC Resumes Next Week*, THE LUBANGA TRIAL AT THE INTERNATIONAL CRIMINAL COURT, Oct. 19, 2010, http://www.lubangatrial.org/2010/10/19/lubanga-trial-at-icc-resumes-next-week/.

7. Prosecutor v. Thomas Lubanga Dyilo, ¶ 7.

8. *Id.*

9. *Id.* ¶ 5.

10. *Id.*

11. *Id.*

12. *Id.* ¶ 7.

13. Prosecutor v. Thomal Lubanga Dyilo, Prosecution's Document in Support of Appeal against Trial Chamber I's Decision of 8 July 2010 to Stay the Proceedings for Abuse of Process, Case No. ICC-01/04-01/06, ¶ 31 (July 30, 2010).

14. Judgment, ¶ 7.

15. *Id.*

16. *Id.* ¶ 7.

quested that the order be stayed while they prepared a request to appeal this order.[17] The Court reluctantly put the matter over one more day.

B. "Profound and Enduring Concern"

At this point, the trial, which would be the first for the ICC, was close to completion. Both the prosecution and the defense had completed their cases, and the prosecution was presenting its rebuttal evidence. The start of the trial had been delayed six months from July 2008 to January 2009. Originally estimated to be completed in twelve months, it was now well into its eighteenth month. There had been frequent logistical problems. The Court and parties were anxious to conclude it without further delays. This was not a good time for a major confrontation between the Court and the OTP. Clearly, everyone's patience was wearing thin.

The next morning, with the parties reassembled, the Court made a last-ditch effort to see if the defense could proceed with cross-examination of 321 and reserve those issues relating to number 143 to a later time.[18] The defense replied that these requests were not feasible. The Court then ordered immediate disclosure of the identity one more time, specifically finding that the protective measures contemplated by VWU would be adequate.[19] The Prosecution requested adjournment to the afternoon to respond.

Upon reconvening in the afternoon, the Prosecution requested the Court to reconsider its order.[20] The Court adjourned and did so, but on returning later, once again ordered immediate disclosure.[21] The Prosecution once again requested a brief delay to allow it to confer with the VWU regarding the protective measures.[22] The Prosecution argued that this delay was necessary because it was "bound by autonomous statutory duties of protection that [it] had to honour at all times" and that it had to be satisfied that disclosure would not violate this ethical obligation.[23] In explaining its refusal to comply with the Court's order at this time, the Prosecutor stated:

> The Prosecution is sensitive to its obligation to comply with the Chamber's instructions. However, it also has an independent statutory obligation to protect persons put at risk on account of the Prosecution's actions. It should not comply, or be asked to comply, with an Order that may require it to violate its separate statutory obligation by subjecting the person to a foreseeable risk. 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 authority of the Chamber, it is instead a reflection of the Prosecution's own legal duty under the Statute.[24]

The Court convened the next day, and, in view of this reply, ordered the case "stayed as an abuse of process of the Court" (tantamount to a dismissal) due to the deliberate refusal

17. *Id.*
18. *Id.* ¶ 8.
19. *Id.* ¶ 9.
20. *Id.* ¶ 10.
21. *Id.*
22. *Id.* ¶ 11.
23. *Id.*
24. *Id.* ¶ 12.

to follow an order of the Court.[25] Of more concern to the Court (a "profound and enduring concern"), however, was the perceived implication by the Prosecution that they could pick and choose which orders of the Court to follow, based on their interpretation of the Statute.[26] The Court made the point in particular that once the trial starts, the protection of witnesses becomes the Court's responsibility, not the Prosecution's, and they have the last word on the adequacy of protection measures, not the Prosecution.[27]

C. The Appeals Chamber Decision

Unfortunately, this ruling did not prevent the further delays, which the Trial Chamber feared. The trial was suspended while the appeal was pending from July through October, at which time the Appeals Chamber reversed the dismissal order, reinstating the trial. The Appeals Chamber, which was, no doubt, reluctant to see the ICC's first trial end in a dismissal for prosecutorial abuse of process, found that the Trial Chamber had not done enough to resolve the issue prior to ordering the indefinite stay of proceedings. By the time the appeal was decided, the Prosecution had completed its review of the protective measures and 143 had agreed to disclosure. By November, 321 was back on the stand testifying. The trial was expected to conclude by the end of the year.

In its ruling, the Appeals Chamber confirmed that "when there is a conflict between the Prosecutor's perception of his duties and the orders of the Trial Chamber, the Trial Chamber's orders must prevail."[28] However, the Appeals Chamber explained that the dismissal sanction is a "drastic remedy" which has the potential to frustrate the overall objectives of the justice system.[29] It is an "exceptional" remedy with a "high threshold" and should be used only once it is no longer possible to salvage a fair trial from the proceedings.[30] In this case, the Appeals Chamber found that this threshold had not yet been reached because the Trial Chamber had not attempted to use monetary sanctions to compel disclosure, and had not made a finding that there was nothing further that could be done to salvage the trial.[31] The Appeals Chamber explained that it was not necessarily holding that monetary sanctions were always a necessary prerequisite to dismissal but simply that there was nothing in the record to show that they had been considered.[32]

D. The Unanswered Question: Does the prosecutor have an independent ethical obligation to protect witnesses to whom it has promised confidentiality?

In its ruling, however, the Appeals Chamber did not resolve the dispute between the Prosecution and the Court and left some very important questions unanswered. Most notably, it did not resolve whether or not the Prosecution does have an independent ethi-

25. *Id.* ¶ 13.
26. *Id.* ¶ 15.
27. *Id.*
28. *Id.* ¶ 48.
29. *Id.* ¶ 55.
30. *Id.*
31. *Id.* ¶ 59.
32. *Id.* ¶ 60, n.135.

cal obligation toward those witnesses which the Prosecution has recruited to cooperate at personal risk to their life and safety, nor did it provide guidance to the Court and parties regarding how to resolve the contest of wills that develops when an attorney believes that an order of the Court places him or her in an ethical dilemma. Simply stating that "the Court's decision is final" gives short shrift to this important question.

Attorneys are generally perceived to have a number of universal ethical obligations, similar to those contained in the ICC Rules of Professional Conduct.[33] These rules include such ethical obligations as not disclosing client confidences,[34] not undertaking representation if there is a conflict of interest with a former or current client,[35] and representing the client zealously and with a minimum required level of competence.[36] Prosecuting attorneys generally also have a number of ethical obligations as relating to their positions of trust.[37] One such obligation deals specifically with protecting the identity of confidential informants. Customary criminal law provides the prosecution with a "Privilege of Non-disclosure" due to this ethical obligation.[38] Under this privilege, if disclosure is ordered over the objection of the prosecution, the prosecution has the election to forfeit the evidence related to the informant or dismiss the case, if the former is not feasible.[39] This election is not considered an abuse of process or bad faith. Thus, the Prosecution's suggestion that a similar process should apply here is not without precedent.

The Rome Statute does not expressly contain such a privilege but does impose a similar duty to protect on the Prosecution, which can equally be viewed as an ethical obligation. Article 68(1) imposes a duty on both the Court and OTP to "protect the safety, physical and psychological well-being and privacy of victims and witnesses."[40] The Appeals Chamber confirmed that the Trial Chamber does have the last word when protection issues arise at trial, but did not comment on the dual nature of this obligation.[41] However, the Trial Chamber took the position that the entire responsibility for protecting witnesses transferred to them once the trial started.[42] A fair reading of the Statute suggests that this is not the case. Article 68(1) initially assigns the duty of protecting witnesses to the Court, but then adds that "[t]he Prosecutor shall take such measures *particularly* during the investigation and prosecution of such crimes [emphasis added]."[43] It would not seem logical to read "particularly" to mean "only." Moreover, the "prosecution" of a crime is commonly interpreted to include the trial of the offense, not just the investigation. Thus, it seems clear that this joint duty to protect is an on-going duty of both the Court and the Prosecu-

33. Code of Professional Conduct for Counsel, Resolution, ICC-ASP/4/Res.1 (Dec. 2, 2005).

34. *Id.* art. 8.

35. *Id.* arts. 12, 16.

36. *Id.* art. 7.

37. The OTP has a general duty to "uphold the highest standards of . . . integrity." Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, Regulation 17.

38. Illinois v. Gates, 462 U.S. 213 (1983).

39. MCCORMICK ON EVIDENCE § 111 (John W. Strong ed., 1999); *see* CAL. EVID. CODE §§ 1040-47 (West 2011).

40. Prosecution's Document in Support of Appeal Against Trial Chamber I's Decision of 8 July 2010 to Stay the Proceedings for Abuse of Process, *supra* note 13, ¶ 62.

41. Judgment, ¶ 48.

42. Under the Trial Chamber's interpretation, the prosecution is no longer vested with any duty of protection once a Chamber is "seized of the matter and has ruled." Trial Chamber Redacted Decision on Intermediaries, *supra* note 2, ¶ 29.

43. Rome Statute of the International Criminal Court, Article 68(1).

tion.[44] In view of the fact that the Court regulations require that any time the conditions of a protective measure are being altered, "the Chamber shall seek to obtain, whenever possible, the consent of the person" protected,[45] and it appeared to the Prosecution that the Court was preparing to order disclosure without the party's consent even though it might still be possible to get that consent, it is easy to see why they felt that they were in an ethical dilemma.

In their decision, the Appeals Chamber clearly affirmed that the Trial Chamber orders must be followed[46] and that the Prosecution's "willful non-compliance constituted a clear refusal to implement the orders of the Chamber," finding that the Prosecutor's refusal to be "disingenuous."[47] However, this characterization belittles the nature of the Prosecution's joint ethical obligation arising out of Article 68(1). The issue here was not *what* decision the Court made. The Court has to make the final decision, and the Prosecution did not contend otherwise. The issue here was how the decision was made. A trial court must make a myriad of decisions during a trial, and many decisions may be made summarily without extended consultation with the attorneys. However, it is generally recognized that when an objection is lodged by a party that a court order conflicts with an attorney's ethical obligation, the Court should proceed carefully, giving increased deference to the party's concern, and a chance for a full hearing on the issue. Every effort should be made to resolve the issue short of imposing sanctions.[48] Taking such extra time at the trial level, even when it disrupts an already impacted trial schedule, usually pays off dividends when the case is reviewed by the Appeals Court. The Prosecution's ethical obligation to protect a confidential witness in this case should have been viewed as solemnly as any of the ethical obligations of defense attorneys, and the dilemma which the Court's order created for the OTP deserved more extensive consideration by the Court than it received.

A decision whether or not to proceed with a particular charge or issue based on risk to an informant is one that the Prosecution is uniquely qualified to make. Courts generally do not consider it an insult or an affront to their authority when the Prosecution must make such a decision. Rather, courts will generally welcome such a decision in order to avoid putting themselves in the delicate position of feeling morally responsible if an informant whom they have ordered disclosed is subsequently the unfortunate victim of an untoward occurrence.

44. Prosecution's Document in Support of Appeal Against Trial Chamber I's Decision of 8 July 2010 to Stay the Proceedings for Abuse of Process, *supra* note 13, ¶¶ 62-64.

45. Regulations of the Court, ICC-BD/01-01-04, Regulation 42(4).

46. Judgment, ¶ 48.

47. *Id.* ¶ 46.

48. The prosecution suggested a number of alternate sanctions that could have been considered before the ultimate sanction of dismissal would apply, including exclusion of witnesses or evidence on particular issues (so-called "issues sanctions") or a "partial dismissal" of one or more, but not all, separate charges. Each of these suggestions are consistent with established jurisprudence, but did not appear to have been considered by the Trial Chamber. Prosecution's Document in Support of Appeal Against Trial Chamber I's Decision of 8 July 2010 to Stay the Proceedings for Abuse of Process, *supra* note 13, ¶¶ 75, 82.