

# **A TURBULENT ADOLESCENCE AHEAD: THE ICC'S INSISTENCE ON DISCLOSURE IN THE *LUBANGA* TRIAL**

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## ABSTRACT

*The completion of the first trial at the International Criminal Court (ICC) against Thomas Lubanga Dyilo was a great milestone for international criminal justice. Despite this obvious accomplishment, this article argues that the Trial Chamber's solutions to two evidentiary problems will restrict the ICC's potential to effectively hear future cases. First, this article presents the details behind the two evidentiary problems of disclosure: that of exculpatory confidential information and that of the identities of the prosecutor's intermediaries. This analysis is exhaustive in order to highlight the challenges that the Prosecutor faced and the manner in which the ICC Chambers responded. The article then demonstrates how the Chamber's focus on the fairness of the Lubanga trial has undermined the ICC's greater goal of ending impunity and achieving accountability for international criminal acts. This article seeks to highlight two areas of concern for the ICC's future as an international court which, if left unaddressed, may harm international justice disproportionately more than the benefits conferred upon it by the Lubanga case.*

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## INTRODUCTION

The year of 2012 should be viewed as a transitional time for international criminal law. If Nuremberg and Tokyo represented the embryonic stage of the field of international criminal justice and the *ad hoc* tribunals its youth, the advent of the International Criminal Court (“ICC”) should signal the adolescence of the field. Similar to a healthy and eager teenager, international criminal justice is currently able and excited to stand on its two feet.

This exciting transition is certainly deserved. The last two fugitives of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) are in The Hague, with Radovan Karadžić on trial and Radko Mladić scheduled to start trial soon. At the Special Court for Sierra Leone (“SCSL”), the last defendant, Charles Taylor, was recently convicted and sentenced to fifty years in prison. In the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), the trial of Case File 002 is proceeding, as is the quest to appoint a third International Co-Investigative Judge, with the hope that the investigation of Case Files 003 and 004 will also go forth. Finally, the ICC reached a judgment in its first case, stemming from the situation in the Democratic Republic of the Congo (“DRC”), against Thomas Lubanga Dyilo. Many hope that while the flame of the *ad hoc* tribunals is dying, their lessons and goals have been effectively transplanted to the ICC. Now, ten years after the ICC’s formation, it has become clear that the ICC can function and that international criminal justice can become a permanent, respected field of law.

Yet, despite these undisputed success stories, those in the international criminal justice field are warranted in asking if the future will look equally as bright. Like all teenagers, the field of international criminal justice also seems to be faced with some existential doubts. The main issue of concern revolves around the shape that the field is likely to adopt in the future. Or, in other words, can the ICC fill the shoes of the *ad hoc* tribunals that it is replacing? If yes, what will it take for this to happen?

While these are complicated questions, this article looks at the evidentiary issues of the *Lubanga* trial and predicts that the ICC’s current stance on two issues of disclosure will create future practical problems for the Court. During the six years in which the *Lubanga* case moved from indictment to conviction, evidentiary issues plagued the proceedings. In its effort to guarantee the right of the accused to a fair trial—which includes the right to receive exculpatory evidence—the Court in 2008 and 2010 ordered a stay of the proceedings and the provisional release of the accused. Through its insistence on disclosure of relevant evidence to the

defense, the Court was able to ensure a fair trial. This article, however, demonstrates how the Court's decisions have also come at a certain expense and predicts that these two evidentiary decisions will likely contribute to a turbulent adolescence for the field of international criminal justice.

Like all national and international criminal courts, the ICC has to strike a balance between a fair trial for the accused and the need to conduct investigations. For the ICC this balance is complicated by the fact that, thus far, all of the Court's investigations have taken place in developing countries rife with conflict. In the *Lubanga* trial, the ICC Chambers prioritized fairness over flexibility on two separate occasions. First, the Chambers stopped the Office of the Prosecutor ("OTP") from *sua sponte* determining how to disclose exculpatory confidential information and insisted that the judges, not the OTP, undertake such a determination. Second, the Chambers held that the OTP must reveal the identities of intermediaries that may have influenced its witnesses.

This article has two larger goals. First, it aims to portray the events surrounding the two issues of disclosure in a comprehensive manner, one that integrates various ICC decisions and critically examines the more subtle themes present in each decision. Such a comprehensive analysis provides a much more thorough picture than previous fragmented attempts.<sup>1</sup> Second, this article argues that the insistence on fairness may adversely affect the OTP's power to investigate future atrocity cases. It contends that the ICC Chamber's decision on the disclosure of exculpatory confidential information has damaged the OTP's flexibility to investigate and prosecute future atrocities. It also contends that the Chamber's decisions on disclosure of the identity of intermediaries can have a chilling effect on the OTP's investigative work. As a result, this article predicts that the ICC will experience practical difficulties in the years to come.

This article proceeds in five parts. Part I presents a brief description of the two disclosure issues that plagued that Lubanga trial. Part II provides an analysis of how the Court dealt with the issue of disclosure of

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1. For some analyses of these issues before the Final Judgment, see Sabine Swoboda, *The ICC Disclosure Regime—A Defence Perspective*, 19 CRIM. L. F. 449, 450 (2008); Kai Ambos, *Confidential Investigations (Article 54(3)(E) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law*, 12 NEW CRIM. L. REV. 543, 547 (2009); Bernard Kuschnik, *International Criminal Due Process in the Making: New Tendencies in the Law of Non-Disclosure in the Proceedings Before the ICC*, 9 INT'L CRIM. L. REV. 157, 185 (2009); Victor Tsilonis, *Thomas Lubanga Dyilo: the Chronicle of a Trial Foretold?*, 5 INTELLECTUM 27 (2008), available at [http://www.intellectum.org/articles/issues/intellectum5/en/ITL05p027042\\_Thomas\\_Lubanga\\_Dyilo\\_The%20Chronicle\\_of\\_a\\_Case\\_Fortold\\_Victor\\_Tsilonis\\_SLSA2009.pdf](http://www.intellectum.org/articles/issues/intellectum5/en/ITL05p027042_Thomas_Lubanga_Dyilo_The%20Chronicle_of_a_Case_Fortold_Victor_Tsilonis_SLSA2009.pdf).

exculpatory evidence, and Part III shows the Court's decision on the issue of intermediaries. Part IV then outlines how the Court's decisions have affected the balance between prosecuting a case and having a fair trial. Finally, Part V concludes the article by highlighting the potential of a new, more restrained role for the ICC than the one held by previous ad hoc tribunals.

### I. BRIEF DESCRIPTION OF DISCLOSURE ISSUES IN THE LUBANGA CASE

The OTP of the ICC has jurisdiction to investigate the commission of atrocities in three separate instances.<sup>2</sup> The jurisdictional power most pertinent to this article is that the ICC can investigate when atrocities are committed in the territory of a state party to the Rome Statute, and the state party has referred the investigation of these atrocities to the OTP.<sup>3</sup> When a referral is issued, the OTP first opens the investigation of a Situation,<sup>4</sup> through which it investigates all the atrocities alleged in the referral. In the second stage, the OTP brings forth criminal prosecutions against particular individuals who allegedly participated in the atrocities of the Situation.

The Democratic Republic of the Congo ("DRC") was one of the first signatories of the Rome Statute, signing on April 11, 2002. It has been a member of the ICC since its first day of existence—July 1, 2002. On April 19, 2004, the ICC OTP announced that the President of the DRC had, through a referral, asked it to investigate alleged atrocities committed in the DRC territory.<sup>5</sup> Soon thereafter, on June 23, 2004, the OTP announced its decision to open investigations into the DRC Situation.<sup>6</sup> It is now known that the OTP had been observing the Situation in the DRC province

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2. Rome Statute of the International Criminal Court art. 13, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] (clarifying that the ICC has jurisdiction over (i) cases referred to it by a State Party, (ii) referrals by the UN Security Council, and (iii) *sua sponte* investigations of the PROSECUTOR in accordance to article 15).

3. *Id.* art. 14.

4. For purposes of clarity, the word "situation" will be capitalized when referring to a Situation under ICC investigation.

5. Press Release, Office of the Prosecutor, Int'l Crim. Ct. [ICC], OTP Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004), [http://www.icc-cpi.int/EN\\_Menu/icc/situations%20and%20cases/situations/situation%20icc%200104/press%20releases/pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx](http://www.icc-cpi.int/EN_Menu/icc/situations%20and%20cases/situations/situation%20icc%200104/press%20releases/pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx).

6. Press Release, Office of the Prosecutor, ICC, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation (June 23, 2004), [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/press%20releases/press%20releases%202004/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20nothern%20uganda.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/press%20releases/press%20releases%202004/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20nothern%20uganda.aspx).

of Ituri since 2003—where the alleged criminal acts perpetrated by Lubanga took place.<sup>7</sup>

The case against Thomas Lubanga Dyilo stemmed from the OTP's investigation of the Situation in the DRC. It was the first case before the ICC, and the accused was in ICC custody since 2006.<sup>8</sup> During trial, the OTP accused Lubanga of the single crime of enlisting child soldiers in the creation and operation of his militia.<sup>9</sup> In order to prove its case, the OTP had to collect information and present evidence to the ICC's Trial Chamber. It is now known that the OTP in this case collected evidence from various organizations on the ground in the DRC and also used local intermediaries to find witnesses against Lubanga.<sup>10</sup> These two prosecutorial strategies shaped the evidentiary issues of the present case, and problems with that evidence began to appear even before the trial commenced.

## II. DISCLOSURE OF EXCULPATORY EVIDENCE

Disclosure of exculpatory evidence was a contentious issue in the *Lubanga* trial. This section presents the ambiguity in the ICC law surrounding the disclosure of confidential information. It then outlines the facts behind the *Lubanga* decision and details the disclosure solution that was imposed by the ICC Chambers. Finally, through the example of the UN, this section demonstrates how the judicial decisions affected the OTP's work in this case.

### A. *The Legal Ambiguity*

A textual interpretation of the ICC Statute and Rules on the issues of confidential information and disclosure to the defense leaves many issues unresolved;<sup>11</sup> notably, the rules fail to answer which obligation—

7. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06OA 12, Judgment on the Appeal against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008" (Oct. 21, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf>.

8. See *Timeline of the Case*, ICC, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx) (last visited June 18, 2013).

9. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, ¶ 404 (Jan. 27, 2007).

10. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment pursuant to article 74 of the Statute, ¶¶ 178–484 (Mar. 14, 2012) [hereinafter Final Judgment].

11. Swoboda, *supra* note 1, at 450.

confidentiality or disclosure—is more important for the OTP. Instead, there is a clear mismatch between Rules 54(3) and 67(2).<sup>12</sup> Given this ambiguity, it is useful both to examine how other domestic and international courts deal with such conflicting obligations and to expose existing trends.

### 1. *Textual Ambiguity at the ICC*

The use of confidential information by the OTP may clash with the OTP's obligation to disclose exculpatory information to the defense. In order to resolve this potential clash, the Rome Statute and the ICC's Rules of Procedure and Evidence govern both issues. The legal framework is not very clear; there are "numerous articles [that] govern time and mode of disclosure . . . [many of which are] open to the resolution of the court."<sup>13</sup>

First, various articles set out the duty of the OTP to disclose exculpatory information to the defense. Under Article 67(2) of the Statute, the OTP must disclose to the defense

evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.<sup>14</sup>

Additionally, under Rule 77, the OTP shall

permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.<sup>15</sup>

Second, some provisions allow the OTP to gather confidential information. Article 54(3)(e) of the Rome Statute instructs the OTP "not to disclose, at any stage of the proceedings, documents or information that

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12. Ambos, *supra* note 1, at 552–55; WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 817, 818 (2011).

13. Swoboda, *supra* note 1, at 450.

14. Rome Statute, *supra* note 2, art. 67(2).

15. ICC, *Rules of Procedure and Evidence*, Rule 77 (2013) [hereinafter ICC, *Rules of Procedure and Evidence*], available at [http://www.icc-cpi.int/en\\_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf](http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf).

the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.”<sup>16</sup> Rule 82 of the Rules of Procedure and Evidence reaffirms the protection of confidentiality for the material collected under Article 54 of the Rome Statute.<sup>17</sup> Finally, Rule 83 clarifies that the OTP must request an *ex parte* hearing for obtaining a ruling under Article 67(2) when there is uncertainty about the requirement to disclose evidence that “tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of Prosecution evidence.”<sup>18</sup>

In general, the Rome Statute and the Rules of Procedure and Evidence have established a detailed system for the disclosure of evidence to the defense. Under this system, the OTP is governed by broad disclosure obligations.<sup>19</sup> It has been argued that these rules endow the Trial Chamber with inquisitorial features, as it has the power to make final determinations in cases of doubt.<sup>20</sup> While these provisions are sufficient to deal with the disclosure of the intermediaries’ identity,<sup>21</sup> they do not resolve the tension between the OTP’s duties of confidentiality towards its sources and its duty of disclosure of exculpatory evidence to the defense.<sup>22</sup>

## 2. *Disclosure of Exculpatory Evidence in Domestic Courts and International Human Rights Courts*

Disclosure to the defense has historically been a central, powerful precept of domestic law all throughout the world.<sup>23</sup> In common law countries, disclosure to the defense is a key element of a fair trial.<sup>24</sup> In these countries, when other interests clash with the defendant’s rights to access certain materials, the court is allowed to view the potentially

16. Rome Statute, *supra* note 2, art. 54(3).

17. *Id.* art. 82.

18. ICC, *Rules of Procedure and Evidence*, *supra* note 15, Rules 82, 83.

19. Ambos, *supra* note 1, at 547.

20. Kuschnik, *supra* note 1, at 185.

21. *See infra* Part IV; Rome Statute, *supra* note 2, Article 67(2) (“affect the credibility of the Prosecutor’s evidence”).

22. SCHABAS, *supra* note 12.

23. For example, in the United States, the prosecutor’s duty to disclose derives, among others, from *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the State has a duty to disclose evidence known to a prosecutor that is favorable to a defendant’s case and material to his guilt or innocence); Ambos, *supra* note 1, at 556–66.

24. Ambos, *supra* note 1, at 556–66.



exculpatory material *in camera* and to decide on the necessity of disclosing the information to the defense.<sup>25</sup>

In civil law jurisdictions, disclosure to the defense is accomplished by allowing access to the dossier of the case, which includes all information that the Investigative Judge considers useful for the case—both exculpatory and incriminating information.<sup>26</sup> In this process, the Investigative Judge determines what evidence will be disclosed.

For international courts, disclosure is equally important. Disclosure of exculpatory evidence to the defense has been enshrined in fundamental international legal instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.<sup>27</sup> International courts of human rights have also upheld this obligation. The European Court of Human Rights (“ECHR”), for example, held that the obligation to disclose material that may assist the accused stems from the principle of “equality of arms.”<sup>28</sup> As such, a balanced trial in the ICC can only take place if the OTP, which is institutionally superior to the accused, discloses any exculpatory information in his possession to the defense.

Nevertheless, the ECHR has recognized that legitimate reasons for non-disclosure to the defense exist, such as the need to protect the fundamental rights of another individual or an important public interest.<sup>29</sup> In cases in which conflicting interests are present, the Court has held that if the OTP refuses to disclose information to the accused for a legitimate reason, it must provide the information to the court, which will then decide if the accused’s rights are violated by this prosecutorial non-disclosure.<sup>30</sup>

### 3. *Disclosure of Exculpatory Evidence in International Criminal Tribunals*

While disclosure of confidential information is a well-established doctrine of both domestic and international human rights courts derived

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25. *See, e.g.*, Pa. v. Ritchie, 480 U.S. 39 (1987) (holding that the defendant’s “interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for *in camera* review”).

26. Ambos, *supra* note 1, at 556–66.

27. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 11(1), U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 14(1), U.N. Doc. A/6316 (Dec. 16, 1966).

28. *Jespers v. Belgium*, App. No. 8403/78, 27 Eur. Comm’n H.R. Dec. & Rep. 61 (1981).

29. *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831.

30. *Rowe & Davis v. United Kingdom*, 2000-II Eur. Ct. H.R. 287.

from the principle of equality of arms during trial,<sup>31</sup> past international criminal tribunals have not always upheld this doctrine. The earliest and most widely recognized discussions on this topic took place in the context of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), which experienced a shift in its legal position over time as relates to this topic.

Initially, the ICTY considered disclosure of exculpatory information to the accused to be in the public interest.<sup>32</sup> The ICTY also clarified that the disclosure of other information of a similar nature was not an acceptable practice.<sup>33</sup> When the OTP faces a choice between the duty to disclose to the defense and the duty of confidentiality towards his sources, the ICTY held in 1994 that Rule 70 (confidential information) did “not override the OTP’s obligation to disclose pursuant to Rule 68.”<sup>34</sup> As a result, the ICTY initially followed domestic and international jurisprudence on the issue of disclosure.<sup>35</sup>

After the Kosovo war, however, the ICTY’s OTP was receiving information including military and intelligence information from NATO countries, which the provider countries insisted on withholding from both defense and the trial chambers.<sup>36</sup> The defense teams nevertheless pressed on with requests for such disclosure, and the trial chambers of the ICTY agreed with these requests.<sup>37</sup> Since such decisions risked ending the cooperation of NATO countries, which was central to the ICTY’s evidence gathering ability, on June 10, 2004, the ICTY amended its Rules of Procedure and Evidence to condition the disclosure of exculpatory information (“Rule 68”) on the confidentiality agreements (“Rule 70”).<sup>38</sup>

31. Gabrielle McIntyre, *Equality of Arms—Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia*, 16 LEIDEN J. INT’L L. 304 (2003); Swoboda, *supra* note 1.

32. Prosecutor v. Brđjanin and Talić, Case No. IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, § 19 (Int’l Crim. Trib. for the Former Yugoslavia May 23, 2002).

33. Prosecutor v. Blaskić, Case No. IT-95-14-A, Judgment, § 266 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004).

34. McIntyre, *supra* note 31.

35. *Id.*

36. *Id.*; Prosecutor v. Milutinović, Case No. IT-05-87-AR108bis.2, Decision on Request of the United States of America for Review (Int’l Crim. Trib. for the Former Yugoslavia May 12, 2006) (granting the request by the USA and other NATO countries that they not be ordered to reveal their national security information).

37. *See, e.g.*, Prosecutor v. Brđjanin and Talić, Case No. IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002 (Int’l Crim. Trib. for the Former Yugoslavia May 23, 2002).

38. Int’l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 68, U.N. Doc. IT/32/REV. 44 (Dec. 10, 2009) [hereinafter ICTY, Rules of Procedure and Evidence], *available*

This change in the rules safeguarded NATO's cooperation with the ICTY by prioritizing confidentiality over the disclosure of exculpatory information.

In its ensuing decisions, the ICTY gave preference to the interest of the confidentiality of the information provider, placing less priority on the defendant's right to a fair trial. While most decisions on this issue are non-public, some post-2004 decisions indicate how the ICTY gave preference to the confidentiality of an information provider. Slobodan Milosevic, for example, was reminded that Rule 70 restrictions had to be respected.<sup>39</sup> Additionally, under the Rule 70 limitations, Dragoljub Odjanic was not given evidence of NATO actions that his defense considered important to their case.<sup>40</sup>

The ICTY's rules on this point constituted a significant difference from domestic and international precedent—one explained by the importance of NATO's role in those proceedings. Indeed, the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court for Sierra Leone ("SCSL"), and the Extraordinary Chambers in the Courts of Cambodia ("ECCC") prioritize the disclosure of exculpatory evidence, even when this clashes with other obligations.<sup>41</sup> Despite this view, the Special Tribunal for Lebanon ("STL") has adopted the ICTY's standpoint, making it the second international criminal tribunal that prioritizes confidentiality over disclosure.<sup>42</sup> While the STL has not yet heard any cases, its rules indicate that confidentiality will be prioritized in important instances.<sup>43</sup>

On the one hand, similar to the framework of the ECHR, the STL framework strikes a workable compromise between confidentiality and disclosure. It provides that if the OTP has evidence that: "(i) may prejudice ongoing or future investigations, (ii) may cause grave risk to the security of a witness or his family, or (iii) for any other reasons may be contrary to the public interest or the rights of third parties," the trial chamber—*ex parte* and *in camera*—will decide on the method of

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at [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_Rev43\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf) (starting with "Subject to the provisions of Rule 70 . . .").

39. Prosecutor v. Milosevic, Case No. IT-02-54-T, Order on the Prosecutor's Fifth Motion for Variance of Prior Orders of Non-Disclosure (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2004).

40. These requests for disclosure of information by Odjanic culminated in Prosecutor v. Milutinovic, Case No. IT-05-87-AR108bis.2, Decision on Request of the United States of America for Review (Int'l Crim. Trib. for the Former Yugoslavia May 12, 2006).

41. Lukasz Korecki, *Procedural Tools for Ensuring Cooperation of States with the Special Tribunal for Lebanon*, 7 J. INT'L CRIM. JUST. 927, 930 (2009).

42. *Id.* at 937–40.

43. *Id.* at 933.

disclosure, if any, that should be used.<sup>44</sup> The same concept applies for evidence that “may affect the security interests of a State or international entity.”<sup>45</sup>

On the other hand, of the STL’s Rule 118 poses significant problems for the defendant’s rights. Under Rule 118, the STL provides that “[w]here the [OTP] is in possession of information which was provided on a confidential basis and which affects the security interests of a State or international entity or an agent thereof,” the OTP will seek that the information provider lifts the confidentiality.<sup>46</sup> If the information provider refuses to cooperate, not even the STL judges shall have access to the evidence.<sup>47</sup> In such cases, a Special Counsel appointed from a list pre-approved by the information providers shall “review the information that the provider has not consented to being disclosed under Rule 118(C) and shall review the list of counterbalancing measures proposed by the [OTP] under Rule 118(C).”<sup>48</sup> While several factors may further explain why the creators of the STL chose not to trust its judges with confidential information, the present process provides protection by balancing the rights of the accused with the interests of the information providers through the partial exclusion of the STL’s judicial bodies.<sup>49</sup> The “lack of meaningful judicial control” should give rise to plenty of concerns.<sup>50</sup>

#### 4. *Overview of Law: Two Opposing Currents*

The law at the ICC does not clarify which obligation, disclosure of exculpatory evidence, or duty of confidentiality towards information providers is supreme. Looking beyond the ICC, under domestic and international law, a defendant has the right to obtain disclosure of exculpatory information held by the OTP.<sup>51</sup> Recognizing that the OTP has an advantage over the defense in the gathering of evidence due to its institutional power,<sup>52</sup> the principle of equality of arms compels courts to demand that the OTP disclose exculpatory information in its possession

44. Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 116, STL/BD/2009/OI/Rev. 4 (Mar. 20, 2009) [hereinafter Lebanon, Rules of Procedure and Evidence], available at [http://www.stl-tsl.org/images/RPE/RPE\\_EN\\_April\\_2013.pdf](http://www.stl-tsl.org/images/RPE/RPE_EN_April_2013.pdf).

45. *Id.* Rule 117.

46. *Id.* Rule 118.

47. *Id.*

48. *Id.* Rule 119.

49. Korecki, *supra* note 41, at 940.

50. *Id.* at 941.

51. *See supra* Part II.A.2.

52. McIntyre, *supra* note 31, at 272–75.

regardless of the origin of that information.<sup>53</sup> Most notably for the present case, when the obligation to disclose evidence contradicts other priorities of the judicial system, common law courts, civil law courts and international courts of human rights have recognized the need for and guaranteed judicial review.<sup>54</sup> Exculpatory information will be withheld from the defense only after the approval of a judicial body. Despite embracing the disclosure of exculpatory evidence, the ICTY and the STL diverge from other judicial bodies by not requiring judicial review.<sup>55</sup> For these tribunals, exculpatory evidence may in some instances be withheld from the defense without any judicial decision-making. The next section demonstrates how the law was settled by the ICC's Chambers.

### *B. The Problem*

The ICC confronted the problem of disclosing exculpatory evidence from the beginning of the *Lubanga* proceedings. In this section, the analysis demonstrates how this issue became a problem for the OTP of the ICC.

When the *Lubanga* case reached the Pre-Trial Chamber ("PTC") for a hearing on the confirmation of charges on January 29, 2007, the disclosure of exculpatory evidence was an obvious problem. According to the ICC Rules of Procedure and Evidence, prior to the confirmation of charges, the PTC must ensure that disclosure takes place.<sup>56</sup> While the OTP is not required to disclose all evidence at this stage, it must prepare a "document containing the charges,"<sup>57</sup> and it must disclose inculpatory and exculpatory evidence into two separate categories.<sup>58</sup> The bulk of such disclosures must happen as soon as practicable ("bulk rule"), including during the time

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53. McIntyre, *supra* note 31.

54. Ambos, *supra* note 1, at 556–66.

55. ICTY Rules of Procedure and Evidence, *supra* note 38, Rule 70; Lebanon Rules of Procedure and Evidence, *supra* note 44, Rule 116.

56. ICC, Rules of Procedure and Evidence, *supra* note 15, Rule 61(3).

57. Rome Statute, *supra* note 2, art. 61(3)(a); ICC, Rules of Procedure and Evidence, *supra* note 15, Rule 121(3); Regulations of Court, ICC-BD/01-01-04, Regulation 51 (May 26, 2004).

58. Perhaps based on ICTY practice where Rules 66 and 68 deal with inculpatory and exculpatory evidence; *see also* Ambos, *supra* note 1, n.29; Prosecutor v. Karemera, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, ¶¶ 9–13 (June 30, 2006); Prosecutor v. Bradlo, Case No. IT-95-17-A, Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, ¶ 35 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 20, 2006).

prior to the confirmation hearings.<sup>59</sup> Disclosure after the confirmation hearing is allowed for facts that have become known only after the confirmation hearing.<sup>60</sup>

In the *Lubanga* case, the defense raised the issue of non-disclosure of confidential information with the PTC before the confirmation hearings.<sup>61</sup> The PTC, in an opinion subsequently quoted by the Trial Chamber, determined that the OTP's practice of resorting to Article 54(3)(e) evidence had led to extensive trial problems, as the OTP faced difficulties in securing the consent of the providers.<sup>62</sup> Nevertheless, the single judge of the PTC found, first, that on the basis of the evidence presented by the OTP, the charges against Lubanga could be confirmed.<sup>63</sup> Second, the PTC Judge held that the transmission of summaries containing the exculpatory information identified in Article 54(3)(e) documents and the use of "analogous information"<sup>64</sup> was a satisfactory substitute for actual disclosure at the trial stage.<sup>65</sup>

After the confirmation of charges, the *Lubanga* case took a series of twists and turns that reveal valuable information about the ICC. First, at a hearing on October 1, 2007, the OTP clarified that, for purposes of disclosure, it was in the process of reviewing "15,000 documents adding up to 32,000 pages."<sup>66</sup> The OTP admitted that there were ongoing requests to various organizations to lift redactions in over 500 documents, amounting to about 3,080 pages.<sup>67</sup> Second, on November 9, 2007, the Trial Chamber issued a decision regarding the timing and manner of disclosure

59. Ambos, *supra* note 1, at 548; Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC 01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, ¶ 123 (June 20, 2008).

60. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, ¶¶ 121–130 (May 15, 2006).

61. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Requesting Observations concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing (June 2, 2008).

62. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-102, Decision Requesting Observations Concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory of Otherwise Material for the Defence's Preparation for the Confirmation Hearing, ¶¶ 9–12 (June 2, 2008).

63. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges (Jan. 27, 2007).

64. *Id.* ¶ 65, 77–82.

65. *Id.*

66. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-T-52-ENG [1Oct2007 ET WT], Transcript (Oct. 1, 2007).

67. *Id.*; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the Prosecutor of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ¶ 15 (June 13, 2008).

and the date of trial.<sup>68</sup> In this decision, the Trial Chamber gave the OTP a choice to (a) withdraw any charges where non-disclosed exculpatory material had a material impact on the Chamber's determination of the guilt or innocence of the accused, or (b) if in doubt as to whether the material falls into the category of exculpatory material, to put the information before the Trial Chamber for its determination. With this order, disclosure would continue until mid-December 2007 and commencement of trial was set for June 23, 2008. Third, on March 6, 2008, the Trial Chamber, as a case management tool,<sup>69</sup> imposed disclosure obligations on the defense. The Trial Chamber requested that the defense disclose its strategy so as to allow better coordination in disclosure of information.<sup>70</sup> Fourth, on March 13, 2008, the OTP admitted to collecting more than fifty percent of its evidence on the basis of the confidentiality rules of the ICC Statute, Article 54(3)(e).<sup>71</sup> On May 6, 2008, the OTP admitted in a status conference that its use of the confidentiality rules was to gather information as quickly as possible and then use what was materially relevant to each case.<sup>72</sup>

Behind this prosecutorial strategy laid the fact that the OTP was not permitted, because of its confidentiality agreements, to disclose certain pieces of evidence to the defense. Throughout the trial, the information providers emphasized three reasons for their lack of cooperation. First, the information providers needed to protect their operations on the ground.<sup>73</sup> Second, they needed to protect their personnel from retaliation.<sup>74</sup> Third, they needed to protect the lives and security of their sources.<sup>75</sup> For the information providers, the requirements of a fair trial, which include the concept of equality of arms from which the OTP's obligation to disclose exculpatory information derives, was not of central importance.

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68. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1019, Decision regarding the timing and manner of disclosure and the date of trial (Nov. 9, 2007).

69. Swoboda, *supra* note 1, at 458.

70. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC 01/04-01/06-1210, Decision on the Defence request for leave to appeal the Oral Decision of redactions and disclosure of 18 January 2008, ¶¶ 2, 11–12 (Mar. 6, 2008).

71. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-T-79, Hearing Transcript (Mar. 13, 2008).

72. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-T-86-ENG, Transcript of Hearing on May 2008, Trial Chamber I, at 23 II, 8–14 (May 6, 2008).

73. *See, e.g.*, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-T-204, Transcript of Hearing on July 2009 (July 6, 2009) (including a discussion with UN witness that highlights the concerns of the UN as an information provider).

74. *Id.*; Larry D. Johnson, *The Lubanga Case and Cooperation between the UN and the ICC Disclosure Obligation v. Confidentiality Obligation*, 10 J. INT'L CRIM. JUST. 887, 897–901 (2012).

75. Johnson, *supra* note 74, at 897–901.

### C. *The Solution*

In light of all of the above complications, the Trial Chamber, on June 13, 2008, imposed a stay on the proceedings.<sup>76</sup> The trial phase had been scheduled to begin on June 23, 2008.<sup>77</sup> The rationale behind this decision informs the present analysis. The Trial Chamber stressed that the OTP was not only unable to disclose exculpatory confidential information to the defense, but also unwilling to reveal this information to the Trial Chamber, thereby failing to abide by the Trial Chamber's November 9, 2007 decision.<sup>78</sup> As a result of the OTP's actions, the defense and the Trial Chamber lacked complete knowledge of the nature of the information. With the exception of the U.N., whose presence had been revealed by the OTP, they did not even know who the information providers were.<sup>79</sup> The Trial Chamber held that "the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial."<sup>80</sup>

The Trial Chamber indicated that the source of the present problems was Article 54(3)(e), which is to be used "*solely* for the purpose of generating new evidence."<sup>81</sup> The OTP, however, did not resort to using it exceptionally. Instead, it used Article 54(3)(e) to "obtain evidence *to be used at trial*,"<sup>82</sup> which was "the exact opposite of the proper use of the provision."<sup>83</sup> The Trial Chamber maintained that if the OTP had properly used Article 54(3)(e), there would have been negligible tension between the OTP's duty to disclose to the defense and its duty of confidentiality to

76. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the Prosecutor of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ¶ 94 (June 13, 2008).

77. *Id.* ¶ 1.

78. *Id.* ¶ 5.

79. This conclusion is reached by reading the totality of the relevant documents. The court's ignorance of the other information providers can be verified by looking at the language used to describe them, vis-à-vis the open references to the UN. *See, e.g.*, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the Prosecutor of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ¶ 40 (June 13, 2008) ("On 7 April 2008 the prosecution informed the Chamber that whilst it was seeking consent from the information providers other than the UN . . .").

80. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the Prosecutor of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ¶ 93 (June 13, 2008).

81. *Id.* ¶ 71.

82. *Id.* ¶ 73.

83. *Id.*



its sources.<sup>84</sup> Apart from chastising the OTP, the Trial Chamber also clarified the meaning of exculpatory material. Adopting a broad definition, it held that such material includes information which (1) shows or tends to show the innocence of the accused, (2) mitigates the guilt of the accused, or (3) may affect the credibility of OTP evidence.<sup>85</sup>

Finally, the Trial Chamber's decision included two significant procedural holdings. First, in contrast to the Pre-Trial Chamber's determination, the Trial Chamber did not allow the OTP's proposal to disclose by analogy alternative material because it "ha[d] grave reservations as to whether serving other, similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence."<sup>86</sup> Second, the Trial Chamber strongly reiterated that in cases of doubt as to disclosure, the decision to evaluate the exculpatory nature of information and method of transmission is "not . . . for the prosecution but for the judges."<sup>87</sup> The Chamber sanctioned the OTP for its refusal to let the judges determine the nature of the confidential material.<sup>88</sup> In doing so, the ICC aligned itself with the jurisprudence of domestic and international jurisdictions, which allow judges to determine the method and manner of disclosure of contested evidence.<sup>89</sup> The Trial Chamber's rebuke of the OTP's practices accompanied its decision to release Lubanga.<sup>90</sup>

Ten days after the Chamber's decision, the OTP filed an appeal on three grounds.<sup>91</sup> It contended that (1) the Trial Chamber erred in its legal interpretation of the nature and scope of 54(3)(e); (2) Trial Chamber erred in law and in fact in its characterization of the OTP's conduct pursuant to Article 54(3)(e); and (3) the Trial Chamber erred in imposing an excessive and premature remedy in the form of an indefinite stay of proceedings.<sup>92</sup> While the appellate procedure was pending, the OTP requested a lift of the stay of the proceedings, which the Chamber rejected because many obstacles for proper disclosure were still in place.<sup>93</sup> Then, on October 14,

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84. *Id.* ¶ 76.

85. *Id.* ¶ 88.

86. *Id.* ¶ 60.

87. *Id.* ¶ 87.

88. *Id.* ¶¶ 87–92.

89. *See supra* Part II.

90. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1418, Decision on the release of Thomas Lubanga Dyilo (July 2, 2008).

91. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1446-Anxl, Prosecution's Document in Support of Appeal against Decision to Stay Proceedings (July 24, 2008).

92. *Id.*

93. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1467, Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings" (Sept. 3, 2008).

2008, the OTP withdrew its first two grounds for appeal because the information providers had in the meantime agreed to allow complete and continuous access to the TC and, if necessary, to the Appellate Chamber.<sup>94</sup>

The scope of the disclosure was important because the information providers had agreed to disclose 135 documents to the defense directly and in a non-redacted form.<sup>95</sup> As for the additional 93 documents, the information providers had agreed to make them available to the Trial Chamber in non-redacted form for the duration of the trial and to the Appellate Chamber for full appellate review.<sup>96</sup> Perhaps most significantly, the OTP revealed its correspondence with the U.N., which illustrates the hurdles it faced to lift the U.N.'s confidentiality.<sup>97</sup> With these new facts in mind, the Appellate Chamber issued its decision on October 21, 2008.<sup>98</sup>

Even though the disclosure was obtained before the appellate decisions, the decisions warrant attention for two reasons. The first decision deals with the release of the accused and is only tangentially related to the present issue. In this, the Appellate Chamber clarified that though the stay of proceedings was implemented on the basis of a previous decision, it did not have to be permanent.<sup>99</sup> On the contrary, it could be imposed conditionally and temporarily.<sup>100</sup> In cases where there is neither a full acquittal nor a complete termination of the criminal trial, the Trial Chamber is not required to release the accused, but it must balance the circumstances.<sup>101</sup> The Appellate Chamber thereby legitimated continued detention during a temporary stay of proceedings—a decision that some commentators have called the most problematic effect of this decision.<sup>102</sup>

94. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1479, Prosecution's Notice to the Registrar of its Discontinuance, as Moot, of the First and Second Grounds of Appeal in its Appeal against Decision to Stay Proceedings (Oct. 14, 2008).

95. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1478, Prosecutor's Application for Trial Chamber to Review all the Undisclosed Evidence Obtained from Information Providers (Oct. 13, 2008).

96. *Id.*

97. *Id.*

98. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008" (Oct., 21, 2008).

99. *Id.* ¶ 83.

100. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1487, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo," ¶ 1 (Oct. 21, 2008).

101. *Id.* ¶ 37.

102. See, e.g., Michela Miraglia, *Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga*, 6 J. INT'L CRIM. JUST. 489 (2008).

Judge Pikis, in a strong dissent, warned that such detention is not allowed because there is only the possibility of trial at an indefinite future time.<sup>103</sup>

Second, the Appellate Chamber agreed with the Trial Chamber's reading of Article 54(3)(e).<sup>104</sup> It concurred in the TC's reading that Article 54(3) was "limited to generation of new evidence."<sup>105</sup> It also clarified that—in its own insistence on using article 54(3)(e) for the generation of new evidence—the Appellate Chamber had not created a distinction between lead and other evidence.<sup>106</sup> Finally, the Appellate Chamber held that the OTP has to abide by its other obligations, including disclosure of exculpatory information, which would trump the confidentiality assurances that have been given to generate new evidence.<sup>107</sup>

While the Appellate Chamber held that the OTP must disclose exculpatory information and that the Trial Chamber can impose a conditional stay of the proceedings, it also cautioned the Trial Chamber to evaluate the developments that had occurred since the stay was imposed.<sup>108</sup> Undoubtedly, the Appellate Chamber was referring to the OTP's October 14, 2008 submissions, according to which the information providers had agreed to full disclosure.<sup>109</sup> Heeding the Appellate Chamber's advice, the Trial Chamber, in a November 18, 2008 status conference, issued an oral decision lifting the stay of the proceedings.<sup>110</sup> In this decision, it specified exactly what previously held confidential information and in what form would be handed over to the defense.<sup>111</sup>

The Trial Chamber's oral decision was followed by a written decision on January 23, 2009 that documented not only the OTP's compliance with the order to turn over all confidential exculpatory information to the judges, but also the methods through which the judges determined what

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103. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1487, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo," ¶ 13 (Oct. 21, 2008) (Pikis, J., dissenting).

104. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008" (Oct. 21, 2008).

105. *Id.* ¶ 41.

106. *Id.* ¶ 54.

107. *Id.* ¶ 2.

108. *Id.* ¶ 85.

109. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1479, Prosecution's Notice to the Registrar of its Discontinuance, as Moot, of the First and Second Grounds of Appeal in its Appeal against Decision to Stay Proceedings (Oct. 14, 2008).

110. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1644, Reasons for the Oral Decision Lifting the Stay of Proceedings, ¶ 29 (Jan. 23, 2009).

111. *Id.* ¶¶ 21–28.

pieces of evidence would be redacted or withheld from the defense.<sup>112</sup> In this decision, the Trial Chamber clarified that “if in the result material was not disclosed to the defence, the Chamber then determined whether and, if so which, counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, notwithstanding the nondisclosure of the information.”<sup>113</sup>

The Trial Chamber further upheld the use of protective measures to balance the accused’s right of access to exculpatory evidence with the real-world priorities of the information providers in the final trial judgment. There, the Trial Chamber clarified that some pieces of exculpatory evidence were not fully disclosed to the accused in order to protect the personal safety and the safety of the families of those individuals named in the various pieces of evidence.<sup>114</sup> In cases where disclosure was incomplete, the Trial Chamber ordering “the disclosure of alternative evidence or summaries” prevented unfairness to the accused.<sup>115</sup> Overall, the Chamber held that “in each instance, any problems that have arisen have been addressed in a manner which has ensured the accused has received a fair trial.”<sup>116</sup>

Overall, when comparing the stances of the OTP in June 2008 and October 2008, it is clear that either the OTP or the information providers made a “strategic turnabout.”<sup>117</sup> Under the pressure of a likely release of the accused, “within two weeks . . . the Prosecutor was able to offer the Chamber all the relevant confidential documents in unredacted form for an *ex parte* and *in camera* review.”<sup>118</sup> In what appears to be a real triumph for the protection of the rights of the accused, the ICC in the *Lubanga* trial aligned itself with international norms and distinguished its practice from that of the ICTY and the STL. For international criminal law in general, the insistence of defendant rights over OTP’s duties to third parties seems a legitimating move. The decisions of the Trial and Appellate Chambers nonetheless leave some important issues unresolved. Part IV will examine these issues.

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112. *Id.* ¶¶ 35–58.

113. *Id.* ¶ 46.

114. Final Judgment, ¶¶ 116–18.

115. *Id.* ¶ 121.

116. *Id.* ¶ 123.

117. Tsilonis, *supra* note 1.

118. Swoboda, *supra* note 1, at 470.

*D. The Example of Evidence Obtained from the UN*

The events described above are illustrated through the relationship of the OTP with the UN. For the purpose of its investigations, the OTP approached various organizations with a presence in the DRC.<sup>119</sup> While we currently know that the OTP has had contact with at least seven such organizations, the only organization whose details have been made public is the UN.<sup>120</sup> Due to this limitation, it is impossible to grasp fully the parameters of the OTP's cooperation with the other six organizations. Regardless, the OTP's agreement with the UN and its subsequent modification illustrates the evidentiary problems faced by the OTP.

On October 4, 2004, the UN and the ICC signed the UN-ICC Relationship Agreement.<sup>121</sup> Article 18(3) states:

[T]he United Nations and the OTP may agree that the United Nations provide documents or information to the OTP on the condition of confidentiality and *solely for the purpose of generating new evidence* and that such documents shall not be disclosed to *other organs* of the Court or third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.<sup>122</sup>

In an extension of this agreement, promulgated because ICC personnel in the DRC needed support from the UN operations on the ground, the ICC concluded a Memorandum of Understanding with the United Nations Organization Mission in the DRC ("MONUC") on November 8, 2005.<sup>123</sup> Relevant for the present analysis, article 10 of this MONUC, concluded on the basis of article 18(3) of the Relationship Agreement,<sup>124</sup> establishes the

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119. *See, e.g.*, Final Judgment, ¶ 167.

120. Throughout the trial there is ample evidence that the OTP cooperated with the UN and equal evidence as to the existence of other unnamed NGOs with which the OTP cooperated. *See, e.g.*, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1467, Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings (Sept. 3, 2008)" ("Of these, 152 Documents were obtained by the prosecution from the United Nations, and the remainder were provided by six Non-Governmental Organisations ('NGOs')").

121. Negotiated Draft Relationship Agreement, U.N.-ICC, U.N. Doc. A/58/874 (June 7, 2004), available at [http://www.amicc.org/docs/UNGA\\_A\\_58\\_874.pdf](http://www.amicc.org/docs/UNGA_A_58_874.pdf).

122. *Id.* art. 18(3) (emphasis added).

123. Memorandum of Understanding between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court, ICC-01/04-01/06-1267-Anx2 (Nov. 8, 2005), available at <http://www.icc-cpi.int/iccdocs/doc/doc469628.pdf>.

124. *Id.* art. 10, ¶ 10.

confidentiality of the information provider and sets up a procedure for partially or completely lifting this confidentiality.<sup>125</sup>

With the help of these organizations, the OTP proceeded with its investigations until February 10, 2006, when the Pre-Trial Chamber issued an arrest warrant for Thomas Lubanga Dyilo, at the OTP's request.<sup>126</sup> In the time between the initiation of the investigation and the issuance of the arrest warrant, the OTP "could not . . . assess the exculpatory nature of some of the material" because it collected material "before cases had been selected."<sup>127</sup> Armed with information collected under confidentiality agreements, the OTP brought its case against Lubanga.

From early on in the proceedings, the OTP tried to obtain confidentiality releases from the UN and the other information providers. For the UN, however, confidentiality was central to the safety of its staff in the DRC and the success of the UN operations in the DRC. The UN representatives feared that any information shared with the defense would be passed along to supporters of Lubanga in the DRC, who would in turn "seriously endanger the safety and security of certain individuals or prejudice the security and proper conduct of the Organization's present and future operations."<sup>128</sup> The UN's concern about the safety of its personnel is clearly reflected in the subsequent trial testimony of witness P-0046, who had held a position of authority within the UN structure in the DRC.<sup>129</sup> In her testimony, witness P-0046 indicates repeatedly that the main concern of the UN was that information regarding the identities of child soldiers under UN care and of Congolese UN-staffers must not be leaked to the defense team.<sup>130</sup> In brief, the UN had turned over 38 documents to the OTP which contained exculpatory information, but which the UN did not want to share with the defense.<sup>131</sup> These concerns

125. *Id.* art. 10, ¶ 8.

126. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2-tEN, Warrant of Arrest (Feb. 10, 2006).

127. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06OA 12, Judgment on the Appeal against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008," ¶ 26 (Oct. 21, 2008).

128. Letter from Prosecutor to UN. ICC-01/04-01/06-1478-Anx1 (Oct. 9, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc575485.pdf>.

129. *See, e.g.*, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-T-204, Transcript of Hearing on July 2009 (July 6, 2009) (including a discussion with UN witness that highlights the concerns of the UN as an information provider).

130. *Id.*

131. Letter from Prosecutor to UN, *supra* note 128.

were prevalent for two documents in their entirety and thirty-six documents in redacted form.<sup>132</sup>

In order to meet the ICC's obligations, the OTP had to convince the UN to overcome its hesitations with regards to these documents. It did so by proposing that the UN give the judges of the Trial and Appellate Chambers access to the non-redacted version of the evidence. If the judges decided to reveal such information to the defense, the OTP undertook to:

1. Seek all possible protective measures available under the Statute and the Rules of Procedure and Evidence;
2. Consider the feasibility of making concessions of fact so as to render that information no longer relevant to the proceedings;
3. Seek permission to amend (but not add or substitute) the charges so as to render the information no longer relevant to the proceedings; and
4. If all these steps were to prove unsuccessful and as a last resort, to seek permission to withdraw the charges.

Reassured by the extent and substance of these protective measures, the UN amended its agreement with the ICC in October 2008 to allow the above scheme to enter into force.<sup>133</sup>

The UN's cooperation with the OTP took a final turn in November of 2008. Having accepted the scheme of judicial review created by the Trial Chamber, the UN notified the OTP that nine of its documents would need "further protective measures" if they were to be used at trial.<sup>134</sup> Seven of these documents came from the list of thirty-eight documents previously discussed, while two documents were new to the trial process.<sup>135</sup> The Chamber accepted the UN requests, marking the end of the UN journey into the ICC's disclosure regime for the *Lubanga* case.

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132. *Id.*

133. Response from UN to Prosecutor, ICC-01/04-01/06-1478-Anx2 (Oct. 10, 2008), available at <http://www.icc-cpi.int/icedocs/doc/doc575486.pdf>.

134. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1644, Reasons for the Oral Decision Lifting the Stay of Proceedings, ¶¶ 26–27 (Jan. 23, 2009).

135. *Id.*

### *E. Conclusion: The Law at Present*

The disclosure of exculpatory evidence consumed the attention of the ICC for more than two years. From the Pre-Trial Chamber's initial decision in January of 2007 until the final decision of the Trial Chamber in January of 2009, the rules of disclosure of confidential exculpatory evidence underwent a major clarification. Now, the OTP must allow the Trial and Appellate Chamber judges unfettered access to all potentially exculpatory evidence and allow these judges to determine in what form such information will reach the defense. As a result, the ICC regime is aligned with all the major domestic and international legal systems and is distinguished from the criticized paradigms of the ICTY and the STL. Nevertheless, as the example of the UN indicates, this post-2008 *modus operandi* necessitated significant changes to the cooperation agreements between the OTP and its information providers. It also implicated the Trial Chamber judges in the review of evidentiary material, a decision of significant importance.

Yet, despite the significance of these events, the final judgment in the *Lubanga* case made only passing reference to the issue. Out of 593 pages, only five paragraphs touch upon the issue of disclosure of exculpatory evidence.<sup>136</sup> This lack of focus indicates that the core of the issue had been exhausted in the previous decisions documented above. It also indicates that the Trial Chamber judges were not in a position to deal with the problems highlighted in Part IV. Before turning to those, it is necessary to address the second issue of disclosure that the ICC faced.

### III. DISCLOSURE OF THE IDENTITY OF INTERMEDIARIES

The disclosure of the identity of the intermediaries that the OTP used to find witnesses in the DRC was another very important issue for the trial of Lubanga. The OTP was unwilling to disclose the identity of the intermediaries to the defense in order to protect the life and security of the intermediaries and their families, but also so as to protect its own operations in the DRC—operations with goals that outlast the completion of the *Lubanga* trial.<sup>137</sup> Admittedly, this evidentiary issue is far less complicated than the disclosure of exculpatory evidence. There, the OTP had to abide by the Court's orders and also persuade the information

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136. Final Judgment, ¶¶ 119–123.

137. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries (May 31, 2010).



providers to follow suit. Here, the OTP had no external actors to convince. The following events show that the disclosure of the identities of the intermediaries was a debate solely between the OTP and the Court, yet it significantly derailed the *Lubanga* trial.

#### A. *Legal Clarity*

The Rome Statute and the ICC's Rules of Procedure and Evidence do not deal directly with the disclosure of the intermediaries used by the OTP. If, however, it becomes apparent that these intermediaries influenced the testimony presented in a case, the law is abundantly clear. Article 67, paragraph 2 of the Rome Statute requires the OTP to disclose "evidence in the Prosecutor's possession or control which . . . may affect the credibility of prosecution evidence."<sup>138</sup> Since it is reasonable to assume that the work of interfering intermediaries may have affected the credibility of the OTP's evidence, the OTP is obliged to reveal the identities of such intermediaries to the defense.<sup>139</sup> Despite this legal clarity, the following factual realities made such revelations hard for the OTP.

#### B. *The Problem*

The OTP had to use intermediaries because of the realities in the Eastern Congo. In conducting the investigations, the OTP had to gain access to documents, witnesses, and former child soldiers who lived in a war zone.<sup>140</sup> Associating with the OTP entailed significant risks for all participants who were likely to be harmed in retaliation for their cooperation with the investigative process.<sup>141</sup> In these circumstances, the OTP resorted to the use of intermediaries.

The OTP used two types of intermediaries. The first included individuals who would contact potential witnesses and arrange for them to meet with the investigators.<sup>142</sup> Others were people who knew the security situation in a certain area, and thus provided guidance on the investigators'

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138. Rome Statute, *supra* note 2, art. 67(2).

139. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2465-Red, Redacted Decision on the "Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses," ¶¶ 26–27 (June 7, 2010).

140. *See, e.g.*, Final Judgment, ¶ 159.

141. *Id.* ¶ 156.

142. *Id.* ¶ 190.

possible actions.<sup>143</sup> Often these two groups overlapped, with security experts providing potential witnesses and vice versa.<sup>144</sup>

Initially, investigators were unable to make any contact with local witnesses without risking the safety of the witnesses and their families.<sup>145</sup> Additionally, in some instances investigators were near gunfights or local militia attacked their convoys.<sup>146</sup> Behind all of these difficulties was the reality that the location of the investigations, particularly the city of Bunia and its surroundings, were under the control of militia groups for the entirety of the Lubanga investigations.<sup>147</sup>

Finding intermediaries was not difficult. Initially, workers of various human rights NGOs provide relevant information to the ICC investigators.<sup>148</sup> As these workers had knowledge of the local environment and expertise on the issue of child soldiers, their input was invaluable to the investigators.<sup>149</sup> They eventually became intermediaries.<sup>150</sup>

From the beginning of their use in the *Lubanga* case, intermediaries had a very active and central role in identifying potential witnesses and putting them in contact with the OTP's investigators.<sup>151</sup> Due to fragile security situations, the intermediaries arranged meetings between potential witnesses and the investigators in churches, "libraries, schools, deserted areas and rented houses."<sup>152</sup>

Furthermore, the intermediaries were compensated for their services. Initially, this compensation reflected the expenses that the intermediaries engaged in on behalf of the investigation.<sup>153</sup> For example, an "intermediary using a motorcycle from Bunia to Mongbwalu" would get reimbursed on the basis of the costs that the investigators paid for analogous trips with MONUC.<sup>154</sup> Later, however, it became apparent that "certain intermediaries were so indispensable that they had to be provided with some form of more appropriate compensation."<sup>155</sup> As a result, a

143. *Id.* ¶ 193.

144. *Id.* ¶ 194.

145. Final Judgment, ¶¶ 151–68.

146. *Id.* ¶ 155.

147. *Id.* ¶¶ 143, 151–55.

148. *Id.* ¶¶ 183–97.

149. *Id.* ¶ 167.

150. *Id.* ("As a result, the investigating team or some of the activists suggested the latter should act as intermediaries.").

151. *Id.*

152. *Id.* ¶ 162.

153. *Id.* ¶ 200 ("All the reimbursements to intermediaries were on the basis of an expense declaration form.").

154. *Id.* ¶ 199.

155. *Id.* ¶ 203.

special contract was arranged by the OTP that officially made the intermediaries employees of the investigative team and spelled out their duties.<sup>156</sup> Records show that such contracts started in early 2005 and carried through to 2010.<sup>157</sup>

The intermediaries' input in the preparation of the *Lubanga* case was monumental. As the Trial Chamber explained in its Decision on Intermediaries, the OTP used seven intermediaries to contact "approximately half of the witnesses it has called to give evidence against the accused in this trial."<sup>158</sup> The defense, however, found the role of intermediaries suspect. It claimed from early in the proceedings that intermediaries impacted the credibility of the witnesses by coaching them and influencing their stories.<sup>159</sup> The defense thus requested that the OTP reveal the identities of the intermediaries so as to allow it to counter their influence.<sup>160</sup>

Initially, the Trial Chamber deflected the defense's requests for the disclosure of the intermediaries.<sup>161</sup> It believed that the rights of the accused had not been infringed upon if the "information is sought solely for the purposes of developing a line of questions that are based on mere supposition."<sup>162</sup> But, as the trial continued, the use of intermediaries became a pressing issue. As a result, the Trial Chamber requested on February 3, 2010 that the OTP provide "comprehensive information" on the contacts that any of its intermediaries had with any of its witnesses.<sup>163</sup> By February 10, the Trial Chamber had heard evidence that placed exactly in front of it the issue of intermediaries; trial witnesses expressly stated that certain intermediaries influenced their testimonies.<sup>164</sup> As a result, on February 10, the Trial Chamber called upon the OTP to undertake four measures that asked "whether the identity of the intermediaries should remain confidential in light of the recent allegations and the emerging defence case."<sup>165</sup>

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156. *Id.* ¶ 203.

157. *See, e.g., id.* ¶ 219 (discussing Intermediary 143).

158. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, ¶ 2 (May, 31 2010).

159. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2465-Red, Redacted Decision on the "Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses," ¶¶ 26–27 (June 7, 2010); Final Judgment ¶ 178.

160. *Id.* ¶ 150.

161. *Id.* ¶ 17.

162. *Id.*

163. *Id.* ¶ 30.

164. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, ¶¶ 26–30 (May, 31 2010).

165. *Id.* ¶ 37.

### C. *The Solution*

Before reaching a solution on these matters, a trial witness unexpectedly revealed the identities of intermediaries 316 and 321 during the oral proceedings.<sup>166</sup> Noting that ascertaining the identity of all intermediaries had by this time become an obvious priority for a complete and fair defense, the Trial Chamber indicated that “the defence was entitled to know the names of certain intermediaries, and including that of intermediary 143 . . . .”<sup>167</sup> Despite this order, the OTP stalled. First, it claimed that the Registrar would also have to approve this decision.<sup>168</sup> The Trial Chamber summarily dismissed this contention since the decision was an order of the Court.<sup>169</sup> Then, the OTP contended that revealing the identity of the intermediaries to the Defence would be “a dereliction of its duty of care towards its intermediaries and the witnesses with whom they deal . . . .”<sup>170</sup> In essence, the OTP argued that its duty towards the safety of the intermediaries trumped its duty to follow the TC’s order. As a result, the OTP proposed a three-stage approach:

First, that an “appropriate” representative of the [OTP] gives evidence about the use of intermediaries. Second, if, following that evidence, the Chamber determines that it remains necessary for one or more of the intermediaries to be called, this should be during an *in camera* hearing at which neither party is present. Third, only as a final measure should the Chamber consider revealing the role of intermediaries.<sup>171</sup>

The Trial Chamber rejected this proposal.<sup>172</sup> Holding that there was extensive and clear evidence on the basis of which the defense should have access to the identity of the intermediaries, it was “not persuaded that these applications can be satisfactorily resolved by the [OTP’s] ‘three-stage approach.’”<sup>173</sup> The Trial Chamber was particularly unconvinced that an *in camera, ex parte* proceeding would guarantee the rights of the accused, as this was “a highly contentious and potentially important

166. *Id.* (explaining that for intermediary 316, this happened as early as June 16, 2009, by P-0015).

167. *Id.* ¶ 41.

168. *Id.* ¶ 42.

169. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, ¶ 42 (May, 31 2010).

170. *Id.* ¶ 58.

171. *Id.* ¶ 91.

172. *Id.* ¶ 136.

173. *Id.*

matter.”<sup>174</sup> Finally, the Trial Chamber reiterated that there was considerable evidence indicating that the intermediaries influenced the witnesses, making it unfair to deny the defense the opportunity to examine this possibility.<sup>175</sup>

The Trial Chamber then issued its own scheme for revealing the identity of the intermediaries. It held that disclosure of the identity of an intermediary would involve a case-by-case determination, and that the “threshold for disclosure is whether *prima facie* grounds have been identified for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question.”<sup>176</sup> Once this threshold was met, disclosure of the identity would take place after an assessment by the Victims and Witnesses Unit (“VWU”).<sup>177</sup> The Trial Chamber can also call intermediaries to the witness stand if there “is evidence, as opposed to *prima facie* grounds to suspect, that the individual in question attempted to persuade one or more individuals to give false evidence.”<sup>178</sup> In light of this scheme, the Chamber called for the testimony of intermediaries 316 and 321.<sup>179</sup> It also reiterated that the OTP had to disclose the identity of intermediary 143, but did not seek to have the latter testify at trial.<sup>180</sup> On June 2, 2010 the Chamber also refused the OTP’s request to appeal this solution to the disclosure of the identity of intermediaries, as the issue did not “affect the fair and expeditious conduct of the proceedings.”<sup>181</sup>

The disclosure of intermediary 143’s identity was not resolved at this point. On July 8, 2010 the OTP requested to change the time limit for disclosing the identity of 143 or to stay the proceedings pending consultations of the VWU.<sup>182</sup> The OTP made this request because intermediary 143 had sought to renegotiate his protective measures.<sup>183</sup> The Trial Chamber had an oral proceeding on July 7, 2010, and was informed that intermediary 143 had accepted the security arrangement offered by the

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174. *Id.* ¶ 137.

175. *Id.* ¶ 138.

176. *Id.* ¶ 139.

177. *Id.* ¶ 139(d).

178. *Id.*

179. *Id.* ¶ 141.

180. *Id.* ¶ 143.

181. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Prosecutor request for leave to appeal the “Decision on Intermediaries,” ¶ 32 (June 2, 2010).

182. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2517-Red, Redacted Decision on the Prosecutor’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).

183. *Id.* ¶ 6.

ICC, only to later renege on his acceptance. By July 6, 2010, it was unclear if intermediary 143 had “rejected [the security measures] outright or intended to require adjustments.”<sup>184</sup> Additionally, “the Chamber was informed by the VWU that, *inter alia*, a significant financial component had been raised by 143.”<sup>185</sup>

In light of these facts, the Trial Chamber ordered the OTP to disclose the identity of intermediary 143 “within the next half-an-hour, and arranged for the Court to reconvene at 14.30 for the continuation of the defense’s questions.”<sup>186</sup> It also stressed that the defense would keep the information limited only to its counsel, assistance, and resource person in the DRC.<sup>187</sup> The OTP, having failed to abide by the order, asked the Chamber to revisit its order that afternoon.<sup>188</sup> The Chamber swiftly rejected the request, clarifying that disclosure should take place, since “protective measures have been offered, which are deemed by the relevant body of this Court to be satisfactory, and that offer has not in any way been withdrawn.”<sup>189</sup> The OTP again refused to comply with this order.<sup>190</sup> Echoing its statements in May, the OTP asserted that it had an obligation to fulfill its duties under the Rome Statute, which include protection of witnesses and intermediaries.<sup>191</sup>

The Trial Chamber’s response to the OTP’s stance was quick and strict. It clarified that the disclosure of identity of the intermediaries is relevant for examining the allegation that “the [OTP] has knowingly employed, or made use of, intermediaries who influenced individuals to give false testimony, thereby abusing its powers.”<sup>192</sup> It then held that:

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

184. *Id.*

185. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2517-Red, 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, ¶ 6 (July 8, 2010).

186. *Id.* ¶ 11.

187. *Id.* ¶ 8.

188. *Id.* ¶ 12.

189. *Id.*

190. *Id.* ¶ 13.

191. *Id.* ¶ 13.1.

192. *Id.* ¶ 20.

the Court, in the sense that they have had dealings with the Prosecution.<sup>193</sup>

The Trial Chamber went on to hold that it is the “only organ of the Court with the power to order and vary protective measures vis-à-vis individuals at risk on account of work of the ICC.”<sup>194</sup>

Furthermore, the Chamber held that the OTP “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.”<sup>195</sup> Because of the material non-compliance with the Chamber’s order of July 7, 2012, the Chamber found it “necessary to stay these proceedings as an abuse of the process of the Court.”<sup>196</sup> Since a fair trial was not possible because the judges could not control the OTP’s actions, the Chamber halted the entire trial process.<sup>197</sup> Consequently, the Trial Chamber, in a July 15, 2010 oral decision, decided to release the accused from detention.<sup>198</sup> For a second time an issue of disclosure had brought the trial process to a grinding halt and had led to the provisional release of Thomas Lubanga Dyilo.

Soon thereafter, the OTP filed three appeals stemming from the Chamber’s decision to release Lubanga. On July 23, 2010, the Appellate Chamber decided to hold Lubanga in detention until the other two appellate decisions were issued.<sup>199</sup> The Appellate Chamber issued its other two decisions on October 8, 2010.<sup>200</sup>

First, it agreed with the Trial Chamber’s determination that the OTP “is obliged to comply with the orders of the Chamber.”<sup>201</sup> It found that the

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193. *Id.* ¶ 21.

194. *Id.* ¶ 23.

195. *Id.* ¶ 28.

196. *Id.* ¶ 31.

197. *Id.* ¶ 28.

198. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-T-314.ENG, Order to Release Mr. Thomas Lubanga Dyilo (July 15, 2010).

199. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2536, Decision on the Prosecutor’s request to give suspensive effect to the appeal against Trial Chamber I’s oral decision to release Mr. Thomas Lubanga Dyilo (July 23, 2010).

200. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 CA 18, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecutor’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); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 0A 17, Judgment on the appeal of Prosecutor against the oral decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo (Oct. 8, 2010).

201. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 CA 18, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecutor’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of

OTP's "willful non-compliance constituted a clear refusal to implement the orders of the Chamber."<sup>202</sup> It disagreed with the Trial Chamber, however, as to the proper remedy for the OTP's violation. Instead of authorizing a stay of the proceeding, the Appellate Chamber held that "sanctions under article 71 of the Statute are the proper mechanism for a Trial Chamber to maintain control of proceedings when faced with the deliberate refusal of a party to comply with its orders."<sup>203</sup> Once imposed, these sanctions should be given reasonable time to effect compliance with the Trial Chamber's orders.<sup>204</sup> As a result, in its second decision of October 8, 2010, the Appellate Chamber held that the release of Lubanga was not warranted.<sup>205</sup>

#### *D. The Consequences that Disclosure had on the Lubanga Judgment*

Following the condemnation of its practices by both the Trial and Appellate Chambers, the OTP revealed the identity of intermediary 143.<sup>206</sup> During the trial, the OTP also called intermediaries 316 and 321 to the stand, thus putting the intermediary issue to rest for the duration of the trial.<sup>207</sup> The issue, however, forcefully returned to the forefront in the Trial Chamber's Final Judgment of March 14, 2010, in which it dealt with the substantive allegations against the involvement of intermediaries.<sup>208</sup>

In the Final Judgment, the Trial Chamber investigated whether, as the defense had always claimed, the intermediaries had interfered with the witness statements.<sup>209</sup> In order to reach its conclusion, the Chamber made two examinations. First, for those intermediaries who were called to testify

Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU," ¶¶ 1–3 (Oct. 8, 2010).

202. *Id.* ¶ 46.

203. *Id.*

204. *Id.* ¶ 3.

205. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 0A 17, Judgment on the appeal of Prosecutor against the oral decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo, ¶ 2 (Oct. 8, 2010).

206. Final Judgment ¶ 208.

207. *Id.* ¶¶ 293, 375.

208. *Id.* ¶¶ 178–484 ("VII. INTERMEDIARIES").

209. *Id.* ¶ 178 ("The fundamental question raised by the defence under this heading is whether during the investigations leading to this trial, four of the intermediaries employed by the prosecution suborned the witnesses they dealt with, when identifying or contacting these individuals or putting them in touch with the investigators, while carrying their risk assessments."); *Id.* ¶ 180 ("As regards this aspect of the case, the Chamber needs to be persuaded beyond reasonable doubt that the alleged former child soldiers have given an accurate account on the issues that are relevant to this trial (*viz.* whether they were below 15 at the time they were conscripted, enlisted or used to participate actively in hostilities and the circumstances of their alleged involvement with the UPC.")).



(“P-0316 and P-0321”), the Chamber weighed the reliability of their statements at trial.<sup>210</sup> For example, it noted that P-0316 was inconsistent on the stand, asserting that he had not claimed expenses from the OTP, only to be confronted with a receipt he had issued by the defense.<sup>211</sup>

Second, for all intermediaries (“143, P-0316, P-0321, P-0031”), the Chamber examined the reliability of the witnesses they introduced to the OTP.<sup>212</sup> Intermediary 143, for example, introduced to the OTP four individuals that were used as witnesses against Lubanga (“P-0007, P-0008, P-0010, and P-0011”).<sup>213</sup> The Chamber examined the testimony of these individuals and found their reliability questionable.<sup>214</sup> It then concluded that there was a “real risk that he [143] played a role in the markedly flawed evidence that these witnesses provided to the OTP and to the Court.”<sup>215</sup>

Overall, once the identities of the intermediaries were disclosed to the defense, the Trial Chamber was able to conduct a fact-based analysis of their input into the investigative process. Through this examination, the Chamber held that intermediaries 143, 316, and 321 had improperly influenced the trial process.<sup>216</sup> There was insufficient evidence, however, to indicate that intermediate P-0031 had done so as well.<sup>217</sup>

210. *Id.* ¶¶ 292–450.

211. *Id.* ¶ 294 (“[T]he defence confronted him with a receipt signed by him indicating that he had received \$30 for transport relating to, and his communication with, three witnesses.”).

212. *Id.* ¶¶ 208–484.

213. *Id.* ¶¶ 208–221.

214. *See, e.g., id.* ¶ 291.

Given the pattern of unreliability as regards the witnesses introduced by Intermediary 143 and called to give evidence during the trial (P-0007, P-0008, P-0010 and P-0011), the Chamber accepts that there is a real risk that he played a role in the markedly flawed evidence that these witnesses provided to the OTP and to the Court. Bearing in mind this consistent lack of credibility as regards the trial witnesses he introduced to the investigators, and particularly focusing on the cumulative effect of their individual accounts, it is likely that as the common point of contact he persuaded, encouraged or assisted some or all of them to give false testimony. The Chamber accepts that the accounts of P-0007, P-0008, P-0010 and P-0011 were or may have been truthful and accurate in part, but it has real doubts as to critical aspects of their evidence, in particular their age at the relevant time. Although other potential explanations exist, the real possibility that Intermediary 143 corrupted the evidence of these four witnesses cannot be safely discounted.

*Id.*

215. *Id.*

216. *Id.* ¶¶ 291, 373 (“Bearing in mind especially P-0316’s lack of credibility, the Chamber is of the view that there are strong reasons to conclude he persuaded witnesses to lie as to their involvement as child soldiers within the UPC.”); *id.* ¶ 450 (“Although the Chamber does not criticise the fact that P-0321 assisted the prosecution and a victims’ organisation simultaneously, on the basis of the matters set out above the significant possibility has been established that P-0321 improperly influenced the testimony of a number of the witnesses called by the prosecution. Additionally, real doubt has been

*E. Conclusion: the Law on Disclosure of the Identity of Intermediaries*

The issue of intermediaries was the most important evidentiary issue in the Final Judgment. The Trial Chamber demonstrated that three intermediaries had improperly influenced witnesses in an extensive 200-page description. Combined with the detailed prior holdings on the issue of intermediaries, the ICC Chambers have sent a clear message to the OTP: if intermediaries are used in investigations and allegations of misconduct arise, their identity will be revealed to the defense. This end-result of the disclosure process may have consequences far beyond the *Lubanga* proceedings. It is to these consequences that the next Part turns.

IV. BALANCING ON TWO FEET: FAIRNESS OR ACCOUNTABILITY

The introduction of this article highlighted that the ICC, like any criminal court, must balance the fairness of the proceedings with the flexibility of conducting investigations and bringing atrocity cases. The two goals may overlap. It would be hard to conceive of an ICC Chambers that prioritized fairness but remained indifferent to the concept of greater accountability for atrocities. Nevertheless, it is possible that measures taken to safeguard fairness impede the possibility of conducting future investigations.

This Part attempts to analyze the impact of the *Lubanga* trial's disclosure issues on the future of the ICC investigations. The first section argues that the Chamber's decision on exculpatory confidential information has damaged the OTP's flexibility in investigating and prosecuting future atrocity crimes. Similarly, the second section contends that the Chamber's decisions on intermediaries can restrict the OTP from bringing future cases.

*A. Two Consequences of the Disclosure of Exculpatory Evidence*

This section argues that, for two reasons, the mandatory disclosure of exculpatory confidential information to the trial judges has shifted the attention of the court so far in the direction of ensuring a fair trial that it risks limiting the power of the ICC to bring future atrocity proceedings. First, however, it is valuable to examine an overview of the realities of

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cast over the propriety of the way in which children were selected for introduction to the prosecution.”).

217. *Id.* ¶ 476.

disclosure of confidential information and cooperation with third-party information providers.

*1. Putting the present facts into a greater perspective*

As outlined in Part II, the *Lubanga* trial has implemented a scheme of disclosure for confidential exculpatory evidence that is lacking in the Rome Statute. There are now four possible outcomes for the cases in which the OTP holds exculpatory evidence falling under the coverage of a confidentiality agreement between the OTP and the information provider. It is possible that the information provider lifts the confidentiality, and the evidence is *in toto* passed to the defense.<sup>218</sup> Alternatively, the information provider lifts the confidentiality but the information passes to the defense in redacted form or in some suitable alternative (e.g., summaries). The ICC judges, *in camera* and *ex parte*, determine this alternative form of evidence.<sup>219</sup> Third, if the information provider does not lift the confidentiality, the OTP must withdraw the charges or admit the underlying facts found in the withheld pieces of evidence.<sup>220</sup> Finally, if the information provider disagrees with the protective measures imposed by the judicial chambers, the OTP can again refuse to disclose and instead withdraw the charges or admit the underlying facts found in the withheld pieces of evidence.<sup>221</sup>

Before proceeding with a two-fold critique of the Chambers' actions, it is important to recognize that disclosure of exculpatory evidence is an issue that plagues all criminal trials. In domestic and international jurisdictions (including the ICC), the disclosure of exculpatory evidence

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218. This comes from the rules and the confidentiality agreements. It was also verified in *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008," ¶ 86 (Oct. 21, 2008).

219. *See, e.g.*, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008," ¶¶ 45–48 (Oct. 21, 2008).

220. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008," ¶ 28 (Oct. 21, 2008); *id.* ¶ 8 (Pikis, J., dissenting).

221. *See* Letter from Prosecutor to UN, ICC-01/04-01/06-1478-Anx1 (Oct. 9, 2008); Response from UN to Prosecutor, ICC-01/04-01/06-1478-Anx2 (Oct. 10, 2008).

relies disproportionately on the honesty and the cooperation of the prosecutor. In the United States, for example, violations of the obligation to disclose exculpatory evidence, known as Brady violations, have resulted in numerous wrongful convictions.<sup>222</sup> The dependence of the system of disclosure on prosecutors can be highly problematic.<sup>223</sup> As the dissents of Justices Marshall and Brennan in *Bagley* indicate, the system of disclosure of exculpatory evidence “permits prosecutors to withhold with impunity large amounts of undeniably favorable evidence.”<sup>224</sup> Similarly, in the ICC, the solution implemented by the Chambers still depends heavily on prosecutors’ decision making. Only the prosecutor is in a position to understand that some evidence is exculpatory and to then seek to disclose it, instead of hiding it from all other participants at the trial. This dependence on the OTP remains even with the new scheme of review prior to disclosure.

While the four alternative possibilities of disclosure do not change the fact that the disclosure regime depends on the honesty of the OTP, they impose two significant burdens that are likely to impede future investigations. Both of the following critiques rest on two assumptions. On the one hand, they assume that it is difficult for the information provider to determine what evidence may be exculpatory. As the ICC Chambers have recognized,<sup>225</sup> the OTP can only make such determinations after a case is built, which in the *Lubanga* case took place years after the initial cooperation of the information providers. As a result, it is assumed that the information providers can only consider whether to provide or not to provide such information. They are not in a position to make strategic calculations by refusing to provide exculpatory information to the OTP.

On the other hand, the following two critiques assume, with good reason, that the OTP is unable to fully investigate all atrocities using its own resources. At the present moment the OTP is tasked with

222. N.Y. STATE BAR ASS’N, TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION’S TASK FORCE ON WRONGFUL CONVICTIONS 21–24 (2009), available at <http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/FinalWrongfulConvictionsReport.pdf> (discussing various categories of Brady evidence).

223. See generally Cynthia E. Jones, *A Reason to Doubt: the Suppression of Evidence and the Interference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415 (2010).

224. *United States v. Bagley*, 473 U.S. 667, 700 (1985).

225. *Prosecutor v. Katanga & Ngudjolo Chui*, Case No. ICC 01/04–01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing (June 20, 2008).

investigating atrocities that occurred in seven Situations.<sup>226</sup> It is also engaged in preliminary inquiries into atrocities allegedly committed in seven other states.<sup>227</sup> Finally, the OTP has to bring forth the cases against fifteen individuals.<sup>228</sup> With a workload that spans the globe and a relatively small workforce, particularly when compared to those of the *ad hoc* tribunals,<sup>229</sup> the OTP has no option but to rely on external sources.<sup>230</sup> The strength of this assumption can be verified by the OTP's own statements.<sup>231</sup> In dismissing any further investigation over atrocities allegedly committed in Iraq by British forces, the OTP clarified that in its preliminary investigation it relied on "open sources . . . among others, the findings of Amnesty International, Human Rights Watch, Iraq Body Count and Spanish Brigades Against the War in Iraq."<sup>232</sup> It also "sought and received additional information from relevant States as well as from other entities identified with the interests of possible victims."<sup>233</sup>

It is additionally noteworthy that it makes perfect sense for the OTP to rely on other organizations for evidentiary purposes. They have significant capacity to assist the ICC, as the Rome Statute mandates.<sup>234</sup> As Baylis illustrates, the actions of MONUC in the DRC make it a great source of information of atrocities.<sup>235</sup> For example, after the Movement de Liberation du Congo ("MLC") perpetrated the *Effacer le Tableau* ("Erase the Board") attack in and around Mambasa, Ituri, MONUC's Human

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226. The current Situations are: Sudan, Libya, DRC, Uganda, Central African Republic, Ivory Coast, Kenya, Mali (available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx)).

227. Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea, and Nigeria (available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) at the bottom of the webpage).

228. For the latest count, see *Situations and Cases*, ICC, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited Apr. 25, 2013).

229. See Alex Whiting, *Lead Evidence and Discovery before the International Criminal Court: The Lubanga Case*, 14 UCLA J. INT'L & FOREIGN AFF. 207, 226–230 (2009).

230. See Christian M. De Vos, *Case Note: Prosecutor v Thomas Lubanga Dyilo 'Someone who Comes between one Person and Another': Lubanga, Local Cooperation and the Right to a Fair Trial*, 12 MELBOURNE J. INT'L L. 1 (2008) (outlining the use of intermediaries and the ICC decisions of 2010 and claiming that intermediaries have a role in the ICC).

231. *OTP response to communication received concerning Iraq*, OFFICE OF THE PROSECUTOR (Feb. 9, 2006), available at [http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf).

232. *Id.* at 7.

233. *Id.*

234. Elena A. Baylis, *Outsourcing Investigations*, 14 UCLA J. INT'L L. & FOREIGN AFF. 121, 143 (2009) (arguing for integration of these regional experts into the Prosecutor's teams).

235. *Id.* at 130–38.

Rights Division stepped in.<sup>236</sup> Its investigators “spent about two-and-a-half months total over the course of two visits investigating this attack and interviewing victims, witnesses, and perpetrators.”<sup>237</sup> In doing so, MONUC helped preserve the evidence of rape, pillage and even cannibalism “for future use and produced several widely publicized reports.”<sup>238</sup> Such evidence would have been useful both for the OTP and the defense teams in a case against members of the MLC. The disproportionality of available resources between the OTP and third-party providers becomes even more obvious when considering that the investigative teams of MONUC “interviewed 150 people and traveled to thirty towns in one 10-day probe of a single incident,” compared to the OTP,<sup>239</sup> which conducted 70 missions and 200 interviews over a one-and-a-half year period.<sup>240</sup> Similarly, past international criminal tribunals, such as the ICTY and the ECCC, relied heavily on the work of third party information providers.<sup>241</sup>

The combination of increased burdens on the OTP and the presence of third parties with significant information makes it extremely likely that the OTP will continue to enter into confidentiality agreements in an effort to cooperate with such third parties. Indeed, the ICC Chambers have also acknowledged that this will be the case.<sup>242</sup> In light of this reality, the findings of the *Lubanga* trial impede the OTP in two significant ways. They are likely to dull the incentive of some important information providers to cooperate with the OTP and diminish the OTP’s capacity to bring an effective case.

236. Elena A. Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C. L. REV. 1, 54–55 (2009).

237. *Id.* at 55.

238. *Id.*

239. Baylis, *Outsourcing Investigations*, *supra* note 234, at 142.

240. U.N. High Comm’r for Human Rights, MONUC Human Rights Div., *Special Report: Special Inquiry into the Bas Congo Events of February and March 2008*, at 1 (May 2008), available at <http://www.refworld.org/publisher/MONUC,,48624eae2,0.html>; ICC, *Report on the Activities Performed During the First Three Years (June 2003–June 2006)*, ¶ 14 (Sept. 12, 2006), available at [http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821725747378AB2/143680/OTP\\_3year\\_report20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821725747378AB2/143680/OTP_3year_report20060914_English.pdf).

241. The ECCC cooperated significantly with the Documentation Center of Cambodia (“DC-Cam”). Additionally, the ICTY—when investigating the atrocities committed in Kosovo—relied on third parties. *See, e.g.*, Gideon Boas, *A Response to Christian De Vos by Gideon Boas*, MELBOURNE J. INT’L L. OPINIO JURIS BLOG (Dec. 7, 2011, 7:00 AM), <http://opiniojuris.org/2011/12/07/a-response-to-christian-de-vos-by-gideon-boas/>.

242. Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing (June 20, 2008) (claiming that “cases are likely to reappear”).

## 2. *Disclosure Scheme Impedes Many Organizations from Cooperating with the OTP*

Future prosecutions may be hindered because the current regime of disclosure increases the involvement of the judiciary, which does not necessarily command the trust of the information providers.

After the *Lubanga* trial, information providers are aware that, if their confidential information containing exculpatory evidence requires protective measures, it will initially be handed over to trial judges without redaction. Under the rules set in the *Lubanga* case, after the judges have made their determination, such information will be given to the defense in the appropriate form, but will also remain available in its original, non-redacted form for the Trial and Appellate Chambers' future review. Additionally, since the ICC is a permanent court, any information given to the OTP will stay on file and may become relevant in a trial after an extended number of years, when the goals of the information provider and its rapport with the ICC may no longer be the same.<sup>243</sup> Overall, the scheme of disclosure complicates the ICC's cooperative relationship with the information providers. They can no longer hide behind their confidentiality agreements and have to work with the OTP and the Chambers to effectuate disclosure when necessary. For two different reasons, these restrictions are certain to cause problems for the OTP's staff. To underscore these difficulties for the reader, this article will examine some of the realities faced in the ICC's ongoing investigations.

On the one hand, plenty of human rights NGOs with ground presence may hesitate to provide evidence under the current scheme of cooperation. At present, these NGOs can choose to disclose information and then rely on the redactions and other protective measures taken by ICC judges. If the latter make a mistaken disclosure, the NGOs will likely face negative operational repercussions. Alternatively, these NGOs can refuse to cooperate with the OTP, not disclose anything, and thus not risk jeopardizing their security and their operations by a possible mistaken decision of the ICC judges.<sup>244</sup> It may, unfortunately, often be the case that the stakes for these NGOs are too high to trust their safety and operations in the protective measures determined by judges in The Hague. Indeed,

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243. See Whiting, *supra* note 229.

244. Larry D. Johnson, *The Lubanga Case and Cooperation between the UN and the ICC, Disclosure Obligation v. Confidentiality Obligation*, 10 J. OF INT'L CRIM. JUST. 887, 903 (2012) (recommending that the UN remain vigilant in cooperating with the OTP).

some NGOs already refused to cooperate with the OTP even before the advent of this disclosure regime.<sup>245</sup>

As most ICC investigations take place in areas of ongoing conflict, judicial decisions have a very real potential to harm the NGO's staff and operations. So far, at least one NGO has been attacked for its cooperation with the OTP in the investigation of atrocities in the DRC.<sup>246</sup> Indeed, in the *Katanga* case, the OTP put forth substantiated claims that, due to actions of individuals in favor of the accused, "staff members of that NGO, in particular, [REDACTED] and their family members, have already suffered intimidation for several years, and were even recently victims of attacks at their homes [REDACTED]."<sup>247</sup> Furthermore, it is already the case that many NGOs have refused to cooperate with the OTP's investigation in Sudan for fear of being associated with the ICC.<sup>248</sup> As the Sudanese government has suspected NGOs of collaborating with the OTP, the former have "gone out of their way to avoid even the appearance of collaboration."<sup>249</sup> Unfortunately, the OTP would want good collaboration with local NGOs in Sudan in particular, where investigating has been almost impossible.<sup>250</sup>

On the other hand, the central role played by judges is very likely to stop any information provision by states and state organizations such as NATO. In ICC investigations in Libya, Sudan, and Uganda, a significant source of information can come from military fact-gathering missions. For example, similar to the Kosovo campaign, NATO intelligence units likely gathered information on the actions of the Qaddafi regime before and during the bombing campaign. The U.S. military personnel advising the Ugandan government on the LRA have probably collected similar evidence. Such evidence could be useful for trial. The member-states of NATO, however, have in the past been unwilling to reveal their military

245. Final Judgment, ¶ 163 ("Some NGOs refused to cooperate with the Court . . .").

246. Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-01/07-888-Red-tENG, Grounds for the Oral Decision on the Prosecutor's Application to Redact the Statements of Witnesses 001, 155, 172, 280, 281, 284, 312 and 323 and the Investigator's Note concerning Witness 176 (rule 81 of the Rules of Procedure and Evidence), ¶ 18 (Jan. 10, 2011).

247. *Id.*

248. Lynsey Addario & Lydia Polgreen, *Aid Groups' Expulsion, Fears of More Misery*, N.Y. TIMES, Mar. 22, 2009, at A8 ("The Sudanese government has long suspected aid organizations of collaborating with the court by providing evidence and helping Prosecutors gather testimony from victims. But aid groups say that they have gone out of their way to avoid even the appearance of collaboration.").

249. *Id.*

250. Situation in Darfur, Case No. ICC-02/05, Prosecutor's Response to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, ¶¶ 8, 11-17 (Sept. 11, 2006).



and intelligence sources to the defense or to international judges.<sup>251</sup> Indeed, as explained in Part II, NATO refused to cooperate with the ICTY, a refusal that led to the changes in the rules of the ICTY.

At the ICC, issues pertaining to intelligence gathering are covered under Article 72 of the Rome Statute, which expressly deals with the protection of a state's national security information.<sup>252</sup> The four provisions of Article 72 give the OTP two options if a state is unwilling to share national security information with the Court.<sup>253</sup> The first option, covering provisions one through three, allows the Court to modify the request for the information sought from a state.<sup>254</sup> This option, however, does not deal with cases when exculpatory information that ought to be disclosed is among the original confidential, national security-sensitive evidence.

The second option under Article 72, which covers instances when the OTP has been handed exculpatory information, calls for "[a]greement on conditions under which the assistance could be provided including . . . providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible . . . ." The text of this provision strongly resembles Rule 83.<sup>255</sup> It is thus reasonable to expect, by analogy to the holding of the *Lubanga* trial on Rule 83, that fairness concerns are again likely to push the ICC Chambers to allow summaries, redactions, or other limitations only after an *in camera*, *ex parte* proceeding over confidential information of national security. In reality, under Rule 72, the *Lubanga* precedent makes it very likely that the judges will seek to review exculpatory information that involves national security.

In light of NATO's historical reluctance to share any intelligence issues with the international judges, the possibility of judicial review makes it is very unlikely that NATO will provide any information to the ICC's OTP. Perhaps, despite NATO's repeated calls for ICC involvement in Libya, it is for this reason that it has yet to mention the possibility of it cooperating with the ICC.<sup>256</sup> Without any information from intelligence sources, the OTP may have a hard time building cases and obtaining convictions.

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251. See, e.g., ICTY experience, *supra* Part II.

252. Rome Statute, *supra* note 2, art. 72.

253. *Id.*

254. ICC, *Rules of Procedure and Evidence*, *supra* note 15, Rule 72 (“(a) Modification or clarification of the request; (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State; (c) Obtaining the information or evidence from a different source or in a different form.”).

255. Rome Statute, *supra* note 2, art. 83.

256. There is a clear lack of NATO press releases on this point.

Instead, the OTP will have to spend money and time collecting evidence from other sources (e.g., local media, NGOs, individuals).

Overall, the rule requiring judicial involvement in determining the correct form of disclosure of confidential exculpatory evidence to the defense is likely to have a dampening effect on the information providers that collaborate with the OTP. NGOs operating in precarious conditions and states operating military and intelligence operations are unlikely to feel confident in the ability of judges at the ICC to safeguard their interests. As a result, they may refuse to cooperate with the ICC, leading an already overburdened OTP to stretch its sources even thinner.

### *3. Disclosure Scheme Imposes Disproportionate Remedy on the OTP*

The second reason the present disclosure scheme risks diminishing the ability of the OTP to bring future cases is its failure to envision appropriate responses if some information providers do not consent to the present scheme of confidentiality.

As outlined above (and in Part II), information providers may either refuse to lift their confidentiality or may disagree with the protective measures proposed by the ICC Chambers. Faced with a refusal, the OTP can either withdraw the charges that the exculpatory confidential information is relevant to or admit the underlying facts contained in the exculpatory confidential information.<sup>257</sup> For example, in the *Lubanga* trial, had the UN not insisted that the judges not access information given to the OTP under the UN-ICC confidentiality agreement, the OTP would have been required to withdraw the charges or admit the underlying facts.<sup>258</sup> For three reasons, this solution has the potential to decrease the OTP's ability to bring future cases where the information provider refuses to cooperate.

First, in many instances, such a remedy will be disproportionately excessive. For example, a single piece of exculpatory evidence, obtained under a confidentiality agreement with a third party information provider, may indicate that the accused had no direct knowledge that his militia was involved in rapes, killings, and food pillaging. If the information provider does not agree to the disclosure of this evidence, the OTP would be barred from seeking that the accused had direct knowledge of his militia's actions of sexual violence, homicide, and destruction of property. But, what if the OTP has one hundred different pieces of evidence that indicate the

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257. Schabas, *supra* note 22.

258. *See supra* Part II.

accused had direct knowledge? Withdrawal of the charges or admitting lack of direct knowledge appears to be an ill-suited remedy.

Second, since the ICC routinely operates in harsh situations, the OTP may only be able to bring limited charges against the accused, tailored in particular to a fast and effective conviction. The present case against Lubanga illustrates this potential. Lubanga was charged only with the crime of enlisting child soldiers, despite his alleged greater involvement in other atrocities.<sup>259</sup> In such cases, if the information provider does not cooperate, the OTP must weaken the case in favor of the single or few charges against the accused, by either withdrawing the charges or admitting the underlying facts. By weakening his own case due to the refusal of the information providers to lift confidentiality, the OTP would be less likely to meet its burden of proof, resulting in an acquittal or a conviction for a lesser crime. Both scenarios would result in a decrease of accountability.

Finally, the present scheme fails to clarify to what extent the OTP must rectify its actions in case of non-cooperation by the information providers. After an information provider refuses to release its information to the judges, does the OTP have to throw away any information it obtained on the basis of the exculpatory evidence? If the ICC follows the “fruits of the poisonous tree” doctrine,<sup>260</sup> it is likely that evidence obtained based on non-disclosed exculpatory evidence will also be tainted and thus inadmissible. Without such evidence, the OTP will have a harder time bringing forth cases.

In order to protect the interests of the accused, the ICC Chambers make the case harder for the OTP. By insisting that the OTP withdraw the charges or admit the underlying facts, the Chambers place the OTP between a rock and a hard place—a position that is unwarranted given the reality that the information providers control the confidentiality.

#### 4. Conclusion

Overall, the ICC Chambers decided to prioritize fairness in the *Lubanga* trial. They created a scheme in which the judges decide the manner of disclosing exculpatory information to the defense, and the OTP

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259. Roman Graf, *The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment*, 10 J. INT'L CRIM. JUSTICE 945 (2012), available at <http://jicj.oxfordjournals.org/content/early/2012/08/09/jicj.mqs044.full.pdf>.

260. See, e.g., Robert M. Pitler, *The Fruits of the Poisonous Tree Revised and Shepherdized*, 56 CALIF. L. REV. 579 (1968), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2807&context=californialawreview>.

faces significant penalties even for failure to disclose. This scheme prioritizes the goal of a fair trial at the expense of future convictions. Indeed, the ability to target atrocity perpetrators may decrease as important information providers feel uncomfortable participating. The stringent consequences imposed on the OTP in cases where disclosure to the judges is impossible may also affect the ability to prosecute perpetrators of atrocities.

### *B. Two Consequences of the Decision on Intermediaries*

For reasons similar to the use of third party information providers, the OTP is unlikely to stop using intermediaries. On the contrary, the greater the number of Situations under investigation, the more likely the OTP will resort to intermediaries, since its staff is limited. By mandating the disclosure of the intermediaries' identities in cases where these they may have influenced witness testimony, the Chambers placed their fairness concerns ahead of the ICC's concern for effective future OTPs. The two assumptions presented above,<sup>261</sup> namely that the OTP does not have enough resources to investigate everything on its own and that there are good reasons for which it should trust locals or experts, are equally applicable in this section. This section will argue that the present decision to disclose the identity of intermediaries has no substantive impact on the trial phase of any case at the ICC. Furthermore, the disclosure of identities may, for two reasons, divert the ICC from its goal to decrease impunity.

#### *1. Disclosure will have a Negligible Substantive Impact at Trial*

While the use of intermediaries is a function of the reality of the Situations that the ICC has to investigate, the disclosure of their identities, for four reasons, will have a negligible impact on the trial phase of any case at the ICC.

First, even without questions from the defense, the OTP has ample reasons to avoid intermediaries who will influence the evidence. Among others, honest intermediaries not only allow the OTP to build a solid case, but also put the OTP's limited resources to their most effective use. In *Lubanga*, the Trial Chamber found the OTP "negligent" of its duties, but this reprimand has little coercive power in and of itself.<sup>262</sup> On the contrary, the OTP in *Lubanga* always had a preference for honest intermediaries,

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261. See *supra* Part IV.A.1.

262. Final Judgment, ¶ 482.

clearly exemplified by the OTP's lengthy internal deliberations about the value of evidence collected by P-0316.<sup>263</sup> Revealing the names of the intermediaries to the defense only slightly impedes the OTP's case.

Second, revealing the intermediaries' identities to the defense had no discernible impact on the evaluation of the evidence at trial. The Trial Chamber is obligated to examine the testimony of all witnesses, regardless of how these became part of the case. In the final judgment of the *Lubanga* case, the Trial Chamber examined the reliability of every witness that became part of the OTP's case through the use of an intermediary.<sup>264</sup> This examination, however, had nothing particularly tailored to the role of the intermediary that linked the witness with the OTP, and it would (should) have happened even if the intermediary's identity had not been disclosed. For example, after examining the testimony of witness P-0008, who had been introduced to the OTP by intermediary 143, the Trial Chamber determined that the witness's account "viewed overall, is contradictory and implausible."<sup>265</sup> Conversely, for witness P-0038, "notwithstanding his connection to [intermediary] P-0316, the Chamber has concluded he was a reliable witness whose evidence is truthful and accurate."<sup>266</sup> The revelation of the identities of the intermediaries to the defense had no impact on these Chamber determinations.

Third, the disclosure of the intermediaries' identities to the defense teams should not be expected to further spur defense investigations. Even without the identity of the intermediaries, the defense teams would have tried to rebut the testimony of all witnesses offered by the OTP. The identity of the intermediaries is of limited use in that endeavor. For the defense, the identity of the witness is the sole important starting point. In the *Lubanga* trial, the defense team managed to discredit the OTP's witnesses by presenting internal inconsistencies in their testimony and by bringing defense witnesses who had good knowledge of their true story.<sup>267</sup> To find these rebuttal witnesses, the defense team only needed to know the identity of the individual witnesses, not of the involved intermediary.

Finally, the defense demanded to know the identity of the intermediaries in order to prove that they had improperly influenced the OTP's witnesses.<sup>268</sup> However, such improper influence could have been

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263. *Id.* ¶ 315.

264. *See supra* Part III.

265. Final Judgment, ¶ 232.

266. *Id.* ¶ 348.

267. *See, e.g.*, Final Judgment, ¶ 281 ([T]o rebut witness P-0011, the Defense called witness D-0024, "a member of P-0011's family.").

268. *See supra* Part III; Final Judgment, ¶¶ 292–484.

established through the use of the diagrams, which linked every intermediary to all the witnesses it produced for the OTP. The OTP provided such diagrams to the Chambers and the defense teams early in the trial.<sup>269</sup> By examining witnesses in an organized fashion, the defense could have shown the improper role of the intermediaries just as well as it did after it was aware of the latter's identities. Indeed, the defense did this with intermediary 143 even before it knew of its identity.<sup>270</sup>

## 2. *Disclosure to Impede Bringing Future Cases*

Even though the above arguments illustrate that the disclosure of the identity of the intermediaries does not help the Trial Chamber's determinations, the work of the OTP, or the defense teams in any meaningful way, this disclosure may impede the ICC's greater goal of ending impunity when conducting atrocity trials.

Most obviously, the threat that the name of an intermediary may be revealed may have a chilling effect on the willingness of intermediaries to participate in the OTP's investigations. As the present case indicates, the intermediaries used by the ICC are usually people aware of the ICC's activities.<sup>271</sup> After ICC personnel arrived in the DRC, intermediaries who worked for local organizations and were aware of the details of the ICC investigation often approached the OTP to volunteer assistance.<sup>272</sup> Such individuals were the most helpful for the OTP's investigative work, as they had direct knowledge of the local conditions and were also aware of the nature of the ICC's works.<sup>273</sup> After the events of the *Lubanga* case, such individuals have been placed on notice that their identities will be disclosed to the defense team upon allegations against their work. It is reasonable to assume that these individuals are aware of this risk, as they follow the developments of the ICC.<sup>274</sup>

In countries with rampant militia activities, where the OTP needs intermediaries the most, people are less likely to risk having their name revealed to the defense team. This deterrent effect, unfortunately, has

269. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, ¶ 15 (May 31, 2010).

270. *Id.*

271. Final judgment, ¶ 184 ("It was accepted that, in reality, the intermediaries were activists, most of whom were fully aware of developments within the sphere of international criminal justice and the objectives of the investigators.").

272. *Id.* ¶ 167 (referring to the contribution of local human rights activists).

273. *Id.* ¶ 184.

274. *Id.* ¶ 154 (claiming that the local population was aware of the ICC's activities in the DRC).

already proven true. In the *Katanga* case, Trial Chamber II found that real threats hung over an intermediary who had been named by a witness at trial.<sup>275</sup> Due to the influence of the accused Ngudjolo's supporters in the DRC, a similar situation occurred, threatening the life and security of translators, witnesses, and their families.<sup>276</sup> The present of such tangible threats may impede certain individuals from cooperating with the investigations, thereby decreasing the quality or increasing the costs of the investigations. Such possibilities also diminish the likelihood of the investigation's success.

Moreover, the revelation of an intermediary's name is likely to have a negative effect on the OTP's ongoing investigations. For example, when the OTP started its investigations in the DRC, intermediaries helped it build cases against Lubanga, but also against Katanga and Ngudjolo, and Bosco Ntaganda.<sup>277</sup> By revealing the name of an intermediary to the Lubanga defense team, the OTP's investigative efforts in the other cases stemming out of the DRC may be implicated. For example, intermediary 143, found to be unreliable in the *Lubanga* final judgment, was also used as an intermediary in the *Katanga/Ngudjolo* case.<sup>278</sup> In earlier stages of the *Lubanga* and *Katanga/Ngudjolo* cases, Trial Chambers I and II, appreciating the difficulties resulting from this practical overlap and the defense's incentive to engage in cross-cutting requests,<sup>279</sup> decided to defer to the first protective measures in place.<sup>280</sup> For intermediary 143, however, that initial protective measure was overturned later in the *Lubanga* case, and his identity was eventually revealed to the defense.<sup>281</sup> Is it realistic to expect that intermediary 143 can still work in the DRC for the OTP in the effort to bring the *Katanga/Ngudjolo* and other cases?

Despite the Chamber's laudable effort to protect intermediaries across multiple cases, the possibility that an intermediary may have his identity

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275. The Prosecutor v. Germain Katanga and Matthew Ngudjolo Chui, ICC-01/04-01/07-888-Red-tENG, Grounds for the Oral Decision on the Prosecutor's Application to Redact the Statements of Witnesses 001, 155, 172, 280, 281, 284, 312 and 323 and the Investigator's Note concerning Witness 176 (rule 81 of the Rules of Procedure and Evidence) (Jan. 10, 2011) (admitting that violence has taken place against ICC personnel and collaborators).

276. *Id.*

277. Final Judgment, ¶¶ 178–291 (explaining how the OTP initiated its investigations in the Congo, which have led to all these cases.).

278. Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-01/06-2190-Conf-Exp., Decision on the application to disclose the identity of intermediary 143 (Nov. 18, 2009) (Trial Chamber II refused a defense request for *Katanga/Ngudjolo* to reveal the identity of intermediary 143 after Trial Chamber I had similarly redacted the intermediary's identity in the *Lubanga* case).

279. *Id.*

280. *Id.*

281. See Final Judgment, ¶¶ 178–484.

revealed can cause considerable difficulties for the OTP. Admittedly, it may be good that the OTP stops using intermediaries that have affected the credibility of his witnesses. But, the quality of the intermediary is currently only judged by a Trial Chamber after the revelation of the intermediaries' identity to the defense.<sup>282</sup> In reality, as evidenced by the case of P-0031,<sup>283</sup> some intermediaries will have their cover blown and yet be found reliable and trustworthy. In such cases, revealing their identities to the defense teams would warrant great concern and trouble for the OTP, as it effectively impedes its other investigations.

### 3. Conclusion

The ICC's decision to disclose the identity of intermediaries aimed to promote fairness in the *Lubanga* trial. Nevertheless, it is not clear that revealing intermediaries made any substantive difference to the defense's strategy. Such revelations, however, will possibly dissuade potential intermediaries from working for the OTP and stigmatize the current intermediaries, leading them to stay out of ongoing or future investigations. By insisting on the fair trial rights of the accused, the Trial Chamber sacrificed the possibility of easier future investigations.

## V. CONCLUSION

The *Lubanga* trial was a watershed moment for international criminal law—the culmination of six months of important developments in the field.<sup>284</sup> After many years of planning and ten years of preparation,<sup>285</sup> an ICC Trial Chamber handed down its first judgment. Admittedly, since this is the first judgment of this Court it will—and should—be scrutinized. This article has examined how the ICC dealt with two types of disclosure: exculpatory confidential evidence the identities of the intermediaries. In doing so, it aimed to convey the complete record of the events at issue, and through these, to illustrate the complexity of such matters. Additionally, this questions the wisdom of these decisions for the long-term viability of international criminal investigations at the ICC.

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282. See, e.g., *id.* ¶¶ 178–484.

283. *Id.* ¶ 476.

284. See *supra* Introduction.

285. See *Timeline of Case*, ICC, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx) (last visited June 18, 2013).



The *Lubanga* judgment inaugurated the adolescent period for the field of international criminal law. Yet, as the above skepticism indicates, the ICC's decisions on evidence have placed considerable impediments in the path of future cases. Like all adolescents, international criminal justice seems to be undergoing a period of rapid and unpredictable transformation. This internal upheaval is primarily caused the Chamber's decision to prioritize the accused's rights without considering the greater institutional balance. Perhaps the future will see this equilibrium recalibrated.

It is also possible, however, that the future of international criminal justice will retain this imbalance. So far, through the *ad hoc* tribunals, international criminal law has played a primary role in post-atrocity criminal justice.<sup>286</sup> Breaking from this tradition, the ICC was designed to be a court of last resort.<sup>287</sup> In maintaining an evidentiary balance in favor of the accused, and thus making it difficult for the OTP to bring forth cases, the ICC judges may be signaling their understanding of this last-resort role.<sup>288</sup> Trials at the ICC may simply be hard to bring by design. In such an environment, the future of international criminal law may depend more on the development of local legal capacity than on successful trials at the ICC. In this regard, the world of international criminal justice remains somewhat infantile, attempting to balance on its two baby legs, while its parents wait to see how tall it will grow.

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286. Both ICTY and ICTR had primacy over the local jurisdictions. See ICTY, Rules of Procedure and Evidence, Rule 7bis-13, *supra* note 38; ICTR, *Rules of Procedure and Evidence*, Rules 8–13, available at <http://www.unictcr.org/Portals/0/English/Legal/ROP/100209.pdf>.

287. Rome Statute, *supra* note 2, art.14 (codifying the Principle of Complementarity).

288. For reasoning on why the ICC should have such a limited role, see William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53 (2008).