July 16, 2012

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 paper argues that the Trial Chamber’s solutions to two evidentiary problems will restrict the ICC’s potential to effectively hear future cases. First, this paper 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 undertaken in an exhaustive manner, 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. The goal of this paper is 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 past six months should be viewed as a transitional moment 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 Karadzic on trial and Radko Mladic scheduled to start trial soon. At the Special Court for Sierra Leone (‘SCSL’), the last defendant, Charles Taylor was recently convicted and sentenced to 50 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, and the hope that the investigation Case Files 003 and 004 will go forth. Finally, the ICC reached a judgment in its first case, one stemming from the Situation in the Democratic Republic of the Congo (‘DRC’), against Thomas Lubanga Dyilo. There is hope that while the flame of the ad hoc tribunals is dying, their lessons and goals have been effectively transplanted at the ICC. At least now, ten years after the ICC’s creation, it has become clear that the ICC can
function and that international criminal justice can become a permanent respected field of the law.

Yet, despite these undoubted success stories, the field of international criminal justice is 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, to put it in other words, can the ICC fill the shoes of the *ad hoc* tribunals that it is replacing? And if yes, what will it take for this to happen?

While there are many different facets to this question, this essay looks at the evidentiary issues of the Lubanga trial and predicts that the ICC’s current stance with regards to two issues of disclosure is bound to create future practical problems for the Court. During the six years that 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 again in 2010, ordered a stay of the proceedings and the provisional release of the accused. Through its insistence on disclosure of relevant evidence to the defence, 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. In brief, this article predicts that these two decisions on evidence are likely to contribute towards a turbulent adolescence for the field international criminal justice.

Like all criminal courts, both national and international, the ICC has to strike a balance between the fairness of the proceedings to 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 societies, rife with conflict. In the Lubanga trial, the ICC Chambers prioritized fairness over flexibility in two separate occasions. First, the Chambers stopped the Office of the OTP (OTP) from *sua sponte* determining how to disclose
exculpatory confidential information, and insisted that such a determination must be undertaken by the judges, not the OTP. Second, the Chambers held that the OTP has to reveal the identities of intermediaries that may have influenced his witnesses.

This essay 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. Second, this essay 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 in investigating and prosecuting future atrocity crimes. It also contends that the Chamber’s decisions on disclosure of the identity of intermediaries can have a chilling impact on the work of the OTP. As a result, this article predicts that the ICC will experience practical difficulties in the years to come.

This article proceeds in five parts. In the first part, it presents a brief description of the two disclosure issues that plagued that Lubanga trial. In Part II, it analyzes how the Court dealt with the issue of disclosure of exculpatory evidence, while Part III shows the Court’s decision on the issue of intermediaries. The essay, in Part IV, outlines how the Court’s decisions have affected the balance between prosecuting a case and having a fair trial. Finally, the essay concludes in Part V.

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Part I. Brief Description of Disclosure Issues in the Lubanga Case

The OTP of the ICC has the jurisdiction to investigate the commission of atrocities in three separate instances.\(^2\) The jurisdictional power most pertinent to this article is that the ICC can investigate when atrocities are committed in the territory of a state-member to the Rome Statute and the investigation of these atrocities has been referred to the OTP by the state-party.\(^3\) When a referral is issued, the OTP first opens the investigation of a Situation,\(^4\) through which he investigates all the atrocities committed under the terms of the referral. In a second stage, the OTP brings forth criminal OTPs against particular individuals that allegedly participated in the atrocities under that Situation.

At present, the Democratic Republic of the Congo was one of the first signatories of the Rome Statute—April 11\(^{\text{th}}\) 2002—and it has been a member of the ICC since its first day of existence—July 1\(^{\text{st}}\) 2002. On April 19\(^{\text{th}}\) 2004, the ICC Office of the OTP (“OTP”) announced that the President of the DRC had—through the process of a referral—asked the OTP to investigate alleged atrocities committed in the DRC territory.\(^5\) Soon thereafter, on June 23\(^{\text{rd}}\), 2004, the OTP announced its decision to open investigations into the DRC.\(^6\) From subsequent information, it is now known that the OTP had been observing the Situation in the DRC province of Ituri—in which the alleged criminal acts perpetrated by Lubanga took place—since 2003.\(^7\)

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\(^2\) Rome Statute, Article 13 Exercise of Jurisdiction (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.)

\(^3\) Rome Statute, Article 14 Referral of a situation by a State Party

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


\(^7\) The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 OA 12, 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
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, with the accused being in ICC custody since 2006. In its trial presentation, the OTP accused Lubanga of the single crime of enlisting child soldiers in the creation and operation of his militia. In order to prove his case, the OTP had to collect information and present evidence to the ICC’s Trial Chamber (‘TC’). It is now known that the OTP in this case collected evidence from various organizations that had a presence on the ground and also used local intermediaries to find witnesses against Lubanga. These two prosecutorial strategies shaped the evidentiary issues of the present case, problems with which began to appear even before the beginning of the trial.

Part II. Disclosure of Exculpatory Evidence

Disclosure of exculpatory evidence was a contentious issue in the Lubanga case. This part of the article presents the ambiguity in the ICC law surrounding the disclosure of confidential information. It then outlines the facts behind the present Lubanga decision and details the disclosure solution that was imposed by the ICC’s Chambers. Finally, through the example of the UN, this article demonstrates how the judicial involvement in this case affected the OTP’s work in the Lubanga case. It thus proceeds in four sections.

a. The Legal Ambiguity

A textual interpretation of the ICC Statute and Rules on the issues of confidential information and disclosure towards the Defence leaves many issues unresolved. Notably, the rules fail to answer which obligation—confidentiality or disclosure—is more important for the OTP. Instead, there is a clear mismatch between Rules 54(3) and 67(2). Having presented this ambiguity, this article turns
to how other domestic and international courts dealt with such conflicting obligations. It concludes by exposing two existing trends on this issue.

(i) 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 Defence. In order to resolve this potential clash, the Rome Statute and the ICC’s Rules of Procedure and Evidence govern, first, the issue of disclosure of exculpatory evidence by the OTP to the Defence, and second, the issue of gathering of confidential information. The legal framework is not very clear, as there are “numerous articles [that] govern time and mode of disclosure…many of which are open to the resolution of the court.”

First, various articles set out the duty of the OTP to provide disclosure to the Defence. Under Article 67(2) of the Statute, the OTP must disclose to the Defence

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\text{evidence in the OTP’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 OTP evidence. In case of doubt as to the application of this paragraph, the Court shall decide.} \]

Additionally, under Rule 77, the OTP shall

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\text{permit the Defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the OTP, which are material to the preparation of the Defence or are intended for use by the OTP 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.} \]

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9 Rome Statute, Article 67(2), Rights of the Accused.
10 Rules of Procedure and Evidence, Rule 77
Second, some provisions allow the OTP to gather confidential information. Article 54(3)(e) of the Statute allows the OTP “not to disclose, at any stage of the proceedings, documents or information that the OTP obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.” Rule 82, of the ICC’s Rules of Procedures and Evidence, reaffirms the protection of confidentiality for the material collected under article 54 of the Rome Statute. Finally, Rule 83 clarifies that the OTP has to request an *ex parte* hearing for obtaining a ruling under article 67(2), i.e. in cases of doubt as to the requirement to disclosure of 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 OTP evidence.”

In general, the Statute and the Rules have established a detailed system for the disclosure of evidence to the Defence. Under this system, the OTP faces broad disclosure obligations. It has been argued that these rules endow the TC with inquisitorial features, as they allow it to make final determinations in cases of doubt. While these provisions were sufficient to deal with the disclosure of the intermediaries’ identity (see *infra* Part IV), 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 Defence.

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11 Rome Statute, Article 54(3), Duties and Powers of the PROSECUTOR with respect to investigations.
12 Rules of Procedure and Evidence, Rules 82 and 83.
15 Rome Statute, Article 67(2) (“affect the credibility of the Prosecutor’s evidence”).
(ii) Disclosure of Exculpatory Evidence in Domestic Courts and International Human Rights Courts

For domestic courts, disclosure to the Defence has historically been a central precept of domestic law—one that trumps other considerations.\textsuperscript{17} In common law countries, disclosure to the Defence is a key element of a fair trial.\textsuperscript{18} In these countries, when other interests clash with the defendant’s rights to access certain materials, the court is allowed to view the potentially exculpatory material \textit{in camera} and to decide on the necessity of disclosing the information to the Defence.\textsuperscript{19}

In civil law jurisdictions, disclosure to the Defence is accomplished by allowing the Defence access to the dossier of the case, which includes all information that the Investigative Judge considers useful for the case-- both exculpatory and inculpatory information.\textsuperscript{20} In this process, the Investigative Judge determined what evidence will be disclosed.

For international courts, disclosure is equally important. Disclosure of exculpatory evidence to the Defence 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.\textsuperscript{21} International courts of human rights have also upheld this obligation. The European Court of Human Rights (ECHR), for example, in Jespers v. Belgium, held that the obligation to disclose material that may assist the accused stems from the principle

\footnotesize{\textsuperscript{17} For example, in the US, the PROSECUTOR’s duty to disclose derives among others from \textit{Brady v. Maryland}, 373 US 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 the issue of guilt or innocence.).


\textsuperscript{19} See 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 \textit{in camera} review.”).


\textsuperscript{21} Article 11(1) of the UDHR; Article 14(1) of the ICCPR.}
of ‘equality of arms.’ As such, a balanced trial can only take place if the OTP—who is institutionally superior to the accused—discloses to the Defence any exculpatory information in his possession.

Nevertheless, the ECHR has recognized that legitimate reasons for non-disclosure to the Defence exist, including the need to protect fundamental rights of another individual or an important public interest. In cases in which another conflicting interests are present, ECHR has held that if the OTP—for some legitimate reason—refuses to disclose information, which the OTP is to the accused, the OTP must provide the information to the court, which will then decide if the accused’s rights are violated by this prosecutorial non-disclosure.

(iii) 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, one that derives from the principle of equality of arms during trial, 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 ICTY, which experienced a shift in its legal position over time as relates to this topic.

Initially, the ICTY—in line with domestic and international human rights standards—considered disclosure of exculpatory information to the accused to be in the public interest. The ICTY also clarified that the disclosure of other information of a similar nature is not an acceptable practice. When the OTP faces a choice between the duty to disclose to the Defence and the duty of confidentiality towards his sources, the ICTY held in 1994 that Rule 70

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23 ECHR, Chahal v the UK, 15 November 1996, Application No. 27052/95.
24 ECHR, Rowe and Davis v United Kingdom, no 28901/95, Judgment of 16 February 2000.
(confidential information) did “not override the OTP’s obligation to disclose pursuant to Rule 68.”28 As a result, the ICTY was initially in line with domestic and international jurisprudence on the issue of disclosure.29

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 Defence and TC.30 The Defence teams, nevertheless, pressed on with requests for such disclosure and the TCs of the ICTY—siding with the principle of disclosure—agreed with these requests.31 Since such decisions risked ending the cooperation of NATO countries—which was central to the ICTY’s evidence gathering—on June 10th 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).32 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.33 Additionally, under the Rule 70 limitations,

29 Id.
30 Id.; The Prosecutor v. Milutinovic et al., “Decision on Request of the United States of America for Review,” IT-05-87-AR108bis.2, 12 May 2006 (granting the request by the USA and other NATO countries that they not be ordered to reveal their national security information).
32 ICTY, Rules of Procedure and Evidence, Rule 68 (starting with “Subject to the provisions of Rule 70.”).
Dragoljub Odjanic was not given evidence of NATO actions that his Defence considered important to their case.\(^{34}\)

It was generally believed that the ICTY’s rules on this point constituted an aberration, one explained by the importance of NATO’s role in those proceedings. Indeed, the ICTR, the SCSL and the ECCC all prioritize the disclosure of exculpatory evidence—even when this clashes with other obligations.\(^{35}\) Despite this view, the law of the ICTY has been recently transplanted to the Special Tribunal for Lebanon (‘STL’), which is the second international criminal tribunal that prioritizes confidentiality over disclosure. While the STL has not yet heard any cases—precluding this analysis from verifying how the rules will work in practice—the STL’s rules indicate that confidentiality will be prioritized in important instances.\(^{36}\)

On the one hand, and 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 TC—\(\textit{ex parte}\) and \(\textit{in camera}\)—will decide on the method of disclosure, if any, that should be used.\(^{37}\) The same concept applies for evidence that “may affect the security interests of a State or international entity.”\(^{38}\)

On the other hand, however, the provisions of Rule 118 pose significant problems for the defendant’s rights. Under Rule 118, the STL provides that “where the OTP is in possession of information which was provided on a

\(^{34}\) These requests for disclosure of information by Odjanic culminated in ICTY, The Prosecutor v. Milutinovic et al., “Decision on Request of the United States of America for Review,” IT-05-87-AR108bis.2, 12 May 2006. §46. (granting the request by the USA and other NATO countries that they not be ordered to reveal their national security information).


\(^{36}\) Id., at p. 933.

\(^{37}\) Special Tribunal for Lebanon, Rule 116

\(^{38}\) Special Tribunal for Lebanon, Rule 117.
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. If the information provider refuses to cooperate, no one—not even the STL judges—shall have access to the evidence. To the contrary, 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 having disclosed under Rule 118(C) and shall review the list of counterbalancing measures proposed by the OTP under Rule 118(C).” Several factors may explain why the creators of the STL do not trust its judges with confidential information, but the present process balances the rights of the accused with the interests of the information providers through the partial exclusion of the STL’s judicial bodies. The “lack of meaningful judicial control” should give rise to plenty of concerns.

(iv) 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. Recognizing that the OTP has an advantage over the defence in the gathering of evidence—due to its institutional power, the principle of equality of arms compels courts to demand that the OTP disclose exculpatory information in its possession regardless of the origin of that information. 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

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39 Special Tribunal for Lebanon, Rule 118.
40 Special Tribunal for Lebanon, Rule 119.
42 Id., at p. 941.
courts of human rights have recognized—as a minimum guarantee—the need for judicial review. Exculpatory information will be withheld from the defence 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 but not requiring the role of judicial review. For these tribunals, exculpatory evidence may in some instances be withheld from the defence 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 29th 2007, the disclosure of exculpatory evidence was an obvious problem. According to the Rules of Procedure and Evidence, prior to the confirmation of charges, the PTC must ensure that disclosure takes place.45 While the OTP does not have to disclose all evidence at this stage, it must prepare a “document containing the charges,”46 and it must disclose inculpatory and exculpatory evidence into two separate categories.47 The bulk of such disclosures must happen as soon as practicable (‘bulk rule’), which includes the time prior to the confirmation hearings.48

45 Rules of Procedure and Evidence, Rule 61(3).
46 Rome Statute, Article 61(3)(a); Rules or Procedure and Evidence, Rule 121(3); Regulations of Court, Regulation 51.
Disclosure after the confirmation hearing is allowed for facts that have become known only after the confirmation hearing.\textsuperscript{49}

The Defence raised the issue of non-disclosure of confidential information with the PTC before the confirmation hearings against Lubanga. The PTC, in an opinion subsequently quoted by the TC, determined that the OTP’s practice of resorting to Article 54(3)(e) evidence extensively had led to trial problems, as the OTP faced difficulties in securing the consent of the providers.\textsuperscript{50} 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. 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”\textsuperscript{51} was—at the trial stage—a satisfactory substitute for actual disclosure.

After the confirmation of charges, the Lubanga case—moving forward to the trial hearings—took a series of twists and turns, which reveal valuable information about the ICC, which is relevant to the present analysis. First, at a hearing on October 1\textsuperscript{st} 2007, the Defence said that the OTP had submitted to it over 15,000 documents. The OTP also admitted that there were ongoing requests to various organizations to lift redactions with regards to over 500 documents, which amounted to about 3080 pages.\textsuperscript{52} Second, on November 9\textsuperscript{th} 2007, the TC issued a decision regarding the timing and manner of disclosure and the date of

\textsuperscript{49} The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-102, Trial Chamber I, Decision on the Final System of Disclosure and the Establishment of a Timetable, § 121-130 (May 15, 2006).

\textsuperscript{50} The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-102, Pre-Trial Chamber, “Decision Requesting Observations concerning Article 54(3)(e) Documents Identifies as Potentially Exculpatory of Otherwise Material for the Defence’s Preparation for the Confirmation Hearing,” § 9-12.

\textsuperscript{51} Id., at §65, 77-82.

\textsuperscript{52} The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Chamber, 13 June 2008, “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,” at §15.
In this decision, the TC gave the OTP a choice to (a) withdraw any charges where non-disclosed exculpatory material has 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 TC for its determination. With this order, disclosure would continue until mid-December 2007 and commencement of trial was set for June 23rd 2008. Third, on March 6th 2008, the TC—as a case management tool imposed disclosure obligations on the Defence. The TC requested the Defence to disclose its line of defence so as to allow better coordination in disclosure of information. Fourth, on March 13th 2008, the OTP admitted to collecting more than 50% of its evidence on the basis of the confidentiality rules of the ICC Statute, i.e. Article 54(3)(e). On May 6th 2008, furthermore, 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 that which was found to be materially relevant to each case.

Behind this decision lay the fact that the OTP was not permitted—under its confidentiality agreements—to disclose certain pieces of evidence to the Defence. Throughout the entire trial, the information providers emphasized three reasons for their lack of cooperation. First, the information providers needed to protect their operations on the ground. Second, they needed to protect their personnel from retaliatory attack. Third, they needed to protect the lives and security of their sources. For the information providers, the requirements of a fair trial, which

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53 The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Chamber, November 9th 2007, “Decision regarding the timing and manner of disclosure and the date of trial.”
55 The Prosecutor v. Thomas Lubanga Dyilo, 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 (6 March 2008), at §2, §11-12.
56 The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-79, Hearing Transcript, §5-6 (Mar. 13, 2008)
58 See e.g. Transcript of Hearing on July 2009, ICC-01/04-01/06-T-204-ENG WT 06-07-2009 (including a
include the concept of equality of arms from which the OTP’s obligation to disclose exculpatory information derives, was not of central importance.

c. The Solution

In light of all of the above complications, the TC, on June 13th, 2008, imposed a stay on the proceedings. The trial phase had been scheduled to begin on June 23rd, 2008. The rationale behind this TC decision informs the present analysis. The TC stressed that not only was the OTP unable to disclose exculpatory confidential information to the Defence, but it was also unwilling to show this information to the TC, thereby failing to abide by the choices set up in the TC’s earlier decision of November 9th 2007. As a result of the OTP’s actions, the Defence and the TC lacked complete knowledge of the nature of the information and, with the exception of the UN whose presence had been revealed by the OTP, they did not even know who the information providers were. The TC 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.”

The TC indicated that the source of the present problems was the erroneous application by the OTP of Article 54(3)(e). According to the TC, this article is to be used “solely for the purpose of generating new evidence” (emphasis in original). The OTP, however, did not resort to using it exceptionally. Instead, as it used this article to “obtain evidence to be used at trial” (emphasis in original), it was engaging in “the exact opposite of the proper use.” For the TC, 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 Defence and its duty of confidentiality towards its sources. Apart from chastising the OTP, the TC also provided some

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59 The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Chamber, 13 June 2008, “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,” at §93.

60 Id., at § 71.

61 Id., at § 73.

62 Id., at § 73.
important clarification as to the meaning of exculpatory material. Adopting a broad definition of the term, it held that such material includes information that (1) shows or tends to show the innocence of the accused, (2) which mitigates the guilt of the accused, and (3) which may affect the credibility of OTP evidence.

Finally, the TC’s decision included two significant procedural holdings. First, and in contrast to the PTC’s determination, the TC found that the OTP’s proposal to disclose by analogy alternative material—similar in nature to the confidential material—was not allowed, because “similar evidence can never provide an adequate substitute for disclosing a particular piece of exculpatory evidence.” The accused has a right to access both “confidential and similar material”.63 Second, and in repetition of its decision of November 9th 2007, the TC 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 OTP but for the judges.”64 The OTP’s refusal to let the judges determine the nature of the confidential material was sanctioned. 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.65 The TC’s strong rebuke of the OTP’s practices was also coupled by a decision to release Lubanga.

Ten days after the TC’s decision, the OTP filled an appeal on three grounds. The OTP contended that (1) the TC erred in its legal interpretation of the nature and scope of 54(3)(e); (2) the TC erred in law and in fact in its characterization of the II’s conduct pursuant to Article 54(3)(e); and (3) the TC erred by imposing an excessive and premature remedy in the form of an indefinite stay of proceedings. While the appellate procedure was pending, the OTP, on July 11th 2008, requested a lift of the stay of the proceedings, which was rejected by the TC because many obstacles for proper disclosure were still in place. Then, on

63 Id., at §60
64 Id., at §87
65 see supra Part II
October 14th 2008, the OTP withdrew the first two grounds of the appeals because the information providers had, in the meantime, agreed to allow complete and continuous access to the TC and, if necessary, to the AC.

In more detail, the scope of the disclosure was important as the information providers had agreed to disclose directly and in a non-redacted form 135 documents to the Defence. As for the additional 93 documents, which could not be disclosed directly or in fully non-redacted form to the Defence, the information providers had agreed to make them available to the TC in non-redacted form for the duration of the trial and to the AC for full appellate review. Perhaps most significantly, the OTP revealed its correspondence with the UN, a reading of which illustrates the hurdles the OTP had to undergo to lift the UN’s confidentiality.66 With these new facts in mind, the AC issued its decision on October 21st 2008.

Even though the disclosure had been obtained before the appellate decisions, the later warrant attention primarily for two reasons. The first decision deals with the release of the accused and is only tangentially related to the present issue.67 In this, the AC clarified that even while the stay of proceedings was implemented on the basis of a previous decision of the AC, it did not have to be permanent. To the contrary, it could be imposed conditionally and temporarily. In such cases, in which there is neither a full acquittal nor a complete termination of the criminal trial, the TC doesn’t have to release the accused but has to balance the circumstances.68 The AC thereby legitimated continued detention when the stay of proceedings is temporary, a decision which some commentators have called the most problematic effect of this decision.69 Judge Pikis, in a strong dissent, warned

66 The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, 13 October 2008, Prosecutor’ s Application for Trial Chamber to Review all the Undisclosed Evidence Obtained from Information Providers.
67 The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 OA 12, Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the release of Thomas Lubanga Dyilo”
68 Id. at § 37.
that such detention is not allowed because there is, at most, the possibility of trial at an indefinite future time.\textsuperscript{70}

Second, and more relevant to the present issue of disclosure, the AC agreed with the TC’s reading of Article 54(3)(e).\textsuperscript{71} It concurred in the TC’s reading that Article 54(3) was “limited to generation of new evidence.” It also clarified that—in its insistence on using article 54(3)(e) for the generation of new evidence—it had not created a distinction between lead and other evidence. Finally, the AC 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.

While the AC held that the OTP cannot hold onto exculpatory information without disclosing it, and that the TC can impose a conditional stay of the proceedings, the AC also cautioned the TC to evaluate the developments that had occurred since the stay was imposed. Undoubtedly, the AC was referring to the OTP’s submissions of October 14\textsuperscript{th} 2008, according to which the information providers had agreed to full disclosure.\textsuperscript{72} Heeding the AC’s advice, the TC in a status conference on November 18\textsuperscript{th} 2008 issued an oral decision lifting the stay of the proceedings. In this decision, it specified exactly what previously held confidential information and in what form would be handed over to the Defence.

The TC’s oral decision was followed, on January 23\textsuperscript{rd} 2009, by a written decision that documented not only that the OTP had complied with the TC’s order to turn over all confidential exculpatory information to the judges, but also the methods through which the judges determined what pieces of evidence would be

\textsuperscript{70} The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 OA 12, Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the release of Thomas Lubanga Dyilo,” Dissent of Judge Pikis, at § 13.

\textsuperscript{71} The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 OA 12, 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 PROSECUTOR of the accused, together with certain other issues raised at the Status Conference on 10 June 2008,” 21 October 2008.

\textsuperscript{72} The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, 13 October 2008, Prosecutor’s Application for Trial Chamber to Review all the Undisclosed Evidence Obtained from Information Providers.
redacted or withheld from the defence. In this decision, the TC 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.”

The use of protective measures to balance the accused’s right of access to exculpatory evidence with the real-world priorities facing the information providers was further upheld in the final trial judgment of March 14th 2012. There, the TC 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. In cases where disclosure was incomplete, unfairness to the accused was protected by the TC’s ordering “the disclosure of alternative evidence or summaries.” Overall, the TC 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.”

Overall, when comparing the stance of the OTP in June 2008 and its stance in October 2008, it is clear that the OTP or the information providers made a “strategic turnabout.” Under the pressure of a likely release of the accused, “within two weeks…the OTP was able to offer the Chamber all the relevant confidential documents in unredacted form for an ex parte and in camera review.” In what appears to be a real triumph for the protection of the rights of the accused, the Lubanga trial aligned with the international norms outlined above, and distinguishes its practice from that of the ICTY and the STL. For international

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74 Id.
75 The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2842, Judgment pursuant to article 74 of the Statute, 14 March 2012, at § 116-118. [hereafter Final Judgment].
76 Id., at 121.
77 Id., at 123.
78 Victor Tsilonis, Thomas Lubanga Dyilo: the Chronicle of a Trial Foretold?, ” Intellectum, at 10.
criminal law in general, the insistence of defendant rights over OTP ’s duties to third parties seems a legitimating move. The decisions of the TC and the AC nonetheless leave some important issues unresolved, however. Part IV will turn to these.

d. The Example of Evidence Obtained from the UN

The events described above are ideally illustrated through the relationship of the OTP with the United Nations (‘UN’). For the purpose of its investigations, the OTP approached various organizations with a presence in the DRC. 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. Due to this limitation, it is impossible to fully grasp the parameters of the OTP’s cooperation with the other six organizations, since the only public agreement of cooperation is that with the UN. Regardless of this limitation, the agreement with the UN and its subsequent modification is indicative of the evidentiary problems faced by the OTP.

On October 4th 2004, the UN and the ICC (which includes the OTP) signed the UN-ICC Relationship Agreement. Article 18(3) of this agreement is relevant for this analysis as it states that

“the 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.” (emphasis added)

In an extension of this agreement—particularly because the ICC personnel in the DRC needed support from the UN operations on the ground—on November

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8th 2005, the ICC concluded a Memorandum of Understanding with the United Nations Organization Mission in the DRC (‘MONUC’). Relevant for the present analysis, article 10 of this MOU, concluded on the basis of article 18(3) of the Relationship Agreement (see supra),\(^{81}\) establishes the confidentiality of the information provider and sets up a procedure for partially or completely lifting this confidentiality.\(^{82}\)

With the help of these organizations—now in the role of confidential information providers—the OTP proceeded with its investigations until February 10th 2006, when the PTC—at the request of the OTP—issued an arrest warrant against Thomas Lubanga Dyilo.\(^{83}\) In the time between the initiation of the investigation and the issuance of the arrest warrant, because it collected material “before cases had been selected,” the OTP “could not then assess the exculpatory nature of some of the material.”\(^{84}\) Armed with information collected under confidentiality agreements, the OTP brought a 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 Defence 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.”\(^{85}\) The preoccupation of the UN with

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\(^{81}\) 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, 8 November 2005, Article 10.10.

\(^{82}\) Id., at 10.08.

\(^{83}\) The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, 10 February 2006, Pre-Trial Chamber I, Warrant of Arrest.

\(^{84}\) The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 OA 12, 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 PROSECUTOR of the accused, together with certain other issues raised at the Status Conference on 10 June 2008,” 21 October 2008 at §26.

\(^{85}\) Letter from Prosecutor to UN, ICC-01/04-01/06-1478-Anx1, 9 October 2008.
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. 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 defence team. In brief, there were 38 documents that the UN had turned over to the OTP which contained exculpatory information, but which the UN did not want to share with the Defence. The documents contained such information that these concerns were prevalent for 2 documents, in their entirety, and 36 documents, in redacted form.86

In order to meet the ICC’s obligations, the OTP had to convince the UN to overcome its hesitations with regards to these 38 documents. It did so by proposing that the UN give the judges of the TC and the AC access to the non-redacted version of the evidence. If the judges decided to reveal such information to the Defence, 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, in October of 2008, the UN amended its agreement with the ICC—under article 18, 4 of the Relationship Agreement—to allow the above scheme to enter into force.87

The UN cooperation with the OTP took a last turn in November of

86 Id.
87 Response from UN to Prosecutor, ICC-01/04-01/06-1478-Anx2, 10 October 2008.
2008. Then, having accepted the scheme of judicial review created by the TC, the UN notified the OTP that nine of its documents would need “further protective measures” if they would be used at trial.\(^\text{88}\) Seven of these documents came from the list of 38 documents previously discussed, while two documents were new to the trial process. The TC accepted the UN requests, marking the end of the UN journey into the ICC’s disclosure regime for the Lubanga case.

**e. Conclusion: The Law at Present**

As it was not clearly resolved in the ICC Rules and it had important consequences for the OTP and the Defence, the disclosure of exculpatory evidence consumed the attention of the ICC for more than two years. From the PTC’s initial decision, in January of 2007, until the final decision of the TC, in January of 2009, the rules of disclosure of confidential exculpatory evidence underwent a major clarification. Now, the OTP has to allow the judges of the TC and of the AC unfettered access to all potentially exculpatory evidence and allow these judges to determine in what form such information will reach the Defence. 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 the information providers. It also implicated the TC 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 this issue. Out of 593 pages of judgment, 5 paragraphs touch upon the issue of disclosure of exculpatory evidence. 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 TC 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.

**Part III. Disclosure of the Identity of Intermediaries**

The disclosure of the identity of the intermediaries that the OTP had used to find witnesses in the DRC was another very important issue for the trial of Lubanga. This time, the OTP was unwilling to disclose the identity of the intermediaries to the Defence 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 exceed the completion of the Lubanga trial.\(^{89}\) Admittedly, this evidentiary issue is far less complicated than the disclosure of exculpatory evidence, which is treated *supra* in Part II. There, the OTP had to abide by the Court’s orders and also persuade the information providers to follow suit. Here, the OTP had no external actors to convince. To the contrary, the following events show that the disclosure of the identities of the intermediaries was a debate solely between the OTP and the Court. Yet, the Lubanga trial was significantly derailed due to this debate.

This Part will proceed in four sections. It starts by indicating how the Rome Statute clearly covers the facts of the present case. Second, it shows the facts and the dispute surrounding the use of intermediaries. Then, it demonstrates how the ICC’s Chambers dealt with the disclosure of their identities. Finally, it shows how this disclosure affected the 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,

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\(^{89}\) The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, 31 May 2010.
however, it becomes apparent that these intermediaries had an influence on the testimony presented in a case, the law is abundantly clear. Precisely, Article 67(2) holds that the OTP has to disclose “evidence in the OTP’s possession or control which…may affect the credibility of OTP evidence.” Since it is reasonable that the work of interfering intermediaries may have affected the credibility of the OTP’s evidence, the OTP would be obliged to reveal these identities of such intermediaries to the Defence. Despite this legal clarity, the following factual realities made such revelation hard for the OTP.

**b. The Problem**

The use of intermediaries by the OTP was necessitated by the realities in the Eastern Congo. In conducting the investigations, the Office of the OTP (‘OTP’) had to gain access to documents, witnesses and—due to the nature of the single charge against Lubanga—former child soldiers who lived in a war zone.\(^90\) Association with the OTP entailed significant risks for all participants, who were likely to be harmed in retaliation for their cooperation with the investigative process.\(^91\) In these circumstances, the OTP resorted to the use of intermediaries.

The OTP used two categories of intermediaries. The first category included individuals who would contact potential witnesses and arrange for them to meet with the investigators.\(^92\) The second category was composed of people who knew the security situation in a certain area, and thus provided guidance on the possible actions of the investigators.\(^93\) Often, these two categories overlapped, with security experts providing potential witnesses and vice versa.\(^94\)

The work of the OTP in the eastern provinces of the DRC necessitated the use of intermediaries. Initially, the investigators were unable to make any contact with local witnesses without risking the safety of the witnesses, and their families.

\(^{90}\) See *e.g.* Final Judgment § 159.

\(^{91}\) Final Judgment § 156.

\(^{92}\) Final Judgment § 190.

\(^{93}\) Final Judgment § 193.

\(^{94}\) Final Judgment § 194.
Additionally, in some instances, investigators were near gunfights or even had their convoys attacked by local militia.\textsuperscript{95} Behind all of these difficulties was the reality that the location of the investigations, in the eastern DRC, and particularly the city of Bunia and its surroundings, were under the control of militia groups for the entirety of the Lubanga investigations.

Finding intermediaries was not difficult. Initially, workers of various human rights NGOs would help the ICC investigators by providing relevant information.\textsuperscript{96} As these workers had knowledge of the local environment and expertise on the issue of child soldiers—which formed the main investigative goal of the ICC against Lubanga—their input was invaluable to the investigators. They eventually became intermediaries.

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. Due to the fragile security situations, the intermediaries arranged meetings between potential witnesses and the investigators in churches, “libraries, schools, deserted areas and rented houses.”\textsuperscript{97}

Furthermore, the intermediaries were compensated for their services. Initially, this compensation reflected the expenses that the intermediaries engaged in on behalf of the investigation. 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.\textsuperscript{98} Later, however, it became apparent that “certain intermediaries were so indispensable that they had to be provided with some form of more appropriate compensation.”\textsuperscript{99} As a result, a special contract was arranged, that officially made the intermediaries

\textsuperscript{95} Final Judgment § 155.
\textsuperscript{96} Final Judgment §§ 183-197.
\textsuperscript{97} Final Judgment § 162.
\textsuperscript{98} Final Judgment § 198.
\textsuperscript{99} Final Judgment § 203.
employees of the investigative team and spelled out their duties. There are records of such contracts starting in early 2005 and carrying through up to 2010.

The input of the intermediaries in the preparation of the Lubanga case was monumental. As the TC 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.” The Defence, 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. It thus requested that the OTP reveal the identities of the intermediaries, so as to allow the Defence to counter their influence.

Initially, the TC deflected the requests of the Defence for the disclosure of the intermediaries. It considered 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.” But, as the trial continued, the use of intermediaries became a pressing issue. As a result, the TC requested on February 3rd, 2010 that the OTP provide “comprehensive information” on the contacts that any its intermediaries had with any of its witnesses. By February 10th, the TC had heard evidence that placed exactly in front of it the issue of intermediaries. In detail, during the previous days, trial witnesses had expressly stated that certain intermediaries influenced their narratives. As a result, on February 10th, the TC called the OTP to undertake four measures that, among others, asked “whether the identity of the intermediaries should remain confidential in light of the recent allegations and the emerging defence case.”

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100 Final Judgment § 203.
101 See e.g. Final Judgment § 219 (talking about Intermediary 143).
103 Id., §150.
104 Id. § 17.
105 Id. § 30.
106 Id., §37.
c. The Solution

Before reaching any solution on these matters, the defence was put on notice about the identities of intermediates 316 and 321, as a trial witness unexpectedly identified them during the oral proceedings. Noting that the identity of all intermediaries had by this time became an obvious priority for a complete and fair defence, the TC on March 15th 2010 “indicated that the defence was entitled to know the names of certain intermediaries, and including that of intermediary 143.” Despite this TC order, the OTP stalled. First, it claimed that the Registrar would also have to approve this decision. This contention was summarily dismissed by the TC—since the decision was an order by the Court. Then, the OTP contended that revealing the identity of the intermediaries would be “a dereliction of its duty of care towards its intermediaries and the witnesses with whom they deal if their identities were to be disclosed to the Defence.” In essence, the OTP argued that his duty towards the safety of the intermediaries trumped his 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.

The TC rejected this proposal. Holding that there was extensive and clear evidence on the basis of which the defence should have access to the identity of the intermediaries, it was “not persuaded that these applications can be

107 Id., (explaining that for intermediary 316, this happened as early as June 16, 2009, by P-0015)
108 Id. § 41.
109 Id. § 42.
110 Id., § 58.
111 Id. § 91.
satisfactorily resolved by the OTP's "three-stage approach"."112 Particularly, the TC was not convinced that an *in camera ex parte* proceeding would guarantee the rights of the accused, as this was “a highly contentious and potentially important matter.” Finally, the TC reiterated that there is considerable evidence indicating that the intermediaries influenced the witnesses, making it unfair to deny the defence the opportunity to examine this possibility.

The TC then issued its own scheme for revealing the identity of the intermediaries. It held that disclosure of 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.”113 Once this threshold has been met, disclosure of the identity will take place after an assessment by the VWU is in place. The TC 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.”114 In light of this scheme, the TC called for the testimony of intermediaries 316 and 321. It also reiterated that the OTP had to disclose the identity of intermediate 143, but did not seek to have the latter testify at trial. On June 2nd, 2010 the TC 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.”115

The disclosure of intermediate 143’s identity was not resolved at this point. On July 8th, 2010 the OTP requested to vary the time limit to disclose the identity of 143 or to stay the proceedings pending consultations of the VWU.116 The basis

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112 Id. § 136.
113 Id., § 139.
114 Id.
115 The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the Prosecutor request for leave to appeal the "Decision on Intermediaries," 2 June 2010, § 32.
116 The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2517-Red, Redacted Decision on the
of this request was that intermediary 143 had sought to renegotiate the protective measures offered to him. In more detail, the TC had an oral proceeding on July 7th, 2010. There, it was informed that the intermediary 143 had accepted the security arrangement offered by the ICC on June 21st, 2010 only to later renege on his acceptance. By July 6th, 2010, it was unclear if intermediary 143 had “rejected them [security measures] outright or intended to require adjustments.”

Additionally, “the Chamber was informed by the VWU that, inter alia, a significant financial component had been raised by 143.”

In light of these facts, the TC 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 defence's questions. The Court adjourned at 10.32.” It also stressed that the defence would keep the information limited only to its counsel, assistance and resource person in the DRC. The OTP, having failed to abide by the TC’s order, asked the TC in the afternoon to revisit its order. This request was swiftly rejected by the TC, which clarified 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 been withdrawn.” The OTP again refused to comply by this order. Echoing its statements made previously in May, it considered that it has an obligation towards its duties under the Rome Statute, which include protection of witnesses and intermediaries.

The TC’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.” It then held that

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, 8 July 2010

117 Id. at § 6.
118 Id. at § 11.
The OTP, by his refusal to implement the orders of the Chamber and in the filings set out above, has revealed that he does not consider that he is bound to comply with judicial decisions that relate to a fundamental aspect of trial proceedings, namely the protection of those who have been affected by their interaction with the Court, in the sense that they have had dealings with the OTP. 119

The TC 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.”

Furthermore, the TC held that the OTP “cannot be allowed to continue with this OTP 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.” Because of the material non-compliance with the Chamber’s order of July 7th 2012, the TC found it “necessary to stay these proceedings as an abuse of the process of the Court.” Since a fair trial was not possible, as the judges could not control the OTP’s actions, the TC halted the entire trial process. 120 As a consequence of this decision, the TC—in an oral decision of July 15th, 2010, decided to release the accused from detention. 121 For a second time, an issue of disclosure had brought the trial process to a grind and had led to the provisional release of Thomas Lubanga Dyilo.

Soon thereafter, the OTP filed three appeals stemming from the TC’s decision. In the first one, on July 23rd, 2010, the AC decided to give suspensive effect to the order to release Lubanga, meaning that Lubanga would be held in detention until the other two appellate decisions were issued. On October 8th, 2010, the AC issued its other two decisions.

In the first, it agreed with the TC’s determination that the OTP “is obliged to comply with the orders of the Chamber.” It found that the OTP’s “willful non-

119 Id., at § 21.
120 Id., at § 28.
121 The Prosecutor v. Thomas Lubanga Dyilo, Order to Release Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-314.ENG, 15 July 2010.
compliance constituted a clear refusal to implement the orders of the Chamber.”

It disagreed, however, with the TC as to the proper remedy for the OTP’s violation. Instead of authorizing a stay of the proceeding, the AC 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.” Once imposed, these sanctions should be given reasonable time to effect compliance with the TC’s orders.

As a result, in its second decision of October 8th, 2010, the AC held that the release of Lubanga was not warranted. Instead, article 71 sanctions against the OTP were the proper mechanism in case the OTP insisted on not abiding by the TC’s order.

d. The Consequences that Disclosure had on the Lubanga Judgment

Following the condemnation of its practices by both the TC and the AC, the OTP revealed the identity of intermediary 143. During the trial, and abiding by the TC’s decision of May 2010, the OTP also called intermediaries 316 and 321 to the stand. The issue of intermediaries was thus put to rest for the duration of the trial. It forcefully returned to the forefront in the TC’s Final Judgment of March 14th, 2010. There, the TC dealt with the substantive allegations against the involvement of intermediaries.

In the Final Judgment the TC investigated whether, as the Defence had always claimed, the intermediaries had interfered with the witness statements. In order to reach its conclusion, the TC examined two things. First, for those intermediaries who were called to testify (i.e. P-0316 and P-0321), the TC weighed the reliability of their statements at trial. For example, it noted that P-

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122 The Prosecutor v. Thomas Lubanga Dyilo, 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," 8 October 2010.

123 Id.

124 Id.
0316 was inconsistent on the stand, by claiming that he had not claimed expenses from the OTP, only to be confronted by the Defence with a receipt he had issued.

Second, for all intermediaries (i.e. 143, P-0316, P-0321, P-0031), the TC examined the reliability of the witnesses they introduced to the OTP. 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). The TC examined the testimony of these individuals and found that their reliability was questionable. 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.

Overall, once the identities of the intermediaries were disclosed to the Defence, the TC was able to conduct a fact-based analysis of their input into the investigative process. Under this examination, the TC held that intermediaries 143, 361 and 321 had improperly influenced the trial process. To the contrary, there was insufficient evidence to indicate that intermediate P-0031 had done so.125

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 TC demonstrated how three intermediaries had improperly influenced the 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 arise of their misconduct, their identity will be revealed to the Defence. 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.

Part IV. Balancing on Two Feet: Fairness or Accountability

The introduction of this article highlighted that the ICC, similar to any

125 Final Judgment §476.
criminal court, has to balance the fairness of the proceedings with the flexibility of conducting investigations and bringing atrocity cases. Admittedly, 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 holding future investigations.

This part attempts to analyze the impact of the Lubanga trial, with regards to the two aforementioned disclosure issues, on the future of the ICC investigations. In the first section, it argues that the Chamber’s decision on exculpatory confidential information has damaged the OTP’s flexibility in investigating and prosecuting future atrocity crimes. Similarly, in the second section, it contends that the Chamber’s decisions on intermediaries can restrict the OTP from bringing future cases.

a. Two Consequences on 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, in many instances, limiting the power of the ICC to bring future atrocity proceedings. Before presenting these two reasons, this section starts with an overview of the realities of disclosure of confidential information and cooperation with third-party information providers.

(i) Putting the present facts into a greater perspective

As outlined above in Part II, the Lubanga trial has implemented a scheme of disclosure for confidential exculpatory evidence that is not found in the Rome Statute. There are now four possible outcomes for the cases that the OTP holds exculpatory evidence that fall under the coverage of a confidentiality agreement between the OTP and the information provider. It is possible that (i) the information provider lifts the confidentiality, and the evidence is in toto passed to
the Defence. Alternatively, (ii) the information provider lifts the confidentiality, but the information passes to the Defence 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. Third, (iii) if the information provider does not lift the confidentiality, the OTP has to withdraw the charges or admit the underlying facts found in the withheld pieces of evidence. Finally, (iv) 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.126

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 relies disproportionately on the honesty and the cooperation of the OTP. In the United States, for example, violations of the obligation to disclose exculpatory evidence—known as Brady violations—are alleged to take place at an alarming rate.127 The dependence of the system of disclosure on OTPs can be highly problematic.128 As the dissents of Justices Marshall and Brennan in Bragey indicates, the system of disclosure of exculpatory evidence “permits OTPs to withhold with impunity large amounts of undeniably favorable evidence.”129 Similarly, in the ICC, the solution implemented by the Chambers still depends on significant decisions by the OTP. Only the OTP 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

126 See Letter from Prosecutor to UN, ICC-01/04-01/06-1478-Anx1, 9 October 2008.; Response from UN to Prosecutor, ICC-01/04-01/06-1478-Anx2, 10 October 2008.
128 For more on this, see Cynthia E. Jones, A reason to Doubt: the Suppression of Evidence and the Interference of Innocence,” 100 J. Crim. L. & Criminology 415 (Spring 2010).
trial. This dependence on the OTP remains even with the new scheme of review prior to disclosure.

While the present four alternative possibilities of disclosure do not change the fact that the disclosure regime depends on the honesty of the OTP, they impose on the OTP two significant burdens that are likely to impede future investigations. Both 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. To the contrary, as the ICC Chambers have recognized, the OTP can only make such determinations after a case is built, which in the Lubanga case took place years after the cooperation with 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 not giving 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 the atrocities using its own resources. At the present moment, the OTP is tasked with investigating atrocities that occurred in seven Situations. In addition, the OTP is engaged in preliminary examinations over atrocities allegedly committed in seven other states. Finally, the OTP has to bring forth the cases against 15 individuals. With a workload that spans the globe and a relatively small workforce, particularly when compared to those of the ad hoc tribunals, the OTP has no option but to rely on external sources. The strength of this assumption can be verified by the OTP’s own

130 The Prosecutor v. Germain Katanga and Matthew Ngudjolo Chui, 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, 20 June 2008
131 The current Situations are: Sudan, Libya, DRC, Uganda, Central African Republic, Ivory Coast, Kenya.
132 Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea, and Nigeria.
133 For the latest count, see the information posted at http://www.icc-cpi.int/Menus/ICC/Situations-and-Cases/
135 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 Journal of International Law 1 (“outlining the use of intermediaries and the ICC decisions of
statements. 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.” It also “sought and received additional information from relevant States as well as from other entities identified with the interests of possible victims.”

It is additionally noteworthy that—for purposes of finding both exculpatory and inculpatory evidence—as the Rome Statute mandates, it makes perfect sense for the OTP to rely on other organizations, as they have significant capacity in helping the ICC. As Baylis illustrates, the actions of MONUC in the DRC make it a great source of information of atrocities. For example, after the attack Effacer le Tableau (‘Erase the Board’) was perpetrated by the Movement de Liberation du Congo (“MLC”) in the town of Mambasa, Ituri and its surrounding areas, MONUC’s Human Rights Division stepped in. 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.” In doing so, MONUC helped preserve the evidence of rape, pillage and even cannibalism “for future use and produced several widely publicized reports.” Such evidence would have been great both for the OTP and the Defence teams in a case against members of the MLC. The disporportionality of available resources between the OTP and third-party providers becomes even more obvious when considering that, in cases stemming out of the DRC, while the OTP conducted a one-and-a-half-year inquiry, including 70 missions and 200 interviews, into local events before prosecuting Lubanga, the investigative teams of MONUC interviewed 150 people

2010 and claiming that intermediaries have a role in the ICC).

136 Office of the Prosecutor, 9 February 2006, Communication regarding the situation in Iraq


and traveled to 30 towns in one 10-day probe of a single incident.\textsuperscript{139} Similarly, past international criminal tribunals, such as the ICTY and the ECCC, relied heavily on the work of third party information providers.\textsuperscript{140}

The combination of increased burdens on the OTP and the presence of third parties that possess 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.\textsuperscript{141} In light of this reality, the findings of the Lubanga trial impede the OTP in two significant ways. First, they are likely to dull the incentive of some important information providers to cooperate with the OTP. They also diminish the capacity of the OTP to bring an effective case.

(ii) Disclosure Scheme Impedes Many Organizations from Cooperating with the OTP

The first reason for which future OTPs may be impeded is that the current regime of disclosure involves increased 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 the Trial judges without redactions. Under the rules set in the Lubanga case, after the judges have made their determination, such information will be given to the Defence in the appropriate


\textsuperscript{140} The ECCC cooperated significant 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, \textit{A Response to Christian De Vos by Gideon Boas}, Melbourne Journal Of International Law Opinio Juris Blog.

\textsuperscript{141} The Prosecutor v. Germain Katanga and Matthew Ngudjolo Chui, 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, 20 June 2008 (claiming that “cases are likely to reappear”).
form (e.g. redactions, summaries), but it will also remain available in its original, non-redacted, form for the future review of the TC and AC. Additionally, since the ICC is a permanent court, any information given to the OTP will stay on its 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. Overall, the scheme of disclosure complicates the cooperation of the information providers with the ICC, as they can no longer remain idle behind their confidentiality agreements, but 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 a presence on the ground—may hesitate to provide evidence under the current scheme of cooperation. At present, these NGOs can chose to disclose information and then rely on the redactions and other protective measures taken by the ICC judges. If the later make a mistaken disclosure, the operations of the NGOs will likely face negative 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. 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, due to fear of associating with the ICC, some NGOs already

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143 This possibility was highlighted by one coordinating NGO, see Coalition for the International Criminal Court, http://www.iccnow.org/?mod=roleofngos (“It is however important to remember that NGOs do not have the same mandate as the ICC and, as such, operate in different ways….NGOs may have concerns about protecting the confidentiality of the source that has provided them with the information. Moreover, as NGOs’ staff operates in the field, NGOs need to take into account many parameters before deciding to cooperate with any Court, as the security of their staff may be threatened and their access to the affected communities jeopardized.”).
refused to cooperate with the OTP even before this disclosure regime was in place.\textsuperscript{144}

As most ICC investigations are taking 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. Indeed, in the Katanga case, the OTP put forth substantiated claims that, due to actions of individuals in favor of the accused Matthew Ngudjolo Chui, “staff members of that NGO, in particular, \textsuperscript{[REDACTED]} and their family members, have already suffered intimidation for several years, and were even recently victims of attacks at their homes \textsuperscript{[REDACTED]}.\textsuperscript{145}” Furthermore, it is already the case that, out of fear of being associated with the ICC, many NGOs have refused to cooperate with the OTP’s investigation in Sudan. 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.”\textsuperscript{146} The idea of providing information and risking disclosing such cooperation due to a judicial decision seems to counter reality. Unfortunately, it is precisely in the investigation in Sudan that the OTP would want a good collaboration with local NGOs, as investigating in Sudan has been almost impossible for its office.\textsuperscript{147}

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

\textsuperscript{144} Final Judgment, § 163 (“Some NGOs refused to cooperate with the Court…”).
\textsuperscript{146} 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.”).
\textsuperscript{147} Situation in Darfur, ICC-02/05, Pre-Trial Chamber I, 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 (11 September 2006).
information can come from military fact-gathering missions. For example, it is likely that, similar to the Kosovo campaign, NATO intelligence units gathered information on the actions of the Qaddafi regime before and during the bombing campaign. The US military personnel advising the Ugandan government on the LRA probably have collected similar evidence. Such evidence could be useful for trial. The member-states, however, of NATO have in the past been unwilling to reveal their military and intelligence sources to the defence or to international judges. 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. The four provisions of Article 72 give the OTP two options if a state is unwilling to share national security information with the Court. The first option, covering provisions one through three, allows the Court to modify the request for the information sought from a state. 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, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.” The text of this provision strongly resembles Rule 83. It is thus reasonable to expect, that by analogy to the holding of the Lubanga trial on Rule 83, concerns of fairness are again likely to push the

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148 Rules of Procedure and Evidence, 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;
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 involve national security issues.

In light of NATO’s historical reluctance to share any intelligence issues with the international judges, the possibility of judicial review makes it 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.\(^{149}\) Without any information from intelligence sources, the OTP may have a hard time building cases and obtaining convictions. Instead, the OTP will have to spend money and time to collect 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 defence 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 his sources even thinner.

**(iii) Disclosure Scheme Imposes Disproportionate Remedy on the OTP**

The second reason for which the present scheme of disclosure of exculpatory evidence risks diminishing the ability of the OTP to bring future cases is its failure to envision appropriate responses in the case that 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

\(^{149}\) *See* (lack of) NATO press releases on this point.
charges for which the exculpatory confidential information is relevant or admit the underlying facts contained in the exculpatory confidential information. For example, had the UN not changed its stance on the Lubanga trial, by insisting that the judges do not access information given to the OTP under the UN-ICC confidentiality agreement, the OTP would have had to withdraw the charges or admit the underlying facts. For three reasons, this solution in cases that the information provider refuses to cooperate has the potential to decrease the OTP’s ability to bring future cases.

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 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, such as that of the DRC, the OTP may—from the beginning—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, as Lubanga—despite his alleged greater involvement in atrocities—was charged only with the crime of enlisting child soldiers. In such cases, if cooperation by the information provider is not achieved, the OTP would have to weaken the case in favor of his only charge, or one of his few charges, against the accused, by either withdrawing the charges or admitting the underlying facts. By weakening his own

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case due to the refusal of the information providers to lift their confidentiality, the OTP would be less likely to carry his burden of proof, resulting in an acquittal or a conviction for a lesser crime. Both scenarios would result in a decrease for accountability.

Finally, the present scheme fails to clarify to what extent the OTP has to rectify his 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, which is routinely used in some domestic jurisdictions, it is likely that evidence obtained (fruits) on the basis of non-disclosed exculpatory evidence (poisonous tree) will also be tainted and thus inadmissible. Without such evidence the OTP will again 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 are placing the OTP between a rock and a hard place, a position that is unwarranted given the reality that the information providers control the confidentiality.

(iii) Conclusion

Overall, the ICC Chambers decided to prioritize the fairness of the Lubanga trial by creating a scheme in which the judges would decide the manner how to disclose exculpatory information to the Defence and the OTP would face 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—for very legitimate reasons—may not feel comfortable participating. This ability may also dim due to the stringent consequences imposed on the OTP in cases that disclosure to the judges is not possible.
b. Two Consequences of the Decision on Intermediaries

For reasons similar to the use of third party information providers, the use of intermediaries by the OTP of the ICC is unlikely to stop. To the contrary, the greater the number of Situations under investigation, the more likely the OTP of the ICC—with its limited number of staff—will resort to intermediaries. By mandating that the identity of intermediaries be disclosed to the Defence in cases where these intermediaries may have influenced witness testimony, the Chamber’s concerns for a fair trial were placed, once again, ahead of the ICC’s concern for effective future OTPs. The two assumptions presented above, 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, first, argue that the present decision to disclose the identity of intermediaries has no real substantive impact on the trial phase of any case at the ICC. The article suggests further that the disclosure of identities may for two reasons divert the ICC from its goal to decrease impunity.

(i) 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, which have always thus far involved societies still in the midst of armed conflicts, the disclosure of their identities, for four reasons, will have a negligible impact at the trial phase of any case at the ICC.

First, even without questions from the Defence, the OTP has ample reasons to avoid intermediaries who will influence the evidence. Among others, honest intermediaries do not only allow the OTP to build a solid case, but also put the OTP’s limited resources to their most effective use. While in Lubanga the TC found the OTP “negligent” of its duties, this reprimand has little coercive power in and of itself. To the contrary, the OTP in Lubanga always had a preference for honest intermediaries, a preference that is clearly exemplified by the OTP’s

151 See supra Part IV, Section a, sub-section (i)
152 Final Judgment § 482
lengthy internal deliberations about the value of evidence collected by P-0316.\textsuperscript{153} By revealing the name of the intermediaries to the defence, only a small deterrent is built into the OTP’s case.

Second, the revelation of the intermediaries’ identities to the defence had no discernible impact on the evaluation of the evidence at trial. The TC is under an obligation to examine the testimony of all witnesses, regardless of how these became part of the OTP’s (or the Defence’s) case. In the final judgment of the Lubanga case, the TC examined the reliability of every witness that became part of the OTP’s case through the use of an intermediary. However, this examination 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 TC determined that the witness’ account “viewed overall, is contradictory and implausible.” To the contrary, 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.” The revelation of the identities of the intermediaries to the Defence had no impact on these TC determinations.

Third, the disclosure of the intermediaries’ identity to the Defence teams should not be expected to further spur Defence investigations. Even without the identity of the intermediaries, the Defence teams would have tried to rebut the testimony of all witnesses offered by the OTP. In order to do so, the identity of the intermediaries is of limited use. To the contrary, for the defence, the identity of the witness is the sole important starting point. In the Lubanga trial, the defence team managed to discredit the OTP’s witnesses by presenting internal inconsistencies in their testimony and by bringing defence witnesses who had good knowledge of

\textsuperscript{153} Final Judgment § 315
their true story (e.g. friends or family members).\textsuperscript{154} To find these rebuttal witnesses, the Lubanga team had to know the identity of the individual witnesses, not their intermediary with the OTP.

Finally, the defence demanded to know the identity of the intermediaries in order to prove that they have improperly influenced the witnesses they found for the OTP. However, such improper influence could have been established through the use of the diagrams, which linked every intermediary to all the witnesses it produced for the OTP. These diagrams had been provided to the Chambers and the defence teams early on in the trial.\textsuperscript{155} By examining witnesses in such an organized fashion, the defence could have illustrated to the ICC the improper role of the intermediaries just as well as it did after it was aware of the latter’s identities. Indeed, the defence did this with regards to intermediary 143 even before it knew of its identity.\textsuperscript{156}

(ii) 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 determinations of the TC or the work of the OTP or the Defence teams in any meaningful way, there are two reasons for which this disclosure may impede the ICC’s greater goal of ending impunity when conducting atrocity trials.

First, and most obvious, the potential to reveal the name of an intermediary 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. After the arrival of the ICC personnel in the DRC, intermediaries that worked for local organizations and were aware of the details of the ICC investigation would often approach the OTP in

\textsuperscript{154} See e.g., Final Judgment, §281, to rebut witness P-0011, the Defence called witness D-0024, “a member of P-0011’s family.”

\textsuperscript{155} The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, 31 May 2010, § 15.

\textsuperscript{156} The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, 31 May 2010.
order to volunteer some assistance.157 Such individuals were the most helpful for the OTP’s investigative work, as they had a direct knowledge of the local conditions and they were also aware of the nature of the ICC’s works. After the events of the Lubanga case, such individuals are placed on notice that—in cases of mere allegations against their work—their identities will be disclosed to the Defence team. On the basis of the facts in the Lubanga case, it is reasonable to assume that these individuals are aware that their identities may be disclosed if there are allegations against them, as they follow the developments of the ICC.158

In countries rampant with militia activities, where the OTP needs the input of intermediaries the most, people are less likely to risk having their name revealed to the Defence team. Such a risk has, unfortunately, already proved to be true. In the Katanga case, TC II found that real threats hung over an intermediary who had been named by a witness at trial. Due to the influence of those supporting the accused Ngudjolo in the DRC, similar threats were found to exist over the life and security of translators, witnesses and their families.159 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.

Second, the revelation of an intermediary’s name is likely to have a negative effect on the OTP’s ongoing investigations. The example of the Situation in the DRC is indicative of this problem. When the OTP started its investigations into the DRC, intermediaries helped it build cases against Lubanga, but also against Katanga and Ndjolo, and Bosco Ntaganda. By revealing the name of an intermediary to the Lubanga defence, the OTP’s investigative efforts in the other

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157 Final Judgment §167 (referring to the contribution of local human rights activists)
158 Final Judgment § 154 (claiming that the local population was aware of the ICC’s activities in the DRC)
159 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), 10 January 2011 (admitting that violence has taken place against ICC personnel and collaborators).
cases stemming out of the DRC may be implicated. For example, intermediary 143—who was found in the Lubanga final judgment to be unreliable—was also used as an intermediary in the Katanga/Ngudjolo case. In earlier stages of the Lubanga and the Katanga/Ngudjolo cases, TC I and TC II—appreciating the difficulties resulting from this practical overlap and the defence’s incentive to engage in cross-cutting requests,\textsuperscript{160} decided to provide deference to the first protective measures in place. For intermediary 143, however, that initial protective measure was overturned later in the Lubanga case, and his identity was eventually revealed to the Lubanga defence (see \textit{supra} Part III). 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 TC’s laudable effort to protect intermediaries across the multiple cases, the possibility that an intermediary working on multiple cases may have his identity 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 TC after the revelation of the intermediaries’ identity to the Defence. In reality, as evidenced by the case of P-0031,\textsuperscript{161} some intermediaries will have their cover blown and yet be found reliable and trustworthy. In such cases, the revelation of their identities to the Defence teams would warrant great concern and trouble for the OTP, as it effectively impedes his other on-going investigations.

(iii) Conclusion

The court’s decision to disclose the identity of the intermediaries was conducted in order to promote the fairness of the Lubanga trial. Nevertheless, it is

\textsuperscript{160} The Prosecutor v. Germain Katanga and Matthew Ngudjolo Chui, , ICC-01/04-01/06-2190-Conf-Exp., Decision on the application to disclose the identity of intermediary 143, Trial Chamber I, 18 November 2009. (TC II refused a request by the defence teams for Katanga/Ngudjolo to reveal the identity of intermediary 143 after TC I, in the Lubanga case, had similarly redacted the intermediary’s identity).

\textsuperscript{161} Final Judgment § 476.
not clear that this revelation added any substantive difference to the defence strategy. Additionally, such revelations have the possibility of dissuading potential intermediaries from working for the OTP and to stigmatize the current intermediaries, leading them to stay out of on-going or future investigations. By insisting on the fair trial guarantees of the accused, the TC tilted the balance away from the feasibility of easy future investigations.

**Part V. Conclusion**

The Lubanga trial was a watershed moment for international criminal law, the culmination of six months of important developments in the field. After many years of planning and ten years of preparation, 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 from many different angles. The current essay has demonstrated how the ICC dealt with two issues of disclosure, that of exculpatory confidential evidence and that of the identity 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 article aims to question the wisdom of these decisions for the long-term viability of international criminal investigations at the ICC.

Following the analogy of the introduction, 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 difficulties in the path of future cases. Like all adolescents, international criminal justice seems to be undergoing a period of rapid and hard-to-predict transformation. This internal upheaval is primarily caused by the counterintuitive nature of these two developments of the Lubanga trial, which prioritize the accused’s rights without considering the greater institutional balance. Perhaps the future will see a re-calibrating of this equilibrium.
Yet it is also possible that the future evolution of international criminal justice will retain this imbalance. So far, through the *ad hoc* tribunals, international criminal law had a primary role with regards to post-atrocity criminal justice. In a break with this tradition, the ICC was designed to be a court of last resort. In maintaining an evidentiary balance in favor of the accused and, thus, making it hard for the OTP to bring forth cases, the ICC judges may be signaling their understanding of this last-resort role.\textsuperscript{162} Trials at the ICC may just be—by design—hard to bring. 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, trying to balance on its two baby legs, while its parents wait to see how tall it will grow.

\textsuperscript{162} For 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).