

## CASE NOTE

### PROSECUTOR V LUBANGA

#### **‘SOMEONE WHO COMES BETWEEN ONE PERSON AND ANOTHER’:<sup>1</sup> LUBANGA, LOCAL COOPERATION AND THE RIGHT TO A FAIR TRIAL**

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#### I INTRODUCTION

In January 2006, the International Criminal Court (‘ICC’ or ‘the Court’) issued an arrest warrant for Thomas Lubanga Dyilo, the former president of the Union of Congolese Patriots (‘UPC’), charging him with war crimes for conscripting and enlisting child soldiers and for using them to further the armed conflict that has gripped the Ituri region of the Democratic Republic of Congo (‘DRC’) for the better part of the past decade.<sup>2</sup> DRC authorities had arrested Lubanga in March 2005 and charged him with genocide, crimes against humanity and war crimes under the country’s military code; however, following the issuance of the ICC warrant, Lubanga was transferred from Kinshasa to The Hague to face trial. He would become the Court’s first defendant.

Over five years later, few would argue that the ICC’s first case has been an exercise in swift justice. The proceedings have been characterised by numerous postponements, and the Office of the Prosecutor (‘OTP’ or ‘the Prosecution’) has endured criticism from the beginning for what many victims’ rights groups have argued was an overly narrow indictment that should have included charges of rape and sexual violence, in a country where the rates of both are amongst the

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<sup>1</sup> International Criminal Court, *Draft Guidelines Governing the Relations between the Court and Intermediaries* (1 October 2010) 5 (‘*Draft Guidelines*’).

<sup>2</sup> *Prosecutor v Lubanga (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06-2-tEN, 10 February 2006). The UPC was a militia group that purported to defend the interests of the Hema ethnic group in the DRC’s Ituri region. While there have been many phases to the Ituri conflict, the most recent armed clashes occurred between 1999 and 2003; however, because the ICC only has temporal jurisdiction over crimes committed after 2002, Lubanga was charged with child soldier conscription from September 2002 through August 2003. See *Prosecutor v Lubanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06-803-tEN, 29 January 2007) [410] (‘*Confirmation of Charges*’).

highest in the world.<sup>3</sup> The roll out of the Court's outreach program in the DRC has also been criticised for failing to adequately explain to victim participants (or to the local population more generally) the meaning and significance of the events of the trial as they unfolded.<sup>4</sup>

But perhaps the most notable aspect of the trial has been the breakdown in relations — recently described by one commentator as 'ugly and unhealthy'<sup>5</sup> — between the judges of Trial Chamber I (presided over by Judge Adrian Fulford) and the OTP. At the core of these controversies, and the subject of this case note, is the delicate balance between the right of defendants to a fair trial and the Prosecution's need to protect the identity of various locally-based informants (including, notably, United Nations staff members and non-governmental organisations) who have provided information and evidentiary leads to the OTP. Of particular concern is the Court's relationship with 'intermediary' informants who, while not ICC employees, often act as informal agents of the Court. While no definition of 'intermediary' is found in the *Rome Statute*<sup>6</sup> or the *Rules of Procedure and Evidence*<sup>7</sup> and the precise scope of the term is still under discussion, the Court currently defines

[t]he essence of the notion of an intermediary [as] someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses ... or affected communities more broadly on the other.<sup>8</sup>

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<sup>3</sup> Victims' frustration over the limited scope of charges came to a head when, in May 2009, legal representatives filed a request before Trial Chamber I seeking a change in the legal characterisation of facts, arguing, on the basis of evidence already presented, that the charges against Lubanga should be supplemented to include inhuman/cruel treatment and sexual slavery. Although a divided Trial Chamber granted the application, the Appeals Chamber reversed it, holding that reg 55 may not be used to circumvent the Prosecutor's charging document. See *Prosecutor v Lubanga (Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled 'Decision Giving Notice to the Parties and Participants That the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court')* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 15 OA 16, 8 December 2009).

<sup>4</sup> See, eg, Human Rights Watch, 'ICC: Congo Ruling Victory for Justice' (Press Release, 18 November 2008):

The suspension of the trial caused significant confusion and disappointment among affected communities in the Ituri district of northeastern Congo, where people were awaiting the start of trial. Lubanga's supporters in Ituri have also sought to use the suspension as proof of Lubanga's innocence.

See also REDRESS, 'Victims Express Relief at Decision to Resume First War Crimes Trial at the International Criminal Court' (Press Release, 8 October 2010) quoting a local activist: 'Here in Ituri, we couldn't understand how a trial of such an importance could have been stopped on a procedural matter ... there is a real need for more information'.

<sup>5</sup> William A Schabas, quoted in Marlise Simons, 'For International Criminal Court, Frustration and Missteps in Its First Trial', *The New York Times* (New York), 22 November 2010, A12. According to Professor Schabas: 'The whole trial has been a nightmare since the disputes between judges and the prosecutor began in 2008 ... There appears almost a breakdown between the two sides'.

<sup>6</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1991, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

<sup>7</sup> International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) ('*ICC Rules of Procedure*').

<sup>8</sup> *Draft Guidelines*, above n 1, 5.

Maintaining this balance between Lubanga's right to a fair trial and the confidentiality of the OTP's interlocutors has bedevilled the proceedings, twice leading to rulings by the Trial Chamber that the Prosecution's failure, or refusal, to disclose the identities of sources on which it relied had compromised Lubanga's fair trial rights and required his release. Though both of the decisions to release Lubanga were later reversed on appeal, they are symptomatic of larger tensions over the proper scope and application of the Court's disclosure regime. Moreover, they call into question the ICC's ability to protect not only the integrity of its trials but the cooperative regime that should govern its relationships with local actors.

This case note proceeds in four parts. In its first and second parts, it details two significant decisions by the Trial and Appeals Chambers of the ICC concerning the Prosecution's disclosure obligations as they relate to evidence and testimony proffered at Lubanga's trial. In the first case, the Trial Chamber concluded that Lubanga's fair trial rights had been irreparably compromised by the OTP's failure to disclose the sources of potentially exculpatory evidence it had collected, on the condition of confidentiality, from various local informants based in the DRC.<sup>9</sup> As a result, the Trial Chamber stayed the proceedings on the eve of Lubanga's trial, leading to almost a year's delay from when it was scheduled to start. Similarly, in the second case, the Trial Chamber imposed a stay — later reversed on appeal — because of the Prosecution's refusal to disclose the identity of an intermediary, the veracity of whose testimony, amongst others, had been called into question.<sup>10</sup>

As will be discussed, both of these cases illustrate key issues presently confronting the Court, including the degree to which the resolution of conflicts between confidentiality and disclosure should be a judicially-managed process and what sort of status intermediaries, in particular, should have with the Court and its various organs. In its concluding section, this note contends that these issues collectively underscore the need to establish a more formalised relationship between the OTP and intermediaries, as well as local informants more generally. Doing so would not only better clarify the duties and obligations of the OTP to its local interlocutors, but could help to build a greater sense of partnership between the Court in The Hague and the communities in whose name it intervenes.

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<sup>9</sup> *Prosecutor v Lubanga (Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together With Certain Other Issues Raised at the Status Conference on 10 June 2008)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01-06/1401, 13 June 2008) ('*Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements*').

<sup>10</sup> *Prosecutor v Lubanga (Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2517 Red, 8 July 2010) ('*Decision to Disclose the Identity of Intermediary 143*').

## II EVIDENCE OBTAINED THROUGH LOCAL INFORMANTS

In June 2008, shortly before Lubanga's trial was due to commence, the proceedings came to an abrupt halt when the Trial Chamber determined that it was 'impossible to piece together the constituent elements of a fair trial' after the Prosecution revealed that it was unable to disclose potentially exculpatory evidence it had been provided confidentially, largely by the UN but also from other locally based NGOs in the DRC.<sup>11</sup> Notably, while there was some indication at Lubanga's August 2006 *Confirmation of Charges* hearing that certain documents containing potentially exculpatory evidence had not been turned over,<sup>12</sup> the Prosecution did not bring the issue to the Trial Chamber's attention until September 2007, nearly one year after the Pre-Trial Chamber had confirmed charges.<sup>13</sup> At that point, the OTP indicated that approximately 50 per cent of the evidence it had gathered in the DRC was obtained under confidentiality agreements.<sup>14</sup>

This delay upset the Trial Chamber greatly. In what has since become a number of admonishing orders directed at the Prosecution, the judges wrote:

from the moment the prosecution entered into the agreements and was thereafter presented with exculpatory materials, it has been under an obligation to act in a timely manner to lift the agreement in order to ensure a fair trial without undue delay. Generally, the late requests by the prosecution to lift the confidentiality agreements should not be allowed to endanger the accused's right to be tried without undue delay and to adequate time and facilities for preparation.<sup>15</sup>

With Lubanga's rights at stake, the Trial Chamber ordered the Prosecution to disclose all outstanding documents by December 2007, and that any redactions to those documents were to be justified to the Court.<sup>16</sup>

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<sup>11</sup> *Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54(3)(e) Agreements* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01-06/1401, 13 June 2008) [91]–[93].

<sup>12</sup> *Confirmation of Charges* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01-06/803, 29 January 2007) [154].

<sup>13</sup> *Prosecutor v Lubanga (Prosecution's Submission regarding the Subjects That Require Early Determination: Trial Date, Languages to Be Used in the Proceedings, Disclosure, and E-Court Protocol)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-951, 11 September 2007) [22]–[25].

<sup>14</sup> *Prosecutor v Lubanga (Transcript of Hearing)* (International Criminal Court, Trial Chamber I, Case No ICC-0104-0106-T-52-ENG, 1 October 2007) [12]–[22]. Although the confidentiality agreements signed between the Prosecution and DRC informants are not publicly available, for an example of one such agreement signed between the United Kingdom and the OTP, see *Exchange of Letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Prosecutor of the International Criminal Court concerning the Provision of Information by the United Kingdom to the Office of the Prosecutor*, 2385 UNTS 415 (signed and entered into force 17 August 2005). At no 1, pt II(7)(vi), this agreement notes, with respect to art 54(3)(e), that

[i]n the event that the OTP believes that the information provided on the condition of confidentiality shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused ... the OTP shall consult the UK and take all necessary steps to resolve the matter by cooperative means.

<sup>15</sup> *Prosecutor v Lubanga (Decision regarding the Timing and Manner of Disclosure and the Date of Trial)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-1019, 9 November 2007) [19] ('*Decision regarding the Date of Trial*').

<sup>16</sup> *Ibid* [25]–[29].

At issue for the Prosecution was its duty under art 54(3)(e) of the *Rome Statute*, which provides, in part, that the OTP may agree

not to disclose, at any stage of the proceedings, documents or information that [it] obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.<sup>17</sup>

Similarly, the cooperation agreement signed between the OTP and the UN stipulates that the latter can

provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.<sup>18</sup>

Yet, the Prosecution has a second, competing statutory duty under art 67(2) of the *Rome Statute*: it must disclose to the defence potentially exculpatory evidence in its possession or control.<sup>19</sup>

Despite the OTP's efforts to gain consent for disclosure, by March 2008 over 200 documents containing potentially exculpatory material still stood undisclosed and Lubanga's trial was postponed.<sup>20</sup> Of the undisclosed documents, information providers had refused to waive their confidentiality for 181 of the potentially exculpatory items.<sup>21</sup> The UN, in particular, which had been the main provider of non-disclosed material to the OTP, was described as 'unrelenting' in its demand for confidentiality, even refusing the Trial Chamber's proposal to review the evidence in question *ex parte* and *in camera* 'to verify at least whether the confidentiality agreements were in principle justified'.<sup>22</sup> By mid-June, a large number of documents still could not be disclosed, but the OTP argued that a fair trial could nonetheless proceed since it had provided the defence with evidence 'analogous' to that kept under seal.<sup>23</sup> However, in light of the OTP's agreement that it would not show the relevant documents to the Trial Chamber or defence counsel, the judges were unable to independently verify that the alternative material contained information equivalent to that contained in the confidential documents.

The Prosecution's arguments failed to persuade the Trial Chamber. While it recognised the legitimate security concerns that disclosure posed, the Court

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<sup>17</sup> *Rome Statute* art 54(3)(e). Article 54(3)(f) further stipulates that the Prosecutor has an affirmative duty to '[t]ake necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence'.

<sup>18</sup> *Relationship Agreement between the United Nations and the International Criminal Court*, 2283 UNTS 195 (signed and entered into force 4 October 2004) art 18(3).

<sup>19</sup> *Rome Statute* art 67(2).

<sup>20</sup> *Decision regarding the Date of Trial* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-1019, 9 November 2007) [29].

<sup>21</sup> *Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01-06/1401, 13 June 2008) [17].

<sup>22</sup> Sabine Swoboda, 'The ICC Disclosure Regime — A Defence Perspective' (2008) 19 *Criminal Law Forum* 449, 469.

<sup>23</sup> *Prosecutor v Lubanga (Transcript of Hearing)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-T-89-ENG, 10 June 2008) [7]–[23].

emphasised that the UN and other information-providers were ‘invited by the [ICC] to enter into these [confidential] agreements’ and that, as a consequence, they should have ‘approached this issue in good faith, bearing in mind their own particular responsibilities and their respective mandates’.<sup>24</sup> To that end, in June 2008, the Court announced that Lubanga’s trial would not proceed as planned and that an indefinite stay of the proceedings was warranted because the Prosecution had effectively abused the art 54(3)(e) provision by making ‘routine’ rather than ‘exceptional’ use of it in order to gather a ‘wide range of materials under the cloak of confidentiality, in order to identify from those materials evidence to be used at trial’.<sup>25</sup> The right to a fair trial, the Court declared, ‘includes an entitlement to disclosure of exculpatory material’.<sup>26</sup>

In rejecting the OTP’s contention that it had furnished the defence with other documents that had the same exculpatory value as the non-disclosed material, the Trial Chamber also made clear that it was for the Court to make this assessment, not the Prosecution.<sup>27</sup> In its words:

what underpins the whole of [the] procedure [under art 67(2)] is that the Chamber retains not only the opportunity but also the obligation of ensuring that any exculpatory evidence or potentially exculpatory evidence over which there’s a doubt is viewed by it so it makes a decision as to what is fair for the accused in the trial. The difference between that and what is being proposed here is that the Chamber, under the proposals [the Prosecutor] is making, is being entirely excluded from the process.<sup>28</sup>

The Court went on to hold that, although it had not been divested of jurisdiction by virtue of the stay, its indefinite duration required Lubanga’s unconditional release.<sup>29</sup>

Faced with the potential collapse of its first case, the OTP subsequently placed great pressure on its local informants to cooperate in the disclosure process. Indeed, ‘[w]ithin two weeks of the Trial Chamber’s order to release the accused, the prosecution was able to offer the Chamber all confidential documents in unredacted form for an ex parte and in camera review’.<sup>30</sup> During this same period, the Appeals Chamber considered the Prosecution’s appeal. In twin judgments issued in October 2008, the Appeals Chamber declined the OTP’s request to overturn the stay, on the grounds that the Trial Chamber had

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<sup>24</sup> *Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01-06/1401, 13 June 2008) [64].

<sup>25</sup> *Ibid* [72]–[74].

<sup>26</sup> *Ibid* [77].

<sup>27</sup> *Ibid* [60].

<sup>28</sup> *Prosecutor v Lubanga (Transcript of Hearing)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-T-89-ENG, 10 June 2008) 8–9.

<sup>29</sup> *Prosecutor v Lubanga (Decision on the Release of Thomas Lubanga Dyilo)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-1418, 2 July 2008).

<sup>30</sup> Swoboda, above n 22, 470. See also *Prosecutor v Lubanga (Prosecution’s Application to Lift the Stay of Proceedings)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-1431, 11 July 2008) [45], [49].

not exceeded its ‘margin of appreciation’.<sup>31</sup> In so doing, the Court affirmed that the Prosecution may only rely on art 54(3)(e) for the purposes of generating new evidence but that all Chambers would ‘have to respect the confidentiality agreement concluded ... under art 54(3)(e) and cannot order the disclosure of material to the defence without the prior consent of the information provider’.<sup>32</sup> When faced with such agreements, the Court — not the Prosecutor — would have to decide whether the material in question must be disclosed and then, if the provider of the material did not consent, ‘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, in spite of the non-disclosure of the information’.<sup>33</sup>

By underscoring the Court’s responsibility in this determination, the Appeals Chamber also expressed concern that

when accepting large amounts of material from the United Nations, the relevance of which for future cases he could not appreciate at that time, the Prosecutor agreed that he would not disclose the material *even to the Chambers of the Court* without the consent of the information providers ...<sup>34</sup>

thus preventing them ‘from assessing whether a fair trial could be held in spite of the non-disclosure to the defence of certain documents, a role that the Chamber has to fulfil pursuant to [art 67(2)]’.<sup>35</sup> To that end, the Court further noted that there was no reason to ‘fault [the Trial Chamber’s] assessment’ that, were the documents in question not to be disclosed, ‘there would always have been a lurking doubt as to whether [they] would have changed the course of the trial’.<sup>36</sup>

As to Lubanga’s release, which the Prosecution had argued was ‘disproportionate and premature’, the Appeals Chamber reversed the decision.<sup>37</sup> It held that the decision was erroneous because it ‘failed to take the conditional character of the stay it had imposed into account’, which led the Trial Chamber to fail to consider all the options that were at its disposal and ‘to assume erroneously that the unconditional release of [Lubanga] was “inevitable”’.<sup>38</sup> In this regard, the Appeals Chamber noted that arts 58(1) and 60(2) of the *Rome Statute* permitted the Trial Chamber to order release with or without conditions; thus, unconditional release was not the inevitable consequence of a stay of

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<sup>31</sup> *Prosecutor v Lubanga (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 Proceedings of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008’)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 13, 21 October 2008) [84] (*‘Lubanga 2008 Appeals Chamber Judgment’*).

<sup>32</sup> *Ibid* [48].

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid* [45] (emphasis added).

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid* [97].

<sup>37</sup> *Prosecutor v Lubanga (Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I Entitled ‘Decision on the Release of Thomas Lubanga Dyilo’)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 12, 21 October 2008) [20].

<sup>38</sup> *Ibid* [31].

proceedings, nor was such a stay tantamount to permanent termination of the proceedings or to Lubanga's acquittal.<sup>39</sup>

Ultimately, within less than a month of the Appeals Chamber's decision, the Prosecution secured permission from the UN and other local providers to share the outstanding exculpatory documents with the Trial Chamber.<sup>40</sup> After assessing these documents, and the Prosecutor's proposed alternative forms of disclosure (for example, redacted or summary versions), the Trial Chamber lifted the stay of proceedings. In January 2009, Lubanga's trial, at last, began.

### III INTERMEDIARIES AT TRIAL

Having resolved the disclosure of evidence, the disclosure of intermediaries' identities and their conduct in the field soon came to define Lubanga's trial itself. The first witness who testified against Lubanga raised eyebrows when he stated that his initial statement was untrue and that 'what he had said that morning did not come from him but someone else'.<sup>41</sup> Although this testimony was later recanted, it laid the groundwork for the first arm of Lubanga's defence strategy: discrediting prosecution witnesses who claimed to have been child soldiers in the UPC. Indeed, in December 2010, Lubanga's defence counsel filed an unsuccessful request to dismiss the case for abuse of process on the basis of the contested role of intermediaries used by the Prosecutor.<sup>42</sup>

Before the application was filed, however, other testimonial irregularities led the Trial Chamber to issue a *Decision on Intermediaries* in May 2010, in which it opined that the 'precise role of ... intermediaries (together with the manner in which they discharged their functions) [had] become an issue of major importance in this trial'.<sup>43</sup> The Court, while noting that it was 'alive to the potential risks to the intermediaries employed by the prosecution once their identities are revealed to the accused', found that 'there [was] now a real basis for concern as to the system employed by the prosecution for identifying

<sup>39</sup> Ibid [32]–[42].

<sup>40</sup> *Prosecutor v Lubanga (Reasons for Oral Decision Lifting the Stay of Proceedings)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-1644, 23 January 2009). The UN and the OTP also concluded an agreement during the course of the stay that ultimately enabled the UN to agree to the sharing of the art 54(3)(e) documents with the Trial Chamber. See *Prosecutor v Lubanga (Prosecution's Application for Trial Chamber to Review All the Undisclosed Evidence Obtained from Information Providers)* (International Criminal Court, Public Court Records — Office of the Prosecutor, Case No ICC-01/04-01/06-1478-Anx1, 14 October 2008) <<http://www.icc-cpi.int/iccdocs/doc/doc575485.pdf>>. The agreement was put in place shortly before the Appeals Chamber delivered its decision on art 54(3)(e) in October 2008, although that decision, as discussed, effectively gave the UN the assurance it had been seeking, that is, that the Court was bound to respect the confidentiality of such agreements and could not order the disclosure of any material without the prior consent of the information provider.

<sup>41</sup> *Prosecutor v Lubanga (Redacted Decision on Intermediaries)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 31 May 2010) [7] ('*Redacted Decision on Intermediaries*'), citing *Prosecutor v Lubanga (Transcript of Hearing)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-T-110-Red-ENG CT WT, 28 January 2009). See also 'DR Congo Warlord Witness Retracts', *BBC News Africa* (online), 28 January 2009 <<http://news.bbc.co.uk/2/hi/7857230.stm>>.

<sup>42</sup> *Prosecutor v Lubanga (Requête de la Défense aux fins d'arrêt définitif des procédures)* (International Criminal Court, Case No ICC-01/04-01/06-2657-Conf, 10 December 2010).

<sup>43</sup> *Redacted Decision on Intermediaries* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 31 May 2010) [135]–[138].

potential witnesses'.<sup>44</sup> Accordingly, it ordered the disclosure of additional information on three intermediaries — known by the pseudonyms '321', '316', and '143' — concerning allegations of their misconduct. Intermediaries 321 and 316, whose identities had already been revealed, were to 'be called to deal with the suggestions [from a range of witnesses] that they attempted to persuade one or more individuals to give false evidence'.<sup>45</sup> In the Trial Chamber's view, their testimony would be 'likely to assist ... in resolving ... some of the extensive conflicts in the evidence that have emerged ... [and] the possible contacts between intermediaries'.<sup>46</sup>

Notably, the Trial Chamber also ordered that the Prosecution present some of its staff for questioning over their working methods on the ground, including their 'approach and the procedures applied to intermediaries'.<sup>47</sup> As to 143, the Chamber found that his identity should be disclosed to Lubanga and his defence team, pending the implementation of necessary protective measures, as they were entitled to research whether the allegedly untrue testimony was influenced by 'untoward behaviour on [143's] part'.<sup>48</sup> Nothing less than the disclosure of 143's identity, the Chamber held, would 'enable the defence to conduct necessary and meaningful investigations and to secure a fair trial for the accused'.<sup>49</sup>

The order to disclose intermediary 143's identity came to be the axis on which the second stay of Lubanga's proceedings turned. Although intermediary 143 initially consented to the protective scheme proposed by the ICC's Victims and Witnesses Unit ('VWU'), he changed his mind at the last minute, asking for additional guarantees.<sup>50</sup> In response, at a hearing held on 6 July 2010, the Trial Chamber again ordered that intermediary 143's identity be disclosed, even without all of the protective measures being in place, but only in a limited manner, that is, to Lubanga, his defence team in The Hague, and to a resource person working on behalf of the defence in the DRC.<sup>51</sup> This disclosure was ordered for the sole purpose of questioning another intermediary testifying at the time whom, it was revealed, had also had contact with the same individual. The Chamber thus considered that it was essential that the defence know the

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<sup>44</sup> Ibid [138].

<sup>45</sup> Ibid [141].

<sup>46</sup> Ibid.

<sup>47</sup> Ibid [146].

<sup>48</sup> Ibid [143].

<sup>49</sup> Ibid. On the same day that the Trial Chamber issued the confidential version of its decision on intermediaries, it also took umbrage with the conduct of a member of the prosecution team — Ms Le Fraper du Hellen — who had given an interview where she suggested that Lubanga had intimidated witnesses during the course of their testimony and vigorously defended the use of intermediaries by the Prosecution. In condemning these remarks, the trial judges noted that they 'involved a clear imputation against the judges', in so far as the comments 'seriously intruded' on the role of the Chamber, and effectively 'prejudged' not only the outcome of the abuse of process issue but the trial itself. While the Chamber declined to take further action against Ms Le Fraper du Hellen, its decision, wherein it expressed its 'strongest disapproval of the interview', signalled continued deterioration in OTP–Chamber relations. See *Prosecutor v Lubanga (Decision on the Press Interview with Ms Le Fraper du Hellen)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 12 May 2010).

<sup>50</sup> See Human Rights Watch, 'Recent Developments in the ICC Trial of Thomas Lubanga' (Press Release, 16 July 2010).

<sup>51</sup> See *Prosecutor v Lubanga (Transcript of Hearing)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-T-310-RED, 6 July 2010) 63–5. See also *ibid*.

individual's identity in order to effectively cross-examine the witness.<sup>52</sup> In arriving at this decision, the Chamber relied on the fact that the VWU had expressed confidence that the limited scope of the disclosure would not jeopardise the witness' safety.<sup>53</sup>

At the close of the hearing, the Prosecution stated its intention to appeal the decision and that it would need the five-day delay provided in the ICC's rules to do so. The Trial Chamber suspended the order, stating that it would reconvene the following morning to re-evaluate the parties' positions. This proved unsuccessful. On 7 July 2010 the Trial Chamber, unpersuaded by the OTP's arguments, once more ordered that intermediary 143's identity be immediately disclosed, notwithstanding the stated intention to appeal.<sup>54</sup> The Prosecution, however, refused to do so, insisting that, in spite of the VWU's assessment, the intermediary's life may be at risk if his identity were revealed without the protective measures having been implemented.

On 8 July 2010, the Trial Chamber ordered a stay of Lubanga's trial on the grounds of abuse of process.<sup>55</sup> Notably, the Chamber imposed this stay not from a motion that defence counsel had submitted, but on its own initiative. Referring primarily to the Prosecutor in the singular, rather than the OTP generally, the Chamber, in denying the Prosecutor's request for more time, identified 'two concurrent but essentially different problems'.<sup>56</sup> One problem was the Prosecutor's 'unequivocal refusal to implement the repeated orders of this Chamber to disclose the identity of 143 (in highly restricted circumstances, determined by the Chamber)', while the other revealed a 'more profound and enduring concern'.<sup>57</sup> In the Chamber's view:

by his refusal to implement the orders of the Chamber and in the filings set out above, [the Prosecutor] has revealed that he does not consider that he is bound to comply with judicial decisions that relate to a fundamental aspect of trial proceedings, namely the protection of those who have been affected by their interaction with the Court, in the sense that they have had dealings with the prosecution. Essentially, for the issues covered by Article 68 in this way, he appears to argue that the prosecution has autonomy to comply with, or disregard, the orders of the Chamber, depending on its interpretation of its responsibilities under the Rome Statute framework.<sup>58</sup>

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<sup>52</sup> Human Rights Watch, 'Recent Developments in the ICC Trial of Thomas Lubanga', above n 50.

<sup>53</sup> *Decision to Disclose the Identity of Intermediary 143* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 8 July 2010) [3], [17].

<sup>54</sup> *Prosecutor v Lubanga (Transcript of Hearing)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-T-311-RED, 7 July 2010) 15–22. See also *Prosecutor v Lubanga (Transcript of Hearing)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-T-313, 7 July 2010).

<sup>55</sup> *Decision to Disclose the Identity of Intermediary 143* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 8 July 2010) [31].

<sup>56</sup> *Ibid* [20]. Indeed, while this note generally refers to the Office of the Prosecutor, or the Prosecution as a whole, it is worth noting that many of the Chamber's decisions (particularly throughout the course of the 2010 stay proceedings) have referred primarily to the Prosecutor specifically, rather than the Prosecution generally.

<sup>57</sup> *Ibid* [20]–[21].

<sup>58</sup> *Ibid* [21].

Accordingly, the Trial Chamber based the stay on two grounds: (1) that its order to disclose intermediary 143's identity had not been effected, even in the face of the VWU's assessment that its limited scope would not endanger him, and (2) that the Prosecutor appeared to be operating in accordance with his own interpretation of the *Rome Statute*, not the Court's.<sup>59</sup> In stark words, the trial judges opined that the Prosecutor 'decline[d] to be "checked" by the Chamber'.<sup>60</sup>

One week later, the Trial Chamber rendered an oral decision in which it further ordered that Lubanga be released unconditionally.<sup>61</sup> Speaking for the Panel, Judge Fulford further indicated that, pursuant to art 71 of the *Rome Statute*, the Trial Chamber would consider imposing sanctions on the Prosecutor at some later time for his failure to implement the Chamber's orders.<sup>62</sup> Lubanga's trial remained stayed for three more months, during which time the Trial Chamber also rejected a motion by the Prosecution to interview pending witnesses, despite its (belated) offer to disclose intermediary 143's identity to the defence.<sup>63</sup>

On 8 October 2010, the Appeals Chamber reversed the Trial Chamber's stay.<sup>64</sup> In so doing, it stressed that a stay of proceedings was a 'drastic remedy' and should only be applied where it was 'impossible to piece together the constituent elements of a fair trial'.<sup>65</sup> Notably, whereas the Trial Chamber had stated that it would not consider sanctions against the Prosecutor until after the appeal had been decided, the Appeals Chamber indicated that art 71, as well as r 171(4) of the *Rules of Procedure*, explicitly provided for sanctions where a party refuses to comply with an order of the Court.<sup>66</sup> Thus, the Trial Chamber should have sought to induce the OTP's compliance through these measures — such as imposing reprimands or pecuniary sanctions — before resorting to the imposition of a stay.<sup>67</sup>

Despite its reversal, the Appeals Chamber made clear that the Trial Chamber was 'the ultimate guardian of a fair and expeditious trial',<sup>68</sup> and that its orders

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<sup>59</sup> Ibid [24]–[27].

<sup>60</sup> Ibid [31].

<sup>61</sup> *Prosecutor v Lubanga (Transcript of Hearing)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-T-314, 15 July 2010) 17–22. The Chamber suspended the order, however, pending the OTP's finding of an appeal.

<sup>62</sup> Ibid 22–3.

<sup>63</sup> *Prosecutor v Lubanga (Decision on the 'Prosecution's Application to Take Testimony while Proceedings Are Stayed Pending Decision of the Appeals Chamber')* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 24 September 2010) [20]–[23] ('*Decision on the Prosecution's Application to Take Testimony*').

<sup>64</sup> *Prosecutor v Lubanga (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')* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 18, 8 October 2010) ('*Lubanga 2010 Appeals Chamber Judgment*').

<sup>65</sup> Ibid [55] quoting *Prosecutor v Lubanga (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06-772 OA 4, 14 December 2006) [39].

<sup>66</sup> Ibid [59]–[60].

<sup>67</sup> See, eg, *ICC Rules of Procedure* r 32.

<sup>68</sup> *Lubanga 2010 Appeals Chamber Judgment* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 18, 8 October 2010) [47].

were ‘binding ... unless and until they are suspended, reversed or amended ... or their legal effects are otherwise modified’.<sup>69</sup> Importantly, the Appeals Chamber also emphasised that, where there is a conflict between the OTP’s perceptions of its duties and the order of a Chamber, the latter must prevail; there was no exception to this principle in so far as protective issues were concerned.<sup>70</sup> On the same day, the Appeals Chamber reversed the decision to release Lubanga.<sup>71</sup> As that order had been premised on a stay of proceedings, the Chamber held that the reversal of the stay logically required the reversal of Lubanga’s release.<sup>72</sup>

Following the Appeals Chamber’s decision, proceedings were again postponed after Lubanga formally filed his request to dismiss the case for abuse of process. In a decision made public in March 2011, the Trial Chamber denied the request.<sup>73</sup> In it, the Court quoted the Appeals Chamber to the effect that termination of a trial for abuse of process is a ‘drastic remedy’, to be ‘reserved strictly for those cases that necessitate, on careful analysis, taking the extreme and exceptional step of terminating the proceedings (as opposed to adopting some lesser remedy)’.<sup>74</sup> Thus, the Court concluded, ‘[n]ot every example of suggested prosecutorial misconduct [would] lead to a permanent stay of the proceedings’; rather, such accusations were ‘a matter of fact and degree’, requiring that the nature of the alleged abuse be weighed against the seriousness of the crimes.<sup>75</sup> Accordingly, the Trial Chamber concluded that it would have to ask two questions: (1) whether it would be odious or repugnant to the administration of justice to allow the proceedings to continue, and (2) whether the accused’s rights had been breached to the extent that a fair trial has been rendered impossible.<sup>76</sup>

In both cases, the Trial Chamber determined that it was ‘unpersuaded, in these circumstances, that “the accused’s rights have been breached to the extent that a fair trial has been rendered impossible”’.<sup>77</sup> In so doing, the Chamber emphasised that it could, ‘in due course ... reach final conclusions on the alleged impact of the involvement of the intermediaries on the evidence in this case, as well as on the wider alleged prosecutorial misconduct or negligence’.<sup>78</sup> In other words, the Court concluded, ‘it would be a disproportionate reaction to discontinue the proceedings at this juncture’.<sup>79</sup>

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<sup>69</sup> Ibid [48].

<sup>70</sup> Ibid [54].

<sup>71</sup> *Prosecutor v Lubanga (Judgment on the Appeal of the Prosecutor against the Oral Decision of Trial Chamber I of 15 July 2010 to Release Thomas Lubanga Dyilo)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 17, 8 October 2010).

<sup>72</sup> Ibid [23]–[24].

<sup>73</sup> *Prosecutor v Lubanga (Redacted Decision on the ‘Defence Application Seeking a Permanent Stay of the Proceedings’)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 7 March 2011).

<sup>74</sup> Ibid [168].

<sup>75</sup> Ibid [195].

<sup>76</sup> Ibid [166].

<sup>77</sup> Ibid [188].

<sup>78</sup> Ibid [198].

<sup>79</sup> Ibid [197].

#### IV AN EVOLVING DISCLOSURE REGIME AND THE COOPERATION IMPERATIVE

While Lubanga's trial continues, the decisions described above raise three critical issues worthy of reflection: (1) the degree to which conflicts between confidentiality and disclosure should be a judicially-managed process; (2) the scope of the OTP's disclosure obligations and the deference due to its interpretation of those obligations, particularly concerning evidence gathered through informants and intermediaries; and (3) what sort of cooperative regime should govern the OTP's relationship with its locally-based interlocutors.

##### A *Towards a Judicially-Managed Process*

The Chambers' decisions of 2008 and 2010 are noteworthy in their affirmation of the principle that it is for the judiciary, not the OTP, to determine the extent of the Prosecution's disclosure obligations. Trial Chamber I, in particular, made clear that disclosure is to be, above all, a judicially-managed process. In its words, 'no criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations'.<sup>80</sup> The Chamber was particularly emphatic on this point, given that it later declined to lift its second stay even after the OTP had indicated that the identity of intermediary 143 could be disclosed.<sup>81</sup> Strictly speaking, this should have been sufficient to permit a resumption of Lubanga's proceedings; however, as the Chamber noted, the issue was no longer about disclosure alone, but about who has the authority to interpret disclosure obligations. As the Chamber noted:

It is necessary to repeat and emphasise that justice can no longer be done in this case whilst the Prosecutor continues to reserve to himself the right not to implement the Chamber's orders if he is of the view that they conflict with his interpretation of his other obligations.<sup>82</sup>

While the Appeals Chamber affirmed the Trial Chamber's 2008 holding that it was the ultimate arbiter of disclosure-related conflicts, it focused less on whether or not the OTP had, in fact, abused its authority under art 54(3)(e). For instance, whereas the Trial Chamber's decision referred repeatedly to the OTP's 'incorrect' interpretation of the Statute, as well as its 'wholesale and serious abuse' of the provision,<sup>83</sup> the Appeals Chamber saw 'no reason to doubt the good faith of the Prosecutor'.<sup>84</sup> Instead, it confined itself to the conclusion that the 'final assessment as to whether material in the possession or control of the Prosecutor has to be disclosed under [art 67(2)] will have to be carried out by the Trial Chamber'.<sup>85</sup> The Appeals Chamber indicated that certain

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<sup>80</sup> *Decision to Disclose the Identity of Intermediary 143* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2517-Red, 8 July 2010) [27].

<sup>81</sup> *Decision on the Prosecution's Application to Take Testimony* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 24 September 2010) [5]–[6].

<sup>82</sup> *Ibid* [22].

<sup>83</sup> *Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54(3)(e) Agreements* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-1401, 13 June 2008) [20], [72]–[73].

<sup>84</sup> *Lubanga 2008 Appeals Chamber Judgment* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 13, 21 October 2008) [96].

<sup>85</sup> *Ibid*.

‘counter-balancing measures’ may appropriately remedy the non-disclosure of evidence, such as the identification of similar exculpatory material, the stipulation of certain relevant facts, or the provision of materials in summarised form.<sup>86</sup> Again, however, this was for the Court to decide, not the Prosecutor.

The Appeals Chamber’s 2010 decision further underscores the fact that disclosure is to be a judicially-managed process. Despite reversing the Trial Chamber’s stay, the Appeals Chamber made this clear when it endorsed the imposition of sanctions under art 71 where the Court is ‘faced with a deliberate refusal of a party to comply with its orders which threatens the fairness of the trial’.<sup>87</sup> Moreover, the language of the Appeals Chamber’s second decision is in striking contrast to its 2008 opinion, insofar as it, like the Trial Chamber’s earlier opinions, repeatedly characterises the Prosecutor’s non-compliance as ‘deliberate’,<sup>88</sup> ‘wilful’,<sup>89</sup> and his representations as ‘at best, disingenuous’.<sup>90</sup>

Such language not only points to the larger issue of the deteriorated relationship between the Prosecutor and the Chambers but, in part, it also serves to explain why one sees, in these decisions, a gradual shift away from an adversarial process — where disclosure may be said to rely on trust in the parties themselves — to a model more common in civil law jurisdictions, where the court is the ultimate arbiter in resolving disclosure conflicts. Indeed, if the Prosecution is to be entrusted with resolving conflicts between confidential lead evidence and disclosure, then that requires a level of trust in the parties and a presumption of good faith. Three years on, it would appear that this presumption has been sorely tested. As one commentator, writing in the context of the Court’s 2008 decisions, noted, ‘[t]here are indications that during the course of the *Lubanga* case the court simply lost confidence in the Prosecution, and at the end of the day this may have been one of the biggest factors that pushed the court towards its decision’.<sup>91</sup>

Recent decisions by the Trial Chamber in *Lubanga* have, in fact, taken a more judicially-directed approach to disclosure. In November 2010, for instance, the Trial Chamber questioned the Prosecution’s late disclosure to the defence of part of an investigator’s internal memorandum relating to the negative assessment of the credibility of a prospective witness, who had been introduced to the OTP by

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<sup>86</sup> *Ibid* [48].

<sup>87</sup> *Lubanga 2010 Appeals Chamber Judgment* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 18, 8 October 2010) [60]. Notably, it is unclear why the Chamber invoked art 71 in this regard rather than arts 46 and 47 of the *Rome Statute*, as the latter specifically address sanctions for prosecutorial malfeasance. Otto Triffterer has likewise noted that:

Persons present *before* the Court in the sense of article 71 are all those not belonging to one of the organs of the Court ... This narrow interpretation is confirmed by the fact that articles 46 and 47 provide specific sanctions for misconduct of Judges, Prosecutors and members of the Registry ...

Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Hart Publishing, 2<sup>nd</sup> ed, 2008) 1351 (emphasis in original).

<sup>88</sup> *Lubanga 2010 Appeals Chamber Judgment* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 18, 8 October 2010) [3], [38], [46], [59], [60].

<sup>89</sup> *Ibid* [46].

<sup>90</sup> *Ibid*.

<sup>91</sup> Alex Whiting, ‘Lead Evidence and Discovery Before the International Criminal Court: The *Lubanga* Case’ (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 207, 224.

intermediary 143. The Trial Chamber ordered the Prosecution to explain its ‘principles and approach to disclosure’, so that the Chamber could ‘make up [its] mind’ as to whether or not the OTP has been acting appropriately with regard to disclosure.<sup>92</sup> The Chamber has also taken an increasingly expansive approach to the Prosecution’s disclosure obligations, ruling, over the OTP’s objections, that it has a duty to disclose everything relevant in its possession except materials related to its theories or tactics.<sup>93</sup> In an opinion that might well be read as a referendum on these earlier disclosure controversies, the Trial Chamber wrote:

the prosecution’s disclosure obligations ... are wide, and they encompass, inter alia, any item that is relevant to the preparation of the defence, and including not only materials that may undermine the prosecution’s case or support a line of argument of the defence but also anything substantive that is relevant, in a more general sense, to defence preparation.<sup>94</sup>

That this loss of trust between the Chambers and the OTP appears to have grown over time is cause for concern, but if the Lubanga decisions have served to push the Court towards a more judge-dominated approach, this might augur well for more expeditious proceedings in the future. Indeed, the Trial Chamber cited efficiency, in part, as a basis for its expansive approach to disclosure, reasoning that a broad duty to disclose will ‘increase the likelihood that only those witnesses are called, who are, on an examination of all the relevant material, credible and reliable’.<sup>95</sup>

### B *Disclosure Obligations for the Office of the Prosecutor*

How should the ICC — and more specifically the OTP — partner with local actors in a way that neither compromises the legitimacy of the Court’s trials nor the due process rights of its defendants? Here, the *Rome Statute* is, to some degree, on a collision course with itself: on the one hand, it permits confidentiality agreements in order to obtain potentially incriminating evidence but, on the other, it also mandates that all potentially exculpatory evidence be disclosed to the defence. Added to this challenge is the OTP’s duty not only to disclose potentially exculpatory material, but to actively *investigate* incriminating and exonerating evidence alike.<sup>96</sup> This provision is unique to the *Rome Statute* and reflects the view, informed in part by concerns of the Court’s drafters over ‘equality of arms’, that the Prosecutor’s role should not only be to seek a conviction, but ‘the truth’ itself.<sup>97</sup> Yet, as commentators have noted, the OTP’s duty to disclose ‘could inhibit investigation efforts by the Prosecution in

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<sup>92</sup> See *Prosecutor v Lubanga (Prosecution Submissions on Disclosure Pursuant to Trial Chamber’s I Order of 5 November 2010)* (International Criminal Court, Case No ICC-01/04-01-06, 17 November 2010) [3].

<sup>93</sup> See *Prosecutor v Lubanga (Decision on the Scope of the Prosecution’s Disclosure Obligations as regards Defence Witnesses)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01-06, 12 November 2010) [16]–[18].

<sup>94</sup> *Ibid* [16].

<sup>95</sup> *Ibid* [18].

<sup>96</sup> *Rome Statute* art 54(1)(a).

<sup>97</sup> See, eg, War Crimes Research Office, ‘The Relationship between the International Criminal Court and the United Nations’ (Legal Analysis and Education Project Report 8, Washington College of Law, August 2009) 50–4.

the future as well as the willingness of the parties to cooperate with the [OTP]'.<sup>98</sup> Thus, while it might be 'tempting to view the disclosure debacle in the Lubanga case as reflective of failed Prosecution investigative and disclosure practices in a particular case, it is in fact emblematic of a much larger challenge that the Prosecution faces at the ICC in proving its cases'.<sup>99</sup>

Here, arguably, the OTP was dealt an unfair hand when the Court held that art 54(3)(e) should only be used for what it called 'springboard evidence'.<sup>100</sup> There is nothing in the text of art 54(3)(e) itself to suggest that such evidence might not later be used as lead evidence, so long as the provider consents to its use. Likewise, r 82 of the *Rules of Procedure and Evidence* addresses situations where evidence originally obtained under art 54(3) later becomes evidence to be presented at trial.<sup>101</sup> Finally, the ability to distinguish between what is 'springboard evidence' and what might later become lead evidence is likely an unworkable distinction, as it is difficult to predict if or how material obtained at an investigation stage might later be used at trial. The Appeals Chamber itself noted that the Prosecutor, 'when receiving material on the condition of confidentiality, may not be able to predict with certainty how this material can be used'.<sup>102</sup> Questions of expediency and efficiency undoubtedly inform this calculus as well, as when the Deputy Prosecutor stated in a 2008 status conference meeting that, although there was 'never any intention on the side of the Prosecutor' to use art 54(3)(e) materials for lead purposes, they were obtained with a view to gathering materials 'as quickly as possible for the sake of the ongoing investigation and then allow[ing] the Office of the Prosecutor to identify the materials it [wished] to use as evidence and then seek permission'.<sup>103</sup>

Nevertheless, both of the Appeals Chambers' decisions reinforce the importance of the Prosecution doing its utmost to pre-emptively avoid tensions between the requirements of confidentiality and those of a fair trial. This is crucial since, in the end, the OTP's cases against Lubanga were only saved after the information providers who had initially refused to concede their identities relented (with some redactions), thus allowing the trial to proceed. To this end, art 54(3)(e) should be applied, as one OTP advisor has noted, in 'strict adherence to the conditions stipulated in the provisions so as to avoid routine resort to its application'.<sup>104</sup> Similarly, confidentiality agreements with intermediaries should be arrived at in a way that would allow the Court to resolve potential conflicts

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<sup>98</sup> Whiting, above n 92, 210.

<sup>99</sup> Ibid.

<sup>100</sup> *Lubanga 2008 Appeals Chamber Judgment* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 13, 21 October 2008) [54].

<sup>101</sup> *ICC Rules of Procedure* r 82.

<sup>102</sup> *Lubanga 2008 Appeals Chamber Judgment* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 13, 21 October 2008) [42].

<sup>103</sup> *Prosecutor v Lubanga (Transcript of Status Conference)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-T-86, 6 May 2008) 23. See also *Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54(3)(e) Agreements* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01-06/1401, 13 June 2008) [72].

<sup>104</sup> Rod Rastan, 'Review of ICC Jurisprudence 2008' (2009) 7 *Northwestern Journal of International Human Rights* 261, 274.

before a stay of proceedings — an ‘exceptional remedy’, as the Appeals Chamber noted<sup>105</sup> — is necessary.

This is not an easy task but it seems clear that the OTP, because it has the sole power to raise them, should bring preliminary evidentiary issues to the Court’s attention sooner, in order to avoid the threat that last minute disclosures pose to fair and expeditious proceedings. In *Lubanga*, the Prosecution only disclosed the fact that it was in possession of a large number of potentially exculpatory documents well after the charges had already been confirmed, thereby depriving the defence of time it needed to prepare its strategy and adding greatly to the length of proceedings. One commentator has recommended, in line with the shift towards a more judge-dominated approach, the introduction of ‘some inquisitorial elements into the disclosure phase’, such as compelling the Prosecutor to ‘keep an official file of the investigations that should be disclosed to the defendant in its entirety, without exceptions: initially, before the confirmation hearing and, subsequently, before the trial’.<sup>106</sup> While the disclosure of exculpatory evidence would remain at the Prosecutor’s discretion, the application of more severe sanctions would be appropriate where it was revealed that evidence had been improperly withheld.<sup>107</sup>

### C *Informants, Intermediaries and the Court: Which Way Forward?*

Clearly, local informants and intermediaries in particular perform essential tasks that assist the various organs of the Court in carrying out their duties. As the situation in the DRC attests, it makes great sense for the OTP to develop contacts with actors on the ground, given constraints on its time and resources. Professor Elena Baylis has noted in the context of the DRC investigations that the scale of inquiries that UN actors like the United Nations Organisation Mission in the DRC (‘MONUC’) (now United Nations Organisation Stabilisation Mission in the DRC) have been able to conduct dwarfs the ICC’s.<sup>108</sup> For instance, prior to filing its charges against Lubanga, Baylis notes that the ICC Prosecutor reported that it had conducted a one-and-a-half year inquiry, in which it conducted over 70 missions and interviewed 200 people; yet, in one 10-day probe of a single incident in DRC, MONUC interviewed 150 people and travelled to 30 towns.<sup>109</sup>

At the same time, cooperation between the OTP and country-based informants raises concerns as to the perceived impartiality (or lack thereof) of the OTP and, by extension, the rights of the accused to a fair trial. For instance, adding to the fact that accused persons already suffer a material disadvantage in conducting investigations and gathering evidence vis-à-vis the Prosecution, informants and intermediaries in the ICC’s situation-countries are far more likely to be gathering incriminatory than exculpatory evidence. As Baylis notes, ‘NGOs and other third

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<sup>105</sup> *Lubanga 2010 Appeals Chamber Judgment* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 18, 8 October 2010) [55].

<sup>106</sup> Michele Caianiello, ‘Disclosure before the ICC: The Emergence of a New Form of Policies Implementation System in International Criminal Justice?’ (2010) 10 *International Criminal Law Review* 23, 40.

<sup>107</sup> *Ibid.*

<sup>108</sup> Elena Baylis, ‘Outsourcing Investigations’ (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 121, 142.

<sup>109</sup> *Ibid.*

parties are rarely directing their efforts at producing compelling exculpatory evidence for international criminal defendants'.<sup>110</sup> Nor is there any duty upon these actors, as there is on the Prosecutor, to actively investigate exonerating evidence.

This is a criticism that the OTP is unlikely to ever fully overcome; however, as Baylis argues, there are ways in which the OTP could more effectively draw experts into its investigations from those UN missions and NGOs that are already operating in situation-countries. By doing so, the Prosecution 'would maintain control over the process of investigation and would thereby maximize the reliability of the evidence produced and the transparency of its provenance'.<sup>111</sup> Furthermore, a set of guidelines that not only sets out with greater clarity intermediaries' relationship with the OTP, but also provides more detailed guidance to follow in conducting investigations, could go far in creating a set of standards to govern the Prosecution's relationship with third parties. It would also help to provide greater clarity and oversight at the outset as to the relationship between intermediaries and the Court. Better understanding of who is providing information, why they are providing it, and how they came to possess it could do much to avoid the sort of issues *Lubanga* has raised, as when the veracity and motives of witness intermediaries were called into question. Such an approach, as Baylis notes, might also set forth a standard for evidence reporting that would minimise the need for the large number of confidentiality agreements that nearly derailed the *Lubanga* proceedings.

Finally, beyond these instrumental reasons, there is a normative stake for the Court in developing sustainable working relationships with its local interlocutors. As one victims' rights group has noted, a 'partnership should be strived for whereby both parties work together within their separate competencies to implement the Court's mandate'.<sup>112</sup> In line with this idea, *Draft Guidelines* were, in fact, circulated in October 2010, in an attempt to 'provide a framework with common standards and procedures in areas where it is possible to standardize the Court's relationship with intermediaries'.<sup>113</sup> Yet a review of this document reveals considerable uncertainty as to what sort of relationship this should be. For instance, the *Draft Guidelines* state that 'intermediaries at risk on account of the activities of the Court have a right to protection';<sup>114</sup> however, later, they also indicate that 'the issue of whether the Court has a duty, if any, to protect [intermediaries] and adapt (some) protective measures should be determined on a case by case basis'.<sup>115</sup> These seemingly contradictory conceptions of intermediaries — as rights-bearers on the one hand, and 'volunteers' on the other — further reflect the indeterminacy of their position within the ICC's structure, as the 'selection criteria, nature of the relationship,

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<sup>110</sup> Ibid 145.

<sup>111</sup> Ibid 146.

<sup>112</sup> REDRESS, 'Comments on the Draft Guidelines Governing Relations between the Court and Intermediaries' (Report, REDRESS, 15 October 2010) 1.

<sup>113</sup> *Draft Guidelines*, above n 1, 2.

<sup>114</sup> Ibid 3.

<sup>115</sup> Ibid 4.

and level of support [they provide] vary between different organs and units of the Court and Counsel'.<sup>116</sup>

At the level of the OTP, then, it might well prove preferable to establish a more particularised set of guidelines of the sort that Baylis has proposed. This would not only better ensure that the evidence produced by intermediaries is useful to the OTP, but clarify at the outset the rights and duties owed to those third-parties with whom the Court engages. Otherwise, intermediaries and other local partners risk remaining in an ill-defined and often dangerous role. Carine Bapita, a lawyer from Kinshasa who represents victims in the Lubanga case, illustrated this very point after the Trial Chamber imposed its 2008 stay and ordered Lubanga's release. She called on the OTP to do more to explain to local Congolese what was happening, rather than have that responsibility foisted on intermediaries. In her words, '[t]hey are risking their lives and as if that is not enough, now they are supposed to go to the victims and explain what is happening'.<sup>117</sup>

## V CONCLUSION

Although much commentary has been lavished on the question of the need for state cooperation with respect to the arrest and surrendering of suspects to the Court, it is clear that, just as the ICC needs a network of state actors willing to execute its warrants, it also needs a network of local actors — NGOs, UN missions, and committed individuals — who are willing and able to share the information they have gathered, and to engage with affected communities on the ground. While the decisions highlighted herein underscore the delicate nature and emerging contours of the ICC's disclosure regime, informants and intermediaries are the critical figures that underwrite this narrative, but their relationship with the Court and its organs is in need of further reflection.

Addressing this lack of clarity between the ICC, particularly the OTP, and its local interlocutors must be a priority going forward. Indeed, as subsequent proceedings have demonstrated, the deficiencies laid bare by *Lubanga* extend to other cases in the DRC as well. For instance, in the ongoing case against Germain Katanga and Mathieu Chui, the Prosecution has also drawn heavily on evidence gathered from confidential agreements with intermediaries,<sup>118</sup> leading to the Single Judge expressing her concern about 'the reckless investigative techniques during the first two years of the investigation into DRC'.<sup>119</sup> Though a stay of proceedings was avoided in that matter, the Judge, like Trial Chamber I, expressed frustration with the Prosecutor's late disclosure of documents, which had been 'within the [OTP] for years — and which have not been disclosed to

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<sup>116</sup> Ibid 2.

<sup>117</sup> Quoted in Katy Glassborow, 'Intermediaries in Peril', *Institute for War and Peace Reporting* (online), 28 July 2008 <<http://iwpr.net/report-news/intermediaries-peril>>.

<sup>118</sup> See, eg, *Prosecutor v Katanga (Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 20 June 2008) [52]–[64] (Single Judge Sylvia Steiner).

<sup>119</sup> Ibid [123].

the Defence due to confidentiality restrictions'.<sup>120</sup> Unsurprisingly, Katanga and Chui's defence counsel have also raised abuse of process concerns with respect to the OTP's use of intermediaries.

Ultimately, some of the challenges that the Lubanga trial has laid bare — between the OTP's imperative to balance its fair trial obligations with its need to build partnerships with local actors — were inevitable. Implicit in the constitutional foundation of the ICC is the fact that it is a consent-based institution; its ability to conduct investigations effectively depends on the cooperation of states and state-based actors alike. In order to facilitate this cooperation, compromises with respect to confidentiality of sources and restrictions on disclosure were made, but the perimeters of those compromises must be tested, as they currently are, against the standards of due process to which the Court's defendants are entitled. This is as should it be. As Judge Fulford himself recently remarked, '[e]ven following the best part of a decade since [the Court's] establishment, the strong feeling remains that so much is still in the process of being established'.<sup>121</sup> More courtroom battles lie ahead but, nevertheless, one lesson from *Lubanga* must be the need to think more proactively not only about the OTP's investigative practices, but also about the sort of partnerships the ICC as a whole must build — principled as well as pragmatic — with local actors, on whom the success of the Court most depends.

CHRISTIAN M DE VOS\*

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<sup>120</sup> See *Prosecutor v Katanga (Decision on the 19 June 2008 Prosecution Information and Other Matters concerning Articles 54(3)(e) and 67(2) of the Statute and Rule 77 of the Rules)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 25 June 2008) [7] (Single Judge Sylvia Steiner).

<sup>121</sup> Judge Sir Adrian Fulford, 'The Reflections of a Trial Judge' (Speech delivered at the 9<sup>th</sup> Assembly of States Parties to the International Criminal Court, New York, 6 December 2010).

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