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# **Too Much of a Good Thing in *Lubanga* and *Haradinaj*: The Danger of Expediency in International Criminal Trials**

**Heidi L. Hansberry\***

## I. INTRODUCTION

*The Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj (Haradinaj)* at the International Criminal Tribunal for the former Yugoslavia (ICTY) and *The Prosecutor v. Thomas Lubanga Dyilo (Lubanga)* at the International Criminal Court (ICC) illustrate several challenges faced by international tribunals. First, these cases demonstrate that international tribunals must balance the dual priorities of expediency and the protection of those involved with the proceedings. A second, related challenge that these cases reveal is the difficulty of preserving a trial chamber's<sup>1</sup> discretionary authority while simultaneously limiting the abuse of power and maintaining fair and expeditious proceedings.

Recent actions by judges in international tribunals indicate that judges tend to consider any reason for delay as unjustified and to be avoided at all costs in order to promote trial expediency. This article seeks to show that delays concerning the protection of

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<sup>1</sup> The trial chamber is the component of the ICC and ICTY tasked with conducting trials, as distinct from the pre-trial chamber and the appeals chamber.

individuals involved in court proceedings<sup>2</sup> must be viewed differently, as the *Haradinaj* Appeals Chamber correctly observes. If a court will not ensure the safety of those involved, witnesses and others will be less likely to come forward and be truthful, and the trial will be severely handicapped. Thus, this article will argue that the urge to rush matters regarding protection must be tamed.

Following a background section, Part One of this article will analyze the protection dilemmas encountered by the *Haradinaj* and *Lubanga* courts. Next, it will explain the legal basis for the discretionary decisions made by the respective trial chambers, namely the *Haradinaj* Trial Chamber's refusal to delay proceedings to accommodate witnesses with protection concerns and the *Lubanga* Trial Chamber's stay of proceedings, which resulted from a stalemate between the Trial Chamber and the Prosecutor regarding witness protection issues.

Part Two of this article will explain the significance of the trial chambers' discretion and describe how it can both achieve and undermine goals related to the protection of individuals involved with the tribunals. This section will closely analyze the different outcomes of the protection issues in *Haradinaj* and *Lubanga* and the implications of the trial chambers' decisions.

Part Three of this article will evaluate the appeals chambers' effectiveness in resolving the issues presented in the two cases. It will argue that the *Haradinaj* Appeals Chamber took a strong stance against the Trial Chamber's abuse of discretion and, therefore, provided clear guidance regarding the conduct of trial chambers in relation to witness protection. The appeals decision in *Lubanga*, however, did little to clarify how the Trial Chamber ought to handle protection disagreements in the future. In part because the issue was not ripe, the Appeals Chamber did not address the *Lubanga* Trial Chamber's discretion in the context of protection, nor did it assign weight to the competing concerns of expediency and the protection of individuals involved with the court proceedings.

Part Four will conclude that protection of witnesses and others involved in the court proceedings should trump concerns about expediency because the lack of adequate and timely protective measures could lead to a variety of undesirable and ironic repercussions.

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<sup>2</sup> Throughout this article, this phrase will collectively refer to defense witnesses, prosecution witnesses, and dual status victim-witnesses.

## II. BACKGROUND

### A. *The Issue of Expediency*

#### 1. *Statistics regarding the pace of international criminal trials*

There have been no completed trials to date at the ICC, which was born upon the Rome Statute's entry into force on July 1, 2002.<sup>3</sup> Statistics reflect that an accused person spends an average of 2.3 years awaiting trial at the ICC while in custody.<sup>4</sup> The average time period between custody and a decision on charges, the first step toward a trial at the ICC, alone is 0.9 years.<sup>5</sup> Similarly, the time period between Bahr Idriss Abu Garda's voluntary appearance and the decision on charges was 0.7 years.<sup>6</sup> Thus, it is typical that an exceedingly long period of time elapses before the trial itself begins—even for those defendants who appear voluntarily. And although no trials have concluded at the ICC, the first two trials promise to be lengthy. At the time of writing, the trial of Thomas Lubanga Dyilo has been underway for over two years, since January 26, 2009, and the trial of Germain Katanga and Matheiu Ngudjolo Chui, which began on November 24, 2009, approaches its two-year anniversary.<sup>7</sup>

The ICTY's statistics are similar to those of the ICC, in spite of the fact that the ICTY was established much earlier, in May 1993,<sup>8</sup> and that it has completed many more trials, 126 to date.<sup>9</sup> The average duration of an ICTY trial is 1.4 years, and the pre-trial phase lasts approximately 1.9 years.<sup>10</sup>

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<sup>3</sup> See Rome Statute of the International Criminal Court, art. 126, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (1998) [hereinafter Rome Statute] (entered into force July 1, 2002).

<sup>4</sup> See Annex 1, a table with data regarding the length of time between the major events in trials at the ICC, current through July 12, 2011.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See *About the ICTY*, UNITED NATIONS INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sections/AbouttheICTY> (last visited July 24, 2011).

<sup>9</sup> See *Key Figures*, UNITED NATIONS INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sections/TheCases/KeyFigures> (last visited July 24, 2011).

<sup>10</sup> Jean Galbraith, *The Pace of International Criminal Trials*, 31 MICH. J. INT'L L. 79, 117 (2009); see also Maximo Langer & Joseph W. Doherty, *Managerial*

These statistics are not unique to the ICC and ICTY. The International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone (SCSL) also have lengthy trials (an average of 2.2 years and 3.5 years, respectively) and long pre-trial phases (an average of 3.6 years and 1.4 years, respectively).<sup>11</sup> Even more shocking is the average length of time between custody and the ultimate judgment: 4.7 years (ICTY), 5.9 years (ICTR), and 4.8 years (SCSL).<sup>12</sup>

## 2. *Causes of the slow pace and proposed solutions*

Stating that lengthy proceedings are the biggest problem of international criminal trials, Robert Heinsch enumerated six main reasons for the slow pace of international criminal trials.<sup>13</sup> First, the enormous amount of disclosed material overburdens the defense.<sup>14</sup> Second, the Office of the Prosecutor should, but does not, facilitate the work of the defense by structuring its disclosures and streamlining its cases, so as to create less labor for the defense.<sup>15</sup> Faced with more work, the defense often requests time extensions, a big contributor to the slow pace of proceedings.<sup>16</sup> Heinsch's third point is that judges are not proactive enough in encouraging cooperation between the parties.<sup>17</sup> Fourth, judges are hindered by a lack of information on the background of cases; most significantly,

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*Judging Goes International But Its Promise Remains Unfulfilled: An Empirical Assessment of the Reforms to Expedite the Procedure of the International Criminal Tribunal for the Former Yugoslavia*, 36 YALE J. INT'L L. 241, 253 (2010) (Using statistics current through July, 2006: "The median length of the pre-trial phase is about 18 months (551 days). The trial phase with guilty pleas included has a median length of about 14 months (433 days), while the trial phase without guilty pleas has a median length of about 17 months (515 days).").

<sup>11</sup> See Gailbraith, *supra* note 10, at 117.

<sup>12</sup> *Id.* Note that there is often a substantial amount of time that elapses after an accused individual is taken into custody prior to his or her initial appearance at the tribunal (i.e. the commencement of the pre-trial phase). See Langer & Doherty, *supra* note 10, at 253–54.

<sup>13</sup> Robert Heinsch, *How to achieve fair and expeditious trial proceedings before the ICC: Is it time for a more judge-dominated approach?*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 480, 481 (Carsten Stahn & Göran Sluiter, eds., 2009).

<sup>14</sup> *Id.* at 483.

<sup>15</sup> *Id.* at 485–86, 491.

<sup>16</sup> *Id.* at 486.

<sup>17</sup> *Id.* at 487–88.

they lack awareness of exculpatory material.<sup>18</sup> Fifth, self-represented defendants, rather than experienced attorneys, are allowed to participate in international criminal trials, causing unnecessary delays about basic issues.<sup>19</sup> Sixth, the participation of victims throws off the equilibrium of a typical trial, and, absent a proactive bench, delays ensue.<sup>20</sup>

Summarizing the difficulty in finding a solution to the slow pace of international criminal tribunals, Jean Galbraith noted that there are two typical, yet problematic strategies, which often conflict with each other and with the primary objectives of these tribunals.<sup>21</sup> The first strategy is to abbreviate historical record-building efforts and to devote less time to helping transitioning societies achieve peace.<sup>22</sup> The second strategy is to speed up procedural aspects of trial, which creates due process concerns.<sup>23</sup> Galbraith disagreed with these strategies and suggested plea bargaining and multi-defendant trials as the proper solutions to the slow pace of the international criminal legal system.<sup>24</sup>

The ICTY has also targeted the problem of pace. Its attempts to shorten trials and expedite proceedings, however, have had ironic results, according to one report.<sup>25</sup> In its implementation of so-called managerial reforms, the ICTY actually *lengthened* the average duration of proceedings, according to the report's analysis.<sup>26</sup> These managerial reforms included, *inter alia*, allowing judges to actively manage the pre-trial and trial phases, permitting more written witness statements in lieu of live testimony, granting trial chambers the authority to permit or reject applications for interlocutory appeals, and limiting, at the trial stage, the number of sites and incidents under review.<sup>27</sup> This same analysis showed that the reductions in the duration of trial that did occur were not due to procedural reforms, but rather resulted from increases in court

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<sup>18</sup> *Id.* at 488.

<sup>19</sup> *Id.* at 494.

<sup>20</sup> *Id.* at 495.

<sup>21</sup> Galbraith, *supra* note 10, at 83.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Langer & Doherty, *supra* note 10.

<sup>26</sup> *Id.* at 252.

<sup>27</sup> *Id.* at 251.

capacity and plea-bargaining.<sup>28</sup> Thus, the report showed that “the procedural reforms that aimed to shorten procedure had the opposite effect: lengthening both pre-trial and trial.”<sup>29</sup>

Many of these observations imply concrete ways to improve international courts with strategies that eliminate unnecessary delays. It is important to note that delays caused by witness protection are not listed above, and this article will argue that they are in a category of their own. Unlike delays caused by inefficient procedures or lack of cooperation among the parties and participants, delays concerning the protection of individuals involved with court proceedings are not properly handled with impatience or haste. These types of delays are necessary for the fairness of trials and the optimal functioning of the court system. Discounting the safety and security of witnesses will not necessarily assist courts in overcoming criticism about their slow pace, especially when there are many other causes of delays that are unrelated to witness protection.

## B. Cases

### 1. *Haradinaj*

Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj are accused of participating in a joint criminal enterprise (JCE) to commit crimes against humanity and violations of the laws and customs of war as members of the Kosovo Liberation Army (KLA), which persecuted and abducted Serbian, Kosovar Roma/Egyptian, and Kosovar Albanian citizens.<sup>30</sup> Collectively, the allegations against all three include harassment, deportation or forcible transfers of civilians, cruel treatment, murder, rape, and torture.<sup>31</sup> Haradinaj was allegedly the *de facto* commander of the KLA.<sup>32</sup> Balaj was allegedly a member of the KLA and the commander of a special unit

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<sup>28</sup> *Id.* at 259.

<sup>29</sup> *Id.* at 243.

<sup>30</sup> Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-A, Appeal Judgment, ¶ 3 (July 19, 2010) [hereinafter Haradinaj et al. Appeal Judgment].

<sup>31</sup> See ICTY website, Case Information Sheet for Haradinaj et al., available at [http://www.icty.org/x/cases/haradinaj/cis/en/cis\\_haradinaj\\_al\\_en.pdf](http://www.icty.org/x/cases/haradinaj/cis/en/cis_haradinaj_al_en.pdf).

<sup>32</sup> Haradinaj et al. Appeal Judgment, *supra* note 30, ¶ 2.

called the Black Eagles.<sup>33</sup> Lahi was allegedly a deputy commander and finance director for the KLA.<sup>34</sup>

The *Haradinaj* trial commenced at the ICTY on March 5, 2007, and the Trial Chamber's judgment was delivered on April 3, 2008.<sup>35</sup> The Trial Chamber found insufficient evidence for the charge of JCE among the three defendants. All of the defendants were acquitted of the various charges, with the exception of Brahimaj, who was found guilty of torture.<sup>36</sup> The prosecution filed an appeal on May 2, 2008, claiming that the Trial Chamber abused its discretion by violating the prosecution's right to a fair trial by dismissing its requests for more time to obtain the testimony of a witness reluctant to testify because of alleged intimidation.<sup>37</sup> The appeals decision was delivered on July 21, 2010, in which a partial re-trial was ordered for all defendants concerning the charges of JCE.<sup>38</sup>

## 2. *Lubanga*

Thomas Lubanga Dyilo is on trial at the ICC for war crimes, specifically enlisting and conscripting child soldiers in the Democratic Republic of the Congo (DRC). Lubanga is allegedly the founder and former President of the Union des Patriotes Congolais (UPC), as well as the founder and former commander-in-chief of the UPC's military branch, the Forces patriotiques pour la libération du Congo (FPLC).<sup>39</sup> The UPC/FPLC is described as a hierarchically-organized, armed group participating in the ongoing hostilities in the DRC.<sup>40</sup>

Lubanga's trial began on January 26, 2009.<sup>41</sup> The stay of the proceedings discussed in this article occurred on July 8, 2010, and

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See ICTY website, *supra* note 31.

<sup>36</sup> Haradinaj et al. Appeal Judgment, *supra* note 30, ¶ 481.

<sup>37</sup> *Id.* ¶¶ 14, 17.

<sup>38</sup> *Id.* ¶ 50.

<sup>39</sup> See ICC website, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/democratic%20republic%20of%20the%20congo>.

<sup>40</sup> The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/01-04/06, ¶¶ 3–4 (Apr. 3, 2006).

<sup>41</sup> See ICC website, *supra* note 39.

the appeals decision on the stay of proceedings was delivered on October 8, 2010.<sup>42</sup>

### III. PART ONE: PROTECTION DILEMMAS IN *HARADINAJ* AND *LUBANGA*

#### A. *Dissection of the Dilemmas Encountered by the Haradinaj and Lubanga Courts*

The trial chambers of the ICTY and the ICC were in the same no-win situation when faced with dilemmas concerning the protection of individuals involved with their courts. They were forced to choose between an expeditious trial that compromised the needs of witnesses involved in the trial and a delayed trial that accommodated these individual needs. Both trial chambers chose to expedite proceedings, a choice that was dismissive of the security concerns of those involved in the trials.

In *Haradinaj*, two witnesses refused to testify before the Trial Chamber, citing intimidation and fear in relation to testifying.<sup>43</sup> The prosecution claimed that these witnesses possessed crucial information concerning the accused and that it needed more time to secure their testimony.<sup>44</sup> The Trial Chamber denied the prosecution's requests for more time extensions, noting that the prosecution had already exceeded its time limit for the presentation of its case.<sup>45</sup> The prosecution later argued that the Trial Chamber "rewarded witness intimidation" and prohibited a fair trial by refusing to allow for more time in order to secure the testimony of these witnesses and for not taking steps to facilitate or compel their testimony.<sup>46</sup> Further, the prosecution argued that the absence of these two witnesses' testimonies resulted in the acquittals of the

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<sup>42</sup>The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2582, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 Entitled, "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU" (Oct. 8, 2010) [hereinafter *Lubanga Judgment on the Appeal of the Prosecutor*].

<sup>43</sup>The Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-A 540-483, Prosecution Appeal Brief (Public Redacted Version), ¶ 3 (July 17, 2008).

<sup>44</sup>*Id.* ¶ 5.

<sup>45</sup>*Id.* ¶¶ 4–5.

<sup>46</sup>*Id.* ¶¶ 4–5.

accused.<sup>47</sup> The prosecution criticized the Trial Chamber for choosing an expeditious trial over a fair one.<sup>48</sup>

Similarly, the Trial Chamber in *Lubanga* made a choice between two problematic options with regard to the disclosure of the identity of a person affiliated with the prosecution, referred to as Intermediary 143. Intermediaries are individuals affiliated with the prosecution who work in the field to assist alleged child soldiers in filling out victim application materials and who introduce these children to prosecution investigators.<sup>49</sup> The defense insisted that the disclosure of the identity of Intermediary 143 was essential for the examination of a witness in the defense's abuse of process claim.<sup>50</sup> This abuse of process claim involved the accusation that intermediaries, in collaboration with the prosecution, coached witnesses to provide false testimony.<sup>51</sup>

The prosecution opposed the disclosure of Intermediary 143's identity for several reasons.<sup>52</sup> The prosecution argued that, from a policy perspective, disclosure would inhibit the prosecution's ability to effectively gather information from dangerous locations if it could not guarantee the protection of the identities of intermediaries.<sup>53</sup> The prosecution also emphasized that disclosure would negatively impact the Intermediary's career and professional credibility because of the nature of the defense team's allegations.<sup>54</sup> Most importantly, the prosecution argued that the safety and security of Intermediary 143 would be at risk if his identity was revealed, in part due to the type of allegations and also because "living where they live...[intermediaries] are at real, documented risk on account

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<sup>47</sup> *Id.* ¶ 4.

<sup>48</sup> *Id.* ¶ 3.

<sup>49</sup> The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, ¶ 15 (May 31, 2010).

<sup>50</sup> *Id.* ¶ 143.

<sup>51</sup> *Id.* ¶ 25, quoting Defense Counsel Maitre Mabilie: "The Defence also intend to show that some of this false testimony was fabricated with the assistance of intermediaries who collaborated with the Office of the Prosecutor" (Transcript of Hearing on 27 January 2010, at 20–22, The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-T-236-CONF-ENG ET (Jan. 27, 2010)); see also Lubanga Judgment on the Appeal of the Prosecutor, *supra* note 42, ¶ 4.

<sup>52</sup> The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, ¶¶ 58, 62, 66 (May 31, 2010).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

of the activities they undertake for the OTP [Office of the Prosecutor] and for other organs of the Court.”<sup>55</sup>

Seemingly in agreement with the prosecution’s assessment of the risks associated with revealing the intermediary’s identity, the Trial Chamber initially ordered that the disclosure occur only after protection measures were implemented.<sup>56</sup> The Chamber reiterated its requirement that protective measures be put in place prior to disclosure in its rejection of the prosecution’s request to appeal the disclosure of Intermediary 143:

[A] court will strive not to treat individuals who are affected by the work of the Court unfairly (as demonstrated by the Chamber’s insistence that the necessary protective measures are implemented prior to disclosure of intermediary 143’s identity) . . . the Chamber recognizes that in certain circumstances, the treatment of particular individuals (e.g. the accused, victims or witnesses) may have a significant impact on the overall fairness of the proceedings.<sup>57</sup>

When the Trial Chamber discovered that the implementation of these protection measures would require a time delay, however, the Trial Chamber chose to order the disclosure to a more limited group of defense team members rather than to await the implementation of the protection measures.<sup>58</sup>

The Trial Chamber thus revealed its priority to keep the proceedings running without delay, even though the prosecution, consistent with its earlier position, insisted that Intermediary 143 must be protected by the Court before his identity was revealed.<sup>59</sup>

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<sup>55</sup> *Id.* ¶ 18.

<sup>56</sup> *Id.* ¶ 139(d) (“Disclosure of the identity of the intermediary . . . is not to be effected until there has been an assessment by the VWU, and any protective measures that are necessary have been put in place.”).

<sup>57</sup> The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2463, Decision on the Prosecution’s Request for Leave to Appeal the “Decision on Intermediaries,” ¶ 30 (June 4, 2010).

<sup>58</sup> The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2517-Red, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU (July 8, 2010) [hereinafter Lubanga Redacted Decision on the Prosecution’s Urgent Request].

<sup>59</sup> *Id.* ¶¶ 7–8.

The prosecution in *Lubanga* held this position in spite of the repeated orders of disclosure by the Trial Chamber.<sup>60</sup> The prosecution's noncompliance with these orders caused the Trial Chamber to issue a stay of the *Lubanga* trial.<sup>61</sup>

*B. The No-Win Nature of these Dilemmas*

The *Haradinaj* and *Lubanga* courts had two options. The first option was to delay the respective trials in order to cater to the needs of at-risk individuals, ensuring their safety in spite of the loss of time. The second option was to continue with the proceedings, given that the length of time required for the resolution of the concerned individuals' problems was uncertain, and the trials could be stalled for an unknown period of time.

If judges chose to delay proceedings, they would cause several unfavorable results. First, delaying the proceedings would likely lengthen the overall trial, resulting in additional operating costs. Second, delays potentially infringe upon the accused's right to an expeditious trial. Third, if delaying the proceedings would be perceived as elective or voluntary, doing so may exacerbate criticism that international criminal proceedings are unnecessarily lengthy, which could reduce public support for international tribunals.<sup>62</sup>

This article argues that the second possible course of action, expediting proceedings, would have even greater consequences. If a chamber refused a time extension for the implementation of protective measures, it could cause a frightened witness to refuse to testify. The absence of witness testimony could prevent a critical component of a party's case, and the party would, therefore, have ammunition for an appeal. Ironically, an appeal of this type could lengthen the proceedings more than the delay at issue.

Another danger resulting from expediting the proceedings in the context of witness protection is that other witnesses may be deterred from cooperating with courts if they believe they will not be adequately protected. A third possible consequence is that deficient protective measures could put the lives and safety of witnesses and their families at risk. If a witness were harmed as a result of

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<sup>60</sup> *Id.* ¶¶ 12–13.

<sup>61</sup> *Id.* ¶ 31.

<sup>62</sup> See Heinsch, *supra* note 13, at 481.

testifying, a court would lose credibility in its claim to provide for and prioritize its witnesses' security.

*C. The Legal Basis for the Trial Chambers' Actions*

*1. General authority to ensure a fair and expeditious trial*

Article 20(1) of the Statute of the ICTY states that “The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”<sup>63</sup> Nearly identical is Article 64 of the ICC’s Rome Statute: “The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”<sup>64</sup>

ICTY Statute Article 20(1) and the Rome Statute Article 64(2) establish the trial chamber as the authority in determining what constitutes a fair trial and whether parties are in compliance with the Rules of Procedure and Evidence. This mandate grants trial chambers a huge amount of discretionary power. These provisions also require that a trial chamber ensure fairness, expeditiousness, respect for the rights of the accused, and regard for the protection of victims and witnesses. In essence, a trial chamber has the difficult task of balancing the competing interests of parties or participants.

*2. Authority over matters of protection*

With regard to the protection of victims and witnesses, both the ICTY and the ICC grant the trial chambers ultimate authority over these decisions. The following two sections will explain the different statutory bases for the authority of the ICC and ICTY trial chambers.

*i) ICC*

At the ICC, discretionary authority over the protection of victims and witnesses is enshrined in the Rome Statute and the Rules

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<sup>63</sup> Updated Statute for the International Criminal Tribunal for the Former Yugoslavia, art. 20(1), Sept. 2009 [hereinafter ICTY Statute].

<sup>64</sup> Rome Statute, *supra* note 3, art. 64(2).

of Procedure and Evidence. Article 64 of the Rome Statute states that: “The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”<sup>65</sup> Thus, according to the Rome Statute, the Trial Chamber has both the privilege and the burden to maintain the fairness and expeditiousness of the trial. Additionally, the Trial Chamber has responsibility for the welfare of the accused, the witnesses, and the victims, as its decisions have an impact on these parties.

Rule 87 of the Rules of Procedure and Evidence of the ICC also enables the Trial Chamber to “order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness . . . .”<sup>66</sup> Interestingly, Rule 84 enables the Trial Chamber to order disclosures,<sup>67</sup> and Rule 81 foresees that such disclosures may be the cause of enhanced risk to a participant in the proceedings, as it states: “When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.”<sup>68</sup> The Rome Statute, therefore, provides for situations when disclosures that negatively affect a witness’s safety become necessary.

The Trial Chamber is further tasked with remedying the detrimental impact on victim and witness safety as it sees fit. Part 4 of Rule 81 states: “The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to . . . protect the safety of witnesses and victims and members of their families.”<sup>69</sup> Because it is the entity tasked with making decisions concerning protection, the security of witnesses, victims, and others at risk due to testimony is the Trial Chamber’s responsibility. If the Trial Chamber should make poor decisions or orders in this regard, the parties may bring

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<sup>65</sup> *Id.*

<sup>66</sup> Rules of Procedure and Evidence, r. 87, ICC-ASP/1/3 (Part. II-A) (Sept. 9, 2002) [hereinafter ICC Rules of Procedure and Evidence].

<sup>67</sup> *Id.* r. 84 (“The Trial Chamber shall...make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.”).

<sup>68</sup> *Id.* r. 81(3).

<sup>69</sup> *Id.* r. 81(4).

the issue up to the appeals chamber to remedy the damage done, either during proceedings, in the form of interlocutory appeals, or after a decision is rendered. Interlocutory appeals, however, are subject to certain conditions, which are explained in detail in section III(d).

Although the Trial Chamber has the discretion to decide matters of witness protection on its own, other parties, participants, and organs of the Court may make suggestions, provide advice, and appeal the Trial Chamber's decisions.<sup>70</sup> The Victims and Witnesses Unit (VWU) participates in precisely this manner. Specifically, the Rules of Procedure and Evidence foresee that the Chamber will consult the VWU regarding protective measures:

Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and *after having consulted with the Victims and Witnesses Unit, as appropriate*, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness . . . .<sup>71</sup>  
[emphasis added].

Article 43(6) of the Rome Statute also specifically recognizes the intertwined role of the prosecution in matters of witness protection; it states that the VWU, in consultation with the prosecution, will provide protective measures, security arrangements, and other types of support for victims, witnesses, and other individuals who are at risk on account of witness testimony.<sup>72</sup>

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<sup>70</sup> See Rome Statute, *supra* note 3, art. 68(4) (“The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance...”); see also ICC Rules of Procedure and Evidence, *supra* note 66, r. 81(4) (“The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to...protect the safety of witnesses and victims and members of their families...”).

<sup>71</sup> ICC Rules of Procedure and Evidence, *supra* note 66, r. 87(1).

<sup>72</sup> Rome Statute, *supra* note 3, art. 43(6): “The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such

Further, the VWU is the expert entity that advises the Court on the above-referenced protective and supportive measures<sup>73</sup> and recommends the adoption of particular protective measures.<sup>74</sup> The VWU's mandate requires that it be an impartial service provider,<sup>75</sup> and the Rules of Procedure and Evidence further provide for the VWU to employ experts in witness protection and security.<sup>76</sup> Given its neutrality and expertise, the VWU is the appropriate entity to assess an individual's risk in the event any questions or debate arise.

*ii) ICTY*

Like the ICC, trial chambers at the ICTY have discretionary authority over the protection of individuals involved with the court. Rule 69(A) of the ICTY Rules of Procedure and Evidence states that: "In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal."<sup>77</sup> A failure to comply with disclosure obligations results in sanctions.<sup>78</sup>

Rule 75 of the Rules of Procedure and Evidence grants the Trial Chamber the right to order protective measures for victims and witnesses on its own initiative or at the request of a party or the individual concerned.<sup>79</sup> Furthermore, the ICTY's Rule 75 details the measures possible for the protection of victims and witnesses while emphasizing the Trial Chamber's exclusive control over such measures.<sup>80</sup> However, Rule 69(B) provides that in determining protective measures, the Trial Chamber "*may* consult the Victims

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witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence."

<sup>73</sup> *Id.* art. 68(4).

<sup>74</sup> ICC Rules of Procedure and Evidence, *supra* note 66, r. 17(2)(a)(ii).

<sup>75</sup> *Id.* r. 18(b).

<sup>76</sup> *Id.* r. 19(a).

<sup>77</sup> ICTY Rules of Procedure and Evidence, r. 69(A), U.N. Doc. IT/32/Rev. 44 (Dec. 10, 2009) [hereinafter ICTY Rules of Procedure and Evidence].

<sup>78</sup> *Id.* r. 68 *bis*.

<sup>79</sup> *Id.* r. 75(A) ("A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.").

<sup>80</sup> *Id.* r. 75(B–K).

and Witnesses Section” [emphasis added].<sup>81</sup> Additionally, Rule 34 specifically notes that the Victims and Witnesses Section (VWS) has the ability to *recommend* particular protective measures to the Trial Chamber on behalf of victims and witnesses.<sup>82</sup> Thus, the ICTY Rules are clear that there is no requirement to consult with the VWS. The VWS, therefore, plays an advisory role in informing the Trial Chamber’s orders concerning victim and witness protection.

Noteworthy is the fact that neither the ICTY nor the ICC statutes or rules provide for any other entity to make final determinations concerning the fairness of the proceedings or the measures appropriate for protecting participants in the proceedings. The Trial Chamber, therefore, has the discretionary authority to make any and all decisions in these areas, subject only to the check of the Appeals Chamber.<sup>83</sup> The Trial Chamber, however, may always seek opinions from the parties, participants, and VWU/VWS regarding matters of protection.

#### *D. The Failed Applications for Interlocutory Appeals*

According to ICC Rule 155(1), parties or participants may lodge an interlocutory appeal at any point during the proceedings, subject to the approval of an application submitted to the trial chamber.<sup>84</sup> In order to grant leave to appeal, however, the Trial Chamber must find that the issue meets several criteria, one of which is that the issue affects the fairness and expediency of the

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<sup>81</sup> *Id.* r. 69(B).

<sup>82</sup> *Id.* r. 34(A)(i).

<sup>83</sup> *See* Rome Statute, *supra* note 3, art. 82(1)(d) (“Either party may appeal . . . a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”); *see also* ICTY Statute, *supra* note 63, art. 25 (“(1) The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice. (2) The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.”).

<sup>84</sup> *See* ICC Rules of Procedure and Evidence, *supra* note 66, r.155(1) (“When a party wishes to appeal a decision under article 82, paragraph 1(d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.”).

proceedings or the outcome of the trial.<sup>85</sup> Only if the application for leave to appeal is granted will the appeals chamber hear the issue.<sup>86</sup> At the ICTY, an interlocutory appeal is permitted by Rule 73(B), the requirements of which are identical to those of the ICC Rule 155(1).<sup>87</sup> Like the ICC Trial Chambers, the ICTY Trial Chambers must approve applications for interlocutory appeals.<sup>88</sup>

The *Lubanga* Trial Chamber assessed an application for an interlocutory appeal on June 4, 2010, when the prosecution applied for leave to appeal the disclosure order regarding Intermediary 143.<sup>89</sup> Among other arguments, the prosecution contended that the fairness of the trial would be compromised because disclosure would “critically impact[] . . . the Prosecution’s ability to fulfill its duties with regard to protection.”<sup>90</sup> Concerning the effect on the outcome of the trial, the prosecution argued that “because the Decision negates the usefulness of Intermediary 143, and because it will have consequences on the recruitment of other intermediaries, this will impair the prosecution’s ability to call relevant evidence, and as a result it will have a direct impact on the outcome of the trial.”<sup>91</sup> The Trial Chamber rejected the prosecution’s arguments and held that the order of disclosure neither impacted the fairness or expediency of the

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<sup>85</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 3 March 2006 Decision Denying Leave to Appeal, ¶¶ 9–14 (July 13, 2006).

<sup>86</sup> ICC Rules of Procedure and Evidence, *supra* note 66, r. 155(1); ICTY Rules of Procedure and Evidence, *supra* note 77, r. 73(B).

<sup>87</sup> ICTY Rules of Procedure and Evidence, *supra* note 77, at r. 73(B) (“Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”).

<sup>88</sup> *Id.*

<sup>89</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2463, Decision on the Prosecution Request for leave to Appeal the Decision on Intermediaries, ¶¶ 2, 7, 35 (June 2, 2010).

<sup>90</sup> *Id.* ¶ 11, quoting *Lubanga Redacted Decision on the Prosecution’s Urgent Request*, *supra* note 58, ¶ 33.

<sup>91</sup> *Id.* ¶ 20.

proceedings nor affected the outcome of the trial.<sup>92</sup> Thus, the prosecution was not able to argue its position regarding Intermediary 143 at the appeals level.

Similarly, the prosecution in *Haradinaj* applied for leave to appeal the Trial Chamber's decisions that denied extensions of time to obtain the testimony of a key witness.<sup>93</sup> The Trial Chamber also rejected this application on the grounds that it did not meet the criteria for an interlocutory appeal. The Trial Chamber found that the denial of time extensions was not outcome-determinative because the prosecution had failed to show that the key witness, Shefqet Kabashi, was likely to testify if the extensions were granted.<sup>94</sup> Having been silenced by the Trial Chamber, the prosecution never had the chance to present its arguments regarding the extensions and this witness before the Appeals Chamber.

Both trial chambers determined that the respective issues in *Lubanga* and *Haradinaj* would not affect the outcome of the trials; the opposite came true, however. In *Lubanga*, the unsettled issue of the disclosure of Intermediary 143 resulted in actions by both the prosecution and the Trial Chamber that threatened to terminate the proceedings. In *Haradinaj*, the Appeals Chamber found that the absence of witness testimony could have affected the outcome of the case. These instances indicate that the merits of appeal applications are difficult for a trial chamber to accurately assess. This task presents a conflict of interest for the trial chamber because the trial chamber must assess its own decisions. To expect a trial chamber to do so impartially is perhaps unrealistic. In reviewing applications to appeal, a trial chamber is forced to decide between two options. The first is to justify the trial chamber's own actions by categorizing the issues presented as non-outcome determinative and not having a great impact on the fairness or expediency of trial. The second alternative is for the trial chamber to admit a potential error and possibly delay the trial pending the issue's resolution. Given the pressure on international tribunals to be efficient and also to bolster the public's perception of their credibility and legitimacy,<sup>95</sup> one

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<sup>92</sup> Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-T, Decision on the Prosecution's Request for Certification to Appeal the Trial Chamber's Decision Concerning Shefqet Kabashi, ¶ 4 (Dec. 5, 2007).

<sup>93</sup> *Id.* ¶ 1.

<sup>94</sup> *Id.* ¶ 3.

<sup>95</sup> International tribunals face a variety of criticisms, including that they do not have a legitimate legal basis, are political tools for conducting witch hunts, and

could imagine that trial chamber judges may confront questions of their authority with a variety of motivations, including, among others, the desire to appear consistent, principled, and decisive. Although these are noble goals, they may result in judges being biased in favor of their own decisions.

A policy that could prevent similar problems in the future for both the ICC and the ICTY is to lower the standard for interlocutory appeals. Rather than requiring that an issue be outcome-determinative or greatly impacting upon the fairness or expediency of the proceedings, the issue could be characterized as one that *may* be outcome-determinative or would affect the fairness and expediency of a trial *to a considerable degree*. If trial chambers used this standard, appeals chambers would be more likely to assess problematic issues at an earlier stage, as more applications for appeal would likely be successful.<sup>96</sup> There is a great advantage to an appeals chamber assessing the issues for which the parties seek an appeal, as opposed to the trial chamber silencing them by rejecting appeals applications. An appeals chamber is separated from the day-to-day proceedings of the trial and, therefore, may be less susceptible to the above-noted biases and pressures that a trial chamber faces. An appeals chamber, not the trial chamber, is the most appropriate decision-maker for particularly sensitive issues like the ones addressed in this article.

If the interlocutory appeal application had been granted, the *Lubanga* prosecution would have been able to fully plead its case regarding Intermediary 143. In the prosecution's later appeal of the Trial Chamber's decision to stay the proceedings, it argued that what the Trial Chamber characterized as "non-compliance" was simply a

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have neo-colonialist motives. *See, e.g.,* Stephen Asiimwe, *ICC is another colonial hangover*, NewVision Website, Jun. 29, 2011, available at <http://www.newvision.co.ug/D/8/459/758825> (calling the ICC a "new jacket for colonial hangover"); John Perazzo, *International Kangaroo Court*, Frontpagemag.com, July 30, 2003, available at <http://archive.frontpagemag.com/readArticle.aspx?ARTID=17001> (arguing that the ICC would "likely be used as a political and public relations battering ram...").

<sup>96</sup> When a Trial Chamber's own decision is contested by way of an interlocutory appeal application, the danger for bias on the part of the Trial Chamber is great. Another possible remedy for this apparent conflict of interest is to allow the Appeals Chamber, rather than the Trial Chamber, to assess applications for interlocutory appeals. This method is sensible, at the very least, when the issue of appeal focuses on the Trial Chamber's orders or conduct.

disagreement with the Trial Chamber's disclosure orders.<sup>97</sup> Further, the prosecution argued that it had been denied the proper opportunity to object.<sup>98</sup> Had the prosecution settled the issue with the Appeals Chamber, it would not have been able to justify its non-compliance with the Trial Chamber's orders. Without such justification for non-compliance, the prosecution would, presumably, not have disobeyed the Trial Chamber's orders, and the proceedings would not have been stayed. Similarly, assuming that the Appeals Chamber would have reached the same decision in *Haradinaj* during the trial as it did after the trial concluded, much time could have been saved, as a retrial would not likely have become necessary.

The Trial Chambers' denial of the interlocutory appeals was ostensibly linked to their desire to move forward with the proceedings without unnecessary detours. Ironically, granting the interlocutory appeals in these instances could have shortened the proceedings in both *Lubanga* and *Haradinaj* in comparison to what actually unfolded.

#### IV. PART TWO: THE SIGNIFICANCE OF THE TRIAL CHAMBERS' DISCRETION

##### A. *Analysis of the Protection Issues*

##### 1. *Lubanga*

Following the rejection of its application for leave to appeal the disclosure order, the *Lubanga* prosecution lodged a series of requests for time extensions concerning disclosure.<sup>99</sup> The Trial Chamber refused to grant any extensions, as it viewed the issue as already resolved.<sup>100</sup> This conclusion was in spite of the fact that the

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<sup>97</sup> The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2544-Red, Prosecution's Document in Support of Appeal against Trial Chamber I's decision of 8 July 2010 to stay the proceedings for abuse of process (July 30, 2010).

<sup>98</sup> *Id.*

<sup>99</sup> Lubanga Judgment on the Appeal of the Prosecutor, *supra* note 42, ¶¶ 9-13.

<sup>100</sup> Lubanga Redacted Decision on the Prosecution's Urgent Request, *supra* note 58, ¶ 10 ("In our judgment the proposal outlined by the Chamber, which as I have said we understood to be acceptable to the Defence, namely that disclosure should be limited to those in Court today and the Defence resource person with no investigative steps being taken until a further order was issued by the Chamber, does not materially undermine the position of 143, or in any way enhance any risk that may exist for him . . . In those circumstances we do not consider that there is

order to disclose had been significantly altered to require disclosure *before* protective measures could be put in place, albeit to a limited group of people for limited purposes.<sup>101</sup> Instead, the Trial Chamber ordered immediate disclosure to the defense team, including a defense resource person, and required the disclosure to be limited to the questioning of a defense witness and not to be used for investigative purposes.<sup>102</sup>

The prosecution objected to the limited disclosure for several reasons. First, the prosecution alleged that the defense resource person was not trustworthy.<sup>103</sup> Second, the prosecution argued that the intermediary's safety would be at risk if his identity was disclosed prior to the implementation of the protective measures,<sup>104</sup> a point for which the Victims and Witnesses Unit (VWU) did not provide contemporaneous input and only later disagreed.<sup>105</sup>

Without a full analysis of the serious issues concerning Intermediary 143 and the potential repercussions of disclosure, the Trial Chamber pushed the proceedings forward by ordering a limited disclosure twice on July 7, 2010.<sup>106</sup> The Chamber justified this course of action for several reasons. First, the Chamber implied that since protective measures had been offered, though rejected, by the Intermediary, the Court had fulfilled its obligation to protect the Intermediary.<sup>107</sup> Second, the Chamber dismissed the prosecution's concern that one of the members of the defense team was of

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any potential increased risk to 143 and, [ . . . ] we do not consider it necessary to suspend that order pending any application that may be made by the Prosecution for leave to appeal. It would, in our view, only be necessary to suspend that order if there was a risk that it would enhance or increase the security risk for 143.”)

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* ¶ 19.

<sup>103</sup> The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2544-Red, Prosecution's Document in Support of Appeal against Trial Chamber I's decision of 8 July 2010 to Stay the Proceedings for Abuse of Process, ¶ 3 (July 30, 2010) (“The resource person was allegedly one of the top members of Lubanga's militia. He is in DRC and some defence witnesses made allegations that he attempted to taint evidence.”).

<sup>104</sup> Lubanga Dyilo, Case No. ICC-01/04-01/06-2515, 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 VWU, at 7 ¶ 2 (July 7, 2010) [hereinafter Lubanga Prosecution's Urgent Request].

<sup>105</sup> Lubanga Redacted Decision on the Prosecution's Urgent Request, *supra* note 58, ¶¶ 14, 17.

<sup>106</sup> *Id.* ¶¶ 9–16.

<sup>107</sup> *Id.*

questionable integrity because “no conclusion adverse to that individual [] has been drawn by anyone in a responsible position in this Court.”<sup>108</sup>

Third, even though the Trial Chamber had changed the timing of the disclosure (requiring that it occur prior to the implementation of protective measures), the Trial Chamber opined that the limited nature of the disclosure ensured that the security risk of the Intermediary would not increase.<sup>109</sup> In making this unwarranted assumption about risk, the Trial Chamber declined to utilize the expertise of the VWU. Further, the Trial Chamber eliminated the possibility for the prosecution to appeal the decision and stated the following:

We do not consider it necessary to suspend th[e] order [to disclose the identity of Intermediary 143] pending any application that may be made by the Prosecution for leave to appeal. It would, in our view, only be necessary to suspend that order if there were a risk that it would enhance or increase the security risk for 143.<sup>110</sup>

The Chamber’s orders for a limited disclosure of Intermediary 143’s identity were, in its own opinion, sufficient to ensure the safety of the Intermediary. This determination was, however, not based upon any evidence or consultations with the VWU regarding the alterations to the disclosure’s parameters and timing. Rather, the Trial Chamber independently made the determination about what was necessary for Intermediary 143’s protection. Technically, the Trial Chamber possesses the discretion to do so.<sup>111</sup>

The Trial Chamber did not contact the VWU regarding an updated security assessment for Intermediary 143 until July 8, 2010.

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<sup>108</sup> *Id.*

<sup>109</sup> Lubanga Redacted Decision on the Prosecution’s Urgent Request, *supra* note 58, ¶ 12 (“[T]he limited disclosure that we have ordered, in our judgment, has the result of ensuring that there is no deterioration in the security position of that individual.”), quoting the Trial Chamber’s Second Ruling, delivered on July 7, 2010.

<sup>110</sup> *Id.* ¶ 10, quoting Transcript of Hearing on 7 July 2010, at p. 9, line 20, to p. 13, line 25, The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2517-Red, ¶ 13 (July 7, 2010).

<sup>111</sup> Rome Statute, *supra* note 3, art. 64(2).

The Chamber's consultation of the VWU was prompted by the prosecution's submission: "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." In this submission, the prosecution claimed it would "consult with the VWU as to whether the security situation allows for disclosure now" and needed to "know whether there is any need to implement urgent interim measures prior to disclosure."<sup>112</sup>

When the Trial Chamber subsequently contacted the VWU, the VWU stated that it had understood the Trial Chamber's order to include a requirement to notify Intermediary 143 of the disclosure order and to discuss interim measures.<sup>113</sup> The VWU also informed the Trial Chamber that the limited disclosure of Intermediary 143's identity would not present a security risk, directly contradicting the assertions of the prosecution in its earlier submission.<sup>114</sup> In response to this incongruity, the Trial Chamber stated: "there is reason to doubt the accuracy and reliability of [the prosecution's] submission."<sup>115</sup> The Trial Chamber ignored the prosecution's pleas to revisit the security issue and, following the prosecution's non-compliance with the two orders of disclosure on July 7, 2010, the Trial Chamber stayed the proceedings.<sup>116</sup>

The timing of the Trial Chamber's consultation of the VWU was backwards, as it was only *after* the prosecution refused to comply with the limited disclosure orders that the Trial Chamber explored whether such orders would increase the risk to Intermediary 143, given his unprotected status. Thus, the VWU was consulted amidst the power struggle between the Trial Chamber and the prosecution. At best, the VWU was able to make an on-the-spot determination of the effect of a limited disclosure on a person granted protective measures that had not yet been implemented. At worst, the VWU did not have the time to thoroughly investigate the concerns of the prosecution and Intermediary 143 prior to its endorsement of the Trial Chamber's orders.

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<sup>112</sup> Lubanga Prosecution's Urgent Request, *supra* note 104, quoted in Lubanga Redacted Decision on the Prosecution's Urgent Request, *supra* note 58, ¶ 14.

<sup>113</sup> *Id.* ¶ 13.

<sup>114</sup> *Id.* ¶ 17.

<sup>115</sup> *Id.* ¶ 14.

<sup>116</sup> *Id.* ¶ 31.

In either event, the VWU should have been consulted prior to ordering disclosure if there was a disagreement concerning an individual's security. Not doing so reflected a lack of concern for the protection of those involved with the court. Without providing assurances to witnesses that their safety is of utmost importance, the legitimacy and feasibility of the proceedings are jeopardized. The Trial Chamber, however, had a different priority; it stated that "given the attitude now demonstrated by 143, there is an appreciable risk that implementation will be delayed significantly," and it refused to accommodate the witness's situation.<sup>117</sup> Rather than focusing on the needs of Intermediary 143, the Trial Chamber was preoccupied with preventing delays of the trial.

## 2. *Haradinaj*

By rejecting the prosecution's requests for extensions and its application for leave to appeal, the Trial Chamber in *Haradinaj* closed the prosecution's case and proceeded with the defense's case.<sup>118</sup> The prosecution, therefore, was unable to obtain the testimony of two key witnesses, which, it claimed, resulted in the acquittals of the defendants.<sup>119</sup> In its appeal of these acquittals, the prosecution argued that it had been deprived of a fair trial, a right guaranteed by Article 20(1).<sup>120</sup>

Article 20(1) states: "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."<sup>121</sup> The prosecution argued that, according to 20(1), a chamber must ensure that neither party has a disadvantage in presenting its case and that the Trial Chamber failed in its duty to maintain a fair trial.<sup>122</sup> The prosecution's appeal specifically identified two errors of the Trial Chamber. First, the Trial Chamber refused the prosecution's requests to take "reasonable measures" to

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<sup>117</sup> *Id.* ¶ 12.

<sup>118</sup> The Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-A A540-A483, Prosecution Appeal Brief (Public Redacted Version), ¶ 4 (July 17, 2008) [hereinafter *Haradinaj et al. Prosecution Appeal Brief*].

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* ¶¶ 5–6.

<sup>121</sup> ICTY Statute, *supra* note 63.

<sup>122</sup> *Haradinaj et al. Prosecution Appeal Brief*, *supra* note 118, ¶¶ 6–7.

obtain the testimony of the witnesses.<sup>123</sup> Second, the Trial Chamber did not exercise its own powers to elicit this evidence.<sup>124</sup>

*B. How the Trial Chambers Advanced Goals of International Criminal Trials*

*1. General remarks*

“Swift justice is more certain justice,” stated Alex Whiting in his analysis of expediency in international criminal trials.<sup>125</sup> “If present and future leaders and commanders see that war criminals are brought to justice quickly (and of course effectively), they will be more likely to conform their behavior to the laws of war and to adopt policies and promote training to ensure that these rules are followed.”<sup>126</sup> Thus, preventing excessive or unnecessary delays is important in order to promote deterrence.

Efficient management of the proceedings is also important in terms of fairness to both the accused and the victims. For victims, speedy justice can reduce disillusionment and promote cooperation with the court.<sup>127</sup> Also, fast proceedings help in terms of the preservation of evidence.<sup>128</sup> When trials are completed quickly, the accused’s right to an expeditious trial, enshrined in the Rome Statute and ICTY Statute, is respected.<sup>129</sup> Whiting also cites the possibility that the international community, with its short attention span, will move on to other crises and reduce their cooperation if proceedings take too long.<sup>130</sup>

*2. Lubanga*

In *Lubanga*, the prosecution requested a stay of the proceedings in order to consult with the VWU and to resolve the protection issues concerning Intermediary 143 before continuing

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<sup>123</sup> *Id.* ¶ 5.

<sup>124</sup> *Id.*

<sup>125</sup> Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT’L L.J. 323, 330 (2009).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 333.

<sup>128</sup> *Id.* at 332-33.

<sup>129</sup> See Rome Statute, *supra* note 3, art. 64(2); ICTY Statute, *supra* note 63, art. 20(1).

<sup>130</sup> See Whiting, *supra* note 125, at 333-34.

with the trial. By refusing this request and insisting upon the limited disclosure, as the Trial Chamber did, the Court stood to gain several things. First, it prevented the inevitable delay that would result if Intermediary 143 were permitted to negotiate a satisfactory protection agreement, a process which could be extended and protracted. Additionally, if the Court catered to Intermediary 143's dissatisfaction with the protection package already offered by the VWU, the Court would be acknowledging that such packages are negotiable. By empowering the intermediary to reject the VWU's protection plan, the Court may give Intermediary 143 the impression of being in an advantaged bargaining position. Such a precedent could be dangerous and unmanageable for the VWU, which has financial and practical constraints that limit its operations. A witness could, hypothetically, hold out and refuse to testify in an attempt to secure a larger financial package or a particular place for relocation, which could present significant or even unaffordable costs for the Registry.<sup>131</sup>

If witnesses are given this opportunity to manipulate the system by leveraging their bargaining position, the VWU would be in a very weak position to overcome the demands of this individual in order to allow the trial to go on. Therefore, if there is no check on witnesses involved in protection negotiations with the VWU, the worst case scenario would be costly in terms of both time and money for the Court. The Trial Chamber in *Lubanga* did not allow for this type of manipulation to occur, possibly sparing the Court from being put in this disadvantaged position.

### 3. *Haradinaj*

In *Haradinaj*, the main problem in waiting for witnesses' testimony was that there was no assurance that the witnesses would

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<sup>131</sup> Protective measures can include both relocation to a different geographical area and a stipend from the Registry to enable resettlement. See ICC Rules of Procedure and Evidence, *supra* note 66, r. 16(4) (providing for "[a]greements on relocation and provision of support services on the territory of a State of traumatized or threatened victims, witnesses and others who are at risk on account of testimony given by such witnesses . . ."); see also r.17(2)(a)(i) ("The Victims and Witnesses Unit shall, *inter alia*, perform the following functions, in accordance with the Statute and the Rules, and in consultation with the Chamber, the Prosecutor and the defense, as appropriate: (i) Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection.").

ever testify; so extensions for them could be futile. In fact, the prosecution had already tried and failed to obtain these two witnesses' testimonies on multiple occasions.<sup>132</sup> One witness, Shefqet Kabashi, refused to answer questions on two different occasions, in spite of the fact that the Trial Chamber had already granted three time extensions,<sup>133</sup> offered the ability to testify via video-conference link,<sup>134</sup> and issued an Order in Lieu of Indictment for Contempt against the witness.<sup>135</sup> Notwithstanding these efforts to facilitate or compel testimony, the witness would not comply. Thus, the Trial Chamber asserted that, although several witnesses who were expected to give evidence were never heard, it had "made use of all of its powers under the Rules to facilitate the reception of evidence without stepping beyond its role as an impartial arbiter of facts" in its attempt to acquire this evidence.<sup>136</sup>

In its rejection of the prosecution's request for an extension in order to make further attempts to obtain the testimony of Kabashi, the Trial Chamber emphasized that the prosecution never argued that the testimony of Kabashi would be any more likely to materialize if the prosecution was given more time.<sup>137</sup> Procedurally, the Trial Chamber had taken significant steps to compel testimony, and these failed efforts, in combination with the absence of evidence to the contrary, were a sufficient indication that the witness never intended to testify, according to the Trial Chamber.<sup>138</sup>

In recognition of this witness's asserted intentions, the Trial Chamber stated that: "if there were to be a 'dramatic change' in Kabashi's attitude, which gave cause to believe that he genuinely intended to testify, then the Chamber would entertain a further

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<sup>132</sup> The Prosecutor v. Shefqet Kabashi, Case No. IT-04-84-T, Decision on the Prosecution's Request for Certification to Appeal the Trial Chamber's Decision concerning Shefqet Kabashi, (Dec. 5, 2007).

<sup>133</sup> The Prosecutor v. Shefqet Kabashi, Case No. IT-04-84-T, Appeals Chamber Decision, ¶ 21 (July 19, 2010).

<sup>134</sup> See ICTY Rules of Procedure and Evidence, *supra* note 77, r. 81 *bis* and r. 71(D) (Testifying via video-conference allows a witness to testify from a place other than the courtroom at the seat of the Court.).

<sup>135</sup> Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-T, Judgment, ¶ 27 (Apr. 3, 2008) [hereinafter Haradinaj et al. Judgment].

<sup>136</sup> *Id.* ¶ 28.

<sup>137</sup> Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-T, Decision on the Prosecution's Request for Certification to Appeal the Trial Chamber's Decision Concerning Shefqet Kabashi, ¶ 25 (Dec. 5, 2007).

<sup>138</sup> Haradinaj et al. Appeal Judgment, *supra* note 30, ¶ 25.

application to receive his testimony.”<sup>139</sup> The defense argued that “[t]he mere possibility that [Kabashi] might change his mind at some later stage if he received further legal advice did not warrant a further adjournment of the Prosecution case.”<sup>140</sup> As there was no dramatic change in Kabashi’s attitude, the trial proceeded, and concluded, without his testimony. If Kabashi and the other witness truly never intended to testify, then the Trial Chamber saved itself countless weeks of pointless waiting.

#### 4. *Concluding remarks*

Efficiency in international criminal trials is clearly a legitimate goal. Courts’ prioritization of efficiency when faced with situations that could cause delays of an unknown duration is, therefore, not surprising. The next section will argue, however, that certain objectives, namely the protection of those involved in court proceedings, should trump the goal of maximal trial efficiency even if the length of delays is uncertain.

### C. *How the Trial Chambers Undermined Goals of International Criminal Trials*

#### 1. *General remarks*

In a letter to the President of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Kofi Annan, then the Secretary-General of the United Nations, wrote the following:

The overriding interest [of the ICC] must be that of the victims, [*sic*] and of the international community as a whole. The court must be an instrument of justice, not expedience. It must be able to protect the

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<sup>139</sup> *Id.*, quoting Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahima, Case No. IT-04-84-A, Respondent’s Brief on Behalf of Ramush Haradinaj (confidential), ¶ 39 (Aug. 25, 2008).

<sup>140</sup> *Id.*, quoting Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahima, Case No. IT-04-84-A, Respondent’s Brief on Behalf of Ramush Haradinaj (confidential), ¶ 46 (Aug. 25, 2008).

weak against the strong. It must demonstrate that an international conscience is a reality.<sup>141</sup>

There are several problems with a court that is viewed as an ‘instrument of expedience.’ Judges may be perceived to be inattentive to witnesses’ needs, and the court may deter future witnesses from cooperation. A trial that proceeds at an unforgiving pace might also appear to be biased and may, as a result, lose respect and credibility. A trial that moves too rapidly might also prevent the utilization of witnesses who may not be willing to testify until significantly after the alleged crimes were committed.<sup>142</sup> Whiting argues that “time can allow for witnesses to gain perspective on events in which they participated and to come forward to provide testimony and evidence. The passage of time, then, can allow for a more complete and truer accounting of events to emerge.”<sup>143</sup> Whiting also states that lengthy trials are often necessary because of their very nature<sup>144</sup> and that delays can be vital to effective prosecutions.<sup>145</sup> Whiting’s view is that although the public has “shown signs of impatience and an increased preference for shorter, quicker, and narrower cases . . . cases will require a sustained and long-term commitment from the international community.”<sup>146</sup>

The ICC and ICTY Trial Chambers made their priority of expediency clear by rejecting the prosecution’s requests pertaining to the protection of individuals involved with the court and by denying their applications for interlocutory appeals. While expedient proceedings are often ideal, promoting expediency often involves the balancing of other priorities, or, as alleged by the prosecution in both *Lubanga* and *Haradinaj*, the sacrifice of the fairness of the trials. Both prosecution teams claimed that the consequences outweighed the benefits when it came to expediting the proceedings.

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<sup>141</sup> Letter from Kofi Annan, Secretary-General of the United Nations, to the President of the United Nations Diplomatic Conference of Plenipotentiaries, on the Establishment of an International Criminal Court (July 7, 1998).

<sup>142</sup> See Whiting, *supra* note 125, at 354–56 (describing the examples of Milan Babic and Goran Stoparic, whose truthful and complete testimony took years to acquire in ICTY proceedings).

<sup>143</sup> *Id.* at 358.

<sup>144</sup> *Id.* at 327.

<sup>145</sup> *Id.* at 363.

<sup>146</sup> *Id.* at 364.

## 2. *Lubanga*

The *Lubanga* prosecution made several arguments in its appeal of the Trial Chamber's stay of the proceedings.<sup>147</sup> The first argument was that the prosecution's behavior was *not* non-compliant with the Trial Chamber's orders.<sup>148</sup> The second argument was that the prosecution shares the responsibility for the protection of witnesses with the other organs of the Court, and that the Chamber erred in ruling unilaterally on issues affecting the safety of Intermediary 143.<sup>149</sup> In sum, the prosecution stated that the Chamber's decision reflected a "deep misunderstanding of the legal positions of the Prosecution, its protection duties under the Statute and its right to a reasonable opportunity and time to present its legitimate concerns to the Chamber."<sup>150</sup>

As to the timing of the prosecution's requests for delays and reconsideration of the protection issues, the prosecution claimed that its "insistence to present its views *after* [the Trial Chamber's orders] was wrongly considered to be defiance of the Court's authority."<sup>151</sup> The prosecution claimed that it was never afforded the opportunity to voice its concerns about the safety and security risks that the disclosure of Intermediary 143's identity would present.<sup>152</sup>

The prosecution emphasized the unfairness of the Trial Chamber's "haste" in issuing a "unilateral decision" on a protection matter, for which the prosecution, the VWU, and the Trial Chamber share responsibility.<sup>153</sup> The prosecution stated that it has the right to object to the Trial Chamber's orders, to seek appellate review of such orders, and to suggest alternatives, such as withdrawing evidence, stipulating to particular facts, or amending charges, should

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<sup>147</sup> The third argument by the prosecution was that the stay of the proceedings was a disproportionate response to non-compliance, should the prosecution's actions be characterized as such. This article will not address the particulars of the third argument.

<sup>148</sup> The Prosecutor v. Thomas Lubanga Dyilo, Prosecution's Document in Support of Appeal against Trial Chamber I's decision of 8 July 2010 to stay the proceedings for abuse of process, ICC-01/04-01/06-2544-Red, ¶¶ 51–53 (July 30, 2010).

<sup>149</sup> *Id.* ¶¶ 65–69.

<sup>150</sup> *Id.* ¶ 2.

<sup>151</sup> *Id.* ¶ 4.

<sup>152</sup> *Id.* ¶ 3.

<sup>153</sup> *Id.* ¶ 48.

its objections fail.<sup>154</sup> The prosecution argued that the Trial Chamber amended its order of disclosure without allowing the prosecution to present updated information, including confidential material of which the Trial Chamber may not have been aware.<sup>155</sup> The prosecution contended that the Trial Chamber “spontaneously and unilaterally” determined that the amended order posed no increased risk without consulting the entities with relevant and material information<sup>156</sup> when the Chamber had a duty to verify that its assumptions about the safety of Intermediary 143, following a limited disclosure, were correct.<sup>157</sup> Thus, the prosecution claimed that the Trial Chamber was unreasonably dismissive, resulting in injustice.<sup>158</sup>

The prosecution cited to the Rome Statute, as well as an Appeals Chamber decision, as justification for its independent authority to protect witnesses and to support its allegation that the Trial Chamber “erred by concluding that it has a monopoly of protective functions.”<sup>159</sup> The prosecution specifically identified the Rome Statute Articles 68(1), 54(1)(b) and 54(3)(f) as explicitly involving the prosecution in matters pertaining to witnesses.<sup>160</sup> Additionally, the prosecution quoted the Appeals Chamber in describing the team effort of protecting those at risk: “Consultation, cooperation and advice are all part of ensuring that individuals are not put at risk . . . .”<sup>161</sup> Thus, the prosecution’s argument centered

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<sup>154</sup> *Id.* ¶ 17(iii).

<sup>155</sup> *Id.* ¶ 49.

<sup>156</sup> *Id.* ¶ 49.

<sup>157</sup> *Id.* ¶ 53.

<sup>158</sup> *Id.* ¶¶ 49, 57.

<sup>159</sup> *Id.* ¶ 66.

<sup>160</sup> *Id.* ¶ 62. “Article 68(1) states that ‘[t]he Prosecutor *shall* take such measures particularly during the investigation and prosecution of [ . . . ] crimes.’ ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ The word ‘shall’ in Article 68(1), given its ordinary meaning and the context in which it is used, underlines that this is a mandatory duty upon the Prosecutor to take appropriate measures to protect persons interacting with it. Article 68(1) also specifies that the Prosecution’s duty of protection applies ‘particularly during the investigation and prosecution of [ . . . ] crimes.’ Hence, there is no doubt that the Prosecution duty to protect persons equally applies during trial.”

<sup>161</sup> *Id.* ¶ 60.

upon the notion that the Trial Chamber does not have exclusive and unchecked authority over protection matters.

The prosecution also made several practical points. First, it stated that the risks presented by the immediate disclosure were not outweighed by its benefits because the disclosure would not necessarily expedite the proceedings. Given the fact that the disclosure prohibited the use of Intermediary 143's identity for investigative purposes, the prosecution claimed that it was likely that 143 would be recalled to testify once the prohibition was lifted.<sup>162</sup> Fully implementing protective measures after all barriers were lifted for the defense would, presumably, be more efficient because it would allow all of the questioning to occur at once and would prevent redundant testimony.

Second, the prosecution argued that the short-term delay resulting from the time required to implement the protective measures was relatively minor:

[T]he sole issue before the Trial Chamber here was the potential for a week or two delay in the case, which in the context of a trial that has already lasted for 18 months is not significant. Moreover, the harm to the defence from non-disclosure—the short-term delay of trial—was insignificant. Indeed, it would have been abusive to jeopardize a person at risk in order to avoid a brief delay.<sup>163</sup>

Thus, the prosecution believed that the protection of an individual outweighed the need for expediency in the trial.<sup>164</sup> The *Lubanga* prosecution's concerns, however, fell on deaf ears.

### 3. *Haradinaj*

In *Haradinaj*, the prosecution appealed the Trial Chamber's acquittal of the three accused. The prosecution argued that the Trial Chamber violated the statutory right to a fair trial by refusing the prosecution's requests for additional time to obtain the testimony of

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<sup>162</sup> *Id.* ¶ 39 (quoting Transcript of Hearing on 7 July 2010, at 12, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-T-312 (July 7, 2010)).

<sup>163</sup> *Id.* ¶ 81.

<sup>164</sup> *Id.*

the two witnesses who refused to testify because of intimidation and fear throughout the trial and that this error contributed to the acquittals.<sup>165</sup> The ICTY prosecution criticized the Trial Chamber's "fixation" on speedy proceedings—trading fairness for expeditiousness.<sup>166</sup> Further, the prosecution argued:

A fair trial is not measured in hours. A fair trial must be measured by whether or not the Chamber allowed the parties to present their case. In the case of the Prosecution, this measurement is to be made on a case by case basis recognizing that the prosecution represents the interests of victims, justice and the international community.<sup>167</sup>

The prosecution emphasized that since witness intimidation and fear permeated the entire trial, the Trial Chamber's rejection of requests for additional time were unfair, especially given that the time limit for the prosecution's case was set prior to perceiving the extent of witness intimidation.<sup>168</sup> The prosecution characterized the rush as the Trial Chamber "over react[ing] to time pressure."<sup>169</sup> The prosecution posited, therefore, that the Trial Chamber's inflexible enforcement of a 125-hour limit on its case, when it requested an additional 105 hours, was an abuse of discretion.<sup>170</sup>

#### 4. *Concluding remarks*

The prosecution in both *Lubanga* and *Haradinaj* made strong cases for delaying their respective trials to accommodate special needs of witnesses. The next section details the responses of the two Trial Chambers and demonstrates that they disregarded the protests by the *Lubanga* and *Haradinaj* prosecutions.

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<sup>165</sup> Haradinaj et al. Appeal Judgment, *supra* note 30, ¶¶ 14–15.

<sup>166</sup> *Id.*

<sup>167</sup> The Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-A 540-483, Prosecution Appeal Brief (Public Redacted Version), ¶ 21 (July 17, 2008).

<sup>168</sup> *Id.* ¶ 18.

<sup>169</sup> *Id.* ¶ 20.

<sup>170</sup> *Id.* ¶¶ 17–18.

## V. PART THREE: THE APPEALS CHAMBERS' REMEDIES

A. *Haradinaj*

The *Haradinaj* Appeals Chamber took a strong stance against the Trial Chamber in its agreement with the prosecution's abuse of discretion claim. The appeals judgment, therefore, provided clear guidance regarding the conduct of trial chambers in relation to balancing expediency with attending to the particular needs of witnesses.

The Appeals Chamber described the context of the *Haradinaj* trial as having an "unprecedented atmosphere of widespread and serious witness intimidation that surrounded the trial."<sup>171</sup> The Appeals Chamber held that such extreme witness intimidation per se undermines a fair trial, as guaranteed in Article 20(1).<sup>172</sup> Thus, the Appeals Chamber very clearly prioritized the rights of witnesses to feel and be protected as a necessary condition to a fair trial. The Appeals Chamber directly addressed the Trial Chamber's discretionary authority to manage trials in order to ensure expediency, among other things, and it also stressed that the Trial Chamber must attend to the unique needs of each case.<sup>173</sup> It stated that "what is reasonable in one trial is not automatically reasonable in another."<sup>174</sup> This statement has the dual effect of liberalizing the limit on a party's presentation of its case while also restricting such flexibility to cases with circumstances that warrant it.<sup>175</sup> Thus, the Appeals Chamber simultaneously broadened and limited a trial chamber's ability to extend cases beyond its allotted time.

The Appeals Chamber then criticized the Trial Chamber for its "misplaced priority" in putting "undue emphasis" on time limits, which reflected its lack of appreciation of the "gravity of the threat

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<sup>171</sup> *Haradinaj et al. Appeal Judgment*, *supra* note 30, ¶ 34.

<sup>172</sup> *Id.* ¶ 35 ("In circumstances of witness intimidation such as this, it is incumbent upon a Trial Chamber to do its utmost to ensure that a fair trial is possible. Witness intimidation of the type described by the Trial Chamber undermines the fundamental objective of the Tribunal, enshrined in Article 20(1)."); *see also* ICTY Statute 20(1) ("The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.").

<sup>173</sup> *Id.* ¶ 39.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

that witness intimidation posed to the trial's integrity."<sup>176</sup> The Appeals Chamber pointed out that the Trial Chamber was on notice that serious threats were being made to witnesses, but it nevertheless failed to exercise its powers to ensure the safety of witnesses who were at risk for "objectively less important logistical considerations."<sup>177</sup> The Appeals Chamber, with the exception of Judge Patrick Robinson, quashed the Trial Chamber's acquittal of the three accused and issued a partial re-trial.<sup>178</sup>

*1. Judge Robinson's Dissent*

As referenced above, the appeals decision was not unanimous. Judge Robinson disagreed with the Appeals Chamber's invalidation of the Trial Chamber's discretion:

[T]he mere fact that the Appeals Chamber would have exercised a discretionary power differently is not a sufficient basis for invalidating the Trial Chamber's exercise of that discretion, provided the Trial Chamber has properly exercised the discretion; a certain deference must be given to a Trial Chamber in issues relating to the management of the trial.<sup>179</sup>

This deference, Judge Robinson argued, is due because the Trial Chamber, not the Appeals Chamber, has an "organic familiarity with the day-to-day conduct of the parties and the practical demands of the case."<sup>180</sup>

Judge Robinson noted that the Trial Chamber extended the prosecution's case three times and left open the possibility for a fourth extension should the prosecution demonstrate a likelihood that

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<sup>176</sup> *Id.* ¶ 40.

<sup>177</sup> *Id.* ¶ 43.

<sup>178</sup> *Id.* ¶ 50.

<sup>179</sup> Haradinaj et al. Appeal Judgment, *supra* note 30 (Partially Dissenting Opinion of Judge Patrick Robinson, VI(A) ¶ 2).

<sup>180</sup> *Id.* ¶ 5, quoting Prosecutor v. Zdravko Tolimir et al., Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, ¶ 4 (Jan. 27, 2006); Prosecutor v. S. Milošević, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, ¶ 9 (Nov. 1, 2004).

the relevant witness testimony would actually result.<sup>181</sup> Thus, regarding the issue of granting the prosecution more time, the Appeals Chamber analyzed whether the Trial Chamber's actions had done too little. Judge Robinson criticized this approach and argued that doing "too little" is a discretionary privilege that is not to be second-guessed, and the existence of three extensions negated an abuse of discretion claim in this case.<sup>182</sup> Absent an error that rises to the level of abuse because it is so unfair or unreasonable, which Judge Robinson insisted was not present in this case, the Appeals Chamber may not invalidate the Trial Chamber's discretion.<sup>183</sup>

The obvious point of contention between the Majority and the Dissent is whether the Trial Chamber's actions could be characterized as fair and reasonable. The Majority said that they were not, given the extenuating circumstances of extreme witness intimidation and fear. The Dissent stated that it was an impossible call to make because the Trial Chamber did take *some* action in the right direction. The split reflects the difficulty in overturning a trial chamber's discretionary decisions and perhaps sheds light on why the *Lubanga* Appeals Chamber did not address the issue at all.

### B. *Lubanga*

Although the *Lubanga* Appeals Chamber ultimately reversed the stay of proceedings, it did little to clarify how the Trial Chamber ought to handle protection disagreements in the future. The Appeals Chamber stated the following:

The Prosecutor commingles arguments against the Impugned Decision with challenges to the Trial Chamber's prior orders . . . [but] neither the first nor the Second Order of Disclosure is on appeal. The Appeals Chamber, therefore, does not address the specific challenges to the First and Second Orders of Disclosure and restricts its consideration to whether the Prosecutor refused to comply with the orders of the Trial Chamber and the propriety of the Trial

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<sup>181</sup> Haradinaj et al. Appeal Judgment, *supra* note 30 (Partially Dissenting Opinion of Judge Patrick Robinson, VI(A), ¶ 4).

<sup>182</sup> *Id.* ¶¶ 5–7.

<sup>183</sup> *Id.* ¶ 8.

Chamber's decision to impose a stay of proceedings as a consequence.<sup>184</sup>

The Appeals Chamber characterized the prosecution's actions as deliberate and willful non-compliance, in contrast with the prosecution's justification that it was acting within the statutory framework pursuant to its duty to protect witnesses.<sup>185</sup> Furthermore, the Appeals Chambers said that the Trial Chamber's orders must prevail if there are disagreements in matters relating to protection: "The Prosecutor (or other parties or participants) must follow the orders of the Trial Chamber when it comes to issues of protection."<sup>186</sup> The prosecution, therefore, does not have an independent statutory obligation that supersedes the Trial Chamber's duty to ensure a fair trial. Rather, "the Trial Chamber, subject only to the powers of the Appeals Chamber, is the ultimate guardian of a fair and expeditious trial."<sup>187</sup>

The Appeals Chamber agreed with the second component of the prosecution's argument, that the stay of the proceedings was a disproportionate response to its actions. The Appeals Chamber decided that the Trial Chamber erred in issuing a stay of the proceedings without first using sanctions to obtain compliance. Thus, it was on the proportionality issue that the prosecution prevailed.

The Appeals Chamber did not address the merit of the Trial Chamber's orders because the issue was not ripe. Additionally, it declined to analyze the legitimacy of the prosecution's numerous attempts to protest the orders of the Trial Chamber: "The Appeals Chamber need not consider whether and to what extent parties may seek reconsideration of orders of a Trial Chamber or variations of time limits for consideration of such orders."<sup>188</sup> The Appeals Chamber, therefore, did not address the cause of the non-compliance (i.e. whether the Trial Chamber's independent assessment of the protection issue and its discretionary order of the limited disclosure were proper), nor did it advise the Trial Chamber on how to manage objections to its orders or even whether those objections were

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<sup>184</sup> Lubanga Judgment on the Appeal of the Prosecutor, *supra* note 42, ¶ 45.

<sup>185</sup> *Id.* ¶ 46.

<sup>186</sup> *Id.* ¶ 50.

<sup>187</sup> *Id.* ¶ 47.

<sup>188</sup> *Id.* ¶ 48.

appropriate by the prosecution. While the Appeals Chamber would have overstepped its bounds had it addressed at great length the issues arising from the content of the Trial Chamber's orders, namely witness protection, it nonetheless could have framed its decision in a way that would have provided more guidance to the Trial Chamber and the prosecution.

The Appeals Chamber did make clear, albeit without elaboration, that when differences of opinion occur regarding protection, the only opinion that matters is the Trial Chamber's. With this assertion, the Appeals Chamber diminished the significance of witness protection. Since the Trial Chamber can trump the opinions of the court's parties and participants, entities like the VWU and the prosecution are left powerless in the case of disagreement. The prosecution's witnesses, and all other individuals involved in the proceedings, are therefore left without an advocate and remain defenseless against the authority of the Trial Chamber. And although the Chamber assumes responsibility for these witnesses, the Chamber may not have access to the most up-to-date safety and security information concerning witnesses or individuals involved in the proceedings. Nor will the Chamber necessarily possess the requisite expertise to make safety and security judgments independently, as it did with Intermediary 143. If a trial chamber is allowed to make discretionary decisions concerning the safety and security of individuals involved with a court in a unilateral manner, witnesses and others may be reluctant or afraid to initiate contact with a court or to continue cooperating with a court if already involved. As the Appeals Chamber in *Haradinaj* held, a fair trial is impossible if witnesses face intimidation or fear.<sup>189</sup>

It is important to note that the Appeals Chamber not only avoided the issue of the underlying cause of the non-compliance, but it also failed to address the proper role of the VWU and when it ought to be consulted. Thus, the Appeals Chamber indirectly condoned the Trial Chamber's discretionary decision to amend an order of disclosure without first consulting the VWU. The fact that the Trial Chamber did consult the VWU at the prosecution's prompting indicated that this was a proper step, yet the Appeals Chamber did not highlight the Trial Chamber's error in the timing of this consultation. Thus, the Appeals Chamber overlooked the

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<sup>189</sup> Haradinaj et al. Appeal Judgment, *supra* note 30, ¶ 35.

recklessness of the Trial Chamber's unilateral amendment of the disclosure order.

The Appeals Chamber might have chosen not to address the above-noted issues in its decision for several reasons. First, the prosecution did not make any specific allegations that Intermediary 143 had been threatened, nor did it present any documentation that Intermediary 143 feared for his life and that of his family (at least not as a matter of public record). Along the same lines, the accusations against the defense resource person were informal and unsubstantiated. Thus, the protection issue seemed far more hypothetical in *Lubanga* than it was in *Haradinaj*, where the witnesses had shown the Court documented instances of intimidation. Perhaps the Appeals Chamber agreed with the defense team that the prosecution's deliberate disobedience was "not because of insurmountable external obstacles,"<sup>190</sup> but rather a result of the prosecution's "personal interpretation of his obligations and of the interests at stake."<sup>191</sup> Whatever the reason, the lack of resolution of these issues increases the probability that they are likely to re-emerge in the future.

#### VI. PART FOUR: CONCLUSION

The *Lubanga* stay and the *Haradinaj* acquittals resulted from protection issues concerning individuals involved in the respective court proceedings. In both cases, the trial chambers were hasty and dismissive of protection concerns and used their discretion to prioritize expediency over the careful analysis of concerns voiced by individuals who felt unsafe as a result of their involvement with the respective courts. As described earlier in this article, there are numerous causes of the lengthy proceedings at the ICC and ICTY, and delays appear to plague the pre-trial stage most of all. It is dangerous, therefore, for judges to import the pressure to speed up trials to the context of witness protection, a vital component of the credibility and feasibility of international criminal trials.

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<sup>190</sup> *Lubanga Judgment on the Appeal of the Prosecutor, supra* note 42, ¶ 38.

<sup>191</sup> *Id.* ¶ 39, quoting *The Prosecutor v. Thomas Lubanga Dyilo, Defence Response to the Prosecution's Document in Support of Appeal against Trial Chamber I's decision of 8 July 2010 to stay the proceedings for abuse of process*, ¶ 69 (Aug. 9, 2010).

The *Haradinaj* Appeals Chamber took an extreme position in favor of witness's rights and provided guidance to the Trial Chamber concerning the importance of proceedings that are free of witness intimidation and fear. The Appeals Chamber criticized decisions that were impatient with witnesses' needs and skeptical of the likelihood of witnesses testifying if given more time. The *Lubanga* Appeals Chamber focused on defining the prosecution's actions as non-compliant without addressing the underlying reasons for its non-compliance. Ignoring the reasons for non-compliance was a mistake because the Appeals Chamber failed to resolve whether the Trial Chamber was proper in dismissing controversial protection issues without allowing parties to fully present their views. Notwithstanding the failure of the *Lubanga* Appeals Chamber to address it directly, the lesson to be learned from both *Haradinaj* and *Lubanga* is that trial chambers must set aside the priority of expediency and allow themselves to be checked by parties and participants of the court regarding matters of witness protection.

*Lubanga* and *Haradinaj* demonstrate that expediency is a major preoccupation of international tribunals to the extent that it influences judges' assessments concerning the safety and security of those involved with the courts. These two cases are not, however, isolated examples. Rather, they are the most recent cases of a longer-standing trend, in which the protection of those involved in court proceedings is trumped by other concerns. For example, in *Prosecutor v. Radoslav Brdanin & Momir Talic*, the ICTY Trial Chamber denied a request to grant anonymity to witnesses, stating that "the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one."<sup>192</sup> The protection of witnesses was considered secondary, so the possibility for complete non-disclosure of witness's identities was not permitted absent exceptional circumstances.<sup>193</sup> The court's rationale was that non-disclosure of witnesses was incompatible with an accused's rights.<sup>194</sup>

The risk of so openly discounting the importance of witness protection is that potential witnesses may hesitate to participate in

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<sup>192</sup> *Prosecutor v. Radoslav Brdanin & Momir Talic*, Decision on Motion by Prosecution for Protective Measures, Case No. IT-99-36, ¶ 20 (July 3, 2000).

<sup>193</sup> *Id.* ¶¶ 23, 26.

<sup>194</sup> *Id.*

international criminal trials.<sup>195</sup> The danger in not guaranteeing the safety of endangered witnesses is that the trials will not exist without voluntary witness participation.<sup>196</sup> Encouraging voluntary participation is especially important given the “impossibility” of enforcing compulsory testimony, a problem cited by the ICTR,<sup>197</sup> which is also a difficulty experienced by other tribunals.<sup>198</sup>

The mistake at hand is in viewing witness protection in absolute terms and without patience. This article argues that alternatives to complete non-disclosure exist to ensure the safety of witnesses without diminishing the rights of the accused. The full implementation of witness protective measures, including witness relocation, if necessary, is one such way to provide for witnesses’ safety prior to disclosures. In this way, not only are the rights of the

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<sup>195</sup> Prosecutor v. Radoslav Brdanin & Momir Talic, Motion for Protective Measures, Case No. IT-99-36, ¶¶ 10–11, (Jan. 10, 2000), quoted in Prosecutor v. Radoslav Brdanin & Momir Talic, Decision on Motion by Prosecution for Protective Measures, Case No. IT-99-36, ¶ 8 (July 3, 2000) (“In the past two years, there have been increasing instances involving interference with and intimidation of Tribunal witnesses, including breaches and violations of witness protection orders (including non-disclosure orders) and other security measures. The situations range from witnesses having their lives threatened, to repeated instances of witness statements that have been disclosed to accused and their counsel being published in the media or otherwise made public (despite the existence of non-disclosure orders), to numerous threatening telephone calls, to loss of jobs or job opportunities, to witnesses’ general fear and apprehension that they or their families will be harmed or harassed or otherwise suffer if they testify or co-operate with the Tribunal. In light of these past breaches of confidentiality and other serious problems, and their effect on victims and witnesses, the Prosecutor has grave concerns that the safety of witnesses, their willingness to testify and the integrity of these proceedings will be substantially jeopardised if witnesses’ identities, whereabouts and statements are prematurely disclosed in circumstances where they cannot be protected. The Prosecutor submits that the requested protective measures greatly assist in minimising these concerns.”).

<sup>196</sup> Prosecutor v. Radoslav Brdanin & Momir Talic, Motion for Protective Measures, Case No. IT-99-36, ¶ 9 (Jan. 10, 2000), quoted in Prosecutor v. Radoslav Brdanin & Momir Talic, Decision on Motion by Prosecution for Protective Measures, Case No. IT-99-36, ¶ 9 (July 3, 2000) (“If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal’s ability to accomplish its mission.”).

<sup>197</sup> Göran Sluiter, *The ICTY and the Protection of Witnesses*, 3 J. INT’L CRIM. JUST. 962, 965–66 (2005).

<sup>198</sup> See, e.g., Haradinaj et al. Judgment, *supra* note 135, ¶ 27.

accused preserved, but a message is sent to witnesses and others involved in international courts: courts will do everything in their power to protect individuals, ensuring that there will be no reason to regret getting involved in the international criminal justice system. Defendants also stand to benefit from courts prioritizing witness protection, as they are less likely to suffer delays that result from appeals concerning such witness protection matters. Finally, the courts, by attending more diligently to their witnesses' needs and by involving parties and participants in witness protection decisions, will enhance their legitimacy and encourage greater cooperation among current and potential witnesses. All that is needed in order to implement this alternative is patience from judges, parties, and the general public and understanding for the delays that may result from addressing this priority.

## Annex 1

Accused	Thomas Lubanga Dyilo (DRC)	Germain Katanga (DRC)	Matheiu Ngujijolo Chui (DRC)	Bosco Ntaganda (DRC)	Callixte Mbarushimana (DRC)	Jean-Pierre Bemba Gombo (CAR)	Joseph Kony (Uganda)
Arrest	3/16/06	10/17/07	2/6/08	at large	10/11/10	5/24/08	at large
Custody	3/17/06	10/17/07	2/7/08		10/11/10	7/3/08	
Confirmation of Charges Hearing Start	11/9/06	6/27/08	6/27/08		pending	1/12/09	
Confirmation of Charges Hearing End	11/28/06	7/18/08	7/18/08			1/15/09	
Decision on Confirmation of Charges	1/29/07	9/26/08	9/26/08		7/12/2011*	6/15/09	
Commencement of Trial	1/26/09	11/24/09	11/24/09			11/22/10	<b>AVERAGE:</b>
Time Between Custody and Beginning of Trial (Years)	2.9	2.1	1.8			2.4	<b>2.3</b>
Time Between Custody and Decision on Charges (Years)	0.9	0.9	0.6		0.8*	1	<b>0.9</b>



<b>Adapted Columns for Accused Individuals Who Voluntarily Appeared</b>	Bahar Idriss Abu Garda (Sudan)	Abdallah Banda Abakaer Nourain (Sudan)	Salah Mohammed Jerbo Jamus (Sudan)	
<b>Appearance</b>	5/18/09	6/17/10	6/17/10	
<b>Custody</b>	n/a	n/a	n/a	
<b>Confirmation of Charges Hearing Start</b>	10/19/09	12/8/10	12/8/10	
<b>Confirmation of Charges Hearing End</b>	10/29/09	12/8/10	12/8/10	
<b>Decision on Confirmation of Charges</b>	2/8/10	<i>7/12/2011*</i>	<i>7/12/2011*</i>	
<b>Rejection of Appeal</b>	4/23/10			<b>AVERAGE:</b>
<b>Time Between 1st Appearance and Decision on Charges (Years)</b>	0.7	<i>1.1*</i>	<i>1.1*</i>	<b>0.7</b>

Source: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/>  
*\*Italicized text denotes an absence of decision or action as of 7/12/11, and these data points are excluded from average calculations.*