Northwestern Journal of International Human Rights

Volume 8 | Issue 1 Article 4

Fall 2009

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Recommended Citation

Rachel Katzman, *The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial*, 8 Nw. J. Int'l Hum. Rts. 77 (2009).
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Northwestern Journal of International Human Rights
Volume 8, Issue 1 (Fall 2009)

The Non-Disclosure of Confidential Exculpatory Evidence and the *Lubanga* Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial

Rachel Katzman*

I. INTRODUCTION

¶1 On January 26, 2008, the International Criminal Court (ICC) made history by commencing the trial of its first defendant, Thomas Lubanga Dyilo. This watershed moment demonstrated to the people and leaders of the world that perpetrators of serious international human rights violations will be held accountable. However, many questions remain about the serious challenges facing the Court. The *Lubanga* case not only demonstrates ripe concerns over the investigatory methods used by the Office of the Prosecutor (OTP), but also exposes the disjointed nature of the ICC's defense system.

¶2 Defense attorneys at the ICC are appointed in two very different circumstances. The first is during the "situation" phase, when the OTP conducts a broad investigation into an array of atrocities without identifying or charging an individual. When a particular preliminary issue pertaining to the defense is brought before the Court during the "situation" phase, the Court appoints defense counsel on an *ad hoc* basis to address the concern. However, at this stage, the *ad hoc* defense counsel cannot assert general defense interests of the non-identified future accused. Thus, during the "situation" phase, *ad hoc* defense counsel representation is disjointed and limited to specific instances chosen by the Chamber.

¶3 The other circumstance is when an individual "case" is brought before the Court and an identified suspect is charged with a particular crime or set of crimes. Here, the attorneys are either appointed by the Court or chosen by the defendant. In both instances, the counsel is assisted by the Office of the Public Counsel for the Defense (OPCD). Similar to the appointment of *ad hoc* counsel during the "situation" phase, the "case" stage is disjointed because individual attorneys with limited resources and ICC experience are not evenly matched with the full-time and well funded OTP.

¶4 These dilemmas came to a head in the pre-trial proceedings of the alleged militia leader from the Democratic Republic of Congo (DRC), Thomas Lubanga Dyilo (Lubanga). In this first case before the ICC, on June 13, 2008, the Trial Chamber stayed the proceeding indefinitely because the OTP failed to turn over to the defense counsel potentially exculpatory evidence.[1] Information providers supplied this evidence to the

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[1] *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1401, Decision

OTP on the condition of confidentiality, but under the Rome Statute, the OTP is allowed to use confidential sources only as a stepping stone to gather further evidence.[2] Thus, on October 21, 2008, the Appeals Chamber upheld the Trial Chamber's decision, stating that the failure to supply the defense, or even the Chambers, with the potentially exculpatory evidence precluded the possibility of Lubanga receiving a fair trial.[3] The ICC's first defendant's fair trial rights were in serious jeopardy.

¶5 While these published decisions demonstrated the Court's concern over confidential exculpatory evidence, behind-the-scenes decision making brought the exculpatory evidence to light and allowed the stay of proceedings to be lifted on November 18, 2008. The OTP submitted the undisclosed evidence to the Trial Chamber for review and agreed that a number of methods could be used to ensure the safety of confidential information providers after it disclosed the evidence to the defense.[4] After a long and taxing pre-trial process, the *Lubanga* trial commenced on January 26, 2009, marking a watershed moment in international criminal law.

¶6 Although procedural in nature, the *Lubanga* decision's analysis of potentially exculpatory evidence is not to be taken lightly. Its significance and ramifications are multiple. It is reassuring that the Trial and Appeals Chambers stayed the *Lubanga* proceedings out of concern for the rights of the Accused, but it remains alarming that the OTP withheld potentially exculpatory evidence when the defense relies so heavily on the prosecution's good faith cooperation. In this light, the disjointed defense system creates an opportunity for prosecutorial abuse of power. Confusion over the relationship between the Registrar's OPCD, the appointed "situation" *ad hoc* counsel, and the individual "case" attorneys has created a gap in the advocacy and fair process rights of the accused. Without a solid and unified voice, defense interests stand at the mercy of the Chambers and the OTP.

¶7 For example, the OTP began its investigation into the "situation" in the DRC in 2004. Lubanga was charged in early 2006. The OTP did not bring the issue of confidential exculpatory evidence to the Chamber until September 2007.[5] From 2004 to 2006, the only defense attorneys were those appointed on an *ad hoc* basis from either the OPCD or the Registry's list of unaffiliated counsel who could only address the specific

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on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised on the Status Conference on 10 June 2008, (Trial Chamber I, June 13, 2008).

[2] Rome Statute of the International Criminal Court art. 54, July 17, 1998, A/CONF.183/9.

[3] *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1486, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I entitled "Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised on the Status Conference on 10 June 2008", (Appeals Chamber I, Oct. 21, 2008).

[4] *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1488, Prosecution's submission of 93 documents highlighting the passages of potentially exculpatory value or falling within the parameters of Rule 77, (Office of the Prosecutor, Oct. 22, 2008); *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1497, Prosecution's Provision of Further Information on Undisclosed Items pursuant to Trial Chamber's Orders at 29 October 2008 *Ex Parte* Hearing, (Office of the Prosecutor, Nov. 12, 2008); *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1502, Prosecution's Notification of Disclosure of Exculpatory and Rule 77 Material to the Defence on 18 and 20 November 2008, (Office of the Prosecutor, Nov. 21, 2008).

[5] *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-951, Prosecution's submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol, ¶ 25 (Office of the Prosecutor, Sept. 11, 2007).

preliminary issues raised by the Chamber. Thus, no defense counsel was able to challenge the OTP's misinterpretation of the Rome Statute or its misuse of its power to enter into confidential agreements with information providers. Even after 2006, Lubanga's counsel had to rely on the good faith efforts of the OTP to turn over exculpatory evidence. Unfortunately, the OTP waited until late 2007 to raise the issue of confidential exculpatory evidence. Thus, the prosecution didn't make it known to the Court that there was a problem until well into the pre-trial process and well after Lubanga was charged. Had *ad hoc* defense attorneys, or even OPCD lawyers, been able to learn of the problem and address it earlier in the "situation" phase, or had Lubanga's individual "case" attorney been told of the issue further in advance, the stay of proceedings could have been avoided.

¶8 This paper will explore the nature of the ICC defense system and examine how the structure helped facilitate the *Lubanga* stay of proceedings. First, the paper will discuss the structure of the defense system at the ICC to highlight the confusion and incoherence surrounding the system. Second, the paper will turn to the *Lubanga* case study and examine how and why the OTP was able to withhold potentially exculpatory evidence from the defense. Last, the paper will discuss what the OTP could have done to avoid the problem and assess what the *Lubanga* decision means to the field of international criminal law, and in particular to the ICC.

II. Structure of the Disjointed ICC Defense System

¶9 The disjointed defense system at the ICC leads to confusion and allows for a gap in the fair process rights of the accused. Although the Rome Statute enumerates several guarantees relating to defense rights, it "lacks clear and detailed rules governing the position and organizational structure of the defense within the institutional framework of the ICC."[6] In addition to the Rome Statute, the Rules of Procedure and Evidence (ICC Rules) also include provisions that "provide for defense counsel to have access to appropriate and reasonable administrative assistance."[7] Under the ICC Rules, the subsection on counsel for the defense falls under the Registry.[8] Accordingly, the Registry should be organized to promote the rights of the defense and be consistent with the principles of a fair trial.[9] The Registry must (1) facilitate the protection of confidentiality; (2) provide support, assistance, and information to all defense counsels and investigators necessary for the effective conduct of the defense; (3) assist arrested persons, the accused, and others in obtaining legal advice and counsel; and (4) advise the Prosecutor and the Chambers on all relevant defense-related issues.[10]

¶10 Although these rules help affirm the rights of the defense, "other aspects of the position and organizational structure of the defense within the institutional framework of

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[6] Jan Kleffner, *Some Preliminary Thoughts on the Position of the Defense at the New International Criminal Court and the Role of the Netherlands as the Host State, in* Some Preliminary Thoughts on the Position of the Defense at the New International Criminal Court and The Role of the Netherlands as the Host State, 3 (2002).
[7] International Criminal Court Rules of Procedure and Evidence R. 14(2), Sept. 9, 2002, ICC-ASP/1/3.
[8] *Id.* at R. 20-22.
[9] Kleffner, *supra* note 6, at 3.
[10] *Id.* at 3-4.

the ICC remain unclear."[11] In particular, the organizational structure of the defense remains troubling.[12]

A. The "Situation" Phase

¶11 The first circumstance in which defense counsel are appointed is during the "situation" phase. At this stage, the court has jurisdiction over a state in which numerous atrocities may have taken place. The prosecution conducts a broad investigation into the array of atrocities, but no suspect is identified or charged by the Court. Although no individual is accused, issues relevant to the defense can emerge at this time and thus may necessitate the appointment of a defense attorney. For example, the Rome Statute stipulates for defense counsel to be present when certain preliminary matters arise, *i.e.,* to review evidentiary issues or victims' applications to participate in the proceeding. To comply with the Rome Statute, the Pre-Trial Chamber can appoint non-ICC counsel on an *ad hoc* basis as defense attorneys.

¶12 Thus, at the "situation" phase, defense counsel is appointed on an *ad hoc* basis to address the specific issue before the court at that time. They cannot assert general defense interests of the future accused. For example, an *ad hoc* counsel appointed to review victims' applications cannot argue jurisdictional or evidentiary claims on behalf of a future defendant.

¶13 These *ad hoc* defense attorneys work under the Office of the Registry in the OPCD. They are individual lawyers from around the world who have offered their name to the Registry to be appointed to or chosen by the defendant. Because the Pre-Trial Chamber has little regulatory guidance on how to ensure defense counsel is present when stipulated matters arise in the "situation" phase, it can also appoint attorneys from the OPCD. Often different lawyers, either *ad hoc* or from the OPCD, are used for different issues. This can be problematic as issues are often inter-related, and the attorneys can assert differing or even conflicting strategies.

¶14 As the only permanent unit of the Court assigned to assert defense interests, the OPCD merits close examination. Regulation 77 of the Regulations of the Court establishes the OPCD as a permanent unit of the ICC and states that it falls under the Registry for administrative purposes but otherwise is a wholly independent office.[13] Regulation 77 further elaborates that "[c]ounsel and assistants within the [OPCD] shall act independently," thus asserting OPCD autonomy.[14] The mandate of the OPCD is to (1) represent and protect the rights of the defense during the initial stages of an investigation, (2) provide legal and logistical support and assistance to defense counsel, (3) appear before chamber when there are specific issues relevant to the interests of the defense, and (4) act as *ad hoc* counsel for the general interests of the defense during the investigation stage of ICC proceeding.[15]

¶15 In addition to counsel from the OPCD, attorneys not otherwise affiliated with the ICC can be appointed as defense counsel on an *ad hoc* basis during the "situation" phase. Regulation 76(1) states that the "Chamber…may appoint counsel in the circumstances

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[11] *Id.* at 4-5.
[12] *Id.* at 5.
[13] International Criminal Court Regulations of the Court R. 77, May 24, 2004, ICC-BD/1-01-04.
[14] *Id.*
[15] *Id.*

specified in the [Rome Statute] and the [ICC Rules] or where the interests of justice so require."[16] Regulation 76(2) provides that when the Registry appoints *ad hoc* counsel, the attorney may be selected from the OPCD or the Registry may chose an attorney not formerly connected with the court.[17]

¶16 The first examples of these *ad hoc* appointments arose during the proceedings related to the situation in the Democratic Republic of Congo (DRC). Initially, Pre-Trial Chamber I appointed Mr. Tjarda van der Spoel as *ad hoc* defense counsel to represent the general interests of the defense during the OTP's collection of forensic evidence. Pre-Trial Chamber I appointed another *ad hoc* defense counsel, Mr. Joseph Tsimanga, to respond to applications from victims seeking to participate in the DRC proceedings.

¶17 Although the Chamber appointed Mr. Van der Spoel and Mr. Tsimanga in 2005 and 2006 to serve as *ad hoc* defense counsel in the DRC "situation" under Regulation 76, the Chamber later changed how it assigned defense counsel for issues arising to the "situation." In May 2007, when the Pre-Trial Chamber I sought defense counsel to respond to victims' applications to participate in the proceedings, the Chamber switched course.[18] Rather than appointing an individual *ad hoc* attorney according to Regulation 76, the Chamber turned to the OPCD.[19]

¶18 Confusion arose in 2007 over the role and powers of the OPCD. In the various submissions made by the OPCD regarding victims' applications to participate in the proceedings, the OPCD asserted that under Regulation 77, it had been given a representative function for the general rights of the defense, as opposed to just an ancillary support function.[20] Furthermore, the OPCD argued that its "obligations and powers mirror those of a defense counsel [appointed to] represent the rights of the defense."[21] It contested that the OPCD was "continuing the mandate of the former *ad hoc* counsel for the defense" and thus was entitled to receive documents that were conveyed to the individual *ad hoc* attorney, Mr. Tsimanga, prior to the OPCD's May 2007 appointment.[22]

¶19 Pre-Trail Chamber I disagreed in a September 11, 2007, decision. It stated that the mandate of the OPCD is limited and is not intended to be a continuation of the former *ad hoc* counsel.[23] Thus, the OPCD is not automatically entitled to receive any documents that were conveyed to the individual *ad hoc* counsel appointed under Regulation 76, and the OPCD cannot contact the former *ad hoc* counsel directly.[24] In light of this confusion

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[16] *Id.* at R. 76(1).
[17] *Id.* at R. 76(2).
[18] Pre-Trial Chamber, *Situation in the Democratic Republic of Congo*, ICC-01/04-329, Decision Authorizing the Filing of Observations on Application for Participation in the Proceedings (May 23, 2007).
[19] "Although the Chamber gave no explanation as to its change in approach with respect to *ad hoc* defense counsel, it is likely that the earlier appointments were selected from the list of unaffiliated counsel, rather then OPCD, because OPCD was not fully operation until January 2007." WAR CRIMES RESEARCH OFFICE, PROTECTING THE RIGHTS OF FUTURE ACCUSED DURING THE INVESTIGATION STAGE OF INTERNATIONAL CRIMINAL COURT OPERATIONS, 37 (2008).
[20] Office of the Public Counsel for the Defense, *Situation in the Democratic Republic of Congo*, ICC-01/04-379, Request for Access to Previous Filings, and an Extension of the Page Limit and Time Limit, ¶¶ 14-15 (Aug. 29, 2007).
[21] *Id.*
[22] *Id.*
[23] Pre-Trial Chamber I, *Situation in the Democratic Republic of Congo*, ICC-01/04-389, Decision on the Request by the OPCD for Access to Previous Filings, 6-7 (Sept. 11, 2007).
[24] *Id.*

over the roles of the OPCD and the Regulation 76 appointed *ad hoc* attorneys, the OPCD filed a request for clarification asking the Pre Trail Chamber I to rule on the scope and correlation between the mandates of the *ad hoc* counsel for the defense and the OPCD.[25] The Pre Trial Chamber declined to clarify. The OPCD then requested to communicate with the former *ad hoc* counsel, Mr. Tsimanga, but again the Pre-Trial Chamber rejected this request.[26] The Chamber did, however, assert that former *ad hoc* counsel could voluntarily contact the OPCD.[27]

¶20 Following this ruling, the OPCD asked the OTP for information that would either affect the credibility or contradict the assertions in the victims' applications to participate in the proceedings.[28] The OTP refused the request because, according to the OPCD, it "did not consider the information requested was relevant, or that the OPCD had the right to exculpatory materials."[29] However, the OPCD filed another submission with Pre-Trial Chamber I asking that the OTP search for and disclose to the OPCD any exculpatory material pursuant to the Rome Statute, which calls for the OTP to "disclose to the defense evidence in the prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence."[30] The OPCD stressed that it is fully dependant on the information provided by the victims' applications and by the OTP, and that it does not have any of the investigative opportunities afforded to the prosecution.[31] On December 7, 2007, Pre Trail Chamber I dismissed the OPCD's request for disclosure from the OTP, and the OPCD filed for leave to obtain an interlocutory appeal of the decision.

¶21 This confusion over the respective roles and powers of the Regulation 76 appointed *ad hoc* attorneys and the OPCD is demonstrated by the OTP's and the Chamber's inconsistent treatment of defense counsel. The Pre-Trial Chamber's September 11, 2007, decision demonstrates that they viewed the OPCD and *ad hoc* defense counsel as separate entities with different functions, yet they refused to clarify these roles. It is also confusing that the Chamber appointed the OPCD to review victims' applications when they had previously appointed Mr. Tsimanga on an *ad hoc* basis. The Chamber changed course without explaining its reasoning or describing a method for determining whether an unaffiliated attorney or the OPCD would be appointed. Furthermore, this confusion seemed to have affected the OTP, which did not believe that the OPCD had a right to exculpatory materials. The uncertainty over the disjointed defense system during the

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[25] Office of the Public Counsel for the Defense, *Situation in the Democratic Republic of Congo*, ICC-01/04-390, Request for Clarification, 11 (Sept. 12, 2007).
[26] Office of Public Counsel for the Defense, *Situation in the Democratic Republic of Congo*, ICC-01/04-425, Request for Leave to Contact ad hoc Counsel for the Defense (Jan. 3 2008); Pre-Trial Chamber I, *Situation in the Democratic Republic of Congo*, ICC-01/04-427, Decision on the "Request for leave to contact ad hoc Counsel for the Defense" (Jan. 4, 2008).
[27] *Id.*
[28] Office of Public Counsel for the Defense, *Situation in the Democratic Republic of Congo*, ICC-01/04-378, Request for the Single Judge to Order the Prosecutor to Disclose Exculpatory Materials, ¶ 2 (Aug. 28, 2007).
[29] *Id*. at ¶ 3.
[30] Rome Statute, *supra* note 2, at art. 67(2).
[31] Request for the Single Judge to Order the Prosecutor to Disclose Exculpatory Materials, *supra* note 28, at ¶¶ 8-9.

"situation" phase at the ICC has led to, and possibly will continue to lead to, large gaps in the fair trial rights of the accused.

¶22 Simple changes to the system can remedy the disjointed nature of defense claims in the "situation" phase. First, Pre-Trial Chambers should resume the practice of appointing defense lawyers otherwise unaffiliated with the ICC, as opposed to lawyers from the OPCD, to represent the interests of the accused during the *ad hoc* proceedings that arise in the context of a "situation." Although the Regulations of the Court permit the Chambers to appoint attorneys from the Registrar's list of outside counsel or from within the OPCD, there are two significant reasons to favor the appointment of outside counsel. A potential conflict of interest could arise where the OPCD attorneys appointed to represent the defense at the "situation" stage would interfere with other aspects of the OPCD's mandate. For example, they could gain evidentiary information that may help some future accused while harming others. Additionally, the OPCD, with only six staff members and a tight budget, has limited resources. Its resources would be better spent supporting the independent defense attorneys who come from various legal backgrounds and who have limited experience with the ICC.[32]

¶23 Second, the same attorney should serve as *ad hoc* counsel throughout the proceedings in a given "situation."[33] This would increase efficiency and the quality of representation. Last, the Chamber must clearly define the mandate of the *ad hoc* counsel at the time of appointment, regardless of whether *ad hoc* counsel is appointed from within the OPCD or from the list of independent counsel unaffiliated with the Court.[34]

¶24 Without these improvements, the current system creates a disjointed method of asserting defense claims during the "situation" phase. The only people representing the interests of the defense are the *ad hoc* or OPCD counsel. Even so, these instances are limited to when the Rome Statute specifically dictates that defense counsel must be present. Thus, the interests of the defense largely go unheard during the situation phase.

B. The "Case" Phase

¶25 The second circumstance in which defense counsel is present before the ICC is when individual "cases" are brought before the Court. In this instance, an identified suspect is charged with a particular crime or crimes. These attorneys usually have offered their names to the Registry and are either appointed by the court or chosen by the defendant. In the "case" stage, the appointed or chosen attorneys often have no experience practicing before the ICC. They come from different countries and legal traditions and are expected to face off against a well-funded permanent prosecution team that has already spent substantial time investigating the case. The OPCD is designed to provide guidance and support to these attorneys, but the under-funded and undersized OPCD staff is no match for the robust OTP. This system creates a disjointed process of defense representation that places the accused at a disadvantage against the OTP during the "case" stage.

¶26 Taken together, the disjointed "situation" and "case" systems of defense create many misunderstandings within the Court's operations and pose a threat to the rights of

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[32] WAR CRIMES RESEARCH OFFICE, *supra* note 19, at 6.
[33] *Id.* at 8.
[34] *Id.* at 9.

the accused. They create a system based on the power of the prosecutor. Relative to the OTP, the *ad hoc* defense counsel during the "situation" phase and the individual's attorney in the "case" stage have limited financial, political, and human resources. Most importantly, they rely heavily on the good faith efforts of the OTP to share evidence. The system also creates an institutional framework where the Court's Chambers serve to check the power of the prosecutor, which can obstruct their role as independent arbitrators.

III. *LUBANGA* AS A CASE STUDY

¶27 The *Lubanga* case demonstrates the problems that have emerged from *ad hoc* appointments of OPCD or unaffiliated defense counsel during the "situation" phase, and the appointments of under-resourced individual attorneys during the "case" stage.

¶28 Lubanga was head of the Union of Congolese Patriots (UPC), an Ituri-region political and militia organization in eastern Congo. He also claimed to control its armed faction, the Patriotic Front of Liberation for the Congo (FPLC). On March 17, 2006, Lubanga was arrested and surrendered to the ICC upon a warrant of arrest issued by Pre-Trial Chamber I at the request of the Prosecution. The prosecution charged Lubanga with the war crimes of conscripting and enlisting children under the age of 15 in to the FPLC, and using them to actively participate in hostilities in the Ituri region of the DRC, from September 2002 through August 2003.[35] It was the first case before the Court and the first to arise from the situation in the DRC.

¶29 The proceedings against Lubanga came to a sudden stop on June 13, 2008, when Trial Chamber I imposed a stay on the proceedings. Only ten days before the designated start of the trial, the Chamber found "wholesale and serious abuse" by the prosecution because they had failed to disclose to the accused exculpatory materials attained in confidentiality.[36] Under Article 54(3)(e) of the Rome Statute, the Prosecution is allowed to obtain information from sources on a confidential basis for the sole purpose of generating new evidence.[37] However, the Trial Chamber concluded that:

> i) The disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial;
>
> ii) The prosecution has incorrectly used Article 54(3)(e) when entering into agreements with information-providers, with the consequence that a significant body of exculpatory evidence which would otherwise have been disclosed to the accused is to be withheld from him, thereby

[35] Pre-Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-356, Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and the List of Evidence Pursuant to Rule 121(3), ¶ 12 (Aug. 28, 2006); Pre-Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, ¶ 9 (Jan. 29, 2007); *See* Rene Blattmann and Kirsten Bowman, *Achievements and Problems of the International Criminal Court: A View From Within*, 6 J. INT'L CRIM. JUST. 711, 716 (2008).

[36] Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements, *supra* note 1, at ¶ 59, 73.

[37] Rome Statute, *supra* note 2, at art. 54.

> improperly inhibiting the opportunities for the accused to prepare his defense; and
>
> iii) The Chamber has been prevented from … [determining] whether or not the non-disclosure of this potentially exculpatory material constitutes a breach of the accused's right to a fair trial.[38]

¶30 Because of these factors, "the trial process [was] ruptured to such a degree that it [was] impossible to piece together the constituent elements of a fair trial."[39] On October 21, 2008, the Appeals Chamber affirmed the stay of proceedings but stated that "[i]f the obstacles that led to the stay of the proceedings fall away [the Chamber] may decide to lift the stay of the proceedings."[40]

¶31 This is ultimately what unfolded. Faced with the strong possibility of a protracted stay, the prosecution made various submissions to the Chambers. On October 14, 2008, the prosecution asked the Chamber to review "all of the undisclosed evidence obtained from the information providers . . . indicating that it was in a position to comply with each of the Trial Chamber's conditions…."[41] The prosecution received the consent of the information providers and immediately submitted all the documents, in non-redacted form, to the Trial Chamber for the entirety of the trial.[42] After careful review, the Trial Chamber lifted the stay of proceedings on November 18, 2008, and ordered the prosecution to disclose to the defense all the evidence that was the subject of the stay of proceedings.[43] The prosecution had two days to comply.[44] Accordingly, the prosecution turned over the evidence,[45] and trial proceedings began on January 26, 2009.

¶32 This case demonstrates how the disjointed "situation" and "case" systems almost undermined the trial of the ICC's first defendant. Neither the *ad hoc* counsel appointed from within the OPCD nor the independent counsel unaffiliated with the court were able to successfully raise the issue of confidential exculpatory evidence during the "situation" stage because the Chamber limited their representational scope to issues specifically articulated in the Rome Statute. Additionally, Lubanga's individual attorneys during the "case" stage could not challenge the OTP's confidential exculpatory evidence because the prosecution did not disclose this material until far into the pre-trial process. Had the prosecution brought the issue to the Chamber's attention earlier, or had the *ad hoc* defense counsel been able to challenge the exculpatory evidence during the "situation" phase, the Trial Chamber potentially would not have stayed Lubanga's proceedings and the accused's right to a fair trial would not have been jeopardized.

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[38] Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements, *supra* note 1 at ¶ 92.
[39] *Id.* at ¶ 93.
[40] Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I, *supra* note 3 at ¶ 5.
[41] *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1644, Reason for Oral Decision Lifting the Stay of Proceedings, ¶ 17 (Trial Chamber I, Jan. 23, 2009).
[42] *Id*.
[43] Prosecution's Notification of Disclosure of Exculpatory and Rule 77 Material to the Defense on 18 and 20 November 2008, *supra* note, 4 at ¶ 1.
[44] *Id*.
[45] *Id*. at ¶¶ 2-4.

A. The Conflict in the Democratic Republic Congo

¶33 The more than decade-long conflict in the DRC has left approximately 5.4 million dead from war-related causes, amounting to arguably the world's deadliest documented conflict since World War II.[46] In 1996, Zairian opposition leader Laurent Kabila led a military coup against President Mobuto and renamed the country the DRC. Initially, neighboring Rwanda and Uganda supported Kabila's coup, but conflict among the countries emerged as each sought to control the region's rich natural minerals. Accordingly, Rwanda and Uganda gave their support to anti-Kabila militias, including those led by Thomas Lubanga Dyilo. By 1999, the anti-Kabila forces controlled the northeastern half of the country and in 2000, the United Nations Security Counsel deployed roughly 5,500 peacekeepers to monitor the cease-fire in the DRC.

¶34 During a failed coup attempt in 2001, Laurent Kabila was assassinated and his son, Joseph Kabila, emerged as President. Conflict continued to spread across the north-eastern half of the country, most notably in districts controlled by the anti-Kabila militias supported by Rwanda and Uganda. Following a peace agreement, a power-sharing transitional government took office in 2003, yet militias continue to fight for political power and control over mineral-rich areas.

B. Referral of the Situation to the ICC and the Initial Proceedings

¶35 Following the DRC's ratification of the Rome Statute, the ICC Chief Prosecutor, Louis Moreno Ocampo urged President Joseph Kabila to refer the situation in the DRC to the Court. Consequently, in April 2004, Kabila sent Moreno Ocampo a letter asking the ICC to investigate possible crimes within the jurisdiction of the Court committed in the territory of the DRC.[47] In 2005, President Kabila placed Lubanga under house arrest in Kinshasa on the charges of genocide and crimes against humanity under the DRC military code. The government later added charges of murder, illegal detention, and torture. Moreover, the United Nations (UN) also accused Lubanga of masterminding the murder of nine peacekeepers in the Ituri region.

¶36 Lubanga's detention presented an opportunity to the OTP, as it saw the chance to avoid the logistical challenges of arresting a suspect in the DRC.[48] The OTP feared that Lubanga would be released after a year because DRC authorities had not compiled a record against him that would justify his continued detention.[49] Thus, the OTP applied to the Pre-Trial Chamber for an arrest warrant.[50]

¶37 After the Pre-Trial Chamber determined that the DRC's judicial system was unable or unwilling to prosecute Lubanga and that the case passed the sufficient gravity threshold, it issued the arrest warrant.[51] The ICC Registrar conveyed the warrant to the

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[46] INTERNATIONAL RESCUE COMMITTEE. MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS ii (2007).
[47] Press Release, Int'l Crim. Ct., Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004).
[48] BENJAMIN SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT 212 (Cambridge University Press) (2008).
[49] *Id.* at 221.
[50] *See Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-2-tEN, Warrant of Arrest, 2 (Pre-Trial Chamber I, Feb. 10, 2006).
[51] *Id.*

DRC, and Lubanga was flown from Kinshasa to The Hague on March 17, 2006. The ICC's first accused was charged with enlisting, conscripting, and using children under the age of fifteen in his army.[52]

¶38 On March 22, 2006, Lubanga appeared before the Pre-Trial Chamber and acknowledged the charges against him. In November 2006, the prosecution laid out its case during the confirmation hearing. Subsequently, on January 29, 2007, Pre-Trial Chamber I confirmed that there was sufficient evidence to establish substantial grounds to believe that Lubanga is responsible, as a co-perpetrator, for the war crimes of enlisting and conscripting children under the age of fifteen and using then to participate actively in hostilities.[53] Following a delay from a change in Lubanga's counsel, the trial proceedings were to commence in mid-2008. However, another issue arose— the Chamber decided to delay proceedings when, on September 11, 2007, the prosecution submitted that it had withheld from the defense exculpatory evidence that it had obtained on the condition of confidentiality.[54]

C. The Issue of Disclosure and Evidence Provided on the Condition of Confidentiality

¶39 On June 13, 2008, the Trial Chamber stayed the *Lubanga* proceedings because of the prosecution's failure to turn over potentially exculpatory evidence. The Court reasoned that this violated Lubanga's right to a fair trial and that the prosecution had incorrectly used Article 54(3)(e) when granting confidentiality to information providers. Before examining the issues surroundings the stay of proceedings, it is necessary to understand the relevant Articles and Rules that inform the questions.

¶40 The drafters of the Rome Statue understood that the prosecution would need to be able to obtain information on the condition of confidentiality. Article 54(3) of the Rome Statute states that the Prosecutor may:

> (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
>
> (f) Take necessary measure, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.[55]

¶41 Additionally, the Court's Rules account for information provided on the condition of confidentiality and prohibit the disclosure of information obtained confidentially unless the provider agrees to it. Rule 82(1) of the ICC Rules states,

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[52] *See Id.*; *See* Decision on the Confirmation of Charges, *supra* note 35, at ¶¶ 9, 20.
[53] Decision on the confirmation of charges, *supra* note 35, at 156; *See* Rome Statute, *supra* note 2, at arts. 8(2)(b)(xxvi) & 25(3)(a).
[54] Prosecution's submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure, and e-court protocol, *supra* note 5, at ¶ 25.
[55] Rome Statute, *supra* note 2, at art. 54(3).

> [W]here material or information is in possession or control of the Prosecutor which is protected under Article 54(3)(e), the Prosecutor may not subsequently introduce such material or information into evidence without prior consent of the provider of the material or information an adequate prior disclosure to the accused.[56]

¶42 However, confidential materials can prove to be exculpatory. The Rome Statute creates an affirmative duty of the Prosecution to turn over exculpatory evidence to the defense. Pertaining to the rights of the accused, Article 67(2) of the Rome Statute says,

> In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defense evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of the prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.[57]

¶43 Article 67 is compounded by Rule 77 of the ICC Rules, which pertains to the inspection of material in possession or control of the Prosecutor. The Rule states,

> The Prosecutor shall . . . permit the defense to inspect any books, documents, photographs or other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defense or are intended for use by the Prosecution as evidence for the purposes of the confirmation hearing or at trial….[58]

¶44 However, Rule 77 is subject to restrictions on disclosure on the basis of confidentiality. Under Rule 82 of the ICC Rules, the Prosecutor cannot introduce material or information into evidence that he has obtained under Article 53(3)(e) without first obtaining the consent of the information providers.[59]

¶45 There are several reasons why the ICC allows for and protects the grant of confidentiality. First, it is an incentive for cooperation. More state actors, NGOs, and international organizations are likely to share their vital knowledge with the Court if they do not have to reveal their identities or how they obtained the information. State-actors who also have an interest in protecting national security will likely divulge details of crimes only if they are assured of confidentiality. Likewise, NGOs often can do their work in the field only if they receive permission from the state or from militias. If parties to a conflict know or believe that an NGO is providing information to the ICC, the agency compromises its operations and endangers the lives of its staff. The prosecution in *Lubanga* even conceded "it would not have been able to initiate an investigation in the DRC without the information provided by the UN under the confidentiality

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[56] Rules of Procedure and Evidence, *supra* note 7 at R. 82.
[57] Rome Statute, *supra* note 2 at art. 67(3).
[58] Rules of Procedure and Evidence, *supra* note 7 at R. 77.
[59] *Id.* at R. 82.

agreements."[60] Thus, Article 54(3)(e) ensures that the Court has access to a constant flow of information inside the area of investigation without risking the security of the UN, NGOs, or state-actors.

¶46 However, information obtained on the condition of confidentiality is prone to prosecutorial abuse, and can "easily compromise the fairness and balance of the proceedings."[61] This is even more challenging when the information is potentially exculpatory, as in the case of *Lubanga*. More than half of the prosecution's evidence against Lubanga was gathered by confidentiality agreements.[62] Some of this material included information that Lubanga suffered from mental illness, had been intoxicated, had acted under duress, had acted in self-defense, had demobilized child soldiers, and had not actually commanded people who committed the crimes with which he is charged.[63]

¶47 During the initial stages of the proceedings, the Trial Chamber urged the prosecution to help ensure that the informants agreed to lift the condition of confidentiality. However, on October 1, 2007, the prosecution told the Court that information providers had refused to lift the restrictions from forty-six documents, amounting to about 220 pages of evidence.[64] Additionally, the prosecution was still waiting to receive responses from the informants to its request to lift redactions from over 500 documents, amounting to about 3,080 pages of evidence.[65] However, the informants did not comply with these requests. In particular, the UN, which had provided 156 of the 212 confidential documents, proved to be unrelenting in their demand for confidentiality.[66]

¶48 The UN's persistence stemmed from the nature of its agreement with the ICC and its concern for the safety of its personnel and the success of its missions. The cooperation between the UN and the ICC Prosecutor is controlled by Article 18 of the Relationship Agreement between the UN and the ICC, which entered into force on October 4, 2008. Paragraph three states,

> The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.[67]

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[60] Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements, *supra* note 1, at ¶ 26.
[61] Sabine Swoboda, *The ICC Disclosure Regime—a Defense Perspective*, 19 CRIM. L.F. 449, 468 (2008).
[62] *Id.*
[63] Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements, *supra* note 1, at ¶ 22.
[64] *Id.* at ¶ 15.
[65] *Id.*
[66] *Id.* at ¶¶ 18-19.
[67] Relationship Agreement between the United Nations and the International Criminal Court, art. 18, ¶ 3, Apr. 10, 2004, 2283 U.N.T.S. 196.

¶49 This agreement reflects the understanding that although the UN helps the ICC conduct its investigations, this assistance must not jeopardize the safety of UN personnel or the success of any given mission. Thus, the UN has sole discretion over the waiver of confidentiality. Furthermore, the agreement underscores the principle that the ICC can obtain confidential documents only if the documents are subsequently used to generate new evidence.

¶50 In addition to this Relationship Agreement, the UN and the ICC drafted a Memorandum of Understanding (MOU) regarding cooperation between the UN's Organization Mission in the Democratic Republic of the Congo (MONUC) and the ICC. The MOU addresses issues of administrative and logistical services, medical services, transportation, and military protection to facilitate the ICC investigation in the DRC.[68] More pertinently, the MOU also addresses issues of (1) ICC access to documents and information held by MONUC, (2) interviews and testimonies of MONUC staff, (3) finding witnesses, and (4) preservation of physical evidence.[69] Since the implementation of the MOU, MONUC has provided information to the ICC Prosecutor.[70]

¶51 However, throughout the initial stages of the *Lubanga* proceedings, the UN continued to withhold its consent to disclose substantial amounts of material to the defense and the Chambers. The UN even declined to allow Pre-Trial Chamber I to review the evidence in private to determine whether the confidentiality agreements were justified. The Chamber found this quite troubling and stated:

> [F]rom the moment the prosecution entered into the agreements and was thereafter presented with exculpatory materials, it has been under an obligation to act in a timely manner to lift the agreements in order to ensure a fair trial without undue delay. Generally, the late requests by the prosecution to lift the confidentiality agreements should not be allowed to endanger the accused's right to be tried without undue delay and to adequate time and facilities for preparation.[71]

¶52 To this end, the Chamber ordered the disclosure of the evidence and stated that any redactions were to be justified to the Court.[72]

¶53 In light of this decision, on March 25, 2008, the prosecution informed the Chamber that it had disclosed or provided for pre-inspection seventy-six documents pursuant to Rule 77.73. Forty-four of these seventy-six documents were disclosed or provided in full,

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[68] Memorandum of Understanding between the United Nations and the International Criminal Court concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo and the International Criminal Court, art. 5-9, Nov. 8, 2005, 2263 U.N.T.S. 331; *See Discussion*, 6 J. INT'L CRIM. JUST. 763, 771 (2008).

[69] *Id.*; *See Discussion*, *supra* note 68.

[70] *Id.*; *See Discussion*, *supra* note 68.

[71] Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1019, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, ¶ 19 (Nov. 11, 2007).

[72] *Id*. at ¶ 27.

[73] Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1248, Prosecution's submission on undisclosed documents containing potentially exculpatory information, ¶ 6 (March 28, 2008).

and thirty-two contained redactions that the information providers requested.[74] In spite of these efforts, the prosecution conceded that it had not disclosed to the defense a total of 212 items containing potentially exculpatory material.[75]

¶54 The prosecution appeared to have its hands tied. Information providers had refused to waive their confidentiality for 181 of the 212 potentially exculpatory items, and the informants were still deliberating about the rest.[76] The Chamber recognized the prosecution's attempt to obtain consent to disclose exculpatory evidence, and the prosecution asserted that it was emphasizing the urgency of the matter to the informants. During an October 1, 2007, hearing, the prosecution stated, "The Prosecution always was and continues to actively seek the lifting of respective materials, the lifting of respective restrictions, and the Prosecution of course pays particular attention to such documents which contain information that falls within the ambit of Article 67(2)."[77] The prosecution further stated:

> In this context there are very complex negotiation processes ongoing between the Office of the Prosecutor and the various information providers, and it certainly doesn't come as surprise… that these negotiation processes take time…. [T]hey are determined and are influenced by the information providers' internal structures and decision-making procedures… that's beyond the Office of the Prosecutor's control.[78]

¶55 The prosecution even offered to provide the defense with similar alternative evidence in the event that the information providers did not offer their consent.[79] However, the Trial Chamber stated this was not an option unless it could see the original exculpatory evidence and ensure that the similar alternative evidence really was analogous.

¶56 Uncertain as to how to resolve the issue, the prosecution kept the Chamber well-informed of the up-to-date status of undisclosed evidence. For example, during a June 10, 2008, status conference, the prosecution told the Chamber that there were 156 confidential documents that the UN, as an information provider, had refused disclose to the defense.[80] Ninety-five of these 156 items were considered potentially exculpatory or mitigating in nature.[81] Moreover, of the over 200 total documents from the UN and other information providers that the prosecution conceded were potentially exculpatory, 112 were material to defense preparation.[82] The defense, hoping to view these documents, argued that Article 67(2) imposed upon the prosecution an obligation to disclose not only

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[74] *Id.*
[75] *Id.* at ¶ 7.
[76] Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements, *supra* note 1 at ¶ 17.
[77] *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-T-52, Transcript of Hearing on 1 October 2007, 14 ll. 17-21 (Trial Chamber I, Oct. 1, 2007).
[78] *Id.* at 15 ll. 11-20.
[79] *Id.* at 18 ll. 1-10.
[80] *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-T-89, Transcript of Hearing on 10 June 2008, 5 ll. 8-11 (Trial Chamber I, June 10, 2008).
[81] *Id.* at 46 ll. 2-3, 9-12.
[82] *Id.* at 46 ll. 4-6.

exculpatory evidence, but also mitigating evidence or evidence that affects the credibility of the prosecution's evidence.

¶57 Without the consent of the information providers, the two sides appeared to be at a stalemate. Thus, the Chamber ordered the OTP to submit the undisclosed exculpatory evidence to the Court.[83] To accommodate confidentiality concerns, it granted the prosecution permission to submit descriptions of the undisclosed potentially exculpatory evidence, in addition to explanations of why the prosecution did not believe particular documents were exculpatory. The prosecution countered that it was unable to comply with the order because of the provisions in the confidentiality agreements. Furthermore, the UN refused to allow the Chamber to view the material. In response, the Chamber stated:

> It needs to be stressed, however, that the Chamber fully appreciates that the UN, and possibly other information-providers, were invited by the court to enter into these [confidential] agreements, and it unreservedly accepts that they will have approached this issue in good faith, bearing in mind their own particular responsibilities and their respective mandates.[84]

¶58 The Chamber recognized the security risks that informants face when they cooperate with the Court's investigations, but it was also deeply concerned about the rights of accused.

¶59 Without knowing exactly what information the confidential documents contained, and without the power or resources to conduct its own investigation in the DRC, Lubanga's defense team was at the mercy of the OTP. Although the defense advanced cogent legal arguments about the use of Article 54(3)(e) confidential agreements, it was largely the Trial Chamber that served as a check on the OTP's power and ability to use these agreements.

D. The Stay of Proceedings

¶60 In light of this impasse, on June 11, 2008, Trial Chamber I announced that Lubanga's trial would not start on June 23 as planned. On June 13, 2008, Trial Chamber I imposed a stay on the proceedings. In particular, the Chamber reviewed Article 54(3)(e), Article 67(2), and Rule 77, and determined that violations of those standards affected the accused's right to a fair trial.

¶61 Throughout the status hearings leading up to the stay of proceedings, the prosecution applied a liberal reading of Article 54(3)(e). It interpreted the Rome Statute as allowing confidentiality agreements even when the evidence was not provided with the sole purpose of generating new evidence.[85] The prosecution believed that the UN and other information providers had submitted general confidential information, from which

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[83] *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1259, Order on the "Prosecution's submission on undisclosed documents containing potentially exculpatory information," ¶ 3 (Trial Chamber I, Apr. 3, 2008).

[84] Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements, *supra* note 1, at ¶ 64.

[85] *Id.* at ¶ 27.

the OTP could selectively choose lead evidence to be used at trial.[86] The prosecution even conceded that at the time the confidentiality agreements were signed, there was a "clear understanding that these materials were likely to be used as evidence [at trial]."[87] This interpretation is clearly at odds with the language of Article 54(3)(e), in addition to the Relationship Agreement and MOU.

¶62 Conversely, the defense argued that Article 54(3)(e) confidentiality agreements can be entered into only when the confidential evidence is solely used to generate new evidence. [88] Additionally, the defendant argued that once the evidence had been obtained through an Article 54(3)(e) confidentiality agreement, it should not be tendered as evidence at trial.[89] From a defense perspective, the purpose of Article 54(3)(e) was not to make it easy for the prosecution to receive information. The confidentiality agreements should not be used to broadly shield a pool of documents from a particular source. In fact, at a status conference on June 10, 2008, just days before the stay of proceedings, the defense noted that the prosecution's broad use of confidentiality agreements stood on shaky ground because the UN was unable to provide one instance-specific reason that justified the need for confidentiality.[90] Moreover, to illustrate the misuse of the confidentiality agreements, the defense noted that a confidential document that the prosecution had recently disclosed to them was in fact a public document.[91]

¶63 The Trial Chamber issued a decision on June 13, 2008, to stay the proceedings based on the conclusion that the prosecution misused the confidentiality agreements under Article 54(3)(e). This decision reflects the Chamber's fundamental concern over the accused's right to a fair trial in the face of the prosecution's inability to disclose potentially exculpatory evidence. The Chamber first addresses this when mentioning the prosecution's argument that it had furnished the defense with other documents or information that had the same exculpatory value as the non-disclosed material. The Chamber asserted its concern over this premise because "the Court has been unable to assess for itself whether this proposition is accurate."[92] The Chamber also stated that "fairness dictates that the accused should be provided with part or all of the undisclosed evidence . . . The Chamber has grave reservations as to whether . . . similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence: the right of the accused is to both items."[93]

¶64 This concern seems to reflect the Chamber's insistence that it, not the prosecution, must decide whether evidence is exculpatory in nature. It is not sufficient for the prosecution to say that two pieces of evidence, one disclosed and the other not, have the same exculpatory value. Rather, it is the Chamber that must make this determination. Leaving it to the prosecution to evaluate the similarity and value of exculpatory evidence is a violation of the accused's fair trial rights.

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[86] *Id.*.
[87] *Id.*
[88] *Id.* at ¶ 28.
[89] *Id.*
[90] *Id.*
[91] Transcript of Hearing on 10 June 2008, *supra* note 80, at 19 ll. 6-12.
[92] Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements, *supra* note 1, at ¶ 60.
[93] *Id.*

¶65 Thus, the Chamber was skeptical about the prosecution's proposal to give the judges excerpts and summaries of potentially exculpatory evidence, as this implied that the prosecution was "entitled to review and evaluate the evidence in its original form, while the Trial Chamber would only receive the prosecution's conclusions on the evidence or filtered information about its content."[94] In the Chamber's eyes, this amounted to an abuse of the prosecution's competences under Article 54(3)(e).

¶66 In this vein, the Trial Chamber boldly asserted that "the right to a fair trial—which is without doubt a fundamental right—includes an entitlement to disclosure of exculpatory material."[95] Absent disclosure, there is a violation of the rights of the accused, and this must lead to only one possible result. The Trial Chamber stated, "If, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary—indeed, inevitable—that the proceedings should be stayed."[96] The stay of proceedings was a strong assertion by the Chamber that the rights of the accused are paramount. After Lubanga had spent over two years in ICC custody, his trial appeared to be in limbo.

¶67 The June 13, 2008, Trial Chamber decision is also remarkable for its interpretation of Article 54(3)(e) and its finding that the prosecution improperly used the confidentiality provisions of Article 54(3)(e) in its agreements with information providers. To the Chamber, the meaning and purpose of Article 54(3)(e) is clear. It interprets the article to provide that:

> In highly restricted circumstances, the prosecution is given the opportunity to agree not to disclose material provided to it at any stage in the proceeding. The restrictions are that the prosecution should receive documents or information on a confidential basis **solely** for the purpose of generating new evidence—in other words, the only purpose of receiving this material should be that it is to lead to other evidence.[97]

Thus, Article 54(3)(e) allows the prosecutor, in exceptional circumstances, to receive information on the condition of confidentiality if the sole purpose of that information is to serve as "spring-board" evidence that will lead to the discovery of further materials.[98] Notably, such information cannot be used at trial.

¶68 However, in the Trial Chamber's eyes, the prosecution gave Article 54(3)(e) "a broad and incorrect interpretation: it . . . utilized the provision routinely, in appropriate circumstances, instead of resorting to it exceptionally, when particular, restrictive circumstances apply."[99] The prosecution entered into confidentiality agreements

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[94] Swoboda, *supra* note 61, at 469.
[95] Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements, *supra* note 1, at ¶ 77.
[96] *Id.* at ¶ 91.
[97] *Id.* at ¶ 71 (emphasis by Chambers).
[98] Swoboda, *supra* note 61, at 469.
[99] Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements, *supra* note 1, at ¶ 72.

habitually and for the purposes of gathering "spring-board" evidence *and* "lead" evidence.[100]

¶69 In contrast to Article 54(3)(e)'s original purpose, the Chamber stated:

> [The prosecution's] general approach [was] to use Article 54(3)(e) to obtain a wide range of materials under the cloak of confidentiality, in order to identify from those materials evidence **to be used at trial** (having obtained the information-provider's consent). This is the exact opposite of the proper use of the provision, which is, exceptionally, to allow the prosecution to receive information or documents **which are not to be used at trial** but which are instead intended to "lead" to new evidence. The prosecution's approach constitutes a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive information confidentially, in very restrictive circumstances.[101]

As the Chamber noted, the Prosecution used the provision in Article 54(3)(e) routinely instead of resorting to it in exceptional circumstances.

¶70 This conclusion was supported by a candid statement by the Deputy-Prosecutor at a May 6, 2008, status conference meeting:

> Of course, there was never any intention on the side of the Prosecutor…that these [Article 54(3)(e) confidential] materials were received only for lead purposes. The point was to obtain these materials as quickly as possible for the sake of the ongoing investigation and then allow the Office of the Prosecutor to identify the materials it wishes to use as evidence and then seek permission.[102]

This substantiates the Chamber's fear that from the very beginning of the investigations in the DRC, the prosecution broadly collected materials from informants on the condition of confidentiality with the presumption that it would use them as evidence at trial. Judge Sylvia Steiner repeatedly expressed her concern over the "reckless investigative techniques during the first two years of the investigation into the DRC."[103] Non-disclosed exculpatory evidence was also an issue in the second DRC case against Germaine Katanga and Mathieu Ngudjolo Chui.[104] It was suggested that both DRC cases illustrate that the ICC disclosure problems are rooted in the OTP's questionable investigatory practices, and not in the Rome Statute, ICC Rules, or even the Relationship Agreement with the UN.[105] The June 13, 2008, Trial Chamber decision appears to reflect this fear.

¶71 If the OTP began to gather confidential exculpatory evidence at the beginning of the DRC investigations, then it likely knew of the problem well before it raised the issue

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[100] *Id.*
[101] *Id.* at ¶ 73 (emphasis by Chambers).
[102] *Id.* at ¶ 72.
[103] Heikelina Verrign Stuart, *The ICC in Trouble*, 6 J. INT'L CRIM. JUST. 409, 412 (2008).
[104] *Id*. at 412-13.
[105] *Id.* at 413.

with the Chambers in late 2007. The OTP must have understood the quandary even during the "situation" phase. This brings up the question of who represented the interests of the defense when the use of confidential agreements containing exculpatory evidence first emerged in the "situation" phase. Since the *ad hoc* counsel was only allowed to address the specific issues raised by the Pre-Trial Chamber, the use of Article 54(3)(e) agreements could never have been challenged. Additionally, once Lubanga was appointed an individual attorney during the "case" stage, the defense had to rely on the good faith of the OTP. Lubanga's defense team was unable to address the issue of confidential exculpatory evidence on its own accord because its very knowledge of the dilemma was dependant on the OTP. However, the prosecution did not reveal the dilemma until well into the pre-trial process—just a few months before the trial was set to commence.

E. The Aftermath of the Stay of Proceedings

¶72 Not long after the Trial Chamber stayed the proceedings, the prosecution told the Chamber that it was continuing its discussions with the UN regarding the confidentiality restrictions under the Article 54(3)(e) agreements. On June 20, 2008, the prosecution announced that in "the absence of consent by the UN to lift the restrictions, a verbal agreement had been reached covering all the UN documents."[106] Judges would be allowed to view the potentially exculpatory evidence. The stay of proceedings seemed to have enhanced the prosecution's ability to negotiate with its informants.

¶73 On June 23, 2008, the Prosecutor filed a request to appeal the Trial Chamber's decision. On the following day, the Chamber set pre-requisites to be met by any application to lift the stay; any proposal allowing judges to view the potentially exculpatory material must allow for the Trial and Appeals Chamber to view, retain, and study the material in question.[107] One week later, the Trial Chamber I granted the Prosecutor's June 23 application to appeal the stay of the proceedings. It appeared that the prosecution had made progress in its negotiations with the information providers and that disclosure to judges was a viable solution.

¶74 However, on September 3, 2008, the Trial Chamber rejected the OTP's application to lift the stay of proceedings because: (1) the proposal failed to address any real prospect that NGOs will agree to any form of disclosure—an issue that affected twenty-one NGO documents; (2) the application unacceptably demanded that the Chamber return UN documents to the prosecution after an initial review and remove any quotes and paraphrases from the documents in the judges' notes, thereby preventing them from keeping the documents under review on a continuing basis throughout trial; (3) the proposals did not guarantee that the Trial Chamber could adequately review the documents in a way that was susceptible to full appellate review; and (4) there was no assurance that the prosecution would be able to disclose the exculpatory materials in the event that the Chamber decided that the documents should be turned over to the defense.[108] Despite the prosecution's negotiation efforts with the information providers, the Trial Chamber was still strongly concerned about the accused's fair trial rights.

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[106] Reason for Oral Decision Lifting the Stay of Proceedings, *supra* note 41, at ¶ 3.

[107] *Trial Chamber I Stated that it is Premature to Release the Accused*, INT'L CRIM. CT. PRESS RELEASE, June 24, 2008.

[108] Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1467, Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of

¶75 Faced with the very real prospect of an indefinite stay of proceeding, the OTP apparently placed enormous pressure on the information providers. A month and a half after the Trial Chamber rejected their application to lift the stay of proceedings, the prosecution submitted to the judges all relevant undisclosed documents received from information providers pursuant to Article 54(3)(e).[109] The informants ultimately agreed to give to the Trial Chamber, and if necessary, the Appeals Chamber, "complete and unfettered access to all the Article 54(3)(e) documents."[110] All of the documents, in non-redacted form, were submitted to the Chambers for the entirety of the trial.[111] This included ninety-three non-redacted documents—thirty-eight provided by the UN and fifty-five from various NGOs.[112]

¶76 In a dramatic showing of good faith, the prosecution included a range of options, in accordance with the wishes of the information providers, for the disclosure of evidence to the defense. These included (1) a non-redacted version of the documents, save for the identity of the information provider; (2) a redacted version of the documents, limited to names and identifying information; (3) a redacted version of the documents that removed other types of information; (4) summaries instead of the original documentation, including verbatim quotes on the relevant subjects; (5) admission of fact; (6) alternative evidence; and (7) documents disclosed in full, with restrictions as to the extent of their publication.[113] In addition to these proposals, the prosecution submitted a detailed analysis of each of the ninety-three documents in question, as well as a justification for partial disclosure and a proposed remedy.[114] These steps marked a sea change in the prosecution's ability and willingness to disclose potentially exculpatory evidence to the Chamber and the defense. It appeared that the Trial Chamber's repeated pressure on the OTP and its informants to find solutions to the problems of disclosure had succeeded. It remains unclear, however, why the OTP and the information providers took so long to reach a viable solution.

¶77 As these promising developments pertaining to disclosure unfolded, the Appeals Chamber still faced the prosecution's appeal of the stay of proceedings and the Trial Chamber's interpretation of Article 54(3)(e). It rendered its decision on October 21, 2008, unanimously upholding the Trial Chamber's findings. The Appeals Chamber reaffirmed that:

> (i) the Prosecutor may only rely on Article 54(3)(e) of the Statute for a specific purpose, namely in order to generate new evidence;
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> (ii) in its use of Article 54(3)(e), the prosecution must have regard to its obligations vis-à-vis the accused and apply the provision in such a manner that allows the Court to resolve the potential tension between the confidentiality to which the prosecution has agreed, and the requirements of a fair trial;

Proceedings," ¶ 40 (Sept. 3, 2008).

[109] Reason for Oral Decision Lifting the Stay of Proceedings, *supra* note 41, at ¶ 13.

[110] *Id.*

[111] *Id.* at ¶ 17.

[112] *Id.* at ¶ 18.

[113] *Id.*

[114] *Id.*

> (iii) the Trial Chamber must be allowed access to any material in possession or control of the prosecution which is subject to a confidentiality agreement under Article 54(3)(e), so that it can decide whether it is to be disclosed pursuant to Article 67(2). Any Chamber receiving such information must never order its disclosure without the prior agreement of the information provider;
>
> (iv) a conditional stay of proceeding may be the appropriate remedy where a fair trial cannot be held at the time that the stay is imposed, but where the unfairness to the accused is of such a nature that a fair trial might become possible at a later stage because of a change in the situation that led to the stay;
>
> (v) if the obstacles that led to the stay of proceedings fall away, the Chamber that imposed the stay of proceedings may decide to lift it, if this would not occasion unfairness to the accused person for other reason, in particular in light of his or her right to be tried without undue delay.[115]

¶78 This reaffirmation of the Trial Chamber's decision again demonstrates the ICC's deep concern over the rights of the accused. By insisting that confidential evidence can be obtained only when the evidence is used as a "springboard" to other materials, the ICC not only protects the accused against broad reaching confidentiality agreements shielding exculpatory evidence, but also forces the OTP to conduct more focused investigations.

¶79 In the Trial Chamber, the prosecution continued to submit previously undisclosed documents through November 2008. Various status conference hearings ironed out the methods of disclosure as the prosecution and Chambers negotiated the status of specific documents. Finally, on November 18, 2008, the Trial Chamber lifted the stay of proceedings and ordered the prosecution to disclose all evidence in question to the defense. By November 21, 2008, the prosecution had disclosed to the defense all items of evidence that were the subject of the stay of proceedings.

¶80 It is hard not to view the aftermath of the June 13 stay of proceedings as a success. The Chamber persistently declared that the accused's right to a fair trial is a fundamental right hindered by the non-disclosure of exculpatory evidence. The prosecution negotiated waivers of confidentiality with the UN and other information providers, and developed methods of disclosure that ensured the continued safety of on-the-ground informants. Although the trial's delay forced Lubanga to remain in custody while the proceedings against him were in limbo, he can be assured that his fundamental rights will be protected.

IV. THE *LUBANGA* EFFECT

¶81 The ability of informants to provide confidential information under Article 54(3)(e) is vital to the ICC's success. Since the ICC has to rely so heavily on the cooperation of

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[115] *Id.* at ¶ 14; Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I, *supra* note 3, at ¶¶ 1-5.

the UN, states, NGOs, and individuals during the investigatory stage, it must be able to accept information provided on conditions of confidentiality. Both the ICC and the informants benefit. The ICC is able to obtain critical on-the-ground information, and informants are less fearful of violent reprisals for talking to the ICC. However, as *Lubanga* illustrates there is a difference between providing confidential evidence that leads the Prosecution to further evidence and confidential evidence to be used at trial. Fair trials cannot be conducted on the basis of secret evidence. As one commenter wrote, "A court cannot pass judgment in acknowledged blindness—and it cannot leave it to the prosecution to decide whether potentially exculpatory, yet confidential evidence can be withheld from the defense because the evidence is too insignificant to make a difference to the finding of guilt or innocence."[116]

¶82 On the other hand, Mona Rishmawi, Legal Advisor for the Office of the UN High Commissioner for Human Rights, believes that *Lubanga*, the stay of proceedings, and the Chamber's urging of the UN to waive the condition of confidentiality could have drastic consequences both in the DRC and with the ICC's success at large. She states, "Given the nature of the UN operation on the ground, the nature of the crimes within the ICC jurisdiction, and the limited ability of the ICC at this stage to carry out serious witness protection work, this approach could seriously hamper the flow of information."[117] But this line of thinking in essence makes the OTP and the success of ICC investigations totally dependent on the UN and other information providers. When the prosecutor agrees to confidentiality, and this confidentiality is extended to virtually all provided material, a fair trial is essentially moot.[118]

¶83 As in all criminal trials, a balance must be struck between the rights of accused to challenge the evidence presented against him and the ability of the prosecutor to maintain the safety and confidentiality of his witnesses. However, when the prosecutor obtains confidential evidence, he must also build upon that evidence. He should not use that evidence as the foundation of his case, but rather as a stepping stone to find and understand independently obtained evidence. Had the OTP properly used the UN's evidence as a stepping stone to other information, rather than as lead evidence, the OTP would not have relied so heavily on confidential information for its case against Lubanga, and the issue of confidential exculpatory evidence might not have arisen.

¶84 *Lubanga* stands for one bright line rule that likely will pertain to future ICC cases: the prosecution cannot use Article 54(3)(e) confidentiality agreements in a broad attempt to generate sweeping evidence against the accused at trial. Rather, these agreements must be entered into only in circumstances where the confidential material provided is only used as a tool to generate additional information. Confidential evidence cannot serve as foundational evidence at trial and should not be the backbone of the investigation

¶85 This will undoubtedly affect the way the OTP conducts its investigations. It will conduct more thorough, independent investigations, but it will not be able to offer absolute confidentiality for any primary evidence. This will prove challenging because the OTP's investigations rely so heavily on the cooperation of the UN, states, NGOs and local inhabitants whose confidentiality protects them against violent reprisals. It is hard to guess if information providers will be less willing to talk to the ICC due to fear that their

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[116] Swoboda, *supra* note 61, at 470.
[117] *Discussion*, *supra* note 68, at 772.
[118] Stuart, *supra* note 103, at 414.

confidentiality will be revoked in the future. However, such fear would be unfounded because informants must give their consent to waive their confidentiality, and methods such as redactions can be used to protect the identities of confidential sources.

¶86 In addition to the strong rule against the overuse of Article 53(4)(e) agreements, there are other lessons to be learned from *Lubanga*. The *Lubanga* developments are particularly troubling because it is the first case before the Court, and the world is watching to see if the ICC's historic experiment in international criminal law will work. The signal to the world is not promising when the first case before the ICC is stayed because the prosecution failed to turn over potentially exculpatory evidence to the defense. Questions of competency and credibility are likely to shroud the OTP in all of its future efforts, including investigations and court fundraising. On the other hand, the *Lubanga* decision can serve to quell fears of prosecutorial abuse. It demonstrates the Court's steadfast resolve to protect the rights of the accused and challenge the OTP's authority. However, it simultaneously demonstrates the potential for a tremendous abuse of power by an unchecked prosecution.

¶87 Perhaps the most important lesson to be learned from *Lubanga* is that the ICC needs more robust defense representation at both the "situation" and "case" stages. The evidentiary issues presented in *Lubanga* could have been resolved during the "situation" phase had the Chamber allowed either the *ad hoc* or the OPCD attorneys to assert related claims. Additionally, Lubanga's individual counsel could have raised his concerns about confidential exculpatory evidence had the OTP brought the issue to the court's attention earlier. Finally, the OTP must address preliminary evidentiary issues such as these earlier in the process since it has the sole power to raise them, and the accused is completely dependent on the OTP's good faith.

V. CONCLUSION: UNDERSTANDING *LUBANGA* WITHIN THE CONTEXT OF THE DEFENSE SYSTEM

¶88 It is reassuring that the Trial and Appeals Chambers stayed the *Lubanga* proceedings out of concern for the rights of the accused. On the other hand, it remains alarming that the OTP entered into confidentiality agreements that shielded exculpatory evidence because the defense system relies so heavily on the prosecution's good faith cooperation. This tension reflects the troubling proposition that the disjointed defense system at the ICC creates an opportunity for prosecutorial abuse of power. The confusion over the disjointed "situation phase" relationship between the OPCD and unaffiliated counsel appointed on an *ad hoc* basis, and the relatively meager resources of defense "case" attorneys has created a hole in the fair trial rights of the accused. Defense interests stand at the mercy of the Chambers and the OTP.

¶89 Although procedural in nature, the *Lubanga* decision regarding confidential exculpatory is an effective illustration of how the disjointed structure of the ICC defense system interferes with the accused's right to a fair trial. The OTP began its investigation into the "situation" in the DRC in 2004. Lubanga was charged in early 2006. The OTP did not bring the issue of confidential exculpatory evidence to the Chamber until late 2007. Between 2004 and 2006 the only defense representation were the attorneys appointed on an *ad hoc* basis from either the Registry's list of outside counsel or from the OPCD. These *ad hoc* attorneys were not permitted to address Article 54(3)(e) issues. Thus, during the "situation" phase, no defense counsel was able to challenge the OTP's

misinterpretation and misuse of Article 54(3)(e) confidential agreements. Even during the "case" stage, Lubanga's counsel had to rely on the good faith efforts of the OTP to reveal the existence of the confidential exculpatory evidence dilemma. Instead, the prosecution did not inform the court of the issue until well into the pre-trial process.

¶90 It is comforting that the OTP raised the problem at all, but the lengthy delay remains troubling particularly in light of the fact that it is the articulated duty of the prosecution to disclose exculpatory evidence to the defense. Had the *ad hoc* defense counsel been able to address the problem of Article 54(3)(e) agreements earlier in the "situation" phase, or had Lubanga's individual "case" attorney been informed of the issue farther in advance, the stay of proceedings could have been avoided. Instead, the disjointed defense system threatened to undermine the legitimacy of the *Lubanga* proceedings, as it threatens to undermine the legitimacy of the ICC in general.