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# COMMENTS

## THE FUTURE OF THE INTERNATIONAL CRIMINAL COURT: THE LONG ROAD TO LEGITIMACY BEGINS WITH THE TRIAL OF THOMAS LUBANGA DYILO

Sara Anoushirvani

### INTRODUCTION

The idea of establishing an effective independent international criminal court has been in the making for decades. Since the end of World War I in 1919, the international community has made significant efforts to establish a permanent international criminal court.<sup>1</sup> The United Nations (“UN”) in particular has been instrumental in seeking to establish this type of Tribunal. The UN General Assembly’s passing of Resolution 260 on December 9, 1948, which adopted the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), paved the way for the establishment of a permanent Tribunal.<sup>2</sup> Resolution 260 further “invited the International Law Commission ‘to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide.’”<sup>3</sup> Almost fifty years later,

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<sup>1</sup> BASSIOUNI, M. CHERIF, *THE LEGISLATIVE HISTORY OF THE ICC STATUTE* 45 (2005).

<sup>2</sup> Article IV of the Genocide Convention provides, in pertinent part, that persons charged with genocide “shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction . . . .” United Nations Convention on the Prevention and Punishment of the Crime of Genocide, art. VI, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

<sup>3</sup> Rome Statute of the International Criminal Court, Overview, <http://untreaty.un.org/cod/icc/general/overview.htm> (last visited Feb. 14, 2010) (citing

the goal of establishing an international criminal court was attained after the General Assembly convened the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in Rome, Italy, from June 15 to July 17, 1998.<sup>4</sup>

The international community praised the creation of an independent and permanent international criminal court.<sup>5</sup> Then UN Secretary-General, Kofi Annan, commented that "[i]n the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision."<sup>6</sup> The International Criminal Court ("ICC") was created with the aspirations to achieve justice for all, end impunity, help end conflicts, remedy the deficiencies of ad hoc tribunals, take over when national criminal justice institutions are unwilling or unable to act, and deter future war criminals.<sup>7</sup> Moreover, "[a]n international criminal court has been called the missing link in the international legal system."<sup>8</sup> The Preamble to the Rome Statute further elaborates on the purposes and goals of the ICC by noting that crimes against humanity threaten the peace, security and well-being of the world; the most serious crimes must not go unpunished; effective prosecution must be ensured; and International Criminal Court jurisdiction shall complement national criminal jurisdiction.<sup>9</sup>

Though created with the best intentions, the ICC is now

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the Genocide Convention) [hereinafter Overview of the Rome Statute].

<sup>4</sup> *Id.*; Rome Statute for the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90, available at [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_glish.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_glish.pdf) [hereinafter Rome Statute]; see BASSIOUNI, *supra* note 1, at 45 (noting that achieving the goal of creating a permanent international criminal court "was slow and painstaking, but it was finally achieved").

<sup>5</sup> See, e.g., Letter from Kofi Annan, United Nations Sec'y-Gen., to Professor M. Cherif Bassiouni (Aug. 31, 1998) (noting that "[t]he adoption of the Rome Statute of an International Criminal Court marks a giant step forward in the march towards universal human rights and the rule of law").

<sup>6</sup> Overview of the Rome Statute, *supra* note 3.

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

<sup>8</sup> *Id.* The Overview further explains that since the International Court of Justice in The Hague handles only cases between States, not individuals, "individual responsibility as an enforcement mechanism, acts of genocide and egregious violations of human rights often go unpunished" in the absence of an international criminal court with a mandate to prosecute individuals. *Id.*

<sup>9</sup> Rome Statute, *supra* note 4, pmbl.

struggling to achieve and maintain legitimacy. In light of the ICC's treatment of its case against Thomas Lubanga Dyilo ("Lubanga"),<sup>10</sup> and in particular, the Tribunal's insistence upon upholding the principle of a defendant's right to a fair trial, the ICC has taken one step forward in establishing itself as a legitimate judicial institution. As the case against Lubanga is the first case ever tried at the ICC, the ICC's treatment of the case will have significant implications on the future of the Tribunal and international criminal law.

Part I of this note discusses the background of the case and introduces the competing provisions of the Rome Statute and the ICC's Rules of Procedure and Evidence, which have given rise to the principal legal issue in the case against Lubanga. Part I also analyzes the tension between competing provisions of the Rome Statute and the ICC's Rules of Procedure and Evidence. Article 54(3)(e) of the Rome Statute allows the Office of the Prosecutor ("the Prosecutor") to gather documents and information on a confidential basis solely for the purpose of generating new evidence.<sup>11</sup> This provision also forbids the Prosecutor from disclosing this evidence to the defendant without the consent of the information providers.<sup>12</sup> This raises serious concerns for the

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<sup>10</sup> On March 3, 2004, the situation in the Democratic Republic of the Congo was referred to the Prosecutor of the ICC and the Prosecutor's decision to open an investigation in the situation in the DRC was announced on June 23, 2006. *Chronology of the Thomas Lubanga Dyilo Case*, INT'L CRIM. CT. NEWSL. (Int'l Criminal Court, The Hague), Nov. 2006, at 1 [hereinafter ICC Newsletter No. 10], available at [http://www.icc-cpi.int/NR/rdonlyres/B75835\\_FA-167E-4E9D-BC37-06239D316DD4/146439/ICCNL10200611\\_En1.pdf](http://www.icc-cpi.int/NR/rdonlyres/B75835_FA-167E-4E9D-BC37-06239D316DD4/146439/ICCNL10200611_En1.pdf). On January 12, 2006, the Prosecutor submitted an application to the Chamber for the issuance of an arrest warrant for Lubanga. *Id.* On March 17, 2006, Lubanga was transferred to the ICC, where he has remained. *Id.* Nearly a year later, on January 29, 2007, the Pre-Trial Chamber I confirmed the charges against Lubanga. *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007) [hereinafter Decision on the Confirmation of Charges], available at <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf>. The international community began to closely monitor the case against Lubanga, as it was set to be the "first trial before the International Criminal Court and the first time that an individual has been brought before an international court solely on the basis of these crimes." Press Release, International Criminal Court, Child Soldier Charges in the First International Criminal Court Case (Aug. 28, 2006), available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/-Reports+and+Statements/Press+Releases/Press+Releases+2006>.

<sup>11</sup> Rome Statute, *supra* note 4, art. 54(3)(e).

<sup>12</sup> *Id.*

legitimacy of the proceedings, as this provision makes it entirely possible for the Prosecutor to possess, yet refuse to disclose to the defense, potentially exculpatory information. The Tribunal must strive to strike a proper balance between a defendant's right to a fair trial versus the reality of the Prosecutor's need to rely on information obtained on a confidential basis. This article analyzes the Tribunal's treatment of the case against Lubanga and focuses on the Tribunal's first attempt at addressing these competing tensions.

Part II of this note examines how other international courts, specifically the International Criminal Tribunal for the former Yugoslavia and the European Court of Human Rights have analyzed and decided similar legal issues (i.e., whether the discovery of potentially exculpatory information is a fundamental right and part of a defendant's right to a fair trial). Finally, Part III of this note discusses the likely impact of the ICC's treatment of the case against Lubanga on the ICC. Given that the case against Lubanga is the ICC's first case, it will undoubtedly have significant implications for the legitimacy of the ICC.

### I. THE ICC PREPARES FOR ITS FIRST TRIAL

The ICC's Pre-Trial Chamber I determined, based on the evidence presented to the Tribunal for the purpose of the confirmation hearing that, there was:

[S]ufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible [for] enlisting and conscripting children under the age of fifteen years into the FPLC<sup>13</sup> and using them to participate actively in hostilities within the meaning of Articles 8(2)(b)(xxvi) and 25(3)(a) of the [Rome] Statute from early September 2002 to 2 June 2003.<sup>14</sup>

Shortly after the confirmation hearing, Luis Moreno-Ocampo,

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<sup>13</sup> FPLC is the acronym for the *Forces Patriotiques pour la Libération du Congo*, the armed military wing of the *Union des Patriotes Congolais* ("UPC"). Decision on the Confirmation of Charges, *supra* note 10, at 6. On September 15, 2000, Lubanga was the first signatory of the statutes of the UPC and held a leadership position. *Id.* The UPC was renamed *Union des Patriotes Congolais/Réconciliation et Paix* (UPC/RP) in early September 2002, at which Lubanga becomes its President. *Id.* Lubanga also became the Commander-in-Chief of the FPLC. *Id.*

<sup>14</sup> *Id.* at 156.

the Chief Prosecutor of the ICC, made a statement at a Press Conference in which he emphatically stated that the case against Lubanga “is the first case, not the last . . . [and Lubanga’s] arrest is a step forward in realizing the Rome Statute vision - to end impunity and atrocities all over the world.”<sup>15</sup> Mr. Moreno-Ocampo further emphasized the importance of this case to the international community in an ICC Newsletter by stating that “[t]he Lubanga case is of historic magnitude for the fight against impunity and accountability for the commission of these crimes against children. This case will inevitably resonate far beyond the courtroom.”<sup>16</sup> The international community now continues to watch as the proceedings against Lubanga ensue.

After four and one-half years since the situation in the Democratic Republic of the Congo was referred to the ICC, and after one and one-half years since Lubanga has been confined at an ICC detention facility, on June 13, 2008, the ICC’s Trial Chamber I (“Trial Chamber”) rendered a decision imposing a conditional stay on the proceedings (“decision imposing stay”) concluding that “the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.”<sup>17</sup> Shortly thereafter, the Trial Chamber ordered the release of Lubanga pending a decision from the Appeals Chamber (“decision on release”).<sup>18</sup> The Trial Chamber’s decision nearly extinguished all hope of the ICC trying its first case on the merits.

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<sup>15</sup> Luis Moreno-Ocampo, Chief Prosecutor of the Int’l Criminal Court, Statement at Press Conference in Relation with the Surrender to the Court of Mr. Thomas Lubanga Dyilo, at 3 (Mar. 18, 2006), *available at* [http://www.icc-cpi.int/rdonlyres/699D1671-4841-4AAC-BFF41F1BF3F9DFEC/143842/LMO\\_20060318\\_En1.pdf](http://www.icc-cpi.int/rdonlyres/699D1671-4841-4AAC-BFF41F1BF3F9DFEC/143842/LMO_20060318_En1.pdf).

<sup>16</sup> ICC Newsletter No. 10, *supra* note 10, at 2.

<sup>17</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain other Issues Raised at the Status Conference on 10 June 2008, ¶¶ 93, 95 (Jun. 13, 2008) [hereinafter Decision imposing stay], *available at* <http://www.icc-cpi.int/iccdocs/doc/doc511249.PDF>. Instead of creating finality, the Court left Lubanga’s fate, and its legitimacy, up in the air. *See id.* (noting that “if the stay on the proceedings is lifted hereafter, at that stage [other issues not addressed in this decision] will be resolved”).

<sup>18</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Release of Thomas Lubanga Dyilo, ¶¶ 35-36 (July 2, 2008) [hereinafter Decision on release], *available at* <http://www.icc-cpi.int/iccdocs/doc/doc522804.PDF>.

On October 21, 2008, the Appeals Chamber confirmed the Trial Chamber's decision imposing a stay of the proceedings ("decision confirming stay").<sup>19</sup> On the same day, however, the Appeals Chamber rendered an additional decision reversing the Trial Chamber's decision on the release of Lubanga ("decision reversing release")<sup>20</sup> finding that the Trial Chamber used the incorrect analysis in ordering Lubanga's release.<sup>21</sup> Specifically, the Appeals Chamber concluded that "[i]f a Chamber imposes a conditional stay of the proceedings, the unconditional release of the accused person is not the 'inevitable' consequence and 'the only correct course' to take."<sup>22</sup> The Appeals Chamber further determined that "the Chamber will have to consider all relevant circumstances and base its decision on release or detention on the criteria in Articles 60 and 58(1) of the Statute."<sup>23</sup> This action undermined the ICC's struggle to achieve legitimacy by staying the proceedings yet reversing the release of Lubanga.

Principally at issue is a discovery dispute. The Prosecutor received over 200 documents, that are potentially exculpatory or which are material to the defendant's preparation.<sup>24</sup> Specifically, the Chamber was informed that "there are 'approximately' 95 items of potentially exculpatory material and 112 items which are 'material to defence preparation.'"<sup>25</sup> The Prosecutor refused to

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<sup>19</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled "Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain other Issues Raised at the Status Conference on 10 June 2008", at 3 (Oct. 21, 2008) [hereinafter Decision confirming stay], available at <http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf>.

<sup>20</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled "Decision on the Release of Thomas Lubanga Dyilo", at 3 (Oct. 21, 2008) [hereinafter Decision reversing release], available at <http://www.icc-cpi.int/iccdocs/doc/doc578365.pdf>.

<sup>21</sup> See *id.* ¶ 1.

<sup>22</sup> *Id.* ¶ 1.

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

<sup>24</sup> Decision imposing stay, *supra* note 17, ¶ 63.

<sup>25</sup> *Id.* The first 156 of the 207 documents at issue, were provided by the UN. *Id.* Prosecutor divided the undisclosed evidence into two categories: "evidence which would not materially impact on the Chamber's determination of the guilt or innocence of the accused and evidence which had that potential." Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Prosecution Submission on Undisclosed Documents Containing Potentially Exculpatory Information, ¶ 8

disclose the documents, relying on Article 54(3)(e) of the Rome Statute, which provides 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."<sup>26</sup> The Prosecutor further argued that not only could he refuse to disclose the documents, but that he is obligated to refuse disclosure unless the information provider has consented to the disclosure, pursuant to the Negotiated Relationship Agreement between the International Criminal Court and the United Nations and Rule 82(1) of the ICC Rules of Procedure and Evidence ("ICC Rules").<sup>27</sup> Article 18(3) of the Negotiated Relationship Agreement provides that:

The United Nations and the Prosecutor may agree that the

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(Mar. 28, 2008). Evidence that the Prosecutor argued could not impact the Chamber's decision as to Lubanga's guilt or innocence consists of: "evidence which purported to establish that children voluntarily joined the UPC/FPLC or were sent by their parents; *tu quoque* evidence which purported to establish the use of child soldiers by the Lendu or other armed groups in Ituri; reported benevolent acts by Thomas Lubanga Dyilo; material relating to the political nature of the UPC/FPLC and its aim of pacifying Ituri or references to it as an 'all-inclusive' organization; and information falling within the scope of Rule 77." *Id.* ¶ 15. The evidence which the Prosecutor acknowledged could materially impact the Court's determination of Lubanga's guilt or innocence included: "evidence indicating that [Lubanga] suffered from a mental condition; that he was intoxicated thus impairing his capacity to control, or understand the unlawfulness of, his conduct; that he was under duress or compulsion; that he acted in self-defence; that he made efforts to demobilize child soldiers; that he had insufficient command over people who committed the crimes with which he is charged; that the UPC/FPLC was under the control of Uganda, Rwanda and other countries." *Id.* ¶¶ 19-26. Lubanga claimed that the description of the categories of undisclosed potentially exculpatory materials were in fact exculpatory and should be disclosed. *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Defendant's Response to the "Prosecution's Submissions on Undisclosed Documents Containing Potentially Exculpatory Information," ¶¶ 14-19 (Apr. 22, 2008).

<sup>26</sup> Rome Statute, *supra* note 4, art. 54(3)(e).

<sup>27</sup> Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Jun. 7, 2004 [hereinafter Negotiated Relationship Agreement], available at [http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf); International Criminal Court Rules of Procedure and Evidence [hereinafter ICC Rules], available at [http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules\\_of\\_procedure\\_and\\_Evidence\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf).



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.<sup>28</sup>

Rule 82 (1) of the ICC further provides that “the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.”<sup>29</sup>

The Prosecutor defended the confidentiality agreements arguing that without the assistance of the UN and the documents provided under the agreements, it would not have been able to bring the case against Lubanga.<sup>30</sup> Moreover, the Prosecutor explained that the Office of the Prosecutor “depends upon the cooperation of information-providers who were working under very difficult conditions on the ground and who had made a deliberate decision that, in order to protect staff, their information must be confidential.”<sup>31</sup> The Prosecution further contended that, if the Tribunal refused to accept the realities for the UN and NGOs on the ground, the information providers would not provide evidence and that “there was no other option available.”<sup>32</sup> If the Prosecutor disclosed information obtained on a confidential basis, the information providers would lose the confidence of the victims and witnesses who provide the information. Also, in light of Lubanga’s charge of recruiting and conscripting child soldiers, many of the victims and witnesses are vulnerable children terrified of what could happen to them once the defendant becomes aware of their identities. If their confidence is lost, the information providers would not have any evidence to give to the Prosecutor and crimes could not be prosecuted.

The Prosecutor’s argument raises significant concerns about

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<sup>28</sup> Negotiated Relationship Agreement, *supra* note 27, art. 18.

<sup>29</sup> ICC Rules, *supra* note 27, R. 82(1).

<sup>30</sup> Decision imposing stay, *supra* note 17, ¶ 26 (citing Transcript of Hearing at 84, Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-T-52-ENG (Oct. 1, 2007)) [hereinafter Transcript of Oct. 1, 2007], available at <http://www.icc-cpi.int/iccdocs/doc/doc354143.PDF>.

<sup>31</sup> Decision imposing stay, *supra* note 17, ¶ 26.

<sup>32</sup> *Id.* at 12/44-13/44, citing to Transcript of Oct. 1, 2007, *supra* note 30, at 86.

the future of the ICC. There are currently three other pending cases at the ICC regarding the Situation in the Democratic Republic of the Congo (or "DRC").<sup>33</sup> If the information providers refuse to allow disclosure of the evidence in the case against Lubanga, it is likely that they would refuse to allow disclosure of the material provided under similar confidentiality agreements in the other cases. Given this potential, a resolution to this discovery dispute is evermore important in order to prosecute cases of alleged war crimes committed in the DRC.

Furthermore, if the Prosecution would not have been able to initiate an investigation in the DRC without the information provided by the UN under the confidentiality agreements,<sup>34</sup> there would be significant implications for the ICC. In particular, the inability to investigate and prosecute allegations of war crimes would undermine the purposes and goals of the ICC.<sup>35</sup> Certainly, there could be neither an end to impunity nor any help to end conflict without effective investigations and prosecutions. The ICC has and will continue to receive criticism until it in fact conducts a fair trial and renders a decision on the merits of a case.<sup>36</sup>

While the Trial Chamber's decision could receive criticism, at the same time, it serves to provide the ICC some standing and

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<sup>33</sup> Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06 (Apr. 28, 2008); Prosecutor v. Katanga, Case No. ICC-01/04-01/07 (July 2, 2007).

<sup>34</sup> See Decision imposing stay, *supra* note 17, ¶ 26 (arguing that it "would not have been able to initiate an investigation in the DRC without the information provided by the UN under the confidentiality agreements").

<sup>35</sup> See Rome Statute, *supra* note 4, pmbl. (stating that the most serious crimes must not go unpunished [and] effective prosecution must be ensured); see also Overview of the Rome Statute, *supra* note 3 (noting that the ICC was created with the aspirations of achieving justice for all, to end impunity, to help end conflicts, to remedy the deficiencies of ad hoc tribunals, to take over when national criminal justice institutions are unwilling or unable to act, and to deter future war criminals).

<sup>36</sup> See Decision imposing stay, *supra* note 17, ¶ 95 (admitting that the court's legitimacy could be called into question as a direct result of the Court not being in a position to reach a decision based on the merits of the case). Specifically, the Court stated that "[a]lthough the Chamber has no doubt that this stay of proceedings is necessary, it is nonetheless imposed with great reluctance . . . [w]hen crimes, particularly of a grave nature, are alleged it is necessary for justice that, whenever possible, a final determination is made as to the guilt or innocence of the accused. The judicial process is seriously undermined if a court is prevented from reaching a verdict on the charges brought against an individual." *Id.*

legitimacy as a result of its insistence upon upholding the bedrock principle of a defendant's right to a fair trial. In its decision, the Trial Chamber explained that "[t]he disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial."<sup>37</sup> The Prosecution's reliance on Article 54(3)(e) of the Rome Statute and its confidentiality agreements with the UN must not serve to circumvent the rights of a defendant. The Appeals Chamber explains that "the use of Article 54(3)(e) of the Statute must not lead to breaches of the obligations of the Prosecutor vis-à-vis the suspect or the accused person."<sup>38</sup> The Prosecutor, under Article 54(1)(c) of the Rome Statute, is obligated to "[f]ully respect the rights of persons arising under [the] Statute."<sup>39</sup> Furthermore, "[a] fundamental right of the accused person in proceedings before the Court is the right to disclosure of '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[s] evidence.'"<sup>40</sup> By imposing a stay on the proceedings, the ICC is emphasizing the importance of a fair trial.

The Appeals Chamber further emphasizes the importance of a fair trial by explaining that "[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed."<sup>41</sup> The Appeals Chamber supports its position by quoting the English Court of Appeal in *Huang v. Secretary of State*, which held that:

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<sup>37</sup> *Id.* ¶ 92. The Court further explained that "[t]he 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 improperly inhibiting the opportunities for the accused to prepare his defence; and [t]he Chamber has been prevented from exercising its jurisdiction under Articles 64(2), Article 64(3)(c) and Article 67(2), in that it is unable to determine whether or not the non-disclosure of this potentially exculpatory material constitutes a breach of the accused's right to a fair trial." *Id.*

<sup>38</sup> Decision confirming stay, *supra* note 19, ¶ 42.

<sup>39</sup> Rome Statute, *supra* note 4, art. 54(1)(c).

<sup>40</sup> Decision confirming stay, *supra* note 19, ¶ 42 (quoting Rome Statute, *supra* note 4, art. 67(2)).

<sup>41</sup> Decision confirming stay, *supra* note 19, ¶ 78.

It is the duty of a court: to see to the protection of individual fundamental rights which is the particular territory of the courts . . . . Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.<sup>42</sup>

The international community may claim that the ICC is valuing a defendant's rights over those of the victims'. However, while protecting victims and granting victims a voice in judicial proceedings are extremely important, they cannot be afforded at the expense of justice. Indeed, justice is, in part, a transparent and fair judicial system. At the heart of a transparent and fair judicial system is the right to a fair trial.

Moreover, if the ICC ruled in favor of the Prosecutor, by allowing the Prosecutor to keep potentially exculpatory material from the defendant, the ICC would likely have lost any and all legitimacy it currently possesses, as justice cannot exist if the defendant is denied a fair trial. The Prosecutor has a significant role in ensuring that a trial is fair. One international law scholar has explained that:

The international prosecutor is the representative of the international community. . . . The mandate given to him by the international community does not encompass working towards the conviction of any suspect, rather he must be convinced that every other possible chronology of events can truly be excluded. The prosecutor is obliged to the truth. Therefore he has to perform his duties in an objective manner. This is understood to imply more than just the proper conduct of the inquiry. Objectivity means that the prosecutor must actively seek for incriminating as well as exculpatory evidence.<sup>43</sup>

Additionally, it is important to note that in most criminal

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<sup>42</sup> *Id.* ¶ 78.

<sup>43</sup> CHRISTOPHER J.M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 367 (2001).

justice systems “the end is not just to punish somebody for a crime that occurred, but to find the person who has actually committed the offense. To punish by any means is therefore ruled out.”<sup>44</sup> This principle also serves to advance the ICC’s purpose of ensuring effective prosecution.<sup>45</sup> Accordingly, the Trial Chamber and the Appeals Chamber correctly concluded that, the defendant must receive all exculpatory material in order to receive a fair trial.

The Trial Chamber’s emphasis on a defendant’s right to a fair trial is highlighted in its decision imposing the stay, serving to further legitimize its decision and its role as an impartial international criminal tribunal. The Trial Chamber posed the question of whether the right to a fair trial includes the right to disclosure of potentially exculpatory material.<sup>46</sup> It then “unhesitatingly concluded that the right to a fair trial – which is without doubt a fundamental right – includes an entitlement to disclosure of exculpatory material.”<sup>47</sup> It reasoned that the trial could not fairly go forward given the prosecution’s inability to allow disclosure of potentially exculpatory documents.<sup>48</sup> Specifically, it noted that:

[T]he Bench has been prevented from assessing for itself the impact on the fairness of [the documents in question] should the evidence remain undisclosed, and the approach of the prosecution means, *inter alia*, that for purposes of Article 67(2), the Chamber could never, ‘in case of doubt,’ make a decision (because it will be unable to view the underlying material).<sup>49</sup>

Although the international community may have viewed the stay as an initial setback, it nonetheless cannot deny the underlying importance of the court’s reasoning and analysis.<sup>50</sup>

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<sup>44</sup> *Id.* at 18-19.

<sup>45</sup> See Rome Statute, *supra* note 4, pmbl. (noting that effective prosecution must be ensured).

<sup>46</sup> Decision imposing stay, *supra* note 17, at 34.

<sup>47</sup> *Id.* at 34.

<sup>48</sup> *Id.* at 38.

<sup>49</sup> *Id.* at 38-39.

<sup>50</sup> See ICC: Congo Ruling Victory for Justice, HUMAN RIGHTS WATCH, Nov. 18, 2008, available at <http://www.hrw.org/en/news/2008/11/18/icc-congo-ruling-victory-justice>. Param-Preet Singh, counsel in Human Rights Watch’s

In its decision confirming the stay, the Appeals Chamber provided further insight on a defendant's right to a fair trial, and further support for the proposition that the decisions add to the ICC's legitimacy. The Appeals Chamber opined that "[n]either the Rome Statute nor the Rules of Procedure and Evidence provides for a 'stay of proceedings' before the Court."<sup>51</sup> Nonetheless, it follows from Article 21(3) of the Statute that:

Where [a] fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped.<sup>52</sup>

The Appeals Chamber further explained that "[h]ad the Trial Chamber decided to go ahead with the trial, there would always have been lurking doubt as to whether the undisclosed material would have potentially changed anything for the outcome of the trial."<sup>53</sup> Moreover, "[k]nowledge of the existence of exonerating evidence not put before the Trial Chamber would cloud the proceedings with doubt, rendering them *a priori* inconclusive."<sup>54</sup> In light of the circumstances surrounding the case and the Prosecution's inability to turn over the potentially exculpatory documents, the ICC had no impartial choice but to impose a stay in order to maintain credibility.<sup>55</sup> Accordingly, if the case against Lubanga proceeded to trial and the ICC rendered a decision finding Lubanga guilty of the charges, even though Lubanga had not received the potentially exculpatory documents, the

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International Justice Program, noted that "[t]he judge's insistence on protecting the rights of the defendant also shows the ICC's commitment to fair trials." *Id.*

<sup>51</sup> Decision confirming stay, *supra* note 19, at 29.

<sup>52</sup> *Id.*

<sup>53</sup> Prosecutor Transcript of Hearing at 7, Prosecutor v. Dyilo, Case No. ICC 01/04-01/06 (Oct. 21, 2008) [hereinafter Transcript of Oct. 21, 2008], *available at* <http://www.icc-cpi.int/iccdocs/doc/doc578601.pdf>.

<sup>54</sup> Decision confirming stay, *supra* note 19, at 58.

<sup>55</sup> See Transcript of Oct. 21, 2008, *supra* note 53, at 10-11(emphasis added) (noting that "[a] fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.").

legitimacy of the ICC would be severely undermined.<sup>56</sup>

In order to protect its legitimacy, the ICC should not value expedience over rules of procedure established to ensure a fair trial. Former UN Secretary-General, Kofi Annan, emphasized the importance of fair trials by stating:

I reiterate what I said in my address at the opening of the Conference: The overriding interest must be that of the victims, 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 weak against the strong. It must demonstrate that an international conscience is a reality.<sup>57</sup>

Moreover, whether the ICC's first trial is considered "fair" is imperative to foster the Tribunal's legitimacy.<sup>58</sup>

The right to a fair trial also resonates in international law documents such as the International Covenant on Civil and Political Rights<sup>59</sup> and the Universal Declaration of Human Rights.<sup>60</sup> In fact, Article 67 of the Rome Statute, providing for "Rights of the accused,"<sup>61</sup> was modeled after Article 14(3) of the International Covenant on Civil and Political Rights, which is considered one of the principal human rights treaties.<sup>62</sup> The Universal Declaration of Human Rights,<sup>63</sup> the regional human

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<sup>56</sup> See Decision confirming stay, *supra* note 19, at 58 (noting that "[i]f the Trial Chamber was to embark upon the trial of the accused, this would be done with knowledge that the right of the accused to prepare his defence had been violated and that evidence supporting the accused's innocence was withheld with predictable consequences on the safety of the verdict of the court").

<sup>57</sup> Letter of the Secretary-General of the United Nations to the President of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (July 7, 1998).

<sup>58</sup> See Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 114 (2002) (opining that "[i]f trials are unfair, or perceived to be unfair, international criminal courts – the two ad hoc tribunals, the ICTY and the ICTR and the ICC might quickly lose legitimacy").

<sup>59</sup> International Covenant on Civil and Political Rights, Dec. 12, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>60</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>61</sup> Rome Statute, *supra* note 4, art. 67.

<sup>62</sup> WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 206 (2007). See also ICCPR, *supra* note 59.

<sup>63</sup> See Universal Declaration of Human Rights, *supra* note 60, arts. 10, 11(3). Article 10 provides that "[e]veryone is entitled in full equality to a fair

rights conventions,<sup>64</sup> and humanitarian law instruments<sup>65</sup> further protect and emphasize the right to a fair trial. International law scholar and commentator William A. Schabas further explained that:

The general right to a 'fair hearing' established in the *chapeau* of Article 67 of the Statute provides defendants with a powerful tool to go beyond the text of a Statute, and to require that the Court's respect for the rights of an accused keep pace with the progressive development of human rights law. Although Article 67 is placed with the provisions dealing with the trial itself, the right to a fair hearing applies at all stages of the proceedings, and even during the investigation, when no defendant has even been identified.<sup>66</sup>

It is extremely unlikely that the international community, believing in the importance of the rule of law, would accept an institution that would allow unfair trials to proceed. Moreover, the ICC, being a relatively new institution, would lose credibility and legitimacy. Without legitimacy, the ICC's goals would become unattainable and the ICC would fail to fulfill its mission set forth in the Preamble to the Rome Statute.<sup>67</sup>

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and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." *Id.* art. 10. Article 11(3) provides that "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." *Id.* art. 11(3).

<sup>64</sup> See Organization of American States, American Convention on Human Rights art. 8, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; European Convention on Human Rights art. 6, Sept. 3, 1953, 213 U.N.T.S. 221; African Charter on Human and Peoples' Rights art. 7, June 27, 1981, 21 I.L.M. 58, 60; Convention on the Rights of the Child art. 40, ¶ 2, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>65</sup> See Geneva Convention Relative to the Treatment of Prisoners of War arts. 84-87 and 99-108, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilians Persons in Time of War arts. 5, 64-76, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, Dec. 12, 1977, 1125 U.N.T.S. 3; Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6, Dec. 12, 1977, 1125 U.N.T.S. 609.

<sup>66</sup> SCHABAS, *supra* note 62, at 207.

<sup>67</sup> See ANTONIO CASSESE, 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 91 (2002) (explaining that "[t]he Rome Statute provides the



The ICC, however, undermines its own legitimacy by emphasizing the importance of a defendant's right to a fair trial, yet rendering its decision confirming a conditional stay and reversing the decision on Lubanga's release. The Trial Chamber, in its decision on the release of Lubanga, determined that "the inevitable result [of the stay] is that the Chamber must order the immediate release of the accused."<sup>68</sup> The Appeals Chamber disagreed with the Trial Chamber's analysis and reversed the decision.<sup>69</sup> The Appeals Chamber reasoned that "[i]f a Chamber imposes a conditional stay of the proceedings, the unconditional release of the accused person is not the 'inevitable' consequence or 'the only correct course' to take. Instead the Chamber will have to consider all relevant circumstances and base its decision on release or detention on the criteria in Articles 60 and 58(1) of the Statute."<sup>70</sup>

On remand, the Trial Chamber has been instructed to "take into account that the trial has been conditionally stayed, not permanently terminated. If the conditions for continued detention are not met, the Chamber will have to determine whether . . . release should be with or without conditions."<sup>71</sup> Specifically, the Trial Chamber must consider "whether further developments since the imposition of the conditional stay make it likely that the stay might be lifted in the not-too-distant future."<sup>72</sup> It further explained that "the Chamber must be vigilant that any continued detention would not be for an unreasonably long period of time, in breach of internationally recognised human rights<sup>73</sup> . . . [and] [i]f a Chamber concludes that the continued detention, or

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framework for an extraordinary new institution, but ultimately the Court's vitality and living impact will depend on the dedication and ability of its staff and the political support it receives from States and from the world public . . . [w]ith support, it can help deter some of the worst crimes and help uphold stability and the rule of law").

<sup>68</sup> Decision on release, *supra* note 18, at 15.

<sup>69</sup> Decision reversing release, *supra* note 20, at 3.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 15.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*, ICCPR, *supra* note 59, art. 9(3); Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(3), Nov. 4, 1950, 213 U.N.T.S. 2889 (protecting human rights and fundamental freedoms in Europe); American Convention on Human Rights art. 7(5), Nov. 22, 1969, 1144 U.N.T.S. 17955; African Charter on Human and Peoples' Rights art. 7(1)(d), June 27, 1981, 21 I.L.M. 58, 60.

the release only with conditions, is justified, it will have to review such a decision at short intervals.”<sup>74</sup>

Judge Georgios M. Pikis of the Appeals Chamber, in a separate opinion, criticized the majority’s rationale and decision. He explained that “contemplating [the] stay being lifted at an unspecified future time contradicts the order of the stay itself, founded as it was on the impossibility of holding a fair trial and wholly ignores the timeliness of the proceedings as an element of a fair trial, not to mention its expeditiousness.”<sup>75</sup> Moreover, “[a]uthority to lift [the] stay would leave the accused answerable to charges for an indefinite period of time, theoretically in perpetuity, in breach of his right to be tried without undue delay; a right associated with certainty respecting his status and rights as a human being.”<sup>76</sup> In light of customary international law and agreements,<sup>77</sup> the ICC’s decision to allow further detention, while dismissing the appeal, will undoubtedly cast some doubt over the legitimacy of the ICC.

Judge Pikis also pointed out the contradictory nature of the ICC’s treatment of Lubanga. Since the Trial Chamber found that it would be “impossible”<sup>78</sup> to conduct a fair trial, Judge Pikis explained that “[t]he likelihood of holding an expeditious trial after the stay of proceedings on grounds of impossibility of holding a fair trial cannot be envisioned. *It is a contradiction in terms.*”<sup>79</sup> Furthermore, he comments on the treatment of Lubanga and notes that “[i]t is hardly [a] humane treatment to

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<sup>74</sup> Decision reversing release, *supra* note 20, at 15.

<sup>75</sup> Decision confirming stay, *supra* note 19, at 59.

<sup>76</sup> Decision reversing release, *supra* note 20, at 23-24 (internal citation omitted).

<sup>77</sup> See ICCPR, *supra* note 59, art. 9, which provides, in pertinent part, that “[a]nyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release.” *Id.* art. 9 (3). Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, provides, in pertinent part, that “No one shall be deprived of his liberty save . . . in accordance with a procedure prescribed by law . . . [and the accused] shall be entitled to trial within a reasonable time or to release pending trial.” *Id.* art. 5(1)(c) and 5(3). Article 7 of the American Convention on Human Rights, “Pact of San Jose, Costa Rica,” Nov. 22, 1969, 1144 U.N.T.S. 17955, provides, in pertinent part, that “[a]ny person detained . . . shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings.” *Id.* art. 7(5).

<sup>78</sup> Decision on release, *supra* note 18, at 15.

<sup>79</sup> Decision reversing release, *supra* note 20, at 24-25 (emphasis added).

expect the accused to live under the burden of accusation for an indefinite or uncertain period of time, while prevented from asserting his innocence before a court of law.”<sup>80</sup> Allegations of contradictory and inhumane treatment by a sitting Judge on the Appeals Chamber certainly do not evince an efficient and legitimate Tribunal. Despite this criticism, the ICC will not lose all legitimacy, given its insistence upon upholding the bedrock principle of the right to a fair trial.

While considering the rights of the accused, the Tribunal must also consider the rights of the victims and community members. Victims of the atrocities committed in the DRC oppose the release of Lubanga, arguing that if Lubanga is released without ever being tried, “the sense of the people of the country that the perpetrators of grave crimes . . . will be undermined or destroyed; sequentially it will cultivate a sense of impunity on the part of the perpetrators of grave crimes.”<sup>81</sup> One of the victims’ advocates added that if the ICC releases Lubanga, “the victim[s] will experience remorse or regret for coming to the Court, a step reduced to inconsequentiality.”<sup>82</sup> More importantly, the ICC must be aware of the witnesses’ and victims’ safety.<sup>83</sup> Furthermore, in light of the current state of the Democratic Republic of the Congo and the lack of respect for the rule of law, it is unlikely that the alleged war criminals could be ensured a fair trial there.<sup>84</sup>

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<sup>80</sup> *Id.* at 25.

<sup>81</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC 01/04-01/06, “Observations on the Prosecutor’s appeal against the Decision of 2 July 2008 ordering the release of the accused” ¶ 7 (Aug. 12, 2008); Prosecutor v. Lubanga Dyilo, Case No. ICC 01/04-01/06, Observations of the Legal Representative of Victim a/0105/06 Regarding the Release of Lubanga Dyilo ¶ 17 (Aug. 12, 2008).

<sup>82</sup> *Id.* ¶ 18.

<sup>83</sup> See Prosecutor v. Lubanga Dyilo, Case No. ICC 01/04-01/06, Decision on the prosecution and defence applications for leave to appeal the Trial Chamber’s “Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters” (Dec. 16, 2008). In denying the defendant’s contention on the prosecution’s disclosure obligation, the Trial Chamber I noted that “[i]t is to be observed that the protection of individuals or organizations lay at the heart of the agreements reached under [Article 54].” *Id.*

<sup>84</sup> Mary Will, Note, *A Balancing Act: The Introduction of Restorative Justice in the International Courts*, 17 J. TRANSNAT’L L. & POL’Y 85, 101 (2007). Congolese justice system not equipped to handle international crimes with so many victims. This is precisely why “the Congolese victims put their hope in the International Criminal Court.” *Id.* (citing Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, at 76 (Nov. 9, 2006), available at <http://www.icc-cpi.int/iccdocs/doc/doc216086.PDF>).

Justice for victims is extremely important and the ICC must be sensitive not only to the submissions of the participating victims but to the people remaining in the Democratic Republic of the Congo who are subject to the atrocities being committed in their country. Nonetheless, “[h]uman rights . . . aim to sustain the core of humanity and the right to a fair trial is amongst the most consequential ones. Laxity in their protection beholds, as history teaches, great dangers for humanity, such that no court of law should countenance.”<sup>85</sup> In light of the importance of the right to a fair trial and the fact that the ICC upheld this standard, the ICC is moving closer to achieving legitimacy.

## II. EXAMINATION OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND THE EUROPEAN COURT OF HUMAN RIGHTS’ INTERPRETATIONS OF SIMILAR LEGAL ISSUES

In its reasoning for imposing the stay, the Tribunal “unhesitatingly concluded that the right to a fair trial – which is without doubt a fundamental right – includes an entitlement to disclosure of exculpatory material.”<sup>86</sup> To support this conclusion, the Court looked to Article 67(2) of the Rome Statute as well as relevant international jurisdiction.<sup>87</sup> In particular, the Court reviewed jurisprudence of the European Court of Human Rights (“ECtHR”) and the International Criminal Tribunal for the former Yugoslavia (“ICTY”).<sup>88</sup> The Tribunal also specifically noted relevant portions of the ICTY’s reasoning in the cases of *The Prosecutor v. Krstic*,<sup>89</sup> *The Prosecutor v. Oric*,<sup>90</sup> and *The Prosecutor*

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<sup>85</sup> Decision reversing release, *supra* note 20, at 15.

<sup>86</sup> Decision imposing stay, *supra* note 17, at 34.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (citing *V. v. Finland*, App. No. 40412/98, Eur. Ct. H.R. ¶ 74 (2007)), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=815825&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, in which the European Court of Human Rights stated that “both [the] prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party . . . prosecution authorities [must] disclose to the defence all material evidence in their possession for or against the accused”).

<sup>89</sup> *Id.* (citing *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgment, ¶ 180

*v. Brdanin and Talic*<sup>91</sup> to support its conclusion that Lubanga would be denied his right to a fair trial without the disclosure of potentially exculpatory material.<sup>92</sup> The Tribunal also drew its rationale from the ECtHR citing the cases of *Rowe & Davis v. U.K.*<sup>93</sup> and *Jasper v. U.K.*<sup>94</sup> The Tribunal determined that, in light of the jurisprudence of the ECtHR and the ICTY, it must impose a stay of the proceedings until such time as would render it possible to hold a fair trial (i.e., when the prosecution would agree to turn over the potentially exculpatory documents in question).

The Appeals Chamber of the ICTY in *Krstic* stated that “[t]he disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached.”<sup>95</sup> In *Oric*, the Trial Chamber noted that “[t]he jurisprudence of the Tribunal is clear that, in pursuit of justice, the disclosure of [exculpatory] Material to the Defence is of paramount importance to ensure the fairness of proceedings before [the] Tribunal.”<sup>96</sup> The Trial Chamber also

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(Apr. 19, 2004), *available at* <http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf>.

<sup>90</sup> *Id.* at 35 (citing Prosecutor v. Oric, Case No. IT-03-68-T, Decision on ongoing complaints about prosecutorial non-compliance with Rule 68 of the Rules, ¶ 20 (Dec. 13, 2005), *available at* <http://www.icty.org/x/cases/oric/tdec/en/051213.htm>).

<sup>91</sup> *Id.* (citing Prosecutor v. Brdanin & Talic, Case No. IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, ¶ 19 (May 23, 2002), *available at* <http://www.icty.org/x/cases/brdanin/tdec/en/020523.pdf>).

<sup>92</sup> See Decision imposing stay, *supra* note 17, at 34-35.

<sup>93</sup> *Id.* at 36-37 (citing Rowe & Davis v. United Kingdom, App. No. 28901/95, Eur. Ct. H.R., Judgment, ¶ 66 (Feb. 16, 2000), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ROWE&sessionid=37977910&skin=hudoc-en>).

<sup>94</sup> *Id.* at 37 (citing Jasper v. U.K., App. No. 27052/95, Eur. Ct. H.R., Judgment, ¶ 56 (Feb. 16, 2000), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=27052/95&sessionid=37978501&skin=hudoc-en>).

<sup>95</sup> *Id.* at 34 (citing Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, ¶ 180 (Apr. 19, 2004), *available at* <http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf>).

<sup>96</sup> *Id.* at 34-35 (citing Prosecutor v. Oric, Case No. IT-03-68-T, Decision on ongoing complaints about prosecutorial non-compliance with Rule 68 of the Rules, ¶ 20 (Dec. 13, 2005), *available at* <http://www.icty.org/x/cases/oric/tdec/en/051213.htm>).

emphasized in *Talic* that, although it may be “necessary in some cases to withhold certain material from the defence, so as to safeguard an important public interest,” nonetheless “the public interest . . . is excluded where its application would deny to the accused the opportunity to establish his or her innocence.”<sup>97</sup> In light of the ICTY’s reasoned decisions and the disclosure issues at bar, the ICC made a logical decision upholding established principles of fairness, by imposing the stay.

Similarly, the jurisprudence of the ECtHR provided further support for the ICC’s decision imposing the stay. The Grand Chamber of the ECtHR in *Rowe & Davis v. United Kingdom*<sup>98</sup> noted that the right to disclosure is not an absolute right.<sup>99</sup> Nonetheless, it emphasized that “[a] procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh[s] this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1 [right to a fair trial].”<sup>100</sup> This approach and emphasis on a defendant’s right to a fair trial has been confirmed in several subsequent decisions of the European Court of Human Rights.<sup>101</sup> Moreover, demonstrating the need for judicial control over discovery disputes, the ECtHR noted in *Jasper v. United Kingdom* that “[t]he fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important, safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld.”<sup>102</sup> The ICC’s decision imposing a stay of proceedings pending resolution of the discovery disputes was made in accordance with the wise reasoning set forth in the jurisprudence of the ECtHR.

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<sup>97</sup> *Id.* at 35 (citing Prosecutor v. Brdanin & Talic, Case No. IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, ¶ 19 (May 23, 2002), available at <http://www.icty.org/x/cases/brdanin/tdec/en/020523.pdf>).

<sup>98</sup> *Rowe & Davis v. United Kingdom*, App. No. 28901/95, Eur. Ct. H.R., Judgment, ¶ 66 (Feb. 16, 2000).

<sup>99</sup> *Id.* ¶ 61.

<sup>100</sup> *Id.* ¶ 63.

<sup>101</sup> See *Condrón v. United Kingdom*, App. No. 35718/97, 31 Eur. H.R. Rep. 1, 65 (2001); *Atlan v. United Kingdom*, App. No. 36533/97, 34 Eur. H.R. Rep. 33, 38 (2002); *Dowsett v. United Kingdom*, App. No. 39482/98, 38 Eur. H.R. Rep. 41, 44 (2004); *V. v. Finland*, ¶ 78.

<sup>102</sup> *Jasper*, 30 Eur. H.R. Rep., ¶ 56.

The ICC is progressing toward achieving legitimacy by supporting its decision to impose the stay of proceedings with established jurisprudence of the ECtHR and the ICTY, along with a permanent court and an ad hoc war crimes tribunal. To the contrast, the Tribunal would be taking a step backward if it completely disregarded established, well-reasoned jurisprudence.

### III. IMPLICATIONS OF THE DECISION LIFTING THE STAY

On remand before the Trial Chamber I, nearly one month after the decision by the Appeals Chamber staying the proceedings, the Trial Chamber I determined that since the Prosecution was able to come to an agreement with the UN and the information gatherers, “the reasons for imposing the stay and thereafter for retaining it have fallen away,”<sup>103</sup> and subsequently set a trial date for the ICC’s first case to commence.<sup>104</sup> The Tribunal further explained that it had “originally imposed the stay of proceedings because the Chamber was not to be permitted to assess for itself the impact of the fairness of these proceedings if evidence was to remain undisclosed.”<sup>105</sup>

In light of the fact that Lubanga’s trial is the first trial before the ICC, the proceedings will undoubtedly have significant implications on the future of the Tribunal. First, human rights workers have noted that “[t]he work of the ICC is important because it sends the signal that [unaccounted-for war crimes are] coming to an end.”<sup>106</sup> Second, “so long as government rewards warlords and doesn’t punish them then impunity will continue.”<sup>107</sup>

It is also important to note that this trial may have an impact on the way war crimes are viewed, both by the international community seeking the promotion of human rights and

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<sup>103</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Status Conference Transcript, at 3 (Nov. 18, 2008), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc586028.pdf> [hereinafter Transcript of November 18, 2008, hearing].

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2.

<sup>106</sup> See Karen Allen, *Congo Trial Starts Road to Justice*, BBC NEWS, Jan. 25, 2009, <http://news.bbc.co.uk/1/hi/world/africa/7850357.stm>.

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

accountability and by alleged war crimes violators.<sup>108</sup> The commencement of trial, after the disclosure obligations have been met, is certainly a step in the right direction toward achieving the goals set forth in the Preamble to the Rome Statute.<sup>109</sup>

The creation and efficient functioning of a new institution must begin somewhere. A fair trial of Thomas Lubanga is an essential step in attaining an effective and legitimate ICC. One commentator has noted that “[a]lthough the [Lubanga] case is relatively minor, focusing only on two counts of war crimes, it was a ‘*Tadić* case’ with which the ICC could demonstrate how it would begin discharging its judicial functions.”<sup>110</sup> The *Tadić* case was the first proceeding before the International Criminal Tribunal for the former Yugoslavia and “was a case against a relatively ‘small’ accused that should have probably never been tried before an international tribunal . . . .”<sup>111</sup> Nonetheless, it has been noted that the *Tadić* trial “turned out to be the ideal test for an international judicial institution to prove that it could function effectively, dispensing fair and effective justice for international crimes.”<sup>112</sup> Similarly, the Lubanga trial could be the ideal test for the ICC to prove its legitimacy. Indeed, the ICC has already proved that it is committed to ensuring a defendant’s right to a fair trial by imposing a stay after determining that potential exculpatory documents were not disclosed.<sup>113</sup>

While in this initial trial, the Tribunal has insisted upon upholding a defendant’s right to a fair trial, it must maintain this bedrock principle in subsequent cases. “In a discussion of legitimacy and international institutions Julian Ku has drawn from Robert Dahl’s formulation that a government is said to be ‘legitimate’ if the people of government possess the quality of ‘rightness,’ propriety, or moral goodness — the right, in short, to

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<sup>108</sup> See *id.* (noting that children’s charities “warn that the trial could have far-reaching implications for the use of child soldiers worldwide” and that “the Lubanga trial is crucial”).

<sup>109</sup> See Samantha Power, *The ICC Can Serve the U.S.*, WALL ST. J. (Europe), July 11, 2002, at A10.

<sup>110</sup> Salvatore Zappalá, *Lubanga Before the ICC*, 6 J. INT’L CRIM. JUST. 467, 468 (2008).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 469 n.3.

<sup>113</sup> See generally Decision imposing stay, *supra* note 17; see also Decision confirming stay, *supra* note 19.



make binding rules.”<sup>114</sup> Furthermore, “the question of the legitimacy of a rule or a system cannot be kept wholly distinct from the fairness of its substantive content.”<sup>115</sup> If the ICC cannot make binding rules, such as upholding the right to a fair trial under Rule 67, the Tribunal will likely be seen as a weak and arbitrary political body and will quickly lose its legitimacy.

World opinion, including the opinions of victims, is essential for legitimacy. If victims of war crimes do not feel as if the Tribunal is working in the interest of justice, the Tribunal cannot attain legitimacy. The commencement of the trial against Lubanga serves to further legitimize the Tribunal in the eyes of the victims in the DRC.<sup>116</sup> The Council for Human Rights Watch’s International Justice Program commented that the decision lifting the stay “assures that victims will have the chance to see Lubanga face justice . . .”<sup>117</sup> The Council further explained that “[t]he suspension of the trial caused significant confusion and disappointment among affected communities . . .”<sup>118</sup> where those in support and in opposition of Lubanga awaited a trial on charges of conscripting and enlisting child soldiers.<sup>119</sup> Moreover, in order for a community to perceive the ICC as legitimate, “[i]t is vital for affected communities to have accurate information on developments in the case”<sup>120</sup> and “[i]f the court is serious about making justice meaningful to those most affected, it needs to find effective ways of reaching them and explaining what happened and why.”<sup>121</sup> In light of the lifting of the stay, victims and members of the Democratic Republic of the Congo’s community may finally be one step closer to witnessing justice.<sup>122</sup>

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<sup>114</sup> Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT’L L. & POL. 583, 653 n.213 (2007).

<sup>115</sup> *Id.* at 673 n.214.

<sup>116</sup> See Decision imposing stay, *supra* note 17, at 42. The judges admitted that by staying the proceedings “the victims [had] . . . been excluded from justice.” *Id.*

<sup>117</sup> ICC: Congo Ruling Victory for Justice, *supra* note 48.

<sup>118</sup> *Id.*

<sup>119</sup> See *id.* (explaining that “Lubanga’s supporters in Ituri have also sought to use the suspension as proof of Lubanga’s innocence”).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See Interview by Jeremy Paxman of the BBC with Luis Moreno-Ocampo, ICC Chief Prosecutor, in U.K. (Jan. 27, 2009) [hereinafter Moreno-Ocampo,

To the contrary, if the trial against Lubanga would not have proceeded, the Tribunal's legitimacy in the eyes of the victims and members of the community would have been severely undermined.<sup>123</sup> One of the Victim's Advocates described the terrible state of the war-torn Ituri region while arguing before the ICC that Lubanga should not be released pending the commencement of the trial.<sup>124</sup> The Victim's Advocate further explained that "new armed groups have sprung to light, and they are sowing death and distress. Such a release [of Lubanga] would only encourage them, and it would emphasise not only impunity, it would also emphasise that if proceedings are blocked, then it would encourage impunity."<sup>125</sup> In light of the commencement of Lubanga's trial, a message has been sent to Congolese warlords that the ICC is now in a position to prosecute war crimes in the DRC and, furthermore, that violators will be held accountable for their crimes.

The ICC, and in particular the Office of the Prosecutor, has been criticized for delays during pre-trial proceedings and the cost of putting one single defendant on trial.<sup>126</sup> In an interview with the BBC, the ICC's Chief Prosecutor, Luis Moreno-Ocampo, articulated his view of the significance of the Lubanga trial.<sup>127</sup> In particular, he explained that the international community should not be focusing on the number of trials that the ICC has held.

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Interview], available at <http://news.bbc.co.uk/2/hi/programmes/newsnight/7853594.stm>. When asked the significance of the trial, the Chief Prosecutor explained that for the "people of Ituri it makes an absolute difference." *Id.*

<sup>123</sup> See LUBANGA TRIAL: A LANDMARK CASE, OPEN SOCIETY JUSTICE INITIATIVE, available at <http://lubangatrial.org> (noting that "[c]hildren's organizations and human rights activists welcomed the arraignment of Lubanga as a step toward the protection of children's rights and a first step towards ending impunity").

<sup>124</sup> See Transcript of November 18, 2008, hearing, *supra* note 103 (opining that "the security situation on the ground in Ituri is a problem today . . . . We think that it is not appropriate at this time to [release Lubanga] because the situation on the ground does not allow for this.").

<sup>125</sup> *Id.*

<sup>126</sup> See Transcript of November 18, 2008, hearing, *supra* note 103, at 34 (opining that the "security situation on the ground in Ituri is a problem today . . . . We think that it is not appropriate at this time to [release Lubanga] because the situation on the ground does not allow for this.").

<sup>127</sup> Moreno-Ocampo, Interview, *supra* note 122. See also *Lubanga Trial: A Landmark Case*, *supra* note 121. Mr. Moreno-Ocampo further explained the significance of the charges against Lubanga stating that, "[t]urning children into killers jeopardizes the future of mankind." *Id.*

Rather, it is more important to focus on future implications.<sup>128</sup> Mr. Moreno-Ocampo explained that the Tribunal is in the process of creating international criminal jurisprudence and, as such, the measurement of achievement is “not the number of trials in the court, it’s the impact of the trial on the world.”<sup>129</sup> Responding to criticism regarding the Tribunal’s budget, he further explained that if “one trial in The Hague [could change] how armies around the world work . . . that is cost efficiency[—] . . . one trial, [with a] global impact . . .”<sup>130</sup> He also emphasized the importance of the Tribunal’s work by explaining that “we are [in] a new era [of] . . . ending impunity . . .”<sup>131</sup> Moreover, accountability for alleged war crimes, justice for victims and national reconciliation, along with other aspirations for the ICC, cannot be measured in terms of monetary value.

### CONCLUSION

After the International Criminal Tribunal for Rwanda issued the first-ever genocide conviction by an international tribunal, former U.N. Secretary-General, Kofi Annan, expressed his desire for effective and legitimate war crimes tribunals. He stated, “[f]or there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law.”<sup>132</sup> It is certainly the hope of the international community that the ICC will attain legitimacy and in turn provide justice with respect for human rights and the rule of law.

The creation of the ICC took many years and, now that it is in existence, some expect immediate results, including fair trials and prosecutions. While the ICC’s first case was caught in pre-trial procedures and disputes for over four and one-half years, the ICC nonetheless determined that it must value the right of a fair trial over expediency. The ICC’s treatment of this case illustrates that while the functioning of an impartial judicial institution will

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<sup>128</sup> Moreno-Ocampo, Interview, *supra* note 122.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> International Criminal Court of Rwanda, Basic Documents and Case Law 2001-02, at 2, <http://www.icttr.org/ENGLISH/library/ICTR.CD.LLET.PM.pdf> (quoting Kofi Annan, U.N. Secretary General).

take time, a fair and legitimate proceeding is indeed possible. A fair trial of Thomas Lubanga is an essential step in attaining an effective and legitimate ICC. In light of the ICC's treatment of the case against Thomas Lubanga, the ICC has taken a step in the proper direction to demonstrate to the international community that it is a legitimate judicial institution.