POLICING INTERNATIONAL PROSECUTORS

JENIA IONTCHEVA TURNER*

A recurring question in international criminal procedure is how to ensure that prosecutors are held accountable for their errors and misconduct. When International Criminal Court (ICC) judges encountered the first serious error by the prosecution in Prosecutor v. Lubanga, *they opted for an absolutist approach to remedies: the judges stayed the proceedings and ordered the release of the defendant. Although termination of the case was avoided through the intervention of the Appeals Chamber, the standoff between the judges and the prosecution highlighted the dilemmas that the ICC faces in these circumstances. To protect the integrity of its proceedings, the court must order remedies that effectively punish misconduct. At the same time, sweeping remedies may harm other interests of international criminal justice, including deterrence, retribution, and the establishment of an accurate historical record.*

In its more recent decisions, the ICC has acknowledged these competing interests and weighed them in determining remedies for prosecutorial misconduct. This Article argues that the court should fully and openly embrace a balancing approach to remedies. Because of the gravity and systematic nature of international crimes, it is essential to recognize and accommodate the significant interests of the international community and victims in preventing impunity and establishing an accurate record of the crimes.

The balancing approach is not without shortcomings—it can be unpredictable, and it risks weakening enforcement of defendants' rights. To avoid these dangers, the court should take several concrete steps in conducting the balancing analysis: specify clearly the factors that will guide it; place special importance on the fair trial rights of the

* Professor, Southern Methodist University Dedman School of Law. I thank Jeff Bellin, William Bridge, Anthony Colangelo, Meg deGuzman, Stuart Ford, Håkan Friman, Jeff Kahn, Maximo Langer, Milan Markovic, Fred Moss, Kelly Pitcher, Meghan Ryan, Sonja Starr, John Turner, Alex Whiting, and participants in the 2011 Annual Meeting of the International Society for the Reform of Criminal Law, the 2011 Meeting of the International Criminal Law Interest Group of the American Society of International Law, the 2012 ASIL Research Forum, and the Grotius Centre's Conference "ICC at 10: The Law and Practice of the International Criminal Court" for their helpful comments and questions. I also thank Briget daGraca and Amber Reece for their outstanding research assistance.

defendant; temper remedies only when a significant and legitimate goal of the international criminal justice system warrants it; and finally, develop a broader range of responses to prosecutorial misconduct, including sentence reductions, partial dismissals, fines, and disciplinary referrals. By applying a well-defined balancing analysis, the ICC can achieve an approach to prosecutorial misconduct that is both effective and able to accommodate the competing interests of international criminal justice.

I. INTRODUCTION

A recurring question in international criminal procedure is the accountability of prosecutors for their errors and misconduct. It was a question that troubled U.S. negotiators of the Rome Statute of the International Criminal Court ("ICC"),[1] and it is one that the ICC, now years after it has begun operations, has yet to resolve. Although ICC prosecutors have completed only one trial so far, their missteps have made headlines and threatened to derail the progress of cases.[2]

How to respond to such prosecutorial mistakes is an issue that continues to be debated even in well-established domestic systems.[3] But it has an added urgency at the international

1. Alison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 514 (2003); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 81–82 (2001–02).

2. Marlise Simons, *For International Criminal Court, Frustration and Missteps in Its First Trial*, N.Y. TIMES, Nov. 22, 2010, at A12.

3. *See generally* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L. J. ONLINE 203 (2011), http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/volume-121; Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010).

level. Because of the gravity of the crimes and the unique goals of international criminal justice, the dilemmas presented by prosecutorial misconduct are more acute.

In *Prosecutor v. Lubanga*, the ICC's first case, these dilemmas came to the fore before the trial had even begun. Thomas Lubanga, a notorious Congolese militia leader, was charged with war crimes for recruiting and using child soldiers.[4] Several months before trial, prosecutors informed the Trial Chamber that they had discovered more than two hundred documents containing potentially exculpatory evidence or evidence material to the defense.[5] Prosecutors could not, however, disclose the documents to either the defense or the Chamber, because the documents had been obtained under confidentiality agreements. The sources that had supplied the documents to the prosecution—the United Nations and several non-governmental organizations—had refused to grant consent for any disclosure, even to the court. Prosecutors averred that that they were acting in good faith and had repeatedly tried to obtain consent to reveal the documents. The defendant responded that his fundamental right to receive exculpatory evidence was violated and that the proceedings should be stayed because no fair trial could occur under the circumstances.[6]

After several unsuccessful attempts to resolve the conflict, the Trial Chamber held that the prosecutor had violated the Rome Statute to the point of undermining the foundations of a fair trial. In particular, the Trial Chamber found that the prosecution had violated the Statute in two ways: (1) by collecting a significant amount of its evidence under confidentiality agreements, the prosecutor had misused the provision allowing for the use of confidentiality agreements only in exceptional circumstances, as leads to other evidence that can be

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4. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, ¶ 1 (Mar. 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

5. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1401, 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, ¶ 17 (June 13, 2008), http://www.icc-cpi.int/iccdocs/doc/doc511249.PDF [hereinafter *Lubanga*, First Stay of Proceedings].

6. *Id.* ¶¶ 36–41, 43, 54.

disclosed; and (2) the prosecutor had failed to comply with his obligation to disclose potentially exculpatory evidence to the defense.[7] The Trial Chamber therefore concluded that the only appropriate remedy was to stay the proceedings indefinitely and order the release of the defendant.[8]

The combination of these remedies, if actually implemented, would have effectively ended the case. If the defendant had in fact been released, it would have been unlikely that the Court would have been able to regain custody of him. Still, the Trial Chamber emphasized that it saw no realistic prospect of the prosecution revealing the exculpatory evidence, and therefore it viewed the stay as indefinite and the release of the defendant as inevitable.[9]

The Chamber ordered the stay and release in full awareness of the significant costs—to victims, who would not receive a remedy for the wrongs they suffered; to the international community, which created the ICC to punish and deter international crimes; and to the court's own goal of uncovering the truth.[10] But the court deliberately chose to set aside these competing social and legal interests and instead focused solely on the seriousness of the procedural violation.[11] It refused to consider alternative remedies and, by effectively dismissing the case, it opted for what one might call an absolutist approach to remedies.[12]

Under the guidance of the Appeals Chamber, however, the ICC has gradually adopted a more nuanced interest-balancing approach. When the prosecutor failed to disclose exculpatory documents in *Lubanga*, the Appeals Chamber upheld the stay of proceedings imposed by the Trial Chamber. But contrary to the Trial Chamber's ruling, the Appeals Chamber categorized the stay as merely conditional and temporary

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7. *Id.* ¶ 75.

8. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Release of Thomas Lubanga Dyilo, ¶ 30 (July 2, 2008).

9. *Id.* ¶¶ 30–36.

10. *Lubanga*, First Stay of Proceedings, *supra* note 5, ¶ 95.

11. *See id.*

12. *See* Madhav Khosla, *Proportionality: An Assault on Human Rights?: A Reply*, 8 INT'L J. CONST. L. 298 (2010) (contrasting balancing and absolutist approaches to human rights).

and thus reversed the order to release the defendant.[13] This decision gave the prosecution more time and impetus to reach an agreement with the information providers, and it allowed the trial to resume.[14]

Two years later, the *Lubanga* Trial Chamber imposed another stay and again ordered the release of the defendant, in response to a refusal by the prosecution to obey the court's orders.[15] The Appeals Chamber reversed both the order to release the defendant and the underlying stay of the proceedings.[16] In justifying the reversal, the Appeals Chamber emphasized that a stay is an extreme measure that should be used

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13. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 13, 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," ¶ 75 (Oct. 21, 2008), http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 12, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled "Decision on the Release of Thomas Lubanga Dyilo," ¶¶ 37, 45 (Oct. 21, 2008), http://www.icc-cpi.int/iccdocs/doc/doc578365.pdf.

14. The prosecution was able to reach an agreement with the information sources to disclose the documents for *ex parte* review by the Trial Chamber. Once the Trial Chamber was able to review the documents, it imposed various measures to deal with potentially exculpatory documents that were still confidential and could not be disclosed to the defense. It ordered the prosecution to provide summaries, redacted documents, or analogous documents to the defense, and it lifted the stay once the prosecution complied. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Reasons for Oral Decision Lifting the Stay of Proceedings, ¶¶ 25, 33–35, 59 (Jan. 23, 2009), http://www.icc-cpi.int/iccdocs/doc/doc622878.pdf.

15. In this instance, the Prosecutor refused to obey a court order to reveal the identity of an "intermediary" who had helped the prosecution contact witnesses, but had allegedly bribed and coached some of these witnesses to give testimony favorable to the prosecution.

16. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 18, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 Entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit To Disclose the Identity of Intermediary 143 or Alternatively Stay Proceedings Pending Further Consultations with the VWU," ¶ 62 (Oct. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc947768.pdf; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 17, Judgment on the Appeal of Prosecutor Against the Oral Decision of Trial Chamber I of 15 July 2010 To Release Thomas Lubanga Dyilo, ¶ 27 (Oct. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc947862.pdf.

only as a last resort.[17] Accordingly, before imposing a stay, trial judges should first consider alternative measures, such as fining the Office of the Prosecutor.[18] Alternative measures could still ensure a fair trial, but would be less costly to other goals of international criminal justice. Subsequent Trial Chamber decisions have also recognized this point and have been more sensitive to the various legitimate interests at stake.

Over time, the ICC appears to have moved away from case-determinative remedies in response to violations of defendants' rights. In doing so, it has acknowledged that providing relief to defendants, while important for vindicating fair trial rights, can impair the court's ability to achieve other goals, such as punishing international crimes, offering relief to victims, and compiling an accurate historical record.

This Article argues that the court was correct to move towards a balancing approach to remedies. The balancing approach does not always produce different or better outcomes than the absolutist approach. For egregious violations of fundamental rights, for example, the outcome will often be the same. But overall, the balancing approach tends to be more sensitive to competing interests at the remedial stage. In evaluating the optimal response to prosecutorial misconduct, the court ultimately selects those remedies and sanctions that effectively deter misconduct and promote the fairness of the trial while not sacrificing other legitimate goals of the ICC.[19] Critically, the balancing approach is also more transparent and forthright about the considerations that motivate the court's decision.

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17. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 18, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 Entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit To Disclose the Identity of Intermediary 143 or Alternatively Stay Proceedings Pending Further Consultations with the VWU," ¶ 60 (Oct. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc947768.pdf.

18. *Id.*

19. Such goals include determining the truth about the crime, preventing and punishing international crimes, and respecting crime victims' rights to receive a judicial remedy for their suffering. *See infra* Section III.A. For other arguments in favor of the balancing approach to remedies at international criminal courts, see Daniel Naymark, *Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy*, 4 J. INT'L L. & INT'L REL. 1 (2008); Sonja Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693 (2008).

The balancing approach is not without shortcomings. In the absence of clear standards, it can lead to inconsistent results and involve courts in controversial policymaking. If the remedies chosen rarely affect the results of a prosecution, over time, this can undermine the rights that remedies are supposed to protect.

For the balancing approach to be meaningful and effective, it is important to structure the court's discretion and specify the factors that should guide it. The Article outlines several concrete factors that the court could consult in choosing the optimal response to prosecutorial misconduct.[20] These factors could make the balancing analysis more predictable and minimize concerns that judges would engage in illegitimate policymaking.

The court could first examine the extent to which the prosecutor's violation prejudiced the defendant or harmed the integrity of the proceedings. The focus of this inquiry would be whether the violation has undermined confidence in the verdict. The court could next examine whether the violation was deliberate, reckless, or negligent, and whether it was an isolated incident or part of a pattern. In cases that may result in exclusion of the evidence, the court could also consider the probative value of the evidence before deciding on the remedy. Throughout this process, the court would be guided by the principle of proportionality and choose a remedy that advances legitimate goals of international criminal justice, while imposing the least burden on individual rights.[21] These considerations could ultimately lead to an array of possible sanctions and remedies, ranging from dismissal of a case for

20. *See infra* Section IV.C.

21. This approach follows the proportionality analysis that a number of human rights and constitutional courts around the world use to reconcile conflicting rights and interests. For a review of proportionality analysis, see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007); Vicki Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803 (2004); Khosla, *supra* note 12; Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 195 (2006); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008); Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 8 INT'L J. CONST'L L. 468 (2009).

the most egregious violations to fines and sentencing reductions for less extreme misconduct.[22]

If implemented in this fashion, a balancing approach holds great promise. The court must respond effectively to prosecutorial misconduct. But it must also be wary of imposing sweeping remedies that threaten to wipe out the competing goals of ending impunity for international crimes, uncovering the truth about atrocities, and respecting victims' rights. This Article offers a comprehensive and nuanced framework for determining appropriate judicial responses to prosecutorial misconduct at the ICC.

II. The Judicial Response to Prosecutorial Misconduct at the ICC: From an Absolutist to a Balancing Approach

Despite their strong commitment to fair trial principles, international criminal courts have not been immune to prosecutorial misconduct. From the International Criminal Tribunal for the former Yugoslavia (ICTY) to its sister tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), international courts have sanctioned prosecutors for disclosure violations,[23] failures to comply with court orders,[24]

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22. I use "prosecutorial misconduct" and "prosecutorial error" interchangeably, as less cumbersome alternatives to the more precise term: "procedural violation by the prosecution." Although "misconduct" often suggests a deliberate or grave violation, and error suggests an unintentional and less serious violation, I use both terms without necessarily evaluating the seriousness of the violation or the culpability of the prosecutor in each particular case. Prosecutors themselves are keen to distinguish between errors and misconduct, but courts often use these interchangeably. *E.g.*, Louise Arbour, *Legal Professionalism and International Criminal Proceedings*, 4 J. Int'l Crim. Just. 674, 677–82 (2006).

23. *E.g.*, Prosecutor v. Orić, Case No. IT-03-68-T, Decision on Ongoing Complaints About Prosecutorial Non-Compliance with Rule 68 of the Rules (Int'l Crim. Trib. for the Former Yugoslavia Dec. 13, 2005); Prosecutor v. Kamuhanda, Case No. ICTR-99-54 A-T, Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor (Aug. 29, 2002).

24. *E.g.*, Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Decision on Two Defence Motions Pursuant to, *Inter Alia*, Rule 5 of the Rules and the Prosecutor's Motion for Extension of Time To File the Modified Amended Indictment Pursuant to the Trial Chamber II Order of 20 November 2000, Warning to the Prosecutor's Counsel Pursuant to Rule 46(a) (Feb. 27, 2001).

prejudicial public statements,[25] and various other procedural violations.[26]

The International Criminal Court has already had to confront many of the same problems. In the process, it has begun to articulate a framework for sanctioning prosecutorial misconduct and providing relief to defendants. As this Part argues, the ICC's approach to this issue has evolved from an insistence on providing full remedies regardless of the costs to a more nuanced and policy-oriented approach.

A. *The Absolutist Approach*

The early decisions of ICC trial chambers favored an absolutist approach to remedies. Under this approach, once the court concludes that a violation of certain rights has occurred, it has to order a full and effective remedy, regardless of its costs. The absolutist approach has a long legal tradition. It is inspired by principles of corrective justice and was embodied in the Roman law principle *ubi jus ibi remedium* (where there is a right, there must be a remedy).[27]

At the international level, the absolutist approach to remedies is prominent in the law on state responsibility and human rights.[28] International human rights conventions typically require states to ensure that victims of rights violations

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25. Prosecutor v. Taylor, Case No. SCSL-03-1-T, Decision on Motion for Disclosure of Evidence Underlying Prejudicial Statements Made by the Chief Prosecutor, Mr. Stephen Rapp, to the Media, ¶ 30 (Feb. 9, 2009).

26. *E.g.*, Prosecutor v. Nyiramasuhuko, Case No. ICTR-97-21-T, Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's Counsel (July 10, 2001) (issuing a warning to the prosecutor for improperly revealing the identity of defense personnel to the public); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Decision on Prosecutor's Motion To Correct the Indictment Dated 22 December 2000 and Motion for Leave To File an Amended Indictment, Warning to the Prosecutor's Counsels Pursuant to Rule 46(A) (Jan. 25, 2001) (issuing a warning to the prosecutor for attempting to amend indictment on her own, without judicial leave, and for failing to comply with court orders).

27. *Cf.* Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859, 869 & n.40 (1991) (discussing the long tradition of corrective justice and the *ubi jus ibi remedium* principle in English and American law).

28. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 99 (1st ed. 1999); Starr, *supra* note 19, at 699–704.

receive effective remedies.[29] Human rights courts have often interpreted "effective remedies" to mean full reparation and to require an effort to make the victim whole.[30] The International Court of Justice has similarly held that remedies must, "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[31]

In the same vein, the international criminal tribunals for Rwanda and the former Yugoslavia have "treated the 'right to an effective remedy' as an absolute right, or nearly so" and have refused to limit remedies "on the basis of countervailing interests, such as the public interest in punishing major crimes or other social welfare concerns."[32] In these courts, "full reparation" has generally meant dismissal of the case, retrial, or exclusion of evidence. The International Criminal Court initially took a similarly absolutist approach toward remedies for prosecutorial misconduct.

1. *Stay of Proceedings*

The International Criminal Court encountered procedural violations by the prosecutor in its very first case, *Prosecutor v. Lubanga*. Relying on Article 54(3)(e) of the Rome Statute, the prosecution in *Lubanga* had entered into confidentiality agreements with the United Nations and non-governmental organizations operating in the Democratic Republic of Congo

29. *See, e.g.*, International Covenant on Civil and Political Rights, 16 December 1966, G.A. Res. 2200A(XXI), art. 2(3), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (providing for the right to an effective remedy); American Convention on Human Rights, 22 November 1969, art. 25, OEA/ser.L/V/II.23, doc. 21 rev.6 (1979) (same); European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, art. 13, 213 U.N.T.S. 221 (same).

30. *See, e.g.*, Caso de los 19 Comerciantes, Preliminary Objections, Inter-Am.Ct. H.R., (ser. C) No. 93, ¶ 35 (June 12, 2002); Case of Velásquez-Rodriguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 62, 66 (July 29, 1988).

31. Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13); Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 103, ¶ 161 (Nov. 30) (quoting *Factory at Chorzów*).

32. Starr, *supra* note 19, at 705.

(DRC) to gather thousands of documents related to the case.[33] The agreements were very broad, promising to keep the information confidential not just from the defense, but also from the court.[34] Several months before the trial was to begin, the prosecution realized that some of the documents gathered in this fashion contained potentially exculpatory information. Prosecutors brought this to the attention of the court, and on November 9, 2007, the Trial Chamber ordered the prosecution to disclose the potentially exculpatory documents.[35] Prosecutors began negotiating with the providers of the information to obtain consent to disclose, but as late as June, 2008, after several orders from the Chamber to disclose the information, the prosecution was still unable to do so.[36]

Once prosecutors realized that consent to disclosure might not be forthcoming, they began taking inconsistent positions on whether the evidence was in fact material to the guilt or innocence of the defendant. They began arguing that some of the evidence initially identified as "potentially exculpatory" was actually not material to the determination of guilt or innocence.[37] They also argued that other evidence was only material "in principle," but not "in fact."[38]

As the prosecution's position changed over the course of the months of arguments about disclosure, so did the Trial Chamber's. The Chamber had initially held that if the prosecution possessed material exculpatory evidence that could not be disclosed, the prosecution would be under an obligation to withdraw any charges impacted by the nondisclosure.[39] The court had essentially left the remedy in the hands of the prose-

33. Article 54(3)(e) provides that the prosecutor may "[a]gree 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." Rome Statute of the International Criminal Court art. 54(3)(e), July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter ICC Statute].

34. *Lubanga*, First Stay of Proceedings, *supra* note 5, ¶ 64.

35. *Id.* ¶ 5.

36. *Id.* ¶ 17.

37. *Id.* ¶ 20.

38. *Id.* ¶ 22.

39. *Id.* ¶ 6.

cution, as the ICTY had done when faced with a similar problem.[40]

But as a result of the prosecution's changing positions, the Trial Chamber lost faith in the prosecution's ability to determine what constitutes material exculpatory evidence. The judges were no longer confident that the prosecution would properly discharge its duty to withdraw or amend charges.[41] The Chamber therefore opted for a more radical response. It imposed an indefinite stay of the proceedings and ordered the release of the defendant.

Following Appeals Chamber precedent, the Trial Chamber held that a stay was appropriate when the rights of the accused had been violated to such an extent that it was impossible for him to obtain a fair trial.[42] In such situations, "the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, [was] outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice."[43]

The Trial Chamber focused on the effect of the violation, not the culpability of the prosecutor.[44] The court concluded

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40. Alex Whiting, *Lead Evidence and Discovery Before the International Criminal Court: The* Lubanga *Case*, 14 UCLA J. Int'l L. Foreign Aff. 207, 213 (2009).

41. *Id.* at 224 ("Finally, there are indications that during the course of the *Lubanga* case the court simply lost confidence in the Prosecution, and at the end of the day this may have been one of the biggest factors that pushed the court towards its decision."). Perhaps adding to the problem was that the undisclosed documents seemed to pertain to all the charges filed against Lubanga (enlisting and conscripting child soldiers and using them to participate actively in the hostilities).

42. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 (OA4), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ¶ 37 (Dec. 14, 2006). Neither the Statute nor the Rules mention a stay of proceedings as a remedy for violations of the right to a fair trial. Instead, the remedy was established by an earlier decision of the ICC Appeals Chamber and was imported from international human rights law, which under Article 21 of the ICC Statute is a source of law for the court. *Id.* ¶¶ 36, 39.

43. *Id.* ¶ 39.

44. A stay of proceedings may thus be ordered even if the prosecution has acted in good faith, as long as its actions have seriously impaired the defendant's rights. *Lubanga*, First Stay of Proceedings, *supra* note 5, ¶ 90. Other international criminal courts have suggested that the court could provide certain remedies, such as sentence reductions, for violations in which

that the failure to disclose potentially exculpatory documents had rendered a fair trial impossible.[45] Without examining the documents at issue, the Chamber would be unable to ensure that the verdict in the case was fair and accurate.

Although the violation occurred before trial, the Trial Chamber concluded that there was no reasonable prospect of the documents being disclosed. More than six months after the court had ordered that the evidence be disclosed, the prosecution had made no visible progress in its negotiations with the information providers. Prosecutors had gone "no further than raising the possibility that the Chamber may be provided at some stage in the future with no more than incomplete and insufficient materials."[46] The court therefore concluded that "the trial process ha[d] been ruptured to such a degree [that] it [was] . . . impossible to piece together the constituent elements of a fair trial."[47]

The Trial Chamber's opinion focused largely on the violation of the right to receive exculpatory evidence. At the same time, the court made clear that the decision to stay the proceedings was based on another violation as well—the prosecution's misuse of Article 54(3)(e) in gathering evidence.[48] Under Article 54(3)(e), the prosecution may use confidentiality agreements to gather information merely as a lead to other evidence that can be used at trial.[49] In *Lubanga*, the prosecu-

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the prosecution had no involvement whatsoever, "but only where the illegal conduct in question is such as to make it repugnant to the rule of law to put the accused on trial." Prosecutor v. Kaing Guek Eav (alias Duch), Case No. 001/18-07/2007/ECCC/SC, Appeal Judgment, ¶ 392 (Extraordinary Chambers in the Courts of Cambodia, Feb. 3, 2012), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf. At the same time, an ICC Pre-Trial Chamber has suggested that the culpability of the prosecutor may be relevant to the inquiry whether a serious violation has occurred. Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the "Defence Request for a Permanent Stay of Proceedings," 5–6 (July 1, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1102225.pdf.

45. *Lubanga*, First Stay of Proceedings, *supra* note 5, ¶¶ 91–94. In support, the court referred to human rights cases establishing that the right to receive exculpatory evidence was an essential element of a fair trial. *Id.* ¶ 77.

46. *Id.* ¶ 91.

47. *Id.* ¶ 93.

48. *Id.* ¶¶ 71–75.

49. *See* ICC Statute, *supra* note 33, art. 54(3)(e); *see also Lubanga*, First Stay of Proceedings, *supra* note 5, ¶¶ 70–76; Prosecutor v. Lubanga, Case

tion had ignored this requirement and had gathered thousands of documents under confidentiality agreements, fully intending from the outset to use some of the documents at trial and not simply as leads.[50] And although prosecutors should have foreseen the conflict between their duties of confidentiality and disclosure,[51] they obtained most of their evidence under confidentiality agreements, discounting concerns about the potential legal difficulties this would create. It appears that ICC prosecutors were proceeding on the hope that providers of the information would consent to disclosure and thus eliminate any conflict.[52] According to the Trial Chamber, the overreliance by the prosecution on confidentiality agreements was not merely a violation of Article 54(3)(e), but also the root of the ultimate conflict between the duty of confidentiality and the duty to disclose.

In justifying the stay of proceedings on two independent grounds—the failure to disclose and the abuse of Article 54(3)(e)—the Trial Chamber left some ambiguity as to the critical factors underlying the stay. It remains unclear whether a stay would have been imposed if the prosecution had committed only one of the two violations at issue. But soon after the proceedings resumed, the Trial Chamber had another reason to clarify its views on the conditions for a stay.

On July 8, 2010, the *Lubanga* Trial Chamber imposed a second stay of the proceedings, after the prosecution deliberately refused to comply with the Chamber's order to release

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No. ICC-01/04-01/06 OA 13, 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," ¶¶ 41, 55 (Oct. 21, 2008). Scholars disagree about the validity of this interpretation of Article 54(3)(e). Some concur with the trial and appellate decisions holding that the Article authorizes the prosecution to collect only lead evidence, while others contest this interpretation as inconsistent with other ICC Rules, "artificial[,] and unworkable." *Compare* Kai Ambos, *Confidential Investigations (Article 54(3)(e) ICC Statute) vs. Disclosure Obligations: The* Lubanga *Case and National Law*, 12 NEW CRIM. L. REV. 543, 555–56 (2009), *with* Whiting, *supra* note 40, at 218–19.

50. *Lubanga*, First Stay of Proceedings, *supra* note 5, ¶¶ 27, 72–73.

51. *See* Whiting, *supra* note 40, at 209 (noting that the same conflict had already arisen at the ICTY and was therefore highly foreseeable at the ICC).

52. *Lubanga*, First Stay of Proceedings, *supra* note 5, ¶¶ 25, 72.

the identity of an intermediary whom the prosecution had used to contact witnesses in the DRC.[53] The prosecution argued that it could not comply with the order because disclosure of the person's identity might jeopardize his safety. Therefore, complying with the court's order would conflict with the prosecution's statutory obligation to protect witnesses.[54]

In its decision, the Trial Chamber noted that it had ordered the disclosure of the person's identity only after consulting the ICC's Victims and Witnesses Unit about the necessary protective measures and after taking into account all the circumstances, including the accused's rights to confront adverse witnesses.[55] The prosecution's deliberate refusal to follow the court order meant that the prosecutor declined "to be 'checked' by the Chamber."[56] As long as the Prosecutor persisted in his refusal to comply, "the fair trial of the accused is no longer possible, and justice cannot be done, not least because the judges will have lost control of a significant aspect of the trial proceedings as provided under the Rome Statute framework."[57] Once the Chamber concluded that there was no realistic prospect of a fair trial, it ordered a second stay of the proceedings and the release of the defendant.

In both *Lubanga* decisions to stay the proceedings, judges were well aware of the potential negative consequences that a stay might have on the international criminal justice system. In the decision concerning the failure to disclose exculpatory evidence, the judges noted that they ordered the stay "with great reluctance."[58] The decision acknowledged that, as a result of the stay, the court would "not make a decision on issues which are of significance to the international community, the peoples of the [DRC], the victims and the accused himself" and "victims will be denied an opportunity to participate in a pub-

53. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit To Disclose the Identity of Intermediary 143 or Alternatively To Stay Proceedings Pending Further Consultations with the VWU, ¶ 31 (July 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc906146.pdf.

54. *Id.* ¶¶ 13–16.

55. *Id.* ¶¶ 12–17.

56. *Id.* ¶ 31.

57. *Id.*

58. *Lubanga*, First Stay of Proceedings, *supra* note 5, ¶ 95.

lic forum, in which their views and concerns were to have been presented and their right to receive reparations will be affected."[59] The judges stated that they were "acutely aware that by staying these proceedings the victims have, in this sense, been excluded from justice."[60]

While the court mentioned the legitimate interests of victims, the DRC, and the international community, it did not balance them against the interest in ensuring a fair trial. It did not consider whether less drastic measures were available to redress the problem. In the case concerning disclosure, for example, the Trial Chamber could have: (1) forbidden the prosecution to rely on evidence contradicted by the non-disclosed evidence (an approach followed by the ICTY);[61] (2) imposed a conditional stay of the proceedings (the remedy ultimately imposed by the Appeals Chamber); or (3) imposed cumulative daily fines on the prosecution until the evidence was disclosed, perhaps followed by a conditional stay if fines proved unsuccessful.[62] But these and other alternatives were not fully explored.[63] Once the court determined that the violation was sufficiently serious, it regarded an immediate and unconditional stay of proceedings, accompanied by the release of the defendant, as the only possible consequence. It was an absolutist approach, focusing solely on the defendant's rights and the fairness of the trial and bracketing off competing social interests.

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59. *Id.*

60. *Id.*

61. Whiting, *supra* note 40, at 213.

62. The Appeals Chamber also identified various remedies that the Trial Chamber could order after obtaining access to review the materials: "the identification of similar exculpatory material, the provision of materials in summarized form, the stipulation of relevant facts, or the amendment or withdrawal of charges." Rod Rastan, *Review of ICC Jurisprudence 2008*, 7 NW. U. J. INT'L HUM. RTS. 261, 275 (2009). The Prosecution had previously asked for such alternative measures to be imposed instead of a stay, but the Trial Chamber held that it could not grant such measures until it could review the evidence and determine if it was in fact material and exculpatory. *Id.* n.39. Ultimately, when the Trial Chamber was able to review the documents, it imposed just such alternative measures. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Reasons for Oral Decision Lifting the Stay of Proceedings, ¶¶ 25, 33–35, 59 (Jan. 23, 2009), http://www.icc-cpi.int/iccdocs/doc/doc622878.pdf.

63. *See* Rastan, *supra* note 62, at 275 n.39.

2. *Excluding Evidence*

At the ICC, prosecutorial misconduct can also occur in the process of gathering evidence, as the Office of the Prosecutor relies on its own investigators to collect much of its evidence. Article 69(7) of the Rome Statute provides for the exclusion of unlawfully obtained evidence. Exclusion is available if: (1) the evidence was obtained in violation of the Statute or internationally recognized human rights; *and* (2) the violation "casts substantial doubt on the reliability of the evidence," or the "admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."[64]

ICC Trial Chambers have so far ruled on motions to exclude unlawfully obtained evidence in two decisions. The first decision, concerning interrogations, adopts an absolutist approach to remedies, whereas the second, concerning searches and seizures, takes an interest-balancing approach. This Section discusses the first decision, which suppressed evidence obtained as a result of an unlawful interrogation.[65]

On December 17, 2010, the Trial Chamber in *Prosecutor v. Katanga* held that Congolese authorities had violated Germain Katanga's right to remain silent.[66] Specifically, the authorities had not provided the accused with access to counsel and had failed to offer other guarantees to ensure that the interrogation respected his right to remain silent.[67] The Congolese authorities were not acting on the request of the ICC, and the ICC prosecutor was not involved in the interrogation in any way.[68] Nonetheless, the Chamber concluded that because Katanga's interrogation violated international human rights, the statements obtained from the interrogation had to be excluded under Article 69(7).[69]

The Trial Chamber did not explain why exclusion followed automatically. It is possible that judges believed the statements were unreliable as a result of being obtained in the

64. ICC Statute, *supra* note 33, art. 69(7).

65. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions (Dec. 17, 2010), http://www.icc-cpi.int/iccdocs/doc/doc987504.pdf.

66. *Id.* ¶¶ 55–65.

67. *Id.* ¶¶ 55–56, 63.

68. *Id.* ¶ 57.

69. *Id.* ¶¶ 60, 62–63.

absence of counsel. This would have been a proper ground for exclusion, but the Chamber made no finding to this effect.

The decision appears to assume that admission of evidence obtained in violation of international human rights is by definition "antithetical to and would seriously damage the integrity of the proceedings." In other words, without elaborating on it, the Chamber collapsed the two prongs of Article 69(7) into one, rendering the second prong mere surplusage. This reading appears inconsistent not only with the text, but also with the drafting history of Article 69(7). Delegates to the Rome Conference negotiating the ICC Statute expressly rejected a draft providing for automatic exclusion of evidence gathered in violation of the Statute or other rules of international law.[70] Instead, they opted for a version that would require independent assessment of whether admitting the evidence would seriously harm the integrity of the proceedings. The *Katanga* Chamber, however, did not engage in such an assessment.

The Chamber also refused to consider the probative value of the defendant's statement.[71] Once the Chamber concluded that the statement was obtained in violation of human rights, this automatically led to exclusion—the Chamber refused to conduct any balancing and consider competing interests that may favor admissibility. This decision is another example of the absolutist approach to remedies.

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Lubanga and *Katanga* were the ICC's first two cases. It is possible that judges used strict remedies in these cases to solidify their authority early on and to send a clear message about the importance of obeying court orders. But Trial Chambers have suggested that a stay of the proceedings may be imposed again in the future, for a range of violations from "the material mistreatment of the accused in order to obtain evidence (e.g., by use of torture) [and] the non-disclosure of significant ex-

70. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the "Bar Table," ¶ 39 (June 24, 2009), http://www.icc-cpi.int/iccdocs/doc/doc702244.pdf.

71. *Id.* ¶ 64.

culpatory evidence"[72] to "delays in bringing the accused to justice, broken promises to the accused with regard to his prosecution and bringing the accused to justice by illegal or devious means."[73] The *Katanga* decision also leaves open the possibility that exclusion of evidence may be ordered for any violation of international human rights.

These decisions leave the impression that the absolutist approach to remedies might continue to be broadly applied to the ICC. But as the next Section discusses, other recent pronouncements by both the Trial and Appeals Chambers suggest that the court may be taking a different course.

B. *The Balancing Approach*

Several recent ICC decisions have taken a more nuanced view to remedies for procedural violations. The court has begun balancing legitimate social interests in deciding whether and which remedy to impose.

The balancing approach to remedies has been adopted by many national jurisdictions and can find support in certain international law principles, such as proportionality.[74] Under it, courts are willing to contemplate less than full remedies for violations of human rights in order to fulfill competing legitimate social aims.[75] The balancing approach recognizes that remedies such as dismissal, stay, retrial, and exclusion may impose significant burdens on third parties and on the justice system, and it takes these burdens into consideration when determining the optimal remedy. For example, in deciding

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72. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings," ¶ 195 (Mar. 7, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1036342.pdf (noting that these are "clear examples" of violations that would lead to a stay).

73. Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the "Defence Request for a Permanent Stay of Proceedings," 6 (July 1, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1102225.pdf. By contrast, the prosecution's mischaracterization "of the specific nature of the procedural initiatives taken vis-à-vis [the defendant] by the German investigative authorities" at the time of the prosecutor's application for a warrant was not a sufficiently serious procedural violation to warrant a stay of proceedings, particularly since there was no evidence it was done in bad faith. *Id.* at 5–6.

74. *See, e.g.*, Starr, *supra* note 19, at 704; Khosla, *supra* note 12, at 299.

75. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 591 (1983); Starr, *supra* note 19, at 752–63.

whether to exclude evidence, it may weigh the benefits of exclusion—deterring official misconduct, compensating the defendant for the violation of his rights, and safeguarding the integrity of the justice system—against its costs—reducing the court's ability to arrive at the truth, making it more difficult to prosecute international crimes, and undermining victims' rights to be heard and to receive an adequate remedy. The International Criminal Court has recently begun to be more mindful of these costs in its analysis of remedies.

1. *Stay of Proceedings*

In its 2008 decision staying the proceedings, the *Lubanga* Trial Chamber refused to balance the competing interests affected by the stay. But upon review several months later, the Appeals Chamber recognized the need to seek less drastic remedies and to leave open the possibility for the trial to proceed on the merits. The Appeals Chamber re-characterized the stay as "conditional" and reversed the order to release the defendant.[76] The re-categorization of the stay ensured that the court would be able to reach the merits of the case if the prosecution were able to obtain consent to disclose the documents to the Chamber.[77] By the time the Appeals Chamber delivered the judgment, an agreement had in fact already been

76. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 13, 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," ¶¶ 4–5 (Oct. 21, 2008), http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 13, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled "Decision on the Release of Thomas Lubanga Dyilo," ¶¶ 44–45 (Oct. 21, 2008), http://www.icc-cpi.int/iccdocs/doc/doc578365.pdf.

77. The prosecution obtained the consent after assuring the providers that the Chamber would treat the documents as confidential (an assurance that the Chamber had given much earlier in the process and before the initial stay) and after promising that it would take all protective measures necessary, including withdrawal of the charges, in the event the Appeals Chamber were to order the disclosure of documents without the providers' consent. Rastan, *supra* note 62, at 275–76 n.42.

reached.[78] The Trial Chamber accepted the agreement and lifted the stay.

The Appeals Chamber embraced the balancing approach more openly two years later, when it overturned the second stay of proceedings in *Prosecutor v. Lubanga*. It held that the court must first consider less drastic measures—such as sanctions against the prosecutor—before ordering a stay of the proceedings.[79] The opinion emphasized that an indefinite stay of proceedings imposes significant costs on the ICC's ability to fulfill all of its purposes and that it should therefore be used only as a last resort. In concluding that a stay was not appropriate under the circumstances, the Appeals Chamber expressly considered the social interests that favored a more moderate response. These included the interests of victims and of the international community "to see justice done," as well as the interest of the accused in a final decision on the merits.[80]

Perhaps following the guidance of the Appeals Chamber, the *Lubanga* Trial Chamber itself appears to have become less absolutist in its approach to remedies. In 2011, at the close of the prosecution's case in *Lubanga*, the defense alleged a pattern of prosecutorial misconduct in the case and requested another indefinite stay of proceedings. This time, however, the Trial Chamber rejected the motion, reasoning that less drastic alternatives to a stay were available to it.[81] The alleged prosecutorial misconduct included: (1) failure to check and further investigate the statements of some of its witnesses; (2) failure to "reveal the alleged weaknesses in the accounts of Intermediary 316 and Witness 157";[82] (3) a potentially deliberate

78. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Reasons for Oral Decision Lifting the Stay of Proceedings, ¶ 13 (Jan. 23, 2009), http://www.icc-cpi.int/iccdocs/doc/doc622878.pdf.

79. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 18, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 Entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit To Disclose the Identity of Intermediary 143 or Alternatively Stay Proceedings Pending Further Consultations with the VWU," ¶ 61 (Oct. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc947768.pdf.

80. *Id.* ¶ 60.

81. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings," ¶ 197 (Mar. 7, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1036342.pdf.

82. *Id.* ¶ 204.

delay in disclosing evidence in a few instances;[83] and (4) failure to supervise, investigate, or control intermediaries who were alleged to have bribed and coached witnesses to obtain evidence favorable to the prosecution.[84]

The court concluded that even if these allegations were true, a stay would not be warranted; instead, less costly corrective measures would be more appropriate. The Trial Chamber noted that, at the end of the case, it would review the instances in which the prosecution may have been submitting unreliable evidence, and it would weigh or exclude evidence as necessary.[85] The appropriate remedy for delayed disclosure would also lie in the evaluation of the evidence at the end of the case and the drawing of adverse inferences as appropriate.[86] And if the Chamber were to find the allegations about the intermediaries correct, it would similarly respond to the problem at the end of trial, by excluding or giving lesser weight to any evidence procured unlawfully. The Chamber indicated that it would consider whether the Office of the Prosecutor was negligent in failing to supervise or control its intermediaries and failing "to act on indications of unreliability."[87]

Finally, the Trial Chamber emphasized that it had taken affirmative measures, in the course of the trial, to ensure that evidence related to these defense allegations was sufficiently explored. Intermediaries were called to testify, investigators who were principally responsible for them also testified, and

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83. The Chamber cited to five documents that were disclosed late and one instance (the decision not to call Witness 157 in the *Katanga* trial) in which the defense uncovered the information independently. The Chamber reasoned that "the relatively limited instances of alleged deliberate non-disclosure relied on do not make it unfair or repugnant to continue the trial." *Id.* ¶ 212.

84. *Id.* ¶ 196.

85. *Id.* ¶ 204.

86. *Id.* ¶ 212. In the common-law tradition, the drawing of adverse inferences is frequently used as a remedy for the loss or destruction of evidence by one of the parties. By analogy, it can be applied when the prosecution purposely withholds a piece of evidence that it is required to disclose. As the Chamber suggests in its Abuse of Process decision, it could also be applied, perhaps with modification, in cases of delayed disclosure by the prosecution. The Chamber could, for example, give lesser weight to belatedly disclosed evidence.

87. *Id.* ¶ 198.

the prosecution was ordered to provide disclosure of all materials relevant to the intermediaries' conduct.[88] These measures made it possible for the Chamber to evaluate the defense's allegations that witness testimony was unreliable and that the prosecution had negligently allowed such evidence to be introduced. The Chamber could therefore exclude or give lesser weight to any evidence that it found to be unreliable or tainted by prosecutorial misconduct.[89]

On several occasions, the Trial Chamber emphasized that a stay of proceedings was a "drastic" and "exceptional" remedy that should be used only sparingly.[90] As discussed earlier, the *Lubanga* Trial Chamber has thus far treated the stay of proceedings as an indefinite suspension and ordered the release of the defendant pursuant to the stay.[91] In practice, the inability of the court to ensure the reappearance of the defendant means that an indefinite stay, combined with an order to release, effectively terminates the prosecution. In deciding whether to impose a stay in 2011, the *Lubanga* Trial Chamber recognized this effect of the stay, noting that it "must weigh the nature of the alleged abuse of process against the fact that only the most serious crimes of concern for the international community as a whole fall under the jurisdiction of the Court."[92] Moreover, because the allegations of misconduct "only related to one, albeit significant area of a wider case, it would be a disproportionate reaction to discontinue the pro-

88. *Id.* ¶ 188.

89. Indeed, in its final judgment, the Trial Chamber determined that it could not rely on any of the statements procured with the help of intermediaries. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶¶ 482–83 (Mar. 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

90. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings," ¶ 189 (Mar. 7, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1036342.pdf. Although a stay guarantees the enforcement of fundamental rights, it also has significant costs: "It brings proceedings to a halt, potentially frustrating the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute." *Id.* ¶ 165.

91. *See supra* text accompanying notes 8–9.

92. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings," ¶ 195 (Mar. 7, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1036342.pdf.

ceedings at this juncture."[93] In other words, in this more recent decision, the *Lubanga* Trial Chamber seemed to be moving toward a balancing approach, placing a greater emphasis on the competing interests at stake and on the need to consider less drastic measures to remedy violations of the defendant's rights.

2. *Excluding Evidence*

An even more open embrace of the balancing test is evident in the *Lubanga* Pre-Trial and Trial Chambers' decisions to admit certain documents obtained in violation of the right to privacy. The Pre-Trial Chamber addressed the admissibility question when it confirmed the charges against Lubanga in 2007, while the Trial Chamber reexamined the question in 2009, when the prosecution sought to introduce the documents into evidence at trial.[94]

The documents in question were seized during a search of the home of a third party in the DRC. The search was conducted by Congolese authorities, but in the presence of an ICC investigator, who had been permitted to assist. The search violated Congolese criminal procedure because it was conducted in the absence of the owner of the premises. This violation of domestic law would not trigger exclusion under the Rome Statute,[95] but the search and seizure also violated the internationally recognized right to privacy. Both the Pre-Trial Chamber and the Trial Chamber in *Lubanga* held that Congolese authorities disproportionately invaded the right to privacy of the homeowner by indiscriminately seizing hundreds of items, including documents that were not relevant to the investigation.[96]

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93. *Id.* ¶ 197.

94. The Pre-Trial Chamber's decision on admissibility came as part of the confirmation of charges in 2007, a year before the Trial and Appeals Chambers' decisions on the first stay of the proceedings in *Lubanga*. Subsequently, the Trial Chamber issued its own decision on admissibility in 2009, one year after the first stay of proceedings in *Lubanga*, but before the second stay, which occurred in 2010.

95. ICC Statute, *supra* note 33, art. 69(8) ("When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.").

96. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 81 (Jan. 29, 2007), http://www.icc-cpi.int/

Although both Chambers found a human rights violation that could trigger exclusion under the Rome Statute, both also concluded that exclusion was not warranted. Following the text of Article 69(7), the Pre-Trial Chamber first assessed the effect that admitting the documents would have on the integrity of the proceedings. It concluded that the privacy violation was not especially serious and was therefore not likely to undermine "the fairness of the trial as a whole."[97] On the other hand, the evidence was reliable and probative, and excluding it would hinder the administration of justice.[98] Balancing the seriousness of the violation against the reliability and probative nature of the evidence, the Pre-Trial Chamber concluded that exclusion was not justified.

In adopting this balancing approach, the Pre-Trial Chamber followed the lead of the International Criminal Tribunal for the former Yugoslavia (ICTY). In *Prosecutor v. Brdjanin*, the ICTY's main precedent on the exclusionary rule, the ICTY Trial Chamber concluded that "it would be utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed."[99] This holding was expressly based on a consideration of the competing interests that the ICTY was meant to serve. The Tribunal's mandate was not only to ensure the fairness of the proceedings, but also to "bring to justice persons allegedly responsible for serious violations of international law, to render justice to the victims, to deter further similar crimes and to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia."[100] Because exclusion of probative and reliable evidence would conflict with these goals, it would be ordered only for violations that seriously undermine the fairness of the trial.

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iccdocs/doc/doc266175.PDF; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the "Bar Table," ¶ 38 (June 24, 2009), http://www.icc-cpi.int/iccdocs/doc/doc702244.pdf [hereinafter *Lubanga*, Decision on the Confirmation of Charges].

97. *Lubanga*, Decision on the Confirmation of Charges, ¶¶ 89–90.

98. *Id.*

99. Prosecutor v. Brdjanin, Case No. IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence," ¶ 63 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 3, 2003), http://www.icty.org/x/cases/brdanin/tdec/en/031003.htm.

100. *Id.*

Like the *Lubanga* Pre-Trial Chamber, the Trial Chamber also concluded that exclusion of the documents was not justified, but for somewhat different reasons. The Trial Chamber agreed with the Pre-Trial Chamber that exclusion does not automatically follow from a finding that evidence was obtained in violation of international human rights. The Trial Chamber noted that delegates to the Rome Conference negotiating the ICC Statute had expressly rejected a provision that would have mandated the exclusion of evidence gathered in violation of international human rights.[101] Instead, the language that the drafters ultimately chose requires an independent evaluation of whether admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.[102]

The Trial Chamber therefore first examined whether the seizure seriously damaged the integrity of the judicial proceedings. To do so, the Trial Chamber "balance[d] a number of concerns and values found in the Statute."[103] The factors it considered in the course of this balancing were somewhat different than those chosen by the Pre-Trial Chamber.

First, the Trial Chamber rejected the Pre-Trial Chamber's holding that the probative value of the evidence should be evaluated in deciding whether to admit the evidence. In support, the Trial Chamber pointed to the lack of any reference to probative value in the text of Article 69(7). It noted further that Article 69(7) was drafted intentionally to be different and more specific than the broader ICC rule on admissibility of evidence, which balances probity against prejudice.[104] Therefore, the Trial Chamber concluded that even if the evidence was very probative, and even if "it alone provides proof of an element of the charges," this should be irrelevant to the decision whether to admit it under Article 69(7).[105]

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101. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the "Bar Table," ¶ 39 (June 24, 2009), http://www.icc-cpi.int/iccdocs/doc/doc702244.pdf.

102. *See supra* text accompanying note 70.

103. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the "Bar Table," ¶ 42 (June 24, 2009), http://www.icc-cpi.int/iccdocs/doc/doc702244.pdf.

104. *Id.* ¶¶ 34, 43.

105. *Id.* ¶ 43.

Similarly, the Trial Chamber concluded that the gravity of the alleged crimes is not relevant to the admissibility of evidence.[106] In this respect, the Chamber departed from a number of national courts, which consider the seriousness of the offense as a factor in the balancing analysis.[107] The Chamber reasoned that the ICC has jurisdiction over "the most serious crimes of international concern" and therefore all cases before it would involve crimes of high seriousness.[108] For that reason, the court did not find it appropriate to rank crimes by their gravity and emphasized that Article 69(7) itself provided no basis for such ranking.

Instead, the Trial Chamber examined three other factors in deciding that the unlawful seizure did not seriously damage the integrity of the proceedings. These included the gravity of the procedural violation, the impact of the violation on the rights of the accused, and the involvement in the violation by the ICC prosecution.

When focusing on the gravity of the procedural violation, the Trial Chamber reasoned that respect for the rights of the person is not the only concern of international criminal justice. Rather, it has to be balanced against other core values of the Rome Statute, such as "respect for the sovereignty of States . . ., the protection of victims and witnesses and the effective punishment of those guilty of grave crimes."[109] The effective punishment of serious crimes makes it inappropriate to exclude evidence obtained as a result of a minor procedural

106. *Id.* ¶ 44.

107. *See infra* text accompanying notes 133–34; *see also* Yves-Marie Morissette, *The Exclusion of Evidence Under the* Canadian Charter of Rights and Freedoms: *What To Do and What Not To Do*, 29 McGill L.J. 521, 528–30 (1984) (noting the relevance of the seriousness of the offense in decisions whether to exclude unlawfully obtained evidence in Canada, Germany, Scotland, and Australia); Thomas Weigend, *Germany*, *in* Criminal Procedure: A Worldwide Study 243, 252 (Craig M. Bradley ed., 2d ed. 2007). *But see* R v. Grant, 2 S.C.R. 353, ¶ 84 (2009) (Can.) (noting that while the seriousness of the offense might be a valid consideration, "it has the potential to cut both ways").

108. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the "Bar Table," ¶ 44 (June 24, 2009), http://www.icc-cpi.int/iccdocs/doc/doc702244.pdf.

109. *Id.* ¶ 42 (quoting Otto Triffterer et al., Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 1335 (2d ed. 2008)).

violation, as long as the overall fairness of the trial can be guaranteed.[110]

The Trial Chamber also considered the harm that the violation caused the defendant. The Chamber concluded that the defendant should be allowed to challenge violations of a third party's rights, because, presumably, such violations may affect the integrity of the proceedings even if they do not directly harm the defendant.[111] But because excluding the evidence would compensate merely the defendant and not the third party, the court seemed to worry about an unjustified windfall to the defendant. Accordingly, while harm to the defendant was not a dispositive factor, it was still relevant. Because no demonstrable harm to the defendant was shown, exclusion was less likely.

Finally, the Trial Chamber considered carefully the prosecutor's involvement in the unlawful search and seizure. The court examined whether the prosecution played an active role in the process leading up to the violation: Did the prosecution control the process? Was it able to "prevent improper or illegal activity"?[112] The court also noted that, were prosecutors to be involved in the violation, it would consider their culpability—i.e., whether they had acted in bad faith.[113] The court concluded that it would not be likely to exclude evidence when, as in the case at hand, ICC prosecutors did not participate in the unlawful activity and would not be deterred by exclusion.[114] The Chamber concluded that the responsibility for conducting the search rested entirely with the Congolese authorities and that the ICC has no mandate to deter or punish illegal conduct by domestic authorities.[115]

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110. *Id.* ¶ 42.

111. *Cf. id.* ¶ 37 ("The Statute establishes the benchmark that evidence obtained otherwise than in compliance with internationally recognized human rights standards (or in breach of the Statute) shall be excluded, if it is potentially unreliable or would undermine the proceedings.").

112. *Id.* ¶ 46.

113. *Id.*

114. *Id.* ¶¶ 45–46.

115. *Id.* On the other hand, if actions by national authorities put the reliability of the evidence into question, this may still lead to exclusion, even if ICC prosecutors did not take part in the unlawful activity. *See* ICC Statute, *supra* note 33, art. 69(7).

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The *Lubanga* Trial and Appeals Chamber decisions on excluding evidence and staying the proceedings suggest that the ICC may be moving from an absolutist to a balancing approach to remedies. At the same time, the court has not explicitly renounced the absolutist approach or formed a consistent framework for balancing. The next Part presents several arguments why the court should firmly and openly adopt the balancing approach to remedies for prosecutorial misconduct.

III. An Argument for the Balancing Approach

A. *Competing Goals of International Criminal Justice*

Remedies and sanctions for prosecutorial misconduct serve multiple functions: compensating the defendant for the breach of his rights, punishing prosecutors, condemning the behavior as inappropriate, and deterring future misconduct.[116] Through these functions, remedies and sanctions for prosecutorial misconduct help promote a central role of international criminal justice: to ensure fair trials and promote individual rights. But as this Section shows, promoting fair trials and individual rights is not the only goal of the International Criminal Court. The court also aims to punish international crimes effectively and to establish the truth about these crimes. The balancing approach to remedies can help the court accommodate these sometimes competing goals.

International courts have repeatedly emphasized their commitment to providing fair trials and protecting defendants' rights.[117] The U.N. Secretary-General found it "axiomatic

116. For a discussion of the differences between remedies and sanctions, see *infra* Section IV.A.

117. *E.g.*, Prosecutor v. Kordić, Case No. IT-95-14/2-A, Judgement, ¶ 242 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004), http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf; *see also* International Military Tribunal, Trial of the Major War Criminals Before the International Military Tribunal 101–02 (1947) (statement of Justice Robert Jackson, Chief Counsel for the United States) ("We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well."); Patrick Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 Eur. J. Int'l. L. 569, 582–83 (2000) (detailing the statutory guarantees of fair trials in the ICTY).

that the International Tribunal [for the former Yugoslavia] must fully respect the internationally recognized standards regarding the rights of the accused at all stages of its proceedings."[118] Reflecting this, the ICTY and ICTR Statutes provide that trials should be fair and conducted "with full respect for the rights of the accused."[119] The Rome Statute similarly provides that its provisions must be interpreted consistently with international human rights law.[120]

More broadly, the mission of international criminal courts is often described as spreading to national justice systems a "human rights culture" and respect for fair trials.[121] In this view, courts such as the ICC can lead by example and must set the highest standards for the fairness of trials.[122] Their ability to model a steadfast commitment to human rights and the rule of law is especially important for the countries most affected by the courts' decisions, which are frequently struggling to reestablish respect for the rule of law after the end of violent conflicts or authoritarian regimes.[123] To the extent that

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118. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 106, U.N. Doc. S/25704 (May 3, 1993).

119. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 20(1), May 25, 1993, U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda art. 19(1), Nov. 8, 1994, U.N. Doc. S/RES/955.

120. ICC Statute, *supra* note 33, art. 21(3) ("The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights. . . .").

121. Mirjan Damaška, Keynote Address at the Concluding Conference of the International Criminal Procedure Expert Framework: General Rules and Principles of International Criminal Procedure (Oct. 27, 2011) (on file with author).

122. Yvonne McDermott, *Rights in Reverse: A Critical Analysis of Some Interpretations of Fair Trial Rights Under International Criminal Law, in* Ashgate Research Companion to International Criminal Law: Critical Perspectives (William A. Schabas et al. eds., forthcoming 2013); Theodor Meron, *Procedural Evolution at the ICTY*, 2 J. Int'l Crim. Just. 520, 524 (2004); Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. Int'l & Foreign Aff. 77, 82–83, 103 (2009). The ability and desirability of the ICC to set such standards has been the subject of some debate in the literature, however. *See, e.g.*, Frédéric Mégret, *Beyond Fairness: Understanding the Determinants of International Criminal Procedure*, 14 UCLA J. Int'l L. & Foreign Aff. 37, 76 (2009).

123. *See* Ohlin, *supra* note 122, at 103.

the ICC is aiming to promote respect for human rights globally, it is important for the court to show that it takes fair trial violations seriously.[124]

If ensuring fair trials and spreading respect for the rule of law were the only goals of international criminal justice, then the absolutist approach to remedies may well be the optimal one.[125] The emphasis on broad and strong remedies would help minimize prosecutorial misconduct and ensure that ICC proceedings provide as close to a fair model of justice as possible. Yet international criminal justice pursues multiple legitimate goals, some of which may at times conflict with the goal of ensuring maximum procedural fairness to defendants.

The International Criminal Court proclaims as its central mission "to put an end to impunity for the perpetrators of [war crimes, crimes against humanity, genocide, and aggression] and thus to contribute to the prevention of such crimes."[126] By prosecuting those most responsible for serious human rights violations, international criminal courts strive to affirm the rule of law, avoid collective recriminations, and prevent violence from reoccurring.[127] To the extent that deter-

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124. Starr, *supra* note 19, at 713. A similar point was made by U.S. Supreme Court Justice Brandeis when he contemplated the value of excluding unlawfully obtained evidence. He argued that exclusion was essential to "maintain respect for law" and to "preserve the judicial process from contamination." Olmstead v. United States, 277 U.S. 438, 484–85 (1928) (Brandeis, J., dissenting). He argued in favor of strong remedies such as exclusion because of the negative message that the government would send if it failed to discipline its own officers when they broke the law. The same argument applies to the ICC and the messages it sends: like the U.S. government, if it "becomes a lawbreaker, it [would] breed[ ] contempt for the law." *Id.*

125. *But see* Starr, *supra* note 19, at 752–63 (arguing that the balancing approach would be be preferable even in these circumstances, because it would allow judges to candidly take into account the costs of remedies and would reduce the likelihood that judges would interpret rights more narrowly in order to avoid the imposition of costly remedies).

126. ICC Statute, *supra* note 33, pmbl.

127. Prosecutor v. Nikolić, Case No. IT-02-60/1-S, Sentencing Judgement, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003), http://www.icty.org/x/cases/nikolic/tjug/en/mnik-sj031202-e.pdf; Prosecutor v. Blaškić, Case No. IT-95-14-PT, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, ¶ 154 (Int'l Crim. Trib. for the Former Yugoslavia July 18, 1997), http://www.icty.org/x/cases/blaskic/tdec/en/70718SP2.htm; JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 158 (1964); Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 5–6 (1998).

ring future violence and crimes depends on convictions of the guilty, certain more drastic remedies (including dismissals, stays of proceedings, and retrials), which frustrate prosecutors' ability to obtain a conviction, may stand in the way of accomplishing this larger goal of the ICC.

International criminal courts, particularly the ICC, have also stressed their commitment to honoring the rights and interests of crime victims. Under human rights law, victims of crime have the right to receive adequate judicial remedies for the wrongs done to them.[128] The ICC has gone further and acknowledged that victims also have a right to participate in the court's proceedings.[129] These rights of victims, however, often come in tension with defendants' rights to receive adequate remedies for violations of their own fair trial rights. When a remedy for prosecutorial misconduct entails a permanent stay or a dismissal, crime victims' interests in participating at trial and seeing a resolution on the merits are bound to be undermined. This presents another instance in which the goals of international criminal courts may conflict.

Finally, international criminal courts have consistently affirmed that they strive to provide an accurate record about the events they are adjudicating.[130] At the national level, the

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128. *E.g.*, Kaya v. Turkey, Judgment, App. No. 22729/93 Eur. Ct. H.R. (Feb. 19, 1998), ¶ 86, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58138. *See generally* JONATHAN DOAK, VICTIMS' RIGHTS, HUMAN RIGHTS AND CRIMINAL JUSTICE 159–71, 180–86 (2008) (discussing human rights provisions granting victims of crime the right to justice and truth in the investigation and prosecution of the case); SHELTON, *supra* note 28, at 14–37 (discussing provisions in regional and international human rights treaties which guarantee the right to effective judicial remedies).

129. ICC Statute, *supra* note 33, art. 68(3). The provision emphasizes, however, that victim participation must be exercised "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." *Id.*

130. *E.g.*, Prosecutor v. Nikolić, Case No. IT-02-60/1-S, Sentencing Judgement, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003), http://www.icty.org/x/cases/nikolic/tjug/en/mnik-sj031202-e.pdf; Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgement, ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003), http://www.icty.org/x/cases/obrenovic/tjug/en/obr-sj031210e.pdf. *See generally* LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 257–61 (2005) (arguing that international criminal trials can play an important role in documenting atrocities); Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Impli-*

search for the truth is also an important goal.[131] But the emphasis on documenting the crimes and the context in which they occurred is even more pronounced at the international level because of the systematic nature, historic proportions, and political underpinnings of the crimes. Although certain remedies are fully consistent with this goal of international criminal courts, others—such as exclusion of evidence or staying the proceedings—are less so.

Given these competing aims of international criminal justice, the absolutist approach to remedies appears too blunt a tool. While it advances the goal of providing fair trials, the absolutist approach often conflicts with other important commitments of international criminal courts. Even at the domestic level, many criminal justice systems have acknowledged that the defendant's right to an effective remedy for the breach of his rights must be balanced against other important public interests, such as punishing crime or uncovering the truth about the accusations.[132]

The need to accommodate these competing goals is more pressing at the international level, given the extreme gravity, broad scope, and systematic nature of the crimes. The public interest in retribution and deterrence is greater in cases of serious and widespread crimes. Many national legal systems recognize this point and adjust remedies depending on the gravity of the crime. A classic German treatise on evidence captures the point vividly: "[T]he interest in solving high treason or a murder is infinitely greater than the interest in investigating and punishing a cyclist who drives on the wrong side of the

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cations for the Success of Transitional Justice Mechanisms, 45 VAND. J. TRANSNAT'L L. 405, 472–75 (2012) (arguing that establishing an accurate historical record is one of the most important goals of international criminal courts).

131. *E.g.*, Dimitrios Giannoulopoulos, *The Exclusion of Improperly Obtained Evidence in Greece: Putting Constitutional Rights First*, 11 INT'L J. EVID. & PROOF 181, 186 (2007); Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 167–70 (2003).

132. *See, e.g.*, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 86 (Jan. 29, 2007), http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF; J.R. Spencer, *Evidence*, *in* EUROPEAN CRIMINAL PROCEDURES 603–10 (Mireille Delmas-Marty & J.R. Spencer eds. 2002); Giannoulopoulos, *supra* note 131, at 206–07, 211–12; Stephen C. Thaman, *Constitutional Rights in the Balance: Modern Exclusionary Rules and the Toleration of Police Lawlessness in the Search for Truth*, 61 U. TORONTO L.J. 691 (2011); Weigend, *supra* note 107, at 252.

road, or a sassy young man who gives his desire for singing too long a rein during night time hours."[133] When grave crimes are also widespread and systematic, the public interest in prosecution and trial on the merits is even stronger, and a remedy that extinguishes the possibility for such a trial becomes less acceptable.[134]

B. *Practical Difficulties of International Prosecutions*

For practical reasons, remedies for prosecutorial misconduct are also typically more costly at the international than at the national level. International prosecutions are generally more complex, more expensive, and more difficult to accomplish than domestic prosecutions. In that context, certain remedies, such as dismissals, retrials, stays of proceedings, and exclusion of evidence, are also likely to be more damaging to the prosecution than equivalent remedies would be at the domestic level.

International prosecutions typically occur years after the crimes were committed and far from the place where the crimes occurred. They often require enormous infrastructure to accommodate work across different countries, cultures and laws, and involve witnesses who are severely emotionally traumatized, concerned about their safety, and often unwilling to testify.[135] International prosecutions are also very complex be-

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133. Ernst Beling, Die Beweisverbote als Grenzen der Wahrheitserforschung im Strafprozess (1903), *quoted and translated in* Thaman, *supra* note 132, at 732.

134. Some have argued that gravity should be irrelevant to the determination of remedies, because the more serious the charges, the higher the stakes for the defendant, and therefore the greater his interest in receiving a full remedy for violations of his rights. Thaman, *supra* note 132, at 732. But even though the stakes are indeed higher for international crimes defendants, it does not follow that the pressing public interests in prosecution of grave crimes are simply canceled out and that the gravity of the crimes should not be considered at all. The balancing approach would allow courts to consider gravity on both sides of the scale on a case-by-case basis. Another criticism of considering gravity with respect to remedies for misconduct is that it will dilute the protection of the underlying rights. *See, e.g.*, Yale Kamisar, *'Comparative Reprehensibility' and the Fourth Amendment Exclusionary Rule*, 86 Mich. L. Rev. 1 (1987). I address this criticism in Section III.D.

135. Starr, *supra* note 19, at 716; Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 Harv. Int'l L. J. 323, 336–37 (2009).

cause they concern mass atrocities occurring on a vast geographic scale and require uncovering the operations of foreign and often secretive political and military structures. A typical international prosecution costs millions of dollars and lasts several years.[136] Accordingly, at least one remedy—retrial—is often likely to be prohibitively expensive.[137]

International prosecutions are not only costly, but also difficult to pursue effectively. In addition to being legally and factually complex, they are often politically charged and occur in volatile and unsafe regions. Such prosecutions target powerful political and military leaders and occur during or immediately after a violent conflict or a major political transition. National authorities, who would normally be best equipped to gather evidence, are generally unwilling or unable to cooperate with international prosecutors.[138] Under these circumstances, it is much more difficult for prosecutors to make up for a piece of excluded evidence or to handle a retrial.[139] Similarly, it is difficult to ensure the reappearance of a defendant once he has been released as a result of a stay of the proceedings.[140] In addition, some national authorities may become entirely uncooperative if they perceive that the international court is releasing a defendant "on a technicality."[141]

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136. Whiting, *supra* note 135, at 340; David Wippman, Notes and Comments, *The Costs of International Justice*, 100 AM. J. INTL L. 861, 872–77 (2006).

137. International tribunals have ordered a retrial only twice so far. Muvunyi v. Prosecutor, Case No. ICTR-2000-55A-A, Judgement, ¶ 171 (Aug. 29, 2008) (quashing conviction and ordering retrial); Prosecutor v. Haradinaj, Case No. IT-04-84-A, Judgement, ¶ 377 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2010) (ordering a partial retrial after the prosecution appealed an acquittal).

138. *See* Whiting, *supra* note 135, at 335–36.

139. Of course, this is not to deny that even in national jurisdictions, the exclusion of evidence often leads to dismissal of the prosecution. This is most common in simple possession or distribution cases, however, and is less likely to occur in cases of higher complexity (more similar to those at the international criminal courts), where the prosecution's case rests on multiple pieces of evidence.

140. *See supra* text accompanying note 9.

141. *See* Starr, *supra* note 19, at 717. When the ICTR Appeals Chamber ordered the release of Barayagwiza on the grounds that he had been improperly detained for several months, the Rwandan government threatened to cease cooperating with the Tribunal. This would have prevented the Tribunal from continuing its prosecutions, so the Chamber issued a new deci-

For all these reasons, remedies such as retrials, exclusion of evidence, or a stay of proceedings and release of the defendant are often more damaging to the prosecution at the international level than at the domestic level. International criminal courts can therefore benefit greatly from the balancing approach, which would allow them to select more flexible and less drastic responses to prosecutorial misconduct.

C. *Transparency and Inclusiveness*

The balancing approach has another important advantage: it requires judges to expose and defend the interests they consider in determining remedies.[142] Under the absolutist approach, the court essentially declares one right or interest the winner and elevates it above all other interests for an indefinite period of time. In effect, judges are "freezing in place a prior act of balancing."[143] By contrast, balancing courts openly consider and reconsider relevant rights and interests in each case, which makes it easier to review, challenge, and reform doctrine as needed.

Balancing courts are also less likely to engage in "remedial deterrence."[144] Remedial deterrence occurs when courts are faced with remedies that are inordinately costly to legitimate public interests, and judges are reluctant to separate remedies from the underlying right. Instead, judges sympathetic to the legitimate interests at stake might constrict the scope of individual rights and conclude that there is no violation of the right and no relief is warranted. As Sonja Starr has documented, the ICTY and ICTR frequently engaged in such remedial deterrence.[145]

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sion, suggesting that the proper remedy was in fact sentence reduction or, should Barayagwiza be acquitted, financial compensation. *Id.*

142. *See* Jackson, *supra* note 21, at 831–32 (making the same point about proportionality analysis); Sweet & Mathews, *supra* note 21, at 77 (same).

143. Sweet & Mathews, *supra* note 21, at 87–88.

144. *See* Starr, *supra* note 19. *See generally* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889–99 (1999) (discussing remedial deterrence and arguing that "remedial consequences exert an important influence over the shape and existence of constitutional rights").

145. Starr, *supra* note 19, at 720–24; *see also* Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111 (2003) (making a similar point in the context of U.S. criminal procedure).

Over the long term, "remedial deterrence" likely curtails defendants' rights. While a few defendants benefit from broad remedies for violations of their rights, many others are denied even the mere recognition that their rights were violated. This sets back not only the cases of individual defendants, but also the development of legal doctrine on fair trial rights. In short, even under an absolutist approach, the costs of remedies are bound to influence the court's decision-making, but under that approach, the influence is simply not openly acknowledged.

Under the balancing approach, by contrast, when judges find that they must restrict remedies, they do so openly and provide reasons for awarding less than complete relief. When judges are straightforward about the values that motivate their decisions and about the interpretative methods they employ to derive these values, they open up a broader space for deliberation and contestation that can ultimately be useful to international criminal justice. At the international level, there is no democratically elected legislature that can revisit the weight given to different rights and interests in specific cases. For that reason, it is especially important for ICC judges to be transparent about the values motivating their decisions. This allows for public review and criticism of their decisions, and ultimately, for broader legitimacy of the court's work.[146]

Greater legitimacy stems not only from the transparency of the balancing approach, but also from its inclusiveness. By openly addressing competing interests in its decisions, the court signals to all the parties affected that their concerns will be considered. For example, if a balancing court imposes a costly remedy, such as a stay of the proceedings, it would nonetheless engage the parties representing opposing public interests (e.g., the victims and the prosecutor) and acknowledge that they have legitimate claims on their side. The court can therefore "credibly claim that it shares some of the loser's distress in the outcome."[147] In the process, the court also reinforces the legitimacy of resolving value conflicts through reasoned deliberation in a court of law.

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146. *Cf.* Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 153–59 (2009) (asserting that, in inter-state disputes, an international court's transparency bolsters its credibility).

147. Sweet & Mathews, *supra* note 21, at 89.

D. *Responding to Criticisms of Balancing: Structuring Discretion*

The balancing approach is inclusive, transparent, and accommodating of multiple goals of international criminal law. But it is not without flaws. Criticism typically falls into two principal categories.

First, the balancing approach is criticized for allowing courts to make policy on questions that are the province of legislatures.[148] On this account, the balancing approach authorizes judges to revalue competing interests which the legislature has already weighed in the process of defining individual rights. For example, when legislators determine the permissible length of detention before a suspect is presented to a judge, they have already balanced the suspect's liberty interests against society's interest in punishing crime effectively. When a suspect is detained for an unduly long period before presentment to a judge, and a court awards less than complete relief for that violation, this arguably disturbs the balance between liberty and security chosen by the legislature in codifying the right.[149]

But what seems like judicial policymaking to some can in fact be explained as a gap-filling interpretative exercise. When defining rights, legislatures often fail to specify the remedies that follow when these rights are violated. For example, a statute may provide for prompt judicial review after detention, but fail to indicate what remedies should be imposed when a person is detained for an unreasonably long period before presentment. Since the legislature has essentially left this issue unresolved, courts have to fill the gap through interpretation—an exercise that courts engage in whenever a statutory provision is ambiguous, whether it concerns rights, duties, or remedies.

If the legislature wishes to restrain the judges' interpretative discretion, it can always do so. It can specify the remedies warranted for a particular violation, or at least outline a particular approach toward remedies. At the ICC, the Assembly of States Parties (which, albeit not democratically elected, has the power to adopt rules of procedure for the ICC) could lay out concrete factors that judges must consider in choosing the

148. *See* Gewirtz, *supra* note 75, at 607; Tsakyrakis, *supra* note 21, at 470.
149. Gewirtz, *supra* note 75, at 607.

type and level of remedy for, say, disclosure violations or violations of the right to counsel. Some national legislatures have already done so, for example, by outlining the factors that courts should take into account when deciding whether to exclude unlawfully obtained evidence.[150]

The second criticism of the balancing approach presents a more forceful challenge. If courts regularly provide incomplete relief for procedural violations, over time, they might dilute the value and meaning of the underlying right.[151] This would be especially true if "psychologically, judges . . . systematically undervalue individual rights if allowed to balance them against broad social interests."[152] Some of the studies of the balancing approach to remedies in the United States suggest that this is a real possibility.[153]

To avoid such dilution, scholars have proposed that the individual right violated must be given special weight in the balancing analysis.[154] Under this view, a fundamental right, such as the right to obtain exculpatory evidence, would be assigned a greater value in the balancing process than competing social interests. Only especially weighty public interests could overcome individual rights, and fundamental rights would rarely be trumped by countervailing interests.

But simply stating that courts ought to place a special emphasis on individual rights may not provide sufficient guidance to courts and may leave the protection of rights too indeterminate. Instead, this Article proposes several more concrete steps that a court such as the ICC can take to structure judges' discretion.

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150. Evidence Act 2006 § 30 (N.Z.).

151. Gewirtz, *supra* note 75, at 607–08; Roach, *supra* note 27, at 862–83, 895; David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1212; Tsakyrakis, *supra* note 21, at 470.

152. Gewirtz, *supra* note 75, at 607–08.

153. *See, e.g.*, Roach, *supra* note 27, at 895 (noting that American courts have used the slogan of the equitable, or balancing, approach to minimize rights claims of disadvantaged groups); Rudovsky, *supra* note 151, at 1212, 1254 (noting that courts have limited the enforcement of civil rights by denying more serious remedies and instead pointing to the availability of less drastic alternative remedies).

154. Gewirtz, *supra* note 75, at 607; Starr, *supra* note 19, at 759 .

First, the court must develop a broad palette of remedies and sanctions that judges can choose from, to ensure that proportionate relief is available in most cases. As the next Part discusses in greater detail, in addition to exclusion of the evidence, stay of the proceedings, and dismissal of the case, judges should also have the option of employing less costly responses to misconduct, such as sanctioning prosecutors, dismissing individual charges, and reducing the defendant's sentence.

Second, in its decisions, the court must clarify the factors relevant to balancing in order to make the analysis more transparent, predictable, and capable of review. These factors include the harm to the defendant's rights or the integrity of the proceedings; the culpability and level of involvement of ICC prosecutors; the extent to which the violation was an isolated occurrence or part of a pattern; and the probative value of any evidence obtained as a result of the procedural violation. The court may conclude that other factors will also be relevant, but this list would be an appropriate starting point.

Third, the court should examine alternative remedies and sanctions and determine whether a less restrictive measure may be available in a particular case. If several remedies are available, and all serve to advance important goals of international criminal justice, but one is less costly to individual rights and the integrity of the judicial process, the court must opt for that less restrictive remedy.

Finally, the court must openly and straightforwardly state and weigh the competing values that influence its analysis. If it decides to restrict a remedy, it must explain how doing so advances a goal of international criminal justice and why this benefit outweighs any loss to individual rights. Alternatively, if it awards a full remedy despite a significant harm to public interests, it must justify this balance in a reasoned decision. Part IV discusses in greater detail this framework for a structured balancing approach.

IV. Implementing the Balancing Approach

A. *Expanding the Range of Remedies*

In response to prosecutors' errors and violations, the court can choose one of two principal responses: a remedy or a sanction. Remedies aim not only to punish and deter the

misconduct, but also to repair to some degree the harm done to the defendant.[155] By contrast, sanctions focus primarily on punishment and deterrence. The distinction between the two is not always straightforward, however. Some remedies, such as declaratory judgments, offer only symbolic relief to the defendant. Conversely, sanctions may at times also provide some relief to the defendant by recognizing the harm done to him and punishing the errant prosecutors. Ultimately, both remedies and sanctions aim to protect the integrity of the proceedings. Despite these similarities, the formal distinction between remedies and sanctions persists in the case law of the ICC and in the academic literature.[156] This Part therefore analyzes remedies and sanctions separately, while ultimately recognizing that they are alternative and complementary means of addressing prosecutorial misconduct.

The Rome Statute currently provides only three remedies for procedural violations: termination of the proceedings,[157] compensation,[158] and exclusion of evidence.[159] As discussed in Part II, through its jurisprudence, the court has begun expanding the remedies available for procedural violations by prosecutors. Drawing on human rights jurisprudence, the ICC has developed a remedy of staying the proceedings. And reading broadly its powers to evaluate the evidence, at least one Trial Chamber has stated that it could draw negative evidentiary inferences from failures by prosecutors to comply with their obligations under the Statute.

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155. *E.g.*, SHELTON, *supra* note 28, at 38–43; Rudovsky, *supra* note 151, at 1211.

156. *See, e.g.*, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 18, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 Entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit To Disclose the Identity of Intermediary 143 or Alternatively To Stay Proceedings Pending Further Consultations with the VWU," ¶ 60 (Oct. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc947768.pdf; STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 834 (6th ed. 2002); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 78–79 (1995); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 827 (1999).

157. ICC Statute, *supra* note 33, art. 85(3) (implying that termination may be a remedy for grave and manifest injustice).

158. *Id.* art. 85.

159. *Id.* art. 69(7).

To make the interest balancing approach more meaningful and effective, the court ought to develop an even broader set of remedies for procedural violations. In addition to the more drastic measures such as dismissal of the case and stay of proceedings, the court could consider remedies such as dismissals of select counts, sentence reductions, and declaratory relief. It could also apply more frequently the more moderate remedies it has developed in its case law, including negative evidentiary inferences and conditional stays of the proceedings. As Section IV.B elaborates, the court could also broaden the use of sanctions, such as fines and disciplinary referrals, as a response to procedural violations by the prosecution. These alternatives would allow the court to respond effectively to prosecutorial misconduct without unduly jeopardizing other goals of international criminal justice.

1. *Sentence Reductions*

A remedy that is not expressly contemplated by the Rome Statute, but that could be beneficial to the ICC, is sentence reduction. Other international criminal courts, including the ICTR and the Extraordinary Chambers in the Courts of Cambodia (ECCC), have already granted sentence reductions to redress violations of defendants' rights. Although these courts' statutes do not expressly authorize sentence reductions, judges have exercised their "inherent powers" to provide such reductions as "effective remed[ies]" for violations of defendants' rights.[160]

So far, sentence reductions have been used exclusively to redress unlawful detentions before trial. In one case, the ICTR awarded a six-month sentence reduction in response to a violation of the defendant's right to be promptly informed of the charges against him.[161] In two others, the Tribunal reduced life imprisonment sentences to 45 and 35 years, respectively, to remedy unlawful pretrial detentions.[162]

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160. Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, Judgement, ¶¶ 251–52, 322–24 (May 23, 2005), http://www.unictr.org/Portals/0/Case/English/Kajelijeli/judgement/appealsjudgement.doc.pdf.

161. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, ¶¶ 579–80 (May 15, 2003), http://www.unictr.org/Portals/0/Case/English/Semanza/decisions/index.pdf.

162. *Kajelijeli*, ¶¶ 251–52, 322–32 (reducing a sentence of two terms of life imprisonment to 45 years as a remedy for the defendant's unlawful pretrial

In determining whether to award a sentencing reduction and how long the appropriate reduction should be, the ICTR has considered three key factors: (1) the seriousness of the violation of the accused's rights; (2) the extent to which the violation was the fault of the Prosecution or the Tribunal; and (3) the prejudice to the accused.[163] With respect to the first factor, seriousness of the violation, the ICTR looked to the length of the unlawful detention of the accused. To measure the second factor, the fault of the prosecutor, the ICTR considered the extent to which unlawful detention was attributable to actions by national authorities and thus to circumstances beyond the ICTR prosecutor's control. Even when national authorities were primarily responsible for the delay, the Tribunal still considered whether the international prosecutor "failed to effect its prosecutorial duties with due diligence."[164] Finally, in determining the prejudice to the defendant, the court considered whether the defense itself had contributed to the delay[165] and whether the court had taken measures to mitigate the effects of the violation.[166]

The ECCC Trial Chamber also reduced a defendant's sentence for a violation of his right to a speedy trial.[167] The defendant, Kaing Guek Eav (also known as Duch), had been unlawfully detained by the Cambodian Military Court for eight years, far longer than allowed under the law. After holding that the lengthy detention violated the defendant's right to a speedy trial, the Trial Chamber reduced his sentence from 35 to 30

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detention); Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review of Reconsideration), ¶ 75 (Mar. 31, 2000), http://www.unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs20000331.pdf (holding that appropriate remedy in the event of acquittal would be compensation and in the event of conviction—sentence reduction). Barayagwiza's sentence was eventually reduced from life imprisonment to 35 years. Prosecutor v. Nahimana et al., ICTR-99-52-T, Judgement and Sentence, ¶¶ 1106–07 (Dec. 3, 2003), http://www.unictr.org/Portals/0/Case/English/Nahimana/judgement/Judg&sent.pdf.

163. *Semanza*, ¶¶ 579–80.

164. *Kajelijeli*, ¶¶ 251–53.

165. *Semanza*, ¶¶ 579–80; *Barayagwiza*, ¶¶ 54–58, 61–62, 71.

166. *Semanza*, ¶¶ 579–80.

167. Prosecutor v. Kaing Guek Eav (alias Duch), Case No. 001/18-07/2007/ECCC, Trial Chamber Judgement, ¶ 624 (Extraordinary Chambers in the Courts of Cambodia July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf.

years of imprisonment.[168] The reduction was overturned on appeal, however, because the fault for the excessively long detention was attributed entirely to Cambodian authorities, rather than to the ECCC.[169] For the Appeals Chamber, the lack of direct involvement by the ECCC prosecution was a dispositive factor.

A number of national jurisdictions, both in the common-law and civil-law tradition, have also used sentence reductions as a remedy for procedural violations,[170] and the European Court of Human Rights has expressly recognized that national authorities can afford "adequate redress" by "reducing the applicant's sentence in an express and measurable manner" where the right to a hearing within a reasonable time or the right to be brought promptly before a judge has been vio-

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168. *Id.* ¶¶ 631–32. The Trial Chamber explained that it was guided by the principle that the reduction should "be express and measurable and based on the totality of the circumstances of the case." *Id.* ¶ 625.

169. Prosecutor v. Kaing Guek Eav (alias Duch), Case No. 001/18-07/2007/ECCC/SC, Appeal Judgement, ¶¶ 392–99 (Extraordinary Chambers in the Courts of Cambodia Feb. 3, 2012), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf. Two judges dissented from the Appeals Chamber judgment on this point. *Id.* ¶¶ 3–20 (partially dissenting joint opinion of Judges Klonowiecka-Milart and Jayasinghe).

170. *See, e.g.*, Eckle v. Germany, App. No. 8130/78 Eur. Ct. H.R. (Jul. 15, 1982), ¶ 33, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57476 (quoting the German Federal Court of Justice as stating that "[e]xcessive length of criminal proceedings may . . . constitute a special mitigating circumstance . . . [and] that the spirit of the law would be lost sight of . . . if, when determining sentence, this circumstance were not clearly (deutlich) taken into account"); Salah v. Netherlands, App. No. 8196/02 Eur. Ct. H.R. (July 6, 2006), ¶¶ 30–40, 74, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76256 (discussing Dutch cases that applied sentence reduction as a remedy for state misconduct); Beck v. Norway, App. No. 26390/95 Eur. Ct. H.R. (June 26, 2001), ¶ 14, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59527 (quoting the City Court on the three mitigating factors considered in determining the sentence, including the long time between when the crime was committed and when the trial was held); Yetkinsekerci v. United Kingdom, App. No. 71841/01 Eur. Ct. H.R. (Oct. 20, 2005), ¶ 8, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70729 (quoting the U.K. Court of Appeal as holding that it was reducing the sentence from the 18 to 12 years in light of the excessive time taken for the appeal of the sentence); R. v. Nasogaluak, [2010] 1 S.C.R. 206, ¶ 53 (Can.) (holding that a sentence may "be reduced in light of state misconduct even when the incidents complained of do not rise to the level of a [Canadian Charter of Rights and Freedoms] breach").

lated.[171] The factors considered as relevant to the determination of sentence reductions vary somewhat from jurisdiction to jurisdiction, but, like the ICTR and the ECCC, national courts typically examine the seriousness of the violation, the culpability of state actors, and the prejudice to the defendant, among other factors.

Sentence reductions can offer an attractive alternative to more drastic remedies, such as releasing the defendant and dismissing the charges with prejudice. They are especially appropriate where the reliability of the verdict is not at stake, but the violation is nonetheless serious (e.g., violations of the right to a speedy trial or the right to privacy, intentional delay in the disclosure of evidence, and certain violations of the right to counsel).[172]

In such cases, sentence reductions could be used to condemn, punish, and deter prosecutorial misconduct. Prosecutors care not simply about obtaining a conviction, but also about the sentences imposed on defendants.[173] As Sonja Starr has argued persuasively in the American context, "prosecutors have many reasons to prefer longer sentences: political pressures, ideology, office policy and culture, and career interests."[174] Some of the same factors apply at international courts, where prosecutors have frequently appealed sentences perceived as too lenient.[175] Finally, even prosecutors who are not greatly concerned with the length of sentences still have a reason to dislike sentence reductions because they "would face embarrassment if a sentence were reduced on the express basis of [their] wrongdoing."[176]

Even more than prosecutors, defendants care about the length of their imprisonment. A sentence reduction therefore provides concrete and desired relief to convicted defendants

171. Chraidi v. Germany, App. No. 65655/01 Eur. Ct. H.R. (Oct. 26, 2006), ¶¶ 24–25, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77694.

172. *See* Sonja Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1519 (2009).

173. *Id.*

174. *Id.* at 1513.

175. *E.g.*, Jennifer J. Clark, Note, *Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 96 GEO. L.J. 1685, 1710 (2008).

176. Starr, *supra* note 172, at 1513.

whose rights have been violated.[177] More broadly, such reductions have an expressive function, sending a message that the international court will not tolerate misconduct by its own officers. In these ways, sentence reductions promote the goals of ensuring fair trials at the ICC and strengthening respect for the rule of law.[178]

In addition to punishing misconduct effectively, sentence reductions are typically consonant with the main goals of international criminal justice. Because the ICC is still able to adjudicate the case fully on the merits, it is not prevented from punishing and deterring international crimes, uncovering the truth about these crimes, or helping victims obtain redress. Guilty defendants do not avoid punishment altogether, as they might if the court ordered a more drastic remedy. In short, sentence reductions are flexible and capable of accommodating diverse penological goals.

ICC judges could use sentence reductions to address various types of misconduct at both the trial and pre-trial stages. To make the use of reductions more consistent, judges could establish guidelines on their application. The court could specify types of misconduct for which sentence reductions would be particularly appropriate.[179] The guidelines could also outline cases for which reductions would not be a suitable remedy—for example, to remedy grievous misconduct that undermines the reliability of the conviction,[180] or conversely, to remedy minor procedural violations. The guidelines could further lay out factors that should be considered in calculating the sentencing reduction, including the harm to the defendant, the nature of the rights violated, and the culpability of the prosecutor for the misconduct.[181]

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177. *E.g.*, Calabresi, *supra* note 145, at 116. For those who are acquitted, financial compensation may be available. *See infra* Section IV.A.4.

178. Starr, *supra* note 172, at 1513.

179. For examples of violations for which sentencing reductions might be appropriate, see *supra* text accompanying note 172.

180. Starr, *supra* note 172, at 1519–20 ("Sometimes, dismissal of charges, mistrial, or appellate reversal may be necessary to avoid a risk of wrongful conviction. Sentence reduction would be plainly inadequate to serve this purpose . . . at least not as the sole remedy, when prosecutorial misconduct undermines the court's confidence in the factual validity of the conviction.").

181. *See id.* at 1519.

Sentence reductions are not a perfect remedy, however, and their drawbacks must be taken into account when deciding whether they offer a better alternative to other available remedies. In at least some cases, in which aging defendants are sentenced to life imprisonment, a sentence reduction will not be particularly meaningful, since a reduction to 35 or 45 years would still effectively be a life sentence. In such cases, the compensatory value of a reduction, and thus its potential to vindicate individual rights, is likely to be insignificant. For the same reason, the deterrent value vis-à-vis prosecutors is likely to be slight and would consist primarily in the symbolic condemnation of the prosecutor's conduct.[182]

At the ICC, however, this may not be as serious a problem as it has been at other international tribunals. Whereas the ICTR has regularly imposed life imprisonment, at the ICC, life imprisonment is supposed to be used only in exceptionally grave cases.[183] The maximum sentence at the ICC is otherwise set at 30 years.[184] Consequently, at the ICC, sentence reductions are likely to be more meaningful and more likely to deter prosecutorial misconduct. To increase the deterrent effect of such reductions, the court can specifically consider the life expectancy of the defendant in each case and determine whether a sentence reduction would amount to a meaningful remedy.

While reductions may in some cases be too small to make a difference, in other cases, they may be too generous and be perceived as an unjustified windfall for the defendant. Courts must therefore be cautious not to grant reductions that interfere with the purposes of punishment. If the sentence post-reduction seriously underrepresents the defendant's culpability, it can dilute the expressive value of punishment and undermine the retributive and deterrent functions of international criminal justice.

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182. The court could find complementary remedies to enhance the compensatory and deterrent value of sentencing reductions in such situations, for example, by ordering better detention conditions for the accused. I thank Sonja Starr for this suggestion.

183. ICC Statute, *supra* note 33, art. 77(1)(b) ("[The Court may impose life imprisonment] when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.").

184. *Id.* art. 77(1)(a).

While these concerns are valid, judges can address them by employing proportionality analysis at sentencing. Before imposing a sentence reduction, the court could confirm that the ultimate sentence does not significantly underrepresent the defendant's blameworthiness. National courts already use a similar analysis to ensure that discounts awarded for guilty pleas do not result in sentences that are disproportionately low.[185] The same proportionality test could be used in the context of discounts granted to remedy prosecutorial misconduct.

In determining the length of the sentence, courts would be mediating between competing goals. On the one hand, a longer sentence may better serve more traditional goals of punishment, such as retribution, deterrence, and incapacitation. On the other hand, sentence discounts may be justified in the name of efficiency (in the case of guilty pleas) or as a way to deter prosecutorial misconduct and affirm the rule of law (in the case of remedial reductions). The Supreme Court of Canada has justified remedial sentence reductions on just such terms, as a means of promoting the goal of "respect for the law and the maintenance of a just, peaceful and safe society."[186] Judges in Canada may therefore consider "not only the actions of the offender, but also those of state actors . . . [since] the sentencing process includes consideration of society's collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society."[187]

When ICC prosecutors violate the law in the performance of their duties, a sentence reduction may similarly be justified as a means of affirming the rule of law. To ensure that the reduction is proportionate, the court would consider whether the reduction helps punish misconduct and affirm respect for the rule of law, without unduly sacrificing other goals of inter-

185. *See, e.g.*, German Federal Court of Appeals, 2004 STRAFVERTEIDIGER 470 (holding that, when the expected post-trial sentence for tax evasion is six years of imprisonment, a four-year sentence discount to reward a confession is disproportionate); German Federal Court of Appeals, 2008 NEUE ZEITSCHRIFT FÜR STRAFRECHT 170 (holding that the trial court impermissibly coerced the defendant when it offered three and a half years of imprisonment in the event of a confession, and seven to eight years in the absence of a confession).

186. R. v. Nasogaluak, [2010] 1 S.C.R. 206, ¶ 39 (Can.).

187. *Id.* ¶ 49.

national criminal justice, such as deterrence and retribution.[188]

A different and somewhat unusual justification for sentence reductions was offered by the *Lubanga* Trial Chamber in its 2012 sentencing judgment. The Trial Chamber denied that it was granting a sentencing reduction to remedy prosecutorial misconduct.[189] Instead, the Chamber asserted that the sentence was reduced to reward the defendant's "respectful and cooperative [conduct] throughout the proceedings, notwithstanding some particularly onerous circumstances."[190] The "onerous circumstances" all had to do with prosecutorial missteps: the failure to disclose exculpatory materials before trial; the failure to comply with the court's orders to disclose the identity of an intermediary; and the making of misleading public statements about the evidence in the case.[191] In short, prosecutorial misconduct by itself was held not to be appropriate grounds for a sentence reduction in *Lubanga*, but cooperation by the defendant in the face of misconduct was.

It is difficult, however, to understand the reduction in *Lubanga* as rewarding cooperation by the defendant. The defendant did not refrain from filing motions to contest the prosecution's misconduct. He did not admit guilt or cooperate by providing information against other defendants. Instead, his cooperation appears to have amounted to remaining respectful and not boycotting the proceedings—something that ought to be expected at criminal trials and hardly constitutes a reason to reduce a sentence. While it is encouraging to see the ICC granting sentence reductions to indirectly redress prosecutorial misconduct, it would be preferable if these reductions were openly and candidly defended as a means to punish prosecutorial misconduct and affirm respect for the rule of law.

188. *See supra* text accompanying note 185.

189. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 90 (July 10, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf.

190. *Id.* ¶ 91.

191. *Id.*

2. *Dismissal of Select Counts*

Another remedy that international criminal courts have mentioned, but not yet used as a response to prosecutorial misconduct is the dismissal or reduction of select counts against the defendant.[192] Dismissals of individual counts have been used to cure indictment defects,[193] so it is possible to imagine using the same remedy for other procedural violations by the prosecution. Indeed, at the national level, some common-law jurisdictions already use dismissals in this fashion, to cure violations beyond defects in the indictment.[194] And although courts often employ an all-or-nothing approach when they dismiss charges, one could conceive of a more tailored approach in cases of less grievous misconduct.

For example, in cases where the prosecution has withheld or lost potentially exculpatory evidence critical to a particular count, the court could remedy the misconduct by dismissing or modifying that particular count, rather than dismissing the indictment altogether. Indeed, in *Prosecutor v. Lubanga*, as the Trial Chamber grappled with the prosecutor's refusal to turn over exculpatory evidence obtained under confidentiality agreements, the court suggested that a possible remedy would be for the prosecutor to withdraw "any charges where non-disclosed exculpatory material has a material impact on the Chamber's determination of the guilt or innocence of the accused."[195]

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192. Prosecutor v. Bizimungu, Case No. ICTR-99-50-T, Judgment and Sentence, ¶ 174 n.254 (Sept. 30, 2011) (citing Prosecutor v. Augustin Ndindiliyimana, Case No. ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68 (TC), ¶¶ 61–62 (Sept. 22, 2008)). The Trial Chamber mentioned dismissal of charges as a potential remedy for late disclosure of exculpatory information, but dismissed it as too extreme under the circumstances.

193. *E.g.*, Prosecutor v. Ntagerura, Case No. ICTR-99-46-A, Judgment, ¶¶ 33, 35, 40, 42–45 (July 7, 2006); Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-IOA and ICTR-96-17A, Judgment, ¶¶ 59, 84–85, 470–72 (Dec. 13, 2004).

194. *See, e.g.*, Lafler v. Cooper, 132 S. Ct. 1376 (2012) (holding that courts may vacate select counts as a remedy for ineffective assistance of counsel); United States v. Lyons, 352 F. Supp. 2d 1231 (M.D. Fla. 2004) (dismissing select counts as a remedy for prosecutor's failure to comply with disclosure obligations); Henning, *supra* note 156, at 750.

195. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Arti-

Typically, dismissals of particular counts will result in lower sentences, so the advantages and disadvantages of dismissals are quite similar to those of sentence reductions. They offer courts the flexibility to provide a remedy that is both consistent with the public interest in prosecution and effective at deterring prosecutorial misconduct.

Another reason why partial dismissals may be a useful remedial alternative in some cases is that they may have a symbolic value that sentence reductions do not. International criminal defendants often care about the nature of the specific charges against them, apart from any sentencing consequences that the charges may carry. For example, where the same conduct can be charged as either genocide or a crime against humanity, defendants may value deeply a reduction of the charges to crimes against humanity, because of the special stigma that genocide charges impart.[196] For the same reasons, prosecutors themselves care about the nature of the charges that they bring and would be deterred by the prospect of partial dismissals.[197]

Additionally, partial dismissals can be granted at the pretrial stage and immediately after the violation has occurred (for example, in cases where prosecutors have failed to provide potentially exculpatory evidence relevant to the count being dismissed). The immediacy of this sanction arguably strengthens its deterrent effect.[198] When granted during pre-

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cle 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, ¶ 6 (June 13, 2008). The Chamber noted further that "[i]f the prosecution were in doubt as to whether or not any material falls into this category . . . it should be put before the Trial Chamber for its determination." *Id.* Because the prosecution was not able to comply with the latter disclosure requirement, the Chamber eventually stayed the proceedings. *See supra* text accompanying note 5. But since Lubanga was indicted on only two counts, and the potentially exculpatory evidence pertained to both, a partial dismissal would not have been feasible.

196. Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 VAND. L. REV. 69, 119 (2006).

197. *See, e.g.*, Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶¶ 175–78 (Feb. 22, 2008) (discussing prosecutors' decision to appeal the acquittal of forced marriage charges, presumably for symbolic reasons, in a case where the defendant was convicted on alternative and equally serious charges of sexual slavery).

198. Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 821 (2010) (discussing stud-

trial, dismissals also obviate the need for either the defense or the prosecution to present evidence related to the dismissed charges. This is beneficial to both parties, but particularly to the defense, which would be able to conserve its limited resources and use them more effectively to challenge the remaining counts.[199] The court is also likely to derive efficiency gains from such early dismissals.

While beneficial to the parties and the court, partial dismissals also have several drawbacks. The primary disadvantage of dismissals is that they may interfere with the goal of uncovering the truth about the underlying crimes. When counts are dismissed, related evidence is not presented at trial, which limits the record and leaves victims with partial or even no redress.

Dismissals may also conflict with the expressive function of ICC prosecutions. As noted earlier, prosecutors often bring particular charges to send a message—for example, to condemn sexual crimes during conflict or crimes discriminating against a particular class of persons.[200] Dismissing symbolically powerful charges could undermine the ability of international prosecutions to express targeted condemnation and to reinforce respect for particular legal norms.

In some cases, partial dismissals may also be too weak to effectively punish and deter prosecutorial misconduct. For example, partial dismissals that result in lengthy sentences may not be particularly meaningful in the case of aging defendants. In such cases, judges must either adjust the sentence further or impose an additional sanction or remedy to strengthen the effect of dismissals.

In addition, a broader concern remains about partial dismissals: that judges can easily circumvent them at sentencing.

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ies showing that the likelihood and immediacy of punishment are in fact more influential deterrent factors than the severity of punishment).

199. The prosecution is also less likely to benefit from partial dismissals because it will typically already have largely gathered its evidence to support the charges by then. Most of the work in gathering and organizing the evidence will in fact have occurred before the confirmation of charges proceedings.

200. *Cf.* Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 314 (2012) (suggesting that the ICC prosecutor may have chosen to bring certain charges because of their potential to express select global norms).

ICC judges have broad sentencing discretion. There are no sentencing maximums or minimums tied to particular charges, so a dismissal of select counts might not translate into a noticeable sentence reduction. Judges could easily grant a partial dismissal and then thwart its effect by imposing the same or nearly the same sentence they would have imposed absent the dismissal.

In practice, however, this is unlikely to occur. If judges are reluctant to grant a meaningful remedy, they would simply refrain from dismissing any counts. It would be surprising if the same judges who saw the need to dismiss counts in the first place would then undermine their own decision by rendering the dismissal virtually worthless at sentencing.

Like sentence reductions, partial dismissals are not a perfect remedy. They may interfere with the goal of uncovering the truth, and they may lead to sentence reductions that are either unduly generous or too slight to be meaningful. Courts need to be sensitive to these shortcomings of dismissals and order them only when other available remedies would be less appropriate. The most fitting cases would be those where the prosecutor has withheld or lost potentially exculpatory evidence, which is relevant to only one or two counts and is not significant in light of the size and complexity of the case.

3. *Declaratory Relief*

Perhaps the most commonly awarded remedy in international law is declaratory relief. Declaratory relief is an official pronouncement by the court, establishing that misconduct has occurred and that a particular party is at fault. It is the least intrusive remedy that a court could order,[201] because it allows the breaching party to decide whether and how to remedy the situation.[202]

Not surprisingly, declaratory judgments have been used widely at the domestic level, in civil-law and common-law systems, as well as at the international level. As Dinah Shelton reports, "[d]eclaratory judgments are the remedy most often sought and granted in inter-state litigation."[203] At the European Court of Human Rights, too, remedies typically consist of

201. SHELTON, *supra* note 28, at 199.
202. *Id.* at 68.
203. *Id.* at 199.

declaratory judgments.[204] Even at the ICTY and ICTR, a mere "warning" to prosecutors, accompanied by a declaration of the violations committed, was the most commonly imposed remedy for ethical and procedural violations by prosecutors.[205]

A declaratory judgment can have an important symbolic effect of condemning the conduct in question. For prosecutors, who are presumed to be officers of justice and to be acting in good faith to honor their obligations, a mere declaration by the court will often be sufficient to induce compliance.[206] The court's judgment condemning particular actions of prosecutors as unlawful can serve as a potent deterrent for most prosecutors, who would not like to be called out publicly by a court for failing in their obligation. As officers of the court, prosecutors are particularly susceptible to shaming by the court, especially since they are "repeat players" in the system and are likely to appear before the same judges many times. To strengthen the shaming effect, the court could even consider naming the errant prosecutors in its judgment, particularly in cases where the misconduct was deliberate.[207]

In addition to sanctioning prosecutors, a declaration that the defendant's rights were violated may also have a reparative effect. The open recognition and condemnation of the violation can help restore the integrity of the proceedings in the eyes of the public. Similarly, the defendant may derive satisfaction from the official acknowledgement that a wrong was committed and from the public reprimand of the prosecutors.

While declaratory relief has an important role to play in regulating prosecutorial behavior, there is no question that its

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204. *Id.* at 201; Lorna McGregor, *Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of* Khadr v. Canada, 10 HUM. RTS. L. REV. 487, 487 (2010). By contrast, the Inter-American Court of Human Rights has been more reluctant to use declaratory judgments, reasoning that they are inadequate to remedy grave human rights violations. *Id.* at 488.

205. *See* Table of International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda Sanctions (on file with author).

206. *Cf.* SHELTON, *supra* note 28, at 199 (arguing that if a state "is committed to the rule of law, a declaratory judgment still should be effective to end the violation and prevent similar breaches in the future").

207. *Cf.* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys To Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1089–93 (2009) (suggesting that shaming U.S. prosecutors, by listing their misconduct and their names, could be an effective punishment and deterrent).

deterrent effect is typically weaker than that of other remedies, and its reparative effect is even more limited. For that reason, it is important to limit the use of declaratory judgments to cases where prosecutorial violations are minor and where the prejudice to the defendant is insignificant or nonexistent. Declaratory judgments are especially likely to be helpful in cases where prosecutors' actions violated the rights of third parties, but did not harm the defendant. In at least some domestic systems, declaratory relief is used in just such circumstances—when the rule violated "does not purport to protect the interests of the accused in the criminal trial," or when the rights of a third party, but not the accused, were breached.[208]

4. *Compensation to Acquitted Defendants*

Although sentence reductions and partial dismissals may be useful remedies in cases where the defendant is ultimately convicted, they will not be feasible in cases of acquittal. In practice, acquittals are likely to be rare at the ICC, just as they were at the ICTY and ICTR. But if prosecutors committed misconduct in the case of an innocent defendant, and the misconduct was not remedied before the verdict, the court must consider whether a remedy in addition to the acquittal is warranted.

The Statutes of the ICTY and ICTR did not provide for remedies in cases of acquittal, but the courts used their inherent powers to order compensation for prosecutorial misconduct in such cases.[209] At the ICC, the Statute specifically provides for compensation to wrongfully detained or convicted persons.[210] In addition, the court may order compensation "in exceptional circumstances," where it "finds conclusive facts showing that there has been a grave and manifest miscarriage of justice," and where the defendant "has been released from detention following a final decision of acquittal or a termina-

208. Marc Groenhuijsen, *Illegally Obtained Evidence: An Analysis of New Trends in the Criminal Justice System of the Netherlands*, *in* THE XIIITH WORLD CONGRESS OF PROCEDURAL LAW: THE BELGIAN AND DUTCH REPORTS, 91–114 (2008), *available at* http://arno.uvt.nl/show.cgi?fid=92639.

209. Stuart Beresford, *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals*, 96 AM. J. INT'L L. 628 (2002). This is a key reason why compensation was so controversial at the Tribunals.

210. ICC Statute, *supra* note 33, art. 85(1)–(2).

tion of the proceedings for that reason."[211] In determining the amount of compensation, the court must take into account "the consequences of the grave and manifest miscarriage of justice on the personal, family, social and professional situation of the person filing the request."[212]

The desirability of awarding compensation to an acquitted person is debatable. Acquittal itself may be the best way to remedy procedural violations in the case of an innocent defendant.[213] Given the limited resources of the ICC—including for reparations to victims of the serious crimes that the ICC adjudicates—it may also seem inappropriate to use it for compensation to acquitted persons. Finally, there is a concern that compensation may be awarded to persons who are actually guilty, but whose guilt was not proven beyond a reasonable doubt.[214]

At the same time, a person tried before the ICC—even if ultimately acquitted—is likely to be detained for several years, ostracized as a war criminal, and possibly never quite able to shed the stigma of prosecution. Even if defendants are acquitted, therefore, they may deserve compensation for the substantial loss of liberty they suffered as a result of their lengthy pretrial detention, if it can be shown that their detention or trial rights were adversely affected by prosecutorial errors or wrongdoing.[215] In addition to the harms suffered by defendants, the integrity of the international criminal justice system is seriously harmed when an innocent person is prosecuted as a result of a "grave and manifest miscarriage of justice."

The high threshold for compensation, requiring that a serious miscarriage of justice has occurred, is unlikely to produce compensation to factually guilty persons. But to avoid any concern about using the court's scarce resources to pay

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211. *Id.* art. 85(3).

212. ICC Rules of Procedure and Evidence, Adopted by the Assembly of States Parties, R. 175, ICC-ASP/1/3 (Sept. 3–10, 2002) [hereinafter ICC Rules of Procedure and Evidence], *available at* http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf.

213. Beresford, *supra* note 209, at 628.

214. *Id.* at 635; Johan David Michels, *Compensating Acquitted Defendants for Detention Before International Criminal Courts*, 8 J. Int'l Crim. Just. 407, 419 (2010).

215. Beresford, *supra* note 209, at 643.

factually guilty defendants, the court may expressly take into consideration the likelihood of factual guilt in determining whether and how much compensation to award. Similar compensation schemes already exist in several domestic criminal justice systems.[216]

In fact, at the domestic level, compensation schemes are often broader than at the ICC—acquitted persons can receive relief even without a showing that the prosecution has committed misconduct.[217] At the ICC, a defendant can claim compensation only in cases of "grave and manifest miscarriage of justice." Given the gravity of the misconduct at issue, compensation seems particularly well-justified at the ICC. The court must find a way to unequivocally condemn serious injustice caused by its own officials. Acquittal is an indispensable first step, but compensation remains a key complementary remedy in these extraordinary cases.

B. *Expanding the Use of Sanctions*

Although a key function of remedies is to punish and deter prosecutors who violate the law, remedies can do so only indirectly and imperfectly. To curb prosecutorial misconduct more effectively, the ICC must also develop a robust sanctions regime. Sanctions are particularly useful because they can be designed to deliver punishment directly to the erring prosecutors and therefore can have a greater deterrent effect than remedies. Compared to remedies, they are also typically less costly to the international community's interests because they do not end or suspend prosecutions and trials or interfere with the truth-seeking function of the court.[218]

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216. Michels, *supra* note 214, at 420–21 (discussing Norwegian, Dutch, Austrian, and Danish law).

217. *See id.* at 413 (listing jurisdictions in which an acquitted accused may be compensated even where there has been no violation of her rights nor a miscarriage of justice); *see also* UGOLOVNO-PROTSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII [UPK RF] [Criminal Procedure Code] art. 133 (Russ.), *translated at* http://legislationline.org/documents/section/criminal-codes (same).

218. Sanctions are not cost-free, of course. Fines on the Office of the Prosecutor decrease the resources that would be devoted to investigations and prosecutions. Other sanctions, such as suspension, dismissal, or disqualification of prosecutors, may in some cases overdeter and reduce the zeal with which prosecutors perform their tasks. But these costs are much lower and

The Rome Statute provides for several types of sanctions, including disqualification, sanctions for misconduct before the court, prosecution for offenses against the administration of justice, and removal and discipline by the Assembly of States Parties. Although the ICC has not imposed any of these sanctions yet, it has recognized their potential as a less costly and more effective alternative to remedies.[219] The Assembly of States Parties has also shown increased interest in this subject and recently created a self-standing oversight mechanism, which would have the authority to investigate prosecutorial misconduct.[220]

In many cases, sanctions could deter prosecutorial misconduct more effectively than remedies and do so at a lesser cost to the objectives of the ICC. But sanctions can sometimes be so heavy as to overdeter prosecutors. They can also be misused by political bodies to interfere with prosecutorial independence. Therefore, in designing sanctions, the ICC must be careful not to vest too much discretion over sanctions in a political body and not to impose sanctions that are so harsh as to discourage prosecutors from pursuing their duties zealously and effectively.

1. *Court-Imposed Sanctions*

a. Disqualification

The Prosecutor and Deputy Prosecutor may be disqualified from a case by the Appeals Chamber for, among other reasons, the "[e]xpression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned."[221]

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more evenly spread than the costs of many remedies, which suspend or end an entire prosecution.

219. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 18, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 Entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit To Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU," ¶¶ 59–60 (Oct. 8, 2010).

220. A.S.P. Res., Independent Oversight Mechanism, Resolution ICC-ASP/8/Res.1, ¶ 1 (Nov. 26, 2009).

221. ICC Rules of Procedure and Evidence, *supra* note 212, R. 34(1)(d).

Although this sanction has not been used so far at the ICC, the former prosecutor, Luis Moreno Ocampo, and some of his staff were criticized for inappropriate public statements relating to the cases against Sudanese President Omar Al-Bashir and against Congolese militia leader Thomas Lubanga.[222] A motion for disqualification was also filed by one of the suspects in the investigation of Kenyan post-election violence.[223] The Pre-Trial Chamber refused to entertain the motion to disqualify the prosecutor, however, because Rule 34 specifies that only the Appeals Chamber is competent to address such a motion.[224]

Because only the Appeals Chamber is authorized to impose disqualification, and given the rather serious effect of this sanction on the case, it is not likely to be used frequently. But disqualification should not be overlooked, as it can be an effective complement to warnings and sanctions under Article 71 when a prosecutor makes multiple inappropriate comments about ongoing proceedings.

b. Sanctions for Misconduct Before the Court

Although the Rome Statute does not provide for "contempt of court" measures, Article 71 provides for a similar power of the court to deal with misconduct before it. If a person is disrupting the proceedings, the court may give a warning; if the disruption continues, the person may be asked to leave or be removed from the courtroom.[225] If a person deliberately refuses to comply with a direction of the court, "and that direction is accompanied by a warning of sanctions in case of breach, the Presiding Judge of the Chamber dealing with the matter may order the interdiction of that person from the proceedings for a period not exceeding 30 days or, if the misconduct is of a more serious nature, impose a fine."[226] Before

222. *See* Milan Markovic, *The ICC Prosecutor's Missing Code of Conduct*, 47 TEX. INT'L L.J. 201, 229–32 (2011).

223. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision on Application for Leave To Participate Under Articles 58, 42(5), (7)–(8)(a) of the Rome Statute and Rule 34(l)(d) and (2) of the Rules of Procedure and Evidence, ¶¶ 7–8 (Feb. 18, 2011).

224. *Id.*

225. ICC Statute, *supra* note 33, art. 71; ICC Rules of Procedure and Evidence, *supra* note 212, R. 170.

226. ICC Rules of Procedure and Evidence, *supra* note 212, R. 171.

imposing sanctions under Article 71, the court is supposed to give the offender a warning and the opportunity to be heard.[227]

Sanctions can be imposed only on persons present before the court, so some commentators have argued that the article does not apply to conduct occurring before the court convenes or after it adjourns.[228] But decisions of the ICC have interpreted the Article more broadly to cover even actions outside the courtroom if they disrupt or prejudice ongoing proceedings.

The court has on several occasions referred to its powers to impose sanctions under Article 71, although it has not used these powers yet. When the court found that an employee of the Office of the Prosecutor had made prejudicial statements to the press, it expressed the "strongest disapproval of the content of th[e] interview" and warned that "if objectionable public statements of this kind are repeated the Chamber will not hesitate to take appropriate action against the party responsible."[229] The Court was likely referring to its powers to sanction under Article 71. Although the objectionable behavior did not occur before it, it was seen to prejudice the ongoing judicial proceedings and was therefore potentially subject to sanctions under Article 71.

Similarly, after the Prosecutor refused to comply with a court order to reveal the identity of an intermediary who had worked with the Office of the Prosecutor, the *Lubanga* Trial Chamber warned the Prosecutor and Deputy Prosecutor that they would be sanctioned under Article 71, should they continue to breach the Chamber's orders.[230] But because the order in question was being appealed, the Chamber "decided to

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227. Otto Triffterer, *Article 71: Sanctions for Misconduct Before the Court*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, *supra* note 109, at 1347, 1353, 1357.

228. *Id.*

229. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Press Interview with Ms Le Fraper du Hellen, ¶ 53 (May 12, 2010), http://www.icc-cpi.int/iccdocs/doc/doc870208.pdf.

230. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 18, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 Entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit To Disclose the Identity of Intermediary 143 or Alternatively To Stay Proceedings Pending Further Consultations with the

await the outcome of the appeal . . . before taking any further action with respect to imposing sanctions."[231]

On appeal, the court held that sanctions under Article 71 are the preferred measure to employ in the case of a refusal by the prosecution to obey court orders. According to the Appeals Chamber, such sanctions are well-suited to inducing compliance with the court's orders because, if the misconduct continues, the court could impose a new fine on each day that the misconduct continues.[232] Presuming that such hefty fines would spur obedience by the prosecution, the Appeals Chamber concluded that sanctions under Article 71 (rather than a stay of the proceedings) are "the normal and proper means" to ensure the prosecutor's compliance.[233] They can restore the court's ability to ensure a fair trial and are less disruptive than a stay of the proceedings, the measure initially ordered by the Trial Chamber.[234]

While sanctions under Article 71 offer a promising means of punishing and deterring prosecutorial misconduct, the current scheme is problematic in two respects. First, Article 71's scope, even if interpreted liberally, is quite narrow. The court's authority to impose sanctions on prosecutors is limited to instances of disobeying court orders and disrupting the proceedings. Many serious and frequent infractions, such as disclosure violations, appear to be excluded.

To enhance the effectiveness of its response to prosecutorial misconduct, the ICC should be able to impose

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VWU," ¶ 17 (Oct. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc947768.pdf.

231. *Id.*

232. ICC Rules of Procedure and Evidence, *supra* note 212, R. 171(4).

233. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 18, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 Entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit To Disclose the Identity of Intermediary 143 or Alternatively To Stay Proceedings Pending Further Consultations with the VWU," ¶59 (Oct. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc947768.pdf.

234. Despite the Appeals Chamber's call for sanctions as the preferred measure for the prosecutor's misconduct, the Trial Chamber never imposed the measure, as the prosecutor disclosed the intermediary's identity after the decision by the Appeals Chamber. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-T-316-ENG, Status Conference 21 (Oct. 11, 2010), http://www.icc-cpi.int/iccdocs/doc/doc951429.pdf.

sanctions for any procedural violation that is committed in connection to proceedings before the court. This would include any substantial violation of the Statute, the Rules of Procedure and Evidence, and the Regulations of the Court, as long as the violation is connected to ongoing court proceedings. For example, the court should be able to impose Article 71 sanctions for disclosure violations. While this may be a broad reading of Article 71, it is consistent with the court's duty to ensure the fairness of the proceedings.

Another problem with the current sanctions scheme concerns the funds from which fines would be paid and the fund in which they would be deposited. Currently, it is unclear whether fines for prosecutorial misconduct would be drawn from the general fund for the court or from the fund dedicated specifically to prosecutions. If the sanctions are drawn from the general fund, prosecutors would have little financial incentive to avoid violations. To enhance the deterrent value of fines, the money ought to be taken from a fund specifically dedicated to the Office of the Prosecutor and transferred to the defense fund of the court, which supports the Office of Public Counsel for the Defense, counsel appointed for indigent defendants, and defense investigations. This would ensure both that prosecutors have an incentive to avoid sanctions and that the funds are used to advance the court's goal of providing fair trials.

The court should not only impose fines more frequently, but also make use of the other type of sanction provided by Article 71 for refusing to obey court orders: interdicting the violator from the proceedings for a period not exceeding thirty days. Unlike fines, interdiction can typically be imposed swiftly and directly on the person responsible for the violation (other prosecutors, who were not responsible for the violation, could continue to present the case before the court). Because of its very public nature, interdiction from the court is likely to have a strong shaming effect. For all these reasons, it can be a useful measure to punish and deter individual prosecutorial misconduct, without imposing any significant costs to other legitimate goals of international criminal justice.

2. *Administrative Sanctions*

As discussed in the previous Section, court-imposed sanctions can be very effective thanks to their immediacy. In practice, however, judges will not be able to devote significant time or resources to the investigation of each instance of prosecutorial misconduct. Administrative sanctions are therefore an important complement to court-imposed sanctions.

Administrative mechanisms are frequently used to sanction prosecutors in domestic criminal justice systems. Common-law systems typically rely on bar associations to apply administrative discipline.[235] At the international level, no equivalent body exists. Instead, the administrative measures discussed here, imposed by the ICC's Assembly of States Parties and the newly created Independent Oversight Mechanism, are more akin to the disciplinary mechanisms of civil-law systems. In these systems, prosecutors are subject to internal discipline for minor infractions. For violations that warrant more serious sanctions, prosecutors may be judged by special disciplinary tribunals comprised of professional judges and prosecutors.[236]

Given the prevalence of administrative discipline at the national level, one might expect it to work well at the ICC, too. But as the following sections discuss, administrative sanctions can be used inconsistently and in a political fashion, so any administrative model of prosecutorial discipline must be designed carefully to minimize these dangers.

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235. *E.g.*, Keenan et al., *supra* note 3, at 234–40. In recent years, however, England, Scotland, Australia and New Zealand have moved away from reliance on self-regulation in the legal profession, establishing disciplinary schemes that rely on legal services commissioners or boards. Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?*, 2008 J. PROF. LAW. 53, 55, 73–76 (2008).

236. E-mail from Thomas Weigend, Professor of Law, University of Cologne, to author (Aug. 5, 2011, 4:16 CST) (on file with author) (discussing the German disciplinary regime); *see also* RICHTERGESETZ FÜR DAS LAND NORDRHEIN-WESTFALEN [SGV. NRW.] [JUDICIARY ACT FOR THE STATE OF NORTH RHINE-WESTPHALIA], Mar. 1966, LANDSRICHTERGESETZ [LRiG] 29 §§ 47, 66, 67; DISZIPLINARGESETZ FÜR DAS LAND NORDRHEIN-WESTFALEN [SGV. NRW.] [DISCIPLINARY CODE FOR THE STATE OF NORTH RHINE-WESTPHALIA], Nov. 2004, LANDESDISZIPLINARGESETZ [LDG NRW] 16, § 34, 35.

a. Removal and Disciplinary Measures by the Assembly of States Parties

The Statute and the Rules provide for disciplinary measures against the Prosecutor and Deputy Prosecutor in cases of serious misconduct, serious breach of duty, and misconduct of less serious nature. These individuals may be removed from office, reprimanded, or fined for engaging in such misconduct. The provisions on removal and discipline, like those on disqualification, deal only with the two highest-ranking members of the Office of the Prosecutor. Other attorneys and staff members are not included.

The Prosecutor and Deputy Prosecutor may be disciplined for misconduct occurring in the course of their official duties if it is "incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court."[237] By way of example, the Rules suggest that serious misconduct would occur if the prosecutor discloses information that she has acquired in the course of her duties or on a matter which is under consideration by the court "where such disclosure is seriously prejudicial to the judicial proceedings or to any person."[238] The other two examples involve serious misconduct for personal benefit.[239]

A prosecutor would commit a "serious breach of duty" if she "has been grossly negligent in the performance of . . . her duties or has knowingly acted in contravention of those duties."[240] The Rules provide two examples of such breaches: failing to request to be excused from a case, when knowing that there are grounds for doing so; and repeatedly causing unwarranted delays in the prosecution of cases.[241] The Prosecutor and Deputy Prosecutor may be removed from office if they engage in serious misconduct or serious breach of duty.[242]

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237. ICC Rules of Procedure and Evidence, *supra* note 212, R. 24(1)(a).

238. *Id.* R. 24(1)(a)(i).

239. Specifically, "(ii) Concealing information or circumstances of a nature sufficiently serious to have precluded him or her from holding office;" and "(iii) Abuse of judicial office in order to obtain unwarranted favourable treatment from any authorities, officials or professionals." *Id.* R. 24(1)(a).

240. *Id.* R. 24(2).

241. *Id.* R. 24(2)(a)–(b).

242. ICC Statute, *supra* note 33, art. 46.

Less serious misconduct may be found when the prosecutor's action "causes or is likely to cause harm to the proper administration of justice before the Court or the proper internal functioning of the Court, such as "[r]epeatedly failing to comply with or ignoring requests made by the Presiding Judge or by the Presidency in the exercise of their lawful authority."[243] The Prosecutor and Deputy Prosecutors may be fined or reprimanded for engaging in less serious misconduct.

Complaints identifying misconduct must be transmitted to the Presidency of the Court, which may also initiate proceedings itself. The Presidency will review complaints with the help of three judges and will set aside anonymous or manifestly unfounded complaints.[244] Any remaining complaints concerning the Prosecutor will be sent to the Bureau of the Assembly; those concerning the Deputy Prosecutor will go to the Prosecutor.[245] The decision to discipline the Prosecutor must be made by an absolute majority of representatives in the Assembly. In the case of misconduct by the Deputy Prosecutor, the Assembly can decide on removal and fines, but only upon the recommendation of the Prosecutor.[246] Finally, the Prosecutor alone makes the decision to reprimand her Deputy for misconduct.[247]

While removal of the Prosecutor is a serious measure that is likely to be used only in extraordinary circumstances, reprimands and fines of the Prosecutor and Deputy Prosecutor can be applied somewhat more broadly. These measures do not alter the result of judicial proceedings and would not directly undermine the goals of punishing international crimes and uncovering the truth.

But the disciplinary measures are not without shortcomings. First, they can only be imposed on the Prosecutor and Deputy Prosecutor and therefore cannot address misconduct by line prosecutors. Second, they require an absolute majority vote in the Assembly of States Parties, which means that some misconduct may remain unpunished because of a failure to

243. ICC Rules of Procedure and Evidence, *supra* note 212, R. 25(a).

244. *Id.* R. 26; Regulations of the Court ICC-BD/01-01-04, Reg. 120 (2004).

245. Regulations of the Court ICC-BD/01-01-04, Reg. 121(2) (2004).

246. ICC Statute, *supra* note 33, art. 46(2).

247. ICC Rules of Procedure and Evidence, *supra* note 212, R. 30(3)(a).

muster the requisite agreement in the Assembly. Conversely, the Assembly may use these disciplinary measures inappropriately and for political reasons—for example, to punish prosecutors for pursuing unpopular cases.[248] Such intervention can seriously undermine the independence and effectiveness of ICC prosecutors, ultimately jeopardizing the ability of the ICC to accomplish its goal to prevent impunity for international crimes.

b. Investigations by the Independent Oversight Mechanism

In an important recent development, the Assembly of States Parties created an Independent Oversight Mechanism (IOM) to investigate misconduct by prosecutors, judges, court staff, and contractors retained by the court.[249] The IOM is not yet fully operational, although it is expected to begin work at some point in the next year. The IOM would have the power to investigate misconduct by both top officials and staff members of the Office of the Prosecutor (as well as judges, the Registrar, and staff members of the Chambers and the Registry). Misconduct includes "any act or omission . . . in violation of [the staff member's] obligations to the Court pursuant to the Rome Statute and its implementing instruments, Staff and Financial Regulations and Rules, relevant administrative issuances and contractual agreements, as appropriate."[250]

Before commencing an inquiry into the conduct of a member of the Office of the Prosecutor, the IOM will notify the Prosecutor that it has received information meriting the

248. The judicial referral mechanism—which is supposed to set aside manifestly unfounded complaints—helps to minimize this concern, however. *See supra* text accompanying note 244.

249. The ASP established the Mechanism under Article 112(4) of the ICC Statute, which provides that: "The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy." ICC Statute, *supra* note 33, art. 112(4). Some commentators have questioned whether the authority to discipline a wide range of prosecutorial misconduct can be based on this grant of competence to enhance the "efficiency and economy" of the court. *The Proposed Independent Oversight Mechanism for the International Criminal Court, Invited Experts on Oversight Question*, UCLA LAW FORUM, (May–Sept. 2011), http://uclalawforum.com/home (contribution by Nicholas Cowdery).

250. A.S.P. Res., Independent Oversight Mechanism, ICC-ASP/9/Res.5, Annex, ¶ 2 n.2 (Dec. 10, 2010).

inquiry.[251] Investigations are to be conducted "with strict regard for fairness and due process for all concerned;"[252] the specific procedures to ensure this will be included in the Operations Manual that the IOM is set to issue later this year. If the IOM concludes that the misconduct warrants criminal prosecution, it will recommend referring the case to national authorities.[253] But if it concludes that less than criminal misconduct has occurred, it will recommend disciplinary measures to be taken by the Office of the Prosecutor. The ultimate responsibility for imposing such measures will rest with the Prosecutor, and the Prosecutor will have to report to the IOM and the Assembly of States Parties on the measures taken.[254] If the Prosecutor continually ignores recommendations of the IOM, the IOM can investigate the Prosecutor himself or herself for misconduct, and the Assembly of States Parties can impose sanctions accordingly.[255]

The former Prosecutor, Luis Moreno Ocampo, objected to the competence of the IOM to investigate staff in his office without his prior agreement. In a submission to the Assembly of States Parties, he argued that such broad competence would interfere with the statutorily enshrined independence of the Office of the Prosecutor. Article 42 of the Rome Statute provides that "[t]he Office of the Prosecutor shall act independently as a separate organ of the Court" and that "[a] member of the Office shall not seek or act on instructions from any external source."[256] According to the Prosecutor's submissions, these provisions suggest that the IOM cannot "instruct" or demand cooperation with its investigations from prosecutorial staff without the consent of the Prosecutor.[257] Moreover, under Article 42, the Prosecutor has "full authority over the management and administration of the Office, including the staff, facilities and other resources thereof," which

251. The notification will not reveal the identity of the information source. *Id.* ¶ 18.

252. *Id.* ¶ 27.

253. *Id.* ¶ 31.

254. *Id.* ¶ 35.

255. A.S.P. Res., Independent Oversight Mechanism, *supra* note 250, at annex, ¶ 24; ICC Statute, *supra* note 33, art. 46.

256. ICC Statute, *supra* note 33, art. 42.

257. Report of the Bureau on the Independent Oversight Mechanism, ICC-ASP/9/31, ¶ 44 (Nov. 29, 2010).

reflects "the intention by the drafters to ensure full and unfettered administrative independence of the Prosecutor."[258]

In view of the Prosecutor's objections, the Assembly of States Parties revised the IOM's procedures. Under the new provisions, whenever the ICC Prosecutor and the IOM disagree as to whether investigations of prosecutorial staff should proceed, an independent third-party will be brought in to resolve the dispute.[259] The third party will decide whether the investigation may undermine prosecutorial independence. If so, the investigation would be suspended.

Despite this amendment, commentators continue to be concerned that the Assembly of States Parties, through the IOM, could use its disciplinary powers to interfere with the independence of the ICC Prosecutor for political reasons.[260] States parties unhappy with charging decisions of the Prosecutor, for example, might use the oversight mechanism to harass the Office of the Prosecutor, prevent the Office from devoting full attention to prosecutions, and place pressure on the prosecutor to change her policies.[261] To some degree, these concerns have been accommodated through procedural and structural safeguards, such as the recourse to an independent third party. But it is still unclear what procedures the IOM will adopt to ensure due process and confidentiality and how independent the third-party arbiter will in fact be (since it will be appointed by the Assembly of States Parties, some observers worry its independence may not be entirely assured).[262]

A better way to ensure that the IOM will not interfere with the independence of the Office of the Prosecutor would be to require any complaints about prosecutorial misconduct relat-

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258. *Id.*

259. A.S.P. Res., Independent Oversight Mechanism, *supra* note 250, ¶¶ 20–25.

260. *See The Proposed Independent Oversight Mechanism for the International Criminal Court, Invited Experts on Oversight Question*: UCLA LAW FORUM, (May-Sept. 2011), http://uclalawforum.com/oversight (contributions by José Alvarez, Nicholas Cowdery, and Harmen van der Wilt) (discussing how IOM oversight could interfere with the operation of the ICC Prosecutor's Office).

261. *Id.* (contribution by Harmen van der Wilt); Michelle Coleman et al., Assessing the Role of the Independent Oversight Mechanism in Enhancing the Efficiency and Economy of the ICC 51 (Universiteit Utrecht 2011), *available at* http://www.iilj.org/newsandevents/documents/IOMFinalPaperasPublishedinOTPWebSite.pdf.

262. Coleman et al., *supra* note 261, at 6.

ing to investigative and trial work to be referred or at least vetted by ICC judges.[263] The judicial referral mechanism would prevent politically motivated investigations of prosecutors from occurring, but would still allow valid complaints to be investigated by the IOM.[264]

Even if the judicial referral mechanism addresses the concern about the IOM's potential politicization, another problem remains. The current structure of the IOM includes only two staff members. Given that the IOM is supposed to investigate complaints concerning not only prosecutors, but also judges, the Registrar, staff members of the Chambers and the Registry, and contractors, a two-member office seems inadequate to the task. Unless the IOM's capacity is expanded, the Mechanism is likely to have only a limited role to play in monitoring ICC prosecutors.

In light of its currently limited resources, the IOM would do best to direct its efforts to cases where it is likely to have the most impact and where other sanctions and remedies are insufficient. For example, the IOM could usefully investigate complaints alleging that prosecutors knowingly or purposefully violated the rules, but the defendant was not directly or seriously harmed. Similarly, investigations would be helpful where the prejudice to an individual defendant is minor, but there is a pattern of misconduct by the Office of the Prosecutor. In such cases, the court may be reluctant to impose any meaningful remedies, because the harm to an individual defendant is small. Action by the IOM would therefore be critical to holding prosecutors accountable and deterring future violations.

c. Internal Discipline

Perhaps the most effective administrative sanctions are those imposed within the Office of the Prosecutor. At the domestic level, internal discipline is already used widely to police prosecutors in civil-law countries and is increasingly seen as

263. This mechanism would be consistent with the framework for imposing discipline on the Prosecutor and Deputy Prosecutor under Article 46. *See supra* text accompanying note 244.

264. In common-law countries, courts similarly refer prosecutorial misconduct to disciplinary committees of bar associations. *See, e.g.*, Keenan et al., *supra* note 3, at 234–40.

key to reducing prosecutorial misconduct in the United States.[265]

Internal sanctions work well because they are imposed directly on those prosecutors responsible for the violations and take the form of punishments that prosecutors care about—for example, salary reductions, suspensions, demotions, and even termination. If imposed consistently, such punishments send a clear message about the importance of following the rules of the court. In addition, internal mechanisms such as training and oversight programs play a critical role in preventing misconduct in the first place. So while judges, the Assembly of States Parties, and the IOM all have an important role to play in policing ICC prosecutors, the Office of the Prosecutor will continue to bear the main responsibility for fostering a culture of respect for the rule of law among its staff.

The Office of the Prosecutor already appears to have a hierarchical structure with clear lines of control and several levels of oversight, which would indicate that internal discipline may work well in many instances.[266] But anecdotal accounts also suggest that the Office could do more to train and regularly audit its personnel in proper investigative and disclosure procedures. As others have argued persuasively, the Office must also develop a more detailed Code of Conduct to guide its prosecutors.[267]

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265. For discussion of proposed or current internal mechanisms used to regulate prosecutors in various offices across the world, see DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 128–32 (2002); Barkow, *supra* note 3, at 895–905; Bibas, *supra* note 3, at 996–1015; Coleman et al., *supra* note 261, at 56; Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1478–79 (2010); James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119, 139 (2009).

266. Important management decisions are handled first by the head of the respective division, then by the Executive Committee, and then by the Prosecutor. *See, e.g.*, Gregory Townsend, *Structure and Management*, *in* INTERNATIONAL PROSECUTORS 171, 287 (Luc Reydams et al. eds., 2012) (providing an organizational chart of the ICC Office of the Prosecutor). Despite this formal hierarchy, some in the Office of the Prosecutor have complained that "OTP's management and management culture is lacking." *Id.* at 293.

267. Markovic, *supra* note 222. The Office of the Prosecutor has, however, issued regulations that cover many questions pertaining to professional conduct. *See* International Criminal Court, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 (Apr. 23, 2009), http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109

By strengthening its internal oversight mechanisms, the Office can bolster its argument that external investigations, such as those by the IOM, should be limited. Credible internal discipline will also generally help improve the Office's reputation with judges and with the international community. Maintaining a strong reputation with these two constituencies is critical to ICC prosecutors' ability to function effectively.

Even an effective internal oversight program does not entirely eliminate the need for external monitoring. First, internal discipline will not work when the violation of the rules is condoned or ignored by supervisors. The main violations at issue in *Lubanga* did not concern errant line prosecutors, but involved a fundamental disagreement between the Office of the Prosecutor and the court about how to interpret the Rome Statute. In cases where the defendant has been seriously harmed by the misconduct, moreover, internal discipline will typically not be sufficient to repair the injury. While in-house efforts have a role to play, it remains critical for the ICC itself to develop a robust approach to policing prosecutorial misconduct. The next Section elaborates a set of factors to help judges decide whether and what remedies and sanctions to impose for different types of misconduct.

C. *Choosing Remedies and Sanctions*

In response to misconduct, judges must decide two preliminary questions. First, is a remedy or sanction warranted? If yes, what remedy, sanction, or combination of remedies and sanctions is most fitting? Under the balancing approach, judges enjoy broad leeway in answering these questions. This leads to concerns that judges would enact their own policy preferences into law and erode individual rights.[268] The court therefore needs a structured and disciplined approach that is more protective of fundamental rights.

This Section proposes that the court develop a set of concrete factors that guide its analysis on whether and what remedy or sanction to impose. The early ICC decisions offer some guidance on what factors would be relevant. The court has

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ENG.pdf. It is also revising its policies and Operations Manual and planning to "clarify operational processes, reporting lines, and responsibilities." Townsend, *supra* note 266, at 294.

268. *E.g.*, Jackson, *supra* note 21, at 832.

held that a stay of proceedings is reserved only for extraordinary circumstances, where the prosecutor violated fundamental rights of the accused and a fair trial cannot be expected.[269] This holding indicates that the type of rights violated is a central factor in the analysis. In deciding whether to exclude illegally obtained evidence, the court has also examined the seriousness of the procedural violation and its impact on the fairness of the trial; the harm to the defendant's rights; and the level of involvement by the prosecution.[270] By contrast, the court has excluded from its analysis the gravity of the charged offense.[271]

Building on this jurisprudence, this Section provides a more concrete list of factors relevant to the choice of remedies and sanctions. It also explains how these factors advance different goals of international criminal justice. Finally, taking a cue from proportionality analysis used by constitutional courts around the world, the Section suggests that the court should always consider whether alternative remedies may be available, which could advance legitimate goals of international criminal justice, but at a lesser cost to individual rights and the integrity of the judicial process.

1. *Harm to the Defendant's Rights*

Under existing ICC case law on remedies, harm to the defendant's rights is a critical, albeit not determinative, factor. National and international precedents similarly identify harm or prejudice to the defendant as a critical element of the remedy determination.

Prejudice is an obvious element in the balancing analysis—the more serious the harm to the defendant, the more there is to remedy. A potential difficulty arises with ranking different defendants' rights as relatively more or less important, but courts have proven capable of constructing such a hierarchy. As part of its jurisprudence on prosecutorial misconduct, the ICC has already begun categorizing certain rights as belonging to the core of fair trial protections.[272] Based on

269. *See supra* text accompanying notes 42–45, 79, 90.

270. *See supra* text accompanying notes 101–15.

271. *See supra* text accompanying notes 106–08.

272. *See supra* text accompanying note 45. The ICTY has also attempted to distinguish between egregious human rights violations, which warrant the

this case law, we can already predict that, if prosecutors or their agents coerce statements from the defendant or fail to disclose exculpatory evidence, the remedy is likely to be quite strict.[273] By contrast, disclosing exculpatory evidence with only a minor delay or making a public statement perceived as prejudicial would warrant a lesser remedy or sanction.[274]

The main principle guiding this assessment appears to be whether the prosecutor's misconduct has increased the risk that an innocent person might be convicted. Non-disclosure of exculpatory evidence and coercion during interrogation may heighten this risk, whereas mere delays in disclosure, privacy violations, and potentially prejudicial public statements typically do not. Violations of the first type are therefore more likely to warrant serious remedies. This approach toward measuring the seriousness of the violation is consistent with holdings by other international and domestic courts, which focus on whether a particular rights violation has affected the overall fairness of the proceedings.[275]

Another element that the court should consider when evaluating harm to the defendant is the timing of the violation. Certain violations, such as the failure to disclose exculpatory evidence, can be more easily corrected if uncovered early in the proceedings. In those circumstances, the court can adopt an escalating approach, beginning with lesser remedies,

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setting aside of the court's jurisdiction, and other violations, which trigger an interest-balancing test. *E.g.*, Prosecutor v. Nikolić, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia June 5, 2003), http://www.icty.org/x/cases/dragan_nikolic/acdec/en/030605.pdf (holding that the kidnapping of the accused before transfer to the Tribunal was not such an egregious human rights violation as to warrant setting aside the court's jurisdiction).

273. *See supra* text accompanying notes 65–68, 195.

274. *See supra* text accompanying notes 23–26, 83.

275. *E.g.*, Panovits v. Cyprus, App. No. 4268/04 Eur. Ct. H.R. (Dec. 11, 2008), ¶ 66, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90244. *See generally* JEREMY MCBRIDE, HUMAN RIGHTS AND CRIMINAL PROCEDURE: THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 14 (2009), *available at* http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/documentation/Echr_and_crim_procedure.pdf; *see also* Kyles v. Whitley, 514 U.S. 419, 435 (1995) (holding that to show a *Brady* violation and receive a remedy, defendant must show that the undisclosed "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"); HM Advocate v. Higgins, [2006] HCJ 05, 2006 S.C.C.R. 305 (Scot.).

but shifting to stronger remedies if the prosecutor fails to comply within a specified time.[276] When the court has the opportunity to address the violation before or during trial, the harm to the defendant will often be less significant than if the violation is uncovered after conviction. In these circumstances, the court may choose a lesser remedy or even no remedy at all, if the harm to the defendant has been fully repaired.

2. *Harm to the Integrity of the Proceedings*

Typically, prejudice to the defendant results in harm to the integrity of the proceedings. It is also possible that the defendant suffers no prejudice, yet the misconduct harms the integrity of the judicial process. At least one ICC Trial Chamber has suggested that remedies would be available in these situations as well.[277]

Many domestic jurisdictions deny relief when the defendant was not personally harmed by the violation, on the reasoning that remedies are awarded primarily to vindicate individual rights.[278] But the ICC's approach can be justified as a means of advancing the broader goal of ensuring fair trials and modeling respect for the rule of law. Even when the defendant has not been harmed, remedies can be useful to punish and deter prosecutorial misconduct. By imposing remedies even in the absence of prejudice to the defendant, the court condemns the misconduct, restores judicial integrity, and expresses its commitment to procedural fairness and prosecutorial accountability. And at least when it comes to the exclusion of evidence, this approach is also textually grounded. Article 69(7) of the Rome Statute provides that a violation which seriously endangers the integrity of the proceedings can result in exclusion of evidence; it does not require that the defendant's rights be directly harmed.

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276. This is the approach that the ICC Appeals Chamber used to address the prosecutor's failure to disclose potentially exculpatory information in *Prosecutor v. Lubanga*. *See supra* text accompanying notes 13–14, 76–77.

277. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the "Bar Table," ¶ 37 (June 24, 2009), http://www.icc-cpi.int/iccdocs/doc/doc702244.pdf.

278. *E.g.*, Rakas v. Illinois, 439 U.S. 128, 137–38 (1978); Sabine Gless, Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial (Germany) 10 (2010), *available at* http://ssrn.com/abstract=1743530; Groenhuijsen, *supra* note 208, at 2.

The court is therefore correct to consider awarding remedies when a violation does not prejudice the defendant's interest, but harms the integrity of the proceedings. Consistent with proportionality, judges can still adjust the type and level of remedy to avoid an unjustified windfall to the defendant at the expense of other important interests in the international criminal justice system. A declaratory judgment, perhaps accompanied by sanctions, would typically be an appropriate response under the circumstances. It would acknowledge the violation, provide some, albeit largely symbolic, relief, and, by disciplining the responsible prosecutors, also help deter future misconduct.

3. *Prosecutor's Culpability*

Consistent with current decisions, the culpability of ICC prosecutors should remain a factor in the court's analysis. When a prosecutor deliberately flouts the rules, the court should impose a more serious sanction or remedy than when a prosecutor is acting negligently or in good faith. Factoring in the prosecutor's mental state would help strengthen the deterrent effect of sanctions and remedies and thus promote the ICC's goal of providing fair trials.[279]

Although culpability should remain a relevant factor, it should not be dispositive. If prosecutors have acted in good faith, this may be a mitigating factor in the selection of the type of remedy, but should not by itself preclude the imposition of remedies.[280] If the defendant's rights have been seriously prejudiced, a remedy may be necessary to ensure that the defendant is not judged unfairly and to affirm the importance of fair trial rights.

At the same time, since good-faith and negligent mistakes ought to be more easily deterred, the court can adjust the remedy or sanction to reflect this. For example, where the violation of the defendant's rights is relatively minor and an iso-

279. *E.g.*, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the "Bar Table," ¶ 47 (June 24, 2009), http://www.icc-cpi.int/iccdocs/doc/doc702244.pdf.

280. *Cf.* Jennifer Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1022–24 (2010) (explaining why, in criminal cases, U.S. courts have traditionally not considered the intent of government actors in determining remedies for constitutional violations).

lated incident (of, say, belated disclosure), declaratory relief may be sufficient to respond to good-faith mistakes. By contrast, when prosecutors deliberately and systematically violate defendants' rights, more drastic remedies, such as sentencing reduction, exclusion of evidence, stay of the proceedings, or retrial may be warranted.[281] The prosecutor's intent, therefore, should be considered alongside other factors, including the seriousness of the violation, whether the violation was isolated or systematic, and whether the prosecutor's office has taken measures to prevent such violations from occurring in the future.[282]

4. *Prosecutor's Level of Involvement in the Violation*

The level of prosecutorial involvement in the violation is arguably also relevant to the remedy determination, although the ICC has yet to clarify its position on this question. In the *Lubanga Admissibility Decision*, the court held that the mere presence of ICC investigators during an unlawful search by national authorities did not warrant exclusion of the evidence obtained during the search because ICC investigators had no control over the operation. Because there were "no indicators that the [ICC] investigator controlled or could have avoided the disproportionate gathering of the evidence, or that he acted in bad faith," there was no conduct by the ICC official that could be disciplined or deterred.[283] More broadly, the Trial Chamber seemed to concur with the position of ICTY Trial Chambers that "exclusionary rules. . . [at the international level] were not intended to deter and punish illegal conduct by domestic law enforcement authorities."[284]

By contrast, in *Prosecutor v. Katanga*, the court excluded statements where national authorities, without any ICC involvement or encouragement, had obtained statements from

281. *See* Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 AM. J. CRIM. L. 121, 160–64 (1998) (arguing that courts should consider whether prosecutors acted "with a conscious purpose to unfairly prejudice a defendant").

282. *See infra* Section IV.C.5.

283. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the "Bar Table," ¶ 46 (June 24, 2009), http://www.icc-cpi.int/iccdocs/doc/doc702244.pdf.

284. *Id.* ¶ 45.

the accused in violation of his right to counsel.[285] The Rome Statute did not expressly require that the accused be assisted by counsel under the circumstances.[286] But the Trial Chamber held that the accused's statements were obtained in violation of international human rights law and this was a sufficient reason to exclude them from the trial. The Chamber never discussed the wisdom of imposing a remedy for a violation for which only national authorities—and not ICC prosecutors—were responsible. Because the Chamber did not provide any detailed reasons for its decision, it remains unclear how the ICC would handle similar violations by national authorities in the future.

The *Lubanga* Trial Chamber was more forthcoming in its reasoning about prosecutorial contributions to rights violations, and future ICC decisions should build on it. As the *Lubanga* Chamber recognized, the level of involvement by prosecutors is relevant to the question of remedy because it reflects the likelihood that a remedy will have a deterrent effect.[287] A remedy may not need to be imposed at all where ICC prosecutors did not encourage, order, or exercise control over the actions of national authorities that violated the defendant's rights, particularly where the violation was not very serious. There is no realistic prospect of deterring the conduct of national authorities through the exclusion of evidence (and in any event, the ICC has no mandate to do so),[288] and yet exclusion under the circumstances may unduly jeopardize important goals of international criminal courts.

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285. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions, ¶¶ 57, 60, 62–63 (Dec. 17, 2010), http://www.icc-cpi.int/iccdocs/doc/doc987504.pdf.

286. Article 55(2) of the Statute requires such assistance only where the accused is questioned by the ICC prosecutor or by national authorities on the request of the ICC prosecutor. ICC Statute, *supra* note 33, art. 55(2). As the *Katanga* decision acknowledges, "Article 55(2) does not impose procedural obligations on states acting independently of the Court." Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions, ¶ 59 (Dec. 17, 2010), http://www.icc-cpi.int/iccdocs/doc/doc987504.pdf.

287. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the "Bar Table," ¶ 46 (June 24, 2009), http://www.icc-cpi.int/iccdocs/doc/doc702244.pdf.

288. *Id.*

Therefore, if ICC prosecutors did not encourage, order, or control the conduct of the national authorities, remedies should be imposed only in exceptional circumstances, where the violation is *both* antithetical to and threatens to *seriously* undermine the integrity of the proceedings (for example, where authorities used coercion to obtain statements from the accused). For less serious violations, remedies should either not be imposed or should be limited to declaratory relief.[289]

5. *Pattern of Misconduct*

In determining the need for remedies and sanctions, the court must consider whether misconduct was an isolated occurrence or part of a larger pattern.[290] A pattern of misconduct is more likely to cause harm to the integrity of the judicial system and to the defendant's rights. It is also more difficult to deter because it implies deliberate indifference on part of the Office of the Prosecutor toward correcting procedural violations by its staff.[291]

For that reason, more forceful remedies and sanctions should typically be imposed when such a pattern is present. Indeed, the court may well consider that significant remedies should be imposed even in the absence of prejudice to the

289. *Cf.* Prosecutor v. Kaing Guek Eav (alias Duch), Case No. 001/18-07/2007/ECCC/SC, Appeal Judgement, ¶¶ 392–99 (Extraordinary Chambers in the Courts of Cambodia Feb. 3, 2012), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf (interpreting international law to require international criminal courts to provide a remedy for procedural violations only where there is either abuse of process or involvement by officers of the international court).

290. In the United States, courts typically require a showing of a pattern of misconduct to support a finding of civil liability for prosecutors who have violated a defendant's constitutional rights. *E.g.*, Connick v. Thompson, 131 S.Ct. 1350, 1360–61, 1366 (2011).

291. *See, e.g.*, United States v. Morrison, 449 U.S. 361, 366 n.2 (1981) ("[W]e note that the record before us does not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter future lawlessness."); United States v. Hasting, 461 U.S. 499, 527 (1983) (Brennan, J., with Marshall, J., concurring in part and dissenting in part) ("If Government prosecutors have engaged in a pattern and practice of intentionally violating defendants' constitutional rights, a court of appeals certainly might be justified in reversing a conviction, even if the error at issue is harmless, in an effort to deter future violations.").

defendant, because of the serious threat that a pattern of misconduct presents to the integrity of the proceedings.

A finding that the misconduct was part of a series of violations should warrant sanctions that are not only more significant, but also directed at the Office of the Prosecutor as an institution. Hefty fines and referral of the violation to the IOM may be warranted, in addition to remedies such as exclusion, sentencing reduction, or even a stay, particularly if the repeated violations have harmed the defendant. Conversely, milder sanctions would be warranted when the violation is an isolated example or when the Office of the Prosecutor has implemented concrete measures to prevent violations from recurring, for example, by disciplining the violators and instituting better oversight and training programs within the Office.[292]

6. *Probative Value of the Evidence*

Another factor that would be relevant to at least one type of remedy—exclusion—is the probative value of the evidence being excluded. The *Lubanga* Trial Chamber refused to consider this factor, because Article 69(7), pertaining to the exclusion of evidence, did not specifically mention it.[293] But Article 69(7) also fails to mention several other factors pertinent to exclusion, which the Trial Chamber nonetheless considered in its analysis. In these other instances, the Trial Chamber adopted a purposive approach and considered factors that were not listed in the Statute, but were reasonably related to one or more of the court's central goals.

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292. In the context of prosecutions of corporations in the United States, courts frequently mitigate sanctions (and prosecutors often defer prosecution) if a corporation can show that it has implemented adequate compliance mechanisms to prevent the violation from recurring. A similar approach with respect to violations by international prosecutors would likely encourage better internal oversight by the Office of the Prosecutor itself. Ultimately, such internal oversight is likely to be one of the most effective means of preventing misconduct by prosecutors. *See* Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2106–12, 2118 (2010).

293. *E.g.*, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the "Bar Table," ¶ 43 (June 24, 2009), http://www.icc-cpi.int/iccdocs/doc/doc702244.pdf.

A purposive analysis would place greater emphasis on the probative value of the evidence as this would be consistent with the goal of international criminal courts to obtain a more complete and accurate record of the crime. As the ICTY explained in *Prosecutor v. Brdjanin*, "in situations of armed conflict, intelligence which may be the result of illegal activity may prove to be essential in uncovering the truth; all the more so when this information is not available from other sources."[294] As long as admission would not seriously undermine the integrity of the proceedings and the evidence is reliable, the Chamber should be more likely to admit highly probative evidence than evidence that is less relevant and useful to uncovering the truth about the charged crimes.

In some instances, the probative value of the evidence may work in favor of the defense and call for stronger remedies for prosecutorial misconduct. For example, where the prosecution has failed to disclose exculpatory evidence in a timely fashion, and the evidence is highly probative of the defendant's *innocence*, the court may draw a stronger negative inference from this failure to disclose or even order additional sanctions and remedies.

While consideration of the probative value of the evidence is likely to advance the truth-seeking goals of the ICC, if used frequently to restrict exclusion, it may reduce the deterrent effect of the ICC's exclusionary rule. As the next Section discusses, to prevent this from occurring, the court should not end the analysis by concluding that the evidence is very probative and exclusion is therefore inappropriate. Instead, the court should consider alternatives to exclusion, such as sentence reductions, fines, and disciplinary referrals, which would still be compatible with the truth-seeking goals of the ICC, but could also deter prosecutorial misconduct more effectively in such instances.

7. *Less Restrictive Measures*

To ensure the fairness of the proceedings, the court must consider whether the remedies it plans to impose sufficiently

294. Prosecutor v. Brdjanin, Case No. IT-99-36-T, Decision on the Defense "Objection to Intercept Evidence," ¶ 61 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 3, 2003), http://www.icty.org/x/cases/brdanin/tdec/en/031003.htm.

vindicate the defendant's rights. To do so, judges can examine whether alternative remedies exist which are less burdensome on individual rights and more likely to safeguard the integrity of the proceedings.

Consider again a court faced with a situation in which ICC investigators violated the defendant's privacy rights during a search in which they obtained very probative and reliable evidence concerning crimes against humanity committed by the defendant. The court may seek an alternative to exclusion because exclusion may harm the search for the truth about the charged crime. Feasible alternative remedies include declaratory judgments, sanctions, and sentence reductions. Unlike exclusion, these remedies would allow the court to examine more fully the circumstances of the commission of the crime and would not interfere with the court's truth-seeking function. But among these measures, sanctions and sentence reductions are more likely to vindicate individual rights and safeguard the integrity of the judicial process. Under the less restrictive measures approach, therefore, the court would ordinarily opt for sanctions and/or sentence reductions rather than for a declaratory judgment.

Introducing this step in the balancing analysis can help alleviate concerns that fundamental rights will be eroded. The less restrictive measures approach demands that remedies are restricted only as far as necessary, and no further, to accomplish a legitimate purpose. It requires the court to consider openly the available alternatives and to explain why the measure it has chosen strikes an adequate balance between competing interests. In this respect, the court would move beyond "free balancing" and closer to the more structured proportionality analysis used by constitutional and human rights courts around the world. As others have remarked, it is precisely an emphasis on less restrictive measures that makes a balancing test such as proportionality more transparent, consistent, and protective of individual rights.[295]

8. *Transparent Balancing*

In the final prong of the balancing test, judges should weigh openly the competing rights and interests and justify

295. *E.g.*, Jackson, *supra* note 21, at 831.

which should prevail. When granting a more drastic remedy, for example, the court would explain why individual rights and commitment to rule of law outweigh other considerations. Conversely, when the court orders a more modest remedy, it would examine why public interests such as retribution, deterrence or truth-seeking are so pressing in a particular case that they justify the lesser sanction. The very act of articulating and justifying the balancing of interests would help discipline judicial decision-making, and it would enhance the political legitimacy of the court's work.

The outcome of the balancing test may not always be broadly accepted. The court may give undue deference to goals that, over time, prove less central to international criminal justice than the court assumed them to be. But, as discussed at greater length in Section III.C, the strength of balancing lies in its transparency and inclusiveness, and judges should emphasize these qualities in their reasoning. This would allow for the jurisprudence of the court to mature as the ICC engages in a reasoned dialogue with its various constituencies, other courts, and the public.

V. Conclusion

In confronting prosecutorial misconduct, courts around the world struggle to find the right balance between public interests and individual rights. In their remedial decisions, judges strive to deter misconduct and protect the integrity and fairness of the proceedings. At the same time, they seek to minimize the costs that remedies impose on other important interests of the criminal justice system, such as retribution, deterrence, and the establishment of an accurate historical record.

At the ICC, this balance is even more difficult to attain. Because of the gravity and systematic nature of international crimes, the goals of preventing impunity, uncovering the truth about the crimes, and respecting victims' interests are especially significant. The ICC will thus often be inclined to refrain from providing remedies that would interfere with these goals. Yet the ICC must remain committed to providing fair trials and serving as a global model of criminal procedure. In addressing prosecutorial misconduct, the ICC must show that it

can live up to its own ideals of accountability and the rule of law.

The ICC's competing goals make the absolutist approach to remedies a poor fit for international criminal procedure. The court must find a way to accommodate its most significant and legitimate interests without unduly restricting any of them. A balancing analysis can help the court navigate this challenging course. Under this approach, the court may limit remedies if one of its key goals—for example, establishing an accurate historical record—demands a restriction on remedies for prosecutorial misconduct. But the court must always try to impose the narrowest restriction needed to accomplish the goal at hand.

To ensure that the balancing test is applied consistently, the court must articulate specific factors that it will rely on. These would include the harm the misconduct caused to the defendant or to the integrity of the proceedings; the culpability and involvement of ICC prosecutors in the violation; the frequency of similar violations by the Office of the Prosecutor; and the probative value of the evidence affected. By applying these factors and adding others as new circumstances warrant, the ICC can help make its balancing test more transparent and predictable and ultimately more protective of individual rights and the integrity of the justice system.

The ICC should correspondingly expand the range of available remedies and sanctions. In each case, the court should then select a remedy or sanction that is narrowly tailored to the misconduct at hand and does not unduly burden any of the court's significant goals. Accordingly, in addition to excluding evidence, staying the proceedings, or dismissing the case, the court should consider policing prosecutors through sentence reductions, dismissals of select counts, fines, and referrals for discipline.

By expanding its responses to misconduct and applying a well-defined balancing analysis, the ICC can achieve an approach to prosecutorial error that is both effective and able to accommodate the competing interests of international criminal justice.