

# Accountability of International Prosecutors

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The dilemma of holding prosecutors accountable while ensuring their independence was at the center of the debates surrounding the establishment of the International Criminal Court.<sup>2</sup> The drafters of the Rome Statute for the ICC understood that the Court would be handling cases with significant political implications and yet working with limited resources and no independent enforcement capacity. To enhance prosecutors' ability to operate successfully in this environment, the drafters enshrined prosecutorial independence into the Statute and gave prosecutors significant discretion over charging and investigation decisions. At the same time, drafters worried that ICC prosecutors were not sufficiently accountable to anyone. This led to the decision to give judges and the Assembly of States Parties a limited authority to oversee prosecutorial actions.

The concern about accountability initially focused on prosecutors' decisions about which situations to investigate, which persons to indict, and what charges to bring. But as the ICC began proceedings in its first case, *Prosecutor v. Lubanga*, it soon confronted prosecutorial errors and misconduct relating to procedural matters—e.g., the duties to disclose potentially exculpatory evidence, to follow court orders, and to comply with human rights law in the

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<sup>2</sup> See Morten Bergsmo and Frederik Harhoff, 'Article 42' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed. Hart/Beck 2008) 972; Jan Wouters et al., 'The International Criminal Court's Office of the Prosecutor: Navigating Between Independence and Accountability?', in José Doria et al. (eds.) *The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko* (Brill 2009) 349-51. These debates reflect a difference in civil-law and common-law approaches to prosecutorial accountability. Whereas common-law countries tend to emphasize the importance of democratic accountability for prosecutors, civil-law countries place a greater value on political independence and emphasize instead bureaucratic forms of accountability for prosecutors. See, e.g., Michael Tonry, 'Prosecutors and Politics in a Comparative Perspective' (2012) 41 *Crime & Just* 1; Ronald F. Wright and Marc L. Miller, 'The Worldwide Accountability Deficit for Prosecutors' (2010) 67 *Washington & Lee L Rev* 1587, 1590.

gathering of evidence.<sup>3</sup> The Trial Chamber attempted to fashion a response. But its reaction was at times too drastic and threatened to derail the proceedings in *Lubanga*. The Court's predicament revived debates about the tradeoffs between prosecutorial accountability and other legitimate goals of the international criminal justice system. Over time, judges came to acknowledge that sweeping remedies, while protecting the defendant's right to a fair trial, may disproportionately harm other important public values, including deterrence, retribution, and the establishment of an accurate historical record.<sup>4</sup>

As prosecutorial failings surfaced, some also called for stronger non-judicial mechanisms to police the process. The Assembly of States Parties created its own subsidiary body, the Independent Oversight Mechanism, to investigate misconduct among prosecutors. But the Assembly's intervention was seen by many as compromising the principle of prosecutorial independence and creating the risk that politics would influence disciplinary decisions. The Office of the Prosecutor insisted that the Statute entrusted it—and not the Assembly—with the primary responsibility to police misconduct among its members.<sup>5</sup>

This debate highlights the need for a more comprehensive evaluation of existing and proposed mechanisms of ensuring prosecutorial accountability at the ICC. These include internal bureaucratic controls within the Office of the Prosecutor, judicial intervention, and disciplinary measures by the Assembly of States Parties, the Independent Oversight Mechanism, and national or international bar associations. Internal controls are critical and should be developed further, but they are not a sufficient response to the problem of misconduct. External mechanisms remain an important backstop and can help encourage the development of stronger and more effective internal oversight.

Among the several external mechanisms, judges remain best situated to police prosecutorial misconduct, at least in the near future. But judicial actions are not a perfect solution—they are often too blunt and provide a windfall to defendants at the expense of

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<sup>3</sup> See *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, ¶ 95 (June 13, 2008).

<sup>4</sup> See *infra* Part III.

<sup>5</sup> See *infra* Part V.A.

legitimate interests of international criminal justice. Judges also do not have the resources to investigate every alleged ethical violation or misconduct by prosecutors. In the long term, the ICC must develop a broad disciplinary framework that makes greater use of non-judicial mechanisms of accountability, such the Assembly of States Parties, the Independent Oversight Mechanism, and perhaps an international professional association such as the International Association of Prosecutors. These organizations offer distinct types of accountability—along political, administrative, and professional dimensions—which could serve as an important complement to judicial remedies and sanctions.

Prosecutorial conduct can also be influenced more subtly through informal sanctions by fellow prosecutors, defense attorneys, and judges. Because the ICC is a diverse community with fewer shared norms and fewer repeat interactions between the lawyers and judges, the effect of informal sanctions by professional peers is likely to be somewhat less meaningful at the international than at the national or local level. For several reasons, however, it is nonetheless important to discuss informal sanctions. They are imposed quickly and efficiently, without the need for an extensive investigation into the circumstances surrounding the misconduct. They are also less likely to frustrate the ability of the ICC to continue proceedings in the case affected by the misconduct. Over time, as the ICC legal community becomes more established, they are also likely to be a more potent and useful complement to formal sanctions.<sup>6</sup>

In addition to punishing misconduct after it occurs, the ICC must strengthen its preventive programs in this area. As a critical step in that direction, the Office of the Prosecutor has recently adopted a Code of Conduct for its members.<sup>7</sup> The Office has also committed to developing more regular training programs concerning professional conduct and instituting more rigorous internal oversight for line prosecutors.<sup>8</sup> To the extent that the Office falls behind in this task, ICC judges can provide encouragement, both formally and informally. Two recent decisions in *Prosecutor v. Kenyatta*, one calling on the OTP to adopt a Code of Conduct and

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<sup>6</sup> See *infra* Part V.C.

<sup>7</sup> See *infra* Part V.D.

<sup>8</sup> *ibid.*

another urging the Office to change its methods of reviewing documents for disclosure, suggest that judges are willing to take on this important responsibility.<sup>9</sup>

Within the first ten years of the Court's existence, judges have taken firm measures in policing procedural violations by prosecutors. They have affirmed the Court's commitment to the rule of law and fair trials, while remaining sensitive to competing interests of international criminal justice. The ICC must do more to develop non-judicial mechanisms to police prosecutorial misconduct, and the debate surrounding the establishment of the Independent Oversight Mechanism suggests that such mechanisms must be structured in a way that preserves the independence and effectiveness of ICC prosecutors. As judicial and non-judicial mechanisms of accountability develop, it is also important to establish guidelines to coordinate among them.

## I. Balancing Accountability and Effectiveness

The Rome Statute proclaims that the ICC's central mission is "to put an end to impunity for the perpetrators of [international crimes] and thus to contribute to the prevention of such crimes."<sup>10</sup> Retribution and deterrence are therefore central goals of the Court. But like other international criminal courts, the ICC also strives to achieve broader goals, such as producing an accurate record of the events it adjudicates.<sup>11</sup> The Court also pursues expressive and didactic goals, aiming to model a commitment to human rights and the rule of law for national jurisdictions to follow.<sup>12</sup>

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<sup>9</sup> *ibid.*

<sup>10</sup> ICC Statute pmb1.

<sup>11</sup> *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); Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgement, ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence' ¶¶ 50-52; *see also* Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale UP 2005) 257-61; Stuart Ford, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms' (2012) 45 Vand J Transnat'l L 405, 472-75.

<sup>12</sup> *E.g.*, 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); Margaret M. DeGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 Mich J Intl L 265, 312-317; Theodor Meron, 'Procedural Evolution at the ICTY' (2004) 2 J Intl Crim Just 520,

International prosecutors play an essential role in helping the ICC accomplish these goals. They select the cases and charges that they believe would best advance the Court's objectives, and they conduct the investigations necessary to support the cases in court. Because of their considerable discretion in the process, international prosecutors are considered "the driving force of all international criminal tribunals."<sup>13</sup>

While ICC prosecutors have ample legal discretion to select cases and charges, they remain constrained by the intensely political environment in which they operate. The crimes within the Court's jurisdiction typically concern powerful political or military actors who are likely to resist investigations. Domestic authorities are (by definition under the Statute's admissibility requirements) unwilling or unable to prosecute the cases that are presented to the Court. Yet because ICC prosecutors have no independent law enforcement capacity, they depend heavily on these same domestic authorities for investigations. At the same time, ICC prosecutors operate with limited resources drawn from member state contributions, and they "must, as a matter of necessity, be extremely selective in deciding which cases to investigate . . . ."<sup>14</sup> This challenging environment demands not merely legal acumen, but also a great deal of diplomatic savvy on the part of international prosecutors.<sup>15</sup>

Understanding this political background, the framers of the ICC inscribed the value of prosecutorial independence into the Statute. Article 42 provides that the "Office of the Prosecutor shall act independently as a separate organ of the Court" and that its members "shall not seek or act on instructions from any external source."<sup>16</sup> The drafters of the ICC Statute viewed these guarantees of prosecutorial independence as an essential precondition for the Court's ability to accomplish its various goals. Freedom from political interference would allow

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524; Jens David Ohlin, 'A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law' (2009) 14 *UCLA J Intl & Foreign Affairs* 77, 82-83, 103.

<sup>13</sup> Luc Côté, 'Independence and Impartiality' in Luc Reydams et al. (eds) *International Prosecutors* (OUP 2012) 319, 321.

<sup>14</sup> Louise Arbour, 'Progress and Challenges in International Criminal Justice' (1997) 21 *Fordham Intl LJ* 531; see also Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005); DeGuzman (n 12) 268-69.

<sup>15</sup> Côté (n 13) 322; see also Carla del Ponte and Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (Other Press 2009).

<sup>16</sup> ICC Statute, art. 42.

prosecutors to pursue cases impartially, based above all on legal merit, and would thus ensure the long-term political legitimacy of the Court.<sup>17</sup>

At the same time, ICC framers understood that prosecutorial discretion must be controlled at least to some degree in order to prevent abuse and injustice.<sup>18</sup> In domestic systems, prosecutors are held accountable through a variety of external mechanisms, including the democratic process, professional discipline boards, civil service disciplinary frameworks, and judicial supervision.<sup>19</sup> Several of these mechanisms are either unavailable or only minimally available at the international level. ICC prosecutors are not embedded in a broader democratic political system, they are not members of an international bar association (sometimes not even a national bar association<sup>20</sup>), and they are not part of a civil service hierarchy that extends beyond the Court. The drafters of the ICC Statute therefore had to experiment with new models of prosecutorial accountability and to rely more heavily on judicial supervision than might be expected in a domestic criminal justice system. At the same time, some state representatives wanted to include some type of political check on the prosecution, and this led them to entrust the Assembly of States Parties—a political body composed of ICC member state representatives and possessing quasi-legislative functions—with a limited power to discipline prosecutors for serious misconduct.

Both judicial and political oversight of prosecutorial actions at the ICC must contend with the dilemma between accountability and effectiveness. Judges can respond to prosecutorial misconduct with powerful sanctions and remedies, including dismissals, retrials, and the exclusion of evidence, which could effectively end a case. Through the imposition of such remedies, judges can affirm the ICC's commitment to the rule of law and fair trials.<sup>21</sup> At the same time, case-determinative remedies inflict serious costs on other objectives of international criminal justice, including the Court's primary goal of preventing impunity for international crimes. Judicial oversight must grapple with the tension between these goals.

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<sup>17</sup> See Côté (n 13) 322.

<sup>18</sup> Frédéric Mégret, 'Accountability and Ethics' in Luc Reydamts et al. (eds.) *International Prosecutors* (OUP 2012) 416, 418.

<sup>19</sup> Wright and Miller (n 2) 1600-09; Tonry (n 2).

<sup>20</sup> See *infra* text accompanying note 108.

<sup>21</sup> Turner (n 1) 205-06.

Likewise, political oversight by the Assembly of States Parties can come into conflict with prosecutorial independence. Most obviously, this can occur when the Assembly launches an investigation into prosecutorial actions in order to interfere with a prosecution that Assembly members oppose on political grounds. Even when such blatant manipulation is not at issue, regular inquiries into prosecutorial activity can undercut legitimate prosecutorial efforts. A prosecutor who has to account for each and every one of his acts can quickly cease to be effective.<sup>22</sup> Prosecutors who are routinely forced to respond to inquiries must divert scarce time and resources from their work of developing and presenting cases. More broadly, the prospect of investigations can deter certain socially desirable actions by prosecutors and diminish the zeal with which they pursue cases. The Court cannot tolerate arbitrariness and injustice by prosecutors, but at the same time, accountability must not “be so pervasive as to defeat the purpose of having an independent Prosecutor.”<sup>23</sup>

## II. Internal Oversight

Relying on the Rome Statute’s provisions on prosecutorial independence, the Office of the Prosecutor has argued that internal oversight is the most appropriate means of regulating its staff. In support of this position, the Prosecutor has referred to the general provision that its staff members should act independently and not on external instructions, as well as to Article 42(2), which vests the Prosecutor with “full authority over the management and administration of the Office, including the staff, facilities and other resources thereof.”<sup>24</sup> The ICC Staff Rules and Regulations likewise contemplate that members of the Office of the Prosecutor would be disciplined for “unsatisfactory conduct” primarily through an internal administrative process.<sup>25</sup>

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<sup>22</sup> Mégret (n 18) 418.

<sup>23</sup> *ibid.*

<sup>24</sup> ICC Statute art. 42(2).

<sup>25</sup> Staff Regulations of the International Criminal Court art. X; Staff Rules of the International Criminal Court, Rule 110.1; Prosecutor v. Kenyatta, Case No. ICC-01/09-02, Decision on the Defence Application Concerning Professional Ethics Applicable to Prosecution Lawyers ¶12 (May 31, 2013) (“As the Staff Regulations make clear, the authority to impose disciplinary measures on Prosecution staff for misconduct lies primarily with the Prosecutor.”). Allegations of unsatisfactory conduct are to be reviewed by a Disciplinary Board, which consists of one member appointed by the Prosecutor, one by the Registrar, and one by the staff representative body. Staff Rules of the International Criminal Court, Rule 110.3. The Board’s decision is not binding on the Prosecutor, however. The Prosecutor also has the

Unsatisfactory conduct is broadly defined and includes “failure to observe the standards of conduct expected of an international civil servant.”<sup>26</sup>

Administrative sanctions imposed within the Office of the Prosecutor are most likely to be effective in addressing individual misconduct by line prosecutors. At the domestic level, internal discipline is already used widely to police prosecutors in civil-law countries and is increasingly seen as key to reducing prosecutorial misconduct in the United States.<sup>27</sup> 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.<sup>28</sup> In all these ways, the Office of the Prosecutor can take concrete and effective measures to foster a culture of respect for the rule of law among its staff.

The Office already appears to have a hierarchical structure with clear lines of control and several levels of oversight, which would indicate the basic infrastructure for internal oversight is present.<sup>29</sup> But anecdotal accounts also suggest that the Office could do more to train and regularly audit its personnel in proper investigative and disclosure procedures. The recent failure to identify and disclose potentially exculpatory evidence in the *Kenyatta* case confirms

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authority to summarily dismiss staff members for serious misconduct, but the summary dismissal may still be reviewed by the Board. Ibid Rule 110.8.

<sup>26</sup> Staff Rules of the International Criminal Court, Rule 110.1.

<sup>27</sup> For discussion of proposed or current internal policies used to regulate prosecutors in various offices across the world, see David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (OUP 2002) 128–32; Rachel E. Barkow, ‘Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law’ (2009) 61 *Stanford L Rev* 869, 895–905; Stephanos Bibas, ‘Prosecutorial Regulation Versus Prosecutorial Accountability’ (2009) 157 *U. Pa. L. Rev.* (2009) 959, 996–1015; Coleman et al. (n 99) 56; Erik Luna and Marianne Wade, ‘Prosecutors as Judges’ (2010) 67 *Washington & Lee L Rev* 1413, 1478–79; James Q. Whitman, ‘Equality in Criminal Law: The Two Divergent Western Roads,’ (2009) 1 *J Legal Analysis* 119, 139.

<sup>28</sup> See *infra* Section V.D.

<sup>29</sup> Important management decisions are handled first by the head of the respective division, then by the Executive Committee, and then by the Prosecutor. Gregory Townsend, ‘Structure and Management’ in Luc Reydam et al. (eds) *International Prosecutors* (OUP 2012) 171, 287. Despite this formal hierarchy, some in the Office of the Prosecutor have complained that “OTP’s management and management culture is lacking.” *ibid* 293.



these accounts.<sup>30</sup> As others have argued persuasively, it is also important for the Office to promulgate a detailed Code of Conduct to guide its prosecutors.<sup>31</sup>

Responding to these concerns, the Office recently adopted a Code of Conduct.<sup>32</sup> It also commissioned a study to examine its supervision practices and has committed to reform in this area.<sup>33</sup> Finally, the Office has pledged to institute more regular and comprehensive training programs for its members.<sup>34</sup> 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, however. First, internal discipline will not work when the violation of the rules is condoned or ignored by supervisors. The main violations that occurred in the Court's first case, *Prosecutor v. Lubanga*, did not concern errant line prosecutors, but involved a fundamental disagreement between the Office of the Prosecutor and the judges 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.

### III. Judicial Oversight

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<sup>30</sup> *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests ¶¶ 93-94 (Apr. 26, 2013).

<sup>31</sup> Milan Markovic, *The ICC Prosecutor's Missing Code of Conduct*, 47 *Tex. Int'l L.J.* 201 (2011). 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). It is also revising its policies and Operations Manual and planning to "clarify operational processes, reporting lines, and responsibilities." Townsend (n 29) 294.

<sup>32</sup> International Criminal Court, Office of the Prosecutor, Code of Conduct for the Office of the Prosecutor (Sept. 5, 2013).

<sup>33</sup> International Criminal Court, Office of the Prosecutor, Strategic Plan, June 2012-2015, at 33 ¶¶ 77-84 (Oct. 11, 2013).

<sup>34</sup> *ibid.* ¶¶ 74, 57.

The ICC Statute vests judges with the primary authority to police prosecutorial conduct that may harm the integrity of the proceedings. In response to misconduct, judges can exclude evidence, order compensation to the accused, give warnings to the prosecution, impose fines, and interdict prosecutors from the courtroom.<sup>35</sup> Over time, the Court has developed several other responses to misconduct by relying on its “inherent” powers, its authority to ensure the fairness of the trial, and its duty to ensure that the Statute’s provisions are read in conformity with human rights law.<sup>36</sup> These include conditional and unconditional stays of the proceedings, orders to release the accused, and adverse inferences from the evidence.<sup>37</sup> They even extend to prophylactic measures, such as orders for the Office of the Prosecutor to implement specific measures to prevent misconduct from recurring.<sup>38</sup>

The Court has also gradually shifted its approach from one that focuses strictly on the prejudice to the defendant and the integrity of the proceedings to one that considers broader competing interests in determining the appropriate remedies for misconduct. The first two decisions in which the Court took a more absolutist approach to remedies concerned the failure

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<sup>35</sup> ICC Statute arts. 69(7), 71, 85. The Court can also exercise jurisdiction over offenses against the administration of justice under Article 70, but it is not entirely clear from the Statute and the Rules who would investigate and prosecute such offenses when the suspected offender is a member of the Office of the Prosecutor. *Ibid.* art. 70; *compare* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Prosecution’s Observations on Article 70 of the Rome Statute (Apr. 1, 2011) (prosecution brief arguing that the prosecution is exclusively responsible for prosecuting such offenses) *with* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Observations de la Défense sur la mise en oeuvre de l’Article 70 (Apr. 1, 2011) (arguing that when the prosecution has a conflict of interest, the Trial Chamber can ask the Registrar to appoint an *amicus curiae* to conduct the prosecution).

<sup>36</sup> *See* Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests ¶¶ 89-90 (Apr. 26, 2013); 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); 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).

<sup>37</sup> 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); 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,” ¶¶ 41, 55 (Oct. 21, 2008); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings,” ¶ 212 (Mar. 7, 2011).

<sup>38</sup> Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests ¶¶ 89-90, 97 (Apr. 26, 2013).

to disclose potentially exculpatory evidence before trial and the refusal to obey court orders to disclose the identity of an intermediary who had worked for the prosecution.

In *Prosecutor v. Lubanga*, 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.<sup>39</sup> Prosecutors maintained that they could not 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.<sup>40</sup> Prosecutors maintained that they were acting in good faith and had repeatedly tried to obtain consent to disclose the documents.<sup>41</sup> While acknowledging that the prosecution was acting in good faith, the Trial Chamber emphasized that the prosecution had violated the accused’s fundamental right of access to exculpatory evidence. By collecting much of its evidence under broad confidentiality agreements, which prevented even the Trial Chamber from reviewing the evidence in camera, the prosecution laid the foundation for the conflict between confidentiality and disclosure.<sup>42</sup> Because the judges could not ensure a fair trial without first reviewing the evidence to determine its materiality, they decided to stay the proceedings indefinitely and order the release of the defendant.<sup>43</sup>

After an intervention by the Appeals Chamber and a change of course by information providers, who finally consented to the disclosure of the documents to the Trial Chamber, the proceedings resumed.<sup>44</sup> Soon after the trial began, however, the *Lubanga* Trial Chamber imposed

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<sup>39</sup> 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).

<sup>40</sup> *ibid* ¶ 64.

<sup>41</sup> *ibid* ¶ 17.

<sup>42</sup> *ibid* ¶ 75.

<sup>43</sup> Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Release of Thomas Lubanga Dyilo, ¶ 30 (July 2, 2008).

<sup>44</sup> Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Reasons for Oral Decision Lifting the Stay of Proceedings, ¶ 13 (Jan. 23, 2009). 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

a second stay of the proceedings.<sup>45</sup> The prosecution had deliberately refused to comply with the Chamber's order to release the identity of an intermediary whom the prosecution had used to contact witnesses in the DRC.<sup>46</sup> The prosecution argued that it could not comply with the order because disclosure of the person's identity might jeopardize his safety and would conflict with the prosecution's duty to protect witnesses.<sup>47</sup> The Trial Chamber noted, however, 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.<sup>48</sup> The prosecution's deliberate refusal to follow the court order meant that the prosecutor declined "to be 'checked' by the Chamber."<sup>49</sup> The Chamber concluded that there was no realistic prospect of a fair trial under the circumstances, so it again stayed the proceedings and ordered the release of the defendant.<sup>50</sup>

In both *Lubanga* decisions, the combination of the stay and order to release, 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. The judges suggested in passing that they were aware of the potential significant costs of their orders—to the international community, which created the ICC to punish and deter international crimes; to victims, who would not receive a remedy for the wrongs they suffered; and to the Court's own goal of uncovering the truth.<sup>51</sup> But the judges deliberately chose to set aside these competing social and legal interests and instead focused solely on the seriousness of the procedural violation.<sup>52</sup> They refused to consider whether less burdensome remedies might

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charges, in the event the Appeals Chamber were to order the disclosure of documents without the providers' consent. Rod Rastan, 'Review of ICC Jurisprudence 2008' (2009) 7 Nw U J Intl Hum Rts 261, 275-76 n 42.

<sup>45</sup> 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 (July 8, 2010).

<sup>46</sup> *ibid* ¶ 31.

<sup>47</sup> *ibid* ¶¶ 13-16.

<sup>48</sup> *ibid* ¶¶ 12-17.

<sup>49</sup> *ibid* ¶ 31

<sup>50</sup> *ibid*.

<sup>51</sup> 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, ¶ 95 (June 13, 2008).

<sup>52</sup> *ibid*.

be available to address the misconduct, and by effectively dismissing the case, opted for what one might call an absolutist approach to remedies.<sup>53</sup>

While these first two decisions by the *Lubanga* Trial Chamber might suggest that the Court would take a very strict and uncompromising line on prosecutorial misconduct, more recent pronouncements by both Trial and Appeals Chambers indicate that the Court is adopting a more measured approach. When the Appeals Chamber reviewed the first decision to stay the proceedings in *Lubanga*, for example, it recognized the need to leave open the possibility for the trial to proceed. The Appeals Chamber re-characterized the stay as “conditional” and reversed the order to release the defendant.<sup>54</sup> The re-categorization of the stay allowed the Court to reach the merits of the case once the prosecution was able to obtain consent to disclose the documents to the Chamber.<sup>55</sup>

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 Trial Chamber should first consider less drastic measures, such as sanctions against the prosecutor, before ordering a stay of the proceedings.<sup>56</sup> Because an indefinite stay of proceedings imposes significant costs on the ICC’s ability to fulfill all of its purposes, it should be used only in the last resort. In concluding that a stay was not appropriate under the circumstances, the Appeals

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<sup>53</sup> See Madhav Khosla, ‘Proportionality: An Assault on Human Rights?: A Reply’ (2010) 8 Intl J Const L 298 (contrasting balancing and absolutist approaches to human rights).

<sup>54</sup> *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); *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).

<sup>55</sup> 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 (n 44) 275–76 n 42. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Reasons for Oral Decision Lifting the Stay of Proceedings, ¶ 13 (Jan. 23, 2009).

<sup>56</sup> *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).

Chamber expressly considered 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.<sup>57</sup>

Since then, Trial Chambers in several cases have rejected defense motions to stay the proceedings and have emphasized the need to seek less costly corrective measures.<sup>58</sup> In *Lubanga*, for example, the defense requested a permanent stay to remedy several prosecutorial failures, including the failure to verify certain witness statements and the failure to supervise several intermediaries who had allegedly bribed prosecution witnesses.<sup>59</sup> The Trial Chamber concluded that even if these allegations of misconduct were true, a remedy less drastic than a stay could cure the prejudice at issue. At the conclusion of the case, the Trial Chamber would review the instances in which the prosecution might have been submitting unreliable evidence, and it would weigh or exclude evidence as necessary.<sup>60</sup> In deciding whether to impose a stay, the Chamber noted 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.”<sup>61</sup>

The Trial Chamber applied a similar balancing approach to remedies in *Prosecutor v. Kenyatta*.<sup>62</sup> In that case, the prosecution failed to disclose a potentially exculpatory witness statement until after the hearing to confirm the charges had concluded. The omission resulted from a deficient review system within the Office of the Prosecutor where “persons without knowledge of the overall state of the evidence against the accused, or at a minimum the overall

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<sup>57</sup> *ibid* ¶ 60.

<sup>58</sup> *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); *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ¶ 77-78 (Apr. 26, 2013) (reviewing more recent cases and concluding that “[i]t is clear from the more recent jurisprudence of the Court that not every violation of fair trial rights will justify the imposition of a stay (conditional or unconditional) of the proceedings and that this is an exceptional remedy to be applied as a last resort”).

<sup>59</sup> *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings,” ¶ 196 (Mar. 7, 2011).

<sup>60</sup> *ibid* ¶ 204.

<sup>61</sup> *ibid* ¶ 195.

<sup>62</sup> *ibid* ¶ 189. 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.” *ibid* ¶ 165.

evidence provided by the witness concerned,” reviewed documents for disclosure.<sup>63</sup> The defense therefore received the document only after it had requested the prosecution to provide more information about it.<sup>64</sup>

The Trial Chamber noted that the prosecution’s failure to turn over the document was “a cause for serious concern, both in terms of the integrity of the proceedings and the rights of Mr. Kenyatta.”<sup>65</sup> But it noted that the document was ultimately disclosed before trial, even if belatedly. The Chamber also emphasized that there was no evidence of bad faith on part of the prosecution and that the prejudice caused by the late disclosure could be cured at trial, where the defense would be able to challenge the credibility of the evidence.<sup>66</sup> For these reasons, the Chamber concluded that it would be disproportionate to stay the proceedings.<sup>67</sup> Instead, the Chamber reprimanded the prosecution and required it to conduct a complete review of its case file and “certify to the court that it has done so in order to ensure that no other materials in its possession that ought to have been disclosed to the Defense, are left undisclosed.”<sup>68</sup> The Chamber stressed that it expected the prosecution, “if it had not already done so, to make appropriate changes to its internal procedures.”<sup>69</sup> While imposing relatively mild sanctions on the prosecution—a mere reprimand, the Chamber left open the possibility that the sanctions might escalate if a similar disclosure problem were uncovered as the case progressed.<sup>70</sup>

This most recent decision concerning prosecutorial misconduct illustrates three positive developments in the Court’s approach toward prosecutorial misconduct. First, it confirms the Court’s commitment to policing prosecutors for errors and misconduct. As in earlier decisions in *Lubanga* and *Katanga*, ICC judges have actively assumed the responsibility to address

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<sup>63</sup> Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ¶ 93 (Apr. 26, 2013). Even though other prosecutors from the Office conducted further interviews with the witness, requested authorization from a judge to withhold the affidavit, and reviewed the evidence provided by the witness when preparing for the confirmation hearing, no one noticed the potentially exculpatory nature of the statement. *ibid.*

<sup>64</sup> *ibid.* ¶ 94.

<sup>65</sup> *ibid.* ¶ 95.

<sup>66</sup> *ibid.* ¶ 96.

<sup>67</sup> *ibid.* ¶ 97.

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid.*

<sup>70</sup> ICC Trial Chambers have also taken different approaches to the remedy of excluding evidence—in some cases using a balancing approach and in other cases using an absolutist approach. For a more detailed discussion of these two different approaches to excluding evidence, see Turner (n 1) 192-94, 199-203.

procedural violations by prosecutors and have not deferred disciplinary questions to internal mechanisms within the Office of the Prosecutor or to the Assembly of States Parties. Given the current weakness of these other mechanisms, judicial activism in addressing misconduct is generally a positive development, even when it occasionally results in overly burdensome remedies.

Second, the *Kenyatta* decision builds on the line of cases that have adopted a structured balancing approach to remedies. Following this approach, the Trial Chamber acknowledges 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 and compiling an accurate historical record.<sup>71</sup> The Court is transparent and forthright about the considerations that motivate its decision, allowing a more fruitful debate about its merits.<sup>72</sup> Significantly, by enumerating the specific factors that guide its balancing analysis, the *Kenyatta* Chamber is providing much-needed structure and predictability to the balancing approach developed in earlier ICC decisions.<sup>73</sup>

Finally, the *Kenyatta* decision further expands the range of remedies and sanctions for prosecutorial misconduct. The Court had previously done so on several occasions by reading broadly its authority to ensure the fairness of the proceedings and its duty to interpret the Rome Statute consistently with international human rights. By reprimanding prosecutors and threatening more serious sanctions unless prosecutors implement a specific plan to reform their disclosure practices, the *Kenyatta* Chamber has further diversified the remedies available to the Court. As the Court adds to the palette of remedies and sanctions provided under the Statute, it helps ensure that it can offer more proportionate and targeted responses to misconduct. Going forward, the Court can build on this record and introduce two important additional remedies—sentence reductions and dismissals of select counts, which have been used effectively in other

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<sup>71</sup> Turner (n 1) 204-09. *But cf.* Kelly Pitcher, 'Addressing Violations of International Criminal Procedure', in D. Abels et al. (eds.), *Dialectiek van Nationaal en Internationaal Strafrecht* (Den Haag: Boom Juridische uitgevers 2013) 257-308.

<sup>72</sup> Turner (n 1) 211-12.

<sup>73</sup> The early decisions on prosecutorial misconduct offer some indication of what factors may be relevant. These include the prejudice to the defendant's rights, the culpability of the prosecutor, and the level of involvement by the prosecution. The Court can build on these to establish a clear framework for responses to misconduct. Turner (n 1) 246-56.



international criminal tribunals and a number of national jurisdictions. These remedies have the virtue of allowing the trial on the merits to proceed, while still effectively punishing errant prosecutors and vindicating individual rights.<sup>74</sup>

These first decisions by ICC Chambers have shown that, in many cases, judges are both legally and practically well-situated to respond to prosecutorial misconduct. They are often the first witnesses to misconduct and are able to address it promptly and directly. At the same time, judges do not have unlimited time or resources to investigate and sanction prosecutorial misconduct. Their investigative capacity is especially likely to be insufficient when it comes to systemic misconduct by the Office of the Prosecutor or when the misconduct does not directly threaten the integrity of the proceedings. This is one reason why additional political and administrative measures remain necessary to police prosecutorial misconduct adequately. In addition, even when judges are able to impose remedies that effectively punish misconduct, these remedies are often too blunt and may interfere with other goals of the international criminal justice, including the goal to punish and deter international crimes effectively. Judicial mechanisms therefore remain an imperfect response to prosecutorial misconduct, and political and administrative mechanisms are still necessary to address misconduct effectively.

#### **IV. Political Oversight**

Political accountability of prosecutors is a common feature of domestic criminal justice systems. Common-law countries have applied it as a check on prosecutorial discretion for a long time, and civil-law countries occasionally use it to supplement bureaucratic mechanisms of accountability.<sup>75</sup> Yet the idea of holding prosecutors accountable through political institutions remains controversial at the ICC. Commentators fear that oversight by a political body such as the Assembly of States Parties would undermine the ability of prosecutors to accomplish their

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<sup>74</sup> *ibid* 215-37. The Court could also broaden the use of sanctions, such as fines and interdiction, to respond to misconduct. *Ibid.* 232-38. In *Kenya*, the Trial Chamber referred to its “broad discretionary powers to ensure a fair trial” as a basis for imposing sanctions for breaches of its orders even when the breach did not occur during the proceedings, as Article 71, pertaining to sanctions, appears to require. *Prosecutor v. Kenya*, Case No. ICC-01/09-02/11, Decision on the Defence Application Concerning Professional Ethics Applicable to Prosecution Lawyers ¶ 14 (May 31, 2013).

<sup>75</sup> Wright and Miller (n 2) 1590-91.

tasks impartially and effectively. The concern is that the political implications of cases are often too immense—and the prosecutorial role in them too central—to allow for disinterested action by Assembly delegates when it comes to policing prosecutors.

While these concerns are not entirely without merit, the ICC Statute explicitly provides for Assembly oversight in several provisions concerning the appointment, removal, and discipline of the Prosecutor and Deputy Prosecutor and provisions concerning the management of the Office of the Prosecutor.<sup>76</sup> In addition to textual support for Assembly oversight, there is also a policy argument for it. Given the frequently mentioned “democratic deficit” of the ICC, some level of oversight by the Assembly may help the Court gain a measure of political legitimacy (at least with those member states that see political accountability of prosecutors as a virtue).<sup>77</sup> Finally, even if the concerns about political interference by the Assembly are valid as a theoretical matter, they are not likely to be borne out regularly in practice. The Assembly’s disciplinary powers are already legally and practically so circumscribed that we are more likely to see a problem of insufficient discipline rather than overzealous inquiries for political ends.

The Assembly of States can act by majority to elect, remove, or discipline the ICC Prosecutor and Deputy Prosecutor. Disciplinary measures range from reprimands to fines and removal. The Assembly can remove the Prosecutor and Deputy Prosecutor for gross negligence in the performance of their duties, for knowingly acting in contravention of their duties, and for serious misconduct that 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.”<sup>78</sup> The Assembly can fine or reprimand the Prosecutor and Deputy

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<sup>76</sup> ICC Statute, arts. 46, 47, 112.

<sup>77</sup> See Alexander K.A. Greenawalt, ‘Justice Without Politics? Prosecutorial Discretion and the International Criminal Court’ (2007) 39 NYU J Intl L & Pol 583, 657; Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 AJIL 510, 535. For an analysis of the different attitudes toward political accountability of prosecutors in civil-law and common-law countries, see Darryl K. Brown, *Law, Democracy, and Structures of Adjudication* (manuscript on file with author); Tonry (n 2).

<sup>78</sup> ICC Statute, art. 46; ICC Rules of Procedure and Evidence, R. 24(1)(a). An example of serious misconduct is the disclosure of information that the Prosecutor 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.” ICC Rules of Procedure and Evidence, R. 24(1)(a)(i). The other two examples involve serious misconduct for personal benefit. 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.”

Prosecutor for less serious misconduct that “causes or is likely to cause harm to the proper administration of justice before the Court or the proper internal functioning of the Court.”<sup>79</sup> As an example, repeatedly “failing to comply with or ignoring requests made by the Presiding Judge or by the Presidency in the exercise of their lawful authority” qualifies as such misconduct.<sup>80</sup>

The broad language of these provisions lends some credence to the concern that the Assembly may use discipline for political reasons (for example, when a majority of states believes that a prosecutor is mishandling a sensitive case). But a layer of procedural constraints sharply limits the odds of misuse. First, any complaint about prosecutorial misconduct must be transmitted to the Presidency of the Court before it is sent to the Assembly for consideration. A board of three judges reviews the complaints and sets aside anonymous or manifestly unfounded complaints.<sup>81</sup> Only after such complaints are filtered out does the Presidency forward the remaining ones to the Assembly.<sup>82</sup>

It is still theoretically possible that complaints that are not “manifestly unfounded,” but are also not entirely legitimate, can be used to harass top prosecutors and frustrate their work.<sup>83</sup> Yet other statutory provisions set additional limits on Assembly intervention in most cases of misconduct. First, measures by the Assembly can be imposed only on the Prosecutor and the Deputy Prosecutor. At least for now, judicial responses remain the only external source of accountability for line prosecutors.<sup>84</sup> Even with respect to misconduct by the two top prosecutors, the Assembly’s ability to respond is procedurally constrained. The Assembly meets regularly only once a year, and during that sole meeting it must decide on a number of important budgetary and management questions pertaining to the Court as a whole. The Assembly is not likely to devote its limited time to disciplinary measures except in

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<sup>79</sup> ICC Statute, art. 47; ICC Rules of Procedure and Evidence, R. 25.

<sup>80</sup> ICC Rules of Procedure and Evidence, R. 25(a).

<sup>81</sup> ICC Rules of Procedure and Evidence, R. 26; Regulations of the Court ICC-BD/01-01-04, Reg. 120 (2004).

<sup>82</sup> Regulations of the Court ICC-BD/01-01-04, Reg. 121(2) (2004).

<sup>83</sup> The limited experience of the Court so far contradicts such concerns, however. In a controversial case concerning allegations that the former ICC Prosecutor, Luis Moreno Ocampo, had committed sexual assault, the panel of judges found that the complaint was ‘manifestly unfounded’ although not malicious. *Mégret* (n 18) 480.

<sup>84</sup> Once the Internal Oversight Mechanism becomes functional, it will also provide such external oversight. See *infra* Section V.A.

extraordinary cases. Disciplinary measures also require an absolute majority vote in the Assembly of States Parties, which is a high threshold to cross.<sup>85</sup> Under these procedural constraints, the Assembly is likely to address only egregious misconduct by top prosecutors. The more realistic prospect is therefore that the Assembly would provide weak oversight, and judicial oversight will remain the backstop for most instances of prosecutorial misconduct.

Although the Assembly is not likely to discipline prosecutorial misconduct frequently, its authority to do so overlaps to some degree with judicial authority to police prosecutorial misconduct. To ensure that the Assembly and judges use their disciplinary powers efficiently, it is important to delineate more clearly when each body should intervene. In determining how to divide responsibility for different types of misconduct, the ICC may consider the following three factors: 1) the relative expertise of each body in investigating the specific type of misconduct at hand; 2) the relative ability of each body, with respect to the type of misconduct at issue, to impose sanctions that effectively punish misconduct, affirm the rule of law, and promote fair trials; 3) the relative burden that judicial and Assembly interventions might impose on the ability of the ICC to accomplish its central purposes, such as preventing impunity for international crimes and ascertaining the truth about the crimes.

With respect to the last factor—the cost of the measures imposed—reprimands and fines by the Assembly fare relatively well. Reprimands and fines do not alter the result of judicial proceedings and do not directly undermine the goals of punishing international crimes and uncovering the truth. In many cases, therefore, they represent a superior alternative to judicial remedies that disrupt the course of the case, such as a stay of proceedings, dismissal, or exclusion of evidence. On the other hand, reprimands and fines provide no concrete relief for violations of individual rights, and the Assembly is not well-suited to determining when such a violation has occurred. Accordingly, a reprimand or fine by the Assembly would not be a useful substitute for judicial remedies when the violation at issue has harmed individual rights. They would be more appropriate for violations that have not prejudiced individual rights, yet are significant or pervasive enough to warrant a response.

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<sup>85</sup> The Assembly can call special sessions by a vote of a third of its members or on the initiative of its Bureau, but this adds yet another procedural threshold. ICC Statute art. 112(6).

In some cases, the Court could also refer to the Assembly cases of misconduct that have affected individual rights or the integrity of the proceedings and for which the Court has already imposed some remedies. Because remedies are costly, the Court could impose more measured remedies but then refer a case for further discipline by the Assembly (at least where the misconduct can be attributed to the Prosecutor or Deputy Prosecutor). The judicial referral could help overcome the procedural hurdles to Assembly action and reduce the risk of politicization. At the same time, by combining milder judicial remedies with Assembly sanctions, the Court could achieve the desired punitive effect at a lesser cost to the proceedings on the merits.<sup>86</sup>

## V. Administrative and Professional Oversight

### A. Independent Oversight Mechanism

Perhaps in recognition of its limited practical ability to discipline prosecutors directly, the Assembly of States Parties recently created an Independent Oversight Mechanism (IOM) to investigate misconduct by prosecutors, judges, court staff, and contractors retained by the court.<sup>87</sup> The IOM is not yet fully operational but is expected to begin work in the near future. The IOM would have the power to investigate misconduct by prosecutors and recommend disciplinary measures to the Office of the Prosecutor.<sup>88</sup> Where criminal conduct is suspected, it

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<sup>86</sup> Milder remedies may include a sentence reduction, adverse evidentiary inference, or reprimand. Even when combined with Assembly sanctions, however, these remedies would not be appropriate when prosecutorial misconduct has undermined confidence in the verdict. *See* Turner (n 1) 182.

<sup>87</sup> 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, 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), at <http://uclalawforum.com/home> (contribution by Nicholas Cowdery).

<sup>88</sup> A.S.P. Res., Establishment of an Independent Oversight Mechanism, ICC-ASP/8/Res.1, ¶ 6(d) (Nov. 26, 2009). In a more recent resolution, adopted as this book chapter was going through the editing process, the ASP expanded the IOM’s function to include unscheduled inspections of “any premises or processes” of the Court, as requested by the Bureau of the ASP. A.S.P. Res., Independent Oversight Mechanism, ICC-ASP/12/Res.6, Annex, ¶ 6 (Nov. 27, 2013). The new functions will also include “evaluation of any programme, project or policy as requested by the Assembly or Bureau.” *ibid* ¶ 16.

could recommend that the Court refer the matter to the relevant national authorities.<sup>89</sup>

Misconduct is interpreted very broadly and 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.”<sup>90</sup> It does not, however, include offenses against the administration of justices, such as presenting false testimony and interfering with witness testimony, which are covered by Article 70 of the ICC Statute and remain subject to prosecution by the Office of the Prosecutor and trial by the Court.<sup>91</sup>

The Oversight Mechanism is presented by the Assembly as an independent administrative body that would hold ICC prosecutors to account in order to ensure the effective functioning of the Court. The Assembly grounded its authority to establish the IOM on two provisions of the Rome Statute. Article 112(2)(2) provides that the Assembly “shall . . . provide management oversight to . . . the Prosecutor . . . regarding the administration of the Court.”<sup>92</sup> To do so, under Article 112(4), “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.”<sup>93</sup>

The Office of the Prosecutor has objected to the Assembly’s competence to establish the Independent Oversight Mechanism and has argued that IOM investigations into prosecutorial misconduct would interfere with the principle of prosecutorial independence enshrined in Article 42 of the Rome Statute.<sup>94</sup> According to the OTP, if an external body such as the IOM were to “instruct” or demand cooperation from prosecutorial staff without the consent of the Prosecutor, it would violate the Rome Statute’s language that prosecutors “shall not seek or act on instructions from any external source.”<sup>95</sup> Because the Statute also provides that the Prosecutor has “full authority over the management and administration of the Office, including

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<sup>89</sup> *ibid* ¶ 41.

<sup>90</sup> *ibid* ¶ 28 n.4.

<sup>91</sup> *ibid* ¶ 30.

<sup>92</sup> ICC Statute art. 112(2)(2).

<sup>93</sup> ICC Statute art. 112(4).

<sup>94</sup> ICC Statute, art. 42 (providing 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”).

<sup>95</sup> Report of the Bureau on the Independent Oversight Mechanism, ICC-ASP/9/31, ¶ 44 (Nov. 29, 2010).

the staff, facilities and other resources thereof,” the Prosecutor has argued that he enjoys “full and unfettered administrative independence” to investigate and discipline his own staff.<sup>96</sup>

In view of the Prosecutor’s objections, the Assembly of States Parties revised the IOM’s procedures twice. The first amendment provided that whenever the ICC Prosecutor and the IOM disagree as to whether investigations of prosecutorial staff should proceed, an independent third-party would be brought in to resolve the dispute.<sup>97</sup> If the third party determined that the investigation might undermine prosecutorial independence, the investigation would be suspended. Even after this amendment was adopted, however, concerns remained that the IOM’s investigations could be used by the Assembly to interfere with the independence of the ICC Prosecutor.<sup>98</sup> Commentators suggested that states parties unhappy with charging decisions of the Prosecutor 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.<sup>99</sup> To some degree, these concerns were accommodated through the recourse to an independent third party and the requirement that investigations be conducted “with strict regard for fairness and due process for all concerned.”<sup>100</sup> But it was still unclear what exact procedures the IOM would adopt to ensure due process and confidentiality and how independent the third-party arbiter would in fact be (since it would be appointed by the Assembly of States Parties, some observers worried that its independence may not be entirely assured).<sup>101</sup>

In its most recent session, the Assembly revised the IOM procedures once more. This time, it provided that the IOM must notify the Prosecutor of any pending investigation of a staff

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<sup>96</sup> *ibid.* The submissions to the Bureau on this issue were signed by then-Prosecutor Luis Moreno Ocampo. The most recent Strategic Plan of the OTP suggests that the new Prosecutor, Fatou Bensouda, similarly insists on maintaining the independence of the Office in disciplinary matters. International Criminal Court, Office of the Prosecutor, Strategic Plan, June 2012-2015, at 33 ¶ 85 (Oct. 11, 2013).

<sup>97</sup> A.S.P. Res., Independent Oversight Mechanism, ICC-ASP/9/Res.5, Annex, ¶¶ 20-25 (Dec. 10, 2010).

<sup>98</sup> See The Proposed Independent Oversight Mechanism for the International Criminal Court, Invited Experts on Oversight Question, UCLA Law Forum, (May-Sept. 2011), at <http://uclalawforum.com/home> (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).

<sup>99</sup> *ibid.* (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), at <http://www.ijl.org/newsandevents/documents/IOMFinalPaperasPublishedinOTPWebSite.pdf>.

<sup>100</sup> *ibid.* ¶ 27.

<sup>101</sup> Coleman et al. (n 99) 6.

member and then consult with the Prosecutor within five working days of the notification, “in order to avoid any negative impact on on-going investigative, prosecutorial and judicial activities resulting from the proposed investigation.”<sup>102</sup> If following the consultation, the Prosecutor continues to believe that the proposed investigation is outside the mandate of the IOM, the Prosecutor can report its concerns to the Bureau and then seek a determination from the Presidency of the ICC.<sup>103</sup> The President of the Court will be assisted by three judges in issuing a final and binding judgment on this matter.

The most recent amendment minimizes the risk that the IOM would interfere with legitimate prosecutorial actions. In an earlier writing on this topic, I had proposed that IOM procedures be revised to require that any complaints about prosecutorial misconduct relating to investigative and trial work be referred or at least vetted by ICC judges.<sup>104</sup> Such a mechanism already exists with respect to complaints of misconduct transmitted to the Assembly for disciplinary measures under Article 46. I therefore argued that the same mechanism for complaints to the IOM would be practical and consistent with the existing legal framework. The judicial referral mechanism could prevent politically motivated investigations of prosecutors from occurring, but would still allow valid complaints to be investigated by the IOM. The 2013 Assembly Resolution provides for a similar judicial check on IOM inquiries, but it requires the Prosecutor to trigger the procedure by seeking a determination from the Presidency. This new procedure appears to strike a good balance between the need to preserve prosecutorial independence and yet ensure accountability.

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 four staff members. It was increased from the earlier provision for only two members, but the mandate of the IOM was also extended to cover inspections and evaluation of ICC programs more broadly.<sup>105</sup> Given that the IOM is supposed to inspect and evaluate ICC programs and then also investigate complaints concerning prosecutors, judges, the Registrar, staff members of

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<sup>102</sup> A.S.P. Res., Independent Oversight Mechanism, ICC-ASP/12/Res.6, Annex, ¶ 34 (Nov. 27, 2013).

<sup>103</sup> *ibid* ¶ 35.

<sup>104</sup> Turner (n 1) 243-44.

<sup>105</sup> A.S.P. Res., Independent Oversight Mechanism, ICC-ASP/12/Res.6, ¶ 4 (Nov. 27, 2013).



the Court, and contractors, a four-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 addition to these resource constraints, as noted earlier, the IOM is also legally limited to investigate misconduct other than offenses against the administration of justice.<sup>106</sup> Therefore, the real problem with the IOM may be that it would provide insufficient, rather than overzealous scrutiny of prosecutorial misconduct.

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 engaged in misconduct, 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. As with disciplinary measures by the Assembly, it would be useful to delineate the instances in which IOM action would be more beneficial than judicial intervention.

## B. Bar Associations

Because of the various shortcomings of discipline by the Assembly of States Parties and the IOM, some have suggested that bar associations could be used to regulate international prosecutors. Bar associations have the authority to investigate and discipline prosecutorial misconduct in common-law systems, and at least in theory, they offer a fair and efficient way to handle misconduct. They are composed of prosecutors' professional peers and can draw on members' legal expertise to address questions of misconduct competently; they are generally seen as neutral and apolitical bodies; and their disciplinary measures have no direct effect on the outcome of ongoing cases. But as commentary on bar discipline at the domestic level has

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<sup>106</sup> *ibid* ¶ 30.

shown, in practice, such discipline is rarely imposed, and it has failed to constrain prosecutorial misconduct effectively.<sup>107</sup>

At the ICC, regulation by bar authorities is even less likely to work, for several reasons. First, ICC prosecutors are not required to be members of a national bar association, and at least some current prosecutors appear to lack such membership.<sup>108</sup> Unless the Office of the Prosecutor begins requiring membership as a matter of policy, local bar associations could not offer comprehensive regulation. A bar membership requirement is not likely to be forthcoming, however, because prosecutors from civil-law countries are typically not regulated through their bar associations. They are seen as organs of the court and members of the civil service, on par with judges, and are disciplined either through internal administrative measures, or, for more serious violations, by civil service tribunals.<sup>109</sup>

Another potential problem is that national bar associations may not always apply their codes of conduct extraterritorially.<sup>110</sup> Even when rules do apply across borders, national bar authorities would be reluctant to conduct expensive and logistically challenging investigations of misconduct abroad.<sup>111</sup> If national authorities are already failing in their duties to discipline prosecutorial misconduct at home, it appears implausible that they would consider inquiries into misconduct at the ICC a high priority.

Even if we were to assume that some enforcement by local authorities would occur, another problem remains. As debates about witness proofing, *ex parte* contacts, and cross-examination at the international criminal courts have shown, norms of conduct still differ significantly across jurisdictions. Depending on the choice-of-law rules applied by local bar

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<sup>107</sup> David Keenan et al., 'The Myth of Prosecutorial Accountability After *Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct' (2011) 121 Yale L J Online 203, <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/volume-121>; Fred C. Zacharias, 'The Professional Discipline of Prosecutors' (2001) 79 NC L Rev 721; *see also* Judith L. Maute, 'Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?' 2008 J Prof Law 53, 73–76.

<sup>108</sup> Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on the Defence Application Concerning Professional Ethics Applicable to Prosecution Lawyers ¶ 6 (May 31, 2013).

<sup>109</sup> Luna and Wade (n 27) 1474–79; Turner (n 1) 238.

<sup>110</sup> Bar Standards Board, Code of Conduct, Annexe A: The International Practising Rules R.2, at <https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/annexes-to-the-code/annexe-a-the-international-practising-rulesred-european-lawyers-rules>. *But see* Model Rules of Professional Conduct R. 8.5(a) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.").

<sup>111</sup> *See* Catherine A. Rogers, 'Lawyers Without Borders' (2009) 30 U Pa J Intl L 1035, 1083.

associations, ICC prosecutors may be subject to different norms of conduct, creating a problem of inconsistent treatment. In fact, even if the choice-of-law rules consistently directed national bar associations to apply ICC rules,<sup>112</sup> a problem of expertise in interpreting and applying these rules would likely arise. Moreover, choice-of-law provisions typically do not apply to procedural and evidentiary matters, so the problem of different treatment would still remain to a certain degree.

In response to these concerns, some have suggested that an international professional body, such as the International Association of Prosecutors (“IAP” or “Association”), ought to play a more central role in sanctioning ICC prosecutors.<sup>113</sup> But at least at present, the IAP has not assumed any disciplinary role and has limited itself to drafting a model code of conduct for ICC prosecutors.<sup>114</sup> It is not at all clear that relevant actors at the ICC would wish to see a more active role for the Association. The Assembly of States Parties decided to create an oversight mechanism under its own auspices instead of entrusting the IAP with the task of disciplining prosecutors.

Requiring international prosecutors to join an international association such as the IAP and giving it investigative authority over prosecutorial misconduct would have certain benefits. Regulation by an international association would provide greater uniformity in the standards governing prosecutorial actions compared to regulation by national bar associations. Compared to oversight by the IOM and the Assembly of States Parties, it would also present a lesser risk that disciplinary measures would be used for political ends. Finally, the Association would draw on the expertise of prosecutors from different legal systems, including some with international experience, ensuring that discipline is imposed with a good understanding of the context in which international prosecutors operate.

Despite these potential benefits of IAP oversight, it is not likely to be the optimal means of accountability for prosecutors at the ICC in the foreseeable future. The Association is not an

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<sup>112</sup> Model Rules of Professional Conduct R. 8.5(b)(1) (“[F]or conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.”).

<sup>113</sup> Mégret (n 18) 465; *see also* James G. Stewart, New Thoughts About Barayagwiza: Reactions to Policing International Prosecutors, NYU JILP Symposium, *Opinio Juris*, Apr. 5, 2013, at <http://opiniojuris.org/2013/04/05/nyu-jilp-symposium-new-thoughts-about-barayagwiza-reactions-to-policing-international-prosecutors>.

<sup>114</sup> Markovic (n 31) 205.

organ of the Court, and it might be difficult to reconcile its oversight functions with the Rome Statute. The creation of the Independent Oversight Mechanism further reduces the appeal of transforming the IAP into a regulatory body for ICC prosecutors. Regulation by both the IAP and the IOM would be duplicative and inefficient. In choosing between the two oversight mechanisms, ICC prosecutors would likely prefer the IAP because of its perceived neutrality, expertise, and distance from the Assembly of States Parties. But the Assembly would prefer to rely on the mechanism it has already created, and it is not clear that the Rome Statute gives the Office of the Prosecutor the authority to override that preference. Finally, some civil-law prosecutors working at the ICC, who identify above all as organs of the Court, might be reluctant to be regulated by an external professional association. For all these reasons, the IAP is unlikely to take on disciplinary duties with respect to ICC prosecutors, at least in the foreseeable future.

### **C. Informal Sanctions**

A less obvious mechanism of regulating the conduct of international prosecutors includes informal sanctions by other prosecutors, defense attorneys, and judges.<sup>115</sup> Such sanctions can be imposed promptly and efficiently as they do not require an extensive information gathering process or an elaborate procedure before judgment.<sup>116</sup> While they are milder in effect than most formal sanctions, informal measures are likely to be imposed more frequently because they are relatively economical. The speed with which they can be levied adds to their deterrent effect. Such sanctions are especially effective in tight-knit legal communities, in which lawyering norms are broadly shared and prosecutors' careers depend heavily on their reputation with peers.<sup>117</sup>

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<sup>115</sup> For a discussion of the role of informal sanctions in a domestic setting, see, for example, Bruce A. Green and Fred C. Zacharias, 'Regulating Federal Prosecutors' Ethics' (2002) 55 *Vanderbilt L Rev* 381, 405, 472 (discussing informal sanctions by judges); Kay L. Levine and Ronald F. Wright, 'Prosecution in 3-D' (2012) 102 *J Crim L & Criminology* 1119 (discussing informal instruction by fellow prosecutors); Darryl K. Brown, 'Criminal Procedure Entitlements, Professionalism, and Lawyering Norms' (2000) 61 *Ohio State LJ* 801, 812 (discussing the limited ability of defense attorneys to impose informal sanctions on prosecutors).

<sup>116</sup> See W. Bradley Wendel, 'Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities' (2001) 54 *Vand. L. Rev.* 1955, 1955.

<sup>117</sup> *ibid* at 2042.

At least at present, informal sanctions are less likely to be a significant source of regulation at the ICC. The ICC's legal community is both very diverse and transient, and consensus on governing professional norms has yet to emerge. But because social norms are likely to become more influential as the ICC matures, it is important to examine their potential usefulness in policing prosecutorial actions.

A great deal of informal regulation is likely to occur within the Office of the Prosecution itself. Conversations in the corridor and discussions over lunch can help impart codes of professional conduct.<sup>118</sup> By virtue of their experience and status, senior prosecutors can set standards particularly effectively, and this type of peer assessment can work well in cases where the errors result from inexperience or incompetence. Like formal internal sanctions, however, informal regulation within the Office of the Prosecutor is less apt to address systemic misconduct. Such misconduct becomes pervasive precisely because it is condoned or at least neglected by leaders of the Office, so internal regulation—whether formal or informal—is likely to be ineffectual in such cases.

Defense attorneys can also indirectly influence prosecutorial conduct through informal channels. They may, for example, spread negative gossip about prosecutors whom they perceive as overly aggressive or unprofessional, and they may refuse to cooperate on scheduling requests, deadline extensions, and procedural waivers.<sup>119</sup> But as in the domestic setting, international criminal defense attorneys have no significant leverage over the outcome of cases or over formal sanctions on prosecutors, and this limits their ability to apply informal pressure on prosecutors. The influence of defense attorneys is likely to be minimal for other reasons as well. At least at this time, personal interaction between defense and prosecution lawyers at the ICC tends to be limited to the courtroom. While prosecutors frequently interact socially with one another, with prosecutors from other international tribunals, and with members of the Chambers, they do not tend to socialize as often with defense attorneys.<sup>120</sup>

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<sup>118</sup> Levine and Wright (n 115) 1122; *cf.* Elena Baylis, Function and Dysfunction in Post-Conflict Justice Knowledge Networks and Communities 37-42 (unpublished manuscript, on file with author) (discussing the active exchange of information about legal norms among professionals working for international criminal courts and tribunals).

<sup>119</sup> *See* Brown (n 115) 812.

<sup>120</sup> *See, e.g.,* Baylis (n 118) 66-67; Judith A. McMorrow, 'Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY' (2007) 30 Boston College Intl & Comp L Rev 139, 151-53 (reviewing the isolation

Defense attorneys are in The Hague only part-time, since they have to attend to other cases in their domestic practice; professional divisions likely further diminish social interactions with prosecutors. Even dealings within the court are frequently limited to one case, reducing the “repeat-player” effect that may lead prosecutors to cooperate with defense attorneys in domestic settings.<sup>121</sup> Finally, ICC prosecutors rarely trade places with international criminal defense attorneys during their professional career. This further reduces their incentives to maintain friendly relations with the defense. For all these reasons, defense attorneys are not well-situated to influence prosecutors informally. In many cases, defense attorneys may also not even attempt to apply any social pressure on prosecutors. Defense attorneys are ethically bound to place their clients’ interests first, and they may perceive that the risk of antagonizing prosecutors conflicts with the duty to serve their clients in a particular case.<sup>122</sup>

ICC judges are likely to be more effective in sanctioning prosecutors informally. They can admonish a prosecutor off the record, relate improper conduct to a prosecutor’s superior, make scheduling decisions inconvenient to the misbehaving prosecutor, demand additional written submissions from prosecutors who act unprofessionally, and make the courtroom experience of a prosecutor unpleasant in various other ways.<sup>123</sup> Because ICC judges in general wield broad authority over the outcome of a case (to a greater degree than judges in common-law jurisdictions, for example<sup>124</sup>) and because they can impose formal sanctions for misconduct, their informal reprimands are likely to be taken seriously by ICC prosecutors. Judges at the ICC have shown that they are eager to use both formal and informal means to encourage prosecutors to adopt certain standards of professional conduct, although it is too early to assess the effectiveness of these sanctions.<sup>125</sup>

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of ICTY defense attorneys from prosecutors and judges and concluding that “[t]he disparate legal backgrounds of the legal actors at the ICTY and the need for strict separation of functions means that socialization . . . does not appear to be a strong source of norms at the ICTY”).

<sup>121</sup> See John Jackson and Yassin M’Boge ‘The Effect of Legal Culture on the Development of International Evidentiary Practice: From the ‘Robing Room’ to the ‘Melting Pot’ (2013) 26 *Leiden J Intl L* 947, 967-68.

<sup>122</sup> Brown (n 115) 843-44.

<sup>123</sup> Peter Margulies, ‘Above Contempt? Regulating Government Overreaching in Terrorism Cases’ (2005) 34 *Sw U L Rev* 449; Zacharias and Green (n 115) 472.

<sup>124</sup> See, e.g., Jenia Iontcheva Turner, *Legal Ethics in International Criminal Defense*, (2010) 10 *Chi J Intl L* 685, 704-05.

<sup>125</sup> At the ICTY, Chambers concluded that they did not have jurisdiction to develop a prosecutorial code of conduct, but they sought at least indirectly to encourage the Prosecutor to adopt certain standards. Mégrét (n 18) 460. ICTY

Judges' ability to apply informal sanctions is not unlimited, however. The effect of such sanctions is likely to be felt primarily by the individual prosecutor working on the case. Informal sanctions are not publicized and for that reason would not be the optimal means of addressing a pattern of misconduct in the Office of the Prosecutor.<sup>126</sup> Moreover, the ICC is generally a "far less structured social system" than a domestic criminal justice community.<sup>127</sup> Both prosecutors and judges are typically at the ICC for only a short time. Judges' terms are limited to nine years.<sup>128</sup> Prosecutors frequently work on only one ICC case and then return either to domestic practice or move on to a different international institution.<sup>129</sup> As international court practitioners themselves have commented, this reduces the pressure to please judges.<sup>130</sup> A bad reputation internationally does not necessarily "trickle[] down into a domestic practice that is separate in geography, community, and law."<sup>131</sup>

More broadly, until a more solid consensus develops on the applicable norms of professional conduct at the ICC, informal sanctions are likely to remain a weak constraint on prosecutorial actions. Unlike in local legal communities, where "internalized standards of professional conduct . . . are written in the hearts and minds of each lawyer," ICC lawyers come from diverse legal traditions and cultures and do not yet share a common understanding of professional norms.<sup>132</sup> The lack of a formal code of conduct for prosecutors and the rapid turnover of lawyers and judges at the ICC also contribute to the problem. In the near future,

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judges generally used their informal sanctioning powers broadly to encourage the development of norms of attorney conduct. *See* McMorrow (n 120). At the ICC, judges have read their own powers to ensure the fairness and integrity of the proceedings more broadly and have imposed certain rules of professional conduct on prosecutors. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on the Defence Application Concerning Professional Ethics Applicable to Prosecution Lawyers (May 31, 2013); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (Nov. 30, 2007).

<sup>126</sup> Green and Zacharias (n 115) 472.

<sup>127</sup> Mégret (n 18) 419; *see also* James G. Stewart, New Thoughts About Barayagwiza: Reactions to Policing International Prosecutors, NYU JILP Symposium, *Opinio Juris*, Apr. 5, 2013, at <http://opiniojuris.org/2013/04/05/nyu-jilp-symposium-new-thoughts-about-barayagwiza-reactions-to-policing-international-prosecutors>.

<sup>128</sup> ICC Statute art. 36.

<sup>129</sup> Jackson and M'Boge (n 121) 967-68.

<sup>130</sup> *ibid.* 967-69.

<sup>131</sup> James G. Stewart, New Thoughts About Barayagwiza: Reactions to Policing International Prosecutors, NYU JILP Symposium, *Opinio Juris*, Apr. 5, 2013, at <http://opiniojuris.org/2013/04/05/nyu-jilp-symposium-new-thoughts-about-barayagwiza-reactions-to-policing-international-prosecutors>.

<sup>132</sup> Wendel (n 116) 1960, citing Geoffrey C. Hazard, Jr. et al., *The Law and Ethics of Lawyering* (3d ed. Foundation P 1999) 19-20.

therefore, the ICC will have to continue to rely primarily on formal rules and methods of policing misconduct. But as the ICC develops its own set of identifiable and harmonized ethical norms and expectations, informal sanctioning will become a more potent source of regulating prosecutorial conduct, as it has been in domestic settings.

#### **D. Preventive Measures**

While the discussion so far has focused on measures responding to misconduct after the fact, the ICC can also benefit from developing structures that prevent misconduct from occurring in the first place. An important element of prevention is the establishment of a set of shared norms of professional conduct. Commentators had long argued that the Prosecutor must adopt a Code of Conduct to guide its prosecutors.<sup>133</sup> In both common-law and civil-law systems, formal rules and codes of ethics serve as a critical *ex ante* constraint on prosecutorial actions.<sup>134</sup> They are even more necessary in a pluralist legal culture such as the ICC, where wide disagreement about the applicable norms persists. The formulation of a code of conduct could help deter misconduct before the fact and ensure fair punishment after misconduct occurs.

For more than ten years, however, the Office had failed to promulgate such a Code, even though similar Codes were adopted for defense attorneys, victim's representatives and judges. The Office argued that the Rules of the Court, Staff Rules, and the OTP Operations Manual provide sufficient guidance for prosecutors. In September 2013, the Office finally adopted a Code of Conduct, perhaps in response to a judicial nudge. In May 2013, acting under its authority to ensure a fair trial, the Trial Chamber in *Prosecutor v. Kenyatta* ordered the prosecution to follow several provisions of the Code of Professional Conduct for Counsel, which formally applies only to defense counsel, counsel for States, amici curiae, and counsel or legal representatives for victims and witnesses.<sup>135</sup> The Chamber acknowledged that its order is limited only to the case before it and that only the Office of the Prosecution can promulgate a more broadly applicable Code of Conduct for ICC prosecutors. While it was limited to one case,

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<sup>133</sup> Markovic (n 31).

<sup>134</sup> Wright and Miller (n 2) 1601.

<sup>135</sup> *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, Decision on the Defence Application Concerning Professional Ethics Applicable to Prosecution Lawyers ¶¶ 13-16 (May 31, 2013).



the Chamber's decision to impose the defense Code of Conduct provisions to prosecutors in *Kenyatta* sent a clear signal that greater ethical regulation of ICC prosecutors is needed. The adoption of the Code of Conduct for the Office of the Prosecutor helps address this concern and is a positive development towards accountability and transparency.

The Office of the Prosecutor can do more to prevent misconduct by adopting additional training and monitoring programs for its lawyers. These features--"training, articulated standards, internal review of individual decisions and writing-based processes" --are a staple of civil-law systems' accountability frameworks for prosecutors, and they are increasingly being considered by common-law systems as a means of preventing misconduct.<sup>136</sup> They help reduce misconduct not only by clarifying the applicable rules, but also by "strengthen[ing] the concept of the prosecutor's job as a neutral quasi-judicial officer" rather than a partisan advocate.<sup>137</sup>

The Office of the Prosecutor has not clarified what training and internal review programs it has put in place to prevent misconduct, and the recent failure to disclose potentially exculpatory evidence in *Kenyatta* exposed certain flaws in its internal processes.<sup>138</sup> But the most recent Strategic Plan unveiled by the Prosecutor in October 2013 suggests that the new Prosecutor, Fatou Bensouda, is aware of the need to address this problem and is taking steps in that direction. The Plan sets out a concrete goal of revising training programs and evidence disclosure practices, and it avows that the Office will pay "increased attention to proper performance management and an increased provision of training."<sup>139</sup> If the Office fails to follow through on these commitments to prevent misconduct, judges can again use their sanctioning powers to encourage the Office to adopt specific compliance programs.<sup>140</sup> Given the high cost of imposing remedies for misconduct after the fact, it is critical for the Court to develop more effective prophylactic measures.

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<sup>136</sup> Wright and Miller (n 2) 1604.

<sup>137</sup> *ibid.*

<sup>138</sup> Prosecutor v. *Kenyatta*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests ¶¶ 93-94 (Apr. 26, 2013).

<sup>139</sup> International Criminal Court, Office of the Prosecutor, Strategic Plan, June 2012-2015, ¶¶ 74, 57 (Oct. 11, 2013). The Plan describes various additional steps that can be taken to "maintain a professional office with specific attention to performance management and measurement." *Ibid* ¶¶ 77-84.

<sup>140</sup> *ibid* ¶ 97.

## E. Conclusion

Soon after the ICC encountered prosecutorial errors and misconduct in its first case, it became clear that the Court could not rely exclusively on the Office of the Prosecutor to oversee the conduct of its members. In an important early accomplishment, ICC judges asserted an active role in sanctioning prosecutorial misconduct, imposing bold and sometimes drastic remedies. These early decisions were an important expression of the Court's commitment to the rule of law and fair trial rights. Over time, however, the Court recognized that remedies must be calibrated in order to account for other important goals of the international criminal justice system, such as retribution, deterrence, and the establishment of an accurate historical record. Trial and Appeals Chambers began relying on a balancing approach to remedies and articulated some of the factors that would guide it.

Going forward, the ICC will undoubtedly continue to rely greatly on judicial intervention to address prosecutorial misconduct. Judges are often the first to observe ethical and procedural violations by prosecutors, and they have the legal authority to impose sanctions and remedies to ensure the fairness and integrity of the proceedings.<sup>141</sup> But judicial remedies can be too blunt and interfere with legitimate interests of the ICC in completing proceedings on the merits. Conversely, remedies can be too narrow; they often respond merely to the specific instance of misconduct before the Court and may not be well-suited to addressing systemic violations. Commentators have therefore begun turning their attention to other mechanisms that could provide more comprehensive oversight of prosecutorial actions. These include the Assembly of States Parties, the Independent Oversight Mechanism, bar associations, and the Office of the Prosecutor itself.

These mechanisms have the potential to address systematic violations by the Office of the Prosecutor without imposing undue burdens on ongoing judicial proceedings. Yet they also carry distinct risks. Internal oversight is not likely to correct violations that are tolerated, explicitly or implicitly, by the leadership of the Office of the Prosecutor. Discipline by the Assembly and the Independent Oversight Mechanism, on the other hand, can be misused for

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<sup>141</sup> Mégret (n 18) 459; McMorrow (n 120) 171.

political reasons. More broadly, the multiplication of oversight mechanisms may lead to duplicative and inefficient inquiries, which impose unnecessary burdens on prosecutors, calling them to account too frequently and distracting them from their primary tasks of investigating and prosecuting international crimes. Conversely, the diffusion of regulatory responsibility may undermine efforts to hold prosecutors accountable, as each institution presumes that another will respond to an instance of misconduct.<sup>142</sup>

To avoid these risks and ensure that the system functions effectively, the Court could develop mechanisms to coordinate the tasks of judicial, political and administrative authorities.<sup>143</sup> The Court could draft a protocol that outlines when judges should take the lead in sanctioning misconduct and when they should refer cases for investigation and discipline to the Assembly, the IOM, or the Office of the Prosecutor. As discussed earlier, the Court may adopt a presumption that judges focus on misconduct that prejudices the defendant or the integrity of the proceedings, while non-judicial mechanisms address other cases. In some cases of systemic misconduct, both a judicial and an administrative response may necessary. When investigations of misconduct are undertaken by the Assembly or the IOM, a procedure that relies on judicial referrals can help minimize the risk of politicization. As foreseen in the ICC Statute, the Office of the Prosecutor would likely continue to have the primary responsibility to prevent misconduct—by drafting a Code of Conduct, instituting more regular training sessions, and improving its system of internal supervision. But judges may use their disciplinary powers to prompt the Office of the Prosecutor to take additional preventive steps when there is evidence that existing measures are inadequate. As the ICC’s accountability framework matures, the Court will be well-served by a coordinated approach that is led by the judges, yet assisted by other authorities, such as the Assembly of States Parties, the Independent Oversight Mechanism, and the Office of the Prosecutor.

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<sup>142</sup> Bruce A. Green, ‘Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?’ (1995) 8 *Saint Thomas L Rev* 69, 91-92.

<sup>143</sup> *ibid* 93.