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# Addressing Violations of International Criminal Procedure

K.M. Pitcher\*

## A. Introduction

On 3 November 1999, the shared Appeals Chamber of the ad hoc Tribunals (i.e. the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)) imposed a permanent stay of proceedings in the case of *Barayagwiza*.<sup>1</sup> Jean-Bosco Barayagwiza had been indicted for genocide, conspiracy to commit genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity and war crimes. According to the Appeals Chamber, the stay was justified on account of serious rights violations during the accused's detention in Cameroon at the ICTR Prosecutor's request, whereby the Prosecutor had failed to act with due diligence to ensure the protection of such rights. The decision to stay the proceedings was met with mixed responses. To some commentators, it represented 'a stunning setback in efforts to hold accountable those responsible for the Rwandan genocide in 1994'.<sup>2</sup> In other quarters it was hailed as a triumph for the protection of human rights.<sup>3</sup> In Rwanda itself, the decision was met with widespread public condemnation. Moreover, the Rwandan government is reported to have 'reacted adversely' to the Appeals Chamber's decision to stay the proceedings and 'promptly threatened to suspend all cooperation with the ICTR'.<sup>4</sup> Upon request of the Prosecutor, the decision was reviewed by a newly constituted Appeals Chamber,<sup>5</sup> which found that the stay of proceedings and release of the Accused were no longer appropriate. According to the Appeals Chamber, the 'new facts' established upon review 'diminish[ed] the role played by the failings of the Prosecutor as well as the intensity of the violation of the

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<sup>1</sup> *Barayagwiza*, Appeals Chamber (AC), ICTR, 3 November 1999 (Decision).

<sup>2</sup> W.A. Schabas, 'International Decisions: *Barayagwiza v. Prosecutor* (Decision, and Decision (Prosecutor's Request for Review or Reconsideration))' (2000) 94(3) *American Journal of International Law* 563, 563.

<sup>3</sup> See e.g. C. DeFrancia, 'Due Process in International Criminal Courts: Why Procedure Matters' (2001) 87(7) *Virginia Law Review* 1381, 1405.

<sup>4</sup> Schabas (n 2) 565. See also S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003) 256.

<sup>5</sup> Schabas (n 2) 563.

rights of the Appellant'.<sup>6</sup> Instead, the Accused would be entitled either to financial compensation upon acquittal, or sentence reduction upon conviction.<sup>7</sup>

The *Barayagwiza* case highlights the (potential) challenges for judges in international criminal proceedings deciding on how to respond to (alleged) procedural violations. Such challenges tend to 'stem from the unique severity of the charges with which international criminal tribunals are concerned'.<sup>8</sup> In this regard, Naymark points to the 'potential force of political opposition to any meaningful remedy when an accused is regarded by an entire society as a villain of the highest order'.<sup>9</sup> International criminal tribunals, such as the ad hoc Tribunals and International Criminal Court (ICC), it should be recalled, do not have their own enforcement agencies and are reliant on state cooperation for, among other things, obtaining custody of persons suspected of crimes falling within their jurisdiction. Thus, political opposition 'can do more than undermine the reputation of the tribunals; it can erode the support among stakeholders necessary for the establishment and continued functioning of such highly politicized institutions'.<sup>10</sup> In addition, Naymark points to a 'substantive legal' challenge, observing that in ruling on the consequences of procedural violations, the seriousness of the crimes falling within the jurisdiction of the international criminal tribunals 'inevitably enters the analysis'.<sup>11</sup> It is up to judges in international criminal proceedings to determine *how* the public interest in the investigation and prosecution of very serious crimes, i.e. the seriousness of the offence(s) charged, should enter the analysis.<sup>12</sup>

Since the *Barayagwiza* case, various international criminal tribunals have addressed the question of how to respond to (alleged) procedural violations. The purpose of this article

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<sup>6</sup> *Barayagwiza*, AC, ICTR, 31 March 2000 (Decision (Prosecutor's Request for Review or Reconsideration)), para. 71. The reasoning of the AC has been subject to much criticism: see e.g. Schabas (n 2) 567 and DeFrancia (n 3) 1405–1406.

<sup>7</sup> *Barayagwiza* (n 6) para. 75.

<sup>8</sup> D. Naymark, 'Violations of the Rights of the Accused at International Criminal Tribunals: the Problem of Remedy' (2008) 4(2) *Journal of International Law and International Relations* 1, 2–3.

<sup>9</sup> Naymark (n 8) 3–4.

<sup>10</sup> Naymark (n 8) 4. See also M.A. Fairlie, 'Due Process Erosion: The Diminution of Live Testimony at the ICTY' (2003) 34(1) *California Western International Law Journal* 47, 57–59 and S.B. Starr, 'Rethinking "Effective Remedies": Remedial Deterrence in International Courts' (2008) 83(3) *New York University Law Review* 693, 717.

<sup>11</sup> Naymark (n 8) 4.

<sup>12</sup> While 'it is difficult to maintain that outside wishes and interests, be they attributed to the form of a U.N. organ, an individual State, or even the international community at large, fail to influence the activities of the [international criminal tribunals]', including judicial responses to procedural violations (as demonstrated by the *Barayagwiza* case) (see Fairlie (n 10) 57–59), this article argues, in Section C, that judges cannot *legitimately* take into account any interest on the part of any such organ, State or community in the investigation and prosecution of very serious crimes that is wholly unconnected to broader objectives of (international) criminal justice. Thus, judges cannot *legitimately* take into account any wish on the part of such 'parties' to obtain a verdict *at any cost*, i.e. pursuant to a trial that has not provided adequate protection against wrongful conviction and/or that has not adequately protected the moral integrity of the criminal justice system.

is to provide an overview of such tribunals' law and practice in this regard, in the specific contexts of unlawful arrest and detention, unlawfully obtained evidence and non-disclosure, including how they have dealt with the 'unique severity of the charges' in this context (Section B). In addition, this article will address the question of how best to accommodate the various—seemingly competing—interests in international criminal proceedings, as set out above, including how the public interest in the investigation and prosecution of very serious crimes relates to the (violated) rights of the suspect or accused (Section C).

## B. Overview of judicial responses to violations of international criminal procedure

International criminal tribunals have addressed the violation of procedural standards in three main contexts: arrest and detention, the collection of evidence and disclosure.<sup>13</sup> Before going on to set out the judicial responses available in respect of procedural violations in each of these contexts, however, it is important to first consider the authority of judges in international criminal proceedings to attach consequences to such violations.

The authority of the ad hoc Tribunals to attach consequences to procedural violations flows from, *inter alia*, the (inherent) powers of such tribunals to supervise the proceedings. According to the Appeals Chamber in the ICTR case of *Barayagwiza*, it is 'generally recognised that courts have supervisory powers that may be utilized in the interests of justice, regardless of a specific violation'.<sup>14</sup> Where a written rule of procedure or evidence has been violated, the authority flows from Rule 5 of the ICTY and ICTR Rules of Procedure and Evidence (RPE), which gives broad powers to trial chambers to grant remedies 'on the ground of non-compliance with the [RPE] or Regulations [of the ad hoc Tribunals]'.<sup>15</sup> In other words, as far as the authority of the ad hoc Tribunals to attach consequences to procedural violations is concerned, a distinction may be drawn between violations resulting from non-compliance with written rules and violations of other applicable law. The authority of the ad hoc Tribunals to attach consequences to procedural violations may further be inferred from more specific provisions, such as Rule 89(D) of the ICTY RPE, which provides

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<sup>13</sup> This list is certainly not (intended to be) exhaustive. Other contexts in which international criminal tribunals have addressed the violation of procedural standards include defence investigations (see, in this regard, *Banda and Jerbo*, Trial Chamber (TC), ICC, 26 October 2012 (Decision on the defence request for a temporary stay of proceedings)).

<sup>14</sup> *Barayagwiza* (n 1) paras 91–92.

<sup>15</sup> According to Sluiter, '[a]lthough Rule 5 [of the ICTY and ICTR Rules] applies to violations of the Rules or Regulations, it [also] offers a good starting point when dealing with violations of other applicable law.' G. Sluiter, 'Commentary', in A. Klip and G. Sluiter (eds), *Annotated Leading Cases of the International Criminal Tribunals, Vol. VII: The International Criminal Tribunal for the former Yugoslavia 2001* (Antwerp: Intersentia, 2004) 246 n19.

for the exclusion of evidence on grounds of fairness, and Rule 95 of the ICTY and ICTR RPEs, which provide for the exclusion of certain evidence on grounds of (un)reliability and integrity. In addition, Rule 68bis of the ICTY RPE provides that: ‘The pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.’<sup>16</sup>

The authority of the ICC judges and chambers to impose remedies flows from, *inter alia*, specific provisions in the ICC Statute, which provide for the exclusion of evidence (Article 69(4) and (7)), (financial) compensation for unlawful arrest or detention (Article 85) and judicial disciplinary measures (Article 71). For stays of proceedings, it flows from Article 21(3), which requires the ICC to ‘exercise ... jurisdiction ... in accordance with internationally recognized human rights norms’.<sup>17</sup>

a. Unlawful arrest and detention

i. Ad hoc Tribunals

Perhaps the most infamous case at the ad hoc Tribunals to address the unlawful deprivation of liberty is *Barayagwiza* (as already referred to in the introduction), in which a plethora of violations was found to have been committed in the context of Jean-Bosco Barayagwiza’s detention in Cameroon at the ICTR’s request. According to the Appeals Chamber, the cumulative effect of the violations of the right to be charged promptly, the right to be brought promptly before the judicial authorities (as meant in Articles 9(3) of the ICCPR and 5(3) of the European Convention on Human Rights (ECHR)), the right to be informed promptly of the reasons for arrest and detention (as meant in Articles 9(2) of the International Covenant on Civil and Political Rights (ICCPR) and 5(2) of the ECHR) and the right to challenge the lawfulness of detention (as meant in Articles 9(4) of the ICCPR and 5(4) of the ECHR),<sup>18</sup> and

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<sup>16</sup> This provision lacks a counterpart in the ICTR RPE.

<sup>17</sup> *Lubanga*, AC, ICC, 14 December 2006 (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), para. 36. The notion of inherent or implied powers at the ICC is perhaps more controversial than at the ad hoc Tribunals. According to Swart and Sluiter, although it cannot be excluded that the ICC will assert such powers, ‘... given the detailed character of the [ICC] Statute, it was clearly the objective of the framers to limit the powers of the Court to those set out in the [ICC] Statute’. See B. Swart and G. Sluiter, ‘The International Criminal Court and International Criminal Co-operation’, in H.A.M. von Hebel et al. (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: T.M.C. Asser Press, 1998) 102–103.

<sup>18</sup> Most instances of unlawful arrest and detention are, in one way or another, connected to the right to personal liberty, as provided for in, for example, Arts 9 ICCPR and 5 ECHR.

the ICTR Prosecutor's failure to act with due diligence to ensure the protection of such rights warranted the imposition of a (permanent) stay of proceedings.<sup>19</sup>

A stay of proceedings at the ad hoc Tribunals is a judicial ruling by which the proceedings are brought to a halt, whereby a distinction can be drawn between 'permanent' and 'non-permanent' stays. Neither is explicitly provided for in the governing documents of the ad hoc Tribunals. While a permanent stay of proceedings bars prosecution for the same charges at a later date, a non-permanent stay does not, at least, not initially.<sup>20</sup> Both stays may be imposed in connection with the fairness of the trial. Unlike a permanent stay, however, the non-permanent stay presupposes that a fair trial is still possible, i.e. that the underlying violation is reparable. Where the circumstances that led to the imposition of a non-permanent stay fall away, the trial may, in principle, be commenced or continued.<sup>21</sup> Since violations of rules governing arrest and detention (and their effect on the fairness of the proceedings) are typically irreparable, a non-permanent stay will not be an appropriate response to such violations.<sup>22</sup> If such violations are sufficiently serious, a permanent stay may well be the appropriate response. The basis for a permanent stay at the ad hoc Tribunals is the abuse of process doctrine. According to the Appeals Chamber, 'the abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct'.<sup>23</sup> It was the second 'limb' that was at stake in *Barayagwiza*,<sup>24</sup> and in order for proceedings to be stayed on this basis, the 'pre-trial impropriety or misconduct' would have

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<sup>19</sup> *Barayagwiza* (n 1). Strictly speaking, it warranted the 'dismissal of the indictment with prejudice to the prosecutor', a U.S. remedy comparable to a permanent stay of proceedings. In both case law and literature on international criminal proceedings alike, these terms have been used interchangeably.

<sup>20</sup> As such, whereas a permanent stay of proceedings must lead to immediate release, a non-permanent stay need not do so. See *Brđanin and Talić*, TC, ICTY, 16 May 2001, para. 5 and *Barayagwiza* (n 1) paras 106–113.

<sup>21</sup> See e.g. *Brđanin and Talić* (n 20) para. 5, *Blagojević*, AC, ICTY, 7 November 2003 (Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defense Team), para. 7, and *Barayagwiza et al.*, AC, ICTR, 4 August 2004 (Decision on Ngeze's Motion for a Stay of Proceedings).

<sup>22</sup> In such cases, a non-permanent stay of proceedings would not achieve anything (other than postponing the inevitable). As such, non-permanent stays will receive no further attention here. It may, however, be an appropriate response to violations of rules governing disclosure and, as such, is dealt with below under 'Non-disclosure'.

<sup>23</sup> *Barayagwiza* (n 1) para. 77. The two 'situations' referred to by the AC reflect the two limbs of the abuse of process doctrine in the English case *R. v. Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42. The rationale underlying the first limb is the protection of the defendant from wrongful conviction, whereas the rationale underlying the second is to preserve the integrity of the court. See in this regard A.L-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Oxford: Oxford University Press, 2008) 18–19.

<sup>24</sup> *Barayagwiza* (n 1) para. 77.

to entail ‘serious and egregious violations of the accused’s rights’.<sup>25</sup> This was indeed the case and, according to the Appeals Chamber, ‘to proceed with the Appellant’s trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process’. Moreover, it continued, the permanent stay was ‘the only effective remedy for the cumulative breaches of the [A]ccused’s rights’ and ‘may very well deter the commission of such serious violations in the future’.<sup>26</sup> Finally, the Appeals Chamber was of the view that under the abuse of process doctrine it is ‘irrelevant which entity or entities were responsible for the alleged violations ...’.<sup>27</sup> Nevertheless, it should be noted that most of the violations established by the Appeals Chamber in that case were attributable to the ICTR and, more specifically, to the Prosecutor. Upon review (at the request of the Prosecutor), however, the Appeals Chamber considered that, although the Appellant’s rights had been violated, the ‘new facts’ submitted by the Prosecution ‘diminish[ed] the role played by the failings of the Prosecutor *as well as* the intensity of the violation of the rights of the Appellant’.<sup>28</sup> Therefore, a permanent stay of proceedings was no longer justified. Nevertheless, since ‘all violations demand a remedy’,<sup>29</sup> the Appeals Chamber found that the Appellant was entitled either to financial compensation upon acquittal, or sentence reduction upon conviction,<sup>30</sup> despite the fact that neither the Statutes nor RPEs of the ad hoc Tribunals provide for either of these remedies. Upon conviction, Barayagwiza’s sentence was reduced from one of life imprisonment to thirty-two years.<sup>31</sup>

The same approach was adopted in *Semanza*, in which the Appeals Chamber found that similar violations to those established in *Barayagwiza* had been committed. While the judicial response sought by the Appellant, release, was considered disproportionate in the circumstances,<sup>32</sup> upon conviction the Trial Chamber found that ‘it was appropriate to reduce the Accused’s sentence by a period of six months’ in view of the violations committed in the

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<sup>25</sup> *Barayagwiza* (n 1) paras 73–75. See also the AC in the ICTY case of *Karadžić*. In that case, the AC confirmed that there are two limbs to the abuse of process doctrine (fair trial and integrity) and that the AC’s finding in *Barayagwiza* that, invoking the abuse of process doctrine as a matter of discretion ‘is a process by which Judges may decline to exercise the court’s jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused’s rights would prove detrimental to the court’s integrity’, refers to the second limb. See *Karadžić*, AC, ICTY, 12 October 2009 (Decision on Karadžić’s Appeal of Trial Chamber’s Decision on Alleged Holbrooke Agreement), para. 51.

<sup>26</sup> *Barayagwiza* (n 1) para. 108. See also para. 76.

<sup>27</sup> *Barayagwiza* (n 1) paras 73–77.

<sup>28</sup> *Barayagwiza* (n 6) para. 71 (emphasis added). See also para. 74. As noted above, while the role played by the Prosecution’s failings was diminished, the new facts did not negate it altogether.

<sup>29</sup> *Barayagwiza* (n 6) para. 74.

<sup>30</sup> *Barayagwiza* (n 6) para. 75.

<sup>31</sup> *Barayagwiza et al.*, TC, ICTY, 3 December 2003 (Judgement and Sentence), para. 1107; *Barayagwiza et al.*, AC, ICTR, 28 November 2007 (Judgement), para. 1097.

<sup>32</sup> *Semanza*, AC, ICTR, 31 May 2000 (Decision), para. 125. For the remedy sought, see para. 59.

context of his pre-trial detention.<sup>33</sup> In the ICTR case of *Kajelijeli*, the Appeals Chamber converted Kajelijeli's original sentence of two life sentences and fifteen years into a single sentence of 45 years on account of violations of Kajelijeli's detention rights.<sup>34</sup> The relief initially sought by the Defence (a permanent stay of proceedings) was found to be disproportionate and dismissed for lack of 'egregiousness' (of the violations).<sup>35</sup>

In *Rwamakuba*, the Appeals Chamber confirmed the Trial Chamber's decision ordering, pursuant to its 'inherent power',<sup>36</sup> the Registrar to pay André Rwamakuba financial compensation (US \$2,000) on account of his—the Registrar's—responsibility for the violation of Rwamakuba's right to legal assistance in the initial months of detention.<sup>37</sup> Rwamakuba had sought such compensation after being acquitted.<sup>38</sup> However, it took some time for the compensation to be paid,<sup>39</sup> as the Registrar initially indicated that he would not be paying the compensation on the grounds that 'neither the [S]tatute nor the budget of the ICTR make it possible to carry out financial reparations' and that he would instead be referring the matter 'to his hierarchy' at the United Nations.<sup>40</sup>

While for stays of proceedings the procedural violation need not (always) be attributable to the relevant ad hoc Tribunal, this is not entirely clear for financial compensation and sentence reduction. In both *Barayagwiza* and *Semanza*, the Appeals Chamber held that 'all violations demand a remedy',<sup>41</sup> which has been construed by some authors as 'support for the idea that the Tribunal will remedy *any* violations in the context of

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<sup>33</sup> *Semanza*, TC, ICTR, 15 May 2003 (Judgement and Sentence), paras 579–580 (although the TC acknowledged that the violation of the right to challenge the lawfulness of detention had not caused the Appellant *material* prejudice), as upheld in *Semanza*, AC, ICTR, 20 May 2005 (Judgement), paras 323–329.

<sup>34</sup> *Kajelijeli*, AC, ICTR, 23 May 2005 (Judgement), paras 255 and 320–324.

<sup>35</sup> *Kajelijeli* (n 34) para. 255 in conjunction with para. 206, referring to *Barayagwiza* (n 1) and *D. Nikolić*, AC, ICTY, 5 June 2003 (Decision on Interlocutory Appeal Concerning Legality of Arrest).

<sup>36</sup> *Rwamakuba*, TC, ICTR, 31 January 2007 (Decision on Appropriate Remedy), para. 58.

<sup>37</sup> *Rwamakuba* (n 36) the 'Disposition'.

<sup>38</sup> *Rwamakuba*, TC, ICTR, 20 September 2006 (Judgement).

<sup>39</sup> Hirondele News Agency, 'ICTR Compensates Genocide Acquitted Person For Legal Discrepancy', 27 February 2008, available at <http://www.hirondellenews.com/ictr-rwanda/363-trials-ended/rwamakuba-andre/21559-en-en-270208-ictrrwamakuba-ictr-compensates-genocide-acquitted-person-for-legal-discrepancy1061010610> (last visited 16 July 2013).

<sup>40</sup> Hirondele News Agency, 'The ICTR Registrar Is Unable to Enforce a Judgment of the ICTR', 18 September 2007, available at <http://www.hirondellenews.com/ictr-rwanda/363-trials-ended/rwamakuba-andre/20846-en-en-180907-ictrrwamakuba-the-ictr-registry-is-unable-to-enforce-a-judgment-of-the-ictr98979897> (last visited 16 July 2013). The lack of a budget in this regard is problematic. See K. Pitcher, 'Remedies', in G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 359–361.

<sup>41</sup> *Barayagwiza* (n 6) para. 74; *Semanza* (n 32) para. 125

its case, whether or not the violations could be attributed to the Prosecutor'.<sup>42</sup> Nevertheless, as the ICTY Trial Chamber pointed out in the case of *Karadžić*,

... the major discussions and findings [in the relevant ICTR decisions in the cases of *Barayagwiza*, *Semanza* and *Kajelijeli*, as relied upon by *Karadžić* in support of his argument that attribution of rights violations to the ad hoc Tribunals need not be shown] ultimately revolved around the Prosecution's responsibility for violations, rather than the responsibility of State authorities.<sup>43</sup>

According to the Trial Chamber there was 'substance in the Prosecution's submission that, before being able to obtain the remedy he seeks, the Accused has to be able to attribute the infringement of his rights to one of the organs of the Tribunal or show that at least some responsibility for that infringement lies with the Tribunal'.<sup>44</sup> Finally, it is worth noting that in the one case in which financial compensation was granted for violations of an accused's rights, the violation in question was attributable to the ICTR Registrar.<sup>45</sup>

Although the stay of proceedings imposed in *Barayagwiza* was eventually reversed, the test formulated by the Appeals Chamber in that case was endorsed in the ICTY cases of *Nikolić* and *Karadžić*. In the former case, the Accused alleged to have been captured by unknown individuals in the Federal Republic of Yugoslavia before being handed over to the NATO-led Stabilisation Force (SFOR) in Bosnia and Herzegovina and ultimately to the ICTY. In considering whether the response sought (a permanent stay of proceedings) was warranted, the Trial Chamber stressed that, in order to invoke the doctrine, 'it needs to be clear that the rights of the [a]ccused have been egregiously violated'.<sup>46</sup> As to what constitutes an egregious violation, the Trial Chamber held that 'in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the [ICTY], this may constitute a legal impediment to the exercise of jurisdiction over [i.e. the continuation of the proceedings against] such an accused' and that even without the involvement of the Prosecution or SFOR, the Trial Chamber would find it 'extremely difficult to justify the exercise of jurisdiction over a person ... after having

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<sup>42</sup> C. Paulussen, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court* (Antwerp: Intersentia, 2010) 518.

<sup>43</sup> *Karadžić*, TC, ICTY, 31 August 2009 (Decision on the Accused's Motion for Remedy for Violation of Rights in Connection with Arrest), para. 6.

<sup>44</sup> *Karadžić* (n 43) para. 6. Nevertheless, the TC's language appears cautious in this regard: '... the Chamber also notes its view that there is substance in the Prosecution's submission that ...'.

<sup>45</sup> See *Rwamakuba* (n 36), and *Rwamakuba*, AC, ICTR, 13 September 2007 (Decision on Appeal against Decision on Appropriate Remedy).

<sup>46</sup> *D. Nikolić*, TC, ICTY, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 111.

been seriously mistreated'.<sup>47</sup> In addition, the *Nikolić* Trial Chamber confirmed the Appeals Chamber's finding in *Barayagwiza* that, 'in cases of egregious violations of the rights of the [a]ccused', it is irrelevant which entity was involved.<sup>48</sup> Further, in finding that the serious mistreatment of an accused prior to being surrendered to the ICTY might impede the exercise of jurisdiction over such an accused, the Trial Chamber noted that this would 'certainly be the case if the Tribunal was somehow involved'.<sup>49</sup> In other words, the collusion by (an organ of) the ad hoc Tribunals in the violation is a factor weighing in favour of staying the proceedings, due to its capacity to elevate serious violations of the accused's rights, to egregious ones.<sup>50</sup>

In the end, the Trial Chamber in *Nikolić* found that the treatment of the Accused by the unknown individuals at the time of arrest was not of such an egregious nature as to impede the exercise of jurisdiction, i.e. require a stay of proceedings. Its reasoning was upheld on appeal, with the Appeals Chamber confirming that 'certain human rights violations are of such a serious nature that they require that [a permanent stay of proceedings be imposed]' and that, apart from such exceptional cases, a permanent stay of proceedings 'will ... usually be disproportionate'.<sup>51</sup> According to the Appeals Chamber, a permanent stay of proceedings will be disproportionate where the 'essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law' outweigh the fundamental rights of the accused.<sup>52</sup>

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<sup>47</sup> *D. Nikolić* (n 46) para. 114.

Regarding the 'exercise of jurisdiction', according to the AC, applications for a permanent stay of proceedings on the basis of alleged procedural violations do not constitute a challenge to jurisdiction within the meaning of Rule 72(D) RPE, i.e. to the personal, territorial, temporal or subject matter jurisdiction defined therein. See *D. Nikolić*, AC, ICTY, 9 January 2003 (Decision on Notice of Appeal), at 3; *Boškoski and Tarčulovski*, AC, ICTY, 9 January 2007 (Decision on Ljube Boškoski's Appeal on Jurisdiction), para. 5; *Tolimir*, AC, ICTY, 12 March 2009 (Decision on Zdravko Tolimir's Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest), paras 11-12; and *Karadžić*, TC, ICTY, 8 July 2009 (Decision on the Accused's Holbrooke Agreement Motion), para. 41. Rather, such challenges are relevant to the issue of jurisdiction 'in a wide sense', i.e. to the discretion of the ad hoc Tribunals to take cognizance of the case against the accused. K.A.A. Khan and R. Dixon, *Archbold International Criminal Courts. Practice, Procedure and Evidence* (London: Sweet & Maxwell, 2009) 111.

<sup>48</sup> *D. Nikolić* (n 46) para. 114 (emphasis added).

<sup>49</sup> *D. Nikolić* (n 46) para. 114 (emphasis added). See also paras 106 and 113, where the involvement of the prosecuting forum is identified as a factor weighing in favour of finding that a human rights violation has occurred.

<sup>50</sup> It is noteworthy that while the AC in *Barayagwiza* refers to 'serious and egregious' violations of the Accused's rights (*Barayagwiza* (n 1) para. 74), in *Nikolić* (*D. Nikolić* (n 46) para. 114; *D. Nikolić* (n 35) para. 32) and in *Karadžić* (*Karadžić* (n 47) para. 85; *Karadžić* (n 25) para. 47) the TC and AC only to 'egregious' violations.

Another factor weighing in favour of the setting aside of jurisdiction may be the 'intensity' of the violation of the rights of the accused. *Barayagwiza* (n 6) para. 71.

<sup>51</sup> *D. Nikolić* (n 35) para. 30. See also *Kajelijeli* (n 34) para. 206.

<sup>52</sup> *D. Nikolić* (n 35) para. 30.

ii. ICC

Like the ad hoc Tribunals, the ICC draws a distinction between permanent and non-permanent—‘conditional’—stays of proceedings, depending on whether the underlying violation is reparable. As violations of rules governing arrest and detention (and their effect on the fairness of the proceedings) are typically irreparable, a conditional stay will not be an appropriate response to such violations. As such, conditional stays will receive no further attention here.<sup>53</sup>

To date, the most important ICC case to address the unlawful deprivation of liberty is *Lubanga*. In that case, the ICC Appeals Chamber considered the permanent stay of proceedings amid allegations that Thomas Lubanga Dyilo had been illegally detained and ill-treated by the Congolese authorities with the ICC’s collusion. The Appeals Chamber held that:

Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.<sup>54</sup>

Also in the same decision, the Appeals Chamber held that:

Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. ... Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial.<sup>55</sup>

In a subsequent decision (in the same case), the Appeals Chamber observed that the ‘nature of such allegations were such that, if established, the breaches of the rights of the appellant might have led to an objectively irreparable and incurable situation’ and that a stay of proceedings imposed on such a basis ‘would be absolute and permanent’.<sup>56</sup> As such, a (permanent) stay of proceedings is a ‘drastic’ and ‘exceptional’ remedy.<sup>57</sup> The ICC Appeals

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<sup>53</sup> They may, however, be an appropriate response to disclosure violations, which are addressed below under ‘Non-disclosure’.

<sup>54</sup> *Lubanga* (n 17) para. 37.

<sup>55</sup> *Lubanga* (n 17) para. 39.

<sup>56</sup> *Lubanga*, AC, ICC, 21 October 2008 (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”), para. 79.

<sup>57</sup> *Lubanga*, AC, ICC, 8 October 2010 (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”), para. 55. See also *Lubanga*, TC, ICC, 7 March 2011

Chamber has in subsequent decisions referred to the statements set out above as the test for imposing a stay of proceedings.<sup>58</sup> As to the scope of the test, it appears that the fair trial references in at least the first of the statements are to be ‘perceived and applied’ broadly, to ‘[embrace] the judicial process in its entirety’.<sup>59</sup> Such references do not appear to be limited to the right to fair trial *proper* (fair trial in a narrow sense),<sup>60</sup> including the ability of the suspect to exercise fair trial rights in the pre-trial phase of proceedings.<sup>61</sup> Accordingly, a fair trial may become impossible due to the violation of *other* rights (than fair trial rights), such as ‘violations of the rights of the accused in the process of bringing him/her to justice’, i.e. in the process of exercising jurisdiction over the accused,<sup>62</sup> even if such violations do not affect the ability of the accused to mount an effective defence and, by extension, the ability of the judges to determine guilt accurately (and, therefore, the suspect’s or accused’s right to a fair trial proper). In other words, in such cases the question is not whether the suspect or accused can receive a fair trial proper, but whether in the circumstances it would be fair to put them on trial in the first place (fair trial in a broader sense).<sup>63</sup>

As observed by the Appeals Chamber in *Lubanga*, neither the ICC Statute nor ICC RPE provide for permanent (or conditional) stays of proceedings.<sup>64</sup> It found that: ‘The power to stay proceedings for abuse of process ... is not generally recognised as an indispensable power of a court of law, an inseparable attribute of the judicial power’ and that ‘the [ICC]

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(Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”), para. 168; *Gbagbo*, Pre-Trial Chamber (PTC), ICC, 15 August 2012 (Decision on the “Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)”), para. 91; and *Banda and Jerbo* (n 13) paras 78–80.

<sup>58</sup> See *Lubanga* (n 56) paras 77–79; *Lubanga*, AC (n 57) para. 55; *Katanga and Chui*, AC, ICC, 12 July 2010 (Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”), para. 48 n95. See also *Mbarushimana*, PTC, ICC, 1 July 2011 (Decision on the “Defence request for a permanent stay of proceedings”), at 4–5, *Gbagbo* (n 57) paras 89 and 92, and *Banda and Jerbo* (n 13) paras 81–83.

<sup>59</sup> *Lubanga* (n 17) para. 37.

<sup>60</sup> The second statement in *Lubanga* (see n 55 and accompanying text) does, however, appear to refer to trial fairness (fair trial narrowly construed).

<sup>61</sup> The question of when fair trial rights (should) apply, i.e. solely during the trial stage, or also during the pre-trial phase of proceedings, is beyond the scope of this article. For further reading on this issue, see S.J. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Oxford: Hart Publishing, 2007) 163–168 and J. Jackson, ‘Human Rights, Constitutional Law and Exclusionary Safeguards in Ireland’, in P. Roberts and J. Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing, 2012) 142.

<sup>62</sup> *Lubanga* (n 17) para. 36.

<sup>63</sup> It is worth noting that this second ground for staying the proceedings is likely to be applicable in only a narrow set of cases. The AC’s reference in *Lubanga* ((n 17) para. 38) to the case of *Teixeira de Castro v. Portugal*, ECtHR, 9 June 1998 may be instructive in this regard. Only in a narrow set of cases will pre-trial impropriety ‘definitively [deprive]’ the suspect of a fair trial ‘right from the outset’, i.e. render the trial unfair because its *basis* is unfair.

<sup>64</sup> *Lubanga* (n 17) para. 35; *Lubanga* (n 56) para. 77.

Statute does not provide for stay of proceedings for abuse of process as such'.<sup>65</sup> It observed, however, that the abuse of process doctrine

had *ab initio* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of the litigant, the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations in the process of bringing him/her to justice.<sup>66</sup>

'More importantly', it observed that Article 21(3) of the ICC Statute requires the ICC to exercise its power to exercise jurisdiction<sup>67</sup> 'in accordance with internationally recognized human rights norms'.<sup>68</sup> According to the Appeals Chamber, the obligation to abide by human rights standards, 'first and foremost ... the right to a fair trial', when exercising jurisdiction conferred on the ICC the power to stay the proceedings (i.e. to *not* (continue to) exercise jurisdiction). Therefore, while the Appeals Chamber has rejected the abuse of process doctrine insofar as it entails the *inherent* power of a court to impose a stay of proceedings,<sup>69</sup> it certainly does not appear to have rejected the 'contextual and policy considerations'<sup>70</sup> underlying it.<sup>71</sup>

As to the circumstances under which a permanent stay of proceedings may be imposed, in the first place, 'not each and every breach of the rights of the suspect and/or the accused [entails] the need to stay the relevant proceedings' and 'only gross violations of those rights ... justify that the course of justice be halted'.<sup>72</sup> Therefore, not every violation of the suspect's or accused's rights in the exercise of the ICC's jurisdiction will require the ICC to stay the proceedings permanently. Only those which render a fair trial (both narrowly and

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<sup>65</sup> *Lubanga* (n 17) para. 35.

<sup>66</sup> *Lubanga* (n 17) para. 36.

<sup>67</sup> Regarding the 'exercise of jurisdiction', the ICC AC has held that such applications do not constitute challenges to jurisdiction within the meaning of Art. 19(2) ICC Statute, but rather argue that the ICC 'should refrain from exercising its jurisdiction in the matter in hand'. According to the Appeals Chamber, the true characterisation of such applications is that of a '*sui generis* application, an atypical motion, seeking a stay of proceedings', whereby the term '*sui generis*' in this context conveys 'the notion of a procedural step not envisaged by the Rules of Procedure and Evidence or the Regulations of the Court invoking a power possessed by the Court to remedy breaches of the process in the interest of justice. The application could only survive, if the Court was vested with jurisdiction under the Statute or endowed with inherent power to stop judicial proceedings where it is just to do so.' *Lubanga* (n 17) para. 24. See also *Gbagbo*, AC, ICC, 12 December 2012 (Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings), paras 100–101.

<sup>68</sup> *Lubanga* (n 17) para. 36. See also *Mbarushimana* (n 58) 4.

<sup>69</sup> But cf. *Banda and Jerbo* (n 13) paras 74–78.

<sup>70</sup> Y.Q. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (The Hague: T.M.C. Asser Press, 2010) 332.

<sup>71</sup> As stated above, the ICC allows for the imposition of a stay where a fair trial, both narrowly and broadly construed, is impossible. Arguably, this approach encompasses the aforementioned 'contextual and policy considerations' (see n 23 and accompanying text).

<sup>72</sup> *Mbarushimana* (n 58) at 4–5.

broadly construed) impossible will require it to do so. In the second place, according to the test formulated by the Appeals Chamber (as set out above), such a stay may be imposed in cases of breaches of the fundamental rights of the suspect or the accused ‘by his/her accusers’ (rendering a fair trial impossible). This means that where such breaches have been committed by national authorities or unknown third parties, ‘concerted action’ between such authorities or individuals and the ICC (as the ‘accuser’) must be established.<sup>73</sup> Regarding the requirement of concerted action, the ICC Appeals Chamber has held that: ‘Mere knowledge on the part of the Prosecutor of the investigations carried out by the Congolese authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose.’<sup>74</sup> On appeal, the *Lubanga* Pre-Trial Chamber’s finding that no concerted action had taken place between the Congolese authorities and the ICC was confirmed.<sup>75</sup> In addition, the Appeals Chamber confirmed the Pre-Trial Chamber’s findings ‘respecting the absence of torture or serious mistreatment’.<sup>76</sup> What is unclear from such findings, however, is whether in cases of torture or serious mistreatment of a suspect or an accused by national authorities or unknown individuals it is necessary to establish concerted action between such authorities or individuals and the ICC. While a number of authors have interpreted the Appeals Chamber’s findings to mean that the ICC would decline to exercise jurisdiction in such cases regardless of the entity or entities involved (in line with the ICTY’s approach in *Nikolić*),<sup>77</sup> others have not ruled out the possibility that such cases will be subject to the test formulated by the Appeals Chamber in its entirety (pursuant to which jurisdiction may be set aside upon violation of the rights of the accused ‘by his/her accusers’).<sup>78</sup> The (scope of the) test has, in other words, yet to be clarified.<sup>79</sup> In any case, the determination of

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<sup>73</sup> *Lubanga*, PTC, ICC, 3 October 2006 (Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute), at 9–11; *Lubanga* (n 17) para. 42. Paulussen ((n 42) 87) notes that this requirement only appears to apply to violations committed prior to the transmission of an official request for arrest and surrender pursuant to Art. 89 ICC Statute. Once such a request has been transmitted, no such concerted action need be shown. In this regard, Paulussen relies on *Lubanga, ibid.*, at 9–11, where the PTC held that concerted action would only have to be shown after 14 March 2006, the date on which the official request for cooperation was transmitted to the Congolese national authorities, and n30, where the PTC observed that the ICTR ‘... has repeatedly stated that the Tribunal is not responsible for the illegal arrest and detention of the accused in the custodial State if the arrest and detention was not carried out at the behest of the [ICTR]’.

<sup>74</sup> *Lubanga* (n 17) para. 42.

<sup>75</sup> *Lubanga* (n 17) para. 42.

<sup>76</sup> *Lubanga* (n 17) para. 43.

<sup>77</sup> See e.g. G. Sluiter, ‘Human Rights Protection in the ICC Pre-Trial Phase’, in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff/Brill, 2009) 471; and C. Ryngaert, ‘The Doctrine of Abuse of Process: A Comment on the Cambodia Tribunal’s Decisions in the Case against Duch’, (2008) 21(3) *Leiden Journal of International Law* 719, 735–736.

<sup>78</sup> See Paulussen (n 42) 897–900.

<sup>79</sup> There are, however, indications that attribution to an organ of the ICC must *always* be shown for a stay of proceedings. See *Gbagbo* (n 57) paras 92, 107 and 110. The TC’s decision was upheld on appeal,

the ICC judges of whether to stay the proceedings permanently involves a balancing exercise in which the ‘interest of the world community to put persons accused of the most heinous crimes against humanity on trial’ are weighed against the ‘need to sustain the efficacy of the judicial process as the potent agent of justice’.<sup>80</sup>

Other judicial responses to unlawful arrest and detention at the ICC include financial compensation and sentence reduction. Turning first to financial compensation, Article 85 of the ICC Statute provides for (financial) compensation ‘to an arrested or convicted person’ in three different scenarios.<sup>81</sup> First, where a person has been unlawfully arrested or detained, that person is entitled to financial compensation (paragraph 1). Second, where a person has been convicted and punished, and the conviction is later overturned on the basis of newly discovered facts, that person is entitled to compensation to the extent that he or she has undergone punishment (paragraph 2). Third, where a person has been acquitted or the proceedings terminated, compensation may be available to a person who has been detained, but only in exceptional circumstances, i.e. upon showing that there has been a ‘grave and manifest miscarriage of justice’ (paragraph 3). It is important to note that unlike the first two scenarios, the third ‘confers no *right* to compensation, but allows for compensation to be awarded in the [ICC’s] *discretion*’.<sup>82</sup>

In the context of unlawful arrest and pre-trial detention, only the first and third paragraphs are relevant. None of the paragraphs specify whether the ‘unlawful arrest or detention’ or the ‘miscarriage of justice’ must be attributable to the ICC in some way in order to trigger Article 85. However, in *Kenyatta et al.*, the Trial Chamber ruled that, ‘in order to obtain a finding under Article 85(1) of the Statute it is insufficient to establish that a person’s arrest is merely “connected with Court proceedings” in the absence of concerted action’,<sup>83</sup> whereby ‘[m]ere knowledge on the part of the Prosecutor of the investigations carried out by the Congolese authorities is no proof of involvement on his part in the way they were

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and while this was not an issue on appeal, the AC did not distance itself from the TC’s finding on attribution. See *Gbagbo* (n 67).

In *Banda and Jerbo* ((n 13) paras 88–89), the TC ‘found it unnecessary to consider the question of whether the remedy of a stay of the proceedings is available in the absence of prosecutorial fault’.

<sup>80</sup> *Lubanga* (n 17) para. 39.

Interestingly, in referring to the ‘need to sustain the efficacy of the judicial process as the potent agent of justice’ in the context of the test for stays of proceedings, the AC appears to be construing the right to a fair trial as institutional, rather than personal, in nature. See n 181–182 and accompanying text.

<sup>81</sup> See Rule 175 ICC RPE, which speaks of ‘amount of compensation’, thereby implying financial compensation.

<sup>82</sup> C. Staker, ‘Article 85’, in Triffterer (ed.), *Commentary on the Rome Statute* (München, Oxford and Baden-Baden: Verlag C.H. Beck, Hart Publishing and Nomos Verlagsgesellschaft, 2008) 1501.

<sup>83</sup> *Kenyatta et al.*, TC, ICC, 19 November 2012 (Decision on the application for a ruling on the legality of the arrest of Mr Dennis Ole Itumbi), para. 9.

conducted or the means including detention used for the purpose.’<sup>84</sup> Accordingly, given that the Trial Chamber in that case was not satisfied that the person seeking compensation pursuant to Article 85 of the ICC Statute had been arrested in a manner attributable to the Prosecution or any other organ of the ICC, the application had to be rejected.<sup>85</sup> Finally, it is important to note that while the ICC Statute expressly provides for financial compensation for unlawful arrest and detention, it does not provide for a specific budget for this purpose.<sup>86</sup>

As to sentence reduction, while neither the ICC Statute nor RPE provide for sentence reduction for procedural violations, the case law confirms that this remedy may be available for such purposes. While in the *Lubanga* case the Trial Chamber did not consider the alleged prosecutorial conduct to ‘merit a reduction in ... sentence’, it did not reject sentence reduction as a possible response to rights violations.<sup>87</sup>

b. Unlawfully obtained evidence

i. Ad hoc Tribunals

Both the ICTY and ICTR RPEs explicitly provide for the exclusion of unlawfully obtained evidence in certain circumstances. Unlawfully obtained evidence that is otherwise relevant and probative may be excluded pursuant to one of two exclusionary provisions: Rule 89(D) or Rule 95. While the first provides for an exclusionary discretion, the second has often been described as mandatory in nature.<sup>88</sup>

Pursuant to Rule 89(D) of the ICTY RPE,<sup>89</sup> a ‘Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.’ Thus, Rule

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<sup>84</sup> *Kenyatta et al.* (n 83) para. 8, referring to *Lubanga* (n 17) para. 42.

<sup>85</sup> *Kenyatta et al.* (n 83) para. 10.

<sup>86</sup> See in this regard Pitcher (n 40) 367.

<sup>87</sup> *Lubanga*, TC, ICC, 10 July 2012 (Decision on Sentence pursuant to Article 76 of the Statute), para. 90.

<sup>88</sup> See e.g. A. Alamuddin, ‘Collection of Evidence’, in K.A.A. Khan et al. (eds), *Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press, 2010) 284, N.A. Combs, ‘Evidence’, in W.A. Schabas and N. Bernaz (eds), *Handbook of International Criminal Law* (Abingdon: Routledge Press, 2010) 328 and A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2008) 380.

However, it is not always clear how the term ‘mandatory’ is being employed. In the first place, it may be employed as a synonym for ‘automatic’, in the sense that, when certain conditions are satisfied, a particular consequence will automatically follow. In the second place it may be employed not as synonym for ‘automatic’, but rather to indicate that, once one of the prongs of Rule 95 ICTY/ICTR RPE has been satisfied, the chamber *must* exclude the material in question. As a way of distinguishing between Rule 89(D) ICTY RPE and Rule 95, this latter usage of the term ‘mandatory’ is misleading. See in this regard n 91 and 96 and accompanying text.

<sup>89</sup> This provision lacks a counterpart in the ICTR RPE. Nevertheless, according to Nerenberg and Timmermann, ‘[b]ased upon the need to guarantee the rights of the accused under Articles 19 and 20 of the Statute, ICTR jurisprudence holds that ‘the Chamber has the inherent power to exclude evidence ... to ensure a fair trial’, even though the ICTR RPE lack any specific analogous rule to the ICTY’s Rule 89(D).’ See M. Nerenberg and W. Timmermann, ‘Documentary Evidence’, in K.A.A. Khan et al. (eds),

89(D) requires chambers to undertake a balancing exercise, whereby the probative value of the evidence in question is weighed against its prejudicial effect on the fairness of the trial. According to the Trial Chamber in *Brđanin and Talić*, the ‘correct balance must, therefore [i.e. pursuant to the balancing exercise prescribed by Rule 89(D)], be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law’.<sup>90</sup> Although Rule 89(D) may appear to have been drafted in such a way that even when the evidence’s probative value is substantially outweighed by the need to ensure a fair trial the chamber may nevertheless admit the evidence, it is reasonable to assume that, once the chamber has concluded that the probative value of the evidence is substantially outweighed by its prejudicial effect, it *must* exclude the evidence. Thus, Rule 89(D) does not (and, in any case *should* not) confer on the chamber ‘totally unfettered power’ to admit evidence (despite the evidence’s prejudicial effect substantially outweighing its probative value). Rather, the discretion in Rule 89(D) appears to signify ‘the open-texturedness of the test or standard to be applied in reaching a conclusion’.<sup>91</sup>

Pursuant to Rule 95 of the ICTY and ICTR RPEs, ‘[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.’ At first glance, the mandatory nature of this provision appears to lie in the term ‘shall’ (whereas pursuant to Rule 89(D), evidence ‘may’ be excluded). On a second reading, however, the mandatory nature of this provision may not be so evident, at least as regards the second ground for exclusion: serious damage to the integrity of the proceedings.<sup>92</sup> While it *is* evident that, once the trial chamber has determined that the admission of certain evidence would be ‘antithetical to, and ... seriously damage, the integrity of the proceedings’, such evidence *must* be excluded, the determination of whether the integrity of the proceedings has been seriously undermined

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*Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press, 2010) 477, referring to *Karemera et al.*, TC, ICTR, 2 November 2007 (Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse), para. 3.

<sup>90</sup> *Brđanin and Talić*, TC, ICTY, 3 October 2003 (Decision on the Defence “Objection to Intercept Evidence”), para. 62.

<sup>91</sup> Choo (n 23) 156. But cf. C. Gosnell, ‘Admissibility of Evidence’, in K.A.A. Khan et al. (eds), *Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press, 2010) 421 and Zahar and Sluiter (n 88) 382–383.

<sup>92</sup> Nor may the mandatory nature of this provision be evident for the first ground for exclusion: substantial doubt as to reliability. Insofar as the violation in question does not automatically render the evidence obtained unreliable, there appears to be room for a discretionary assessment with respect to this first ground. Nevertheless, the scope for such an assessment appears to be narrower than for the second ground.

calls for the consideration of the particular facts and circumstances of the case, i.e. for the trial chamber to undertake some sort of balancing exercise. Initially, the title of Rule 95 referred to ‘Evidence Obtained by Means Contrary to Internationally Protected Human Rights’. If Rule 95 is understood as being solely concerned with evidence obtained in violation of human rights, it is not difficult to understand the characterization of the exclusion prescribed by this provision as ‘mandatory’ (as in, ‘automatic’), if the assumption is that evidence obtained in violation of human rights will *by definition* be ‘antithetical to, and ... seriously damage, the integrity of the proceedings’,<sup>93</sup> thereby requiring its automatic exclusion. Currently, however, the title of Rule 95 simply refers to ‘Exclusion of Certain Evidence’.<sup>94</sup> According to Zahar and Sluiter, the title of the rule was amended in order to ‘expand the rule’s scope of application’, to cover *all* procedural violations that damage the integrity of the proceedings.<sup>95</sup> It is reasonable to assume that, where the procedural violation concerned does *not* constitute a human rights violation, an examination will be required of the particular facts and circumstances of the case in order to determine whether the admission of evidence obtained in this manner would damage the integrity of the proceedings. Once, of course, the trial chamber has determined that it would, it *must* exclude the evidence. However, given the ‘steps’ that must necessarily be taken in order to determine whether the integrity of the proceedings has been damaged, the label ‘mandatory’ (as in, ‘automatic’) exclusion is misleading.<sup>96</sup>

Turning to the case law, in the ICTY case of *Halilović* the Defence sought to have the statement of the Accused, based on interviews conducted with the Prosecution, excluded pursuant to Rule 89(D) of the ICTY RPE. The Prosecution had not kept notes of the

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<sup>93</sup> By contrast, not all human rights violations will cast substantial doubt on the reliability of the evidence.

<sup>94</sup> The title of Rule 95 ICTY RPE was amended on 12 November 1997. The title of Rule 95 ICTR RPE reads as follows: ‘Exclusion of Evidence on the Grounds of the Means by Which It was Obtained’. See further M.A. Fairlie, ‘The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit’ (2004) 4(3) *International Criminal Law Review* 243, 286–287.

<sup>95</sup> Zahar and Sluiter (n 88) 381.

<sup>96</sup> Cf. M.A. Fairlie, ‘*Miranda* and its International Counterparts: Protections for Questioned Suspects at Home and Abroad’ (forthcoming).

Even if the term ‘mandatory’ is not being used to signify the automatic nature of the exclusionary rule (according to which, when certain conditions are satisfied, a particular consequence will automatically follow), but rather to demonstrate that once one or both of the two prongs of Rule 95 has/have been satisfied, the material in question *must* be excluded, it is misleading. After all, Rule 89(D) ICTY RPE, which is often described as discretionary in nature, also *requires* evidence to be excluded once the chamber has concluded that the probative value of the evidence is substantially outweighed by its prejudicial effect on the fairness of the trial. See n 88 and 91 and accompanying text.

interviews in its records and the interviews were not audio- or video recorded,<sup>97</sup> in violation of Rule 43 of the ICTY RPE, pursuant to which, '[w]henver the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded', in accordance with a specified procedure. According to the Trial Chamber, Rule 43 'aims at ensuring the integrity of the proceedings, *inter alia*, by providing for an instrument to ascertain the voluntariness of a statement and the adherence to other relevant safeguards as provided for in Rule 42 and Rule 95', and 'is a safeguard for a full and accurate reflection of the questions and answers during the interview and thus enables the parties and the Trial Chamber to verify the exact wording of what was said during the interview'.<sup>98</sup> In view of the violation of Rule 43, and the fact that the Accused had not chosen to waive his right to remain silent at trial, the Trial Chamber found that the admission of the statement would infringe upon the Accused's right to a fair trial and therefore excluded it pursuant to Rule 89(D).<sup>99</sup> Interestingly, the Trial Chamber appears to have adopted a broad definition of 'fair trial' in this case, by virtue of its interpretation of Rule 43 (the violation of which infringed the Accused's right to a fair trial), which encompasses both the ability of the Trial Chamber to determine guilt accurately (which is undermined when the reliability of the evidence in question is at stake) and the integrity of the proceedings. In *Kordić and Čerkez*, the Trial Chamber excluded certain material pursuant to Rule 89(D) of the ICTY RPE on account of the fact that 'the Defence would have no opportunity ... of cross-examining any witness about [such material], which are based on a variety of sources (sometimes anonymous)'.<sup>100</sup> Certainly fair trial rights, i.e. the rights enumerated in or otherwise flowing from human rights provisions on the right to a fair trial, appear to trigger the fairness criterion of Rule 89(D) of the ICTY RPE.

Turning now to the case law on Rule 95, trial chambers appear to look to the nature of the (human rights) violation in question to determine whether the admission of evidence obtained in this manner would seriously undermine the integrity of the proceedings, whereby a distinction may be drawn between violations of the ad hoc Tribunals' 'own Statutes and Rules or internationally protected human rights' and *other* procedural violations.<sup>101</sup> Moreover, it appears that, regarding the first 'category', a further distinction may be drawn between fair

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<sup>97</sup> *Halilović*, TC, ICTY, 8 July 2005 (Decision on Motion for Exclusion of Statement of Accused), para. 2.

<sup>98</sup> *Halilović* (n 97) para. 24.

<sup>99</sup> *Halilović* (n 97) paras 26–27.

<sup>100</sup> *Kordić and Čerkez*, TC, ICTY, 1 December 2000 (Decision on Prosecutor's Submissions Concerning "Zagreb Exhibits" and Presidential Transcripts), para. 40.

<sup>101</sup> M. Klamburg, 'General Requirements for the Admission of Evidence', in G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 1033.

trial rights and *other* human rights. Turning first to fair trial rights, while in the ICTY case of *Mucić et al.* the interview conducted by the Austrian police with the Accused Zdravko Mucić (during which Mucić did not have access to counsel, consistent with applicable Austrian criminal procedure) was not, strictly speaking, excluded pursuant to Rule 95 of the ICTY RPE,<sup>102</sup> the Trial Chamber’s observation that, ‘[i]t seems ... extremely difficult for a statement taken in violation of Rule 42 [of the ICTY RPE, which confers on suspects certain rights related to questioning] to fall within Rule 95 [of the ICTY RPE] which protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast substantial doubts on its reliability’,<sup>103</sup> has since been cited in a number of ICTR decisions as a ground for excluding statements obtained in violation of Rule 42 pursuant to Rule 95 of the ICTR RPE.<sup>104</sup> In *Karemera et al.*, for example, the Trial Chamber, having found that the Prosecutor had ‘not established beyond reasonable doubt that Joseph Nzirorera waived his right to be silent and to be assisted by counsel in an express and unequivocal manner’,<sup>105</sup> concluded that there was ‘substantial doubt as to the reliability of the interview [with Nzirorera]’ and that ‘its admission into evidence would be antithetical to and seriously damage the integrity of the proceeding[s], wherefore pursuant to Rule 95, the interview is not admissible’.<sup>106</sup> In the ICTY case of *Martić*, the Trial Chamber, in setting out guidelines on the ‘Standards Governing the Admission of Evidence’ in that case, clarified that ‘statements which are not voluntary, but rather are obtained by means including oppressive conduct, cannot be admitted pursuant to Rule 95. If there are *prima facie* indicia that there was such

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<sup>102</sup> See *Mucić et al.*, TC, ICTY, 2 September 1997 (Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence), para. 55 (emphasis added): ‘The question is whether the interview is one which can pass the test of Article 18 and Rule 42. The allegation of the Defence of inducement to confess did not go beyond reading the rules of the Austrian Police procedure to the suspect. This being the only offensive conduct, the Trial Chamber is not satisfied that this by itself was sufficient. This is because though the rules relating to silence and confession are contradictory to the relevant rules in Rule 42, *they do not fall below fundamental fairness and such as to render admission antithetical to or to seriously damage the integrity of the proceedings* [such as to warrant exclusion pursuant to Rule 95 ICTY RPE]. *However violation of Sub-rules 42A(i) and 42(B) by themselves would be sufficient by virtue of Rule 5 to render the statements before the Austrian Police null and inadmissible in proceedings before us and to be excluded.*’ See Fairlie (n 96) for a more detailed analysis of the decision in this regard. But cf. Alamuddin (n 88) 280, Nerenberg and Timmermann (n 89) 479 and Zahar and Sluiter (n 88) 304–305 in this regard.

<sup>103</sup> *Mucić et al.* (n 102) para. 43.

<sup>104</sup> See Fairlie (n 96).

<sup>105</sup> *Karemera et al.* (n 89) para. 31.

<sup>106</sup> *Karemera et al.* (n 89) para. 32. See also *Bagosora et al.*, TC, ICTR, 14 October 2004 (Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89 (C)), para. 21 and *Nchamihigo*, TC, ICTR, 5 February 2007 (Decision on the Prosecutor’s Application to Admit into Evidence the Transcript of the Accused’s Interview as a Suspect and the Defense’s Request to Hold a *Voir Dire*).

oppressive conduct, the burden is on the party seeking to have the evidence admitted to prove that the statement was voluntary and not obtained by oppressive conduct.’<sup>107</sup>

Such cases should be distinguished from those in which evidence has been obtained by ‘minor breach[es] of procedural rules which [trial chambers are] not bound to apply’.<sup>108</sup> In *Brđanin and Talić*, where the Defence sought the exclusion of several intercepted telephone conversations on the grounds that such intercepts had been ‘obtained illegally because they did not conform with the law of Bosnia and Herzegovina at the time’, the Trial Chamber held that,

admitting illegally obtained intercepts into evidence does not, in and of itself, necessarily amount to seriously damaging the integrity of the proceedings. Rather, in situations of armed conflict, intelligence which may be the result of illegal activity may prove to be essential in uncovering the truth; all the more so when this information is not available from other sources. As stated above, in applying the provisions of Rule 95, this Tribunal considers all the relevant circumstances and will only exclude evidence if the integrity of the proceedings would indeed otherwise be seriously damaged.<sup>109</sup>

It is difficult to ascertain on the basis of the ICTY’s case law what the inter-relationship is between Rule 89(D) and Rule 95.<sup>110</sup> At the ICTR, where trial chambers do not have a Rule 89(D) at their disposal, trial chambers have, according to Combs, made greater use of Rule 95.<sup>111</sup> However, this has not necessarily led to more evidence being excluded and, in this regard, it is worth noting that, as at the ICTY, at the ICTR, ‘Rule 95 does not require automatic exclusion of all unlawfully obtained evidence’.<sup>112</sup>

## ii. ICC

Like the ad hoc Tribunals, the ICC makes explicit provision for the exclusion of unlawfully obtained evidence. Unlawfully obtained evidence that is otherwise relevant and probative may be excluded pursuant to one of two provisions: Article 69(4) or Article 69(7) of the ICC Statute.

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<sup>107</sup> *Martić*, TC, ICTY, 19 January 2006 (Decision Adopting Guidelines on the Standards Governing the Admission of Evidence), para. 9. The TC does not, however, specify which leg—reliability or integrity—is at stake. Presumably both are.

<sup>108</sup> *Mucić et al.*, TC, ICTY, 9 February 1998 (Decision on the Tendering of Prosecution Exhibits 104 - 108), para. 20, as referred to in *Brđanin and Talić* (n 90) para. 63. See also *Karadžić*, TC, ICTY, 30 September 2010 (Decision on the Accused’s Motion to Exclude Intercepted Conversations), para. 10.

<sup>109</sup> *Brđanin and Talić* (n 90) para. 61 (emphasis in original).

<sup>110</sup> Several authors have commented on what the interrelationship between these two provisions *should* be. See e.g. Zahar and Sluiter (n 88) 382.

<sup>111</sup> Combs (n 88) 328. But see n 89.

<sup>112</sup> *Karemera et al.*, TC, ICTR, 25 January 2008 (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence), para. 11, referring to, among other decisions, *Brđanin and Talić* (n 90).

Pursuant to Article 69(4), the ‘Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.’ While not expressed as an exclusionary rule or discretion as such, ‘by inserting fair trial considerations into the Trial Chamber’s decision on admissibility’, Article 69(4) appears to allow for the exclusion of evidence where the probative value of such evidence is (substantially) outweighed by its prejudicial effect on the fairness of the trial.<sup>113</sup>

Pursuant to Article 69(7), ‘[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.’ Zahar and Sluiter have criticized the formulation of this provision on the grounds that it appears to imply that not all violations of internationally recognized human rights will seriously damage the integrity of the proceedings. They argue that such an interpretation ‘amounts to a departure from the original purpose of Rule 95 of the ICTY and ICTR RPE[s], and also makes a mockery of human rights law as an indivisible set of minimum legal standards’.<sup>114</sup> Indeed, as will be seen below, Article 69(7) does not prescribe the automatic exclusion of evidence obtained in violation of the ICC Statute or internationally recognized human rights.

Turning to the case law, it appears that, like ICTY and ICTR trial chambers, ICC chambers, in deciding whether the integrity of the proceedings has been undermined such as to warrant exclusion, look to the nature of the (human rights) violation in question, whereby a distinction may be drawn between fair trial rights and *other* rights violations. In *Lubanga*, the Defence sought the exclusion of evidence obtained by seizure during the search of the home of a third party in the Democratic Republic of Congo. While both the Pre-Trial Chamber at the confirmation of charges stage, and the Trial Chamber at the trial stage of the proceedings, found that the search and seizure had violated internationally recognized human rights—in this case the right to privacy<sup>115</sup>—neither found that exclusion was warranted.<sup>116</sup> Both stressed that a violation of domestic law alone cannot lead to the exclusion of evidence so obtained,

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<sup>113</sup> Combs (n 88) 328. See also Zahar and Sluiter (n 88) 382.

<sup>114</sup> Zahar and Sluiter (n 88) 382.

<sup>115</sup> *Lubanga*, PTC, ICC, 29 January 2007 (Decision on the confirmation of charges), paras 81–82; *Lubanga*, TC, ICC, 24 June 2009 (Decision on the admission of material from the “bar table”), para. 38.

<sup>116</sup> *Lubanga*, PTC (n 115) para. 90; *Lubanga*, TC (n 115) para. 48.

referring to Article 69(8) of the ICC Statute.<sup>117</sup> Since reliability was not at stake in this case,<sup>118</sup> the question was whether this particular violation of internationally recognized human rights impacted on the integrity of the proceedings such as to warrant the exclusion of evidence in question pursuant to Article 69(7) of the ICC Statute. According to both chambers, it did not. The Trial Chamber's findings are worth reproducing here:

The argument that any violation of internationally recognized human rights will necessarily damage the integrity of the proceedings before the ICC does not take into account the fact that the Statute provides for a "dual test", which is to be applied following a finding that there has been a violation. Therefore, should the Chamber conclude that the evidence has been obtained in violation of the [ICC] Statute or internationally recognized human rights, under Article 69(7) it is always necessary for it to consider the criteria in a) and b), because the evidence is not automatically inadmissible.<sup>119</sup>

In *Katanga and Ngudjolo*, the Defence for Germain Katanga sought the exclusion of a statement taken by the Congolese authorities, who, as the Defence acknowledged, were not acting on behalf of the ICC Prosecutor.<sup>120</sup> The Trial Chamber found that the statement in question had been obtained in violation of the Accused's right to remain silent and the privilege against self-incrimination,<sup>121</sup> and, therefore, in violation of internationally recognized human rights.<sup>122</sup> Accordingly, the statement had to be excluded pursuant to Article 69(7) of the ICC Statute.<sup>123</sup> In excluding the statement on this basis, the Trial Chamber did not, however, specify which of the two limbs it fell under: reliability or integrity. However, given that the Defence had previously argued that the admission of a statement obtained in violation of such rights would seriously undermine the integrity of the proceedings,<sup>124</sup> and that the Trial Chamber did not explicitly refer to the issue of reliability in its findings, it is fair to assume that this particular violation of internationally recognised human rights was, by itself, considered to undermine the integrity of the proceedings.<sup>125</sup>

### c. Non-disclosure

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<sup>117</sup> *Lubanga*, PTC (n 115) para. 69; *Lubanga*, TC (n 115) para. 36. See also Klamberg (n 101) 1034–1035.

<sup>118</sup> *Lubanga*, PTC (n 115) para. 85; *Lubanga*, TC (n 115) para. 40.

<sup>119</sup> *Lubanga*, TC (n 115) para. 41 (footnote in original omitted).

<sup>120</sup> *Katanga and Ngudjolo*, TC, ICC, 17 December 2010 (Decision on the Prosecutor's Bar Table Motions), para. 57.

<sup>121</sup> *Katanga and Ngudjolo* (n 120) para. 63.

<sup>122</sup> *Katanga and Ngudjolo* (n 120) para. 64.

<sup>123</sup> *Katanga and Ngudjolo* (n 120) para. 65. It should be noted that the statement in question was admitted for the purposes of the confirmation hearing. See *Katanga and Ngudjolo*, PTC, ICC, 30 September 2008 (Decision on the confirmation of charges), paras 79–99.

<sup>124</sup> *Katanga and Ngudjolo* (n 120) para. 56.

<sup>125</sup> Iontcheva Turner is critical in this regard: J. Iontcheva Turner, 'Policing International Prosecutors' (2012) 45(1) *N.Y.U. Journal of International Law and Politics* 175, 192–194.

i. Ad hoc Tribunals

The ad hoc Tribunals have addressed the issue of late and non-disclosure on numerous occasions. According to the Trial Chamber in the ICTR case of *Ndindiliyimana et al.*, there is ‘a large number of remedial options ... available to the Chamber’ in this regard, including: ‘recalling relevant prosecution witnesses for further cross-examination, allowing the Defence teams to call additional defence witnesses, excluding relevant parts of the prosecution evidence, drawing necessary inferences from the exculpatory material, dismissing charges touched upon by the exculpatory material, and ordering a stay of proceedings’.<sup>126</sup> In determining which of these options is most suitable, ‘the Chamber must take into account the nature and significance of the Prosecution’s violations in light of the current stage of proceedings, the rights of the Accused, the need to preserve the integrity of the proceedings, and its obligation to discover the truth about the events that happened in Rwanda in 1994’.<sup>127</sup> In addition, the Trial Chamber noted that the last four of those options ‘are severe forms of remedy that should be invoked only in exceptional circumstances where less severe measures reasonably capable of remedying the Prosecution’s violation are unavailable’.<sup>128</sup> Indeed, the ‘remedy’ most frequently opted for by the ad hoc Tribunals appears to be ‘to allow additional time for review of the newly disclosed materials or permit the recall of witnesses for further cross-examination’, even in cases of repeated violations.<sup>129</sup> Thus, in the ICTY case of *Orić*, upon being called to address the Prosecution’s failure to comply with its Rule 68 disclosure obligations (pursuant to which the prosecution is obliged to disclose to the defence potentially exculpatory and ‘other relevant material’) for the fifth time, the Trial Chamber ordered the immediate disclosure of the Rule 68 material in question to the Defence, and invited the Defence ‘to indicate ... the names of any witnesses of the Prosecution that the Defence may wish to call for further cross-examination’ in light of the disclosure of the material.<sup>130</sup> Similarly, in the ICTR case of *Karemera et al.*, the Appeals Chamber held that ‘not every violation of this important obligation [to disclose potentially exculpatory material] implicates a violation of an accused’s fair trial rights, warranting a remedy. If a Rule 68

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<sup>126</sup> *Ndindiliyimana et al.*, TC, ICTR, 22 September 2008 (Decision on Defence Motions Alleging Violation of the Prosecutor’s Disclosure Obligations Pursuant to Rule 68), para. 61.

<sup>127</sup> *Ndindiliyimana et al.* (n 126) para. 61.

<sup>128</sup> *Ndindiliyimana et al.* (n 126) para. 62.

<sup>129</sup> K. Gibson and C. Lussiaà-Berdou, ‘Disclosure of Evidence’, in K.A.A. Khan et al. (eds), *Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press, 2010) 335, referring to *Orić*, TC, ICTY, 27 October 2005 (Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68), at 3. See also *Blaškić*, TC, ICTY, 28 September 1998 (Decision on the Defence Motion for Sanctions for the Prosecutor’s Continuing Violation of Rule 68), at 3.

<sup>130</sup> *Orić* (n 129) 5.

disclosure is extensive, parties are entitled to request an adjournment in order to properly prepare themselves.’<sup>131</sup>

According to Gibson and Lussiaà-Berdou, ‘probably the most severe remedy’ to have been handed down at the ad hoc Tribunals for disclosure violations was in *Orić*, in which, in response to further allegations that the Prosecution had violated its Rule 68 obligations, the Trial Chamber held that it would respond to established Rule 68 violations ‘at its definitive evaluation of the evidence presented by the Prosecution, and consider the possibility of drawing the reasonable inferences in favour of the Accused with respect to specific evidence which has been the subject of a Rule 68 violation’.<sup>132</sup>

In addition to the aforementioned responses, the ad hoc Tribunals have on occasion sought to punish, or impose ‘sanctions’ for, prosecutorial misconduct resulting in disclosure violations.<sup>133</sup> In this regard, it is notable that in 2001, a new Rule 68*bis* was included in the ICTY RPE, pursuant to which the ‘pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.’<sup>134</sup> In response to, among other things, the failure of the Prosecution to comply with its disclosure obligations, the Trial Chamber in *Furundžija*, while having ‘no express powers of discipline over members of the Prosecution’, expressed ‘its dismay at the conduct of the Prosecution’ and referred the matter to the Prosecutor ‘to be dealt with as she determines fit’.<sup>135</sup> According to the Trial Chamber, such conduct did not, however, rise to the level required for contempt within the meaning of Rule 77 of the ICTY RPE.<sup>136</sup> A similar approach was taken in *Karemera et al.*. According to the Trial Chamber, ‘the lack of diligence in the Prosecution’s compliance with its disclosure obligations’ was ‘unacceptable’, ‘offensive’, obstructed the proceedings and was ‘contrary to the interests of justice’. It therefore found that ‘a sanction should be imposed against the

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<sup>131</sup> *Karemera et al.*, AC, ICTR, 28 April 2006 (Decision on Joseph Nzirorera’s Interlocutory Appeal), para. 7 (footnotes in original omitted).

<sup>132</sup> Gibson and Lussiaà-Berdou (n 129) 336, referring to *Orić*, TC, ICTY, 13 December 2005 (Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules), para. 35. See also *Orić*, TC, ICTY, 30 June 2006 (Judgement), paras 72–77.

<sup>133</sup> De los Reyes distinguishes between remedies and sanctions as follows: ‘Whereas remedies are meant to cure the prejudice suffered by either party, sanctions are meant to punish a party for failing to respect the rule of law.’ C. de los Reyes, ‘Revisiting Disclosure Obligations at the ICTR and its Implications for the Rights of the Accused’ (2005) 4(2) *Chinese Journal of International Law* 583, 595. See also Iontcheva Turner (n 125) 215–216.

<sup>134</sup> This provision has been criticized for being too broad. See e.g. S. Zappalà, ‘The Prosecutor’s duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE’ (2004) 2(2) *Journal of International Criminal Justice* 620, 627 and De los Reyes (n 133) 596.

<sup>135</sup> *Furundžija*, TC, ICTY, 5 June 1998 (The Trial Chamber’s Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution), para. 12.

<sup>136</sup> *Furundžija* (n 135) para. 11.

Prosecution, by formally drawing the attention of the Prosecutor himself, as the disciplinary body, to this misconduct'.<sup>137</sup>

Late and non-disclosure is an area in which the ad hoc Tribunals have consistently required a showing of 'actual' or 'material' prejudice to the accused in order to warrant a judicial response to disclosure violations (beyond affording the defence additional time to review the newly disclosed materials and recalling witnesses for further cross-examination).<sup>138</sup> Thus, in the ICTY case of *Brđanin*, the Trial Chamber held that: 'If the Defence satisfies the Trial Chamber that there has been a failure by the Prosecution to comply with Rule 68, the Trial Chamber in addressing the aspect of appropriate remedies will examine whether or not the Defence has been prejudiced by non-compliance and will provide accordingly pursuant to Rule 68bis'.<sup>139</sup> In *Orić*, the Trial Chamber held that in determining the appropriate remedy for non-compliance with Rule 68 obligations, it *had* 'to examine whether or not the Defence had been prejudiced by [the Rule 68 breach]'.<sup>140</sup> This emphasis on the existence of actual or material prejudice was endorsed by the Appeals Chamber in the ICTR case of *Rutaganda*, where it held that, 'even when the Appeals Chamber is satisfied that the Prosecution has failed to comply with its Rule 68 obligations, it will examine whether the Defence has actually been prejudiced by such failure before considering whether a remedy is appropriate'.<sup>141</sup> Finally, the ICTY Trial Chamber has held that: 'As a general rule, if Rule 68 material is known and reasonably accessible to the defence, material prejudice cannot be shown.'<sup>142</sup>

In the *Karadžić* case, declaratory relief has been granted on numerous occasions for disclosure violations on the part of the Prosecutor where there has been no prejudice to the Accused. In a partially dissenting opinion on the matter, however, Judge Kwon opined that 'when the Accused does not suffer any prejudice resulting from the Prosecution's violation of

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<sup>137</sup> *Karemera et al.*, TC, ICTR, 19 October 2006 (Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution), para. 17.

<sup>138</sup> This factor has featured less prominently in the context of unlawful arrest and detention, for example.

<sup>139</sup> *Brđanin*, TC, ICTY, 30 October 2002 (Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to Be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial Can Be Resolved"), para. 23 (emphasis added). See also *Orić*, TC, ICTY, 13 December 2005 (Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules), para. 24.

<sup>140</sup> *Orić* (n 129) 3. In other words, the language of the TC in this regard is stronger than that of the TC in *Brđanin*. See also the language of the AC in *Blaškić*, AC, ICTY, 29 July 2004 (Judgement), para. 268.

<sup>141</sup> *Rutaganda*, AC, ICTR, 8 December 2006 (Decision on Request for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification), para. 37.

<sup>142</sup> *Orić* (n 132) para. 27, referring to *Blaškić*, AC, ICTY, 26 September 2000 (Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings), para. 38

Rule 68 ... it is unnecessary, moot or even frivolous to issue a declaratory finding that the Prosecution has violated Rule 68 of the Rules. It serves no purpose.’<sup>143</sup> He further stated that:

The jurisprudence clearly states that “if the Defence satisfies the Tribunal that there has been a failure by the Prosecution to comply with Rule 68, the Tribunal . . . will examine whether or not the Defence has been prejudiced by that failure to comply before considering whether a remedy is appropriate[.]” Accordingly, in the absence of prejudice, the Accused will not be given any remedy, including a declaration that the Prosecution has violated Rule 68.<sup>144</sup>

Nevertheless, the Trial Chamber has continued to grant declaratory relief where the violation has caused no, or minimal prejudice, to the accused.<sup>145</sup>

## ii. ICC

The most important ICC case to date to address the consequences of late or non-disclosure is *Lubanga*. In that case, the Prosecution’s practice of extensively gathering documents under Article 54(3)(e) of the ICC Statute was at the root of the problems that eventually led to the imposition of a stay of proceedings. Article 54(3)(e) provides that: ‘The Prosecutor may ... [a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents’. Such material may include information within the meaning of Article 67(2) of the ICC Statute. Pursuant to Article 67(2), the Prosecutor is obliged to ‘disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence’. Where the Article 54(3)(e) material being withheld includes information within the meaning of Article 67(2), a conflict arises between the obligations of the Prosecutor to observe confidentiality agreements with information providers and to provide (potentially) exculpatory material to the defence. In order to resolve such conflicts, the trial chamber must have access to the material being withheld in order to determine whether it should be disclosed to the defence.<sup>146</sup> If the trial chamber is not granted such access, it will not be in a position to ensure a fair trial.

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<sup>143</sup> *Karadžić*, TC, ICTY, 29 March 2011 (Decision on Accused’s Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon), at 17.

<sup>144</sup> *Karadžić* (n 143) 18.

<sup>145</sup> See e.g. *Karadžić*, TC, ICTY, 22 November 2011 (Decision on Accused’s Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions), para. 37 n68.

<sup>146</sup> *Lubanga* (n 56) paras 3 and 37–55.

As to the facts in that case, prior to the commencement of trial, the Prosecution had indicated that it had Article 54(3)(e) material in its possession, which it had identified as potentially exculpatory or otherwise material to the Defence. After various (fruitless) attempts to obtain consent from the Article 54(3)(e) information providers to lift the confidentiality agreements, the Prosecution proposed various ‘counter-balancing’ measures, including the provision of ‘similar material’ to that which it was withholding, which, in its view, would allow the Defence to prepare for trial. Upon request of the Trial Chamber to receive the withheld materials for the purposes of being able to ensure a fair trial, the Prosecution indicated that it would be unable to comply (due to lack of consent on the part of the information providers), whereupon the Trial Chamber stayed the proceedings.<sup>147</sup> The stay was upheld on appeal, with the Appeals Chamber confirming that the stay imposed by the Trial Chamber was not permanent, but rather halted the proceedings indefinitely. More specifically, the stay imposed by the Trial Chamber could—according to the Appeals Chamber—be characterized as ‘conditional’.<sup>148</sup> In other words, the stay was subject to the condition that the obstacles that led to the imposition of the stay remain in place, whereby such obstacles were, from the outset, understood to be of such a nature that a fair trial might become possible at a later stage. In characterizing the stay imposed by the Trial Chamber as conditional, the Appeals Chamber does not appear to have envisaged a different response to that envisaged by the Trial Chamber. Indeed, according to the Appeals Chamber it was clear that the Trial Chamber intended to impose a stay that was conditional and therefore potentially only temporary, referring to the Trial Chamber’s explicit acknowledgment that the stay might be lifted.<sup>149</sup> Moreover, according to the Appeals Chamber, the stay imposed by the Trial Chamber was not inconsistent with its—the Appeals Chamber’s—earlier decision setting out the test for imposing a (permanent) stay of proceedings.<sup>150</sup> According to the Appeals Chamber, the earlier decision did not rule out the imposition of a conditional stay in suitable circumstances.<sup>151</sup> Indeed, both permanent and conditional stays are concerned with fairness. Unlike the permanent stay of proceedings, however, the conditional stay presupposes that a fair trial is—theoretically at least—still possible. Thus, a conditional stay

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<sup>147</sup> *Lubanga*, TC, ICC, 13 June 2008 (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).

<sup>148</sup> *Lubanga* (n 56) paras 4, 75 and 80.

<sup>149</sup> *Lubanga* (n 56) para. 75.

<sup>150</sup> *Lubanga* (n 17) paras 37 and 39.

<sup>151</sup> *Lubanga* (n 56) para. 80. The availability of this response has been confirmed in a number of subsequent decisions, e.g. *Banda and Jerbo* (n 13) paras 84–85.

of proceedings may be lifted where the ‘obstacles’ that led to the imposition of such a stay fall away.<sup>152</sup> Nevertheless, a conditional stay may need to be converted to a permanent stay where, ‘in particular because of the time that has elapsed’, a fair trial has become ‘permanently and incurably impossible’.<sup>153</sup>

While both types of stay are concerned with fairness, it is important to distinguish between the two. Thus, while the imposition of a permanent stay of proceedings requires the accused to be released (because continued detention would not be in connection with the exercise of criminal jurisdiction by the ICC), the unconditional release of the person concerned is not the inevitable consequence of a conditional stay.<sup>154</sup> On 18 November 2008, the Trial Chamber lifted the stay in an oral decision, having (finally) been provided with the materials.<sup>155</sup>

It is worth noting that, prior to staying the proceedings for the first time, the Trial Chamber in *Lubanga* indicated that the Prosecution ‘would be under an obligation to withdraw any charges where non-disclosed exculpatory material has a material impact on the Chamber’s determination of the guilt or innocence of the accused’.<sup>156</sup> This appears to imply that, if the Prosecution is unwilling or unable to do so, ICC chambers have the authority to dismiss individual charges to which the withheld exculpatory material is known to pertain. While this has certainly been suggested as a possible response to disclosure violations at the ad hoc Tribunals,<sup>157</sup> the ICC has yet to address this issue in its case law.

Finally, the Appeals Chamber’s findings in relation to the second stay of proceedings imposed by the Trial Chamber in the *Lubanga* case are worth noting here. Two years after the imposition of the first stay of proceedings, the Trial Chamber imposed another stay on account of the Prosecutor’s refusal to comply with its orders to disclose to the Defence the identity of an intermediary in that case, who the Defence alleged had influenced individuals

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<sup>152</sup> *Lubanga* (n 56) para. 80.

<sup>153</sup> *Lubanga* (n 56) para. 81.

<sup>154</sup> *Lubanga*, AC, ICC, 21 October 2008 (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the release of Thomas Lubanga Dyilo”), paras 1 and 37. Thus, the AC had to overturn the TC’s decision to release the Accused (*Lubanga*, TC, ICC, 2 July 2008 (Decision on the release of Thomas Lubanga Dyilo)) following its decision to stay the proceedings (*Lubanga* (n 147)).

<sup>155</sup> *Lubanga*, PTC, ICC, 18 November 2008, at 3–4. The oral decision was followed by a written decision: *Lubanga*, TC, ICC, 23 January 2009 (Reasons for Oral Decision lifting the stay of proceedings).

<sup>156</sup> *Lubanga* (n 147) para. 6.

<sup>157</sup> See n 126 and accompanying text. It has also been suggested as a possible response in the literature: Iontcheva Turner (n 125) 225–228.

to give false testimony (and who the Defence alleged the Prosecution had knowingly employed, or made use of).<sup>158</sup>

While the Appeals Chamber's findings, strictly speaking, pertain to the Prosecution's refusal to comply with court orders more generally (and, ultimately, to the ability of the Trial Chamber to control the proceedings),<sup>159</sup> the underlying refusal to comply with court orders in this instance meant certain information not being disclosed to the Defence. In that case, the Appeals Chamber found that the stay of proceedings imposed by the Trial Chamber was not justified, since 'the Trial Chamber had not yet lost control of the proceedings'. In this regard, the Appeals Chamber noted that: '[A]rticle 71 of the [ICC] Statute [provides] Trial Chambers with a specific tool to maintain control of proceedings and, thereby, to ensure a fair trial when faced with the deliberate refusal of a party to comply with its directions', whereby the purpose of such sanctions 'is not merely ... to punish the offending party, but also to bring about compliance.'<sup>160</sup> Thus, where a refusal by the prosecution to comply with court orders involves certain material not being disclosed to the defence, the measures in Article 71 of the ICC Statute may be employed in order to bring about disclosure.

#### d. Interim conclusion

The picture that emerges from the above may be one of an array of responses that is available in respect of a wide range of violations of international criminal procedure. Nevertheless, the law and practice of the international criminal tribunals in this regard is still very much in development.<sup>161</sup> For example, while the international criminal tribunals have referred to various rationales for responding to procedural violations, they have not yet properly identified (and expanded on) the *primary* rationale(s) for doing so, sometimes citing numerous rationales in the same breath (in respect of the same procedural violation(s)),<sup>162</sup>

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<sup>158</sup> *Lubanga*, TC, ICC, 8 July 2010 (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), para. 20.

<sup>159</sup> *Lubanga*, AC (n 57) paras 57–58.

<sup>160</sup> *Lubanga*, AC (n 57) para. 59.

<sup>161</sup> According to Naymark ((n 8) 14 and 18), such practice is 'piecemeal' and 'often inconsistent'.

<sup>162</sup> See e.g. *Barayagwiza* (n 1) paras 76 and 108. There the AC found that 'to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process'. Moreover, it continued, the permanent stay was 'the only effective remedy for the cumulative breaches of the [A]ccused's rights' and 'may very well deter the commission of such serious violations in the future'. The applicability of the deterrence rationale in the context of international criminal proceedings has since been qualified. See e.g. *Lubanga*, TC (n 115) paras 45–46, referring to *Brđanin and Talić* (n 90) para. 63.

citing certain rationales but not others (without explaining why),<sup>163</sup> or otherwise failing to explain the meaning of nebulous terms such as ‘fairness’ and ‘integrity’.<sup>164</sup> Different rationales may, potentially, lead to different outcomes,<sup>165</sup> making it of paramount importance to identify the underlying (primary) rationale for responding to procedural violations.

Nor is such law and practice clear on how to accommodate the public interest in the investigation and prosecution of very serious crimes in responding to procedural violations, an issue which continues to generate discussion in the literature.<sup>166</sup> While sometimes they expressly include it as a factor in a ‘balancing exercise’,<sup>167</sup> in other instances they do not, either not referring to it at all,<sup>168</sup> or seemingly acknowledging it as an afterthought.<sup>169</sup> In particular, the international criminal tribunals’ law and practice is unclear on how such public interest relates to the (violated) rights of the suspect or accused. As noted in the introduction, the seriousness of the offence(s) charged will inevitably enter the analysis when responding to procedural violations, and it is therefore of paramount importance that international criminal tribunals come to terms with this issue.

Section C below addresses the questions of how best to accommodate public interest considerations related to the seriousness of the offence(s) in responding to procedural violations and how such public interest considerations relate to the (violated) rights of the suspect or accused, using various suggestions and observations in the literature in this regard as a starting point.

### C. Accommodating the seriousness of the offence(s) charged in responding to violations of international criminal procedure

In order to better accommodate public interest considerations related to the seriousness of the offence(s) charged, a number of authors have argued for a more ‘balanced’ approach to procedural violations in international criminal proceedings, whereby the international criminal tribunal in question balances various factors in order to come to a fitting outcome.

In the context of addressing procedural violations, the ‘balancing approach’, or ‘interest-balancing’, has sometimes been proposed in response to what Starr has referred to as

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<sup>163</sup> See e.g. *Barayagwiza* (n 6) para. 74, where the AC refers solely to the right to an effective remedy as the rationale for responding to procedural violations.

<sup>164</sup> See e.g. *Lubanga* (n 17) and *Lubanga* (n 158).

<sup>165</sup> See in this regard A. Ashworth, ‘Excluding Evidence as Protecting Rights’ (1977) *Criminal Law Review* 723, 734, as cited by P. Duff, ‘Admissibility of Improperly Obtained Physical Evidence in the Scottish Criminal Trial: the Search for Principle’ (2004) 8(2) *Edinburgh Law Review* 152, 159.

<sup>166</sup> For a recent example, see *Iontcheva Turner* (n 125).

<sup>167</sup> See e.g. *D. Nikolić* (n 35) para. 30; *Lubanga* (n 17) para. 39; and *Lubanga*, TC (n 57) para. 195

<sup>168</sup> See e.g. *Katanga and Ngudjolo* (n 120).

<sup>169</sup> See e.g. *Lubanga* (n 147) para. 95.

the ‘perverse consequences’ of the ‘absolutist approach’ to procedural violations, pursuant to which, once a rights violation has been established, the court must provide a remedy.<sup>170</sup> In the absolutist approach to addressing procedural violations (specifically, rights violations), the court does not take into account ‘countervailing’ interests, such as the public interest in the investigation and prosecution of the crime, at least, not explicitly.<sup>171</sup> As to the ‘perverse’ effects of this approach, Starr identifies three manifestations of ‘remedial deterrence’, according to which notion ‘if it is more costly to recognize a remedy, courts will be less likely to do so’:<sup>172</sup> first, courts ‘sometimes respond to remedial costs by substantively narrowing the definition of a right’; second, courts can ‘avoid granting undesirable remedies’ by finding ‘some procedural reason to avoid reaching the merits of a rights claim in the first place’, for example, lack of jurisdiction; and finally, courts can ‘decline to grant remedies for rights violations unless the victim shows that she has been or will be harmed’.<sup>173</sup> The expectation is that, by purposely and explicitly including public interest considerations in the determination of whether to attach consequences to a procedural violation, courts will not need to engage in such behaviour. Moreover, by taking into account the various facts and circumstances of the case, including public interest considerations, the court will be able to come to an equitable outcome. Although concrete instances of remedial deterrence are typically difficult to identify (given that courts tend not to be forthcoming in this regard), Starr argues that the international criminal tribunals ‘face particularly potent remedial deterrence pressures’, citing the ‘Appeals Chamber’s legal contortions in the *Barayagwiza* case’ as an example of remedial deterrence.<sup>174</sup> In order to prevent such remedial deterrence, she argues for a ‘candid interest-balancing approach to remedies for human rights violations in international courts’.<sup>175</sup>

At first glance, it is difficult to argue with an approach that purports to be more balanced. Nevertheless, the balancing approach is not without problems. Among other

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<sup>170</sup> See e.g. Starr (n 10) and Iontcheva Turner (n 125). This absolutist approach may be problematic in a system in which only traditional criminal procedure remedies, such as stays of proceedings and/or the exclusion of evidence, are available. In this regard it is worth noting that remedial sentence reduction ‘is essentially unknown in U.S. courts’. See S.B. Starr, ‘Sentence Reduction as a Remedy for Prosecutorial Misconduct’ (2009) 97(6) *The Georgetown Law Journal* 1509, 1511.

<sup>171</sup> This may be because the absolute rule in question has been “pre-balanced” by the law-giver’. See S.C. Thaman, ‘Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules’, in S.C. Thaman (ed.), *Exclusionary Rules in Comparative Law* (Dordrecht: Springer, 2013) 410.

<sup>172</sup> Starr (n 10) 695 and 715, ‘borrowing from’ D.J. Levinson, ‘Rights Essentialism and Remedial Equilibration’ (1999) 99(4) *Columbia Law Review* 857. ‘Costly’ appears to mean both financial costs, e.g. the costs of a retrial, and non-financial costs, i.e. the reputation of the criminal justice system being undermined.

<sup>173</sup> Starr (n 10) 720–730.

<sup>174</sup> Starr (n 10) 710 and 717, respectively. See 711–719 more generally.

<sup>175</sup> Starr (n 10) 752. See 752–768 more generally. See also Iontcheva Turner (n 125).

things,<sup>176</sup> there is potential for misuse. Rather than adopting such an approach in order to come to an equitable outcome and to promote transparency, courts (may) employ it as a tool to avoid having to attach a (particular) consequence to a procedural violation, under a ‘cloak of reasonableness’. This may not always be deliberate and, in this sense, ‘misuse’ is, perhaps, an unfortunate term.<sup>177</sup> It is precisely because it may not be deliberate that it is important to identify and understand the ways in which the balancing approach may be ‘misused’, so that courts may be mindful of potential dangers before undertaking such an exercise.<sup>178</sup> First, there is the danger of misconstruing the nature of the rights and interests underlying the exercise and, by extension, misrepresenting the relationship between them (i.e. pitting them against one another as conflicting or competing interests). Second, there is the danger of including ‘illegitimate interests’ in the exercise.<sup>179</sup> Both may ultimately undermine the (legitimate) underlying interests, rather than serve and protect them.

Pitting rights against public interest considerations related to the seriousness of the offence(s) charged is problematic insofar as it gives rise to the impression that such rights and interests are per se separate and conflicting considerations. Indeed, both courts and commentators alike have suggested that they are precisely that.<sup>180</sup> The accuracy of this suggestion may turn on how ‘rights’ are construed. Summers argues that the rights enumerated in, or otherwise flowing from, Article 6 of the ECHR, i.e. fair trial rights, should be seen as institutional rather than personal or individual in nature.<sup>181</sup> In other words, the purpose of such rights should be dependent on the institutional setting in which they are being exercised. According to Summers:

The historical analysis of the development of European criminal procedure in the course of the nineteenth century demonstrates that those principles, which are now commonly thought of as instrumental ‘defence rights’, developed as part of the institutional and structural form of the criminal procedural system. The development of the ‘defence role’ was precipitated principally by other institutional developments—notably the separation of judging and prosecuting—

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<sup>176</sup> Thus, in the international context, Iontcheva Turner ((n 125) 182) refers to the danger of inconsistent results and the involvement of courts in controversial policymaking. See also Zappalà (n 4) 256–257.

For a robust critique of balancing in the (national) criminal justice context, see A. Ashworth, ‘Crime, community and creeping consequentialism’ (1996) *Criminal Law Review* 220.

<sup>177</sup> The same applies to the terms ‘misrepresentation’ and ‘misconstruing’, both of which are used in this context.

<sup>178</sup> Thus, this article does not reject outright the use of balancing exercises.

<sup>179</sup> Starr (n 10) 761.

<sup>180</sup> *D. Nikolić* (n 35) para. 30; *Lubanga* (n 17) para. 39; *Lubanga*, TC (n 57) para. 195; Iontcheva Turner (n 125); Starr (n 10); Naymark (n 8) 1, 4, 14, 15 and 16; and Zappalà (n 4) 256.

<sup>181</sup> Summers (n 61).

rather than as a means to enhance the autonomy of the accused or as a constraint on the criminal justice authorities.<sup>182</sup>

Arguably, in any criminal procedural system in which the judge is an impartial adjudicator (charged with determining the guilt or innocence of the accused) and the prosecutor a party to the proceedings (rather than a neutral observer), fair trial rights should be seen as operating to ensure, at a minimum, that the verdict is not based on a one-sided account of events, i.e. that of the prosecutor, thereby protecting the accused from wrongful conviction.<sup>183</sup> In other words, in a criminal procedural system in which the judge is an impartial adjudicator, both the prosecution and the defence ‘ought to have the opportunity to convince the court of their position’.<sup>184</sup> Against this ‘institutional backdrop’, fair trial rights should at the very least be viewed as aimed at ensuring factual accuracy of verdict and, by extension, at establishing the truth.<sup>185</sup> Indeed, the primary purpose of the (international) criminal trial is to determine the individual criminal responsibility of the accused (and to prescribe individual punishment)<sup>186</sup> and, to this extent, it may be considered to be concerned with the establishment of the truth.

In addition, the origin and nature of fair trial rights under Article 6 of the ECHR suggest that other concerns have contributed to their evolution.<sup>187</sup> Indeed, the European Court of Human Rights (ECtHR), in interpreting Article 6, takes account of both epistemic—accuracy of verdict—and non-epistemic considerations.<sup>188</sup> Non-epistemic considerations tend to see fair trial rights as personal, rather than institutional in nature, aimed at ‘guaranteeing

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<sup>182</sup> Summers (n 61) 172.

<sup>183</sup> Cf. Jackson (n 61) 141–142 and Ashworth (n 176) 226–227.

In this regard the question may arise as to *when* such rights should operate to do so: only during the trial stage, or also during the pre-trial phase of proceedings? An examination of this question is beyond the scope of this article. See n 61.

<sup>184</sup> Summers (n 61) 27. Thus, the fair trial rights in Art. 6 ECHR should be seen as ‘defence rights’, rather than ‘rights of the (individual) accused’.

Parties may ‘convince the court of their position’ either by putting a positive case forward, or by testing the case of the other party.

<sup>185</sup> According to Hamer, the ‘primary justification for the defendant’s right to present a defence is not the non-epistemic value of autonomy, but rather to assist the court’s epistemic, fact-finding endeavour.’ See D. Hamer, ‘Delayed Complaint, Lost Evidence and Fair Trial: Epistemic and Non-epistemic Concerns’, in P. Roberts and J. Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing, 2012) 216.

Regarding accurate fact-finding and the establishment of the truth in criminal trials more generally, see J.R. Spencer, ‘An English lawyer’s reactions to *Strafvordering* 2001’, in C.H. Brants et al., *Op zoek naar grondslagen. Strafvordering 2001 ter discussie* (Den Haag: Boom Juridische uitgevers, 2003) 29–30.

<sup>186</sup> J.D. Ohlin, ‘Goals of International Criminal Justice and International Criminal Procedure’, in G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 61–63.

<sup>187</sup> Such concerns may even ‘have been the dominant influence on [the evolution of the fair trial rights in Art. 6 ECHR]. J. McEwan, ‘Truth, Efficiency, and Cooperation in Modern Criminal Justice’ *Current Legal Problems* Advance Access published 9 April 2013, 23.

<sup>188</sup> See e.g. McEwan (n 187) 23 n9.

the accused's autonomy in criminal proceedings',<sup>189</sup> reflecting the 'notion that human dignity must be respected when the power of the State is ranged against an individual,<sup>190</sup> and, by extension, at promoting the 'moral integrity of the criminal trial process'.<sup>191</sup>

To view fair trial rights as institutional rather than personal in nature against the backdrop of a system characterized by an impartial judge and a prosecutor who is a party to the proceedings is to acknowledge that the defence has a role to play in ensuring accuracy of verdict. Clearly it is not only the accused or the defence that has an interest in preventing wrongful conviction, but the criminal justice system more generally and indeed society as a whole.<sup>192</sup> In other words, it is misleading to pit fair trial rights against the public interest in investigating and prosecuting (serious) crime as separate and competing considerations. To do so is to misconstrue the nature of both.<sup>193</sup>

Construed as personal or individual rather than institutional in nature, it may be possible to view rights as separate from the public interest in the investigation and prosecution of serious crime. Viewed as such and pitted against one another in a balancing exercise, it is, moreover, not difficult to see that broader societal interests will (and, from a utilitarian perspective, arguably should), more often than not, outweigh the individual autonomy of the accused.<sup>194</sup> However, even if fair trial rights are construed as personal rather than institutional in nature it is difficult to maintain that such rights are separate and distinct from public interest considerations. There is, after all, a public interest in, among other things, the integrity of the criminal justice system.<sup>195</sup> In this regard, Naymark observes that the importance of reputation for international criminal tribunals cuts two ways:

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<sup>189</sup> Summers (n 61) 93. See also 18–19, 61.

<sup>190</sup> Choo (n 23) 14.

<sup>191</sup> Summers (n 61) 18.

<sup>192</sup> See also I.H. Dennis, 'Reconstructing the Law of Criminal Evidence' (1989) 42(1) *Current Legal Problems* 21, 30–31: 'The whole notion of achieving a "balance" between competing claims of crime control and due process seems ... to be suspect. This is partly because the notion sets up an artificial opposition between public and private interests in the use of evidence law. ... There is surely a plurality of public interests involved in this debate.'

<sup>193</sup> Cf. Summers (n 61) 92: 'The defence plays an important institutional role which, like all institutional legal principles, promotes the effectiveness and legitimacy of the proceedings. Defence 'rights' cannot therefore be balanced against crime control issues, because the role of the defence is integral to the institutional conception of the criminal procedural system. Any debate about procedural values must take place on the institutional level and must not be used as an excuse for restricting procedural 'rights' as this will seriously unbalance the proceedings.'

<sup>194</sup> Thus Starr, who appears to view rights as personal in nature, argues that the 'most obvious and drastic remedy—release and dismissal of charges with prejudice—will never be a tenable remedy for procedural violations in international criminal trials, except perhaps in truly extraordinary cases', since the 'charges are simply too serious'. According to Starr, such a response 'would be a windfall to the perpetrator of atrocities'. Starr (n 10) 747. See also 739 and 753.

<sup>195</sup> As Dennis ((n 192) 30–31) points out, '[i]t would seem to be obvious that the public also has an interest in the quality of the proceedings. Whether a conviction may be based on a confession obtained

If a tribunal comes to be seen as an instrument of victor's justice without true regard to justice and human rights, it will necessarily fail in these objectives, even if it succeeds in punishing perpetrators of humanitarian crimes. At the same time, if it comes to be seen as a lame duck, unable to effectively prosecute accused due to an over-emphasis of the most minor due process violations, it will likewise fail in these objectives.<sup>196</sup>

Thus, in deciding that the integrity or reputation of the (international) criminal justice system has been irreparably tainted, the court is already taking into account the public interest in the investigation and prosecution of serious crimes. The same applies when rights (other than fair trial rights) have been violated. While such violations do not typically impact on fairness in the sense of protection from wrongful conviction, they may well impact on the integrity of the criminal justice system. In the ICTR case of *Barayagwiza*, it should be recalled, the proceedings were stayed due to the impact of violations of the right to personal liberty (within the meaning of Articles 9 of the ICCPR and 5 of the ECHR) on the integrity of the proceedings.<sup>197</sup>

Given that both the ad hoc Tribunals and the ICC appear to have embraced the contextual and policy considerations underlying the doctrine of abuse of process, it is worth looking to the domestic application<sup>198</sup> of that doctrine for guidance on how to accommodate public interest considerations in responding to procedural violations. Choo identifies two grounds, or 'limbs', for staying criminal proceedings pursuant to the doctrine: protection of the accused from wrongful conviction and protection of the moral integrity of the criminal justice system. Such grounds reflect certain 'accepted functions' of criminal justice: '[the public interest in] the conviction of the guilty, and, correspondingly, the protection of the innocent from conviction' and the public interest in the protection of the 'moral integrity of the criminal justice system'.<sup>199</sup> While the first ground is concerned with fair trial in a narrow sense, i.e. epistemic considerations, the second is concerned with fair trial in a broader sense, i.e. non-epistemic considerations.<sup>200</sup> Regarding the second ground, the focus is on *judicial*

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by torture cannot simply be a matter of private interest to the defendant concerned.' Such public interest is, in turn, based on the public dimension of the criminal trial, in which 'the trial may be a medium of communication with the public at large'. *Ibid.*, 35–36.

Regarding non-epistemic considerations, in some jurisdictions the focus is on the 'upholding the rule of law', which is inevitably tied up with the notion of integrity.

<sup>196</sup> Naymark (n 8) 13.

<sup>197</sup> Such violations do not typically affect the ability to mount an effective defence, i.e. give rise to the risk of wrongful conviction.

<sup>198</sup> The abuse of process doctrine finds application in various jurisdictions, including Australia, Canada, England & Wales and New Zealand.

<sup>199</sup> Choo (n 23) 12–17.

<sup>200</sup> Choo (n 23) 18–19. Choo refers to 'epistemic' and 'non-epistemic' considerations as 'intrinsic policy' and 'extrinsic policy' considerations, respectively.

integrity: by protecting the moral integrity of the adjudicative process, the moral integrity of the criminal justice system is maintained.<sup>201</sup> Accordingly, a stay of proceedings imposed pursuant to the abuse of process doctrine should not be viewed as a personal remedy, but rather as a measure imposed in the interests of the criminal justice system and the public more generally. According to Choo, while a balancing exercise (whereby the court takes into account the facts and circumstances surrounding the alleged procedural violation) may be appropriate under the second limb of the doctrine (protection of the moral integrity of the proceedings), under the first (protection of the accused from wrongful conviction) it is *not*:

In determining whether a stay of proceedings is warranted in the interests of the protection of the innocent from wrongful conviction ('first limb' abuse of process), it is important to appreciate what criteria it would *not* be relevant to consider, or at least would be relevant to consider only to the extent that they bear on the question whether the continuation of the proceedings might result in a factually erroneous conviction. These criteria include: whether there has been some serious violation of the defendant's rights by the police or prosecution (was there, for example, a breach of a Convention right?); whether the police or prosecution acted in bad faith or maliciously, or with an improper motive; and *the seriousness of the offence with which the defendant is charged*. Any defendant should be afforded adequate protection from a wrongful conviction; it does not matter, for example, that no serious breach of a right of the defendant was involved, or that the police or prosecution did not act in bad faith, or that the offence charged was a relatively serious one. Indeed, it is arguable that those who are charged with serious offences should have greater protection from wrongful conviction than those charged with more minor offences.<sup>202</sup>

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<sup>201</sup> Choo (n 23) 16 and 109. See also A.A.S. Zuckerman, *The Principles of Criminal Evidence* (Oxford: Oxford University Press, 1989) 344.

By contrast, while the protection of integrity is often cited in Dutch literature as a rationale for addressing procedural violations, the focus appears to be on the integrity of the *investigative* process. See e.g. M.J. Borgers, 'De toekomst van artikel 359a Sv' (2012) 4 *Delikt en Delinkwent* 257, 265–266. Thus, in the Netherlands, and in so far as the protection of the integrity of the criminal justice system may be said to be an accepted function of Art. 359a of the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*), pursuant to which provision courts may respond to procedural violations committed during the investigative phase, judicial responses are a means by which to 'regulate the criminal investigation' (*de opsporing te normeren*), thereby protecting its integrity and, presumably, that of the Dutch criminal justice system more generally. However, the idea that courts, as adjudicators, are responsible for maintaining the integrity of the investigative process has been subject to criticism in the (Dutch) literature. See e.g. Borgers, *ibid.*, 266. Similar arguments have been made in other European jurisdictions. Thus, in *R. v. Looseley; A-G's Reference (No. 3 of 2000)* [2001] UKHL 53, [2001] 1W.L.R. 2060, para. 17, Lord Nicholls held that 'when ordering a stay, and refusing to let a prosecution continue, the court is not seeking to exercise disciplinary powers over the police, although staying a prosecution may have this effect'. According to Borgers, *ibid.*, 266, while the courts may not be in a position to protect the integrity of the investigative process, they are in a position to protect the accused's right to a fair trial. It is hereby submitted that they are also in a position to protect the integrity of the adjudicative process.

<sup>202</sup> Choo (n 23) 189 (emphasis added). See also 94–95, 102 and 132. This approach was endorsed in *Warren v. Attorney-General for Jersey* [2011] UKPC 513, para. 25 (per Lord Dyson).

The reason for this, is that while under the first limb ‘it is the *effects* of the conduct of the police with which the court should be primarily concerned’, under the second ‘it is the *nature* of this conduct which should be the focus’.<sup>203</sup> Finally, Choo observes that: ‘In many cases, less dramatic measures than a stay would suffice to [protect the accused from wrongful conviction or to protect the moral integrity of the criminal justice system]’.<sup>204</sup>

In responding to procedural violations, both the ad hoc Tribunals and the ICC have, moreover, drawn on relevant human rights standards, such as the right to a fair trial and the right to an effective remedy. The right to an effective remedy, as provided for in, for example, Article 13 of the ECHR, only appears to require a ‘remedy’ for rights violations (committed during the investigative phase) within the criminal trial insofar as the underlying violation infringes on the fairness of the proceedings, thereby engaging Article 6 of the ECHR.<sup>205</sup> According to the ECtHR, in determining whether Article 6 has been violated (when the prosecution has relied on evidence obtained in violation of a Convention right), ‘the question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair’.<sup>206</sup> In this regard, the question may arise as to the extent to which public interest considerations are, or should be, relevant to the ECtHR in determining whether Article 6 of the ECHR has been violated. In a number of (recent) judgments, the ECtHR explicitly included public interest considerations in its determination of whether Article 6 had been violated. In *Jalloh v. Germany*, for example, in which the applicant had alleged a violation of, *inter alia*, the privilege against self-incrimination and therefore Article 6 of the ECHR, the ECtHR found that:

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In the Netherlands, however, the test for the non-admissibility of the prosecution (*de niet-ontvankelijkheid van het openbaar ministerie*), a comparable judicial response to the stay of proceedings, requires not only that the accused’s right to a fair trial has been frustrated, but also that the underlying procedural violation was committed intentionally, or grossly negligently. See HR 30 March 2004, *NJ* 2004, 376 (*Afvoerpipj*) and HR 19 December 1995, *NJ* 1996, 249 (*Zwolsman*). This has been subject to criticism in the literature. See e.g. G. Knigge, ‘Het Zwolsman-criterium op de helling’ (2003) 4 *RM Themis* 193 and Borgers (n 201) 263–264.

<sup>203</sup> S. Martin, ‘Lost and Destroyed Evidence: The Search for a Principled Approach to abuse of Process’ (2005) 9(3) *International Journal of Evidence and Proof* 158, 181 (emphasis in original), as cited by Choo (n 23) 102 n143

<sup>204</sup> Choo (n 23) 186.

<sup>205</sup> See e.g. *Khan v. UK*, ECtHR, 12 May 2000. It should be noted that the ‘protection’ afforded by the right to an effective remedy in respect of rights violations that impact on the fairness of the trial is already inherent in the protection afforded by Art. 6 ECHR (although the same cannot be said for rights violations that *do not* impact on the fairness of the trial: the duty of domestic criminal courts to ensure the right to a fair trial (and to do that which is necessary in this regard) will not necessarily be sufficient for the purposes of providing an effective remedy for violations of substantive rights such as the right to privacy). In this regard, it should be noted that certain rights violations automatically engage Art. 6 ECHR (e.g. certain, though not all, Art. 3 ECHR violations), while others do not (e.g. Art. 8 ECHR violations).

<sup>206</sup> See e.g. *Khan v. UK*, ECtHR, 12 May 2000, para. 34; *Jalloh v. Germany*, ECtHR, 11 July 2006, para. 95; and *Gäfgen v. Germany*, ECtHR, 1 June 2010, para. 163.

In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; *the weight of the public interest in the investigation and punishment of the offence in issue*; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put... As regards the weight of the public interest in using the evidence to secure the applicant's conviction, the Court observes that, as noted above, the impugned measure targeted a street dealer who was offering drugs for sale on a comparatively small scale and who was eventually given a six-month suspended prison sentence and probation. In the circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity.<sup>207</sup>

Ashworth argues that: 'The implication of the Court's ... ruling is apparently that, in cases where the offence is very serious (unlike small-time drug dealing), official compulsion might be permissible without violating the privilege against self-incrimination.'<sup>208</sup> Moreover, this approach appears to 'mark a significant step away from the Court's older jurisprudence'.<sup>209</sup> Indeed, in *Teixeira de Castro v. Portugal*, the ECtHR appears to have taken a different view:

The use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug trafficking. While the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expedience. The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement.<sup>210</sup>

Thus, including public interest considerations related to, for example, the seriousness of the offence(s) charged, in the determination of whether Article 6 of the ECHR has been violated is problematic because it gives rise to the impression that, the more serious the offence, the less likely it is that such a violation will be found.

To be clear, none of the aforementioned is to say that courts should not consider different factors in determining whether to attach consequences to procedural violations, or

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<sup>207</sup> *Jalloh v. Germany*, ECtHR, 11 July 2006, paras 117 and 119. See also *Heglas v. Czech Republic* (2009) 48 E.H.R.R. 44, paras 87 and 91.

<sup>208</sup> A. Ashworth, 'The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence', in P. Roberts and J. Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing, 2012) 152. See also A.L.-T. Choo, 'Give us what you have'—Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right', in the same volume, 249–254.

<sup>209</sup> Ashworth (n 208) 152.

<sup>210</sup> *Teixeira de Castro v. Portugal*, ECtHR, 9 June 1998, para. 36. See also *Saunders v. UK*, ECtHR, 17 December 1996, para. 74.

that, in doing so, they should never engage in balancing. Indeed, the terms ‘fair trial’ (understood as being concerned with accuracy of verdict) and ‘integrity’ are sufficiently nebulous as to require an examination by the court of the specific facts and circumstances of the case in order to come to a fitting outcome, which may include public interest considerations. Nevertheless, it is worth drawing a distinction between the two objectives for the purpose of determining whether and, if so, to what extent the seriousness of the crime(s) charged should be taken into account.

Turning first to ‘fair trial’, it is highly questionable how relevant this factor is to the determination of whether there is a risk of wrongful conviction, and, indeed, how appropriate it is to consider it in this context. Starr acknowledges the inappropriateness of interest-balancing in this context: ‘At a gut level ... it seems indefensible for the court to say, in effect “Sorry, we know you have not been convicted based on a fair trial, but it would be politically disastrous to release you ...”.’<sup>211</sup> If anything, it may serve as a reminder that, in protecting the accused from wrongful conviction, the court should opt for the least far-reaching course of action (assuming, of course, it is capable of providing protection against wrongful conviction).<sup>212</sup> By contrast, in determining whether the moral integrity of the criminal justice system has been undermined, the seriousness of the offence(s) may play a more explicit role. After all, while ‘fair trial’ is concerned with the *effect* of the violation, integrity is concerned with the *nature* of the violation. Thus, Starr contrasts the first ‘situation’ with one in which a suspect has been unlawfully detained, but who subsequently receives a fair trial (presumably one that protects the accused against wrongful conviction): ‘In the latter situation ... it is much easier to see the justification for interest-balancing ...’<sup>213</sup> However, even where the objective of integrity, rather than ‘fair trial’, is at stake, there may be circumstances in which balancing is not appropriate. For example, it is arguable that certain rights violations

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<sup>211</sup> Starr (n 10) 757. See also 761.

See also Ashworth (n 176) 223 (footnote in original omitted), responding to suggestions for change to the English criminal justice system: ‘It is often argued that law enforcement agencies should have greater powers for more serious offences. ... But the common-sense appeal of this argument evaporates when it is considered from the point of view of defendants’ rights. If we believe, as we should, that individuals have a fundamental right not to be convicted of an offence of which they are innocent, then this right should be more strongly protected, the more serious the offence. All the notorious cases of miscarriage of justice that came to light in the late 1980s involved very serious offences. It is therefore unconvincing to argue from the seriousness of the offence to the need for greater investigative powers. Just as the public interest in preventing and detecting crime increases with the seriousness of the offence, so also the right of innocent persons not to be wrongly convicted is more important for serious crimes.’

<sup>212</sup> In determining that a less-far-reaching measure is sufficient in this regard, the court is effectively balancing the public interest in the protection of the innocent from wrongful conviction against the public interest in the conviction of the guilty.

<sup>213</sup> Starr (n 10) 757–758. Such an exercise may include ‘the defendant’s crime’.

necessarily impact on the integrity of the proceedings to such a degree as to require a stay of proceedings, or to such a degree as to require the exclusion of evidence.<sup>214</sup> In any case, the seriousness of the offence(s) should not be given undue prominence. At most, it should be included in the balancing exercise in order to ensure that the least far-reaching course of action is chosen (assuming, of course, that it is capable of protecting the integrity of the proceedings).<sup>215</sup> Once it has been established that the moral integrity of the criminal justice system has been compromised to such a degree as to require, for example, a stay of proceedings, however, no *further* ‘balancing’ should be possible. Similarly, once it has been established that the risk of wrongful conviction is such as to require a stay, the court may not then decide that, ‘on balance’, for example, in view of competing societal interests, the proceedings should continue.

Given that it is freely conceded that, when determining whether to attach consequences to procedural violations and, if so, which, the court may take into account the facts and circumstances of the case and, where necessary, balance interests (subject to the comment above regarding the appropriateness of balancing in different contexts),<sup>216</sup> the criticism on balancing exercises may seem overly pedantic. Indeed, it may simply be a question of how one perceives ‘balancing exercises’. Thus, Starr argues that the ‘problem is not the use of interest-balancing [as such] but rather the inclusion of *illegitimate* interests in that balance.’<sup>217</sup> More generally, the legitimacy of ‘interest-balancing’ may depend on the purpose for which it is being employed: is it in order to take the particular facts and circumstances of the case into account in order to come to an equitable outcome, or is to avoid having to attach a (particular) consequence to a procedural violation (under a ‘cloak of reasonableness’)? Since courts are unlikely to be forthcoming in this regard, it is important to articulate clear principles on how to balance *legitimately*. In this respect, it is submitted that pitting rights against public interest considerations *as separate and competing considerations*

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<sup>214</sup> See e.g. Choo (n 23) 190–191 and A.L.-T. Choo, *Evidence* (Oxford: Oxford University Press, 2012) 187–189.

<sup>215</sup> The court should opt for the least far-reaching course of action to protect the integrity of the proceedings in order to protect the public interest in the conviction of the guilty and correspondingly, the acquittal of the innocent. Thus, in determining that a less far-reaching measure than e.g. a stay of proceedings is sufficient to protect the integrity of the proceedings, the court is effectively determining that the public interest in the conviction of the guilty (and the acquittal of the innocent) *outweighs* the public interest in the protection of the moral integrity of the proceedings. See Dennis (n 192) 44. Thus, the public interest in the factual accuracy of the verdict (and the establishment of the truth) may well conflict with the protection of rights. Whether this is the case will depend on the nature of the underlying right.

<sup>216</sup> For example, in determining whether a certain piece of (unlawfully obtained) evidence should be admitted, courts may, in certain circumstances, weigh the probative value of such evidence against its prejudicial effect on the fairness of the trial.

<sup>217</sup> Starr (n 10) 761 (emphasis added).

potentially misrepresents the nature of, and ultimately undermines, both. This is because it implies that the public has an interest in the investigation and prosecution of (serious) crimes that is wholly unconnected to broader objectives of (international) criminal justice. In this regard it is important to recall that once courts have established that the protection of the accused from wrongful conviction or of the moral integrity of the criminal justice system requires a certain course of action to be taken, they will already have taken into account the public interest in the investigation and prosecution of serious crimes, following which no further balancing may take place.<sup>218</sup> As such, a stay of proceedings is, or should be, an exceptional remedy not because the public interest in the investigation and prosecution of very serious crimes will, more often than not, outweigh the personal rights of the accused, but because in most cases it will be possible to protect the accused from wrongful conviction, or protect the integrity of the criminal justice system, in other ways. Indeed, it may be possible to protect both by less far-reaching means, such as the exclusion of evidence (which, at both the ad hoc Tribunals and the ICC is possible on grounds of both fairness and integrity),<sup>219</sup> dismissal of select counts,<sup>220</sup> sentence reduction,<sup>221</sup> financial compensation,<sup>222</sup> judicial disciplinary measures (such as the imposition of fines),<sup>223</sup> or declaratory relief. Moreover, in deciding whether to respond to procedural violations, the court may, arguably, take into account the availability of measures outside the criminal trial, such as administrative sanctions.<sup>224</sup>

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<sup>218</sup> As such, (legitimate) public interests in the investigation and prosecution of (very) serious crime will rarely conflict with the protection of rights.

<sup>219</sup> However, the exclusion of evidence may have the same effect as a stay if the remaining evidence is insufficient to convict the accused on the charges.

<sup>220</sup> However, like the exclusion of evidence, the withdrawal of charges may have the same effect as a stay if the indictment consists of only one or two (interrelated) charges. See Iontcheva Turner (n 125) n41 and n195.

<sup>221</sup> However, sentence reduction is unlikely to be an appropriate response for procedural violations (potentially) impacting on the accuracy of the verdict. For a detailed discussion of the suitability of sentence reduction in international criminal proceedings, see Iontcheva Turner (n 125) 217–224.

<sup>222</sup> However, like sentence reduction, financial compensation is unlikely to be an appropriate response to certain procedural violations. Moreover, the lack of an express provision in the governing documents of the ad hoc Tribunals, and the lack of a budget for such purposes at the ad hoc Tribunals and ICC seriously undermine the availability of this response. See Pitcher (n 40) 359–361 and 367.

<sup>223</sup> For an overview and discussion of such measures, see Iontcheva Turner (n 125) 233–237.

<sup>224</sup> In this regard it is worth recalling that the right to an effective remedy does not require a remedy within the criminal trial. See n 205 and accompanying text.

For a discussion of the measures available outside of the trial at the ICC, see Iontcheva Turner (n 125) 238–246.

In the domestic context, Jackson has noted that ‘ensuring that official behaviour in the pre-trial process conforms to general principles of decent and fair treatment ... involves detailed consideration of issues that go far beyond [traditional criminal procedure responses such as] the exclusion of evidence ...’ In his view, ‘[e]xcluding evidence is an imperfect means of controlling illegality by the executive and potentially diverts attention from what may be more effective means of controlling illegal or improper investigatory behaviour. For this reason the possible exclusion of evidence should be viewed as just one

To illustrate the points made above, let us return to the *Lubanga* case and the Trial Chamber's decision to stay the proceedings on account of the non-disclosure of a significant amount of material that was potentially exculpatory or otherwise material to the Defence. Before doing so, however, it is worth briefly considering the 'institutional backdrop' of ICC proceedings. Although the ICC Prosecutor is required to actively investigate (and disclose) both incriminating and exonerating circumstances, once the charges have been confirmed and the trial can commence, the ICC Prosecutor must above all be considered to be a party to the proceedings. Indeed, while the ICC Prosecutor is obliged to *investigate* both sets of circumstances, there is no corresponding obligation for the Prosecutor to *present* exculpatory evidence at trial.<sup>225</sup> As Fedorova observes: 'As the representative of the international community in general, and the victims of the most serious crimes in particular, the prosecutor has a duty to vigorously pursue the institution's primary objective to prosecute those most responsible for international crimes and, thus, to end impunity'.<sup>226</sup> Against such a backdrop, fair trial rights should operate to ensure, at a minimum, (factual) accuracy of verdict.

According to the Trial Chamber, it was impossible to hold a fair trial on account of non-disclosure, but it did not explain why. In this regard it should be noted that if a significant amount of potentially exculpatory evidence is withheld from the defence (and the trial chamber has not been granted access to such material), the indictment consists of only one or two charges and the trial is allowed to proceed to verdict, there will be a risk of a factually erroneous conviction.<sup>227</sup> Such a risk may be mitigated if the trial chamber is provided with the material, in order for it to determine whether the fairness of the trial may be ensured in other ways, i.e. by 'counter-balancing' measures. However, at the time that the

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of a basket of measures that included promulgating clear procedural rules, providing criminal, civil and disciplinary remedies and establishing training programmes, resources and incentives to motivate officials to establish best-practice investigative protocols.' Jackson (n 61) 120 and 143. See also Dennis (n 192) 39 and Borgers (n 201).

<sup>225</sup> M. Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Antwerp: Intersentia, 2012) 151. The same applies to the ad hoc Tribunals. *Ibid.*, 152–154

<sup>226</sup> Fedorova (n 225) 151.

<sup>227</sup> Cf. De los Reyes (n 133), who consistently links disclosure obligations to 'the pursuit of the truth'. Conversely, non-compliance with disclosure obligations, or restrictions thereon, may undermine this pursuit.

The non-disclosure of exculpatory evidence should be contrasted with the situation in which evidence is simply lost. In this regard, Hamer argues that there 'is no heightened risk of wrongful conviction' where evidence is lost, since '[e]vidence that has been lost could have gone either way.' See Hamer (n 185) 225 and 236.

Of course, non-epistemic considerations may also be at stake here, such as the integrity of the proceedings, but, arguably, these are secondary considerations. Regarding the risk of a factually erroneous conviction, Choo ((n 23) 12) questions 'how far the law is to be expected to go in protecting the innocent from wrongful conviction'. In this regard he notes that it is clearly not required 'that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person', citing *Patterson v. New York* 432 US 197, 208 (1977).

stay referred to above had been imposed,<sup>228</sup> the Trial Chamber had not been provided with the material (nor was there any tangible indication that it would be in the near future). Assuming that a significant risk of a factually erroneous conviction was why the Trial Chamber found that it was impossible to hold a fair trial,<sup>229</sup> it was entirely correct to stay the proceedings (albeit conditionally, since the right to a fair trial had, at that time, not been irreparably violated). In doing so it was, moreover, taking into account the public interest, i.e. the public interest in the accuracy of verdict and, by extension, the establishment of the truth.<sup>230</sup> Moreover, it may have been the only viable course of action.<sup>231</sup> At the time of the stay, the Trial Chamber had not been provided with the confidential material (despite directions to this end), which the Prosecution had confirmed included potentially exculpatory material, and it was therefore not in a position to ensure the fairness of the trial in other ways (for example, by allowing ‘alternative disclosure’).<sup>232</sup> Nevertheless, it is unfortunate that the Trial Chamber did not clearly address the nature of the fairness at stake in this context.<sup>233</sup>

Turning briefly to the second stay of proceedings imposed in *Lubanga*,<sup>234</sup> as addressed above,<sup>235</sup> the Trial Chamber’s reasoning in this regard is equivocal. While the decision in question contains numerous references to the ‘right to a fair trial’, the Trial Chamber appears to have based its decision to stay the proceedings on two grounds: the non-disclosure of the identity of an ‘intermediary’ who the Defence alleged had engaged in inappropriate conduct,<sup>236</sup> and the non-compliance with Court orders (issued by the Trial

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<sup>228</sup> A second stay was imposed on 8 July 2010 (*Lubanga*, TC (n 158)). However, on appeal, the AC found that the TC had erred in staying the proceedings (*Lubanga*, AC (n 57)).

<sup>229</sup> This is logical given the purpose of the disclosure obligations at stake in this case, i.e. those under Art. 67 ICC Statute, which is to disclose *exculpatory* material, i.e. material that ‘shows or tends to show innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of the prosecution evidence’. Moreover, there are indications in both the TC’s judgment (*Lubanga* (n 147) paras 59, 61, 87 and 88) and the AC’s judgment (*Lubanga* (n 56) paras 94 and 97) that this was indeed the reason for staying the proceedings.

<sup>230</sup> But cf. Iontcheva Turner (n 125) 190–191: ‘While the court mentioned the legitimate interests of victims, the DRC and the international community, it did not balance them against the interest in ensuring a fair trial.’

<sup>231</sup> But cf. Iontcheva Turner (n 125) 191.

<sup>232</sup> Nor does the withdrawal or dismissal of charges appear to have been a viable alternative, since there were ‘only’ two charges. See n 220. Given the nature of the problem (lack of consent on the part of information providers to lift the confidentiality agreements), the fact that the Prosecution had provided no tangible indication that this situation would change and that the TC therefore saw no prospect of this changing, it is, moreover, questionable how viable or effective an option the imposition of daily, cumulative fines would have been. See in this regard Iontcheva Turner (n 125) 191. Indeed, according to Whiting, the TC had lost confidence in the Prosecution to do that which was necessary. A. Whiting, ‘Lead Evidence and Discovery Before the International Criminal Court: the Lubanga Case’ (2009) 14(1) *U.C.L.A. Journal of International Law & Foreign Affairs* 207, 224.

<sup>233</sup> This issue is addressed towards the end of this Section.

<sup>234</sup> *Lubanga* (n 158).

<sup>235</sup> See n 158 and accompanying text.

<sup>236</sup> *Lubanga* (n 158) para. 20. See also para. 31.

Chamber in relation to that non-disclosure).<sup>237</sup> The first, conceivably, engages ‘fairness’ in the narrow sense, i.e. protection from wrongful conviction (since the allegation was that ‘the prosecution [had] knowingly employed, or made use of, intermediaries who influenced individuals to give false testimony’),<sup>238</sup> while the second appears to engage ‘fairness’ in a wider sense, i.e. the integrity of the proceedings (since non-compliance with the Court’s orders ‘involves a profound, unacceptable and unjustified intrusion into the role of the judiciary’<sup>239</sup>). On appeal, the focus appears to have been on the second argument of the Trial Chamber, i.e. non-compliance with court orders.<sup>240</sup> Assuming that the non-compliance with the Trial Chamber’s orders was problematic due to non-epistemic considerations (unlike the non-disclosure of potentially exculpatory material, which is problematic primarily—though not exclusively—due to epistemic considerations), it was, arguably, appropriate for the Appeals Chamber to include public interest considerations in determining whether the Trial Chamber erred in imposing a stay of proceedings (and whether it should have resorted to less far-reaching measures in this regard), as indeed it did:

Recourse to sanctions [under Article 71 of the ICC Statute and Rule 171 of the ICC RPE] enables a Trial Chamber, using the tools available with the trial process itself, to cure the underlying obstacles to a fair trial, thereby allowing the trial to proceed speedily to a conclusion on its merits. Doing so, rather than resorting to the significantly more drastic remedy of a stay of proceedings, is in the interests, not only of the victims and of the international community as a whole who wish to see justice done, but also of the accused, who is potentially left in limbo, awaiting a decision on the merits of the case against him by the International Criminal Court or another court.<sup>241</sup>

Again, it is unfortunate that neither the Trial Chamber nor the Appeals Chamber clearly addressed the nature of the fairness at stake in this case. However, on the basis of the foregoing, it appears that the difference between the first and second stay of proceedings in the *Lubanga* case lies not so much in a changing attitude towards the role of public interest

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<sup>237</sup> *Lubanga* (n 158) para. 21. See also para. 31. It is not unusual for the same set of facts to raise both concerns. See in this regard Duff (n 165) 156–157.

<sup>238</sup> *Lubanga* (n 158) para. 20.

<sup>239</sup> *Lubanga* (n 158) para. 27.

<sup>240</sup> *Lubanga*, AC (n 57) para. 57: ‘The Appeals Chamber notes that the Trial Chamber did not impose the stay *solely* on the basis of the non-disclosure of the intermediary’s identity’ (emphasis added). Moreover, the remainder of the appeals decision focused on this issue.

<sup>241</sup> *Lubanga*, AC (n 57) para. 60.

ICC chambers have further endorsed ‘balancing’ in the context of Art. 69(7)(b) ICC Statute, pursuant to which chambers must determine whether evidence obtained in violation of the ICC Statute or of internationally recognised human rights seriously damages the integrity of the proceedings such as to require its exclusion. See e.g. *Lubanga*, PTC (n 115) para. 89 and *Lubanga*, TC (n 115) para. 42.

considerations in the determination of whether and, if so, which consequence to attach to a procedural violation, as in the differing nature of the fairness at stake in each case.<sup>242</sup>

Finally, the Trial Chamber's findings in *Lubanga* regarding the factors that may be taken into account in determining whether either of the limbs of Article 69(7) have been satisfied are worth reproducing here:

... the seriousness of the alleged crimes committed by the accused is not a factor relevant to the admissibility of evidence under Article 69(7). As set out in the Preamble and Article 1 of the [ICC] Statute, the Court has jurisdiction over the most serious crimes of international concern. Article 17(1)(d) of the [ICC] Statute renders cases inadmissible that do not possess sufficient gravity to justify further action by the Court. Therefore, the core crimes and the cases which justify "further action" by the Court will always be of high seriousness, *but the public interest in their prosecution and punishment cannot influence a decision on admissibility under this statutory provision*. Indeed, there is no basis with the Rome Statute framework generally for an approach that would allow the seriousness of the crimes to inform decisions as to the admissibility of evidence.<sup>243</sup>

The approach advocated in this article may not produce radically different *outcomes* to one in which rights and public interest considerations are pitted against one another as separate and competing considerations. Again, more often than not, it will be possible to provide protection against wrongful conviction and/or protect the integrity of the proceedings in other, less far-reaching ways than a stay of proceedings. What it recognises, however, is that rights and interests should be viewed in, and not divorced from, the context in which they are being exercised.<sup>244</sup> In criminal proceedings, therefore, both the rights themselves and the responses to the violation of such rights should be explicitly construed in accordance with broader objectives of criminal justice, which generally reflect both epistemic and non-epistemic considerations.<sup>245</sup> Merely referring to the right to a fair trial is insufficient since, as

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<sup>242</sup> But cf. Iontcheva Turner (n 125) 191 and 195.

<sup>243</sup> *Lubanga*, TC (n 115) para. 44 (emphasis added).

<sup>244</sup> Cf. Ashworth (n 176) 229 (emphasis added, footnote in original omitted): 'The term "balance" should be banned, because it is one of the most misleading words in the debate. It has been used by several proponents, including the Royal Commission on Criminal Justice and the Government, as a rhetorical device. Too often it has been claimed that a certain change should be introduced to "redress the balance", without proper supporting argument. On other occasions *the talk of balance suppresses the conflicting considerations that need to be resolved. The first step should be to ascertain what the aim of a given part of the criminal process is, and then to ascertain what rights ought to be accorded to suspects, defendants and victims. If there are conflicts, as there often are, then the justifications for the rights and their relative strength must be examined with care. To short-circuit this process with bland assertions of "balance" leads to sloppy reasoning.*'

<sup>245</sup> Thus Starr observes that: 'Of course, perhaps the rationale for strong remedial rules has never turned on the violation's being "as bad as the crime"' and that, rather, 'it may be about restraining the abuse of power'. According to Starr: 'We tolerate the occasional windfall to the major criminal because vigorous

was argued above, that right can be construed in different ways. In other words, neither rights nor (public) interests should be assessed in a vacuum.

It is of paramount importance that judges in international criminal proceedings clearly explain why they are attaching (certain) consequences to procedural violations, particularly where such consequences have the potential to be perceived by victim populations and the international community more generally as ‘letting the guilty go free on technicalities’. Not doing so leads to the risk of certain courses of action being misunderstood and to the perpetuation of the notion that rights and public interest considerations are per se separate and conflicting considerations. Identifying the rationales for attaching consequences to procedural violations is a necessary means to achieve understanding among participants and stakeholders in international criminal proceedings. Unfortunately, neither the ad hoc Tribunals nor the ICC have clearly identified rationales for doing so.<sup>246</sup> This in turn leads to confusion as to what the primary rationale(s) for responding to procedural violations is (or are), making it difficult for parties to challenge such (alleged) violations. Since different rationales may, potentially, lead to different outcomes, it is of paramount importance to identify the underlying (primary) rationale(s).<sup>247</sup> Thus, while an application for a stay of proceedings for the purpose of providing the accused with an effective, personal remedy for the violation of his or her rights is likely to be dismissed on account of weightier public interest considerations (particularly in the absence of a showing of ‘actual prejudice’ to the accused), an application for a stay for the purpose of protecting the accused against wrongful conviction or of protecting the moral integrity of the criminal justice system may, for the reasons set out above, not so easily be swept aside. Nevertheless, the accused may clearly benefit from a stay imposed for such reasons, and in this regard, it is important to distinguish between the (primary) *rationale(s)* for attaching consequences to procedural violations and the *effects* or *consequences* thereof.<sup>248</sup>

Finally, there is, of course, something deeply paternalistic about lawyers determining ‘what is in the public interest’. However, it is hardly controversial to suggest that we *all* have an interest in accuracy of verdict and in the moral integrity of the criminal justice system (or, as the case may be, in the rule of law being upheld<sup>249</sup>).<sup>250</sup> Indeed, while the public may be

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protection of defendants’ rights may deter the police from rounding up whoever they want and holding them for weeks at a time.’ Deterrence, she notes, is a ‘broader rule-of-law objective’. Starr (n 10) 758.

<sup>246</sup> See n 162–164 and accompanying text.

<sup>247</sup> See in this regard Ashworth (n 165) 734, as cited by Duff (n 165) 159.

<sup>248</sup> See e.g. Choo (n 23) 109; P. Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (Oxford: Oxford University Press, 1997) 22.

<sup>249</sup> See n 195.

quick to condemn judicial responses to procedural violations that are perceived as having the effect of ‘letting the guilty go free on technicalities’, it may be equally quick to condemn official misconduct resulting in the violation of procedural standards (and more besides).<sup>251</sup> Conversely, in view of the broader objectives of criminal justice, it is impossible for courts to *legitimately* take into account, i.e. include in a balancing exercise, any wish on the part of the public, including victim populations, to obtain a verdict *at any cost*. As Starr notes, ‘[i]f the right to a fair trial means anything, it is that the state (or international community) cannot have a legitimate interest in punishing an accused who has not been fairly convicted, no matter how serious the accusations.’<sup>252</sup> The same applies to any interest the public or court may have ‘in avoiding political backlash’,<sup>253</sup> at the expense of broader objectives of criminal justice. Viewing rights and (public) interests against the backdrop of the broader objectives of criminal justice, such as the protection against wrongful conviction and the protection of the moral integrity of the criminal justice system, makes it easier to distinguish such illegitimate interests from legitimate ones. Thus, it is important to not divorce rights from the context in which they are being exercised. Such objectives are just as ‘institutional’ as that of bringing to justice to perpetrators of mass atrocities. At the same time, it should not simply be assumed that the public, including victim populations, are incapable of understanding such objectives. While international criminal tribunals may, therefore, not be obliged to take into account any wishes on the part of the international community to see ‘justice done’ at any cost, they may be under a moral obligation to explain in clear terms why they are opting for a particular course of action in response to a procedural violation, what (legitimate) rights and interests underlie their decision, and how this accommodates the unique severity of the crimes falling within their jurisdiction.

#### D. Final concluding remarks

Judicial responses to procedural violations at the international criminal tribunals very much resemble those at the domestic level. Nevertheless, several authors have argued that the

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<sup>250</sup> See in this regard Duff ((n 165) 174–175): regarding the ‘public interest’ in the protection from the accused from wrongful conviction and in the protection of the moral integrity of the criminal justice system ‘the yardstick is not that of the reactionary, “redneck” tabloid reader but nearer that of the middle-class, broadsheet-reading liberal’.

<sup>251</sup> Choo (n 23) 106.

<sup>252</sup> Starr (n 10) 761.

<sup>253</sup> See Naymark (n 9 and n 10 and accompanying text). While Starr initially appears to entertain the idea that the two interests (in punishing an accused, no matter how serious the accusations and in avoiding political backlash) can be distinguished, she is nevertheless ‘reluctant to endorse’ the consideration of an interest ‘in avoiding political backlash’ as legitimate. Starr (n 10) 761.

unique severity of the crimes falling within the jurisdiction of such tribunals calls for a different, more ‘balanced’ approach to the determination of whether to attach consequences to procedural violations, and, if so, which. While it is difficult to argue with an approach that purports to be more balanced, any international(ized) criminal court or tribunal wishing to undertake such a balancing exercise should be mindful of the dangers of such an approach. In particular, it is important not to divorce any of the (legitimate) interests to be included in the exercise from the context in which they are being exercised: (international) criminal proceedings. When such interests are considered in this context, it becomes easier to reconcile seemingly competing interests, and to distinguish illegitimate interests from legitimate ones. The net result may be no different to a balancing approach in which rights and public interest considerations are pitted against each other as conflicting and competing considerations. However, an approach that takes into account broader objectives of (international) criminal justice may well promote understanding among the participants, including the parties, and stakeholders, including victim populations, in international criminal proceedings.