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The ICC Prosecutor’s Missing Code of Conduct

MILAN MARKOVIC*

Abstract

The intersection between legal ethics and international criminal law has largely been unexamined. This Article addresses the topic by focusing on certain controversial actions taken by the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC” or “Court”) in connection with the *Lubanga* and *Al-Bashir* cases.

Although the ICC has adopted codes of conduct for judges and defense counsel, the OTP has no specific ethics code. This is problematic because the ICC Statute imposes conflicting obligations on the ICC Prosecutor, and, as this Article will show, the Prosecutor has resolved his conflicting obligations in the *Lubanga* and *Al-Bashir* cases in ways that have undermined the ICC’s credibility.

A code of conduct cannot eliminate prosecutorial discretion. Nor can it ensure that ICC prosecutors always will act ethically. Nevertheless, this Article argues that the approach of relying on Chambers to determine whether the Prosecutor has acted appropriately has delayed proceedings and provides insufficient guidance to the OTP. A preferable approach would be to provide prospective guidance to the OTP in managing its conflicting duties through a code of conduct. This Article also proposes specific rules that may mitigate some of the conflicts that already have arisen in the ICC’s first cases.

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INTRODUCTION

International criminal trials are different from domestic trials in significant ways: the crimes for which defendants are tried are so heinous that they are of international concern,¹ the procedures used by international criminal tribunals are a hybrid of those found in common law and civil law countries,² and the tribunals themselves are staffed by lawyers and judges from a highly diverse group of nations and legal cultures.³ International criminal trials are also inherently political because

1. See *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, para. 49 (June 20, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc514860.pdf> ("After more than a hundred years of struggle, a permanent international criminal court has finally emerged as a unique symbol of the fight against impunity for the most heinous crimes of international concern."); see also Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute] ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." (emphasis omitted)).

2. Jens David Ohlin, *Meta-Theory of International Criminal Procedure: Vindicating the Rules of Law*, 14 UCLA J. INT'L L. & FOREIGN AFF. 77, 80–81 (2009).

3. Rep. of the Int'l Tribunal for the Prosecution of Persons Responsible for the Serious Violations of Int'l Humanitarian Law Committed in the Terr. of the Former Yugoslavia Since 1991, paras. 26–30, U.N. Doc. A/65/205-S/2010/413 (July 31, 2010). See also Rep. of the Int'l Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Int'l Humanitarian Law Committed in the Terr. of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Terr. of Neighboring States Between 1 Jan. and 31 Dec. 1994, paras. 15–19, U.N. Doc. A/65/188-S/2010/408 (July 30, 2010) (showing the composition of the Chambers to include jurists from no fewer than twenty-two different nations).

crimes such as genocide and crimes against humanity often implicate the policies of governments and rebel groups.⁴

Despite the proliferation of international criminal tribunals and the widespread recognition that international criminal trials are different, there has been relatively little analysis of whether the legal actors that comprise these tribunals should be subject to distinctive ethical rules.⁵ Existing ethical codes for defense counsel at the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) mirror domestic codes,⁶ and codes for prosecutors are brief and abstract.⁷ The International Criminal Court (“ICC” or “Court”) has adopted basic ethics codes for judges and defense counsel but has yet to promulgate any formal set of ethical rules for ICC prosecutors.⁸

This Article will analyze how the absence of an ethics code for the ICC Prosecutor has impacted the Court’s early cases. As this Article will demonstrate, the Prosecutor has conflicting duties under the ICC Statute, and the Prosecutor’s decisions as to how to fulfill his statutory obligations have caused “ugly and unhealthy” tensions⁹ with the Court’s Chambers¹⁰ and have brought controversy to the Court. This Article hopes to begin a dialogue concerning the importance of a code of conduct for the Office of the Prosecutor (“OTP”) and suggests specific rules that can help mitigate conflicts such as those that already have arisen in the Court’s early cases.

4. See Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 510 (2003) (explaining that the ICC has jurisdiction over “crimes of the utmost seriousness often committed by governments themselves, or with their tacit approval” and describing the cases adjudicated by the ICC as “infused with political implications”).

5. Notable exceptions are: Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. INT’L & COMP. L. REV. 139 (2007); Jenia Ioncheva Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT’L L. 685 (2010) [hereinafter Turner, *Legal Ethics*].

6. Compare U.N. Int’l Crim. Tribunal for the Former Yugoslavia, Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125 REV. 3, art. 11 (Aug 6, 2009), http://www.icty.org/x/file/Legal%20Library/Defence/defence_code_of_conduct_july2009_en.pdf, and U.N. Int’l Crim. Tribunal for Rwanda, Code of Professional Conduct for Defense Counsel, art. 6 (Mar. 14, 2008), <http://www.unict.org/Portals/0/English/Legal/Defence%20Counsel/English/04-Code%20of%20Conduct%20for%20Defence%20Counsel.pdf>, with MODEL RULES OF PROF’L CONDUCT R. 1.3 (2006).

7. The ethics codes for ICTR and ICTY Prosecutors are each four pages. See U.N. Int’l Crim. Tribunal for Rwanda, Standards of Professional Conduct for Prosecution Counsel, Prosecutor’s Regulation No. 2 (1999), http://www.unict.org/Portals/0/English/Legal/Prosecutor/reg_05.pdf; U.N. Int’l Crim. Tribunal for the Former Yugoslavia, Standards of Professional Conduct for Prosecution Counsel, Reg. No. 2 (Sept. 14, 1999), http://www.icty.org/x/file/Legal%20Library/Miscellaneous/otp_regulation_990914.pdf [hereinafter ICTY Standards]; see also *infra* Part I(C).

8. See THE SECRETARIATS OF THE INT’L ASS’N OF PROSECUTORS AND THE COAL. FOR THE INT’L CRIM. CT., CODE OF PROFESSIONAL CONDUCT FOR THE PROSECUTORS OF THE INTERNATIONAL CRIMINAL COURT, <http://www.amicc.org/docs/prosecutor.pdf> [hereinafter Draft OTP Code] (showing that only a draft code released in 2002 for peer review exists); Int’l Crim. Ct. Office of the Prosecutor, Draft Regulations of the Office of the Prosecutor, Book 2 (2005), <http://www.jura.uni-muenchen.de/fakultaet/lehrstuehle/satzger/materialien/istghdrre.pdf> (setting out regulations intended to complement the ICC Statute and the Rules of Procedure and Evidence).

9. Marlise Simons, *For International Criminal Court, Frustration and Missteps in First Trial*, N.Y. TIMES, Nov. 22, 2010, at A12 (quoting William Schabas).

10. The Court has three Chambers: a Pre-Trial Chamber, a Trial Chamber, and an Appeals Chamber. ICC Statute, *supra* note 1, art. 39.

Given the diversity of legal backgrounds in the OTP and the Court as a whole, it will be difficult to gather consensus as to what a code of conduct should look like and perhaps even what subjects should be addressed therein. Nevertheless, the enterprise of generating an OTP code of conduct is worthwhile and should be undertaken to provide some prospective guidance to prosecutors as to how to address ethical dilemmas that are likely to arise during international criminal trials.

In Part I, I address the structure of the OTP and the current framework for addressing misconduct by ICC prosecutors. I argue that notwithstanding the existence of certain basic staff rules that are applicable to all ICC staff with fixed-term appointments,¹¹ there is an urgent need for a code of conduct. This is because OTP lawyers come from diverse legal backgrounds and do not have a shared sense of how to resolve ethical issues, and because the goals of international criminal justice require that OTP attorneys be perceived as ethical. In Part II, I address conflicting duties that have already arisen in the trial of Thomas Lubanga Dyilo (“Lubanga”). These conflicts are (1) the Prosecutor’s duty to investigate versus his duty to disclose evidence and (2) his duty to act independently from Chambers versus his duty to obey orders therefrom. Although the Appeals Chamber has issued rulings on these issues, these rulings have not resolved how the Prosecutor should manage his conflicting duties in future cases. I propose specific conduct rules that will make serious disputes concerning disclosure and compliance with Chambers less likely to occur.

In Part III, I focus on the Prosecutor’s duty to act impartially versus his duty to secure cooperation from the international community in connection with the investigation and prosecution of ICC defendants. The OTP should not be precluded from speaking publicly about ICC defendants because the OTP must secure the cooperation of the public so that it can carry out its mandate to conduct investigations, prosecute crimes, and secure the presence of defendants before the Court. However, any statements made by the OTP should not be misleading or prejudicial to the defendant. Under the current ICC framework, the OTP’s public statements are essentially unregulated.

It is tempting to dismiss some of the OTP’s early difficulties as growing pains or even incompetence on the part of the current Prosecutor. However, as this Article will illustrate, the Prosecutor’s duties under the ICC Statute are often conflicting or unclear. Without a shared and detailed ethical framework for navigating these conflicts, the OTP could often find itself acting in ways that may be counterproductive to the ICC as a whole.

I. THE OTP AND THE IMPORTANCE OF LEGAL ETHICS

A. *The OTP and Its Current Disciplinary Framework*

The OTP is one of the four organs of the ICC along with Chambers, Registry, and Presidency.¹² Under the ICC Statute, the OTP is responsible for “receiving

11. Staff Rules of the International Criminal Court, Scope and Purpose, ICC-ASP/4/3 (Aug. 25, 2005), http://www.icc-cpi.int/NR/rdonlyres/56F9B14B-B682-4D9C-8762-A25B944FA214/140109/ICCASP43_English.pdf [hereinafter Staff Rules].

12. ICC Statute, *supra* note 1, art. 34.

referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.”¹³ The OTP is required to “act independently as a separate organ of the Court.”¹⁴ The OTP is led by the Prosecutor, who is elected by an absolute majority of the members of the Assembly of States Parties (“ASP”).¹⁵ Luis Moreno-Ocampo of Argentina has been the Prosecutor since the ICC began its day-to-day operations in June of 2003.¹⁶

The ICC Statute considers the Prosecutor’s ethical obligations only in general terms and as a part of his general qualifications. Article 42 states that the Prosecutor must be a person of “high moral character” and be “highly competent in and have extensive practical experience in the prosecution or trial of criminal cases.”¹⁷ The Statute also forbids the Prosecutor from “engag[ing] in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence”¹⁸ and “participat[ing] in any matter in which [his or her] impartiality might reasonably be doubted on any ground.”¹⁹

The ICC currently has no specific code of conduct for OTP prosecutors. The International Association of Prosecutors and the Coalition for the International Criminal Court proposed a draft code of conduct for prosecutors (“Draft OTP Code”) in 2002,²⁰ but it has not been adopted.²¹ The ICC has adopted a Code of Professional Conduct for Counsel (“Code for Counsel”), but it applies only to “defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses.”²² The ICC also has a Code of Judicial Ethics.²³ Other criminal tribunals have formulated codes of conduct specifically for prosecutors.²⁴

Although the ICC lacks a code of conduct for prosecutors, OTP attorneys, including the Prosecutor himself, may be subject to dismissal or sanction if they

13. *Id.* art. 42(1).

14. *Id.*

15. *Id.* art. 42(2), (4). *See also id.* art. 112 (the ASP is composed of one member from each of the State Parties to the Court).

16. *The Prosecutor*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Biographies/The+Prosecutor.htm> (last visited June 17, 2011). Prosecutor Moreno-Ocampo’s term expires in June 2012. *See* Press Release, Int’l Crim. Ct., Search Committee for ICC Prosecutor Takes Up Work, ICC-ASP-20110207-PR626 (Feb. 8, 2011), <http://www.icc-cpi.int/menus/asp/press%20releases/press%20releases%202011/search%20committee%20for%20the%20position%20of%20icc%20prosecutor%20takes%20up%20work?lan=en-GB>.

17. ICC Statute, *supra* note 1, art. 42(3).

18. *Id.* art. 42(5).

19. *Id.* art. 42(7).

20. Draft OTP Code, *supra* note 8.

21. *See ICC Activities, Codes of Conduct*, AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COAL. FOR THE INT’L CRIM. CT., http://www.amicc.org/icc_activities.html (scroll down to “Codes of Conduct”) (last visited July 17, 2011) (discussing the hope that a draft could be presented for consideration for adoption by the ICC).

22. Code of Professional Conduct for Counsel Appearing Before the International Criminal Court, Res. ICC-ASP/4/Res.1, art. 1 (Dec. 2, 2005), http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCAPSP432Res1_English.pdf [hereinafter Code for Counsel].

23. Code of Judicial Ethics, Res. ICC-BD/02-01-05 (Mar. 9, 2005), http://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf.

24. For a discussion of the ICTY’s adoption of standards for prosecutors, *see infra* Part I(C).

violate the Staff Rules of the ICC (“Staff Rules”).²⁵ One of the Prosecutor’s responsibilities is to determine whether OTP staff members have violated the Staff Rules and what disciplinary measures should be imposed.²⁶ He is advised in this capacity by the Disciplinary Advisory Board, which can take evidence and make recommendations.²⁷

The Staff Rules include provisions concerning independence,²⁸ confidentiality,²⁹ and conflicts of interest.³⁰ These rules are general in scope. For example, Staff Rule 101.6, which concerns conflicts of interest, merely states that “[s]taff members shall abstain from any conduct which may be directly or indirectly in conflict with the discharge of their official duties.”³¹ Similarly, Staff Rule 101.3(i) states:

[S]taff members shall ensure that [their personal] views and convictions do not adversely affect their official duties or the interest of the Court. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the Court. They shall avoid any action, in particular any kind of public pronouncement, that may adversely reflect on their status or on the integrity, independence and impartiality that are required by that status.³²

The Staff Rules are not directed specifically at OTP attorneys³³ and would also appear to be difficult to enforce against OTP attorneys without a normative framework against which conduct can be judged. For example, without clearly articulated standards of what level of “integrity, independence and impartiality” is required of OTP attorneys, it will be difficult to adjudicate whether a particular “public pronouncement” could adversely impact a prosecutor’s “integrity” or “status” under the Staff Rules.

In addition, although the Staff Rules nominally apply to all staff holding fixed-term appointments,³⁴ it is questionable whether they will actually be applied against the Prosecutor or Deputy Prosecutor. The Prosecutor can be disciplined by the Bureau of the Assembly of States Parties (“Bureau of the ASP”) with reprimands or fines.³⁵ The Prosecutor is authorized to reprimand the Deputy Prosecutor; any fine

25. Staff Rules, *supra* note 11, R. 110.6.

26. *Id.* R. 110.6, 110.7.

27. The Disciplinary Advisory Board consists of three members, one appointed by the Registrar, one appointed by the Prosecutor, and one elected by the staff representative body. *Id.* R. 110.3(a), 110.4(b), (d)–(e).

28. *Id.* R. 101.3(a)–(b).

29. *Id.* R. 101.4.

30. *Id.* R. 101.6.

31. Staff Rules, *supra* note 11, R. 101.6(a).

32. *Id.* R. 101.3(i).

33. *See id.* Scope and Purpose (“These Staff Rules apply to *staff members* of the Court holding a fixed-term appointment.” (emphasis added)).

34. *Id.*

35. International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3, R. 30(2), 32 (Sept. 9, 2002), http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf [hereinafter ICC Rules]. “The Bureau of the Assembly consists of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.” *Bureau of the Assembly*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ASP/Bureau> (last visited Oct. 29, 2011).

must be recommended by the Prosecutor and approved by an absolute majority of the Bureau of the ASP.³⁶ Only an absolute majority of the ASP has the power to remove the Prosecutor from office.³⁷ The same applies to the Deputy Prosecutor, with the additional requirement that the Prosecutor must have recommended removal.³⁸ To be removed, the Prosecutor or Deputy Prosecutor must have “committed serious misconduct or a serious breach of his or her duties under the Statute . . . or [be] unable to exercise the functions required by this Statute.”³⁹ The ICC Rules of Procedure and Evidence (“ICC Rules”) define “serious misconduct” as conduct that is “incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court.”⁴⁰ The Prosecutor or Deputy Prosecutor commits a “serious breach of duty” when he or she “has been grossly negligent in the performance of his or her duties or has knowingly acted in contravention of those duties.”⁴¹

The ICC Rules lists several illustrative examples of “serious misconduct” and “serious breach of duty.”⁴² The ICC Statute and ICC Rules do not specifically define a violation of the Staff Rules as “serious misconduct” or “a serious breach of duty,” which tends to suggest that a violation of the Staff Rules alone will not necessarily serve as a basis for the ASP to remove either the Prosecutor or Deputy Prosecutor. The Bureau of the ASP also could impose a reprimand or fine for a violation of the Staff Rules if it determines that the violation constitutes misconduct of “a less serious nature.”⁴³ But this assumes that the ASP and Bureau of the ASP are familiar with the Staff Rules and are actively monitoring the Prosecutor and Deputy Prosecutor’s compliance therewith.⁴⁴

Beyond the Staff Rules and general prohibitions against misconduct and breach of duty, OTP attorneys currently operate under no formal ethical constraints in carrying out their day-to-day duties at the Court. As explored in the next section, this is problematic because OTP prosecutors likely will have very different intuitions as to how to fulfill their duties under the ICC Statute.

B. *Why Is a Code of Conduct Needed?*

Given the existence of disciplinary mechanisms that allow for the removal of OTP attorneys and even the Prosecutor himself, it is perhaps understandable that the

36. ICC Rules, *supra* note 35, R. 30(3).

37. ICC Statute, *supra* note 1, art. 46(2)(b).

38. *Id.* art. 46(2)(c). The Prosecutor has the authority to reprimand the Deputy Prosecutor, but any fine imposed must be approved by an absolute majority of the Bureau of the Assembly of States Parties. ICC Rules, *supra* note 35, R. 30(3).

39. ICC Statute, *supra* note 1, art. 46(1)(a)–(b).

40. ICC Rules, *supra* note 35, R. 24(1)(a).

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

42. *Id.* R. 24(1)–(2).

43. ICC Statute, *supra* note 1, art. 47; ICC Rules, *supra* note 35, R. 30, 32.

44. Professor Danner has suggested that the ASP is likely to be divided because of internal policy disputes and that similar bodies have been unable to provide strong oversight over other international legal organizations. See Danner, *supra* note 4, at 524 (explaining that the ASP will not be a sufficient mechanism of accountability and “likely will have little impact on a prosecutor who is simply ineffective or demonstrates poor judgment”).

OTP has not prioritized formulating a code of conduct. However, disciplinary mechanisms are not a substitute for a fully conceived code of conduct that would govern the day-to-day practice of OTP lawyers. The importance of ethical rules is that they reflect lawyers' respect for the rule of law and consequently can help legitimate their actions. As Professors Hazard and Dondi have suggested, "[I]f the rule of law requires lawyers, lawyers also require rules for their governance. . . . [T]he rules of professional ethics constitute the normative regime to which . . . lawyers look to in assessing the character of a lawyer's participation in the rule of law."⁴⁵ Currently observers cannot assess whether OTP attorneys are acting appropriately because of the minimal guidance provided by the ICC Statute concerning the Prosecutor's ethical obligations. An OTP code of conduct would also give other organs of the Court, particularly Chambers, a better sense of how the OTP interprets its obligations.

ICC prosecutors likely require ethical rules more than domestic prosecutors do. The OTP, like the Court as a whole, is composed of individuals from widely divergent backgrounds in terms of nationality and legal culture.⁴⁶ There are some obvious advantages to this. The representativeness of the OTP tends to at least somewhat undercut claims that the OTP acts predominately in the interests of powerful nations.⁴⁷ OTP attorneys also may be less prone to "groupthink," because they are likely to approach legal problems from different perspectives and legal backgrounds.⁴⁸

Nevertheless, because the ICC system is *sui generis*, one would expect that the OTP would struggle with how to balance its various obligations under the ICC Statute.⁴⁹ The OTP cannot draw on a shared legal culture to resolve good faith disputes as to how the Prosecutor should act in a given situation.⁵⁰ Domestic ethical codes vary, and there may be disagreements within the OTP as to whether an ethical problem even exists, with some potentially taking the view that the only relevant question is one of litigation strategy.⁵¹ A code of conduct specific to the OTP would

45. GEOFFREY HAZARD & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY 2* (2004).

46. The ICC Statute requires, for example, that the Prosecutor and the Deputy Prosecutor be of different nationalities. ICC Statute, *supra* note 1, art. 42(2).

47. The ICC often has been criticized for serving the interests of European countries and acting as a "[c]ourt for Africa." Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163, 175 (2011) (quoting HUMAN RIGHTS WATCH, *COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEAR* 44–45 (July 2008), available at <http://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf>). See also Lars Waldorf, *A Mere Pretense of Justice: Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal*, 33 FORDHAM INT'L L.J. 1221, 1275 (2010) (noting that the post-Nuremberg justification of international criminal tribunals rests "on claims that they are more impartial (i.e., more cosmopolitan) than national tribunals and domestic criminal law").

48. For a seminal discussion of lawyers and group dynamics, see Donald Langevoort, *Where Were the Lawyers?*, 46 VAND. L. REV. 76, 105–08 (1993).

49. Professor Byrne has made a similar argument with respect to "the basic choreography of international trial practice." Rosemary Byrne, *The New Public International Lawyer and the Hidden Art of International Trial Practice*, 25 CONN. J. INT'L L. 243, 248 (2010) ("For practitioners, national codes of procedure and evidence reflect, rather than create, deeply rooted conceptions of process. . . . In the international context . . . rules of procedure and evidence have the daunting task of creating, rather than reflecting, a shared and coherent conception of process and professional roles.").

50. See *id.* at 252–53 (noting that "[i]n the international trial, players with divergent training and origins rotate, as do the varied expectations about process, justice, and the respective roles of legal actors").

51. As discussed *infra* Part II(B), an example of this phenomenon is the possible tension between the Prosecutor's duty to obey orders from Chambers and the risk that following those orders will cause him to

provide a common framework for conceptualizing the Prosecutor's obligations under the ICC Statute. In the absence of such a framework, individual OTP attorneys may either follow their domestic codes of conduct (to the extent their home nations have codes of conduct) or merely follow their individual sense of what is ethical. Alternatively, OTP attorneys may simply defer to the instructions of the Prosecutor and Deputy Prosecutor inasmuch as they cannot express any ethical concerns that they may have in terms of a shared OTP code of conduct.

Another reason that a code of conduct would be particularly valuable for the OTP is the natural tendency of prosecutors to sympathize with victims of crimes at the expense of ICC defendants. To be sure, this is a familiar phenomenon in many domestic systems as well.⁵² However, as Professor Turner has suggested, the phenomenon may be more pronounced in international criminal trials because the "exceptional severity and magnitude of international crimes tends to magnify the desire to protect victims' interests."⁵³ What is more, many actors who tend to advocate for protecting defendants' rights against government abuses at the domestic level are among the most vocal advocates for prosecuting defendants at the international level.⁵⁴ Even if states and non-governmental organizations may have the ability to act as a check on prosecutorial overreach,⁵⁵ they may choose not to act when the Prosecutor's actions are predominately harming the interests of defendants. In addition, the OTP's investigative activities—largely occurring in war-torn regions—occur with minimal oversight from the Court's other organs,⁵⁶ and defendants' interests may not be adequately safeguarded during these investigations.⁵⁷

Lastly, international criminal law is not only concerned with prosecuting the guilty but also with contributing to reconciliation at the national level by creating a historical record and educating those who have been affected by crimes of war,⁵⁸

violate one of his duties under the ICC Statute, thus risking sanction.

52. Turner, *Legal Ethics*, *supra* note 5, at 696.

53. *Id.*

54. *Id.* See also Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 930 (2008) ("Many traditionally liberal actors (such as non-governmental organizations or academics), who in a national system would vigilantly protect defendants and potential defendants, are among the most strident pro-prosecution voices . . .").

55. See Danner, *supra* note 4, at 525 (noting that "the ICC Prosecutor will be accountable to a variety of entities, including states that are not party to the treaty, and other actors such as NGOs").

56. See Michele Caianiello, *Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, 36 N.C. J. INT'L L. & COM. REG. 287, 313 (2011) ("[O]nly the prosecutor knows the entirety of the evidence gathered by his office before trial. Judges cannot search in the prosecutors' files to gather more information relevant to a case.").

57. See *id.* at 295–97 (noting that the OTP has several structural advantages over defense counsel during the investigation phase of ICC trials); see also Elena Baylis, *Outsourcing Investigations*, 14 UCLA J. INT'L L. & FOREIGN AFF. 121, 145 (2009) ("NGOs and other third parties are rarely directing their efforts at producing compelling exculpatory evidence for international criminal defendants . . .").

58. See Turner, *Legal Ethics*, *supra* note 5, at 696–97 (summarizing that the goals of "compiling an accurate historical record, spreading a message of respect for human rights, promoting peace and reconciliation, and giving voice to victims" have helped shape international criminal proceedings). Such goals generally fall under the rubric of transitional justice. See Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79, 90–92 (2010) (describing transitional justice and explaining that "[c]onsiderations of the past, such as recognition of the past atrocities, restitution for victims, and retribution against certain wrongdoers, are important primarily as a means . . . of achieving a peaceful future").

because situations of mass violence are often accompanied by “mass denial.”⁵⁹ Scholars also have claimed that international criminal trials have the potential to demonstrate to post-conflict societies how to fairly and impartially adjudicate even horrific crimes.⁶⁰ These transitional justice goals are important for the ICC in particular because it is concerned only with “the most serious crimes of concern to the international community as a whole”⁶¹ and therefore anticipates that the vast majority of war crimes will be adjudicated in the nations where they occurred.⁶² To the extent that the Prosecutor acts in ways that are perceived as unethical—regardless of whether or not his acts can be justified under the ICC Statute—the educative and demonstrative purposes of ICC trials are undermined.⁶³

Given the amount of time taken to reach a consensus as to the ICC Statute, the process of formulating and adopting an agreed-upon code of conduct for the OTP may also be controversial and time-consuming.⁶⁴ Nevertheless, the ICC has been able to adopt codes of conduct for defense counsel and other non-OTP attorneys who appear before the Court, as well as the Court’s judges.⁶⁵ Although one can question whether these codes of conduct provide sufficient guidance, ICC prosecutors are the Court’s only legal actors that are currently not subject to a discrete set of ethical rules.

In the next section, I explain why the code of conduct should be designed specifically with OTP prosecutors in mind and should not necessarily match the codes of conduct that have been formulated by other international criminal tribunals.

C. *A Detailed Code of Conduct for ICC Prosecutors*

Unlike the ICC, other international criminal tribunals have formulated and adopted codes of conduct for prosecutors.⁶⁶ In adopting its own Standards of Professional Conduct (“ICTY Standards”) in 1999, the Prosecutor’s Office of the

59. Galbraith, *supra* note 58, at 88.

60. See Jane Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT’L L. 251, 262 (2007) (“Accountability proceedings can contribute to strengthening the rule of law in post-conflict societies through their demonstration effects.”); see also Marieke Wierda, *Comparison of the Legacy of the Special Court for Sierra Leone and the ICC Intervention in Uganda From a Practical Perspective*, 103 AM. SOC’Y INT’L L. PROC. 218, 220–21 (2009) (noting the positive effects that the ICC’s involvement in Uganda has had on the domestic legal system).

61. ICC Statute, *supra* note 1, art. 5(1).

62. See Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, 22 AM. U. INT’L L. REV. 539, 543–44 (2007) (discussing the ICC’s role as a “court of last resort”).

63. See ICTY Standards, *supra* note 7, art. 1 (“[P]rosecutors . . . represent the international community . . . and standards and rules concerning the performance of their important responsibilities should promote principles of fairness and professionalism.”).

64. See Philippe Kirsch, *Preface to the First Edition of COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* at xxxvii (Otto Triffterer ed., 2008) (noting that negotiations to establish the ICC began in 1988 and that the ICC Statute was adopted by the United Nations Diplomatic Conference ten years later).

65. See *supra* notes 22–23 and accompanying text.

66. ICTY Standards, *supra* note 7; Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (May 14, 2005), <http://www.sc-sl.org/LinkClick.aspx?fileticket=IbTonPmXLHk%3d&tabid=176>; Int’l Crim. Tribunal for Rwanda, Prosecutor’s Regulations no. 2 (Oct. 21, 1999), Standards of Professional Conduct: Prosecution Counsel, http://unictr.org/Portals/0/English/Legal/Prosecutor/reg_05.pdf.

International Criminal Tribunal for the former Yugoslavia (“ICTY”) noted the existence of codes of conduct for defense counsel and found that “it is desirable that the standards of professional conduct of prosecution counsel should also be clearly set out and understood.”⁶⁷ The Prosecutor’s Office also specifically established that the ICTY Standards would prevail over inconsistent domestic codes of conduct.⁶⁸

Although the ICC can certainly look to the codes of conduct of other international criminal tribunals, it would be imprudent for the OTP to simply import their standards.⁶⁹ The ICC’s structure is different from that of *ad hoc* international criminal tribunals such as the ICTY in important ways. For example, the ICTY has a limited mandate to only adjudicate crimes committed in the former Yugoslavia and has been criticized for being unconcerned with outreach and the instilling of the rule of law in the former Yugoslavia.⁷⁰ Conversely the ICC is a permanent court⁷¹ that is intended to foster “lasting respect for . . . the enforcement of international justice”⁷² and specifically contemplates that the vast majority of war crimes will be prosecuted domestically.⁷³

The ICC Prosecutor’s role is also unique. The Prosecutor is required, “[i]n order to establish the truth, . . . [to] investigate incriminating and exonerating circumstances equally.”⁷⁴ The ICTY Prosecutor has no such obligation under the ICTY Statute.⁷⁵ More broadly, ICTY prosecutors have been criticized for excessive adversarialism that “gives rise to bitter and sometimes imbalanced contests between the prosecutor and defence counsel that may end up occluding the truth,”⁷⁶ whereas the role of the ICC prosecutor is more in accordance with the civil law tradition, which sets as a prosecutor’s ultimate goal the establishment of truth.⁷⁷

67. ICTY Standards, *supra* note 7, art. 1.

68. *Id.* art. 3.

69. This raises the issue of whether the movement of attorneys between the various criminal tribunals may be problematic from the perspective of legal ethics. These attorneys may bring with them useful investigative skills and practical experience but may also inadvertently bring ethical views and practices that do not comport with the ICC’s ideals.

70. See Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT’L CRIM. JUST. 89, 95–96 (2009) (criticizing the ICTY’s outreach and noting that the ICTY has not improved the legal systems of the former Yugoslavia); David Tolbert, *The International Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. OF WORLD AFF. 7, 13 (Summer/Fall 2002) (noting that the ICTY’s work was subject to “gross distortions” in the former Yugoslavia because of its lack of emphasis on educating the people of the region).

71. ICC Statute, *supra* note 1, art. 1.

72. *Id.* Preamble.

73. See *supra* note 62.

74. ICC Statute, *supra* note 1, art. 54(1)(a).

75. See COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1080 n.14 (Otto Triffterer ed., 2008) [hereinafter Triffterer] (noting that this requirement is not present in the ICTY Statute).

76. Jerome de Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?*, 5 J. INT’L CRIM. JUST. 402, 404 (2007). See also *id.* at 408 (“[R]ather than trying to depict the truth as precisely as possible, the [ICTY] prosecutor often seeks above all to win his case, and therefore presents it in a manner that may sometimes seem partial, in both senses of the term.”).

77. Triffterer, *supra* note 75, at 1078. See also ICC Statute, *supra* note 1, art. 54(1)(a) (identifying the Prosecutor’s broad objective as establishing the truth).

Of course, even if the ICC were to adopt a code of conduct that recognizes the unique duties and responsibilities of the ICC Prosecutor, the code of conduct could not eliminate the possibility of good faith disagreements within the OTP as to how to proceed in a given situation. Indeed, because of the differences in legal backgrounds among OTP attorneys, different attorneys may interpret provisions of the code of conduct differently. Nevertheless, if the ICC were to formulate a comprehensive code of conduct, it would serve as a common starting point for ethical deliberation and, if sufficiently specific, would lower the likelihood of major ethical disagreements within the OTP.

The ICTY's standards for prosecutors consist of four pages and contain vague and abstract language.⁷⁸ The ICC may wish to consider providing detailed guidance to ICC prosecutors as to how to conceive of their conflicting duties under the ICC Statute in order to ensure that there is some continuity in the practices of the OTP over time.⁷⁹ While the Prosecutor should be afforded some latitude to shape the ethics of the OTP, the other organs of the Court would benefit from a clearer sense of which actions are permissible for OTP prosecutors to take and which are not. Indeed, as described in the next sections, if the Prosecutor is afforded too much discretion in determining how to prioritize his duties under the ICC Statute, he may act in ways that, while arguably consistent with the ICC Statute, do not fully take into account the interests of the ICC as a whole. This is illustrated by the Prosecutor's attempts to resolve his conflicting duties to (1) investigate versus disclose evidence; (2) act independently from Chambers versus obey orders therefrom; and (3) bring defendants to justice versus act impartially. The first two conflicts arose in the *Lubanga* trial while the last arose in connection with the Prosecutor's securing of an arrest warrant for Sudanese President Omar Hassan Ahmad Al-Bashir.

II. CONFLICTING DUTIES AND THE *LUBANGA* TRIAL

Thomas Lubanga Dyilo is a national of the Democratic Republic of the Congo ("DRC") and the alleged founder and commander-in-chief of the *Union des Patriotes Congolais* ("UPC") and the *Forces Patriotiques pour la Libération du Congo* ("FPLC").⁸⁰ The Prosecutor charged Mr. Lubanga with war crimes under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the ICC Statute for the enlistment and conscription of children into the UPC and FPLC in connection with the Ituri conflict in the DRC.⁸¹ Mr. Lubanga first appeared before the ICC on March 20, 2006, but his actual trial did not begin until January 26, 2009.⁸²

The Trial Chamber was forced to repeatedly delay the start of the *Lubanga* trial because of the Prosecutor's decision to not disclose potentially exculpatory

78. See, e.g., ICTY Standards, *supra* note 7, R. 2(b) (stating that prosecution counsel are expected to "maintain the honour and dignity of the profession and conduct themselves accordingly with proper decorum").

79. In this regard, it is noteworthy how detailed the ICC's other texts are. The ICC Statute has 128 articles and there are 225 rules of evidence and procedure. See generally ICC Statute, *supra* note 1; ICC Rules, *supra* note 35.

80. *Lubanga Case*, COAL. FOR THE INT'L CRIM. CT., <http://www.coalitionfortheicc.org/?mod=drctimelinelubanga> (last visited Oct. 8, 2011); *Thomas Lubanga*, THE HAGUE JUSTICE PORTAL, <http://www.haguejusticeportal.net/eCache/DEF/8/156.html> (last visited Oct. 8, 2011).

81. *Lubanga Case*, *supra* note 80; *Thomas Lubanga*, *supra* note 80.

82. *Lubanga Case*, *supra* note 80.

documents.⁸³ The Chamber also stayed the trial after the Prosecutor failed to comply with an order that he disclose the identity of an intermediary who had contacted witnesses on the Prosecutor's behalf.⁸⁴

A. *The Delay of the Lubanga Trial and the Duties of Investigation and Disclosure*

1. The Stay of Proceedings

The Trial Chamber was forced to stay the *Lubanga* trial in June 2008 because of the Prosecutor's non-disclosure of potentially exculpatory documents to the defense.⁸⁵ The Prosecutor had obtained the documents from third parties, including the United Nations,⁸⁶ pursuant to Article 54(3)(e) of the ICC Statute, which provides:

The Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.⁸⁷

As a result of the confidentiality agreements, the Prosecutor was unable to disclose more than 200 documents that contained potentially exculpatory information,⁸⁸ including "evidence indicating that [Lubanga] suffered from a mental condition;" information that he may have acted under duress, compulsion, or in self-defense; and information that he "had insufficient command over people who committed the crimes with which he [was] charged."⁸⁹

In deciding to stay Mr. Lubanga's trial, the Trial Chamber held that (i) the disclosure of exculpatory evidence is a fundamental aspect of a defendant's right to a fair trial; (ii) the Prosecutor had incorrectly used Article 54(3)(e) such that a significant body of exculpatory materials that would otherwise have been disclosed was withheld; and (iii) the Trial Chamber was prevented from determining whether the Prosecutor had violated Mr. Lubanga's right to a fair trial because the Trial Chamber had been unable to inspect the materials on account of the confidentiality agreements.⁹⁰ The Trial Chamber concluded that under these circumstances "the trial process [had] been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial"⁹¹ and ordered Mr. Lubanga's release.⁹² The Trial Chamber did, however, give leave to the Prosecutor to appeal its judgment and stayed its order to release Mr. Lubanga pending the appeal.⁹³

83. *Id.*

84. *Id.*

85. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1486, Judgment on Appeal of Disclosure Decision, para. 6 (Oct. 21, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf>.

86. *Id.* para. 21.

87. ICC Statute, *supra* note 1, art. 42(3).

88. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 21.

89. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1401, Decision on Non-Disclosure, para. 22 (June 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc511249.pdf>.

90. *Id.* paras. 92, 94.

91. *Id.* para. 93.

92. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1418, Decision on the Release of Thomas

The Appeals Chamber concurred with the Trial Chamber that Mr. Lubanga's right to a fair trial would be violated if the Prosecutor could withhold potentially exculpatory documents obtained pursuant to Article 54(3)(e).⁹⁴ The Appeals Chamber did not order the Prosecutor to disclose the exculpatory documents to the defendant, however, but held that the Prosecutor should disclose the documents to the Trial Chamber so that it could determine whether the documents would need to be provided to the defense.⁹⁵ If the Trial Chamber determined that disclosure was required, the Prosecutor would have to seek the consent of the information providers to disclose the documents.⁹⁶ If the Prosecutor could not obtain the requisite consents, the Chamber could decide what measures should be taken to preserve a fair trial without the disclosure of the relevant documents.⁹⁷ Since the Prosecutor had disclosed some of the potentially exculpatory documents to the Trial Chamber while the appeal was pending, and the information providers had indicated a newfound willingness to allow some of the information contained in the documents to be shared with the defense,⁹⁸ the Appeals Chamber, over the objection of one judge, reversed the order to release Mr. Lubanga.⁹⁹ By November 2008, the Prosecutor was able to disclose all of the potentially exculpatory documents to the defense, and the Trial Chamber lifted its stay.¹⁰⁰

2. Confidentiality Agreements and the Duty to Investigate

Although the disclosure dispute did not end the *Lubanga* trial, the Prosecutor clearly over-relied on confidentiality agreements to build his case against Mr. Lubanga. By its express terms, Article 54(3)(e) is supposed to be used to obtain information that can assist the Prosecutor in generating evidence; instead, the Prosecutor used the provision to directly obtain evidence.¹⁰¹ Fifty-five percent of the materials that the Prosecutor obtained in the DRC investigation had been provided under Article 54(3)(e), and 8,000 documents specific to the *Lubanga* trial were subject to confidentiality agreements.¹⁰² The OTP could not have reasonably

Lubanga Dyilo, para. 35 (July 2, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc522804.pdf>.

93. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1417, Decision on Leave to Appeal, para. 32 (July 2, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc522803.pdf>.

94. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 95.

95. *Id.* para. 3.

96. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 48. *See also* ICC Rules, *supra* note 35, R. 82(1) ("Where material or information is in the possession or control of the Prosecutor which is protected under Article 54, paragraph 3(e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information . . .").

97. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 48.

98. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1487, Judgment on Appeal of Release Decision, paras. 41, 44, 45 (Oct. 21, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc578365.pdf>.

99. *Id.* para. 41.

100. Transcript of Status Conference at 3–4, Prosecutor v. Lubanga, ICC-01/04-01/06-T-98 (Nov. 18, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc586028.pdf>; Rachel Katzman, *The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial*, 8 NW. J. INT'L HUM. RTS. 77, 78 (2009).

101. *See* Kai Ambos, *Confidential Investigations (Article 54(3)(e) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law*, 12 NEW CRIM. L. REV. 543, 554–56 (2009) (describing the "irresolvable conflicts" generated when Article 54(3)(e) is used to gather direct evidence).

102. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 32.

expected that none of these documents would have to be disclosed to the defense.¹⁰³ Indeed, the ICC Statute takes a broad view of the Prosecutor's duty to disclose evidence:

[T]he Prosecutor shall . . . 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.¹⁰⁴

Moreover, the Prosecutor did not appear to take his disclosure obligations sufficiently seriously.¹⁰⁵ The issue of the Prosecutor's failure to provide exculpatory documents obtained on the condition of confidentiality to the defense first arose before the Pre-Trial Chamber in September 2006,¹⁰⁶ and the Trial Chamber suspended the start of the *Lubanga* trial to afford the Prosecutor additional time to obtain the consent of the information providers to disclose the documents.¹⁰⁷ The Prosecutor received permission to disclose the documents to the defense only on the eve of the Appeals Chamber judgment on the issue,¹⁰⁸ suggesting that the Prosecutor may have been less concerned with Mr. Lubanga's right to receive exculpatory information than with the prospect of his release.¹⁰⁹ At a minimum, it appears that the Prosecutor may not fully have sought to persuade information providers to waive confidentiality until Mr. Lubanga's release was imminent.

However, it would be a mistake to dismiss the Prosecutor's decision to use confidentiality agreements as mere prosecutorial overreach. The Prosecutor has described the power to enter into confidentiality agreements with individuals and organizations located in countries where he is investigating as "the core of the Prosecution's ability to fulfill its mandate."¹¹⁰ The Appeals Chamber has agreed that Article 54(3)(e) was an important investigative tool for the Prosecutor, particularly with respect to investigations in countries such as the DRC that are dangerous for

103. See Heikelina Verriijn Stuart, *The ICC in Trouble*, 6 J. INT'L CRIM. JUST. 409, 414 (2008) ("When the OTP . . . agrees to confidentiality in relation to virtually all provided materials, which are furthermore not obtained for the sole use as [a] springboard to find new evidence, the core role of the judges to guarantee a fair trial and to be the custodian of the custodians, has become moot."). Cf. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2006) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice.").

104. ICC Statute, *supra* note 1, art. 67(2). This duty becomes even greater if the Prosecutor intends to use the materials at trial. See ICC Rules, *supra* note 35, R. 77 ("The Prosecutor shall . . . permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for purposes of the confirmation hearing or at trial.").

105. Professor Ambos has suggested that the OTP simply did not give much thought to what documents would have to be disclosed in its haste to collect information with respect to its investigation. Ambos, *supra* note 101, at 551–52.

106. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 86.

107. *Id.* para. 8 (Pikis, J., separate opinion).

108. Katzman, *supra* note 100, at 85.

109. See also *id.* at 97 ("It remains unclear . . . why the OTP and the information providers took so long to reach a viable solution.").

110. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 25 (quoting a submission of the Prosecutor).

the Prosecutor to enter.¹¹¹ In fact, the Prosecutor's investigation occurred during an active armed conflict, necessitating reliance on third parties to suggest leads, identify potential witnesses, and directly provide evidence in some cases.¹¹² Commentators have supported the Prosecutor's view of the central importance of his powers under Article 54(3)(e).¹¹³

Indeed, it is likely that the OTP will have to continue to rely on information providers, many of whom may expect confidentiality, in future investigations¹¹⁴ because the OTP does not have the capacity or resources to conduct full, intensive investigations with respect to every conflict before the Court.¹¹⁵ Nor does it have its own police force.¹¹⁶ While prosecutors at the *ad hoc* tribunals have been able to obtain access to crime scenes, the OTP cannot even enter certain countries that it is investigating, such as Sudan.¹¹⁷ For these reasons, the Prosecutor has no choice but to rely on individuals and organizations that are familiar with the region to provide information.

If the Prosecutor cannot provide assurances to information providers, they may refuse to assist him due to safety concerns, which could imperil his ability to gather evidence (whether it happens to be inculpatory or exculpatory to ICC defendants).¹¹⁸ In particular, the United Nations and human rights groups—such as those that had provided much of the confidential information in the *Lubanga* case¹¹⁹—may cease acting as sources of information because they may be subject to reprisals if their assistance to the ICC Prosecutor were to become public. For example, Mona Rishmawi, the Legal Advisor for the Office of the U.N. High Commissioner for Human Rights, has warned that, “[g]iven the nature of the UN operations on the ground, the nature of the crimes within the ICC jurisdiction, and the limited ability of the ICC at this stage to carry out serious witness protection work, [disclosure of

111. *Id.* para. 42. See also BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, 2009 HUMAN RIGHTS REPORTS: DEMOCRATIC REPUBLIC OF THE CONGO (2010) (commenting on the DRC's poor human rights record and serious abuses of security forces).

112. See Stuart, *supra* note 103, at 414 (describing the difficulties of collecting reliable evidence during an armed conflict); Alex Whiting, *Lead Evidence and Discovery Before the International Criminal Court: The Lubanga Case*, 14 UCLA J. INT'L L. & FOREIGN AFF. 207, 210 (2009) (same).

113. See, e.g., Triffterer, *supra* note 75, at 1086 (“Without ensuring the confidentiality of information, confidence in the integrity of the Prosecutor's work would be quickly undermined and the ability of the Prosecutor to prepare and prosecute cases would grind to a halt.”); Whiting, *supra* note 112, at 227–30 (noting that without Article 54(3)(e), witnesses would be reluctant to provide evidence in the midst of ongoing conflicts and the ICC has no direct access to evidence in certain countries).

114. See Whiting, *supra* note 112, at 231 (noting that disputes concerning disclosure and confidentiality of information are likely to occur in future cases).

115. See Brian D. Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553, 556 (2010) (“There is no question, of course, that the Prosecutor, handicapped by limited resources and confronting a myriad of situations throughout the globe that may involve crimes within the Court's jurisdiction, faces challenging dilemmas”); see also Triffterer, *supra* note 75, at 1078 (“It is unlikely that the Prosecutor would be able to perform [his] functions successfully without enlisting the assistance of Governments.”).

116. Baylis, *supra* note 57, at 122 (“Lacking its own police force, the ICC depends on state cooperation to conduct its investigations, enforce arrest warrants, and carry out other basic functions.”).

117. Whiting, *supra* note 112, at 230.

118. See Ambos, *supra* note 101, at 567 (noting that sources of information would “dry up” without Article 54(3)(e)).

119. Whiting, *supra* note 112, at 208.

material obtained under Article 54(3)(e)] could seriously hamper the flow of information.”¹²⁰

Although prosecutors in domestic settings are frequently faced with the question of what should be disclosed to the defense—indeed, there is a constitutional rule in the United States that specifies prosecutors' duties in this regard¹²¹—there simply is not the corresponding need to rely on third parties to suggest leads and identify witnesses. Domestic prosecutors can, along with law enforcement, effectively investigate most crimes that occur within their jurisdiction and directly collect evidence. The demands on the ICC Prosecutor are unique in this regard, and, at least in some circumstances, he should be able to provide assurances of confidentiality to individuals and organizations that assisted him with his investigations.

3. Lingering Questions Concerning the Duties of Disclosure and Investigation

That the Appeals Chamber eventually was called upon to determine whether the Prosecutor fulfilled his disclosure obligations in the *Lubanga* case is unsurprising. Prosecutors at the ICTY and ICTR also have been repeatedly accused of failing to fulfill their disclosure obligations,¹²² and these tribunals have spent a great deal of time and energy in resolving disclosure disputes.¹²³

Beyond individual trials, however, there is also the danger that in failing to fulfill their disclosure obligations, prosecutors may be advancing a distorted history, jeopardizing what many believe to be an important aspiration of international criminal law.¹²⁴ For example, Professor Erlinder has accused the ICTR prosecutors of ignoring Tutsi crimes (particularly those of Rwanda's current president, Paul Kagame) so as to perpetuate the narrative that the Rwandan genocide was a “long-

120. *Discussion*, 6 J. INT'L CRIM. JUST. 763, 772 (2008) (remarks of Mona Rishmawi, Legal Advisor, Office of the U.N. High Commissioner for Human Rights), *quoted in* Katzman, *supra* note 100, at 99. *See also* Ambos, *supra* note 101, at 567 (“[I]f the identity of these informants is revealed—either directly or indirectly by revealing the information they provided—they run a serious risk of being intimidated (or worse).”).

121. *See* *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”).

122. *See* Jenia Iontcheva Turner, *Defense Perspectives on Law & Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 557–58 (2008) [hereinafter Turner, *Defense Perspectives*] (quoting interviews with defense counsel at the ICTY and ICTR that prosecutors are “disdainful” of their obligation to collect exculpatory evidence and that disclosure of any such evidence often occurs too close to trial); *see also* Charmaine de los Reyes, *Revisiting Disclosure Obligations at the ICTR and its Implications for the Rights of the Accused*, 4 CHINESE J. INT'L L. 583, 584 (2005) (“If the ICTR wishes to disassociate itself from misconceptions of its being a victor's court, one step it may take is to reconsider recent jurisprudence on the topic of disclosure and its practical and substantive effect on the accused and the principle of fairness.”).

123. Salvatore Zappalà, *The Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE*, 2 J. INT'L CRIM. JUST. 620, 623 (2004); Claude Kress, *The Procedural Law of the International Criminal Court: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. JUST. 603, 610 (2003).

124. *See supra* note 58.

planned conspiracy to kill Tutsi civilians” by the Hutu-dominated army.¹²⁵ Whether or not one believes Erlinder’s charges, for more than fourteen years the ICTR failed to produce thousands of pages of documents that were produced by the United Nations and a variety of non-governmental organizations that were in Rwanda when the genocide occurred.¹²⁶ Some of these documents tended to call into question that there was a longstanding Hutu plot to seize power after the assassination of President Juvenal Habyarimana and massacre Tutsi civilians.¹²⁷

In light of the history of problems with respect to disclosure in international criminal trials, and the ICC’s own experience with the *Lubanga* trial, the ICC may wish to re-consider the approach of treating disclosure issues on a case-by-case basis, as opposed to attempting to provide prospective guidance to prosecutors in regarding how to conceive of their disclosure obligations. Specifically in terms of the Prosecutor’s conflicting duties of disclosure and investigation, an OTP code of conduct should attempt to strike a balance. The Draft OTP Code, however, states both that the Prosecutor “shall . . . [p]rotect the confidentiality of all information and evidence retained, stored, and secured through investigation by the Prosecutor, or others representing the Prosecutor in the exercise of his or her functions,”¹²⁸ and that the Prosecutor shall “ensure that evidence favourable to the accused is disclosed in accordance with the Rules and the requirements of a fair trial.”¹²⁹ Left unanswered is which duty should take precedence.

The Appeals Chamber’s decision clearly states that the duty to disclose must take precedence,¹³⁰ and the Prosecutor did eventually disclose all of the documents that he believed to be potentially exculpatory to Mr. Lubanga’s defense.¹³¹ However, by the time of the Appeals Chamber’s decision, a great deal of reputational harm had already come to the Court. Scholars claimed that Mr. Lubanga could not be given a fair trial because of the Prosecutor’s over-reliance on evidence obtained on the condition of confidentiality.¹³² Observers in the DRC, particularly in the Ituri region where Mr. Lubanga allegedly committed his crimes, questioned “the professionalism and the ability of the ICC to carry out its mandate” given that the confidentiality problem had arisen early on in the proceedings but nearly ended the trial on the eve of its supposed commencement.¹³³

Perhaps of greater significance is that, notwithstanding the Appeals Chamber’s decision, it is impossible to know whether Lubanga received all of the documents to

125. Peter Erlinder, *The UN Security Council Ad Hoc Rwanda Tribunal: International Justice or Juridically-Constructed “Victor’s Impunity”?*, 4 DEPAUL J. SOC. JUST. 131, 148–51 (2010). Professor Erlinder claims, for example, that when Prosecutor Carla Del Ponte attempted to investigate crimes committed by Kagame that she was in effect fired. *Id.* at 161–63.

126. *Id.* at 148–49.

127. *Id.* at 167.

128. Draft OTP Code, *supra* note 8, art. 9(3).

129. *Id.* art. 12(1).

130. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, paras. 2, 44.

131. *See supra* note 100.

132. *See, e.g.,* Stuart, *supra* note 103, at 414 (“When the OTP . . . agrees to confidentiality in relation to virtually all provided materials, which are furthermore not obtained for the sole use as springboard to find new evidence, the core role of the judges to guarantee a fair trial and to be the custodian of the custodians, has become moot.”); Ambos, *supra* note 101, at 567–68 (“disclosure of (exculpatory) evidence goes to the heart of an accused’s right to a fair trial”).

133. *See, e.g.,* DRC: ICC Suspension a Risk for Ituri Stability, IRIN AFRICA (June 24, 2008), <http://www.irinnews.org/Report.aspx?ReportId=78820> (quoting a human rights lawyer in Kinshasa).

which he is entitled under the ICC Statute.¹³⁴ The Prosecutor may have taken a narrow view of what evidence “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” under Article 67(2) because so many documents were obtained on the condition of confidentiality.¹³⁵ Indeed, of the thousands of documents obtained from information providers on the condition of confidentiality, the Prosecutor determined that only some 200 contained “potentially exculpatory information or information . . . potentially material to the preparation of the defence.”¹³⁶

Domestic prosecutors can be subject to disciplinary proceedings¹³⁷ and even criminal prosecution when they suppress evidence¹³⁸ but there are no equivalent mechanisms to ensure the compliance of ICC prosecutors with their disclosure obligations.¹³⁹ In terms of the *Lubanga* trial, it was in the self-interest of the Prosecutor to characterize his decision to over-rely on confidentiality agreements with information providers as a relatively minor threat to the fair trial rights of Mr. Lubanga. The possibility of a fair trial for Mr. Lubanga would have been far more remote if the Prosecutor were to have admitted that he could not disclose a greater number of exculpatory documents. By conceiving of his disclosure obligations narrowly, the Prosecutor also would have been able to save himself the embarrassment of having to inform information providers that he could not honor his promise to preserve the confidentiality of a significant percentage of the materials that they had provided.

Even if the Prosecutor does not over-rely on confidential information in future investigations, this will not mean that defendants will receive all the information to which they are entitled. Because of the nature of the ICC's work, neither the defense nor Chambers can effectively police the OTP's compliance with its disclosure obligations.¹⁴⁰ Defense counsel cannot know what other evidence might be available

134. See Whiting, *supra* note 112, at 231 (noting that prosecutors often err on the side of non-disclosure). Cf. Zappala, *supra* note 123, at 623 (noting that changes to ICTY Rules concerning the Prosecutor's disclosure obligations are likely to be ineffective because there is no way to verify whether the Prosecutor fulfills his or her obligations).

135. Even if the Prosecutor did agree that certain materials need to be disclosed, the defense may still be unable to obtain the actual documents if the information provider does not consent. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 48 (“[W]here the material in question was obtained on the condition of confidentiality, the Trial Chamber . . . will have to respect the confidentiality agreement concluded by the Prosecutor under Article 54(3)(e) . . .”).

136. *Id.* paras. 21, 32.

137. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2006).

138. See Sara Gurwitsch, *When Self-Policing Does Not Work, A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 318–19 (2010) (discussing disciplinary procedures taken against prosecutors, including rare instances of criminal prosecution).

139. See Agreement on the Privileges and Immunities of the International Criminal Court, ICC-ASP/1/3, art. 15(1) (September 3, 2002), http://www.icc-cpi.int/NR/rdonlyres/23F24FDC-E9C2-4C43-BE19-A19F5DDE8882/140090/Agreement_on_Priv_and_Imm_120704EN.pdf (stating that the Prosecutor and Deputy Prosecutor enjoy “immunity from legal process of every kind in respect of . . . acts which had been performed by them in their official capacities”).

140. The role of Chambers in ensuring the Prosecutor's compliance with his disclosure duties largely appears to be confined to situations where the Prosecutor willingly submits evidence to Chambers so that it may determine whether the evidence “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.” ICC Statute, *supra* note 1, art. 67(2).

to the OTP because their own ability to gather evidence is highly limited due to non-cooperation from governments and limited budgets for investigatory activities,¹⁴¹ and because advocacy groups tend to be more focused on bringing accused war criminals to justice than safeguarding their procedural rights.¹⁴² For these reasons, prosecutorial compliance with disclosure obligations is even more crucial than in domestic systems.

This is not to say that the prosecutors in international criminal tribunals deliberately take a narrow view of their disclosure obligations. Prosecutors may simply underestimate the degree to which certain evidence “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.”¹⁴³ For example, social psychology research suggests that prosecutors are “likely to search the case evidence for proof confirming the hypothesis to the detriment of exculpatory evidence.”¹⁴⁴ Once a prosecutor forms a personal belief in guilt, “that belief becomes ‘sticky’ as selective information processing, belief perseverance, and cognitive consistency will prevent the prosecutor from revisiting her conclusion.”¹⁴⁵ To extrapolate these concerns to the OTP, by the time that the duty to disclose evidence arises, OTP attorneys already will have investigated and formed a strong belief that the defendant is likely guilty, or else they would not have sought an arrest warrant for the defendant.¹⁴⁶ A review of whether evidence must be disclosed to the defense under the ICC Statute takes place therefore in the context of the OTP’s relatively settled view of the defendant’s guilt and may lead the OTP to undervalue or simply dismiss evidence that does not cohere with the defendant’s guilt.

International criminal court prosecutors may be less likely to fulfill their disclosure obligations than prosecutors in domestic systems because their review of evidence often occurs against a backdrop of the crimes having already been referred to the Court by state parties and/or the United Nations Security Council.¹⁴⁷ Moreover, ICC defendants are charged with crimes that are of “most serious . . . concern to the international community as a whole,”¹⁴⁸ and there is increased pressure on prosecutors to convict and hold defendants responsible.¹⁴⁹ A code of conduct should seek to minimize the likelihood that the Prosecutor will fail to

141. See Turner, *Defense Perspectives*, *supra* note 122, at 556 (noting that defense counsel in international criminal tribunals must at times place their own lives in jeopardy to carry out factual investigation and are hampered by a lack of cooperation from governments in terms of evidence-gathering and a lack of funding for investigation from the tribunals).

142. See *supra* note 54.

143. ICC Statute, *supra* note 1, art. 67(2).

144. Alafair Burke, *Prosecutorial Agnosticism*, 8 OHIO J. CRIM. L. 79, 80 (2010).

145. *Id.*

146. See Alafair Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L. J. 481, 495 (2009) [hereinafter Burke, *Revisiting Prosecutorial Disclosure*] (“Because of confirmation bias, [a domestic prosecutor] is likely to search the investigative file for evidence that confirms the defendant’s guilt”); see also Ellen Yaroshfsky, *Keynote Address: Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 343, 352 (2010) (noting that confirmation bias among police and prosecutors helps contribute to wrongful convictions).

147. See ICC Statute, *supra* note 1, art. 13(a)–(b) (identifying two means of referral by which the Court may exercise jurisdiction).

148. *Id.* art. 5(1).

149. Robinson, *supra* note 54, at 929.

comply with his disclosure obligations out of a desire, conscious or unconscious, that ICC defendants must not go free.¹⁵⁰

With these considerations in mind, I propose the following OTP code of conduct rule. The proposed rule, as with others in this Article, is directed at the Prosecutor but would apply to all OTP attorneys and staff.

Draft Conduct Rule Regarding Disclosure Obligations

(1) To the extent disclosure is not otherwise prohibited by the ICC Statute or Rules, the Prosecutor shall ensure that the defense is not denied access to investigatory materials in the possession, custody, or control of the OTP.

(2) Notwithstanding (1) above, the Prosecutor may provide assurances to individuals or organizations providing information on the condition of confidentiality pursuant to Article 54(3)(e) if (i) the Prosecutor determines that the materials cannot be obtained via other means and (ii) the individual or organization would not provide the materials except under the condition of confidentiality.¹⁵¹

(3) Prior to offering any assurances under Article 54(3)(e), the Prosecutor shall inform the person or organization providing information of the Prosecutor's duties under Article 67(2) and that such duties shall take precedence over the confidentiality of the information, although the Prosecutor shall not disclose any documents directly to the defense without first receiving consent from the individual or organization providing the information.¹⁵²

(4) If consent cannot be obtained to disclose materials obtained pursuant to Article 54(3)(e), but the materials must be disclosed pursuant to Article 67(2), the Prosecutor shall endeavor to provide the materials to the defense in a summary or redacted form¹⁵³ or in some other form ordered by Chambers.¹⁵⁴

150. Professor Burke suggests other mechanisms beyond ethical rules that can assist prosecutors in complying with their disclosure duties. For example, she has suggested that prosecutors should be trained to recognize their own cognitive biases and should consider allowing colleagues who are not as familiar with a particular case to determine whether a particular piece of evidence should be disclosed to the defense. Alafair Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1617–18, 1621–23 (2006). In light of the history of problems with respect to disclosure in international criminal trials, such measures merit the strong consideration of the OTP.

151. See *Ambos*, *supra* note 101, at 555–56 (arguing that “the Prosecutor should conclude confidentiality agreements only under three conditions: first, there is no other ‘normal’ way to obtain the respective information; second, the information is absolutely necessary to continue the investigation; and third, the information is only requested to generate new evidence”).

152. See ICC Rules, *supra* note 35, R. 82(1) (“Where material or information is in the possession or control of the Prosecutor which is protected under Article 54, paragraph 3(e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.”).

153. The ICC Statute contemplates that materials implicating national security information may be presented in such a form. See ICC Statute, *supra* note 1, art. 72(5)(d) (listing “providing summaries or redactions” as an option to resolve cases where a State maintains that disclosure would prejudice its national security interests).

154. See *Prosecutor v. Lubanga*, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 48 (holding that the Chamber must determine which counter-balancing measures can be taken should a party

(5) In construing disclosure obligations under Article 67(2), the Prosecutor shall err toward disclosure to the defense. If there is doubt whether a document must be disclosed, the Prosecutor shall consult the relevant Chamber.¹⁵⁵

If the ICC shares this Article's concerns regarding disclosure in international criminal trials, the proposed rule would be beneficial inasmuch as it discourages both the excessive use of confidentiality agreements and the practice of prosecutors construing their disclosure obligations under Article 67(2) of the ICC Statute narrowly, while still recognizing the importance of the Prosecutor's powers under Article 54(3)(e). Moreover, the proposed rule would warn information providers that information conveyed to the OTP on the condition of confidentiality may nevertheless need to be disclosed so that the information providers can meaningfully assess whether to cooperate with the Prosecutor.

B. *The Prosecutor's Duty to Obey Chambers vs. the Duty of Independence*

1. The Prosecutor's Refusal to Comply with an Order of the *Lubanga* Trial Chamber

The *Lubanga* Trial Chamber imposed a second indefinite stay on July 8, 2010, after the Prosecutor failed to comply with the Trial Chamber's order to disclose the identity of an intermediary who had introduced witnesses against Mr. Lubanga to the Prosecutor.¹⁵⁶ Defense witnesses' testimony had "put into question" the testimony of prosecution witnesses facilitated by the intermediary, and the Trial Chamber ordered that the intermediary's identity be disclosed to the defense.¹⁵⁷ The Prosecutor refused because of his professed concern that measures had not yet been implemented to protect the intermediary.¹⁵⁸ The Trial Chamber not only ordered a stay in the proceedings¹⁵⁹ but warned the Prosecutor that he could be subject to sanctions under Article 71 of the ICC Statute and Rule 171 of the ICC Rules if he continued to refuse to provide the intermediary's name to the defense team.¹⁶⁰ The Trial Chamber subsequently issued an oral order that Mr. Lubanga be immediately released because in its view Mr. Lubanga's right to a fair trial had been

not consent to disclosure).

155. See ICC Statute, *supra* note 1, art. 67(2) (stating that "the Court shall decide" if there is any doubt about what the Prosecutor must disclose).

156. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2517, Decision on Request for Variation of Time-Limit to Disclose the Identity of Intermediary, paras. 12, 31 (July 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc906146.pdf>; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2582, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, para. 5 (Oct. 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc947768.pdf>.

157. See Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 154, paras. 4–5, 7 (detailing the procedural chronology of the Trial Chamber's order).

158. See *id.* paras. 11–12 (quoting the Prosecutor's filings on the date of refusal).

159. *Id.* para. 13.

160. *Id.* para. 17. Rule 171(2) of the ICC's Rules of Procedure and Evidence states that participants in ICC proceedings can be sanctioned for a "deliberate refusal to comply with an oral or written direction by the Court." ICC Rules, *supra* note 35, R. 171(2). The Chamber may impose measures ranging from the interdiction of the offending individual from exercising his or her functions before the Court, as well as fines up to the amount of 2,000 euros a day. *Id.* R. 171(2), (4).

compromised, and he could not be held in preventative custody on the assumption that his trial would resume at some point in the future.¹⁶¹ The order was stayed pending appeal.¹⁶²

In October 2010, the Appeals Chamber issued a judgment that criticized the Prosecutor for refusing to comply with the order.¹⁶³ It held that “[n]o criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations.”¹⁶⁴ The Appeals Chamber explained that all Trial Chamber orders were binding orders that had to be implemented by the Prosecutor, unless they were modified by the Trial Chamber or reversed by the Appeals Chamber.¹⁶⁵ The Appeals Chamber reversed the Trial Chamber’s imposition of a stay, however, on the ground that sanctions had not first been imposed on the Prosecutor under Article 71 to ensure his compliance with the Trial Chamber order.¹⁶⁶ Because Mr. Lubanga’s release was based on the stay, the Appeals Chamber also reversed the Trial Chamber’s order of release.¹⁶⁷

Although the *Lubanga* trial has now resumed, the disruption in the proceedings was arguably unnecessary.¹⁶⁸ The Draft OTP Code and the ICC’s Code for Counsel require attorneys to comply with orders from Chambers.¹⁶⁹ Since the OTP has not formulated a code of conduct, however, the Prosecutor was under no such ethical obligation and the question of whether to obey the *Lubanga* Trial Chamber could be reduced to whether the perceived benefits of non-compliance justified incurring the risk of sanction. The Prosecutor’s actions in this regard underscore the importance of ethical rules as providing a possible constraint on this type of gamesmanship.¹⁷⁰

161. Press Release, Int’l Crim. Ct., Trial Chamber I Orders the Release of Thomas Lubanga Dyilo-Implementation of the Decision is Pending, ICC-CPI-20100715-PR559 (July 15, 2010), <http://www.icc-cpi.int/Menu/Go?id=16d0aad8-501a-46dc-b744-9bdc657c0ac9&lan=en-GB>.

162. *Id.*; Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156, para. 17.

163. *See generally* Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156.

164. *Id.* para. 48.

165. *Id.*

166. *Id.* para. 59.

167. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2583, Judgment on Appeal of Decision to Release Thomas Lubanga Dyilo, para. 24 (Oct. 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc947862.pdf>. The Appeals Chamber noted the Trial Chamber’s attachment of significance to the length of Mr. Lubanga’s detention, but reasoned that the Trial Chamber had made no findings that the detention was no longer necessary for trial or that Mr. Lubanga was detained for an unreasonable period on account of prosecutorial delay. *Id.* para. 25.

168. *See* Kevin Jon Heller, *I Think It’s Time to Remove Moreno-Ocampo*, OPINIO JURIS (July 9, 2010, 8:23 AM), <http://opiniojuris.org/2010/07/09/i-think-its-time-to-remove-moreno-ocampo> (asserting that Moreno-Ocampo’s misuse of confidentiality agreements caused “unwarranted delay” in the trial).

169. Draft OTP Code, *supra* note 8, art. 14(7); Code for Counsel, *supra* note 22, art. 7(3). *See also* ICC Rules, *supra* note 27, R. 25(1)(a)(ii) (defining misconduct to include failing to comply with directions from a presiding judge).

170. *See* HAZARD & DONDI, *supra* note 45, at 8 (suggesting that ethical rules indicate to lawyers “the right thing to do”); *see also* Geoffrey Hazard & Dana Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 804 (2009) (noting that protecting the “proper functioning of the legal system” is a central purpose of all ethical rules).

However, even if the ICC had adopted the Draft OTP Code, the Prosecutor may have chosen to disobey the order that he disclose the identity of the intermediary. The Prosecutor justified his conduct to the Appeals Chamber by claiming that:

The Prosecutor is sensitive to its obligations to comply with the Chamber's instructions. However, it also has an independent statutory obligation to protect persons put at risk on account of the Prosecutor's actions. It should not comply, or be asked to comply, with an order that may require it to violate the separate statutory obligation by subjecting the person to a foreseeable risk.¹⁷¹

The Prosecutor was arguably correct to claim that he faced a choice between obeying the Trial Chamber and fulfilling his obligations under the ICC Statute because the Statute specifically contemplates that "the Prosecutor shall . . . respect the rights, interests, and personal circumstances of victims and witnesses" and furthermore may take "measures . . . to ensure the confidentiality of information and the protection of any person . . ." ¹⁷² The OTP also has the overarching duty to "act independently as a separate organ of the Court."¹⁷³ In the Prosecutor's view, if he had complied with the Trial Chamber's order, he would have placed the intermediary's life in danger.

If the Draft OTP Code had been adopted, the Prosecutor still would have been faced with the same ethical dilemma. Although the Draft OTP Code requires prosecutors to comply with Trial Chamber orders,¹⁷⁴ it also provides that a prosecutor shall "[c]onduct his or her investigations with the goal of . . . ensuring confidentiality [and] fully respecting the rights of all persons under the Statute."¹⁷⁵ What may appear initially as audacious conduct by the Prosecutor, on closer examination could be seen as a genuine disagreement as to whether the Prosecutor's duty to obey orders from Chambers should be absolute or whether the Prosecutor could exercise his independence and refuse to comply with orders that conflict with his statutory duties.

This is not to suggest that the Prosecutor acted properly in violating the Trial Chamber's order, particularly where the obligation to protect potential witnesses appears to lie primarily with other organs of the ICC and may be subordinate to Mr. Lubanga's right to a fair trial.¹⁷⁶ For example, Article 64(2) of the ICC Statute states

171. Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156, para. 12.

172. ICC Statute, *supra* note 1, art. 54(1)(a), 54(3)(f). In addition, Article 68(1) states that measures to protect the "safety, physical and psychological well-being, dignity, and privacy of victims and witnesses" shall be taken by the Prosecutor "particularly during the investigation and prosecution of . . . crimes." *Id.* art. 68(1).

173. *Id.* art. 42(1).

174. Draft OTP Code, *supra* note 8, art. 14(7).

175. *Id.* art. 8(4).

176. See Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156, paras. 50–51 (holding that it is ultimately the job of the Trial Chamber to deal with matters such as witness and victim protection); see also Kevin Jon Heller, *The OTP's Supposed "Independent Statutory Obligation" to Protect Witnesses*, OPINIO JURIS (July 9, 2010, 8:41 PM), <http://opiniojuris.org/2010/07/09/the-otps-non-existent-independent-statutory-obligation-to-protect-witnesses> (arguing that the ICC Statute permits, but does not require, the Prosecutor to protect the confidentiality of persons whereas the Trial Chamber is required to take measures to protect witnesses that are not prejudicial to a defendant's right to a fair trial).

that it is the Trial Chamber that ensures “due regard for the protection of victims and witnesses,” and under Article 68(1), the Prosecutor’s ability to take measures to protect the safety of victims and witnesses “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”¹⁷⁷ However, one can certainly disagree with the Prosecutor’s conduct in this instance and still accept the broader principle that, since the OTP and Chambers are independent organs of the Court, the Trial Chamber should not be able to cause the Prosecutor to violate his duties under the ICC Statute.¹⁷⁸

2. Obedience and Independence

It is tempting to believe that the OTP will never again refuse to comply with a Trial Chamber order. The Appeals Chamber’s judgment makes clear that “when there is a conflict between the Prosecutor’s perception of his duties and the orders of the Trial Chamber, the Trial Chamber’s orders must prevail.”¹⁷⁹ However, the Prosecutor has never disputed that he had a duty to comply with orders from Chambers.¹⁸⁰ Rather, the Prosecutor’s position was that he could violate a Trial Chamber order if he was willing to be held in contempt.¹⁸¹ The Prosecutor’s brinkmanship was rewarded when the Appeals Chamber overturned the Trial Chamber’s decision to release Lubanga.¹⁸² Unfortunately, the Prosecutor’s “victory” seems to have undermined the ICC’s credibility,¹⁸³ and galvanized Lubanga’s supporters,¹⁸⁴ making it less likely that the *Lubanga* trial will foster reconciliation in the DRC or further other transitional justice goals.

The Appeals Chamber’s judgment cannot ensure that the Prosecutor will hereafter obey all future orders from Chambers, particularly if the Prosecutor is willing to be held in contempt for failing to comply with orders.¹⁸⁵ What is needed is

177. ICC Statute, *supra* note 1, art. 64(2), 68(1).

178. This conflict does not appear as frequently in domestic systems because, unlike the ICC Prosecutor, domestic prosecutors are employees of a state and, as such, are not expected to have the same degree of independence. See Danner, *supra* note 4, at 537 (“Unlike the close linkage between prosecutors and the executive in some domestic systems, the ICC Prosecutor is designed to be politically independent of governments. The purpose of this independence is to divorce him from any political objective other than fulfilling the mandate of the court.”). Domestic prosecutors also can be dismissed much more easily.

179. Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156, para. 48.

180. See *id.* para. 32 (“[T]he Prosecutor contends that he did not refuse to comply with the orders of the Court but instead exercised rights available to him as a party.”).

181. See *id.* para. 34 (noting that the Prosecutor had argued that the Trial Chamber should have cited him for contempt or imposed other remedies instead of ordering the release of Mr. Lubanga).

182. *Id.* para. 62.

183. See Michael Steen, *War Crimes Court Set to Free Congo Warlord*, FIN. TIMES, July 15, 2010, at 7 (“Human rights groups had said the long-delayed Lubanga case was perhaps a final chance for the ICC to prove that it could be an efficient forum to try serious war crime allegations.”).

184. See Olivia Bueno, *Kabila’s Visit Highlights Tension Over Lubanga Trial*, LUBANGATRIAL.ORG (Sept. 24, 2010), <http://www.lubangatrial.org/2010/09/24/kabila%E2%80%99s-visit-highlights-tension-over-lubanga-trial> (“According to Congolese activists, the UPC is calling for the unconditional liberation of Lubanga following the Trial Chamber’s July 15, 2010 ruling.”).

185. In this regard, it is noteworthy that the Appeals Chamber’s judgment concerned only whether the Prosecutor had been justified in refusing to disclose the intermediary’s name out of concern for the intermediary’s safety. Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-

an ethical commitment on the part of the Prosecutor to obey all orders from Chambers, regardless of the Prosecutor's other obligations.¹⁸⁶ For example, the ICC's Code for Counsel provides that "[c]ounsel shall comply at all times with . . . rulings as to conduct and procedure as may be made by the Court."¹⁸⁷ A similar code of conduct rule for OTP attorneys would help to ensure that ICC proceedings are not again delayed as a result of the Prosecutor's refusal to follow orders from Chambers. However, a potential pitfall might be that the Prosecutor would be ethically required to follow all orders, even orders that are manifestly unjust or clearly cause him to violate the ICC Statute.

The notion that the OTP code of conduct should ever allow the Prosecutor to violate orders from Chambers could well prove controversial. The drafters of the OTP Code of Conduct may be wary of giving the Prosecutor this power. However, given that the OTP and Chambers are independent organs of the Court with separate statutory responsibilities, there may indeed be some circumstances under which the Prosecutor should be able to disobey orders that fundamentally infringe on his duties under the ICC Statute. Such a view of the Prosecutor's role would be consistent with the position that attorneys should generally be prepared to disobey lawful orders and risk sanction in order to promote broader goals of justice.¹⁸⁸

One can conceive of a situation where the ICC Statute arguably requires that the Prosecutor violate an order from the Trial Chamber. For example, Article 42(7) of the ICC Statute provides that the Prosecutor shall not "participate in any matter in which [his] impartiality might reasonably be doubted on any ground."¹⁸⁹ However, the Trial Chamber is not required to excuse the Prosecutor from the proceedings.¹⁹⁰ Consequently, the Prosecutor could request to be disqualified from a particular case because of a personal conflict of interest,¹⁹¹ but his request could be rebuffed by the Trial Chamber.¹⁹² The Prosecutor would then have to choose either to obey the direction of the Trial Chamber and continue to participate in the proceedings or refuse to do so pursuant to his statutory obligation under Article 42(7). Under these

Limit to Disclose the Identity of Intermediary, *supra* note 156, para. 5.

186. The code of conduct could reflect the view of the Appeals Chamber that "[i]rrespective of whatever duties the Prosecutor may have, he is obliged to comply with the orders of the Trial Chamber." Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156, para. 54.

187. Code for Counsel, *supra* note 22, art. 7(3).

188. See, e.g., William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 238-39 (1997) (discussing films that show that "[p]opular respect for law may require lawyers to violate the positive law"); Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 310-11 (1995) (describing the archetype of the moral individualist who "pursue[s] any legal ends that [he or she] believe[s] to be morally right, by any means that meet the same criterion"). One can certainly construe the Prosecutor's refusal to release the intermediary's name to the defense as emblematic of the moral individualist insofar as the Prosecutor sought to protect the intermediary regardless of the costs to the OTP.

189. ICC Statute, *supra* note 1, art. 42(7).

190. See *id.* art. 42(6) (stating that the Prosecutor "may" be excused by the Presidency).

191. *Id.*

192. One would expect, of course, that the Trial Chamber would allow the Prosecutor to recuse himself from acting in a particular case, but if the Prosecutor raised the issue at a relatively late juncture, it is certainly conceivable that the Chamber would deny a request in order to not delay the trial. Such a decision, like the Trial Chamber's order to disclose the identity of the intermediary, could not be appealed without leave of the Trial Chamber. See generally *id.* art. 82(1)(d) (stating that an appeal of a Trial Chamber "decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" can be pursued with approval of the Trial Chamber).

circumstances, it would not seem unreasonable for the Prosecutor to incur the risk of sanction rather than taint the proceedings with his participation.¹⁹³

In domestic practice as well, lawyers also are occasionally forced to choose between following ethical obligations and obeying court orders. In the United States, for example, attorneys are generally forbidden from revealing “information relating to the representation of a client.”¹⁹⁴ Similarly, in Canada, a lawyer is required “to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of the client,” whereas in Japan, an attorney shall not “disclose or utilize, without any good reason, confidential information of a client which is obtained in the course of his or her practice.”¹⁹⁵ However, a judge may order a lawyer to disclose information he or she receives from the client, and it is unclear whether the lawyer may refuse to provide this information.¹⁹⁶ Courts have differed on this issue.¹⁹⁷ Whereas attorneys in domestic settings can draw on their countries’ legal traditions and may be able to seek guidance from professional associations and ethics experts to help resolve ethical dilemmas of this type, this is not a practical option for OTP attorneys because the ICC is *sui generis*.

In my view, it would be preferable for an OTP code of conduct to specify under what circumstances prosecutors may refuse to comply with orders from Chambers and risk sanction so that the ICC can better anticipate when ethical dilemmas may arise that could delay and jeopardize proceedings. One of the reasons that the Prosecutor’s refusal to comply with the Trial Chamber’s order to disclose the identity of the intermediary was so controversial in the *Lubanga* case was that the Trial Chamber had not encroached on the Prosecutor’s responsibilities. Witness safety is equally a matter of concern for Chambers and the Registry under the ICC Statute.¹⁹⁸ To the extent one accepts the premise that the Prosecutor should be able to refuse to obey some orders from Chambers, the Prosecutor’s discretion to do so should be limited to instances where Chambers is infringing on the OTP’s independence or truly causing him to violate his other statutory duties.

I propose the following rule:

193. This is particularly the case if one keeps in mind the broader goals of international criminal justice. See generally *supra* Part I(B).

194. MODEL RULES OF PROF’L CONDUCT. R. 1.6(a) (2006).

195. HAZARD & DONDI, *supra* note 45, at 205 (citations omitted).

196. In the United States, the operative rule is found in MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 12 (2006) (“Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.”).

197. See *People v. Belge*, 372 N.Y.S.2d 798, 803 (N.Y. Sup. Ct. 1979), *aff’d* 41 N.Y.S.2d 60 (1976) (holding that a lawyer cannot be charged for failing to disclose the location of a murder victim where he learned of the location from his client). *But see* *Matter of Doe*, 20 N.Y.S.2d 996, 999 (N.Y. Sup. Ct. 1979) (holding that a lawyer was required to answer a grand jury question concerning the location of his client where he learned of the location from the client).

198. *Prosecutor v. Lubanga*, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156, para. 50 (noting that the Trial Chamber must ensure that the trial is conducted with “due regard for the protection of victims and witnesses”). See also ICC Statute, *supra* note 1, art. 68(1) (“The Court shall take appropriate measures to protect the safety . . . of victims and witnesses.”) and art. 43(6) (outlining the Registrar’s duty to provide “protective measures and security arrangements” for witnesses and “victims who appear before the Court”).

Draft Conduct Rule Regarding Duty to Chambers

(1) The Prosecutor shall have a duty to comply with orders from Chambers.¹⁹⁹

(2) In a situation where the Prosecutor reasonably believes that an order from Chambers would cause the Prosecutor to violate one of his or her duties under the ICC Statute, the Prosecutor shall explain, in writing, the duty that he or she is being asked to violate and seek reconsideration of that order.

(3) If the Prosecutor is unable to have an order from Chambers modified or vacated, and the order cannot be appealed, the Prosecutor shall comply with the order unless the Prosecutor reasonably believes that the order encroaches on his or her full authority over the proper management and administration of the OTP.²⁰⁰

(4) If the Prosecutor cannot comply with an order pursuant to (3) above, the Prosecutor may withdraw from the proceedings or take such other measures as he or she deems necessary after consultation with the Presidency.²⁰¹

The proposed rule would not have permitted the Prosecutor to refuse to disclose the identity of the intermediary in the *Lubanga* case because the Prosecutor's obligation to protect the intermediary was permissive, not mandatory,²⁰² and the ICC Statute does not confer the responsibility to protect witnesses and victims on the OTP alone.²⁰³ The proposed rule would, however, potentially allow the Prosecutor to refuse to obey an order that he participate in a case in which his impartiality might reasonably be questioned because complying with such an order would both cause the Prosecutor to violate the ICC Statute and would encroach on the Prosecutor's "management and administration of the OTP."²⁰⁴

199. Code for Counsel, *supra* note 22, art. 7(3).

200. See ICC Statute, *supra* note 1, art. 42(2) ("The Prosecutor shall have full authority over the management and administration of the Office.").

201. The Presidency is composed of three judges of the Court and has three main responsibilities: "judicial/legal functions, administration and external relations." *The Presidency*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Presidency>. The Presidency is currently composed of Judges Song, Diarra, and Kaul. *Id.*

202. See ICC Statute, *supra* note 1, art. 54(3)(f) ("The Prosecutor *may* take necessary measures . . . to ensure the confidentiality of information, the protection of any person or the preservation of evidence." (emphasis added)).

203. See, e.g., *id.* art. 68 ("The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.").

204. *Id.* art. 42(2). Another potential example, taken from recent cases in New York, would be if the Trial Chamber ordered the Prosecutor to assign an individual of a particular religion or nationality to the prosecution team. See Jason Mazzone, *Judge Baer and Grutter v. Bollinger*, BALKINIZATION (Oct. 29, 2010, 9:10 PM), <http://balkin.blogspot.com/2010/10/judge-baer-and-grutter-v-bollinger.html> (reporting that in two separate cases Judge Baer required at least one minority and one woman co-counsel for a class action suit). Such an order also would violate the Prosecutor's independence as well as interfere with his management of the OTP.

III. THE OTP'S PUBLIC STATEMENTS: THE DUTY OF IMPARTIALITY AND THE DUTY TO PROSECUTE

The OTP has made several controversial public statements in the course of the ICC's early cases. In this section, I will explore the inherent tension between the Prosecutor's duty of impartiality, which is illustrated by his obligation to seek the truth,²⁰⁵ "investigate incriminating and exonerating circumstances equally,"²⁰⁶ and "[f]ully respect the rights of persons arising under the Statute[.]"²⁰⁷ with his duty to "[t]ake appropriate measures to ensure the effective . . . prosecution of crimes."²⁰⁸ This conflict is illustrated by certain controversial comments made by the Prosecutor in advocating for the arrest of Sudanese President Omar Hassan Ahmad Al-Bashir ("Al-Bashir").

A. *Darfur and the Prosecutor's Editorial*

On July 14, 2008, the Prosecutor sought to obtain an arrest warrant for Sudanese President Al-Bashir for crimes committed in the Darfur region of Sudan from March 2003 to July 2008.²⁰⁹ The Pre-Trial Chamber granted the arrest warrant with respect to crimes against humanity and war crimes but rejected the Prosecutor's application with respect to genocide.²¹⁰

The Appeals Chamber reversed the Pre-Trial Chamber's decision, holding that the Pre-Trial Chamber had misapplied the correct standard of proof required for an arrest warrant under Article 58(1) of the ICC Statute.²¹¹ Article 58(1) states, *inter alia*, that an arrest warrant will be issued where "[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."²¹² In the view of the Appeals Chamber, the Pre-Trial Chamber had erred in construing "reasonable grounds to believe" in the context of genocide to require that the Prosecutor demonstrate that the only conclusion that could be drawn from the Prosecutor's evidence was that Mr. Al-Bashir had acted with genocidal intent.²¹³ The Pre-Trial Chamber subsequently issued an arrest warrant against Al-Bashir for genocide as well as crimes against humanity and war crimes.²¹⁴

A few days later, the Prosecutor authored an editorial for the *Guardian* entitled *Now End This Darfur Denial*.²¹⁵ The editorial made several controversial claims. For

205. ICC Statute, *supra* note 1, art. 54(1)(a).

206. *Id.*

207. *Id.* art. 54(1)(c).

208. *Id.* art. 54(1)(b).

209. Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-73, Judgment on Appeal Against Decision on Warrant of Arrest, para. 2 (Feb. 3, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc817795.pdf>.

210. *Id.* para. 3.

211. *Id.* paras. 41–42.

212. ICC Statute, *supra* note 1, art. 58(1)(a).

213. Prosecutor v. Al-Bashir, Judgment on Appeal Against Decision on Warrant of Arrest, *supra* note 209, para. 39.

214. Press Release, Int'l Crim. Ct., Pre-Trial Chamber I Issues a Second Warrant of Arrest Against Omar Al Bashir for Counts of Genocide, ICC-CPI-20100712-PR557 (July 12, 2010), <http://www.icc-cpi.int/Menu/Go?id=1f037bee-e5a7-4421-ab24-d050d84cd347&lan=en-GB>.

215. Luis Moreno-Ocampo, *Now End This Darfur Denial*, *GUARDIAN*, July 15, 2010, at 33.

example, it claimed that the Pre-Trial Chamber had found that “Bashir’s forces have raped on a mass scale in Darfur” and “deliberately inflict[ed] on the Fur, Masalit and Zaghawa ethnic groups living conditions calculated to bring about their physical destruction.”²¹⁶ Of course, the Pre-Trial Chamber made no such “finding” whatsoever because the only question before it was whether the Prosecutor had satisfied his burden under Article 58(1) to demonstrate that there were “reasonable grounds” to believe that Mr. Al-Bashir had committed the crimes in question so that an arrest warrant should be issued.²¹⁷ This is a far lesser showing than the “beyond reasonable doubt” standard that the Prosecutor would have to satisfy to prove that Al-Bashir actually committed these crimes.²¹⁸ As Professor Schabas has suggested, the Prosecutor’s editorial was highly misleading inasmuch as some *Guardian* readers might reasonably believe that the Court had found Al-Bashir guilty.²¹⁹ Professor Heller has gone so far as to claim that the editorial demonstrated such poor judgment that the ASP should have considered removing the Prosecutor from office.²²⁰

This was not the first time that a member of the OTP has made controversial public statements concerning a pending case. The Trial Chamber had previously strongly criticized Béatrice Le Fraper du Hellen, the head of the OTP’s Jurisdiction, Complementarity and Cooperation Division, for an interview that she had given to an internet website.²²¹ Ms. Le Fraper du Hellen had claimed that the witnesses who had been identified by intermediaries in the *Lubanga* trial were highly credible,²²² that the defense was “fishing for arguments” in seeking to discern the identity of certain intermediaries,²²³ and that Mr. Lubanga would be “going away for a long time.”²²⁴ The Trial Chamber criticized the OTP’s conduct but did not impose formal sanctions.²²⁵

In its decision, the Trial Chamber expressed concern that public statements were essentially unregulated by the ICC Statute framework²²⁶ and reminded the OTP that “the public needs to be able to trust the published statements of those involved in [a] case It is important that in media statements there is a clear and accurate description as to whether issues that are reported have been decided or are still

216. *Id.* Under the ICC Statute, if the Prosecutor’s claims are proven true, Mr. Al-Bashir would be guilty of genocide. See ICC Statute, *supra* note 1, art. 6(c) (“‘Genocide’ means . . . [d]eliberately inflicting on [a] group conditions of life calculated to bring about its physical destruction in whole or in part.”).

217. Kevin Jon Heller, *The Remarkable Arrogance of the ICC Prosecutor*, OPINIO JURIS (July 20, 2010, 9:33 AM), <http://opiniojuris.org/2010/07/20/the-remarkable-arrogance-of-the-icc-prosecutor>.

218. ICC Statute, *supra* note 1, art. 66(3).

219. Heller, *supra* note 217 (quoting William Schabas).

220. See *id.* (detailing the Prosecutor’s misleading statements in the editorial and his refusal to comply with the Trial Chamber in the *Lubanga* case and suggesting that “if things don’t get better in a hurry, the Assembly of States Parties needs to consider removing him”). See also Joshua Rozenberg, *ICC Prosecutors Should Not Be Grandstanding in Their Own Cases*, GUARDIAN, Aug. 18, 2010, available at <http://www.guardian.co.uk/law/2010/aug/18/luis-moreno-ocampo-omar-bashir> (“If Moreno-Ocampo had spent less time grandstanding and more time in court, he may have concluded his first case by now.”).

221. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2433, Decision on the Press Interview with Ms Le Fraper du Hellen, paras. 1, 53 (May 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc870208.pdf>.

222. *Id.* para. 6.

223. *Id.* para. 5.

224. *Id.* para. 8.

225. *Id.* para. 53.

226. *Id.* para. 34.

unresolved.²²⁷ The Prosecutor published his misleading Darfur editorial less than two months after the Trial Chamber's admonishment of Ms. Le Fraper du Hellen.

The OTP obviously should not misrepresent the nature of the Court's work or seek to inflame public opinion against defendants. This would seem to follow from the duty to seek the truth²²⁸ and to "[f]ully respect the rights of persons arising under the [ICC] Statute,"²²⁹ which includes the right of Mr. Al-Bashir and other defendants to "be presumed innocent until proved guilty before the Court."²³⁰ Nevertheless, as noted by the Trial Chamber, the ICC Statute does not regulate public statements by the OTP,²³¹ and there are no specific prohibitions that prevent the Prosecutor from making inflammatory and potentially misleading remarks about defendants. Moreover, the OTP's actions should be seen in context. In terms of Ms. Le Fraper du Hellen's comments, if one accepts that part of the function of international criminal justice is to educate and create a historical record,²³² then it is understandable that the OTP would want to publicly fight accusations that it was engaged in wrongdoing in the *Lubanga* case by relying on allegedly unreliable intermediaries to assist in the gathering of evidence.²³³

The Darfur editorial too can be somewhat justified because the ICC Statute requires the Prosecutor to "[t]ake appropriate measures to ensure the effective . . . prosecution of crimes,"²³⁴ which includes ensuring that perpetrators of these crimes are brought to justice.²³⁵ Bringing Al-Bashir to justice has proven exceedingly difficult as state parties to the ICC have refused to enforce the Court's arrest warrant.²³⁶ Indeed, the African Union halted all cooperation with the ICC as a result of the ICC's decision to issue an arrest warrant for Mr. Al-Bashir.²³⁷ Consequently, the Prosecutor's strident editorial could be seen as part of an effort of "naming and shaming" other nations to bring Mr. Al-Bashir to justice.²³⁸ This does not excuse

227. Prosecutor v. Lubanga, Decision on the Press Interview with Ms Le Fraper du Hellen, *supra* note 221, para. 39.

228. ICC Statute, *supra* note 1, art. 54(1)(a).

229. *Id.* art. 54(1)(c).

230. *Id.* art. 66(1).

231. Prosecutor v. Lubanga, Decision on the Press Interview with Ms Le Fraper du Hellen, *supra* note 221, para. 34.

232. *See supra* note 58.

233. *See* Prosecutor v. Lubanga, Decision on the Press Interview with Ms Fraper du Hellen, *supra* note 221, para. 49. Ms. Fraper du Hellen's comment that Mr. Lubanga would be "going away for a long time," *id.* para. 8, is much more problematic inasmuch as it could be seen to imply that Mr. Lubanga would not receive a fair and impartial trial.

234. ICC Statute, *supra* note 1, art. 54(1)(b).

235. Triffterer, *supra* note 75, at 1081.

236. *See, e.g.,* Alan Cowell, *Sudan Leader Travels Despite Warrant*, NY TIMES, Aug. 27, 2010, available at <http://www.nytimes.com/2010/08/28/world/africa/28sudan.html> (describing an example of Kenya disregarding the international warrant); *African Union Refuses to Cooperate with Bashir Arrest Warrant*, AMNESTY INTERNATIONAL (July 6, 2009), <http://www.amnesty.org/en/news-and-updates/african-union-refuses-cooperate-bashir-arrest-warrant-20090706> (describing the African Union's refusal to cooperate).

237. *African Union in Rift with Court*, BBC NEWS (July 3, 2009), <http://news.bbc.co.uk/2/hi/8133925.stm>.

238. "Naming and shaming" is an example of bottom-up human rights advocacy practiced by non-state actors (chiefly non-governmental organizations). *See* David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 55–57 (2006). It should be noted that "naming and shaming" has not been particularly effective when applied

misleading the public as to the nature of the Court's work, but in light of the lack of guidance offered by the ICC Statute as to what type of public statements, if any, prosecutors may make about pending cases, it is not surprising that the OTP used its discretion to aggressively lobby through the media for Mr. Al-Bashir's capture.

B. Possible Approaches Concerning Extrajudicial Speech

Given the criticism that the OTP has faced for the Darfur editorial and the Le Fraper du Hellen interview, the OTP code of conduct should provide guidance as to what type of public comments prosecutors may make. The Draft OTP Code seems to disfavor any public pronouncements by OTP attorneys:

Prosecutors shall . . . [a]void making public comments outside the courtroom including, inter alia, speaking to the media about the merits of particular cases or the guilt or innocence of certain accused before judgment by the Court, and making any public statements regarding the character, credibility, reputation, or record of an accused.²³⁹

One possible problem with the proposed rule is that it does not depend on the phase of a given case. If a defendant is at-large, like Mr. Al-Bashir is, it is unrealistic to expect the OTP to "avoid making public comments." Compliance with the rule could be contrary to the Prosecutor's obligation to "[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes."²⁴⁰ Moreover, the credibility of the entire Court may suffer if the OTP is precluded from responding to misrepresentations about the OTP's work. In this regard, the Draft OTP Code would create an asymmetry because ICC defense attorneys would be able to make public statements concerning pending cases as long as the statements do not bring the Court into disrepute,²⁴¹ whereas the Prosecutor would be unable to respond publicly to even baseless accusations and distortions.

In the United States, the Model Rules of Professional Conduct ("Model Rules") suggest a different approach. Model Rule 3.6 forbids lawyers from making "any extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding."²⁴² Prosecutors specifically are required to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused" pursuant to Model Rule 3.8.²⁴³ Because these Rules are primarily concerned with prejudice and harm to the defendant, however, prosecutors can publicly convey such

against Sudan. See Anonymous, *Ensuring a Responsibility to Protect: Lessons from Darfur*, 14 No. 2 HUM. RTS. BRIEF 26, 27 (2007) ("The traditional tactic of 'naming and shaming' used by Human Rights Watch, Amnesty International, and the UN . . . among others, has proved to be largely ineffective to persuade Sudan to end its abuses.").

239. Draft OTP Code, *supra* note 8, art. 17(1).

240. ICC Statute, *supra* note 1, art. 54(1)(b).

241. See Code for Counsel, *supra* note 22, art. 24(1) (stating that "[c]ounsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute").

242. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2006).

243. *Id.* R. 3.8(f).

information as the allegations involved,²⁴⁴ information that is a matter of public record,²⁴⁵ and the current status of an investigation.²⁴⁶ Prosecutors also are permitted to warn of dangers associated with the accused and, if the accused has not been apprehended, provide information necessary to aid in apprehension of that person.²⁴⁷ The Model Rules permit these types of comments even though “a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused.”²⁴⁸ The rationale is that the “public has a right to know about threats to its safety and measures aimed at assuring security.”²⁴⁹

Furthermore, under the Model Rules, attorneys are permitted to respond to prejudicial statements made by opposing parties as long as the statements are limited to counteracting adverse publicity on the proceedings.²⁵⁰ Such statements are permissible because of the recognition that “[w]hen prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding.”²⁵¹

Obviously U.S. rules concerning extrajudicial speech by prosecutors and other attorneys may not seem an ideal fit for an international criminal tribunal, particularly one that is a hybrid of common and civil law traditions. Nevertheless, the Model Rules’ approach attempts to balance respect for the rights of defendants with prosecutors’ interest in effective prosecution and could serve as a useful starting point for any deliberations concerning the OTP’s responsibilities when making extrajudicial statements.

To fulfill his duty to “[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes,”²⁵² the Prosecutor likely will need to publicize crimes that are of “most serious concern to the international community as a whole”²⁵³ so as to obtain cooperation with his investigations and to ensure the appearance of defendants before the Court. Moreover, it would seem counterproductive to prohibit the Prosecutor from responding to allegations that prosecutions are meritless, particularly because of the importance of having the ICC’s work perceived as legitimate by societies that have been affected by the crimes that the OTP is prosecuting.²⁵⁴

244. *Id.* R. 3.6(b)(1).

245. *Id.* R. 3.6(b)(2).

246. *See id.* R. 3.6(b)(4) (“[A] lawyer may state the scheduling or result of any step in the litigation . . .”).

247. *See* MODEL RULES OF PROF’L CONDUCT R. 3.6(b)(6) (2006) (“[A] lawyer may state . . . a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest . . .”).

248. *See id.* R. 3.8 cmt. 5 (noting that Model Rule 3.8, which governs prosecutors specifically, does not restrict statements that could be made pursuant to Model Rule 3.6(b), which governs lawyers and publicity generally).

249. *Id.* R. 3.6 cmt. 1.

250. *Id.* R. 3.6(c).

251. *Id.* R. 3.6 cmt. 7.

252. ICC Statute, *supra* note 1, art. 54(1)(b).

253. *Id.* art. 5(1).

254. *See supra* Part I(B); *see also* Turner, *Legal Ethics*, *supra* note 5, at 694 (noting that international criminal trials aspire to promote peace and reconciliation).

One potential concern—acknowledged in the commentary to Model Rule 3.8—is that “a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused.”²⁵⁵ This would be of particular concern for the ICC. Defendants at the ICC are not charged with mere violations of criminal law—they are accused of “crimes of concern to the international community as a whole”²⁵⁶—and public statements by the Prosecutor might bring even more condemnation to ICC defendants, who are presumed innocent under the ICC Statute until proven guilty by the Prosecutor.²⁵⁷ Given the high-profile nature of the Prosecutor’s work, his statements are bound to have a lasting effect on the perception of the accused even if the Prosecutor ultimately fails to convict him or her.

Nevertheless, the mere fact that certain types of statements may bring condemnation to ICC defendants would seem to be a poor reason to entirely prohibit the Prosecutor from making any public statements concerning ICC defendants and cases. As a practical matter, the “public condemnation of the accused” may be inevitable when the charges at issue involve crimes such as genocide. Moreover, given that it will ultimately be ICC judges who adjudicate the guilt of ICC defendants, not the public, the risk of prejudice from any public statements made by the Prosecutor also is lessened, although perhaps not entirely eliminated.²⁵⁸

Finally, the Prosecutor, like defense counsel, also should avoid making any public statements that would bring the Court into disrepute.²⁵⁹ The duty to avoid making such statements is especially significant if one accepts that ICC trials should have a “demonstration effect” on societies seeking to further the rule of law.²⁶⁰ The Prosecutor’s misleading claims concerning the Pre-Trial Chamber’s findings against Mr. Al-Bashir arguably would have violated such a provision because they tended to suggest that the Court had adjudicated Mr. Al-Bashir’s guilt without Mr. Al-Bashir having appeared before the Court.

I propose the following draft rule, which seeks to balance the Prosecutor’s duty of impartiality with his need to obtain assistance from the public regarding the investigation and prosecution of crimes:

255. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 5 (2006).

256. ICC Statute, *supra* note 1, art. 5(1).

257. *Id.* art. 66(1)–(2).

258. See Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1816–17 (1995) (suggesting that prohibitions against extrajudicial speech by attorneys arose out of concerns relating to finding neutral jurors).

259. See Code for Counsel, *supra* note 22, art. 24(1) (“Counsel shall take all necessary steps to ensure that his or her actions or those of counsel’s assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.”). The Prosecutor arguably should have a higher duty because of his role in the search “to establish the truth.” ICC Statute, *supra* note 1, art. 54(1). See also Triffterer, *supra* note 75, at 1078 (“Article 54 sets the goal as an effort to establish the truth.”); ICTY Standards, *supra* note 7, art. 1 (“[T]he duties and responsibilities of the Prosecutor differ from, and are broader than, those of defense counsel.”). The Draft OTP Code goes beyond the prohibition in the Code for Counsel as it requires the Prosecutor to “[t]ake all necessary steps to ensure that his or her actions do not bring proceedings before the Court into disrepute.” Draft OTP Code, *supra* note 8, art. 7(8) (emphasis added).

260. See Stromseth, *supra* note 60, at 262 (suggesting that the “demonstration effects” of criminal trials can “build public confidence that justice can be fair”).

Draft Conduct Rule Regarding Extrajudicial Statements

(1) The Prosecutor shall be prohibited from making statements that are prejudicial to ongoing proceedings or bring the Court into disrepute.²⁶¹

(2) The Prosecutor also shall avoid making public comments outside of the courtroom including, *inter alia*, speaking to the media about the merits of particular cases or the guilt or innocence of certain accused before judgment by the Court, and making any public statements regarding the character, credibility, reputation, or record of an accused or any witness.²⁶²

(3) Notwithstanding (2) above, the Prosecutor may provide factual information concerning: (i) the charges facing the accused to the extent that such statements are necessary to inform the public of the nature and extent of the Prosecutor's action²⁶³ and are intended to aid in the investigation of crimes or to encourage compliance with arrest warrants issued by the Pre-Trial Chamber or (ii) the merits of a particular case when provided in response to publicity that tends to undermine the perception of the Office of the Prosecutor if such adverse publicity was not initiated by the Prosecutor and the statement made pursuant to this paragraph is limited to such information as is necessary to mitigate the recent adverse publicity.²⁶⁴

Although some segments of the ICC may prefer a presumptive ban on extrajudicial speech, the rule proposed here would have precluded the Prosecutor from misstating the nature of the Pre-Trial Chamber's findings concerning Mr. Al-Bashir's alleged crimes while still allowing him to make public statements that could mitigate misimpressions about the OTP's work and encourage compliance with the Al-Bashir warrant.

CONCLUSION

This Article has sought to argue that legal ethics are of central importance to international criminal law. Although the ICC has adopted codes of conduct for judges and defense counsel, no such code of conduct exists for the OTP. This is regrettable, and some of the OTP's most controversial actions—from its over-reliance on confidentiality agreements, to its refusal to comply with orders from the *Lubanga* Trial Chamber and the Prosecutor's decision to publish an editorial concerning Sudanese President Al-Bashir—can be attributed in part to the absence of an ethical framework for ICC prosecutors.

A code of conduct cannot and should not eliminate prosecutorial discretion. However, the ethical dilemmas discussed in this Article are familiar in domestic

261. Code for Counsel, *supra* note 22, art. 24(1).

262. *Cf. id.* ("Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.").

263. MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2006).

264. MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (2006).

contexts, and the OTP should have addressed them in the course of developing an OTP code of conduct prior to the commencement of the ICC's first trials.²⁶⁵ The current state of affairs, where the Appeals Chamber has been called upon to determine what the Prosecutor's obligations should be, is unsustainable and has brought unfortunate controversy to the Court. Nor has the Appeals Chamber fully resolved the Prosecutor's conflicting duties of (i) investigation and disclosure and (ii) independence and compliance with Chambers. The OTP's public statements remain entirely unregulated.

Although the rules proposed in this Article need not be incorporated directly into an OTP code of conduct, there is strong reason to believe that the OTP requires specific rules that go beyond the abstract standards reflected, for example, in the Draft OTP Code and ICTY Standards for Prosecutors. The diversity of legal backgrounds in the OTP, the high profile nature and permanence of its work, and the belief that prosecutions should serve some educative purpose suggest that very specific rules of conduct are needed to create clear expectations for OTP attorneys that may differ markedly from the expectations in domestic systems. A code of conduct will not eliminate the possibility of the OTP taking controversial actions in the future. Nevertheless, if developed in concert with other organs of the Court, it can help to establish relatively clear norms of conduct and provide some prospective guidance as to how ICC prosecutors should address instances of conflicting duties in the future.

For international criminal law to achieve all of its objectives, prosecutors at international criminal tribunals like the ICC must pay greater attention to the ethical dimensions of their actions. Thus far, by engaging in questionable acts such as refusing to comply with orders and misrepresenting actions taken by the Court, the OTP's actions have undermined the Court's early work. The ICC cannot further the rule of law without demanding that its employees not only advocate respect for the rule of law, but embody it.

265. Professor Whiting has suggested that the disclosure issue was particularly foreseeable. See Whiting, *supra* note 112, at 209 (“[O]ne of the most remarkable aspects of this story was its inevitability. The conflict that arose between the Prosecution’s right to obtain confidential ‘lead’ evidence pursuant to Article 54(3)(e) and its responsibility to disclose potentially exculpatory evidence under Article 67(2) is built right into the Statute of the ICC . . .”).