THE EXCLUSION OF IMPROPERLY OBTAINED EVIDENCE AT THE INTERNATIONAL CRIMINAL COURT: A PRINCIPLED APPROACH TO INTERPRETING ARTICLE 69(7) OF THE *ROME STATUTE*

Michael Madden

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DEDICATION

This work is dedicated to my wife, Sandra, who afforded me every opportunity to complete the project despite her total lack of interest in the content of the thesis. It is equally dedicated to my feisty and argumentative daughter, Hallie (who will surely end up studying law someday), and to my son, Dylan, whose arrival helped me to remember that there are far more important pursuits in life than academic degrees.

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ABSTRACT

This thesis examines article 69(7) of the *Rome Statute*, which creates an exclusionary rule for improperly obtained evidence at the International Criminal Court (ICC). Ultimately, the thesis proposes how the ICC should interpret its exclusionary rule. The thesis discusses the theory underlying exclusionary rules, the evidence law and remedial law contexts within which exclusionary rules operate, and numerous comparative examples of exclusionary doctrine from within national criminal justice systems. Finally, some unique aspects of international criminal procedure are described in order to demonstrate how an international exclusionary rule might need to differ from a domestic rule, and previous jurisprudence relating to exclusionary rules at other international criminal tribunals is surveyed. The thesis ends by articulating what a basic test for exclusion at the ICC should look like, and examines how such a rule would operate in respect of all of the different exclusionary doctrines discussed earlier in the thesis.

LIST OF ABBREVIATIONS USED

ACT	Australian Capital Territory
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European *Convention for the Protection of Human Rights*
ICC	International Criminal Court
ICCPR	*International Covenant on Civil and Political Rights*
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHRL	International Human Rights Law
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
SCC	Supreme Court of Canada
SCSL	Special Court for Sierra Leone
WWII	World War Two

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CHAPTER 1 – INTRODUCTION

When the *Rome Statute of the International Criminal Court*[1] was first adopted on July 17, 1998, the United Nations Secretary-General of the day, Kofi Annan, suggested that the establishment of the ICC was "a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law."[2] Amnesty International has similarly noted that the *Rome Statute* "has been hailed by governments, legal experts and civil society as the most significant development in international law since the adoption of the United Nations Charter."[3] These statements recognize the tremendous achievement of a large majority of the international community in conceptualizing a mechanism for bringing perpetrators of the most heinous international crimes to justice: in many ways, the mere fact that an international criminal court was *created* is cause for celebration, regardless of how effectively such a court might ultimately operate.

There is, however, an immense difference between the conceptualization and the operationalization of a good idea. Thus, if the ICC is to offer more than just perpetual "hope" of justice, and if it is to continue its advancement toward universal human rights and the rule of law, then the Court must practically function in ways that conform to the expectations and ambitions of those who drafted, signed, and ratified the *Rome Statute*.

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[1] International Criminal Court, *Rome Statute,* UN Doc A/CONF. 183/9 (July 17, 1998) [*Rome Statute*].

[2] United Nations, "Secretary-General Says Establishment of International Criminal Court is Major Step in March Towards Universal Human Rights, Rule of Law" Press Release L/2890 dated 20 July 1998, online: http://www.un.org/News/Press/docs/1998/19980720.l2890.html.

[3] Amnesty International USA Program for International Justice and Accountability, "Fact Sheet One – International Criminal Court" (2007-2008), online: http://www.amnestyusa.org/pdfs/IJA_Factsheet_1_International_Criminal_Court.pdf.

The Court must give meaningful effect to the lofty language contained within the Preamble of its enabling treaty, wherein the State Parties affirmed "that the most serious crimes of concern to the international community as a whole must not go unpunished,"[4] and wherein they "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[5]

Herein – at the point of operationalizing the *Rome Statute* – lies a major problem for the ICC: how should the court promote universal human rights within international criminal proceedings that involve defendants and other stakeholders (including victims, witnesses, and larger communities) whose interests often conflict with one another? On the one hand, it is obvious that convicting those who are responsible for crimes of widespread and flagrant disrespect for international human rights, such as "the inherent right to life,"[6] should encourage respect for such human rights. On the other hand, however, the ICC must surely also give a full measure of respect to the fundamental human rights, including "the right to a fair trial,"[7] of those who stand accused of international crimes. Is it possible, in considering both the perspectives of accused persons and those who would see them prosecuted, for the ICC to give effect to broadly worded international human rights while still putting an end to impunity for perpetrators of the most serious international crimes? What sacrifices must be made, and by whom, in order to effectively balance justice (in the form of convictions against the guilty) with an ambitious quest for universal human rights?

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[4] *Rome Statute*, *supra* note 1, preamble.
[5] *Ibid*.
[6] *International Covenant on Civil and Political Rights*, New York, 16 December 1966, 999 UNTS 171, entered into force 23 March 1976 [ICCPR], article 6(1).
[7] *Ibid*, art 14(1).

These questions, while relevant to interpretations and implementations of many provisions of the *Rome Statute*, are perhaps most engaged by article 69(7) of the treaty – the provision that requires the ICC to exclude evidence that has been obtained in breach of the Statute or internationally recognized human rights, under certain circumstances. Article 69(7) stipulates that,

> Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
>
> (a) The violation casts substantial doubt on the reliability of the evidence; or
> (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.[8]

Article 69(7) of the *Rome Statute* is an exclusionary rule for improperly obtained evidence, similar to such exclusionary rules found within domestic criminal justice systems throughout the world.

Like domestic criminal law exclusionary rules, however, the ICC's rule represents a site where human rights of accused persons collide with the interests of numerous other stakeholders in international criminal trials. When improperly obtained (but reliable and relevant) evidence is excluded from a trial, then a statement of respect for certain individual human rights, such as rights to privacy and security of the person, is communicated by the Court. However, when this same exclusion of reliable and relevant evidence leads to the acquittal of one who likely committed serious international crimes involving egregious breaches of victims' human rights, then the Court may simultaneously communicate a message of apathy toward certain other individual and collective human rights.

[8] *Rome Statute*, *supra* note 1, art 69(7).

My objective throughout this thesis will be to propose a test that could be used by the ICC in applying Article 69(7) of the *Rome Statute* – or, stated more dramatically, to illuminate how the ICC *can* give justifiable effect to universal human rights when addressing the exclusion of improperly obtained evidence in international criminal trials. At the end of this thesis, I will propose a simple, principle-based exclusionary test that is flexible enough and purpose-suited for adoption by the ICC. However, in the chapters leading up to this final proposal, I will also provide detailed analysis of the theory underlying exclusionary rules, critiques of various aspects of existing exclusionary rules, and discussion of the international criminal landscape within which the ICC's rule must operate – all in an effort to establish why the principle-based exclusionary test that I am proposing would be useful to the ICC. While I cannot propose to the ICC exactly how the Court should decide an exclusionary matter in a particular case, this thesis should provide a paradigm for thinking about exclusion that could be applied in any rights breach scenario in order to guide the Court in identifying relevant factors, before ultimately determining whether tainted evidence should be admitted or excluded in that case.

I. Building an Exclusionary Rule from First Principles

I resolved to write this thesis on the ICC's exclusionary rule after studying the recently reformulated Canadian exclusionary rule[9] in significant detail during previous

[9] The Canadian exclusionary rule is provided for within the Constitution: see *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 24(2) [*Charter*]. However, for a more complete judicial explanation of how the rule operates, see *R v Grant*, [2009] 2 SCR 353 [*Grant*].

projects. In my previous works,[10] it became apparent to me that the Canadian rule was not solidly grounded in either the text of the *Charter of Rights and Freedoms*,[11] or in easily defensible principles. I then began reading about different exclusionary rules that have been adopted in other jurisdictions, which caused me to realize that inconsistency often exists between the purported rationale for, and the actual application of, a given exclusionary rule. It struck me, after reading commentary and leading cases from around the world, that exclusionary rules frequently develop through an accretion of reactive judgments or legislative changes, rather than from a principled basis. With this background in mind, I began to sense that the law might develop more logically if we could (re)commence the exercise of crafting an exclusionary rule from scratch – that is to say, by proceeding from first principles (albeit informed by experiences with different domestic exclusionary rules), but free from the *undue* or unacknowledged influence of any accumulated historical, constitutional, legislative, or judicial baggage.

Certainly, much has been written about the strengths and flaws of various exclusionary rules that are used throughout the world. A typical Canadian law review article on the subject of s. 24(2) of the *Charter*, for instance, will often include a series of footnotes that make reference to some of the approximately 10-20 leading articles by criminal law scholars who have framed the debate about how Canada's exclusionary rule can and should operate.[12] A typical article might also refer to the current status of

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[10] Mike Madden, "Empirical Data on S. 24(2) Under R. v. Grant" (2011) 78 Criminal Reports (6th) 278 [Empirical Data]; Mike Madden, "Marshalling the Data: An Empirical Analysis of S. 24(2) Case Law in the Wake of *R. v. Grant*" (2011) 15 Can Crim L Rev 229 [Marshalling the Data].

[11] *Charter*, *supra* note 9.

[12] See, for instance, Steven Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under s. 24(2) of the Charter" (2003) 49 McGill L

exclusionary rules in any number of different countries, including England, New Zealand, the United States, South Africa, and Israel, to name but a few of the most frequently compared jurisdictions.[13] One can safely say that Canadian scholars are carefully considering certain aspects of their exclusionary rule, and they are diligently looking beyond their borders in their efforts to suggest how exclusionary jurisprudence could be improved. What is more, I have observed that this situation in the Canadian academic legal environment is reflective of the way that exclusionary rules are thought of and written about elsewhere in the English-speaking world[14] – there is no shortage of doctrinal commentary on any domestic exclusionary rule.

However, what should distinguish this thesis from existing academic work is the grounding in principle and theory that the project's ultimate proposal will demonstrate. My observation about the overwhelming majority of current legal scholarship dealing with exclusionary rules is that these works either fail altogether to consider why exclusionary rules exist in the first place, or they accept without question the proffered rationale for a given exclusionary rule that has been supplied by a High Court in their respective jurisdictions. In other words, scholars tend to uncritically accept the *status quo* when it comes to asking what an exclusionary rule should do, and then proceed to

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J 105, at FNs 7 and 8 (where the author cites 10 previous works on s. 24(2) of the *Charter* in the span of two footnotes).

[13] See, for instance, Michael Davies, "Alternative Approaches to the Exclusion of Evidence Under s. 24(2) of the Charter" (2002) 46 Crim L Q 21 (wherein the author refers to exclusionary doctrines that apply in New Zealand and the United States as a basis for comparison with the Canadian rule).

[14] See, for instance, Binyamin Blum, "Doctrines Without Borders: The 'New' Israeli Exclusionary Rule and the Dangers of Legal Transplantation" (2009) 60 Stan L Rev 2131 [Doctrines] (wherein the author describes developments to the Israeli exclusionary rule in the context of similar changes to the law in the United States, Canada, South Africa, and the United Kingdom).

comment upon how a given rule is or is not efficient in achieving the purpose that they have unquestioningly accepted. This type of micro-criticism tends to miss potentially more important issues: what if the rationale that underlies the rule is not sound to begin with? What if a High Court has supplied an incomplete or incorrect answer when it has pronounced upon the rationale for a jurisdiction's rule?

In the United States, for instance, the Supreme Court has determined that a constitutional exclusionary rule exists, first and foremost, to deter future state misconduct.[15] In other words, evidence is to be excluded from criminal trials if it has been obtained in breach of a defendant's rights only when the act of excluding the evidence is likely to deter police (or other state actors) from similarly breaching someone's rights the next time around. In Canada, however, the Supreme Court has categorically determined that the deterrent effect of excluding evidence is *not* a valid consideration for a court when it decides on a s. 24(2) exclusion application.[16] Most critics in the United States therefore tend to write about how and when the exclusionary rule should be applied in order to achieve a deterrent purpose, while critics in Canada tend to focus their suggestions for reform of exclusionary law on how courts can better *dissociate* themselves from tainted evidence, since the Supreme Court of Canada has found that dissociation is the dominant purpose of the Canadian exclusionary rule.[17]

As the above (somewhat over-simplified) discussion demonstrates, there is a

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[15] *United States v Calandra*, (1974) 414 US 338, at 347: "the rule's prime purpose is to deter future unlawful police conduct."

[16] See *Grant*, *supra* note 9, at para 73: "The concern of this [exclusionary] inquiry is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes."

[17] *Ibid*, at paras 72-73.

lacuna in much of the academic criticism dealing with domestic exclusionary rules: commentators are prepared to argue about whether a particular development in the law is good or bad, but they tend to avoid the question of whether the underlying and purported rationale for the law is good or bad. The creation of a new International Criminal Court by way of a treaty that includes an exclusionary rule (that has yet to be comprehensively interpreted)[18] therefore represents a valuable opportunity to critically think about, or rethink, why and how exclusionary rules should operate. In the chapters that follow, I will address both of these questions. First, I will articulate what an exclusionary rule can and should do, and, second, I will articulate what content an exclusionary test should contain if it is to succeed in accomplishing its desired purpose(s). By seizing this new opportunity to develop a principle-based test for exclusion, it is hoped that any weaknesses that currently exist in domestic exclusionary rules can be avoided in their new international counterpart.

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[18] Article 69(7) was discussed in *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Confirmation of Charges', Pre-Trial Chamber I, ICC-01/04-01/06 (29 January 2007) at paras 62-90, wherein the Pre-Trial Chamber I briefly canvassed human rights and ICTY jurisprudence before determining that a balance must be achieved between the seriousness of a violation and the fairness of a trial as a whole. Ultimately, Pre-Trial Chamber I decided to admit evidence obtained in breach of local criminal procedural law. However, the cursory discussion of exclusion in this case can perhaps be attributable to the preliminary nature of the proceeding (as a confirmation of charges rather than a trial on the merits); see para 90:

> The Chamber recalls the limited scope of this hearing, bearing in mind that the admission of evidence at this stage is without prejudice to the Trial Chamber's exercise of its functions and powers to make a final determination as to the admissibility and probative value of the Items Seized.

The same scenario was later ruled upon by Trial Chamber I in *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on Admission of Material from the "Bar Table"', Trial Chamber I, ICC-01/04-01/06 (24 June 2009), but the decision was largely confined to the facts of the case, and did not purport to lay down a framework for the general application of an exclusionary rule.

II. A *Sui Generis* Exclusionary Rule for International Criminal Trials

A second, and perhaps more important, distinction between my thesis and much of the academic literature that has preceded it is in the project's focus on how an exclusionary rule should be applied within the context of *international* criminal law and procedure. Notwithstanding the wealth of commentary on various domestic exclusionary rules, only one scholar has yet published an article or book that addresses Article 69(7) of the *Rome Statute*, and how the ICC's exclusionary rule should be applied.[19] The latter portion of my thesis will concentrate exclusively on the unique function of international criminal trials, and on how doctrines that are borrowed or imported from domestic criminal law must be modified and adapted in order to support this unique function. Thus, while much of the early content of this thesis could be absorbed and applied by any domestic criminal law and procedure scholars, the final output from this thesis will be an exclusionary test that is uniquely tailored for application by the ICC (and perhaps future international criminal tribunals).

III. A Road-*Mapp* Toward Principled Exclusion at the ICC

My research into the American exclusionary rule (which was interpreted so as to be binding on State governments and courts, rather than just the Federal government and courts, in *Mapp v Ohio*)[20] has taught me: a) that no discussion of exclusionary rules is complete without an ostensibly witty pun on the word "map"; and, b) that good scholarship begins with a clear outline – or roadmap – of the argument to be made. In

[19] Kweku Vanderpuye, "The International Criminal Court and Discretionary Evidential Exclusion: Toeing the Mark?" (2006) 14 Tul J Int'l & Comp L 127.
[20] *Mapp v Ohio*, 367 US 643 (1961).

conformity with these conventions, and in recognition of my American roots, I will briefly discuss the structure of this thesis.

Following an introductory chapter, Chapter 2 will attempt to establish a principled basis for exclusionary rules in general. This chapter will examine both forward-looking rationales for exclusion (relying on deterrence- and dissociation-based theories) and backward-looking rationales (relying on vindication- and compensation-based theories of exclusion). Each of these theories can, or at least *could be able to*, explain why exclusionary rules exist in the first place, and why they might operate under some circumstances, but not others. After considering these rationales for exclusion, the countervailing considerations (that is to say, the perceived and/or actual costs of exclusion) will be discussed. Finally, the chapter will conclude by identifying a principled basis for an exclusionary rule based on the various rationales discussed within the chapter. This conclusion will serve as the foundation for subsequent analysis of what should be incorporated into the ICC's exclusionary test, on the assumption that every aspect of a test that the ICC ultimately adopts should be justifiable in terms of the principles that underlie the concept of exclusion.

Before moving on to study specific features of domestic and international exclusionary rules, Chapter 3 will briefly attempt to situate the concept of exclusionary rules within broader fields of criminal evidence law and the law of remedies. This chapter will help to identify how an exclusionary rule – which is both a rule of evidence inadmissibility, and at the same time a judicial remedy for breaches of fundamental rights – should operate in harmony with other related rules that might render certain evidence inadmissible, and/or other remedial options that might be available to a court that is

confronted with a rights breach. As this chapter will demonstrate, the way in which one thinks of exclusionary rules will tend to be influenced by how a given rule fits into its larger legal framework.

Chapters 4, 5, and 6 will then comprehensively evaluate different aspects of exclusionary rules that are actually in use throughout the world. The focus of Chapter 4 will be on standing and identity requirements that form part of different domestic exclusionary rules – that is to say, with cases where an individual other than the accused has suffered a rights breach, or when an individual other than a state agent has committed a rights breach, respectively. Chapter 5 will examine different classes of factors that tend to influence exclusionary decisions in domestic laws, including the good faith (or its absence) of police officers who collect tainted evidence, the seriousness of the underlying offence, and the importance or centrality of the evidence to the case. In Chapter 6, the hypothetical clean path doctrine (including the inevitable discovery doctrine) and the derivative evidence doctrine (or fruit of the poisonous tree doctrine) will be discussed in order to ascertain how these doctrines might form part of a principled exclusionary rule. In each of these three chapters, the analysis will be performed from a domestic comparative perspective by looking at national exclusionary rules, and by assessing how effectively different components of the rules can be justified on the basis of the principles developed in Chapter 2. The rationale for describing and studying domestic exclusionary rules in these chapters is not so much because the rules (and the differences between them) are interesting in their own rights, but because a given foreign rule, or – more likely – a combination of doctrines taken from different foreign rules, might provide a model for the kind of principled test that I propose for use by the ICC.

In Chapter 7, concentration will shift from domestic to international criminal law. The chapter will revisit basic principles of international law, and the role that international criminal law plays in shaping individual and institutional conduct throughout the world, in order to ascertain how an otherwise sound exclusionary rule might need to be modified for use by an international criminal tribunal. Should the ICC play a role in leading criminal law and procedure more toward the protection of human rights in criminal investigations and trials (i.e.: through exclusion), and away from utilitarian crime control paradigms that would permit admission of evidence in spite of state misconduct? Or does the ICC need an exclusionary test that places a premium on truth and accuracy of adjudicative fact-finding, given the seriousness of the crimes over which the tribunal will preside? The responses to these questions will necessarily relate back to the theoretical bases for exclusionary rules (in general) that are addressed in Chapter 2, but the international character of the ICC will prompt questions about whether different weight and importance should be assigned to certain rationales for exclusion of evidence, and the associated countervailing factors, at the ICC.

After reviewing the distinct function of international criminal law, Chapter 7 will discuss how this function sometimes weighs more heavily in favour of admission or exclusion of evidence, respectively. The chapter will conclude by proposing how our understanding of the principled bases for exclusion from Chapter 2 (deterrence, dissociation, vindication, and compensation) would need to be adjusted to suit the needs of international criminal trials.

Chapter 8 will again entail a foray into comparative law, but will examine the jurisprudence of other *international* criminal tribunals (such as the ICTY, ICTR, SCSL,

and ECCC) in order to study how those tribunals have applied exclusionary rules. Since these predecessor tribunals are the closest comparator to the ICC in terms of their roles, jurisdiction, and functions, their case law will offer some helpful final information before the thesis's ultimate proposal regarding the application of Article 69(7) of the *Rome Statute* is introduced.

Chapter 9 will involve careful analysis of the lessons that have been learned in each previous chapter in order to develop and justify a purpose-specific exclusionary test for the ICC. In this chapter, many of the different types of approaches to excluding evidence will be reviewed in order to suggest specifically what should and should not be considered by the ICC when that Court hears an application to exclude evidence. Essentially, each known exclusionary rule doctrine will be subjected to scrutiny by asking whether the given doctrine can be justified in terms of the core principles (as developed in Chapter 2, and as refined in Chapter 7) that give rise to the rule in the first place. This final substantive chapter will ultimately be more about putting things all together than about introducing new research or argument.

In the conclusion, Chapter 10, the work of the thesis will be briefly summarized, and the major contribution of this thesis to the academic literature – namely, a principle-based exclusionary test for use by an international criminal court – will be reiterated.

IV. The Analogy Between Domestic and International Exclusionary Rules

As the above roadmap indicates, a substantial portion of the present thesis will involve study of a body of theory that deals with domestic exclusionary rules (mainly in Chapter 2), and study of specific doctrines from various different domestic exclusionary rules (mainly in Chapters 4, 5, and 6), before moving on to consideration of international

exclusionary rules, and the specific manner in which article 69(7) should be interpreted as an exclusionary rule for use at the ICC. Essentially, this methodological approach assumes that a useful analogy can be drawn between the role, function and operation of a domestic exclusionary rule, and the role, function, and operation of an international exclusionary rule. Some explanation and justification for the basis of this assumption is necessary at the outset of the thesis, given how central the domestic/international analogy will be to the work that follows in subsequent chapters.

International criminal justice systems that first developed over the last century did not emerge from a void; rather, these systems were created in moulds that represented hybrids of existing common law and civil law systems,[21] with greater biases toward one paradigm or another in the cases of different tribunals.[22] In other words, as much as some scholars might advocate for a *sui generis* or unique international criminal procedure system,[23] it is generally recognized that such a system will "inevitably […] have elements from the major domestic legal systems of the world."[24] Jackson and Summers realistically recognize that it is not only inevitable, but also desirable, for the international tribunals to employ evidence and procedural law that is at least somewhat linked to

[21] See generally, Megan Fairlie, "The Marriage of Common Law and Continental Law at the ICTY and its Progeny, Due Process Deficit" (2004) 4 Int'l Crim L Rev 243.
[22] See, for instance, John Jackson and Sarah Summers. *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*. (Cambridge: Cambridge UP, 2012) at 110-111 (noting that the ICC's *Rules of Procedure and Evidence* were originally influenced more by a common law adversarial model, but are now moving more toward an equal "'marriage' of both the common and civil law traditions").
[23] See, for instance, Gideon Boas, James L. Bischoff, Natalie L. Reid and Don Taylor III. *International Criminal Procedure*. (Cambridge: Cambridge UP, 2011), at 15.
[24] Robert Cryer, Hakan Friman, Daryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, (New York: Cambridge UP, 2010) at 425.

accepted domestic laws, if the tribunals are to be perceived as legitimate.[25] In light of this reality, it would seem appropriate to begin a study of the ICC's international exclusionary rule with analysis of the different ways in which domestic exclusionary rules from common and civil law jurisdictions operate: after all, if domestic procedural rules properly form the basis of international criminal procedure, then why should domestic doctrinal and theoretical jurisprudence not form the basis of international commentary applicable to rules of criminal procedure, such as rules for the exclusion of tainted evidence?

There are also pragmatic reasons why study of an international exclusionary rule should draw upon jurisprudence that has emerged from domestic criminal contexts before shifting focus to an international plane – predominantly because a much greater mass of academic literature on domestic exclusionary rules has developed over the last one hundred years than has emerged on international rules over the last twenty years[26] since the enshrinement of the first international exclusionary rule in the ICTY's *Rules of*

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[25] *Supra* note 22, at 145-46:

> [T]he tribunals face legitimacy problems, which makes it all the more important that their decisions can be justified to those affected by them and to the international community. In order to ensure that decisions are accepted locally in the societies from which the accused originate, it makes sense to devise procedures that deviate as little as possible from local norms.

[26] The American Fourth Amendment exclusionary rule applicable to unlawful searches and seizures originated in a 1914 decision of the United States Supreme Court (*Weeks v United States*, (1914) 232 US 383). An article discussing this decision first appeared in the *Harvard Law Review* in February, 1921 (Osmond K Fraenkel, "Concerning Searches and Seizures" (1921) 34 Harv L Rev 361), and, as of 30 Sep 2013, Fraenkel's article had been cited within the Heinonline database 171 times. A search of this database for articles published between 1913 and 1993 (the year that the ICTY was created) containing the phrase "Fourth Amendment exclusionary rule" undertaken on 30 Sep 13 generates 1460 results. This abundance of literature from the United States alone can be contrasted with the relative scarcity of literature on international exclusionary rules. For instance, a search of the Heinonline database undertaken on 30 Sep 13 for articles containing the word "ICTY" and the phrase "Rule 95" only yielded 82 results.

Procedure and Evidence.[27] Where so much thought has already been devoted to more established domestic exclusionary rules, one might expect that something useful could be gained from a study of these rules, even where the ultimate goal of that study is the development of a test for applying an international exclusionary rule.

However, while domestic laws provide a sound starting point for the present thesis, the limited utility of domestic jurisprudence must be acknowledged, since, as a matter of positive law, international criminal procedure is already hybridized to the point that it is somewhat distinct from the procedural law of any one domestic jurisdiction,[28] and since, as a matter of aspiration, the time has perhaps come for international criminal procedure to "embrace its status as a jurisdiction in its own right. Only then will those who draft and interpret the law be free from preoccupation with the common and civil law approaches to problem-solving."[29] In other words, domestic procedural law should probably be a stepping-stone from which international procedural law develops, but not an anchor that prevents the international field from continuing to develop in new directions.

Once the history and potential future of international criminal procedure are understood in these terms – as being linked, but not rigidly or permanently connected to domestic criminal procedure counterparts – then one can begin to see how a useful analogy (but not equation) can be drawn between domestic and international exclusionary

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[27] ICTY *Rules of Procedure and Evidence*, online: http://www.icty.org/sid/136. Made under Article 15 of the ICTY statute (as adopted by UNSCR 827 (1993)), Rule 95.

[28] For a discussion of how the ICTY's procedural law has developed in a way that is foreign to any particular domestic legal system, see Vladimir Tochilovsky, "International Criminal Justice: Strangers in the Foreign System" (2004) 15 Crim L Forum 319, particularly at Part II (sub-titled, "A System Alien to Everyone").

[29] Boas et al., *supra* note 23, at 16.

rules. Domestic rules and theory provide a useful point of departure for subsequent analysis of an international rule, but they cannot provide a complete answer to the central question at the heart of this thesis, namely, "how should the ICC's exclusionary rule be interpreted and applied?" In order to properly develop the answer to this question, therefore, the ensuing study of domestic exclusionary theory and doctrine will be followed by a corresponding study of international theory and doctrine. Only once both of these elements of the thesis are complete, and once it has become apparent how otherwise principled domestic exclusionary doctrines would need to be adopted, modified, or abandoned in order for them to be suitable within an international criminal procedural system, will I be in a position to argue how article 69(7) of the *Rome Statute* should be interpreted.

V. Can the ICC Create the Rule Proposed Within this Thesis?

If my research into American exclusionary law reveals that good scholarship is preceded by a strong outline, then Canadian legal scholarship can be credited with having taught me that academic proposals must be both *theoretically* and *practically* viable if they are to have real value. At a recent conference that I attended, Payam Akhavan (now one of Canada's leading authorities on international criminal law, and previously a Legal Advisor to the ICTY for many years before joining McGill University's Faculty of Law), noted jokingly that he was often asked by his new colleagues, after making the transition from legal practice to the academy, "Yes, Payam, we know it works in practice – but

does it work in *theory*?"[30] While the preceding description of my thesis, and in fact the bulk of the thesis that follows, should satisfy academics that a principle-based exclusionary test for the ICC is theoretically desirable, some energy must be devoted at the outset to demonstrating how the ideas within this thesis could also be useful in practice.

Article 69(7) of the *Rome Statute* is worded rather particularly. In order for evidence to be excluded, first, it must be established that the evidence was obtained: i) by means of a violation of the *Rome Statute*,[31] or, ii) by means of a violation of internationally recognized human rights.[32] I will call this first step the "rights-breach" step of the process. Second, if either one of the first criteria is met during the rights-breach step, then it must also be shown that: "a) the violation casts substantial doubt on the reliability of the evidence,"[33] or, b) "the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."[34] I will refer to this second step as the "exclusionary calculus" step of the process.

Some scholars have suggested that Article 69(7) is a very restrictive exclusionary rule that will lead to exclusion only in rare cases,[35] based on the substantial conditions (either two or three logical conditions, depending on the case) that must be met before

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[30] Payam Akhavan, ICC Panel Discussion. Canadian Council of International Law, 41st Annual Conference, "SOS: International Law in Times of Crisis and Emergency," 10 November 2012.
[31] *Rome Statute*, *supra* note 1, art 69(7).
[32] *Ibid*.
[33] *Ibid*, art 69(7)(a).
[34] *Ibid*, art 69(7)(b).
[35] See, for instance, Nancy Amoury Combs, *Evidence*, (Williamsburg, VA: William & Mary Law School, 2011), at 328. After discussing the ICTY and ICTR exclusionary rules, Combs notes, "the analogous ICC rule appears to require that a higher standard be met before evidence will be excluded."

exclusion is required. They argue that the language to be applied during the exclusionary calculus step, and particularly the language within Article 69(7)(b), is onerous to claimants, requiring them to show not just that admitting tainted evidence could be, or would be, harmful to the proceedings, but that it is *antithetical* to, and would *seriously damage* the integrity of the proceedings. Although this reading of the likely scope of Article 69(7) is plausible, it fails to consider the wide discretion that the ICC actually has in interpreting and applying key phrases contained within Article 69(7).

With respect to clauses i) and ii) that comprise the rights-breach step, this thesis will not attempt to delineate exactly what amounts to a violation of internationally recognized human rights (since there is likely significant debate about the content of such rights beyond a widely-accepted core).[36] Throughout this thesis, I will use examples for the purposes of discussion which suggest that unreasonable searches and confessions obtained through physical coercion tend to generate evidence that is obtained in breach of internationally recognized human rights,[37] because unreasonable searches and confessions obtained through torture clearly violate rights that fall within the widely-accepted core of international human rights law (IHRL).[38] However, I will generally

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[36] However, see Rebecca Young, "'Internationally Recognized Human Rights' Before the International Criminal Court" (2011) 60 ICLQ 189, at 193 (wherein the author notes that the phrase "internationally recognized human rights" is used in only two places within the Rome Statute. She further suggests, "It appears implicit in the use of the phrase in both articles 21(3) and 69(7) that the drafters of the Statute considered that 'internationally recognized human rights' are readily capable of identification").

[37] See William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (New York: Oxford UP, 2010), at 849: "National practice suggests that the exclusionary rule is likely to arise in cases where evidence has been obtained following an illegal search, or as a result of the infliction of torture or other cruel, inhuman, and degrading treatment."

[38] See, for instance, ICCPR, *supra* note 6, arts 7 and 17 (prohibiting torture, and affirming that everyone has the right to be free from arbitrary interference with their privacy,

avoid discussion of clauses i) and ii) in my thesis, because these clauses are more properly about the substantive content of international human rights law and of the rights of accused persons under the *Rome Statute* than about the exclusionary rule itself: they simply represent triggers for the ICC, such that if a breach of a substantive right is found, then the exclusionary calculus must be commenced by the Court. Thus, beyond reference to certain widely accepted core rights of IHRL, my thesis will not endeavour to discuss exclusionary triggers that may or may not lie at the fringes of IHRL.

In any event, if clauses i) and ii) only initiate application of an exclusionary calculus, then clauses a) and b) must be understood as providing ICC with its treaty-based authority to develop a comprehensive exclusionary framework. After all, both the *Rome Statute* and the ICC's *Rules of Procedure and Evidence*[39] are silent as to when a rights-breach (or "violation") will cast "substantial doubt on the reliability of the evidence," or when the admission of evidence would be "antithetical" to the proceedings in a way that would seriously damage their integrity. Thus, in the absence of specific guidance from the Assembly of States Party to the *Rome Statute*, the ICC must interpret and determine for itself when a violation will meet the exclusionary requirements of Article 69(7) – hence the need for a principle-based test that the ICC could use in hearing exclusion applications.

If one accepts that the ICC has some discretion, or even obligation, to interpret and give concrete meaning to Article 69(7), then the next logical question is, how much

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respectively), and the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222, entered into force 3 September 1953 [ECHR], articles 3 and 8 (for articulations of almost identical rights).

[39] ICC *Rules of Procedure and Evidence*. ICC-ASP/1/3, at 10, and Corr. 1 (2002), UN Doc PCNICC/2000/1/Add.1 (2000) [ICC RPE].

discretion does the Court have? As a preliminary point, one might look to the *Vienna Convention on the Law of Treaties*,[40] a widely ratified international instrument[41] that is generally regarded as being expressive of customary international law,[42] and that sets out rules governing the interpretation of treaties. However, as Pauwelyn and Elsig have observed, significant divergence in treaty interpretation approaches exist across global axes of time, space, and identity (of the tribunal interpreting the law),[43] and this divergence is often simply "labeled as an incorrect application of the Vienna Convention Rules."[44] Pauwelyn and Elsig's work deconstructs this kind of oversimplified labeling, and suggests instead that divergence is more a reflection of the fact that "tribunals have a varying degree of interpretation space within which they must select between different interpretative techniques,"[45] than it is an example of some tribunals just being wrong in their approaches to treaty interpretation.

The choice of one interpretation over another, Pauwelyn and Elsig suggest, is a function of both the interpretation space (generally, the ambiguity or uncertainty in a

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[40] *Vienna Convention on the Law of Treaties*, 23 May 1969, entered into force 27 Jan 1980, 1155 UNTS 331 [VCLT].

[41] The VCLT has been ratified by 114 countries: see UN Treaty Database, online: https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf.

[42] See, for instance, Harold Hongju Koh, "Twenty-First-Century International Lawmaking" (2013) 101 Georgetown L J 725, at 738 (noting that the United States recognizes many provisions of the VCLT as reflecting customary international law). See also Joost Pauwelyn and Manfred Elsig, "The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals" in Jeffrey Dunoff and Mark Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations*, (New York: Cambridge UP, 2013), 445 at 448: "International law does offer "general rules" for interpreting treaties. These rules are set out in Articles 31 to 33 of the VCLT and reflect customary international law binding on all states."

[43] See, generally, Pauwelyn and Elsig, *ibid*.

[44] *Ibid*, at 445.

[45] *Ibid*, at 446.

treaty,[46] which is generally higher in large multi-lateral treaties[47] such as the *Rome Statute*), and the interpretation incentives (generally, political, self-serving, or value-laden factors that might influence a tribunal's interpretation).[48] If one accepts their theory – which seems to account for divergence in treaty interpretation more convincingly than the binary right approach / wrong approach theory that has traditionally been advanced by international law scholars (who suggest that the *Vienna Convention* has all the necessary answers)[49] – then it is entirely understandable, and probably unavoidable, that the ICC should have wide latitude to interpret provisions the *Rome Statute*. Where the Court has both a high degree of interpretation space within the text of its (often vaguely worded) treaty, and high levels of individual, political, and humanitarian incentives to interpret the treaty in particular ways for particular reasons, it is perhaps unrealistic to suggest that article 69(7) will bear only one correct interpretation.

Beyond simply considering the general rules of international law applicable to treaty interpretation, however, one must also consider the sources of law that the ICC is required to apply by virtue of Article 21(1) of the *Rome Statute*: first, the ICC's enabling treaty and RPE; second, other treaties and rules of international law; and, third, general

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[46] *Ibid*, at 460-463.

[47] *Ibid*, at 447:

> Treaties tend to be more incomplete contracts than national texts, because of high transaction costs and future uncertainties. This is especially the case for multilateral treaties (many parties must agree on one single text, often left deliberately vague and redacted in multiple languages) as well as for treaties between countries with highly diverse interests and backgrounds (leaving even the most basic notions or terms open to disagreement or different interpretations).

[48] *Ibid*, at 465-468.

[49] See *ibid*, at 445-46 (for a description of the different explanations for divergence in treaty interpretation that have historically been advanced by international law and international relations scholars, respectively).

principles of law derived from national legal systems.[50] While article 69(7) of the *Rome Statute* clearly signals to the ICC that it must apply some kind of exclusionary rule in appropriate cases, none of these sources of law within the hierarchy created by article 21(1) seem to offer determinative guidance as to when this exclusionary rule will be triggered, and what it should look like. At most, the sources of law listed at article 21(1) might encourage the Court to attempt to distil (as Chapters 4, 5, and 6 of this thesis will similarly attempt to distil) legal principles about how and when exclusionary rules should apply from study of domestic criminal justice systems, but the hierarchy of sources is otherwise unhelpful in fleshing out a detailed meaning of article 69(7), since none of the listed sources clearly prescribe how an exclusionary rule must operate.

Under article 21(2), the Court can also (but is not obligated to) apply its own previous jurisprudence.[51] Given the discretionary nature of this guidance to the ICC concerning the precedential value of its own previous decisions, however, article 21(2) is unlikely to encourage unification or clarification of interpretations of the ICC's exclusionary rule. Quite the opposite – as early case law from the Court (that will be discussed in more detail in Chapter 8) reveals, divergent interpretations of article 69(7)'s demands have already emerged from the Court.[52] This reality suggests two points that

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[50] *Rome Statute*, *supra* note 1, arts 21(1)(a)-(c), respectively.

[51] *Ibid*, art 21(2): "The Court may apply principles and rules of law as interpreted in its previous decisions."

[52] See, for instance, *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Decision on the Confirmation of Charges, (Jan 29, 2007), at para 81 (wherein one form of balancing test was applied by the Pre-Trial Chamber in determining that tainted evidence should be admitted in spite of a rights breach); and see *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Decision on the Admission of Material from the "Bar Table," (June 24, 2009), at para 38 (wherein a second, different balancing test was applied by the Trial Chamber in reaching the same decision to admit the same improperly obtained evidence); but see also *Prosecutor v Katanga*, Case No ICC-01/04-01/07, Decision on the Prosecutor's Bar

are particularly relevant to my thesis: first, future Chambers of the ICC will not be bound to follow any exclusionary framework set forth by predecessor Chambers (which points to a wide interpretative margin for all of the Court's decision-makers, and an ability for any Chamber to adopt the proposal that emerges from this thesis); and, second, this thesis must modestly hope to provide the ICC with a defensible and principled test for how article 69(7) should apply to exclusion, but it may not succeed in settling the law across all the Court's Chambers, given the full freedom that each has to depart from precedent.

After setting out the applicable sources of law and the limited force of precedent in articles 21(1) and (2), respectively, article 21(3) of the *Rome Statute* provides that the application of law by the Court must be "consistent with internationally recognized human rights."[53] Although some Chambers of the ICC have read this article as creating an additional substantive source of law – IHRL – that must be applied alongside those listed in at article 21(1),[54] "[a]n examination of the Court's practice reveals that the provision is usually, but not always, conceptualized correctly as an underlying rule of interpretation."[55] Thus, article 69(7) must be interpreted in a way that is *consistent* with internationally recognized human rights, but it is not necessary for the Court to find an equivalent exclusionary rule within the substantive body of IHRL. Unfortunately, this

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Table Motions, (Dec 17, 2010), at paras 55-53 (wherein the Trial Chamber refused to admit evidence obtained in breach of a right to counsel and silence, by applying a more absolute exclusionary rule which seemed to suggest that any rights breach is antithetical to the proceedings). As these early cases demonstrate, there is inconsistency in how the Court is interpreting article 69(7) – which suggests that some flexibility must exist with respect to how this provision of the Rome Statute should be applied.

[53] *Rome Statute*, *supra* note 1, art 21(3).

[54] See Young, *supra* note 36, at 201 (noting that the Pre-Trial Chamber I has, at times, "treated article 21(3) as a 'gap-filling' mechanism. The chamber has indicated that the role of article 21(3) is to step in when there is a lacuna in the Statute or Rules").

[55] *Ibid*, at 207.

additional interpretative guidance cannot conclusively resolve ambiguity in the meaning of article 69(7), since the exclusion of tainted evidence is, on the one hand, consistent with internationally recognized human rights (of the accused) to a fair trial, but, on the other hand, conceptually inconsistent with respect for international human rights of victims who have suffered at the hands of a perpetrator who may be acquitted when the evidence is excluded.

As this discussion demonstrates, the real-world phenomenon of divergence in treaty interpretation, the wide range of sources upon which the ICC can draw, the inconclusive precedential value of previous ICC decisions, and the vague interpretative guidance about ensuring consistency with international human rights that is provided in the *Rome Statute*, all point to a wide margin of appreciation that is afforded to various Chambers of the ICC when they apply the Court's exclusionary rule. In other words, the *Rome Statute* itself, and other sources and principles of international law, seem to provide the Court with substantial freedom to craft an appropriate and principle-based test for the ICC's exclusionary rule.

With respect to Article 69(7)(a) – requiring exclusion of evidence where its reliability is cast into substantial doubt – the ICC likely does not need to break new ground in its jurisprudence. The concept of "reliable evidence" is one that should be familiar to all criminal law judges, is ostensibly objective, and is not particularly value-laden. Furthermore, a rich body of domestic criminal jurisprudence has developed within countless jurisdictions, explaining when evidence that flows from a breach of one's rights is likely to be unreliable. For instance, the Supreme Court of Canada has emphasized that involuntary confessions (which frequently, but not always, arise in cases where a

suspect's *Charter* rights have been breached) tend to be unreliable, and that these unreliable confessions are at risk of occurring whenever state actors direct threats or promises toward a suspect such that the suspect is left with "fear of prejudice or hope of advantage,"[56] whenever an atmosphere of oppression permeates the police-suspect interaction, and whenever other shocking police trickery is involved.[57] However, the same court found, in *R v Grant*,[58] that a gun obtained by police in breach of the accused's rights was "highly reliable evidence"[59] – a factor that weighed in favour of admission of the gun as evidence.[60] In other words, Canadian case law has established some clear guidelines about when evidence that is obtained in breach of an individual's rights is likely to be unreliable, and when its reliability is likely to be unaffected by any rights breaches.

Similarly, in England, s. 76(2) of the *Police and Criminal Evidence Act 1984*[61] provides that confessions shall be excluded whenever they have been obtained through oppression or in circumstances likely to render the confession unreliable.[62] English case law demonstrates that courts tend to view a denial of legal counsel during detention or questioning, and breaches of police practice codes (requiring the recording of interviews, and provision of information to suspects regarding their legal rights) as being examples of circumstances likely to render confessions unreliable, and therefore inadmissible.[63]

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[56] See, generally, *R v Oickle*, [2000] 2 SCR 3, and particularly para 49.
[57] *Ibid*, at paras 58-67.
[58] *Supra* note 9.
[59] *Ibid*, at para 139.
[60] *Ibid*.
[61] *Police and Criminal Evidence Act 1984 (UK)*, c 60.
[62] *Ibid*, s 76(2).
[63] Peter Murphy and Lina Baddour, "International Criminal Law and Common Law Rules of Evidence" in Karim Khan, Caroline Buisman and Christopher Gosnell, eds,

In Taiwan, involuntary confessions are also excluded "on the ground that they are often unreliable and inconsistent with the truth,"[64] particularly where these confessions have been obtained by the government through "fraud, inducement, or any other improper means."[65] However, physical evidence that has been obtained in breach of one's rights, while still subject to an exclusionary rule in Taiwan, is not excluded because of reliability concerns, but out of a desire to protect human rights: "it was also firmly rooted in Taiwan that the purpose of criminal prosecution and trial is to discover the truth. Unlike a confession which might be untrue, physical evidence could never contradict the truth."[66] As this Taiwanese reasoning suggests, some evidence that is obtained in breach of an individual's rights is more likely than other such evidence to raise reliability concerns.

This cursory sampling of domestic law governing the exclusion of unreliable evidence indicates that some general patterns emerge throughout many jurisdictions about how and when such evidence must be excluded. Physical or real evidence, such as guns, will generally be reliable evidence, regardless of how the evidence is obtained. Testimonial evidence, such as a confession, is at a much greater risk of being unreliable if it is obtained in breach of the accused's rights. In light of these and other similarly well-established rules of evidence, the ICC could probably adopt established national and international laws relating to unreliable evidence obtained through rights breaches, and

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Principles of Evidence in International Criminal Justice, (New York: Oxford UP, 2010) at 129.

[64] Jaw-Perng Wang, "Taiwan: The Codification of a Judicially-Made Discretionary Exclusionary Rule" in Stephen C. Thaman, ed, *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 355 at 367.

[65] *Ibid*.

[66] *Ibid*, at 368.

the Court would perhaps even be criticized if it departed materially from this body of established law.

With respect to Article 69(7)(b), however, the Court probably has greater freedom to fashion an exclusionary test of its choosing. There is a sizable and very subjective value judgement to be made when determining if admission of evidence is "antithetical" to the proceedings, or if admission would "seriously damage the integrity of the proceedings." In other words, it would be hard to criticize the Court for departing from the plain meaning of Article 69(7)(b) in any reasonable interpretation of that provision developed by the Court, since the plain meanings of words like "antithetical," "seriously damage," and "integrity" are so inherently vague and malleable. Additionally, while there is some uniformity in the approach to excluding unreliable evidence that is obtained through a rights breach in domestic criminal jurisdictions, there is wide divergence in domestic approaches to dealing with evidence that might tarnish the integrity or repute of the proceedings. For all of these reasons, the ICC should be understood as having wide latitude to develop an exclusionary test of its choosing under the authority of Article 69(7)(b) of the *Rome Statute*, or, more to the point, it should be recognized that the ICC could practically adopt the proposal for exclusion that will ultimately be advanced within my thesis. The details of and justifications for the proposal are explained in the chapters that follow.

CHAPTER 2 – THE THEORY OF EXCLUSIONARY RULES

> The term "exclusionary rules" is a bit like the lunchmeat spam – virtually everybody is familiar with it, only a few people are sure about its precise contents, and most people can stomach it only occasionally and in small portions.[1]

In Chapter 1 of this thesis, I suggest that criticism and consideration of domestic exclusionary rules tends to operate at the micro- rather than the macro-level: commentators will freely point out whether a rule does what it purports to do, but will rarely probe deeper to ask whether the underlying rationale for a rule is sensible in the first place. However, it is arguably much easier to engage in meaningful discourse about exclusionary rules if discussion commences with an explanation of how we conceive of the function that exclusionary rules should perform within our legal systems. After all, how can one determine whether there should be (or how to incorporate) an exception to an exclusionary rule in cases where police have acted in clear "good faith" when they inadvertently breached an individual's rights (i.e.: the specific content of an exclusionary rule), if one has not first determined that an exclusionary rule should serve a deterrent function (i.e.: the more general principle that underpins exclusionary rules)?[2] The goal of

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[1] Eugene R. Milhizer, "Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule" (2012) 211 Mil L Rev 211, at 214 [Great Myths].

[2] For a similar assertion that the rationale of an exclusionary rule tends to determine the content of the rule, see Christian Halliburton, "Leveling the Playing Field: A New Theory of Exclusion for a Post-PATRIOT Act America" (2005) 70 Mo L Rev 519, at 521: "the decision to pursue deterrence goals rather than to provide a remedy for the deprivation of constitutional rights had a profound effect on the subsequent development of the rule." See also, Kelly Perigoe, "Exclusion of Evidence for Failure to Advise Suspects of the Right to Counsel and to Silence Before Custodial Police Interrogation: Comparing the United States and Canadian Doctrines and the Reasons for their Difference in Scope" (2009) 14 UCLA J Int'l L & Foreign Affairs 503, at 528: "whether a court bases its exclusionary doctrine on a rationale of maintaining trial fairness or on rationales of

this second chapter will therefore be to look beneath the surface at exclusionary rules, in order to ascertain what these rules can and should reasonably be expected to accomplish. Ultimately, a principled basis for the development of any *domestic* exclusionary rule should emerge from the analysis contained within this chapter, and this basis will later serve as a starting point for a more specific discussion about exclusionary rules in an international setting in subsequent chapters.

I. Understanding Forward-Looking Rationales for Exclusion

When a court makes a decision to exclude improperly obtained evidence, it can do so for a number of possible reasons. Generally, I would categorize these reasons as either forward-looking or backward-looking rationales. Forward-looking rationales are not concerned with redressing past wrongs, such as the rights breach that led to the collection of impugned evidence, but instead focus on the impact that exclusion is likely to have on a go-forward basis. Some variants of forward-looking theories suggest that they seek to avoid additional harm to the accused that would result from admitting tainted evidence: "when the government tries to convict a person on the basis of an earlier violation of his [constitutional] rights, does it not seek to inflict a *second and distinct* injury?"[3] These types of justifications for an exclusionary rule can be contrasted with backward-looking rationales (to be discussed in more detail in the next section), which are concerned with fixing or ameliorating past wrongs that occurred when evidence was collected in breach

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deterrence and trustworthiness often dictates whether the evidence will ultimately be admitted."

[3] Yale Kamisar, "Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather than an Empirical Proposition?" (1983) 16 Creighton L Rev 565, at 594.

of an individual's rights. There are two main forward-looking rationales: the deterrence rationale, and the dissociation rationale.

i) The Deterrence Rationale

According to the deterrence rationale, evidence obtained in breach of an individual's fundamental rights must be excluded from criminal trials in order to deter state officials from similarly breaching the rights of others in the future. Backward-looking justifications for the rule are typically rejected by those who espouse a deterrence-based rule, in recognition of the fact that courts cannot "unring" the metaphoric bell after someone's rights have been breached: "the purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim,"[4] because the "ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."[5] Instead, "the rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it."[6] I would suggest that the deterrent rationale for exclusion is "violator-centric," in that it is concerned with the effect of exclusion on those who have or who might in the future violate rights of citizens and suspects in criminal investigations.

As the above explanations demonstrate, this deterrence theory is premised on at least three major underlying assumptions: first, that police officers and other state agents involved in evidence collection are informed about the exclusionary rule (at least with respect to its existence and general operation); second, that these individuals care enough

[4] *United States v Calandra*, (1974) 414 US 338, at 347.
[5] *Linkletter v Walker*, (1965) 381 US 618, at 637.
[6] *Elkins v United States*, (1960) 364 US 206, at 217

about the outcome of exclusionary decisions so as to shape their behaviour in a way that respects the rights of those who are ultimately accused of crimes; and, third, that respect for the rights of *all persons* can be encouraged by a rule that only excludes evidence collected *against criminal defendants*. The validity of these assumptions has been, at least in the United States, subject to much debate and empirical study.[7] The United States Supreme Court seems now to have accepted that it will be difficult, if not impossible, to conclusively ascertain the validity of the deterrent assumptions that underlie the exclusionary rule.[8]

Even if one cannot empirically verify the efficiency of an exclusionary rule in terms of its deterrent effect, a deterrent-based rule can nonetheless be criticized from a variety of other theoretical perspectives. Numerous scholars have postulated that an exclusionary rule might actually lead to more, or worse, police misconduct than it strives to deter. Some have argued that the rule leads to police perjury, when officers deliberately misrepresent facts surrounding searches and arrests in order to "construct the appearance of compliance" with constitutional and human rights law, and to avoid exclusionary rulings from trial judges.[9] Others suggest that the exclusionary rule leads police to abandon the prospect of securing convictions against criminals, while driving them to aggressively police communities in ways that would not withstand constitutional

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[7] See, for instance, Thomas Y. Davies, "A Hard Look at What We Know (and Still Need to Learn) About the 'Costs of the Exclusionary Rule: The NIJ Study and Other Studies of 'Lost' Arrests" (1983) Am B Found Res J 611.

[8] See *United States v Janis*, (1976) 428 US 433, at 452 (FN 22): "The final conclusion is clear. No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied."

[9] Jerome Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society*, (New York: John Wiley & Sons, 1966) at 215.

scrutiny at criminal trials: "the exclusionary rule may actively encourage such illegal police activity [leading] to an increase in the use of 'preventative patrols' – police searches aimed not at arrest and prosecution, but at confiscation of weapons and drugs."[10] Still others suggest that reliance on a deterrence-based exclusionary rule inhibits the development of more effective means of controlling police misconduct.[11]

In essence, deterrence theory predicts that a simple and desirable goal can be achieved by excluding improperly obtained evidence: police and other state actors involved in the criminal process will respect the constitutional and fundamental human rights of the populace, because the operation of the exclusionary rule and its undesirable effect on crime control has deterred them from collecting evidence in breach of such rights. However, as even a cursory review of the literature surrounding deterrent theory reveals, the simple premise of the theory is vulnerable to persuasive criticisms.

Notwithstanding the criticisms of deterrent theory, few would argue that an exclusionary rule will have *no* deterrent effect on law enforcement officers, or that it is incapable of deterring rights violations at least some of the time. Thus, while empirical studies and theoretical analysis might lead one to conclude that an exclusionary rule is an

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[10] Tonja Jacobi, "The Law and Economics of the Exclusionary Rule" (2012) 87 Notre Dame L Rev 585, at 610. See also Yale Kamisar, "In Defence of the Search and Seizure Exclusionary Rule" (2003) 26 Harv J L & Pub Pol'y 119, at 126: "large portions of police activity relating to the seizing of criminal property do not produce (and may not have been designed to produce) incriminating evidence, and thus do not result in criminal prosecutions."

[11] Milhizer, Great Myths, *supra* note 1, at 237, suggesting that the exclusionary rule holds "out the false promise of deterrence while masking the need [to] engage in reform that effectively addresses police misconduct." See also the opinion of then-United States Chief Justice Burger in *Stone v Powell*, (1976) 428 US 465, at 500: "it now appears that the continued existence of the rule […] inhibits the development of rational alternatives. The reason is quite simple: Incentives for developing new procedures or remedies will remain minimal or nonexistent so long as the exclusionary rule is retained in its present form."

inefficient, imperfect, or incomplete tool for deterring rights breaches, one should be cautious about concluding that the rule cannot deter egregious police misconduct. Therefore, there is probably some useful role for deterrent theory to play in any discussion about the function and content of principled domestic exclusionary rules.

ii) The Condonation/Dissociation Rationale

The condonation rationale for exclusion is predicated on the notion that courts will be seen to condone improper police or investigative behaviour if they admit improperly obtained evidence into a criminal proceeding. Milhizer suggests that the theory

> is premised on the following syllogism: (1) permitting the reception of evidence at trial indicates not only that the evidence is reliable, probative and relevant, but also it signals that courts encourage or condone the methods used to obtain the evidence; (2) courts should not encourage or condone illegal police conduct; and, therefore, (3) the reception of illegally obtained evidence signals that courts encourage or condone police misconduct.[12]

Similarly, the dissociation rationale for exclusion articulates a need for courts to distance, or dissociate, themselves from other state actors who have breached an accused's rights by excluding tainted evidence from a trial. As these initial descriptions of the rationales demonstrate, both concepts embrace the same key ideas, and simply express these ideas in different (positive/negative) terms. On the one hand, judicial condonation of police misconduct is undesirable, so evidence obtained in breach of a defendant's rights must be excluded in order to avoid the appearance of such judicial condonation. On the other hand, courts must strive to dissociate themselves from unlawful actions by state officials within other branches of government, and excluding improperly obtained evidence is one

[12] Milhizer, Great Myths, *supra* note 1, at 239.

effective means of achieving dissociation. While the deterrent rationale for exclusion is violator-centric, the condonation and dissociation rationales for exclusion are court-centric: these latter bases for exclusion focus on the impact that exclusion will or could have upon the integrity of the courts.

Condonation theory provides the dominant rationale for the Canadian exclusionary rule. In *R v Collins*, a majority of the SCC opined that the purpose of the rule is to "prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies."[13] The majority further noted, "[t]he administration of justice would be brought into greater disrepute […] if this Court did not exclude the evidence and dissociate itself from the conduct of the police in this case."[14] The *Collins* decision serves to illustrate the close connection between concepts of dissociation and condonation, and, through its use of the future tense, highlights the forward-looking basis for the Canadian exclusionary rule. The rationale for exclusion that was advanced in *Collins* was recently reaffirmed in *R v Grant*,[15] wherein a majority of the SCC explicitly noted that the exclusionary analysis is "forward-looking,"[16] and explained that exclusion is often necessary because "admission may send the message the justice system condones serious state misconduct."[17]

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[13] *R v Collins*, [1987] 1 SCR 265, 1987 CanLII 84 (SCC), at para 31 [emphasis in original].
[14] *Ibid,* at para 45.
[15] *R v Grant*, [2009] 2 SCR 353.
[16] *Ibid,* at para 71.
[17] *Ibid*.

American exclusionary law, while now grounded narrowly and exclusively in deterrent theory, was also initially concerned somewhat with dissociating the judiciary from other state actors who participated in rights breaches. For instance, in *Weeks v. United States*,[18] the first United States Supreme Court decision to recognize a constitutional exclusionary rule, Justice Day (for a unanimous court) explained that "unwarranted practices destructive of rights secured by the Federal Constitution, *should find no sanction* in the judgments of the courts which are charged at all times with the support of the Constitution."[19] Justice Brandeis, writing in (a powerful and famed) dissent in *Olmstead v. United States*,[20] subsequently explained why exclusion should have been mandated in that case, using the language of condonation and dissociation:

> The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. […] [A]id is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order is to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.[21]

Although Justice Brandeis' reasoning as to why the exclusionary rule should operate has largely been abandoned in the United States,[22] it nonetheless provides some clear insight

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[18] *Weeks v United States*, (1914) 232 US 383.
[19] *Ibid,* at 392 (emphasis added).
[20] *Olmstead v United States*, (1928) 277 US 438.
[21] *Ibid,* at 483-84.
[22] Notwithstanding the majority opinions of the United States Supreme Court on exclusionary rulings over the years that have emphasized the deterrent rationale of the American rule, numerous dissents have attempted to re-inject a measure of dissociation into the rule. See, for instance, the dissenting opinion of Justice Ginsburg (writing for herself and three other judges in a 5-4 decision) in *Herring v United States*, (2009) 129 S Ct 695, at 704-710, for the most recent example of this phenomenon. Justice Ginsburg

into the judicial thinking that underpins dissociation and condonation theories of exclusion.

Dissociation and condonation rationales do not depend on empirical propositions about the effectiveness of the exclusionary rule to the same extent as deterrent rationales, since the benefit of the rule – under dissociation theory – is largely unquantifiable.[23] How could one measure the value, or good, that is gained when judicial officials distance themselves from unlawful police conduct? Although some studies have been suggested[24] and undertaken[25] in efforts to measure the "repute" of the justice system, and how this reputation is affected by exclusionary decisions, the results of these studies should admittedly be viewed with caution,[26] and courts have expressed reluctance to place any emphasis on empirical data in support of the dissociation rationale.[27] Instead, the benefits

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acknowledges that a "main objective" of the rule is deterrence, but she sees "a more majestic" role for the rule, and suggests that it enables the judiciary to avoid being tainted by partnership in unlawful action, and allows judges to withhold judicial imprimatur or endorsement of tainted evidence. There is a strong current of dissociation theory running through Justice Ginsburg's dissent.

[23] See Milhizer, Great Myths, *supra* note 1, at 247: "if the basic and straightforward deterrence claims in support of the exclusionary rule are unverified and unverifiable, as has been established, then Brandeis' more abstract and expansive claims suffer the same infirmity but to a far greater degree."

[24] Dale Gibson, "Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms" (1983) 61 Cdn Bar Rev 377.

[25] Alan W. Bryant, Marc Gold, H. Michael Stevenson, and David Northrup, "Public Attitudes Toward the Exclusion of Evidence: Section 24(2) of the Canadian Charter of Rights and Freedoms" (1990) 69 Cdn Bar Rev 1.

[26] *Ibid*, at 41: "the results of this study should raise serious questions about the forensic use of most survey evidence on the admissibility of evidence in courts."

[27] See, for instance, *Collins*, supra note 13, at para. 32 (per Lamer J. for the majority), wherein Justice Lamer noted the danger of relying on public opinion polls in exclusionary decisions:

> The position is different with respect to obscenity, for example, where the court must assess the level of tolerance of the community, whether or not it is reasonable, and may consider public opinion polls. It would be unwise, in my respectful view, to adopt a similar attitude with respect to the *Charter*. Members of the public generally become

of exclusionary rules that serve dissociative purposes must be explained in more abstract and philosophical terms, but this reality does not necessarily weaken the validity of the condonation/dissociation rationale as a basis for any domestic exclusionary rule.

II. Understanding Backward-Looking Rationales

Rather than concentrating primarily on the effect that rights breaches (and exclusion) will have, prospectively, on the justice system, backward-looking rationales for exclusion attempt to correct for harm that has already been done to individuals as a result of state misconduct. There are two main backward-looking rationales for exclusion: the compensation rationale, and the vindication rationale.

i) The Compensation Rationale

It is trite to say that there can be no right without a remedy, but compensation theory serves to acknowledge that any remedy must have value commensurate with the value of the right that has been breached in the first place. The compensation rationale uses exclusion in order to recognize "that rights have value and that if the right is destroyed the wrongdoer should provide alternative value to the rights holder lest the right be valueless."[28] As Paciocco explains, "the only way to set the clock back is to treat the parties as though the constitutional violation never occurred. Exclusion arguably achieves this by depriving the state of its wrongful gain and leaving the accused to face

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> conscious of the importance of protecting the rights and freedoms of accused only when they are in some way brought closer to the system either personally or through the experience of friends or family. […] The *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority (citations omitted).

[28] David M. Paciocco, "Section 24(2): Lottery or Law – The Appreciable Limits of Purposive Reasoning" (2012) 58 Crim L Q 15, at 21.

the case he would have faced had the right not been violated."[29] The compensation rationale for exclusion is clearly accused-centric, as it is focused on the beneficial impact that exclusion should have on a particular individual whose rights have been breached.

The compensation rationale, while attractive at first glance, suffers from some theoretical weaknesses. First, as a matter of logic, one might suggest that excluding improperly obtained evidence does nothing to "compensate" an accused; rather, exclusion merely avoids penalizing an accused through the admission of evidence that would lead to conviction. It would perhaps be more coherent to explain exclusion not as a form of compensation to the accused, but as a form of deprivation to the state that seeks to convict on the basis of improperly obtained evidence, and to recognize that deprivation to the state is not necessarily the same as compensation to the accused. Second, as with the deterrent rationale, the compensation rationale for exclusion arguably inhibits more robust and effective remedies from developing to compensate for rights breaches by the state, and is utterly ineffective as a form of compensation for anyone whose rights were breached, but who is not ultimately prosecuted in a criminal trial.

Nonetheless, assuming that some would see the "windfall"[30] from which an accused benefits when exclusion takes place as being a valid form of compensation (that could operate to mitigate the harm occasioned by the government after a rights breach),

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[29] *Ibid*, at 22.

[30] Exclusion is frequently described as a form of windfall to the accused. See, for instance, Akhil Reed Amar, "The Future of Constitutional Criminal Procedure" (1996) 33 Am Crim L Rev 1123, at 1134 ("The guiltier you are, the more evidence the police find, the bigger the exclusionary rule windfall; but if the police know you are innocent, and just want to hassle you […] the exclusionary rule offers exactly zero compensation or deterrence").

then compensation theory can probably provide a valid basis for a domestic exclusionary rule.

ii) The Vindication Rationale

Vindication theory is closely linked to both compensation and dissociation theory. Paciocco suggests that "'vindication' refers to 'affirming constitutional values' by granting meaningful remedies,"[31] which sounds at the outset like the premise upon which compensation theory is based. However, vindication can be distinguished from compensation in that vindication does not necessarily demand a correspondence between the harm suffered as a result of a rights breach and the remedy for the breach, since a meaningful remedy can be a symbolic one that offers no compensation to the accused. Paciocco's description of vindication theory also resembles dissociation theory, in that he suggests a focus on collective (rather than individual) constitutional values and not "on the victim's loss."[32] However, Paciocco correctly notes that condonation/dissociation theory is primarily about courts protecting their own integrity, and implicitly recognizes the retrospective and individualized aspects of vindication theory when he says, "the vindication rationale is also about promoting the relevant right,"[33] both for the benefit of the accused whose right was violated, and for the larger public who have an interest in protecting the right more generally. I am inclined to adopt aspects of Paciocco's vindication theory (namely the backward-looking and individualized aspects of it), but I would disagree with him that vindication does not focus on the victim's loss, since a right cannot, in my view, be vindicated without recognition of the individual harm that was

[31] Paciocco, *supra* note 28, at 24-25.
[32] *Ibid*, at 25.
[33] *Ibid*.

done to the victim, and the victim's sense that the breach must be avenged in order for her to be satisfied. In this sense, the vindication rationale for exclusion has a dual focus: it is both accused-centric, but more broadly, rights holder-centric. Vindication theory suggests that exclusion is warranted in part to give meaning to a particular right of a particular accused that was violated in a particular case, but it is also warranted in order to give expressive meaning to that right in a larger, more collective sense.

The divisions between various rationales for exclusion are not watertight, and this reality is most apparent in considering the vindication rationale. Depending on how one characterizes the rationale, it may be more forward- or backward-looking in nature, and it may be more individual- or group-centric in nature. Ultimately, however, the rationale is capable of offering somewhat of a valid, if a little abstract, basis for exclusion that is unique from the other bases discussed above.

III. Countervailing Considerations Against Exclusion

While all of the above bases are capable of justifying the existence of an exclusionary rule, any discussion about such rules must also include consideration of the factors militating against exclusion. These factors can be broadly categorized as fitting within one of the following groups: public safety; proportionality; efficiency; and epistemic. I will discuss each category briefly, and will expand the discussion substantially in my thesis.

i) Public Safety Considerations

The basic premise of this argument against exclusionary rules, or in favour of significant restrictions on exclusionary rules, is that the rules allow dangerous criminals

to go free, which is detrimental to the public's safety. This argument is presently very strong in American judicial[34] and academic[35] rhetoric, and can probably help to explain the substantial narrowing of the American exclusionary rule over the last fifty years.

ii) Proportionality Considerations

The basic premise of the proportionality argument against exclusion is that exclusion is a disproportionate remedy. A minor or technical breach of one's rights, or a breach made by a police officer acting in good faith, for instance, will be rectified with the "massive"[36] remedy of exclusion. This result, critics would argue, does not accord with our fundamental "notion that judicial sanctions should fit the harm."[37] Thus, proportionality militates against the existence of, or at least against the broad application of, exclusionary rules.

iii) Efficiency Considerations

Countervailing considerations based on efficiency suggest that exclusion should be avoided because it is an inefficient remedy: it does not have the effect that it purports

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[34] See, for instance, the typically expressive *dicta* of Justice Scalia in *Hudson v Michigan*, (2006) 547 US 586, at 595: "The cost of entering this [exclusionary rule] lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card." This language was echoed by Chief Justice Roberts (for the majority) in *Herring v United States*, (2009) 129 S Ct 695, at 701: "The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'"

[35] See, for instance, Eugene Milhizer, "The Exclusionary Rule Lottery" (2008) 39 U Tol L Rev 755 [Exclusionary Lottery], at 766: "The end of reducing police misconduct is unquestionably beneficial. But the means of achieving it – deliberately allowing dangerous criminals to go free and crimes to go unpunished – is unquestionably problematic."

[36] Justice Scalia described the remedy of exclusion as "massive" three times in the course of his fourteen-page opinion in *Hudson v Michigan*, *supra* note 34.

[37] Paciocco, *supra* note 28, at 25.

to have, or it generates only a marginal amount of the desired effect at great cost. This line of reasoning is similar to the proportionality considerations discussed above, except that efficiency compares the costs and benefits of the rule across the full spectrum of cases, in order to determine its institutional efficiency. Proportionality, however, compares the effect of the rule in a particular case with the harm to an accused's rights in that case, in order to ensure a correspondence between the two individualized circumstances.

iv) Epistemic Considerations

Apart from any consequentialist criticisms of exclusionary rules – such as the public safety ones mentioned above – a non-consequentialist argument can be made that exclusionary rules impair the truth-seeking function of criminal trials by hiding (often) relevant and reliable evidence from fact-finders. Thus, while the result of the exclusionary rule is that guilty people will often be acquitted (consequentialist reasoning), the exclusionary rule is also harmful in a more abstract (non-consequentialist) way because it creates dissonance within the accepted theory of criminal trials: trials are first and foremost about establishing the truth in relation to charges against an accused, so a rule that impairs courts in their ability to establish the truth undermines the legitimacy and coherence of the entire criminal trial process. According to this reasoning, exclusionary rules should be eliminated, or constrained so as to minimize the dissonance that they create within criminal trial theory.

Although some might suggest that all of the above countervailing considerations support a total elimination of exclusionary remedies, a more modest view that encompasses consideration of both the laudable objectives of exclusion and the

countervailing factors militating against exclusion would recognize that, in particular cases or classes of cases, any one of the above countervailing considerations could be so overwhelmingly strong as to require the admission of tainted evidence in spite of a rights breach that occurred during the collection of the evidence. In other words, the choice between exclusion or admission of tainted evidence as a rule of law is not a binary one: the salutary aspects of an exclusionary remedy can be acknowledged as a general matter, without losing sight of the fact that exclusion often causes harm to the integrity of the justice system. Thus, while an exclusionary rule should, in principle, be justifiable on the basis of one of the accepted rationales for exclusion, exceptions to an exclusionary rule should equally be justifiable in terms of one or more of the countervailing factors discussed above.

IV. Selecting a Principled Basis for Domestic Exclusionary Rules

Many options and examples of the various bases upon which exclusionary rules can rest were discussed in the early sections of this chapter, above. In this final section of the chapter, however, I will endeavour to select a principled and defensible basis for any domestic exclusionary by answering the following questions: (1) which of the rationales for exclusion are laudable; (2) whether any of the rationales are wholly unachievable through exclusion; and, (3) whether any of the rationales are incompatible with one another. The answers to these questions should reveal the rationale(s) upon which exclusionary rules can and should be developed.

Deterring police misconduct is "unquestionably beneficial,"[38] and the discussion within earlier parts of this chapter should demonstrate that, even in the absence of conclusive empirical data about the efficiency of the exclusionary rule as a deterrent, there is some evidence to suggest that the rule operates as a deterrent at least some of the time. Thus, it is reasonable to expect domestic exclusionary rules to be capable of deterring police misconduct, and any domestic exclusionary doctrine could be justifiable in terms of its deterrent value. In other words, the deterrent theory offers a laudable justification for exclusionary rules, and deterrence is not wholly unachievable through exclusion.

Although the value of dissociating the judiciary from unlawful acts committed by other government agents cannot, or cannot easily, be measured, logic and reason suggest that such dissociation would be beneficial to society. The dissociation rationale corresponds in political philosophy with the separation of powers doctrine upon which constitutional democracies typically depend, by distancing the judiciary from other government actors and branches so that judges can (and can be perceived to) render independent and impartial decisions. Since we have collectively accepted the "good" that flows from the general separation of powers doctrine, we would also likely accept the "good" that flows from an amplification or specific application of that doctrine wherein courts dissociate themselves from rights breaches by excluding evidence that was collected in violation of individual rights. The question then becomes, is dissociation possible through the exclusion of tainted evidence? Although courts are reluctant to rely on public opinion polls, at least one such poll suggests that dissociation is more likely

[38] Milhizer, Exclusionary Lottery, *supra* note 35, at 766.

than not to occur when courts exclude evidence, since the repute of the justice system is enhanced by exclusion.[39] Thus, where dissociation represents a societal good, and where it is achievable in some measure through exclusion, the dissociation rationale can provide justification for an exclusionary rule.

The maxim that there can be no right without a remedy represents a form of "wisdom of the ages" that bolsters a compensation-based rationale for exclusion. Compensating victims of rights breaches is desirable because it gives meaning to the underlying right for the accused, and for all other holders of the relevant right. Furthermore, the compensation rationale corresponds with the underlying premise of tort law, namely that wrongs be compensable through a process of law. Again, since this compensation rationale is already accepted as having value in other areas of law, it could equally be used to justify an exclusionary rule that compensates accused persons after their rights have been breached. With respect to the question of whether compensation is achievable through exclusion, there may be disagreement. Some accused persons would probably be happy to trade a minor rights breach for the exclusion of damning evidence, and would perceive the compensation as fair. Other more principled individuals might conclude that a constitutional wrong cannot be corrected through exclusion because the absence of a penalty to the accused (i.e.: the loss of a conviction that would result from admission of tainted evidence) is not the same as positive compensation for a wrong. However, as long as some possibility that compensation can be achieved through exclusion exists, and as long as compensation is desirable, then one could justify an exclusionary rule in terms of compensation theory.

[39] Bryant, et al., *supra* note 25.

Finally, the vindication rationale that affirms constitutional values by providing meaningful remedies obviously offers laudable benefits. It seems unthinkable to argue that a legal mechanism that strives to affirm constitutional values would be undesirable, or that offering meaningful remedies is a bad thing. The more difficult question for proponents of vindication theory is whether a right can be vindicated through exclusion. There is no data available to suggest whether exclusion actually vindicates individual rights breaches, and perhaps such data would be impossible to collect. However, if we accept that victims of breaches will feel better after exclusion – that they feel as if the state has been served its just dessert after losing a prosecution – then it is possible to conclude that some vindication is possible through exclusion.

As the above analysis demonstrates, any one of the four major exclusion rationales could justify an exclusionary rule. Furthermore, none of the rationales are incompatible with one another: for instance, relying on a deterrent rationale does not preclude one from also relying on a dissociation, compensation, or vindication rationale. That being said, when it comes to the specific content of an exclusionary rule, it would certainly be possible for a part of the rule to be justifiable on the basis of one rationale, but not another. For instance, consider an exception to the exclusionary rule for good faith mistakes by police: this exception could be justified under a deterrent rationale (since good faith mistakes are essentially "accidents" that cannot be deterred), but the exception would be inconsistent or incompatible with a compensation rationale (since the victim would be denied compensation in the form of exclusion even though her rights were breached). It is important to recall, however, that *the purpose of my thesis is to craft an exclusionary test from first principles, rather than to simply determine which*

principles best describe existing exclusionary rules. Thus, the question is not, "which principles can coexist simultaneously as foundations of an extant exclusionary rule?" but, rather, "which principles can coexist simultaneously in principle, and how would these principles then influence the content of a subsequently-created exclusionary test?"

Keeping in mind my thesis's *tabula rasa*-style exercise in crafting an exclusionary test, it becomes apparent that all of the four dominant rationales for exclusion can and should operate together to determine the content of a domestic exclusionary rule. All of the rationales ostensibly offer salutary effects, and all are at least partially capable of delivering on their purported benefits. Furthermore, none of the rationales conflict or would undermine one another in principle. It must be stressed, however, that in certain cases, notwithstanding the benefits that would flow from exclusion in terms of deterrence, dissociation, compensation or vindication, the costs of exclusion in terms of public safety, efficiency, proportionality, and epistemic coherence of the criminal trial process might nonetheless be so great as to demand the admission of tainted evidence as an exception to a general exclusionary rule.

This conclusion that deterrence, dissociation, compensation, and vindication should *all* help to ground a domestic exclusionary rule, and that certain countervailing considerations could similarly help to ground any individual or classes of exceptions to an exclusionary rule, is important because it provides one with a basis for criticism of existing exclusionary rules, and with a theory upon which to develop more principled alternatives to those offered within domestic jurisdictions throughout the world. In the three comparative chapters that follow at Chapters 4, 5, and 6, specific examples of

exclusionary rules and doctrines will be studied against a backdrop of the principled basis that has emerged from this chapter.

CHAPTER 3 – THE EVIDENCE AND REMEDIAL LAW CONTEXTS WITHIN WHICH EXCLUSIONARY RULES OPERATE

Before embarking on a more detailed study of specific exclusionary rules for improperly obtained evidence, it would first be useful to understand how exclusionary rules are integrated into larger legal regimes that regulate evidence generally, and that authorize remedies for rights breaches. In this chapter, I will therefore endeavour to explain how exclusionary rules relate to other rules of admissibility of evidence in domestic and international criminal justice systems. I will also explain how the remedy of exclusion of tainted evidence can be replaced by or integrated into a remedial scheme that includes other remedies for state misconduct, such as public damage awards, disciplinary or other personal liability sanctions against offending state actors, sentence reductions, and stays of proceedings. The contextual information that this chapter will offer should help to situate this thesis within the broader evidence and remedial law environments that surround exclusionary rules, and should assist readers with understanding when and why exclusionary rules, as opposed to other remedies, apply in particular ways.

I. Exclusionary Rules and the Law of Evidence

In a typical common law legal system, the law of evidence generally provides that all relevant evidence is admissible in criminal proceedings, unless excluded on clear grounds of law or policy.[1] Some of the more accepted grounds for excluding evidence

[1] See for instance, a statement to this effect by the Supreme Court of Canada in *R v Khelawon*, [2006] 2 SCR 787 at para 2: "As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central

can include a lack of ability to test the reliability of the evidence;[2] a desire to exclude unreliable evidence;[3] the protection of privileged information in order to foster certain relationships that are based on confidences;[4] and, the desire to restrict witnesses from usurping the trier of fact's role in drawing inferences from the evidence.[5] Even in civil law jurisdictions that purport to adopt the concept of "free proof," or less regulated systems of evidence admissibility, there are, nonetheless, similar broad evidentiary principles in operation: most relevant evidence tends to be brought forward, but some types of evidence (albeit less types than in common law jurisdictions) will fall into a category of exception that is suspect for a particular reason.[6]

This similar approach to evidence across both inquisitorial and adversarial criminal justice systems can also be seen within the general framework regulating evidence at the ICC, but with some modifications that account for the unique nature of

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reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability."

[2] *Ibid*.

[3] This is one of the rationales for the voluntariness rule in Canada relating to confessions made by an accused to a person in authority: "one of the predominant reasons for this concern is that involuntary confessions are more likely to be unreliable" (*R v Oickle*, [2000] 2 SCR 3, at para 32, per Iacobucci J, for the majority).

[4] See, for instance, *Smith v Jones*, [1999] 1 SCR 455 at para 46, for a majority of the SCC's explanation regarding the importance of solicitor-client privilege.

[5] This concern underpins the general prohibition on lay opinion evidence in Canada: see *R v D.D.*, [2000] 2 SCR 275, at para 49.

[6] The civil law approach to evidence is perhaps best described by Howard Krongold, "A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions" (2003) 12 Dal J Leg Stud 97, at 103:

> [T]he civil law seems to recognize the potential for certain evidence to distort the fact-finding process in much the same way that the common law system does. Ultimately, however, it deals with such evidence in different ways. Rather than excluding evidence which may distort the fact-finding process by way of exclusionary rules, the structure and function of the civilian courts results in such evidence not being called. Where it is called, undue reliance on such evidence is mitigated.

international criminal trials at the ICC. Thus, the starting point for the Court is that it has the discretion "to assess freely all evidence submitted,"[7] but some types of evidence, such as evidence of past or subsequent sexual conduct of a victim of a sexual offence, or evidence that is privileged, must not be admitted by the Court.[8] The ICC generally has fewer rules that require evidence to be excluded than many domestic common law legal systems, arguably because the Court's decisions are never rendered by a jury of lay members who are less educated than judges about the inherent frailties of different types of evidence.

This (substantially simplified) view of the law of evidence in domestic and international criminal regimes is important because it highlights the fact that exclusionary rules relating to tainted evidence are not the only rules precluding courts from admitting different kinds of evidence: evidence is frequently excluded even when no state impropriety has taken place in the collection of the evidence.[9] Furthermore, it will often be the case that evidence is inadmissible for several reasons, so even improperly obtained evidence might be excluded without the relevant exclusionary rule being invoked. For instance, an incriminating letter from an accused to his lawyer that was collected through an unreasonable, warrantless search of an attorney's office by police investigators might be excluded in order to protect solicitor-client privilege, even though the letter could also

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[7] ICC *Rules of Procedure and Evidence*. ICC-ASP/1/3, at 10, and Corr 1 (2002), UN Doc PCNICC/2000/1/Add.1 (2000), Rule 63.2 [ICC RPE].
[8] *Ibid*, Rules 71 and 73, respectively.
[9] For instance, police in Canada may be free as a matter of law to conduct polygraph tests on consenting witnesses and suspects, but the results of these polygraph tests are inadmissible in Canadian criminal courts as a matter of the common law of evidence, regardless of the fact that the polygraph results were lawfully obtained: see *R v Beland*, [1987] 2 SCR 398.

be excluded (in Canada) on *Charter* grounds.[10] As a practical matter, it stands to reason that evidence will more likely be excluded from a trial when there are several bases as opposed to only one basis for exclusion, just as one has higher chances of winning a lottery when multiple tickets are purchased instead of a single ticket. The manner in which different (constitutional, common law, and statutory) exclusionary rules interact with one another, however, is situationally dependant, and no clear framework prescribing the order in which such rules are to be applied has emerged in Canada or at the international criminal tribunals. Consequently, even though exclusionary rules for improperly obtained evidence exist, they will not necessarily be invoked or cited as the authority for excluding evidence in all of the fact scenarios wherein the rules could apply, due to the concurrent existence of other policy-based exclusionary rules.

In any case, the focus of this project is on exclusionary rules dealing only with improperly obtained evidence. Therefore, the remainder of this thesis will be concerned with exclusionary rules that are invoked in relation to *otherwise admissible* evidence in an effort to avoid any conceptual blending of different and unrelated rationales for the inadmissibility of various kinds of evidence. From a practical perspective, however, it cannot be forgotten that exclusionary rules for improperly obtained evidence will tend to operate alongside multiple other evidentiary rules of admissibility in any criminal justice system.

II. Exclusionary Rules within the Larger Remedial Landscape

[10] See *R v McClure*, [2001] 1 SCR 445, for a description of solicitor-client privilege in Canada, and its evolution from a common law rule of evidence to a "fundamental legal right" (*ibid*, at para 25).

In this section, I will discuss several alternatives to exclusion that have been considered, proposed, or adopted in domestic jurisdictions in order to demonstrate how the rationale for a particular exclusionary rule can often be related to other remedial options that are available to individuals whose rights have been breached. Unfortunately, much of the debate surrounding the alternatives to exclusion that are discussed in this section has proceeded from a binary assumption that remedies for rights breaches must involve only exclusion or only one of the alternatives to exclusion. I can see no reason why this must be the case, so I will endeavour to highlight within this section not only how alternatives could replace an exclusionary rule in some circumstances, but also how alternatives could operate alongside exclusion in order to create more effective remedial schemes for rights breaches.

i) Police Disciplinary / Personal Liability Proceedings as a Remedy

Some suggest that exclusion of tainted evidence is an ineffective remedy for a rights breach, since it essentially permits two wrongs to occur (the acquittal of an accused who may have committed an offence, and inaction against the individual who breached the accused's rights) rather than addressing and ameliorating the wrong that took place when the accused's rights were breached.[11] As one American commentator has observed,

> In a scenario where a police officer illegally searches a suspect without a warrant and without falling within one of the exceptions to the warrant requirement and finds an unregistered firearm, there are two guilty parties. The police officer is guilty of breaking the law by violating the Fourth Amendment. The suspect is guilty of illegally carrying a firearm. […] However, under our current exclusionary rule regime, both of these individuals who have obviously broken the law will suffer no consequences. Instead of a system where two wrongdoers

[11] See generally, D. Taylor Tipton, "The Dunkin' Donuts Gap: Rethinking the Exclusionary Rule as a Remedy in Constitutional Criminal Procedure" (2010) 47 Am Crim L Rev 1341.

> are punished, the current exclusionary rule regime allows a guilty criminal to go free and a law enforcement officer who has violated a citizen's rights not to face consequences.[12]

The basic axiom, "two wrongs don't make a right" would seem to apply here: a remedy that seeks to fix one injustice committed by the state against a suspect – and arguably against society as a whole – by requiring society to accept another injustice (when a guilty person is acquitted after application of an exclusionary rule) is perhaps difficult to defend in principle.

One alternative remedy that would be an improvement in this respect is the imposition of penal or disciplinary sanctions against state agents who commit rights breaches. It has been suggested that this remedy would bring greater coherence to the law, would serve a more effective deterrent against future rights breaches, and would more fairly allocate the costs of rights breaches against those who have the ability to control the breaches.[13] However, at least one critic of this type of alternative to exclusion has suggested that it would create a disincentive in policing that could cause police officers to avoid policing up to the constitutional limit of the law for fear of incurring personal liability in the event that they exceed the law;[14] these officers (the "Dunkin' Donuts" theory suggests) would more likely spend their time in a donut shop than in policing close cases if disciplinary sanctions against them for breaching an individual's rights were to become commonplace.[15]

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[12] *Ibid*, at 1356.
[13] *Ibid*, at 1351-56.
[14] Louis Seidman, "Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism" (1998) 107 Yale L J 2281, at 2301: "Police departments are likely to steer clear of the constitutional line because they are so uncertain as to where the line is and because crossing it might unpredictably lead to very large losses."
[15] Tipton, *supra* note 11, at 1341-42.

Legislators, judges, and policy makers who have the power to create remedies for rights breaches are thus faced with a difficult choice. The exclusionary rule seems designed to encourage law enforcement activities up to the constitutionally permissible limit, and the rule accepts that some policing beyond the constitutionally permissible limit will occur, particularly in close cases.[16] However, personal liability alternatives to exclusion could result in under-policing due to police officer fears of the personal consequences of rights breaches when they exceed constitutionally permissible limits.[17] If one accepts that it will be impossible to devise rules that result in exactly the correct level of policing,[18] then one must decide whether society is better served by a small degree of over-policing or under-policing, and the ultimate desirability of an exclusionary rule as compared to personal liability alternatives will depend on the answer to this question.

Although I do not propose to answer philosophical questions about whether over- or under-policing is better for society within the present thesis, I have drawn attention to personal liability alternatives to exclusion in order to illustrate that exclusion, at least in a domestic criminal law context, is not the only tool that can be used to achieve objectives

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[16] While this may be the accepted understanding of how the exclusionary rule should operate, Tipton (*ibid*, at 1352) notes that the exclusionary rule tends to allow more over-policing than is often acknowledged:

> Both the empirical and anecdotal evidence would seem to indicate that contrary to the proponents of the Dunkin' Donuts Gap rationale, the lack of the imposition of personal liability on law enforcement officers who conduct warrantless, unconstitutional searches and seizures leads to levels of law enforcement significantly in excess of constitutional limits.

[17] Seidman, *supra* note 14 at 2301.

[18] Because, among other reasons, the constitutionally permissible limit of law enforcement "is not clearly defined by the courts" (Tipton, *supra* note 11, at 1350), and is often a moving target.

like deterrence and vindication.[19] This realization is important, because where alternatives to exclusion can bear some of the load that an exclusionary rule might otherwise be expected to carry on its own, then the content and application of an exclusionary rule can perhaps be modified or tailored to achieve more narrow purposes.

ii) Public Damages as a Remedy

Unlike personal liability alternatives to exclusion, which could, conceivably, include payment of fines by offending police officers to victims of rights breaches, a public damages alternative to exclusion could remedy rights breaches through a financial award against the government (as an institution) in favour of a rights breach victim. Canadian law provides a good example of how such an award could operate, since public damage awards were recently found to be available under s. 24(1) of the *Charter*, in *Vancouver (City) v Ward*.[20] In that case, Ward's rights to be free from unreasonable searches and seizures under s. 8 of the *Charter* were breached when police seized Ward's vehicle and subjected him to a strip search, after incorrectly apprehending him in relation to a tip that the police had received.[21]

At the Supreme Court of Canada, Ward was awarded $5000 in public damages[22] under s. 24(1) of the *Charter* (which authorizes courts to grant such remedies as are "appropriate and just in the circumstances"). In explaining the rationale behind public damage awards, the Court noted that such awards should only be made when they can fulfil "one or more of the related functions of compensation, vindication of the right,

[19] These objectives, and others, are discussed above in detail in Chapter 2.
[20] *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*].
[21] *Ibid*, paras 6-9.
[22] *Ibid*, at para 79.

and/or deterrence of future breaches."[23] In applying the law to the facts of the *Ward* case, the Court found that "the need for compensation bulks large,"[24] but also that the police misconduct, particularly in respect of the unlawful strip search, "engages the objects of vindication of the right and deterrence of future breaches. It follows that compensation is required in this case to functionally fulfill the objects of public law damages."[25]

This type of public law damage award can be defended and critiqued from a variety of theoretical perspectives. On the one hand, for instance, damages might seem to offer a much more effective deterrent than exclusion, since a remedy of damages could be invoked by anyone whose rights were breached,[26] whereas exclusion can only be sought by criminal defendants who actually end up being tried for offences. As a practical matter, however, one must acknowledge that a public damages remedy is unlikely to be sought in many cases, since it would require innocent people who have been mistreated by police to hire lawyers and to participate in what might become lengthy judicial proceedings before the remedy can be obtained from a court.[27] In light of this practical reality, the deterrent effect of public damages is more questionable.

The deterrent effect of public damage awards likely also hinges on the ability of the damage award to shape future police conduct (as a matter of general more than

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[23] *Ibid*, at para 4.
[24] *Ibid*, at para 64.
[25] *Ibid*, at para 66.
[26] See Kent Roach, "A Promising Late Spring for Charter Damages: Ward v Vancouver" (2011) 29 Nat'l J Constitutional L 145 at 166-67: "plaintiffs seeking s. 24(1) *Charter* damages can act as private Attorney Generals vindicating the public interest in *Charter* compliance."
[27] *Ibid*, at 166:

> Any concerns about a *Charter* plaintiff receiving an unjustified windfall will often be met by the fact that the low quantum of damages awarded under s. 24(1), including the $5000 in *Ward*, will not normally compensate for the full cost of litigation in the superior courts even considering costs awards in favour of the plaintiff.

specific deterrence), and would be affected by factors such as the size of the award and the level of government responsible for paying the award. As Tipton notes,

> damages must be enough to "hurt" law enforcement agencies. The actions of law enforcement agencies will not be changed unless they feel pressure from taxpayers to lower the costs of law enforcement or the impetus for change comes internally as the result of a desire to avoid budget shortfalls.[28]

Thus, in *Ward*, where the Vancouver Police Department's annual operating costs for the year 2010 exceeded $27 million,[29] the $5000 damage award against the city may not have been sufficient to "hurt" the police, and may not have achieved either specific (since the award was not made against individual police officers) or general (since the award was so low) deterrence of future rights breaches.

That being said, an award of public damages will always fulfill a compensation function (to greater or lesser degrees depending on the quantum of the award), and will likely serve vindication functions through public judicial pronouncements of the wrongs that have been suffered by victims of rights breaches. Thus, as with personal liability alternatives to exclusion, it would be possible for an exclusionary rule to take on a more limited role in jurisdictions where public damages are also available as a remedy for rights breaches, since much of what an exclusionary rule might otherwise need to accomplish could be categorized as more properly falling within the remedial scope of a public damages scheme.

iii) Sentence Reductions or Stays of Prosecution as Remedies

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[28] *Supra* note 11, at 1359.

[29] *Beyond the Call: Vancouver Police Department Annual Report 2010*, (Vancouver: Vancouver Police Department, 2010), at 4.

Perhaps as a result of criticisms that excluding evidence merely compounds initial state misconduct by allowing criminals to escape justice, some jurisdictions have adopted other remedies, including sentence reductions and stays of prosecutions, in order to more appropriately remedy different kinds of rights breaches. The Dutch *Code of Criminal Procedure*[30] provides an excellent example of the way in which exclusion could operate together with these other two remedies. This statute, at s. 359a(1), provides for three possible remedies when procedural rules are breached during a criminal investigation:

> a. The severity of the punishment will be decreased in proportion to the gravity of the breach if the harm caused by the breach can be compensated in this way;
>
> b. The results of the investigation obtained through the breach may not contribute to the evidence of the offense charged;
>
> c. The Public Prosecution Service will be barred from prosecuting if the breach makes it impossible to hear the case in compliance with the principles of due process.[31]

Dutch case law has provided further guidance about when each of these remedies should be used by courts. Sentence reductions compensate for, but cannot completely remedy, a rights breach, so sentence reductions are mainly used as a "sanction for less serious breaches of procedural rules. Examples are a search which observes the main, but not all legal requirements."[32] Exclusion of evidence "is a sanction that should be used with

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[30] *Nederlandse Wetboek van Strafvordering (Sv)* (*Code of Criminal Procedure (The Netherlands)*), quoted and translated in Matthias J. Borgers and Lonneke Stevens, "The Netherlands: Statutory Balancing and a Choice of Remedies" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 183, at 185 [Dutch *Code of Criminal Procedure*].

[31] *Ibid*.

[32] Matthias J. Borgers and Lonneke Stevens, "The Netherlands: Statutory Balancing and a Choice of Remedies" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 183, at 190.

restraint,"[33] in cases where a causal connection between the rights breach and the collection of evidence exists.[34] Exclusion of evidence is considered to fully remedy the illegal collection of evidence.[35] Finally, barring a prosecution is a remedy that should be available only in "exceptional cases"[36] such as when police deliberately thwart procedural rules that are designed to protect rights.[37] This very simply worded Dutch legislation provides for a statutory remedial framework that is unique among those that operate within the two dozen jurisdictions surveyed throughout ensuing chapters of the present thesis, in that the Dutch law combines several vastly different remedial options into a single, coherent scheme.

Although the source of authority for different remedies is not found in a single statute in Canada, it is nonetheless (at least theoretically) possible to obtain all of the same remedies that are available in the Netherlands after one's Canadian *Charter* rights have been breached, under the common law of sentencing, and ss. 24(1) and (2) of the *Charter*. As has been discussed, above, s. 24(2) of the *Charter* requires courts to exclude evidence obtained in a manner that infringes upon an individual's rights if admission of the evidence would bring the administration of justice into disrepute. Section 24(1) of the *Charter*, however, offers courts a much wider – seemingly unlimited – range of options for remedying a *Charter* breach, by permitting judges to award "such remedy as the court considers appropriate and just in the circumstances."[38] Under this remedial

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[33] *Ibid*, at 189.
[34] *Ibid*.
[35] *Ibid*, at 190.
[36] *Ibid*, at 188.
[37] *Ibid*.
[38] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 24(1) [*Charter*].

authority, Canadian courts have ordered that proceedings be stayed in response to particularly egregious rights breaches,[39] although this remedy should be reserved for extreme misconduct: "there may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare."[40] Finally, while the SCC reiterated in *R v Nasogaluak*[41] that the common law of sentencing in Canada permits judges, "without having resort to s. 24(1) of the *Charter*,"[42] to reduce an offender's sentence in certain cases where the offender's rights have been breached, the Court also observed, in *obiter*, that *a sentence reduction below the statutory minimum* for a particular offence might also be an appropriate remedy under s. 24(1) of the *Charter* in a future case.[43] In other words, although exclusion under s. 24(2) is generally the default remedy that is sought in Canada, a variety of other remedial options are available to judges and claimants, some of which may serve different purposes than just the dissociative purpose of exclusion.

As the above section about alternatives to exclusion has demonstrated, a given domestic jurisdiction may seek to remedy rights breaches in one of any number of ways,

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[39] See, for instance, *R v Bellusci*, 2012 SCC 44 (wherein a stay was affirmed by the SCC as an appropriate remedy under s. 24(1) of the *Charter* after a prison guard provoked and then assaulted Bellusci, who was a shackled inmate locked up in a prison van at the time, in breach of Bellusci's security of the person rights under s. 7 of the *Charter*).

[40] *Canada (Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391, at para 91.

[41] *R v Nasogaluak*, 2010 SCC 6.

[42] *Ibid*, at para 3.

[43] *Ibid*, at para 64:

> Although, as we have seen above, the proper interpretation and application of the sentencing process will allow courts to effectively address most of the situations where *Charter* breaches are alleged, there may be exceptions to this general rule. I do not foreclose, but do not need to address in this case, the possibility that, in some exceptional cases, sentence reduction outside statutory limits, under s. 24(1) of the *Charter*, may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and to the offender.

or in a combination of ways. The different remedies that are available in a particular place should form part of any nuanced analysis about how that jurisdiction's exclusionary rule should operate, and what the rule is expected to accomplish, since many of the alternatives to exclusion might be more capable of achieving certain remedial purposes than a purely exclusionary remedy. Conversely, in jurisdictions where exclusion of evidence is the only available remedy for a rights breach, the conceptual "work" that must be done by an exclusionary rule will tend to be much greater, since the rule may need to achieve many purposes that would otherwise be addressed through alternative remedies. This discussion of how exclusionary rules may need to be shaped in reference to other available remedies for rights breaches – while important as a means of understanding the theory behind any given exclusionary rule – will become particularly important to the present thesis in a subsequent chapter, when the lack of remedial alternatives to exclusion at the ICC is exposed.

CHAPTER 4 – STANDING AND IDENTITY REQUIREMENTS IN DOMESTIC EXCLUSIONARY RULES

In this chapter, I will begin comparative study of domestic exclusionary rules by examining how the identity of actors involved in an evidence-gathering transaction can affect the application of an exclusionary rule. There are essentially two related questions that will be addressed. First, how do domestic exclusionary rules treat evidence that is collected inconsistently with human rights standards by private individuals, as opposed to by state actors? And, second, how do domestic exclusionary rules apply in cases where evidence is collected in breach of the human rights of someone other than the accused person? I will refer to the first question as the "identity" question, since it is really concerned with the identity – as either a state or private actor – of an individual who collects tainted evidence, and will refer to the second question as the "standing" question, since it essentially asks whether an accused person has standing to challenge a human rights violation against a third party.

I. The Identity Question

In Canada, the identity question is perhaps an easy one to answer as a matter of constitutional law: the exclusionary rule is created by s. 24 of the *Charter of Rights and Freedoms*, and s. 32 of the *Charter* stipulates that the instrument only applies to the federal and provincial governments and legislative bodies.[1] In other words, since the constitutional exclusionary rule is derived from the *Charter*, and since the *Charter* "is

[1] See also *McKinney v. University of Guelph*, [1990] 3 SCR 229, regarding the application of the *Charter* generally, and *R. v. Buhay*, [2003] 1 SCR 631, regarding the application of the s. 24(2) exclusionary rule in particular, to only state actors.

essentially an instrument for checking the powers of government over the individual,"[2] it follows that the exclusionary rule cannot apply to actions by non-governmental actors. The same approach is taken to exclusion in the United States: the Fourth Amendment "gives protection against unlawful searches and seizures [but] its protection applies to governmental action."[3] Thus, in the United States, evidence that was unlawfully taken from a defendant's office by a private person can be admitted into evidence, even though it would be subject to the exclusionary rule if a public official had collected such evidence.[4] However, in jurisdictions where exclusionary rules are applicable to more than just breaches of constitutional rights (that is, where an exclusionary rule could also apply to breaches of statutory criminal procedure laws, for instance) or where constitutional rights apply *erga omnes* (rather than just between the state and an individual), then the identity question can become more complex.

By way of example, Belgium has an exclusionary rule that applies in cases where evidence is gathered *illegally*, such as in breach of the formal requirements of the *Code of Criminal Procedure* – but also in cases where the method of collection has undermined the reliability of the evidence, or when use of certain evidence would render a trial unfair.[5] It should also be noted that Belgium penal law permits a "civil party" to

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[2] *McKinney*, *ibid*, at 261.
[3] *Burdeau v. McDowell*, (1921) 256 US 465, at 475.
[4] See generally, *Burdeau, ibid.* See also, Steven Euller, "Private Security and the Exclusionary Rule" (1980) 15 Harv Civ Rts-Civ Liberties L Rev 649, at 650, describing how a private citizen can acquire evidence through theft, burglary, and by drilling into a defendant's personal safe, all without triggering the American exclusionary rule.
[5] See Cour de Cassation de Belgique, Arrêt no P.03.0762.N, 14 Oct 2003 [generally called the *Antigone case*, after the name of the police operation that led to the illegally collected evidence in that case], online:

participate in trials where this party's interests are at stake, and where the party may be entitled to an award of damages as a result of the alleged crime.[6] Perhaps because of these two factors,[7] Belgian case law between 1923 and 1990 affirmed that the exclusionary rule applied equally to government and private actors,[8] such that evidence collected by a private actor who did not comply with statutory search and seizure requirements would be inadmissible against an accused person.

Similarly, in Greece, the Supreme Court has held that the statutory exclusionary rule found at s. 177(2) of the *Code of Criminal Procedure* prohibits the admission of a recorded conversation even where the conversation was recorded by a private individual, since it is an offence to make such recordings.[9] With respect to searches that violate the Greek constitutional right to privacy, the constitutional exclusionary rule also applies to both private and state actors, since "constitutional rights in Greece apply *erga omnes*" –

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http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20031014-18, for a description of the three circumstances that can lead to application of the exclusionary rule.

[6] See *Belgium Code of Criminal Procedure*, arts 63, 66, and 67 (French translation online: http://www.droitbelge.be/codes.asp#ins). One might conceptualize this type of trial as both a criminal and civil trial implicating the state, the accused, and the victim(s), all rolled into a single process.

[7] Civil law systems generally include the "civil party" or victim who seeks damages as a participant in criminal trials. This "civil party" often has rights to tender or call evidence. Perhaps because of this "civil party" who brings his own evidence to the trial, collected outside of the ambit of state authority, exclusionary rules in civil law jurisdictions tend to apply to private actors as well as to state actors. This phenomenon could be relevant to the ICC, which gives extensive voice to victims and administers a victims' fund.

[8] See Marie-Aude Beernaert and Philip Traest, "Belgium: From Categorical Nullities to a Judicially Created Balancing Test" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 161 at 162-166, for a description of the evolution of Belgian exclusionary case law from 1923 to the present.

[9] See Georgios Triantafyllou, "Greece: From Statutory Nullities to a Categorical Statutory Exclusionary Rule" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 261 at 276, for a description of the Greek Supreme Court decision 1568/2004 on this point.

regulating even conduct between private individuals – by virtue of article 25 of the Greek Constitution.[10] Furthermore, in both Italy[11] and Spain,[12] some evidence collection methods can trigger the application of exclusionary rules even if the evidence is collected by private persons.

The different ways in which the identity question is addressed in domestic legal systems merits consideration. Can the differences be explained simply in terms of regional variances in criminal procedure, or do they reflect more fundamental differences in the principles that underlie each exclusionary rule? For instance, a move to expand an exclusionary rule so as to apply to private actors might not be defensible under the deterrent theory of exclusion (since private individuals who illegally collect evidence do not necessarily do so with a view to securing successful prosecutions, so these individuals and others will therefore not likely be deterred from illegally collecting evidence in the future by the present reality of a failed prosecution in a particular case). However, a move to expand an exclusionary rule so as to apply to private actors could easily be justified in terms of compensation and vindication theories, and could possibly also be justified in terms of dissociation. In jurisdictions where rights apply *erga omnes*, for

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[10] Dimitrios Giannoulopoulos, "The Exclusion of Improperly Obtained Evidence in Greece: Putting Constitutional Rights First" (2007) 11 Int'l J of Evidence & Proof 181, at 196.

[11] Wiretaps executed by private persons in Italy are not authorized by law, and would therefore be excluded: see Giulio Illuminati, "Italy: Statutory Nullities and Non-Usability" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 235 at 255.

[12] In Spain, the constitutional right to privacy – which can be enforced through exclusion – grants a person a "space of liberty and privacy against interference from third persons, be it from public authorities, other citizens or private entities": Lorena Bachmaier Winter, "The Constitutional Court's Move from Categorical Exclusion to Limited Balancing" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 209 at 219.

instance, exclusion could potentially provide the same level of *compensation* to an accused person regardless of whether misconduct against the accused flowed from the actions of state or private actors. Likewise, in these jurisdictions, a right could be *vindicated* through exclusion even in cases where the right was trammelled by the conduct of a private individual rather than a police officer, since the expressive aspect of an exclusionary remedy that gives real meaning to a right remains extant even in these cases. Stated simply, if a "right" is capable (by definition) of being breached by a private actor in a particular jurisdiction, then there is no principled reason under either compensation or vindication theory why an exclusionary rule should not be applicable in cases of rights breaches by private actors in these jurisdictions.

Such an application of an exclusionary rule to private actors is perhaps more difficult to justify on the basis of dissociation theory, even in jurisdictions where rights apply *erga omnes*, since dissociation theory is largely premised on the notion that courts must dissociate themselves from improprieties committed by individuals within other branches of government, but not necessarily by private citizens. One must not forget, however, that dissociation theory is essentially the same as condonation theory, and both theories seek avoid the perception that courts condone rights breaches. When dissociation and condonation theories are understood in this way, it becomes apparent that any exclusionary rule that is applicable to improper actions of both private and state actors can be justified under dissociation and condonation theories, since courts should no more condone misconduct by individual citizens than by state officials if they are to maintain their integrity as guardians of the law.

As the above analysis demonstrates, there may be many good reasons why a domestic exclusionary rule would be desirable and justifiable on at least some of the recognized bases for an exclusionary rule, including compensation, vindication, and dissociation bases for exclusion. However, in jurisdictions (such as Canada) where, by definition, rights do not apply *erga omnes*, any attempt to justify the application of an exclusionary rule to misconduct by private individuals would be less persuasive, since these non-state actors technically cannot breach rights that are extended by the state to individuals in the first place.

II. The Standing Question

In Canada, the standing question has a relatively straightforward answer. As a matter of constitutional law, exclusionary remedies are only available under s. 24(2) of the *Charter* to "anyone […] whose rights or freedoms have been infringed or denied."[13] Thus, in *R v Edwards*,[14] the accused was unsuccessful in seeking exclusion of a cache of drugs that was found by police when they conducted an unreasonable search of his girlfriend's residence, since it was not the accused's own *Charter* right to be free from unreasonable search and seizure that was infringed in that case.

The Canadian position on standing to invoke an exclusionary remedy is mirrored in many other jurisdictions. In Germany, for instance, "a person may only challenge the admissibility of illegally obtained evidence if the violated rule on evidence gathering protects his or her acknowledged interests and thus forms part of his or her legally

[13] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 24(1) [*Charter*].
[14] *R v Edwards*, [1996] 1 SCR 128. See also *R v Belnavis*, [1997] 3 SCR 341, for a similar result.

protected rights."[15] In the United States, case law holds that "a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights,"[16] even in an egregious case when state agents deliberately exploited the standing requirement by conducting an unlawful search of an innocent third party's effects in order to collect incriminating evidence against the defendant.

However, the standing question is not answered in the same way in every jurisdiction. In South Africa, for instance, s. 35(5) of the Constitution[17] has been interpreted by the Supreme Court of Appeal (but not yet by the Constitutional Court) as requiring "the exclusion of evidence improperly obtained from any person, not only from an accused,"[18] in a case where the evidence of a witness who had previously been subjected to police torture as part of the investigation was excluded. Similarly, the California Supreme Court held, in 1955, that evidence obtained in violation of the state constitution could not be used in a criminal prosecution even where the defendant was not the victim of the unlawful search or seizure,[19] and this rule remained in place until a constitutional amendment in 1985 brought the state's exclusionary rule into line with the federal rule that imposed a standing requirement upon defendants.[20]

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[15] Sabine Gless, "Germany: Balancing Truth Against Protected Constitutional Interests" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 113 at 122.
[16] *United States v Payner*, (1980) 447 US 727, at 731.
[17] *Constitution of the Republic of South Africa, 1996*.
[18] *Mthembu v The State* (379/2007), [2008] ZASCA 51 (10 April 2008), online: http://www.saflii.org/za/cases/ZASCA/2008/51.html.
[19] See *People v Martin*, (1955) 45 Cal2d 755.
[20] See Mark E. Cammack, "The United States: The Rise and Fall of the Constitutional Exclusionary Rule" in Stephen C. Thaman, ed, *Exclusionary Rules in Comparative Law*,

Dave Ally, in his doctoral thesis on the South African exclusionary rule, suggests that "the rationale of the exclusionary rule should determine the nature of the standing threshold requirement."[21] I would echo this proposition. If a given exclusionary rule is to serve a deterrent function, then surely the rule would be more efficient without a strict standing requirement that could shield many (perhaps most) instances of police misconduct from judicial review. Similarly, if an exclusionary rule is based on condonation or dissociation theory, then the rule should probably be applicable in cases where a third party's rights have been breached, since courts risk condoning police misconduct when they admit evidence obtained through the breach of a third party's rights just as much as when they admit evidence obtained through the breach of an accused person's rights (just as courts benefit from the act of dissociating themselves from this misconduct as much when they exclude evidence obtained through third party rights breaches as through breaches of an accused's rights). Vindication theory offers a more tenuous justification for extension of an exclusionary rule to third party rights breaches since the remedy of exclusion is arguably not well suited for vindicating rights of those who are not the subjects of criminal prosecutions. However, if one accepts that vindication only requires a meaningful and expressive remedy, but not a remedy that is particularly beneficial to a given rights holder, then exclusion would likely be justifiable on vindication grounds at least to some extent in the case of third party rights breaches, since the remedy meaningfully deprives the state of otherwise admissible evidence. In

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(Springer: New York, 2013), 3 at 15, for a brief discussion of the history of California's exclusionary rule.

[21] Dave Ally, *Constitutional Exclusion Under Section 35(5) of the Constitution of the Republic of South Africa, 1996*, (LL.D. Thesis, University of Pretoria, South Africa, 2009), at 193 [LLD Thesis], online: http://upetd.up.ac.za/thesis/available/etd-01282010-133748/unrestricted/00front.pdf.

contrast, if an exclusionary rule is primarily grounded in compensation theory, then a strict standing requirement would be entirely consistent with the rule's rationale, since the accused has suffered no compensable loss when a third party's rights – as opposed to the accused's own rights – have been breached.

Recalling from Chapter 2 that deterrent, dissociation, compensation and vindication theories are all capable of offering a justifiable basis for an exclusionary rule, and that several or all of these rationales for exclusion could concurrently form the basis of a single exclusionary rule, there is no principled reason why an exclusionary rule cannot and should not be invoked even in cases where the rights of someone other than the accused are breached. Eliminating a strict standing requirement would assist any exclusionary rule in achieving at least two, and possibly three, of the recognized objectives of exclusionary rules: vindication, deterrence, and dissociation.

III. Conclusions on the Identity and Standing Questions

The above discussion in this chapter, while suggesting that it would be justifiable under several accepted bases for exclusion to allow exclusionary rules to apply both when a non-state actor is involved in a rights breach (the identity question), and when a third party's rights are breached (the standing question), does not necessarily imply that actual exclusion should always be the result in these types of cases involving rights breaches. Regardless of what one concludes about the standing and identity questions, all of the countervailing considerations that militate against the operation of exclusionary rules (discussed above in Chapter 2) continue to exist. Thus, while the discussion in this chapter strives to demonstrate that exclusionary rules would be more capable of

achieving their various objectives of deterrence, dissociation, compensation, and vindication (and would therefore be more defensible on a principled basis) if they could be applied to exclude evidence even in cases where traditional standing and identity requirements have not been met, the existence of countervailing factors suggests that exclusionary rules must only lead to actual exclusion in certain classes of cases – but probably not all cases – involving rights breaches. In other words, acknowledging that an exclusionary remedy should more frequently be available as a matter of principle in many domestic jurisdictions does not necessarily mean that exclusion should result more frequently, since countervailing considerations of efficiency, proportionality, public safety and epistemic concerns must still be weighed to determine whether exclusion is desirable in a particular case or in particular classes of cases. Nonetheless, the absolute unavailability of exclusion as a remedy in many domestic jurisdictions when standing and identity requirements have not been met will tend to weaken the logical coherence that should exist between a given exclusionary rule and the purported rationale for the rule, as the above discussion has attempted to show.

CHAPTER 5 – FACTORS INFLUENCING EXCLUSION: GOOD FAITH, SERIOUSNESS OF THE OFFENCE, AND IMPORTANCE OF THE EVIDENCE

In this chapter, comparative study of domestic exclusionary rules continues by examining a further set of exclusionary doctrines that frequently form part of domestic rules. Specifically, I will examine certain common doctrines that seem to be found in many exclusionary rules in order to identify how these doctrines operate – often in vastly different ways. I will begin with discussion of the "good faith" doctrine, or the doctrine that often militates in favour of admission of tainted evidence in cases where police or other state agents have (typically) unknowingly breached an individual's rights. I will then consider the "seriousness of the offence doctrine," or the doctrine suggesting that exclusionary remedies should be more limited in cases where a very serious offence is alleged, and more readily available in cases of minor offences. Finally, I will study the "centrality of the evidence" doctrine, which, in some jurisdictions, weighs against exclusion of evidence that is essential to the prosecution's success in a particular case. After discussing each of these doctrines, and how they operate in jurisdictions around the world, I will also analyse how the doctrines could be incorporated into a simple exclusionary test that is built upon the principles identified in Chapter 2.

I. The Good Faith Doctrine

Since at least 1984, American exclusionary case law has consistently held that evidence should not be excluded if it was obtained by police officers who acted in good faith under authority of a search warrant that was subsequently found by a court to be

deficient or invalid.[1] This good faith exception to the exclusionary rule is justified within American jurisprudence, as is the exclusionary rule itself, in the language of deterrence: when a police officer acts on the authority of an apparently valid warrant, "there is no police illegality and thus nothing to deter. […] Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations,"[2] so the exclusionary rule will not apply in such cases.

In New Zealand[3] and Canada,[4] the good faith of a state official who improperly obtains evidence is merely one factor among many that is considered by judges in exclusionary decisions. Similarly, in Israel, a court must "examine whether the law enforcement authorities made use of the improper investigation methods intentionally and deliberately or in good faith,"[5] but, as in Canada and New Zealand, the presence or absence of good faith is not dispositive of matter: "the fact that the authority acted in good faith does not necessarily prevent the evidence being excluded when this is required in order to protect the right of the accused to a fair criminal trial."[6]

In Scotland, case law seems inconsistent in how it treats the good faith doctrine: "acting under an illegal warrant (or without a warrant at all) has been excused in some cases, but exceeding the terms of a warrant has been held – despite the police officers'

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[1] See generally *United States v. Leon*, (1984) 468 US 897.
[2] *Ibid*, at 920-921.
[3] See New Zealand *Evidence Act, 2006*, Public Act 2006 No 69, s. 30(3)(a)-(h), where seriousness of the intrusion upon a right (s. 30(3)(a)) and impropriety done in bad faith (s. 30(3)(b)) are two of the listed factors that a court "may, among other matters" consider in deciding whether to exclude evidence.
[4] See *R. v. Grant*, [2009] 2 SCR 353 [*Grant*], at para 75 (where the SCC indicates that good faith reduces the need for judicial dissociation through exclusion of evidence).
[5] *Issacharov v. Chief Military Prosecutor*, Criminal Appeal 5121/98 [2006], at para 70.
[6] *Ibid*.

good faith – to be inexcusable in others."[7] No judicial test in Scotland has established that good faith should be considered in making exclusionary decisions, but a "leading text on the Scots law of evidence" lists "good faith of those who obtained the evidence" as a factor that must be considered by the courts.[8]

In Belgium, the good faith doctrine appears to be more relevant to police disciplinary hearings than to the actual criminal trial of an accused person who was the victim of a rights breach:

> the intentional nature of the illegality committed by the authorities can certainly play an important and even decisive role in any potential disciplinary or criminal proceedings against the officials involved, but it is not clear that this fact should also play a role in the decision of the criminal courts whether or not to accept the evidence in question in the original criminal proceedings.[9]

However, as the above passage demonstrates, Belgian courts may actually be looking at bad faith by the police (intentional illegality) more than good faith, and this is not unique to Belgium. In Taiwan, for instance, s. 158-4 of the *Code of Criminal Procedure*[10] – which creates the Taiwanese exclusionary rule – has been interpreted by the Supreme

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[7] Findlay Stark and Fiona Leverick, "Scotland: A Plea for Consistency" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 69 at 77-78.

[8] *Ibid*, at 72. Stark and Leverick, however, suggest that this authority is somewhat misleading, in that good faith is probably only a factor that may be considered by courts, rather than one that must be considered.

[9] Marie-Aude Beernaert and Philip Traest, "Belgium: From Categorical Nullities to a Judicially Created Balancing Test" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 161, at 168.

[10] *Code of Criminal Procedure* (Taiwan) (February 6, 2003), English translation online: http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT03.asp. Section 158-4 provides, "The admissibility of the evidence, obtained in violation of the procedure prescribed by the law by an official in execution of criminal procedure, shall be determined by balancing the protection of human rights and the preservation of public interests, unless otherwise provided by law."

Court as requiring courts to consider "the good or bad faith of the officer when violating the law" as one of eight factors that might influence the exclusionary decision.[11]

The good faith doctrine is complicated in many jurisdictions by somewhat loose and ambiguous language among scholars and judges when referring to the conduct of police, as Steve Coughlan has observed in a Canadian context.[12] What exactly does "good faith" mean? Is it merely the absence of bad faith, or is it behaviour that is "so exculpatory of [police] motives as to override any other considerations about seriousness [of the rights breach]"?[13] With respect to Israeli case law, Binyamin Blum has similarly noted that, between the obvious extremes of "intentionally and knowingly violating the law on the one hand, and doing so in good faith on the other," lie a range of police behaviours that courts are less quick to characterize.[14]

In response to this definitional problem, Coughlan essentially proposes a three-category approach to the good faith doctrine: a label of "bad faith" should be reserved for cases wherein police deliberately or knowingly breach fundamental rights;[15] a label of "good faith" should be reserved for cases wherein police reasonably believe that they are complying with the law (such as when police follow a valid law that is subsequently struck down upon judicial review);[16] and, a neutral assessment that neither good nor bad

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[11] Jaw-Perng Wang, "Taiwan: The Codification of a Judicially-Made Discretionary Exclusionary Rule" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 355 at 356-357.
[12] See generally, Steve Coughlan, "Good Faith, Bad Faith and the Gulf Between: A Proposal for Consistent Terminology" (2011) 15 Can Crim L Rev 195.
[13] *Ibid*, at 199.
[14] Binyamin Blum, "'Exclude Evidence, You Exclude Justice'? A Critical Evaluation of Israel's Exclusionary Rule After Issacharov" (2010) 16 Sw J Int'l L 385, at 419 [Exclude Justice].
[15] Coughlan, *supra* note 12, at 204-205.
[16] *Ibid*, at 207.

faith is present should apply to all other cases (such as cases where police act in an environment of legal uncertainty, where they subjectively believe they are complying with the law, but cannot objectively justify their beliefs, or where police are unreasonable or negligent in their efforts to ascertain and comply with the law).[17] Coughlan proposes that true bad faith should always lead to exclusion, true good faith should virtually always rule out exclusion, and, for the vast majority of cases, neutral conduct that cannot clearly be identified as either good or bad faith should have significantly less impact on exclusionary decisions.[18]

Clearly there are many different ways to incorporate the good faith doctrine into an exclusionary rule. Notwithstanding the fairly generous concept of what amounts to "good faith" in American case law, the American doctrine, which automatically forecloses application of the exclusionary rule whenever the police act in good faith, is defensible in terms of deterrence – the sole basis for the American rule. Since one probably can never deter true "accidents" (which is essentially what we might call good faith rights breaches), it would be futile to apply an exclusionary remedy as a means of deterring something that cannot be deterred. Similarly, dissociation and condonation theories likely do not demand that exclusion be available as a remedy in cases of good faith rights breaches, since the courts do not necessarily need to dissociate themselves from mere accidental misconduct on the part of other state actors.

The same good faith doctrine, however, would be problematic if elements of vindication or compensation theory also formed part of the underpinning of an exclusionary rule: an accused person whose rights are breached by an officer acting in

[17] *Ibid*, at 204-205.
[18] *Ibid*, at 199-200.

good faith is arguably no less deserving of compensation than one whose rights are breached by an officer acting in neutral or bad faith, since the accused persons have essentially suffered the same harm in both cases, regardless of the police officers' knowledge or motives in perpetuating rights breaches. Similarly, vindication theory suggests that, if rights are truly to have meaning, then they must be vindicated whenever they are breached (even by officers acting in good faith) rather than just when they are most deliberately or flagrantly breached.

As the above discussion demonstrates, and keeping in mind that vindication and compensation theory could justifiably form part of the basis of any domestic exclusionary rule, there is no principled reason why exclusion should automatically be unavailable to an accused person just because that person's rights have been breached by a state official who acted in good faith. While it is acknowledged that certain countervailing factors might militate in favour of admission of tainted evidence in cases of good faith rights breaches, a calculation that weighs the benefits of exclusion (in terms of vindication and compensation) against the harms of exclusion (in terms of public safety, efficiency, epistemic, and particularly proportionality concerns) should be undertaken on a case by case basis if an exclusionary rule is to remain defensible as a matter of principle. Blanket exceptions to an exclusionary rule for good faith mistakes by police will tend to undermine the logical coherence of a rule as noted above.

II. Seriousness of the Offence as an Exclusionary Factor

The central debate regarding seriousness of the offence as an exclusionary factor is whether exclusionary remedies should be more or less available to those charged with "serious" offences, or, expressed in other terms, whether the social costs and benefits of

excluding evidence in a serious offence case are appreciably different from those in a less serious offence case.

In some countries, the seriousness of the offence with which an accused is charged is explicitly considered as a factor weighing against application of an exclusionary rule. This is the case, for instance, in New Zealand, where s. 30(3)(d) of the *Evidence Act, 2006*, lists "the seriousness of the offence with which the defendant is charged" as one factor to be considered among others,[19] and where case law has established that this factor militates in favour of admission of improperly obtained evidence.[20]

In other jurisdictions, the "offence seriousness" doctrine is less clear. In Canada, for instance, the SCC initially stated in *R. v. Grant*,[21] when it most recently overhauled the exclusionary rule, that,

> while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. […] While the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.[22]

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[19] *Supra* note 3, s. 30(3)(d).

[20] See *R. v. Williams*, [2007] NZCA 52, [2007] NZLR 207, at paras 245-251, for an excellent summary by the Court of Appeal on how the legislated exclusionary rule is to be applied in New Zealand. However, the more recent Supreme Court decision, *Hamed v. R.*, [2011] NZSC 101, [2012] NZLR 305, may have displaced the earlier Court of Appeal framework for applying the exclusionary rule with a vague, unguided discretionary approach to exclusion. It will be interesting to observe the effect of the *Hamed* decision on future cases, to ascertain whether it has complemented or replaced the *Williams* framework. For an insightful case comment on the *Hamed* decision, see Scott Optican, "*Hamed*, *Williams* and the Exclusionary Rule: Critiquing the Supreme Court's Approach to s. 30 of the *Evidence Act 2006*" [2012] NZ L Rev 605.

[21] *Grant*, *supra* note 4.

[22] *Ibid*, at para. 84.

This passage seems to suggest that seriousness of the offence will be a neutral factor, since it weighs both in favour of admission and exclusion. However, in a subsequent decision wherein the SCC reiterated that seriousness of the offence can "cut both ways," the Court perhaps hinted more closely at how it actually views this factor by saying (in purported reliance on the paragraph from *Grant* cited above) that seriousness of the offence "will not always weigh in favour of admission."[23] These words suggest that in proceedings on charges for relatively serious offences, tainted evidence will tend to, but will not necessarily, be admitted.[24] Ultimately, however, the SCC upheld the trial judge's decision to exclude evidence in spite of the seriousness of the charge in *Côté*, and restored the acquittal that was entered at trial,[25] so the SCC's thinking on seriousness of the offence remains ambiguous.

In Taiwan, there is perhaps some similar dissonance between the theory and practice of exclusion. Section 158-4 of the *Code of Criminal Procedure* has been interpreted by the Supreme Court as requiring courts to consider "the gravity of the charged offence and the harm it caused" as one of eight factors in a balancing calculus.[26] However, one commentator has observed that, "in practice, courts tend not to exclude evidence in cases involving very serious offences, such as murder or rape. Guns are also unlikely to be excluded by many courts."[27] In other words, while seriousness of the

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[23] *R. v. Côté*, [2011] SCJ No 46, 2011 SCC 46, at para 53.
[24] In practice, this hypothesis seems to be borne out by the statistics. See, for instance, Mike Madden, "Marshalling the Data: An Empirical Analysis of S. 24(2) Case Law in the Wake of *R. v. Grant*" (2011) 15 Can Crim. L. Rev. 229, at 245 (Table 6), noting that guns (presumably a form of evidence associated with more serious charges) tend to be admitted much more often than other forms of physical evidence.
[25] *Côté*, *supra* note 23, at paras. 89-90.
[26] Wang, *supra* note 11, at 356-357.
[27] *Ibid*, at 357.

charge is purportedly just one among many co-equal factors, it clearly seems to be the driving factor in Taiwanese exclusionary decisions.

There are persuasive reasons why a sliding scale of exclusion should or should not be used depending on the seriousness of the offence, perhaps best explained by commentators from Belgium:

> On the one hand, it is understandable that the extreme seriousness of an offence committed by the accused could go against excluding an illegally obtained piece of evidence where the act in question only involved a "minor" illegality. But on the other hand, we could just as easily argue that a guilty verdict involving a particularly serious offence will typically bring with it a very heavy punishment and it is therefore particularly important that the verdict be the result of a procedure conducted in conformity with existing law. **There exists a paradox in saying that the rule governing admissibility of evidence in cases involving a serious offence should be more flexible than those which apply in the trial of less serious offences with lesser punishments**.[28]

In order to ascertain how this paradox can best be addressed through a principled exclusionary rule, one must consider both the bases for exclusion and the countervailing considerations that were identified in Chapter 2, in order to determine whether the seriousness of the offence doctrine can find a defensible place in a model domestic exclusionary rule.

Consideration of the seriousness of an offence is not particularly useful if a given exclusionary rule is grounded in either vindication or compensation theory, since these rationales for exclusion are mostly accused-centric, and the necessity of excluding evidence in the case of a particular rights breach (if one considers the matter objectively from the accused's perspective) will be the same regardless of the offence with which the accused is charged. Similarly, the need for courts to dissociate themselves from rights breaches by actors within other branches of governments will tend to be the same

[28] Beernaert and Traest, *supra* note 9, at 168 (emphasis added).

regardless of the offence with which an accused is charged: admitting evidence that was collected through a given class and seriousness of rights breach would logically lead to exactly the same degree of judicial condonation (of the breach) in both a prosecution for shoplifting and a prosecution for aggravated sexual assault, because condonation theory is concerned only with the relationship between the courts and the police, rather than with any actions of the accused.

The only rationale for exclusion that might require consideration of the seriousness of the offence doctrine is the deterrent rationale. As discussed above in Chapter 2, the deterrent rationale is based in part on the assumption that police and other state agents involved in the criminal process care enough about exclusionary outcomes as to shape their conduct in ways that are less likely to result in rights breaches and the exclusion of tainted evidence. If it is accepted that police care about exclusionary decisions, and specifically that they dislike outcomes involving exclusion and failed prosecutions, one could reasonably hypothesize that the level of police concern and interest in exclusionary outcomes is proportional to the seriousness of the offence with which an accused is charged – that is, police care a little about exclusionary decisions in minor cases, and they care a lot about exclusionary decisions in major cases. If this hypothesis is correct, then the seriousness of the offence doctrine is highly relevant to a deterrence-based exclusionary rule, since courts will be able to achieve a greater degree of deterrence (i.e.: exclusionary rulings will shape police conduct away from rights breaches both more efficiently and effectively) when they exclude tainted evidence in cases in serious offence cases as compared to minor offence cases.

As the above discussion demonstrates, the seriousness of the offence doctrine is probably irrelevant to exclusionary rules that are grounded in compensation, vindication, or dissociation theory. However, when the doctrine is applied to a deterrent-based exclusionary rule, it suggests that exclusion should result more easily and frequently in cases involving serious offences. This conclusion is somewhat surprising, given that several of the domestic exclusionary rules that have been surveyed in this chapter (including New Zealand, Taiwan, and perhaps Canada) would all favour admission – not exclusion – of tainted evidence in cases where the underlying offence is serious.

One explanation for the dissonance between theory and reality in the context of the seriousness of the offence doctrine in domestic exclusionary rules might be that many domestic rules have simply developed in a reactive, rather than a principled fashion. A more nuanced explanation, however, might acknowledge that the countervailing factors militating against exclusion, such as public safety and proportionality concerns, are significantly more powerful in cases involving serious offences. Public safety is much more at risk when an individual who is charged with a serious offence escapes prosecution on a technicality than when a petty criminal is set free, and the consequences of exclusion are tilted more disproportionately in favour of an accused person and against society when the accused who is charged with a very serious offence avoids a trial on the merits after successfully having tainted evidence excluded.

Thus, while seriousness of the offence might be a relevant consideration in many domestic jurisdictions, it seems that the way in which the doctrine has been integrated into existing exclusionary rules has either not been well considered, or well explained. When deterrent theory suggests that exclusion is more important in serious offence cases,

but domestic legislation and jurisprudence favours admission of tainted evidence in serious offence cases (the opposite outcome), some explanation as to the cause of the dissonance is arguably required. If courts deem that tainted evidence must be admitted in these cases due to proportionality and public safety considerations, then their decisions, and the overall coherence of their exclusionary rules, would be strengthened by a straightforward explanation of this reality. In the absence of any such explanation, many domestic exclusionary rules continue to exist on bases that are often weak and unprincipled.

III. Importance of the Evidence as an Exclusionary Factor

Should evidence be excluded less often when it is of central importance to the prosecution's case? This, essentially, is the question that the "importance of the evidence" doctrine seeks to answer.

In Canada, the SCC has set down an exclusionary framework that involves consideration of three factors: seriousness of the rights breach, significance of the impact that the breach has on the accused, and, consideration of the public interest in seeing the case adjudicated on its merits.[29] However, with respect to the third factor, the Court further observed, "the importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry," since

> the admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.[30]

[29] *Grant*, *supra* note 4, at para 85.
[30] *Ibid*, at para 83.

In practice, lower courts have mainly read this passage to mean that the third *Grant* factor will be high (and exclusion will therefore less likely follow) in cases where the tainted evidence is central to the prosecution's case.[31]

Australian common law also placed weight on the importance of the evidence to the prosecution in its exclusionary framework. In the leading case on exclusion, *Bunning v. Cross*,[32] a majority of the High Court first suggested that some flexibility to admit tainted evidence would be accorded to police in cases where the evidence "is both vital to conviction and is of a perishable or evanescent nature"[33] – perhaps to account for exigent circumstances where there is a danger that an accused will destroy the evidence. However, in the same *Bunning* decision, the majority clarified that it was really most concerned with the centrality of the evidence to the case, rather than the possibility of destruction of the evidence: "if other equally cogent evidence, untainted by any illegality, is available to the prosecution at the trial the case for the admission of evidence illegally obtained will be the weaker."[34] In other words, exclusion will be more palatable under Australian common law only in those cases where it has no impact on the outcome of a case. This common law exclusionary rule continues to apply in several Australian jurisdictions (South Australia, Queensland, Western Australia, and the Northern

[31] See, for instance, *R. v. Bacon*, [2010] BCJ No 48, at paras. 82-86 (where the trial judge noted in his decision not to exclude that "the exclusion of the handguns would result in the dismissal of all charges related to the possession of the handguns and prohibited device" and would "gut the prosecution"). For an appellate court's perspective, see also, *R. v. Martin*, [2010] NBJ No 138, at paras. 94, and 100-101 (where the Court of Appeal noted in its decision to overturn the trial judge's exclusionary ruling that the impugned wiretap evidence was important to the prosecution's case: "without it, the prosecution's case collapsed and society's interest in adjudication on the merits was compromised").
[32] *Bunning v. Cross*, [1978] HCA 22.
[33] *Ibid*, at para 38.
[34] *Ibid*, at para 39.

Territory)[35] but has now been codified in s. 138 of the *Uniform Evidence Legislation*[36] applicable throughout New South Wales, Victoria, Norfolk Island, the ACT and Tasmania.[37]

In South Africa, it is not yet clear how the "importance of the evidence" doctrine will shape exclusionary decisions under s. 35(5) of the Constitution. The Supreme Court of Appeals has ruled on several exclusionary matters, but has yet to articulate a comprehensive framework for future application of the exclusionary rule, and seems content to confine its rulings to the facts of particular cases.[38] There is also some uncertainty about how this factor will be treated in Israel. The Supreme Court, in *Issacharov*, postponed any move to set down a clear framework for application of the doctrine:

> The question of the degree to which the courts in Israel should take into account the importance of the evidence and the seriousness of the offence attributed to the accused within the framework of exercising their discretion under the case law doctrine of inadmissibility does not require a decision in the appellant's case and we can leave this too to be decided in the future.[39]

It will be interesting to see whether the doctrine is eventually incorporated into exclusionary rules in South Africa and Israel, or whether courts determine that the centrality of the tainted evidence is irrelevant to exclusionary decisions.

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[35] Kenneth J. Arenson, "Rejection of the Fruit of the Poisonous Tree Doctrine in Australia: A Retreat from Progressivism" (2011) 13 U Notre Dame Austl L Rev 17, at 20.

[36] The term "Uniform Evidence Legislation" actually refers to a series of identical *Evidence Acts* that are in force in each of a number of Australian jurisdictions. See, for instance, *Evidence Act 2008*, No 48 of 2008, Victorian Consolidated Acts, s. 138, online: http://www.austlii.edu.au/au/legis/vic/consol_act/ea200880/.

[37] Arenson, *supra* note 35, at 20.

[38] See Dave Ally, "Determining the Effect (Social Costs) of Exclusion Under the South African Exclusionary Rule: Should Factual Guilt Tilt the Scales in Favour of the Admission of Unconstitutionally Obtained Evidence?" (2012) 15 Potchefstroom Electronic L J 477, particularly at 494-501 [Factual Guilt].

[39] *Issacharov, supra* note 5, at para 73.

In Greece, article 19(3) of the Constitution[40] provides for an absolute exclusionary rule in cases where an individual's right to privacy has been breached. What is remarkable about this rule is that it will automatically exclude the kinds of reliable, physical evidence that is generated by searches and seizures in violation of rights to privacy, when this evidence will often be the most central to the prosecution's case. Thus, in Greece, it seems that the "importance of the evidence" doctrine has been rejected altogether.

Notwithstanding the various domestic jurisdictions that have found a place for the centrality doctrine in their rules, there remain two theoretical problems with the doctrine that must be identified before moving on. First, one could suggest that the doctrine creates a perverse incentive for police officers to cease collecting additional evidence once they have breached a suspect's rights, on the presumption that the tainted evidence is more likely to be excluded if it is accompanied by other incriminating evidence, and is thus not central to the prosecution's case. Second, it is perhaps impossible or at least imprudent to attempt to assess the importance of a piece of evidence to the prosecution's case as a preliminary matter (i.e.: on a *voir dire* in a common law trial, or by an examining magistrate in a civil law jurisdiction), arguably before the full significance of any single piece of evidence can be appreciated. As Justice Scalia of the United States Supreme Court observed in relation to these kinds of preliminary decisions in another context, "dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[41] In some ways, the importance of the evidence doctrine follows the same flawed reasoning: admitting

[40] *The Constitution of Greece*, *supra* note 22.
[41] *Crawford v. Washington*, (2004) 541 US 36, at 62.

evidence because it is central to the prosecution's case could essentially amount to admitting evidence when the defendant is obviously guilty.[42]

From a deterrence perspective, the fact that a particular piece of tainted evidence is important or central to the prosecution's case should weigh in favour of exclusion rather than admission of the evidence, since the deterrent rationale for exclusion assumes that police care about exclusionary outcomes and failed prosecutions that result from exclusion, and since a failed prosecution is more likely in cases where central evidence is excluded. In other words, the deterrent effect of an exclusionary rule will be greater if the rule tends to exclude key evidence with more frequency than less important evidence.

In contrast, the importance of the evidence doctrine should not necessarily have any influence on an exclusionary rule based on vindication, compensation, or dissociation theories. From a court-centric perspective, the degree to which evidence is important to the prosecution's case will neither increase nor decrease the level of judicial condonation of a particular rights breach if the evidence is admitted; admitting tainted evidence arguably always condones a breach, and excluding it arguably always allows judges to dissociate themselves from a breach, irrespective of the class of evidence that is in issue. Similarly, from an objective accused person's perspective, or the public's perspective, the degree of compensation or vindication that an exclusionary decision yields will not depend on the centrality of the evidence that is excluded: either exclusion is necessary (for any item of reliable, otherwise admissible evidence) as a consequence of a rights breach, or exclusion is unnecessary to achieve compensation and vindication goals – in

[42] See Dave Ally, Factual Guilt, *supra* note 38, at 498: "such an approach implies that unconstitutionally obtained evidence should be readily admitted in the event that the accused is adjudged to be factually guilty."

neither case can the centrality of the evidence have an impact in this calculation. Specifically, if compensation is theoretically generated through exclusion by restoring the accused to the position he would have been in but for the rights breach, then exclusion achieves this compensation when important, unimportant, and every middling degree of somewhat important evidence is excluded. In terms of vindication theory, the remedy of exclusion is expressive, rather than objectively quantifiable. Thus, vindication is equally achieved through exclusion regardless of the importance of the evidence – one cannot hope for *more* vindication from the exclusion of some evidence than from other evidence.

As in the case of the seriousness of the offence doctrine, it is possible that the centrality of the evidence doctrine has become part of some domestic exclusionary rules predominantly because certain countervailing factors weighing against exclusion tend to be higher in cases where evidence is central to the prosecution's case. Although some public safety arguments might be made against exclusion when the evidence in issue is important to the prosecution's case, public safety concerns will tend to be driven more by the nature of the offence with which an accused is charged rather than by the quality of the evidence that is subject to exclusion after a rights breach (i.e.: excluding central evidence in a shoplifting case is unlikely to persuade people that public safety will be compromised, whereas excluding evidence in a murder trial might seriously threaten public safety), so public safety arguments against the exclusion of central evidence are perhaps misplaced. However, epistemic arguments against the exclusion of central evidence could have much more purchase: the truth-seeking function of a criminal trial is compromised very severely when the most truth-assisting, (central) evidence in a trial is excluded. From a proportionality perspective, one could argue that the remedy of

exclusion disproportionately penalizes the state and rewards the accused when central evidence is excluded such that exclusion "effectively guts the prosecution" (and a majority of the SCC has perhaps invited this argument in *R v Grant*).[43] I am not convinced by this argument, as it essentially suggests that a remedy should only flow to the accused in cases where the state can still convict the accused (which would essentially deprive the remedy of any ability to actually compensate the accused and would substantially weaken the remedy's ability to vindicate rights breaches). Such results-driven reasoning, while perhaps capable of persuading the populace that exclusion should be avoided, is difficult to support in principle.

As the above discussion suggests, the centrality of the evidence doctrine seems to form some part of many different domestic exclusionary rules, but there appears to be confusion or uncertainty about what role the doctrine should play. On the one hand, from a principled perspective, we can see that an exclusionary rule based on a deterrent rationale should favour the exclusion of important evidence that is obtained through rights breaches, but that exclusionary rules based on other rationales probably do not need to consider the centrality of the evidence doctrine. On the other hand, regardless of the rationale(s) that underpin a particular exclusionary rule, countervailing considerations involving epistemic concerns about exclusion are most powerful in cases where the evidence that is subject to exclusion is also central to the prosecution's case. In any event, consideration of how the exclusion of important evidence will support or weaken the accepted bases for a given exclusionary rule, and how strongly any countervailing factors might militate against the exclusion of important evidence can help in the

[43] *Grant*, *supra* note 4, at para 83.

development of an exclusionary test that is coherent and justifiable on the basis of clear principles.

CHAPTER 6 – FACTORS INFLUENCING EXCLUSION: DERIVATIVE EVIDENCE AND THE HYPOTHETICAL CLEAN PATH

In many jurisdictions, the application of an exclusionary rule will depend on the type of evidence that is in issue – namely, evidence obtained directly as a result of a rights breach as opposed to indirectly as a result of a breach – and on the likelihood that the evidence could or would have been obtained without a rights breach at some future point. In describing the former situation, a doctrine has developed that is often referred to as the "fruit of the poisoned tree" or "derivative evidence" doctrine, in recognition of the often special considerations that attach to evidence collected indirectly as a result of a rights breach. With respect to the latter situation, a doctrine that is often referred to as the "inevitable discovery" or "hypothetical clean path" doctrine has developed, which sometimes (but not always) militates against exclusion in cases where evidence could lawfully have been obtained by the state through some other means. Both doctrines relate to the question of how police were led to the evidence, so I will discuss them together in this chapter; it should be noted, however, that each of the doctrines tend to operate independently of one another.

I. The Derivative Evidence Doctrine

It is interesting to consider the different ways in which "fruits of the poisoned tree," or derivative evidence, is treated within domestic exclusionary frameworks. Before beginning a comparative study on this topic, however, some discussion of key terms is required: what exactly is meant by the expression, "fruit of the poisoned tree"? This phrase tends to be deployed frequently and indiscriminately in academic literature.

Thaman, for instance, suggests that searches usually pertain to the collection of physical evidence, so "a successful search always has a hoped-for 'fruit.'"[1] In other words, the fruit of an unlawful search, in Thaman's view, is any object seized during the course of the search – a direct relationship between the rights breach and the resulting acquisition of evidence. However, in the same article, Thaman refers to a more indirect form of evidence as the fruit of a tainted confession:

> I will deal with, as "fruits," the discovery of witnesses, the discovery of physical evidence, and the otherwise legal obtainment of a subsequent confession, which may or may not have been the "fruit" of the preceding involuntary confession-admission.[2]

One might think, based on Thaman's classification of direct evidence in a search and seizure context as "fruits" of the poisoned tree, that similarly direct confession evidence obtained through a breach of the right to counsel, or to security of the person (i.e.: the right to not be tortured, or subjected to cruel, inhuman, or degrading treatment) would also be an unlawful "fruit." However, as the above passage demonstrates, there is much inconsistency in how scholars determine whether evidence is or is not the "fruit" of a rights breach.

For the purposes of this thesis, my intent is to henceforward avoid using the unhelpful metaphor, "fruit of the poisoned tree," and to refer instead to derivative evidence. In any situation where a rights breach takes place, one of three evidentiary possibilities exists: first, the breach may not yield any evidence – in which case, the breach could not be remedied through application of an exclusionary rule. Second, the breach could directly yield evidence – cases of unlawful searches wherein evidence is

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[1] Stephen C. Thaman, "'Fruits of the Poisonous Tree' in Comparative Law" (2010) 16 SW J Int'l L 333, at 370 [Fruits of the Poisonous Tree].
[2] *Ibid*, at 354.

found and immediately seized by police, or wherein police physically assault a suspect until she confesses, come to mind as examples of this second possibility. And, third, the breach could lead to either direct evidence or information (as distinct from evidence) that, in turn, causes police to collect incriminating evidence at some other time, or in some other place. When I refer to derivative evidence, I mean indirect evidence that is collected by way of this third possibility, rather than evidence that is collected directly as a result of a rights breach.

With the above definition of derivative evidence in mind, it is now possible to examine how such evidence actually fits within domestic exclusionary frameworks. To begin with, some jurisdictions explicitly treat derivative evidence in the same way as direct evidence for exclusionary purposes. In Serbia's new *Code of Criminal Procedure*,[3] for instance, tainted evidence that is obtained either directly or indirectly must be excluded.[4] This legislative wording appears to represent a deliberate choice on the part of the legislators that will resolve a previously existing controversy among academics and courts in that country about whether derivative evidence ought to be excluded.[5] Similar rules exist in Slovenia, where courts cannot base findings on directly tainted evidence,

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[3] *Criminal Procedure Code (Serbia)*, PR No 89, September 28, 2011, English translation available online: http://www.legislationline.org/documents/id/8918. Although the Code was adopted in 2011, it did not enter into force until January 15, 2013: see art. 608 (Entry into Force and Beginning of Implementation of the Code).

[4] *Ibid*, at art. 16: "Court decisions may not be based on evidence which is, **directly or indirectly**, in itself or by the manner in which it was obtained, in contravention of the Constitution, this Code, other statute or universally accepted rules of international law and ratified international treaties" (emphasis added).

[5] See generally Snežana Brkić, "Serbia: Courts Struggle With a New Categorical Statutory Exclusionary Rule" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 309, at 314-315.

nor on evidence that was acquired indirectly through the use of tainted evidence,[6] and in Columbia, where evidence that owes its existence to excluded evidence must also be excluded.[7]

In other jurisdictions, exclusionary rules categorically do not apply to derivative evidence. In the Netherlands, for instance, the exclusionary rule that is created by s. 359a of the *Code of Criminal Procedure* authorizes a court to (among other things) rule that "the results of the investigation obtained through the breach may not contribute to the evidence of the offence charged."[8] As Borgers and Stevens note, this statutory wording and the manner in which it has been judicially interpreted has barred any application of the exclusionary rule to derivative evidence, since "there must be a *direct connection* each time between the breach of procedural rules […] on the one hand and, on the other, the obtaining of evidence or the harm actually suffered by the accused."[9] The

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[6] *Criminal Procedure Act (Slovenia)*, Official Gazette of the Republic of Slovenia 8/2006, January 26, 2006, at art. 18(2):

> The court may not base its decision on evidence obtained in violation of human rights and basic freedoms provided by the Constitution, nor on evidence which was obtained in violation of the provisions of criminal procedure and which under this Act may not serve as the basis for a court decision, or which were obtained on the basis of such inadmissible evidence.

English translation available online: http://www.legislationline.org/documents/id/16906.

[7] *Codigo de Procedimiento Penal (Columbia)*, at art. 23, quoted and translated in Thaman, Fruits of the Poisonous Tree, *supra* note 1, at 344:

> the CCP-Colombia provides: "All evidence obtained in violation of fundamental guarantees is null within the full meaning of the law and should thus be excluded from the procedure. Evidence that is the consequence of the excluded evidence, or can only be explained by reason of its existence, receive the same treatment."

[8] *Code of Criminal Procedure (The Netherlands)*, quoted and translated in Matthias J. Borgers and Lonneke Stevens, "The Netherlands: Statutory Balancing and a Choice of Remedies" in in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 183, at 185.

[9] Borgers and Stevens, *ibid*, at 190-191 (emphasis in original).

exclusionary rule in Germany also does not extend to derivative evidence,[10] nor does it in England, at least with respect to evidence derived from tainted confessions.[11]

Finally, in many jurisdictions, exclusionary rules will apply to derivative evidence, but in more complicated or nuanced ways than to direct evidence. For instance, in the United States, derivative evidence is presumptively inadmissible, but this exclusionary rule is subject to at least three broad exceptions for inevitable discovery, good faith, and attenuation of the breach (i.e: a weakened causative connection between the breach and the derivative evidence).[12]

Ultimately, there is a large variance in how derivative evidence is treated in domestic laws, partly because there are corresponding differences in the underlying rationales for domestic exclusionary rules. If a rule is based on deterrence, then exclusion of derivative evidence is probably justifiable: without exclusion, police might be inclined to routinely breach suspects' rights by, for instance, beating confessions from suspects, because even if the confession is inadmissible, at least the leads that a confession generates might be sufficient to both solve a case and collect enough

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[10] Sabine Gless, "Germany: Balancing Truth Against Protected Constitutional Interests" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 113, at 128: "The doctrine of 'fruits of the poisonous tree' is recognized neither in the case law, nor by a majority of scholars." Gless explains the rejection of this doctrine in Germany "by the fact that in Germany evidence is not excluded to deter police misconduct, but basically on the 'clean hands' rationale" (*ibid*, at 129).

[11] See *Police and Criminal Evidence Act, 1984 (England)*, c. 60, at s. 76(4): the fact that a confession is inadmissible does not "affect the admissibility in evidence of […] any facts discovered as a result of the confession."

[12] See Stephen Thaman, "Constitutional Rights in the Balance: Modern Exclusionary Rules and the Toleration of Police Lawlessness in the Search for Truth" (2011) 61 UTLJ 691, particularly at 695-696 [Police Lawlessness].

incriminating derivative evidence to yield a conviction.[13] Thaman makes this point effectively with the following observation:

> Clearly if the "fruits" of unlawful wiretaps or bugs may be used to convict a person, then there would be no incentive for law enforcement officials to refrain from secretly wiretapping or bugging private places without probable cause or judicial authorization due to the derivative usefulness of this investigative tool.[14]

Deterrent theory demands that an exclusionary rule should help to shape police conduct toward more lawful, constitutional standards, and such rules will be more effective if all tainted evidence (direct and derivative) is excluded after a rights breach.

In contrast, if an exclusionary rule is based on a dissociation rationale, then courts might be more willing to admit *derivative* evidence, since they could point to the exclusion of tainted *direct* evidence as their primary means of distancing themselves from a rights breach (at least in cases where a given rights breach generates both direct and derivative evidence). The same could be said in respect of exclusionary rules that are predicated on compensation and vindication rationales: as long as some evidence that was obtained directly as a result of a rights breach is excluded, then the accused will have been compensated, and the relevant right will have been vindicated, regardless of the fact that other derivative evidence that flows from the rights breach is admitted against the accused. Compensation, vindication, and dissociation rationales would all favour the exclusion of tainted derivative evidence more strongly, however, in cases where a rights

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[13] This concern was acknowledged by the Supreme Court of Canada when the court recently reformulated its application framework for the Canadian exclusionary rule in *R. v. Grant*, [2009] 2 SCR 353, at para 128: "The s. 24(2) judge must remain sensitive to the concern that a more flexible rule may encourage police to improperly obtain statements that they know will be inadmissible, in order to find derivative evidence which they believe may be admissible." However, one might criticize the Court for continuing to reason along such deterrent-based lines, while nonetheless professing that "the concern of this inquiry is not to punish the police or to deter *Charter* breaches" (*ibid*, at para. 73).

[14] Thaman, Fruits of the Poisonous Tree, *supra* note 1, at 380.

breach does not generate any direct evidence (only information or leads), but eventually generates derivative evidence, since this would leave courts in a situation where the only way to vindicate a right, compensate and accused, and avoid condoning a breach would be through exclusion of the derivative evidence.

None of the recognized countervailing factors discussed above in Chapter 2 would have a particularly strong influence on the derivative evidence question. Public safety, efficiency, proportionality and epistemic problems with exclusion do not change depending on the direct or indirect nature of the evidence in issue, although the concerns might all change on a case-by-case basis depending on a variety of other factors.

As the above discussion demonstrates, incorporation of the derivative evidence doctrine (so as to exclude tainted derivative evidence) can be easily justified according to deterrent theory, but less easily justified under dissociation, vindication and compensation theories. The derivative evidence doctrine will tend not to be affected by general countervailing arguments against exclusion.

II. The Hypothetical Clean Path Doctrine

The "inevitable discovery" doctrine and the "hypothetical clean path" doctrine are somewhat similar, but, as I will explain, the latter doctrine arguably subsumes the former. According to the inevitable discovery doctrine, evidence that is obtained in a manner that breaches a suspect's rights, but that *would* inevitably have been discovered in a lawful manner, is admissible.[15] According to the hypothetical clean path doctrine, "the courts

[15] For the origins of this doctrine in American law, see *Nix v. Williams* (1984), 467 US 431, at 447: "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by

argue that relevant evidence should not be excluded because of a mere 'technical fault', if the evidence *could* otherwise have been discovered by legal means."[16] As these explanations indicate, the inevitable discovery doctrine essentially requires a positive finding (on a balance of probabilities or preponderance of evidence standard)[17] that the state would have collected the incriminating evidence irrespective of the rights breach, while the hypothetical clean path merely requires proof that the evidence could have been collected lawfully.

As mentioned in the previous section, American law recognizes an exception to the exclusionary rule for cases where the incriminating evidence would have been discovered in any event. German law tends to follow the hypothetical clean path doctrine, and, "although the 'hypothetical clean path'-approach has been criticized from the beginning, it is still predominant in case law."[18] Canadian law has recognized that the independent discoverability of tainted evidence has some role to play in exclusionary decisions, but it is not a dispositive factor.[19] In many jurisdictions, such as Greece, a

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the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings."

[16] Gless, *supra* note 10, at 123 (emphasis added).

[17] *Nix*, *supra* note 15, at 444: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means […] then the deterrence rationale has so little basis that the evidence should be received."

[18] Gless, supra note 10, at 123.

[19] *Grant*, supra note 13, at para 122:

> Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. […] The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused's underlying interest against self-incrimination. The converse, of course, is also true. On the other hand, in cases where it cannot be determined with any confidence whether evidence would have been discovered in absence of the statement, discoverability will have no impact on the s. 24(2) inquiry.

rights breach that takes place during an unlawful search cannot be redeemed by any hypothetical scenarios posited by the state.

These doctrines dealing with hypothetical clean paths to otherwise-tainted evidence – regardless of the level of speculation that is involved findings about whether the evidence could or would have been discovered – are conceptually problematic. Consider, for instance, how the doctrine might be justified from a deterrence-based perspective. On the one hand, the fact that police could have obtained a search warrant but chose not to do so could be viewed as a factor that reduces the level of state misconduct in a given case: after all, the state's conduct in such cases would not, in all circumstances, have been impermissible (as contrasted with a case wherein police officers conduct a warrantless search when no ground for a warrant existed in the first place). This line of reasoning appears to be in play in those jurisdictions that recognize a hypothetical clean path doctrine, and it implies that police cannot be deterred by the exclusion of evidence that could have been admitted through some other means. However, on the other hand, many cases wherein police breach a suspect's rights in order to collect evidence that could otherwise lawfully have been obtained will cry out for deterrence. What message is sent to police when courts allow these officials to (at worst) deliberately choose a tainted path over a clean path to evidence, or (at best) to neglect any exploration of other lawful possible sources to the evidence? Surely, many hypothetical clean path decisions to admit evidence will provide police with incentives to breach rights rather than serve as deterrents against such breaches.

The same flaws with the hypothetical clean path doctrine make it difficult to justify from dissociation, vindication, and compensation perspectives. If one accepts that

a rights breach is no less culpable simply because another line of investigation could have generated the same evidence without a rights breach (setting aside the question of whether such a rights breach is *more* culpable), then one would also likely agree that courts must still dissociate themselves from these culpable rights breaches by excluding evidence, even where a hypothetical clean path to the evidence existed. Similarly, vindication theory suggests that exclusion is appropriate even in hypothetical clean path cases, since the culpability of the breach, and the need to vindicate the affected right, remains the same regardless of what other paths police might have chosen to obtain the evidence. Finally, from an accused-centric compensation perspective, it would be difficult to justify the denial of compensation (through exclusion) to an accused person whose rights were breached by state agents who had other investigative options that would not have involved rights breaches, while offering compensation to other accused persons whose rights are violated by police because no other investigative options existed. If a rights breach demands compensation, then extraneous factors such as what other courses of action the police might have pursued should not cause compensation to be withheld from an accused.

Again, as with the derivative evidence doctrine, recognized countervailing factors against exclusion do not carry more or less weight in the context of the hypothetical clean path doctrine. Public safety concerns remain the same regardless of the path that is chosen to obtain a particular piece of evidence, just as epistemic, proportionality, and efficiency concerns would all remain the same.

Having canvassed the most frequently observed domestic exclusionary doctrines in this and the preceding chapters, it is now possible to move on from a domestic to an

international criminal law context. Consequently, my next chapter will begin to shift focus toward the unique nature and function of exclusionary rules at international criminal tribunals and courts.

CHAPTER 7 – EXCLUSIONARY RULES IN INTERNATIONAL CRIMINAL PROCEDURE

In this chapter, I will begin by examining the functions of international criminal proceedings as contrasted with those of domestic criminal trials, since an appreciation for the much broader aspirations of international trials will help to demonstrate why some aspects of a model domestic exclusionary rule must be adapted if international trials are to achieve their ambitious aims. After discussing the unique functions and features of international criminal trials, I will examine the impact – weighing sometimes in favour of exclusion and at other times in favour of admission of tainted evidence – that these functions must have on any principled exclusionary test applicable before an international tribunal. Finally, at the end of this chapter, I will discuss how the various rationales for exclusion that exist in a domestic context might or might not apply in the context of an international exclusionary rule. All of the above analysis should help lay a foundation for the subsequent discussion about the specific test that should be adopted by the ICC in respect of the Court's article 69(7) exclusionary rule that will be proposed in Chapter 9.

I. Ascertaining the Functions of International Criminal Trials

It is worth noting that up until the end of World War II (WWII), and perhaps as recently as 1993, there was arguably no such thing as international criminal law and procedure.[1] Although international tribunals existed to try war criminals in the wake of

[1] See Gideon Boas, James L. Bischoff, Natalie L. Reid and Don Taylor III. *International Criminal Procedure*. (Cambridge, Cambridge UP, 2011), at 3: "Before the creation of the ICTY and ICTR […], the idea that international criminal law, including international criminal procedure, constituted a legitimate body of international law was in some doubt." See also the remarks of William Schabas in "The Influence of International Law and International Tribunals on Harmonized or Hybrid Systems of Criminal Procedure" (2005) 4 Wash U Global Studies L Rev 651 at 653, wherein Schabas describes the origins

WWII, at least one commentator has suggested that these tribunals were not exercising international jurisdiction, but merely a form of extraordinary (and joint) national jurisdiction.[2] Regardless of the state of this branch of international law during the mid-twentieth century,

> it would be absurd to suggest the same now. The extraordinary development of international tribunals since 1993 has quelled any real debate about the existence of a substantive international criminal law, and with it a set of rules of procedure and evidence that underpin the conduct of the proceedings.[3]

It is one thing, however, to acknowledge the existence of a separate discipline of international criminal law and procedure, and another thing entirely to ascertain how the discipline differs from domestic equivalents.

It is generally accepted that domestic criminal trials serve several well-established purposes, including determination of the truth of particular charges,[4] controlling crime through deterrence, and punishing the guilty.[5] Domestic trials may also serve one or several less well-established functions, such as communicating or teaching legal norms to the populace,[6] resolving disputes between citizens,[7] and providing a forum wherein

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of international criminal procedure: "We're not talking about something that begins in 1904, but rather something that begins around 1994 with the creation, the previous year, of the International Criminal Tribunal for the former Yugoslavia."

[2] Boas, et al., *ibid*, at 4.

[3] *Ibid*.

[4] See Larry Laudan, *Truth, Error and Criminal Law: An Essay in Legal Epistemology* (New York: Cambridge UP, 2006), at 18: "In the criminal law, there are always two key hypotheses in play: a) a crime was committed and b) the defendant committed it."

[5] Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, "Introduction: Towards a Normative Theory of the Criminal Trial" in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, eds., *The Trial on Trial Volume 1: Truth and Due Process*, (Oxford: Hart Publishing, 2004), 1 at 21 [Vol 1].

[6] See, for instance, Mireille Hildebrant, "Trial and 'Fair Trial': From Peer to Subject Citizen" in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, eds., *The Trial on Trial Volume 2: Judgment and Calling to Account*, (Oxford: Hart Publishing, 2006), 15, at 20-21 (wherein the author notes that criminal offences destabilize legal

victims can be heard.[8] However, very few domestic criminal justice systems attempt to achieve all of the above functions, and certainly none place primary importance on all of them.

If we examine developments at the international criminal tribunals that have emerged since 1993, however, we see that they strive to fulfill different and increasingly broader goals than their domestic equivalents: "unsatisfied with pursuing just the usual objectives of punishment, they want to achieve aims that transcend, or give a special twist, to the aims of national criminal law enforcement."[9] As Damaška has noted, the functions that international criminal tribunals have sought to fulfill are extensive:

> Beside standard objectives of national criminal law enforcement, such as retribution for wrongdoing, general deterrence, incapacitation, and rehabilitation, international criminal courts profess to pursue numerous additional aims in both the shorter and longer time horizon. At various times, the courts have expressed their intention to **produce a reliable historical record** of the context of international crime, to provide a venue for giving voice to international crime's many victims, and to **propagate human rights values**. Courts have also expressed their aspiration to **make advances in international criminal law**, and to achieve objectives related to peace and security – such as **stopping an ongoing conflict** – that are far removed from the normal concerns of national criminal

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norms, suggests that trials and punishments communicate "by means of hard treatment – the rejection of the incriminated action to all those that share jurisdiction").

[7] Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial Volume 3: Towards a Normative Theory of the Criminal Trial*, (Oxford, Hart Publishing, 2007), at 23-24 [Vol 3].

[8] Hildebrant, *supra* note 6, at 34.

[9] Mirjan Damaška, "The International Criminal Court: Between Aspiration and Achievement" (2009) 14 UCLA J Int'l L & Foreign Aff 19, at 22 [Aspiration and Achievment]. See also Stephanos Bibas and William W. Burke-White, "International Idealism Meets Domestic-Criminal-Procedure Realism" (2010) 59 Duke L J 637, at 642 [Idealism Meets Realism]:

> Domestic criminal law seeks primarily to deter, incapacitate, and inflict retribution. International criminal law has largely sought to ensure retribution as well as international peace and security. But so long as it focuses on the gravest atrocities, international law must also emphasize restorative justice to heal the wounds of genocide and war.

justice.[10]

It is worth pausing for a moment to consider just how much a single trial at the ICC might be expected to accomplish. The trial will obviously need to find and punish the guilty, thereby discouraging future offenders and communicating society's abhorrence of the crimes. However, it will also need to fulfill the kind of role that has, in the past, been filled by bodies such as Truth and Reconciliation Commissions, in establishing (through only the evidence that was led at trial) an accurate historical record of the crimes before the court, and probably the context in which they were committed. The court will also be expected to play a role in progressively developing the humanitarian values that underpin international criminal law (since this law might be conceptualized as the enforcement arm of substantive international humanitarian law), and in didactically disseminating the content of existing laws to the world at large. Finally, "if events involving human rights abuses are in progress, [courts] want to contribute to their cessation, and, if conflicts have ended, they want to facilitate reconciliation."[11]

This "almost grandiose"[12] list of international criminal law goals represents a tall order for any international criminal tribunal, particularly in light of the lack of enforcement powers that constrains these supra-national bodies,[13] and the lack of any

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[10] Mirjan Damaška, "What is the Point of International Criminal Justice?" (2008) 83 Chi.-Kent L Rev 329, at 331 (emphasis added) [What is the Point?].
[11] Damaška, Aspiration and Achievement, *supra* note 9, at 22-23.
[12] *Ibid*, at 22.
[13] See John Jackson, "Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy" (2009) 7 J Int'l Crim Just 17, at 26:

> while domestic courts have the capacity through the extensive enforcement powers of the state to control matters that could materially affect the fairness of

mature theoretical base of international criminal procedure for the courts to draw upon.[14] It would certainly be possible to argue, as Damaška has argued, that the courts have taken on too many tasks to be able to deliver effectively on all of them,[15] just as it might be possible to suggest that the fledgling courts will eventually grow into all of their ambitious roles, to the benefit of humanity. While I acknowledge this important debate in the academic literature, for the time being I have merely described the many functions of international criminal courts in order to demonstrate how international courts differ from domestic criminal courts, and in order to help illustrate how an exclusionary test that is to apply at the ICC will be largely distinct from those applicable in national courts.

II. The Unique Features of International Criminal Trials as Influences on Exclusionary Rules

If international criminal tribunals are assigned functions beyond those of domestic criminal courts, then it follows that these courts must operate under different conditions than domestic criminal courts. In this section, I will discuss some of these operating

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> the tribunals, international tribunals must rely upon the cooperation of states without having the power to compel them to cooperate through enforcement measures.

The lack of any inherent ability at the international criminal tribunals to ensure cooperation and compliance with orders has led commentators to call these courts "giants without arms and legs": Damaška, Aspiration and Achievement, *supra* note 9, at 22.

[14] See Mark Drumbl, "A Hard Look at the Soft Theory of International Criminal Law" in Leila Nadya Sadat and Michael P. Scharf, eds., *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni*, (Leiden: Martinus Nijhoff Publishers, 2008), 1, at 7:

> Despite the fact that the punishment of extraordinary human rights abusers ought to promote didactic and expressive functions that reflect the differences inherent between such punishment and that meted out to ordinary criminals, this potentially sui generis aspect of a penology for international crime remains underdeveloped.

[15] Damaška, Aspiration and Achievement, *supra* note 9.

differences, and how they might support modifications to any model exclusionary rule that is designed for a domestic court.

i) Lengthy International Criminal Trials

The first important characteristic of international trials is their length: they take far longer than most domestic criminal trials. The trial of Slobodan Milosevic at the ICTY, for instance, dragged on for some four years before the accused died in 2006, and before any verdict or sentence was pronounced.[16] Similarly, the first completed trial at the ICC of Thomas Lubanga Dyilo began on January 26, 2009, and ran for over three years until Lubanga was found guilty on March 14, 2012.[17] Even the judgment in the Lubanga case was gargantuan, coming in at 624 pages for the verdict alone, not including sentencing.[18] It has been suggested that a typical "judgement of the ICTY tends to comprise several hundreds of pages and trial transcripts run into tens of thousands of pages in addition to witness statements, official documents and other evidence."[19]

Looking at a broader cross-section of cases,[20] Jean Galbraith has found that the mean length of trials at the ICTY, ICTR, and Special Court for Sierra Leone (SCSL),

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[16] Jackson, *supra* note 13, at 18.
[17] A summary of information about the case can be found at the ICC's website, online: http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/
[18] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012.
[19] Regina E. Rauxloh, "Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining" (2010) 10 Int'l Crim L Rev 739, at 752 [Negotiated History].
[20] Jean Galbraith, "The Pace of International Criminal Trials" (2010) 31 Mich J Int'l L 79, at 112-113; Galbraith studied "the cases of all 307 individuals who have been publicly charged at six international or hybrid criminal tribunals [IMT, ICTY, ICTR, SCSL, ECCC, and ICC] since their inception," as of August 31, 2009.

respectively, were 1.4, 2.2, and 3.5 years.[21] Galbraith also noted that the mean span from the time a suspect was brought into custody until a final judgment (inclusive of any appeals) was rendered at trials before the ICTY, ICTR, and SCSL was 5.1 years.[22] These numbers should be considered alongside American statistics for a sense of context: in all United States federal criminal cases in 2006, the median span from case-filing to trial disposition was 0.6 years in guilty plea cases, and 1.3 years in jury trial cases.[23] In other words, even at the fastest international tribunals, average cases that are heard only before professional judges take longer than trials before juries (which are themselves notoriously long) in the United States.[24]

If international criminal trials tend to drag on much longer than domestic ones, and if there is an interest in reducing or minimizing trial times within reasonable limits, then clearly the rules of procedure and evidence, including exclusionary rules, at international trials must be adapted from domestic baselines. The kind of adaptation that I refer to has, in some ways, taken place at international tribunals. For example, the first of these tribunals began as a predominantly adversarial court,[25] wherein the parties

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[21] *Ibid*, at 117 (Table 1).
[22] *Ibid*.
[23] *Ibid*, at 98.
[24] Galbraith suggests that, when one looks at more complex terrorist-style criminal cases in domestic criminal courts, "on average, the pace of international criminal cases is only modestly slower than complex criminal cases in the Western domestic jurisdictions that have most influenced international criminal law": *ibid*, at 142. However, this reality does not imply that international tribunals should adopt the procedures and evidentiary rules that are used in such domestic jurisdictions any more than it might imply that both domestic and international courts should adopt better, swifter processes in order to deal with their complex cases.
[25] See John Jackson and Sarah Summers. *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*. (Cambridge: Cambridge UP, 2012) at 116-117 (where the authors describe the Nuremburg tribunal as originating from "the

(prosecution and defence) presented their respective cases to neutral judges. This form of tribunal was initially mimicked at the ICTY, but it was soon discovered that the classical adversarial procedure had its drawbacks: "although the ICTY's largely adversarial system went far to ensure defendant rights, it also resulted in long trials with hundreds of witnesses and unacceptable delays."[26] Consequently, the judges of the ICTY have amended the Court's *Rules of Procedure and Evidence*[27] over the years to move away from an original rule that, in principle, witnesses should be heard orally, to a situation that now permits the admission of much more written deposition evidence.[28]

As the ICTY's evolution demonstrates, the significant length of most international criminal trials has led to the development of a unique system that is neither inquisitorial nor adversarial. The initial adversarial rules were modified toward rules that more closely resemble the European continental ideal of "free proof" in the interest of facilitating more expedient trials. This development was carried forward to the ICC, which is "essentially modeled on the same adversarial structure as the ad hoc tribunals, with the prosecutor retaining control over the investigation of evidence and the evidentiary regime at trial based, as in the ad hoc tribunals, to a large extent on the

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American practice of military commissions, which had a decidedly adversarial structure").

[26] Bibas and Burke-White, *supra* note 9, at 694.

[27] ICTY *Rules of Procedure and Evidence*, online: http://www.icty.org/sid/136. Under Article 15 of the ICTY statute (as adopted by UNSCR 827 (1993)), the judges of the Court are granted authority to "adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters."

[28] Jackson, *supra* note 13, at 29-30.

principle of 'free admission'"[29] that makes for swifter trials than more regulated rules of evidence that would demand the oral testimony of numerous witnesses.

In the context of an exclusionary test for the ICC, the substantial length of international trials and the corresponding development of rules of procedure and evidence designed to minimize unnecessary delays might lead to a number of different interpretations of article 69(7) of the *Rome Statute*. To begin with, one might suggest that the ICC's exclusionary test needs to be certain, or predictable, so as to discourage lengthy, needless litigation. This line of reasoning would oppose the development of rules that are largely discretionary in nature, or rules that strive to "balance" different factors against one another, since the outcome of balancing calculations or other exercises of discretion are difficult to know in advance. Furthermore, if the ICTY's shift away from heavily-regulated adversarial proof to less regulated notions of proof continues at the ICC, then a weak, or narrow interpretation of article 69(7) might be preferred on questions of admissibility of tainted evidence, so long as judges are free to later decide what use they will make of the evidence. In any case, the undesirably long nature of international criminal trials could easily militate in favour of a different kind of exclusionary rule from those in use in domestic criminal justice systems.

ii) Documenting the Historical Record

Another aspect of international criminal trials that requires consideration, and that is related to the overall length of the trials, is their need to receive evidence that will allow the courts to establish the historical records relating to the crimes alleged in the

[29] Jackson and Summers, *supra* note 25, at 141.

trials over which they preside.[30] Although the tribunals are inevitably limited in their resources and jurisdictions to deal with international crimes, and although they are not necessarily the best institutional structure to record history (the expectation of finality of judicial decisions, in particular, does not mesh well with the practice of ongoing revision that typically takes place when historians document past events), it is clear that some probing of the circumstances that surround the commission of an international crime is necessary:

> Many argue therefore that truth commissions are in a better position to paint a comprehensive picture of the broader context of the violence. Having said this one must not forget that many of the offences require the Prosecution to prove elements which comprise the general background such as the presence of an international or non-international armed conflict, a widespread or systematic attack directed against any civilian population or intent to destroy part of a group. Thus the fact-finding of an individual case might very well include evidence of the larger context of the conflict.[31]

This objective of receiving evidence that can establish the historical record, however, might conflict with a rule that excludes improperly obtained evidence. Particularly in the case of reliable evidence, an international tribunal may find it hard to justify exclusion when that exclusion will tend to impoverish the overall factual picture that surrounds the case or the situation that is before the court. As a counterpoint, however, and in an increasingly electronic age of information, one might note that the exclusionary ruling itself could form part of the broader historical record. If a reasoned exclusionary decision is given and made publicly accessible, then regardless of whether a particular piece of

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[30] For a further explanation of why this truth-telling role of international tribunals is so important, see Rauxloh, supra note 19, at 740 (wherein the author points out the needs to counter official propaganda that leads to international crimes, to break the cycle of revenge that can flow from international crimes, and to allow new leadership to distance itself from a state's violent history – all of which are aided by the establishment of a valid historical record of past crimes).

[31] *Ibid*, at 743.

evidence is admitted or excluded for the purposes of determining the accused's guilt, the historical record should be more complete than if no exclusionary hearing took place at all, since the circumstances relating to the collection of evidence that ground the exclusionary decision (although perhaps not central to adjudication of the offence itself) will be better understood through the exclusionary decision.

iii) Propagating Human Rights Values

An additional aspect of international criminal trials that might result in a need for a modified approach to exclusion flows from the didactic function of the courts. International tribunals have a responsibility to reinforce the human rights values that international criminal law itself strives to propagate, but this responsibility might generate opposing pressures on article 69(7) of the *Rome Statute*. In terms of promoting human rights values to states (regardless of whether or not they are parties to the Statute), the ICC might wish to implement a very robust exclusionary rule that clearly signals the importance that the Court places on the human rights of those who are the subjects of criminal investigations and the criminal process in general. Such a rule would likely see a sizable amount of evidence excluded from international trials, with a logical consequence of increased acquittal rates.

However, if the ICC sought to promote the kinds of human rights values that are typically disregarded by perpetrators of international crimes – rights to life, basic dignity, and non-discrimination, for instance – then the court might be concerned that any exclusion of incriminating evidence could undermine the court's didactic goal by allowing a factually guilty person to be acquitted on the basis of technical impropriety in

the collection of evidence. Clearly, there is a tension here that needs to be addressed or resolved before the ICC can create a coherent exclusionary test.

iv) Lack of Enforcement Arm

One of the defining features of the ICC and other international tribunals is their inability to directly enforce their jurisdiction to investigate, arrest, or try individuals. At a recent American Society of International Law panel discussion on international criminal law,[32] the ICC Prosecutor, Fatou Bensouda, was asked what one thing she would wish for in order to make her job easier. Following on her comments from earlier in the panel, she replied, "arrests." The same question was then put to Judge Meron, President of the ICTY, who replied similarly by saying, "state cooperation, more generally." Both individuals were alluding to the fact that international tribunals are utterly dependent on states for the resources and access that are often necessary to deal with international crimes.

This dependence of the ICC on domestic governments can have a significant impact on any exclusionary test adopted by the ICC. For instance, where there is no direct connection between the international court receiving tainted evidence and the national authorities that may have improperly gathered that evidence in the first place, then many of the rationales for exclusion are weakened. Dissociation becomes a less persuasive rationale, since the ICC may only feel a need to dissociate itself from improper conduct by the Office of the Prosecutor (OTP), but not from more remote

[32] American Society of International Law. 107th Annual Meeting. "Twenty Years of International Criminal Law: From the ICTY to the ICC and Beyond." Washington, D.C., April 5, 2013. The quotations from this panel discussion in the following sentences are drawn from the author's personal recollection of the discussion.

improprieties on the part of national police. In other words, as long as the OTP has complied with the *Rome Statute* in collecting previously-gathered evidence from state authorities, then it is arguably irrelevant that these same state authorities may have violated a suspect's human rights prior to turning evidence over to the ICC.

Similarly, the deterrence rationale for exclusion is less convincing in an international context, where the international court that ultimately excludes evidence may end up doing so many years after the evidence was collected, in a way that never becomes known to those who collected it in the first place. Unlike in a domestic context, where there is a known and ongoing relationship between criminal courts and the state agents who investigate and prosecute offences, no such connection exists between national authorities who, of their own initiative, collect evidence of international crimes, and the courts that are ultimately confronted with this evidence in a given international criminal trial. Furthermore, the very nature of any crime within the ICC's jurisdiction is such that law and order has likely broken down at the time of the offence, so it might be unreasonable to suggest that an exclusionary rule (that may be invoked in the distant future) has any capacity to deter individuals who are collecting evidence in such an environment. Concerns about admissibility of evidence in courts of law are likely far from the minds of those who collect evidence contemporaneously to the commission of international crimes.

The above discussion highlights some of the ways in which the ICC's lack of a direct relationship with national authorities (who will often, knowingly or unknowingly, do the court's work) illustrates how one's thinking about domestic and international exclusionary rules must sometimes be different.

v) Gravity of the Offences

A final feature of international trials that might have an impact on how exclusionary rules will be interpreted by the ICC and other tribunals is the overarching gravity of the offences that are tried before these courts. As an earlier section of this thesis discusses, seriousness of the offence is a concept that is often incorporated into the application framework of a given domestic exclusionary rule, such that exclusion of tainted evidence is less likely to result where the offence being tried is more serious. Can this doctrine be incorporated into the ICC's exclusionary rule, when, from the outset, the "jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole"?[33] Or, would the doctrine simply be meaningless, since all offences within the ICC's jurisdiction are sufficiently serious as to weigh in favour of admitting tainted evidence?

Some interesting work is currently being done by scholars such as Meg DeGuzman (from Temple University) about how the concept of gravity should be operationalized at the ICC,[34] but ultimately there is no definitive answer yet about how the ICC should weigh the seriousness of an offence when making an exclusionary decision.

III. A Theory of Exclusion for the International Criminal Court

International criminal trials, as a relatively new forum for dispensing justice in

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[33] International Criminal Court, *Rome Statute,* UN Doc A/CONF. 183/9 (July 17, 1998) [*Rome Statute*], art. 5(1).

[34] See, for instance, Margaret deGuzman, "Gravity and the Legitimacy of the International Criminal Court" (2009) 32 Fordham Int'l L J 1400. Professor deGuzman's doctoral thesis, which she expects to complete during 2014, will address the concept of gravity at the ICC in even more detail.

relation the most heinous types of crimes, are a creature unto themselves. The paradox of these courts, Damaška tells us, is that they are "intrinsically powerless institutions"[35] that, with their "panoramic truth-telling task,"[36] their desire to hear and vindicate the suffering of victims, and their goal of advancing the cause of global humanitarian law, "aspire to achieve objectives whose attainment would be a serious challenge to even their most powerful national counterparts."[37] It is clear from their aspirations that international courts will require rules of procedure and evidence that take into account the distinctive functions of international criminal trials, and that construe the right to a fair trial in a manner consistent with these functions. With a clearer understanding of how domestic and international trials differ, and how certain factors at play in international trials put pressure one way or the other on exclusionary theories that would otherwise be persuasive in a domestic context, it will be possible in Chapter 9 of this thesis to draw principled conclusions about the types of doctrines that should or should not form part of the ICC's exclusionary test.

[35] Aspiration or Achievement, *supra* note 9, at 23.
[36] *Ibid*, at 22.
[37] *Ibid*, at 23.

CHAPTER 8 – EXCLUSIONARY RULES AT OTHER INTERNATIONAL TRIBUNALS

In this chapter, I will discuss how the various rules similar to article 69(7) of the *Rome Statute* that have bound other international tribunals have been interpreted in the past, in order to complete the thesis's composite domestic-international comparative study of exclusionary rules. Once both the theory and the practice relating to exclusionary rules in both international and domestic contexts are understood at the end of this chapter, then it should be possible to identify a defensible approach to the interpretation of article 69(7), and to discuss how a test for exclusion that should be adopted by the ICC might apply to different classes of cases.

It should be noted at the outset of this chapter, particularly for the benefit of common law scholars who may be used to seeing comprehensive and well-articulated jurisprudence on the exclusion of improperly obtained evidence,[1] that most decisions from international criminal tribunals dealing with the subject are somewhat terse. Decisions tend not to set forth detailed application frameworks for exclusionary rules, but, rather, confine themselves to the specific facts of particular cases. Nonetheless, this chapter will attempt to distil some guidance from the exclusionary rulings of international tribunals other than the ICC.

The discussion in this chapter begins with a look at the different ways in which exclusionary rules for international tribunals are articulated. The rules can flow from some kind of international instrument, such as rule 95 of the ICTY, ICTR and SCSL's

[1] In *R v Grant*, [2009] 2 SCR 353, for instance, a majority opinion of the Supreme Court of Canada contained **81** paragraphs dedicated exclusively to discussion of s. 24(2) of the Canadian *Charter* – Canada's exclusionary rule – so as to provide both general and specific guidance as to how the rule should be interpreted.

respective *Rules of Procedure and Evidence*, as amplified within the case law of the tribunals. Alternately, as the case of the Extraordinary Chambers in the Courts of Cambodia (ECCC) demonstrates, there may simply be no rule of general application that governs the exclusion of improperly obtained evidence. Regardless of the source of the various rules, they are also worded in slightly different ways, and these differences can be explored to ascertain how, if at all, the syntax of the rules might change the ways in which they are applied. Does it make a difference whether evidence will "seriously damage the integrity of the proceedings" or "bring the administration of justice into disrepute" in terms of deciding whether to exclude the evidence?

It has been said that exclusionary rules at the ad hoc tribunals "are not applied strictly,"[2] and that some sort of "flexibility principle" applicable to international tribunals allows them to admit improperly obtained evidence that might otherwise be excluded by domestic courts.[3] The extent to which international case law on this point supports such an assertion is unclear. In some cases, such as *Delalic et al*,[4] international courts have found that evidence collected in compliance with domestic criminal procedure rules must still be excluded if it was improperly obtained by reference to international criminal procedure standards. However, in many other cases, international tribunals have asserted

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[2] Gideon Boas, James L. Bischoff, Natalie L. Reid and Don Taylor III. *International Criminal Procedure*. (Cambridge, Cambridge UP, 2011), at 342.

[3] This principle was described by the Co-Prosecutors, and essentially accepted by the Co-Investigating Judges, of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in *Prosecutor v. Ieng*, Co-Investigating Judges, 002/19-19-09-2007-ECCCC-OCIJ-D130-8, 28 July 2009, Order on use of statements which were or may have been obtained by torture, at para 6, and in the result.

[4] ICTY. *Prosecutor v. Delalic et al*., Trial Chamber, IT-96-21, 2 September 1997, Decision on Zdravko Mucic's motion for the exclusion of evidence. In that case, Austrian law permitted a suspect to be interrogated by police before any right to counsel could be exercised. The ICTY found that this law was irreconcilable with the ICTY statute and *Rules of Procedure and Evidence*, and excluded the tainted statement.

that acts of mere illegality under domestic laws will not necessarily rise to the level of impropriety that will require exclusion.[5] These divergent approaches toward the consideration of domestic law in international exclusion decisions makes it difficult to draw conclusions about how international criminal procedure, generally, tends to approach the subject of excluding tainted evidence.

Seriousness of the offences is also a factor that has led tribunals to admit improperly obtained evidence in several cases. In *Karadzic*, the ICTY Trial Chamber observed,

> In light of the Tribunal's mandate to prosecute persons allegedly responsible for serious violations of international humanitarian law, it would be inappropriate to exclude relevant and probative evidence due to procedural considerations, as long as the fairness of the trial is guaranteed.[6]

This sentiment echoed earlier ICTY jurisprudence wherein the Trial Chamber admitted illegally intercepted conversations into evidence "in light of the gravity of the charges brought against the accused and the jurisdiction that this Tribunal has to adjudicate serious violations of international law."[7] However, most exclusionary decisions do not seem to consider this factor, perhaps because it is difficult to parse the levels of gravity associated with offences that are all, by definition, serious international crimes. The

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[5] See, for instance, ICTY. *Prosecutor v Stanisic and Zupljanin*, IT-08-91-T. Decision Denying the Stanisic Motion for Exclusion of Recorded Intercepts. 16 December 2009, at para 21:

> The Trial Chamber recalls that the jurisprudence of the Tribunal is clear that Rule 95 does not require that illegally obtained material be automatically and necessarily excluded. The jurisprudence is equally clear that even if the intercepts were obtained illegally, the illegality would not rise to the level that it would seriously damage the integrity of the proceedings such that they must be excluded.

[6] ICTY. *Prosecutor v Karadzic*. Trial Chamber, IT-95-5/18-T, 30 September 2010, Decision on the accused's motion to exclude intercepted conversations, at para 10.

[7] ICTY. *Prosecutor v Brdjanin*, Trial Chamber II, IT-39-66-T, 3 October 2003, Decision on the Defence "Objection to Intercept Evidence," at para 63(8).

ways in which this "seriousness of the crime" doctrine, and other doctrines that are familiar in the context of many domestic exclusionary rules, are developed by international tribunals is therefore difficult to ascertain.

Finally, with respect to international tribunals other than the ICC, the relationship between purpose-specific exclusionary rules for improperly obtained evidence (such as rule 95 of the ICTY's RPE), and more general exclusionary rules that weigh any evidence's probative value against its prejudicial effect (such as Rule 89(D) of the ICTY's RPE, and its equivalent in ICTR case law), must be examined. In many ways, the latter rules often do the bulk of the work in cases where the purpose-specific exclusionary rule might be more appropriate, as the courts seem reluctant (perhaps for political reasons) to pronounce upon impropriety by state actors when a discussion of prejudice to the accused can accomplish the desired result of justifying exclusion. This reality creates a situation where international exclusionary case law of the kind relevant to this thesis is particularly sparse, and where it is therefore difficult to generalize about common standards that might be found in international exclusionary rules.

Notwithstanding the above-mentioned lacuna in international exclusionary jurisprudence, there have been two cases involving exclusionary rulings that have thus far been decided by the ICC that merit discussion: the *Lubanga*, and *Katanga and Chui* cases. Article 69(7) was discussed in *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Confirmation of Charges',[8] wherein the Pre-Trial Chamber I briefly canvassed human rights and ICTY jurisprudence before determining that a balance must be achieved between the seriousness of a violation and the fairness of a trial as a whole. Ultimately,

[8] *Prosecutor v Thomas Lubanga Dyilo*, 'Decision on the Confirmation of Charges', Pre-Trial Chamber I, ICC-01/04-01/06 (29 January 2007) at paras 62-90

Pre-Trial Chamber I decided to admit evidence obtained in breach of local criminal procedural law. However, the cursory discussion of exclusion in this case can perhaps be attributable to the preliminary nature of the proceeding (as a confirmation of charges rather than a trial on the merits:

> The Chamber recalls the limited scope of this hearing, bearing in mind that the admission of evidence at this stage is without prejudice to the Trial Chamber's exercise of its functions and powers to make a final determination as to the admissibility and probative value of the Items Seized.[9]

The same scenario was later ruled upon by Trial Chamber I in *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on Admission of Material from the "Bar Table"',[10] but the decision was largely confined to the facts of the case, and did not purport to lay down a framework for the general application of an exclusionary rule.

In *Prosecutor v. Katanga*, 'Decision on the Prosecutor's Bar Table Motions,'[11] the Trial Chamber refused to admit evidence obtained in breach of a right to counsel and silence, by applying a more absolute exclusionary rule that seemed to suggest that any rights breach is antithetical to the proceedings, and must therefore result in exclusion.[12] As these *Katanga* and *Lubanga* decisions demonstrate, no single approach to interpreting article 69(7) of the Rome Statute has yet emerged from the ICC, so a more complete, or even an altogether different exclusionary test could still arguably be articulated by the ICC even after initial steps have been taken in these two decisions to explain how article 69(7) should be interpreted. In light of this potential space for the introduction of a more

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[9] *Ibid*, at para 90.
[10] *Prosecutor v Thomas Lubanga Dyilo*, 'Decision on Admission of Material from the "Bar Table"', Trial Chamber I, ICC-01/04-01/06 (24 June 2009).
[11] *Prosecutor v Katanga*, 'Decision on the Prosecutor's Bar Table Motions', Trial Chamber I, ICC-01/04-01/07 (17 December 2010).
[12] *Ibid*, at paras 55-65.

definsible exclusionary test at the ICC, the following chapter of this thesis will suggest exactly how such a test should be articulated, based on principles and comparative precedents discussed throughout this thesis.

CHAPTER 9 – A DETAILED PROPOSAL FOR THE INTERPRETATION AND APPLICATION OF ARTICLE 69(7) OF THE ROME STATUTE

In this final substantive chapter of my thesis, I propose to explain exactly how the ICC should interpret and apply its exclusionary rule. My goal in this chapter is to discuss all of the different principles and doctrines that could form part of an exclusionary rule in order to explain how these doctrines should or should not be incorporated in the ICC's exclusionary rule.

To begin with, the analysis in Chapter 2 showed that a domestic exclusionary rule could defensibly be based on a combination of deterrent, dissociation, vindication, and compensation rationales. These rationales are not mutually exclusive, are all at least partially achievable through exclusion, and all of them further laudable social goals. Additionally, none of the unique features of international criminal procedure that were discussed in Chapter 7 alter this exclusionary landscape: the weight that a court can or should assign to one rationale for exclusion over another might be different in a particular domestic criminal trial than in a similar international criminal trial, but from a systemic perspective, the four major rationales for exclusion are equally capable of supporting both domestic and international exclusionary rules.

Similarly, the same kinds of countervailing factors against exclusion (introduced in Chapter 2) that exist in domestic criminal justice systems also create pressures against exclusion in international criminal trials, but the factors will tend to weigh differently in an international context. Public safety arguments against exclusion, for instance, will not necessarily be as powerful at the ICC since defendants are typically so notorious (at least by the time proceedings at the ICC conclude) that there is much less opportunity for them

to pose a future risk to public safety in the way that a released domestic criminal might pose such a risk. However, proportionality arguments against exclusion may have much greater purchase in an international context: if it is somewhat disproportionate for a domestic murderer to escape a trial on the merits after tainted evidence is excluded, then it would be grossly disproportionate for a perpetrator of more serious crimes against humanity or genocide committed against masses of people to escape a trial on the merits for the same reason.

Thus, any exclusionary rule at the ICC should attempt to foster objectives of deterrence, dissociation, vindication and compensation, as should any domestic exclusionary rule. Likewise, the ICC's rule should also be balanced against public safety, efficiency, proportionality and epistemic concerns, as should any domestic rule. In other words, the foundational structure of international and domestic exclusionary rules does not need to be different in principle, even though the application of a given rule's structure to particular international and domestic criminal cases will often lead to different results.

Recalling from Chapter 1 that article 69(7) requires the exclusion of evidence that is obtained through a human rights breach or breach of the *Rome Statute* where the evidence is either unreliable, or its admission would be "would be antithetical to and would seriously damage the integrity of the proceedings,"[1] it is now possible to propose how these concepts should be interpreted. Simply stated, if the preceding argument within this thesis is accepted then **article 69(7) should lead to exclusion whenever exclusion will advance objectives of deterrence, dissociation, vindication or**

[1] International Criminal Court, *Rome Statute,* UN Doc A/CONF. 183/9 (July 17, 1998), art 69(7) [*Rome Statute*].

compensation, and the gains that exclusion will bring in one or more of these areas is larger than any social costs of exclusion in terms of public safety, efficiency, proportionality, or epistemic sacrifices or risks. In other words, article 69(7) should not set forth an automatic exclusionary rule that will always and formulaically cause evidence to be excluded when certain criteria are met, and always permit evidence to be admitted when other criteria are met, since this type of rule would not allow for the kind of case-by-case weighting of factors (both in favour of and against exclusion) that a nuanced and principled exclusionary rule demands.

To say that the ICC's exclusionary test must be flexible, and must always balance the benefits of exclusion in terms of deterrence, dissociation, compensation and vindication against the harms of exclusion in terms of public safety, efficiency, proportionality, and epistemic losses, is not to say that the test cannot include guidance to litigants and judges about how certain doctrines or classes of cases will generally need to fit within the rule. It would therefore be helpful to assess the domestic exclusionary doctrines discussed in Chapters 4, 5, and 6 to determine how they would tend to operate as part of the article 69(7) test that I have just proposed.

The identity doctrine discussed in Chapter 4 often operates in domestic jurisdictions to bar exclusion as a remedy in cases where rights are breached or disrespected by private actors instead of state agents. In an international context, exclusion can probably have even less of a deterrent effect on private actors than in a domestic context, given the additional temporal and geographic separation between evidence collection and trial that will almost always exist at the ICC. However, if the ICC hopes to propagate respect for fundamental human rights, then exclusion will

provide much needed dissociation for the Court from misconduct by private actors who trammel human rights, and will likely provide the kind of compensation and vindication that will help to strengthen respect for fundamental human rights. Thus, the aggregated four rationales for exclusion suggest that the ICC's exclusionary rule should operate just as strongly in favour of exclusion regardless of whether state or private actors collect tainted evidence. What is more, none of the countervailing factors against exclusion depend on the identity of the individual who collects the evidence, so the overall balance of factors tends to suggest that the identity question should not be relevant in exclusionary decisions at the ICC: no matter who collects tainted evidence, the calculation of benefits and harms of exclusion will not significantly depend on the identity of the transgressor, so the doctrine can, from a principled perspective, safely be discarded by the ICC.

The domestic standing doctrine discussed in Chapter 4 often dictates that exclusion will not be available as remedy except in cases where the accused's own rights are breached, rather than when a third party's rights are breached. However, the deterrent effect of a rule (in shaping the conduct of evidence collectors more toward respect for constitutional and human rights – an objective that is consistent with the ICC's efforts to increase respect for human rights) will be stronger if the rule applies to the full range of police and state interactions with the population, not only to those interactions involving a small set of accused persons. Similarly, the need for courts such as the ICC to dissociate themselves from misconduct by evidence collectors is just as strong in the case of a third party rights breach as in the case of a rights breach against the accused. Finally, although a third party receives no direct compensation from evidence being excluded, it

is still possible for his or her rights to be vindicated when a state or society is deprived of evidence as a result of the rights breach, since this kind of exclusion expresses a measure of the importance of the right, and of the sacrifices that society is willing to accept in order to give meaning to fundamental rights. Thus, the collective of rationales for exclusion all suggest that a strict standing requirement should not form part of the ICC's exclusionary test. Furthermore, as with the identity requirement, no countervailing rationale against exclusion operates more persuasively in cases of third party rights breaches than in cases where the accused's own rights are breached, so the abandonment of any strict standing requirement for exclusion could be – on balance – justified at the ICC.

The good faith doctrine that was discussed in Chapter 5 often operates in domestic jurisdictions to allow tainted evidence to be admitted in cases where a right was breached in good faith by the state when the evidence was collected. This doctrine is justifiable on the basis of deterrence and dissociation theories, in that good faith mistakes and accidents by police cannot easily be deterred (since they were unintentional from the start), and they do not always necessitate judicial dissociation. However, the doctrine is problematic from vindication and compensation perspectives, since it leaves rights breaches to stand without compensation to the accused, and without meaningful reassertion of the importance of the right. At the ICC, a good faith exception to an exclusionary rule would have the same kind of impact in terms of these rationales for exclusion: the exception would frustrate some objectives of exclusion (vindication and compensation), but other objectives would be impossible to promote through exclusion of evidence obtained through good faith rights breaches. Thus, without yet considering the

impact of countervailing factors on a good faith doctrine at the ICC, one could say that the exception would be justifiable in cases where vindication and compensation for a rights breach have already been achieved or could otherwise be achieved through some other means (a domestic tort or public damages remedy, for instance). However, exclusion would nonetheless be necessary in cases where exclusion is the only way to vindicate a right and compensate the accused. In terms of countervailing factors, one might note that proportionality concerns would favour a good faith exception at the ICC, since the harm of a good faith rights breach – while perhaps substantial to an accused – is somewhat reduced from a societal perspective in cases of good faith mistakes, and therefore calls for a less drastic remedy than exclusion in trials involving serious international crimes. As this discussion demonstrates, the good faith exception should sometimes have a role to play in balancing the benefits and harms of exclusion in proceedings under article 69(7) at the ICC, just as it should sometimes affect exclusionary outcomes in domestic criminal justice systems.

The domestic seriousness of the offence doctrine discussed in Chapter 5 suggests that evidence should be excluded less frequently in cases where the accused is charged with a particularly serious offence. However, when this doctrine is examined from a principled perspective, it is apparent that it cannot be justified on dissociation, vindication, or compensation grounds, and on deterrent grounds, it generates an outcome (admission of tainted evidence) that likely undermines rather than strengthens the deterrent effect of the basic rule. In an international context, the doctrine would be even less coherent, since it would require the ICC to develop some kind of hierarchy of seriousness that could be applied to offences before the Court, when, in fact, all offences

within the Court's jurisdiction are supposedly very serious. It is acknowledged that some persuasive public safety and proportionality arguments could be advanced against exclusion in cases of serious offences, but the overall dissonance within exclusionary theory that this doctrine would create, particularly in international criminal trials, leads to the conclusion that the doctrine should not form part of the article 69(7) exclusionary test at the ICC.

The importance of the evidence doctrine that was discussed in Chapter 5 is equally difficult to incorporate into a principled exclusionary rule at the ICC. This doctrine suggests that evidence should be excluded less frequently when it has special importance or centrality to the prosecution's case. However, applying the doctrine cannot help to advance any dissociation, vindication or compensation goals of exclusion, and probably hinders the deterrent goal by admitting tainted evidence in a way that encourages future breaches by evidence collectors. No compelling public safety or efficiency arguments can be made against exclusion simply because of the importance of the evidence, but there is scope to argue that exclusion of central evidence would destroy the epistemic purpose of a trial, and that it would be a disproportionate remedy. Based on the fact that the centrality of the evidence doctrine cannot be justified on the basis of a known rationale for exclusion, and on the absence of any unique factors applicable to international criminal trials that would change this reality, the doctrine should probably not form part of a principled exclusionary test at the ICC. Nonetheless, in extreme cases, it is *possible* that the harm of excluding really important evidence (in terms of epistemic or proportionality concerns) would outweigh the benefits of exclusion, so it is

conceivable that the doctrine would occasionally play a relevant role in exclusionary calculations at the ICC.

The derivative evidence question that was studied in Chapter 6 asks whether an exclusionary rule should operate to exclude both evidence that was collected directly in connection with a rights breach, and evidence collected indirectly (but still deriving from) a rights breach. The deterrent rationale for exclusion suggests that derivative evidence should be subject to an exclusionary rule, but other rationales for exclusion offer less clear answers: so long as some direct evidence is excluded, then a measure of dissociation, vindication and compensation will be achieved in respect of a rights breach, even if derivative evidence is admitted. Depending on the case, it might also be necessary to exclude derivative evidence if the exclusion of only directly tainted evidence is insufficient to achieve the objectives of an exclusionary rule, but this will not necessarily be the case, particularly if countervailing factors against exclusion in a given case are strong. Thus, a principle-based exclusionary test at the ICC would extend the rule's reach to derivative evidence as a general matter, but would apply the same basic test that is proposed in this thesis (does the benefit of exclusion in terms of advancing laudable goals outweigh the countervailing harm?) to determine whether article 69(7) requires exclusion on the facts of a particular case.

The hypothetical clean path doctrine that was examined in Chapter 6 provides that tainted evidence can be admitted if police could, hypothetically, have obtained the same evidence by some other means that would not have led to a rights breach. If one accepts that a rights breach is even more egregious when the breach was likely unnecessary in order to obtain the evidence, then clearly the hypothetical clean path doctrine would

undermine all of the recognized rationales for exclusion, particularly at the ICC where the Court hopes to contribute to improvements in global respect for human rights. Furthermore, no countervailing argument against exclusion is any more persuasive in cases where a hypothetical clean path to the tainted evidence existed. Consequently, the doctrine should not form part of the ICC's exclusionary test, since it cannot be justified on the basis of principle.

In summary, an application of the basic exclusionary test that is proposed within this thesis to different classes of cases and domestic exclusionary doctrines reveals that some accepted doctrines should clearly form part of the ICC's rule, some should clearly not form part of the rule, and some doctrines should contextually influence the outcome of exclusionary decisions in certain types of cases, but not others.

The identity and standing requirements within some domestic exclusionary rules should not be imposed upon accused persons at the ICC, since these requirements would undermine the objectives of the exclusionary rule in a manner that cannot be justified by reference to any countervailing factors. Similarly, the hypothetical clean path and seriousness of the offence doctrines should not form part of the ICC's exclusionary test, since these doctrines create dissonance and incoherence within exclusionary rules rather than supporting exclusionary rules on one or more principled bases.

In contrast, the derivative evidence doctrine that extends an exclusionary rule's reach to evidence that is collected indirectly as a result of a rights breach should clearly be incorporated into the ICC's exclusionary test (such that the exclusionary rule would apply to this class of evidence in the same manner as to evidence that is obtained directly through a rights breach). This doctrine furthers several of the objectives of exclusion to

the extent that any harms arising in connection with countervailing arguments are outweighed by the benefits of extending the exclusionary rule's reach to derivative evidence.

Finally, the good faith and importance of the evidence doctrines that create exceptions to an exclusionary rule in cases where evidence collectors breach rights through good faith mistakes or where the tainted evidence is particularly important to the prosecution's case (respectively) should *sometimes* have a role to play within the ICC's exclusionary calculus. A good faith exception could be justified in some cases on deterrent grounds, particularly if the accused can be compensated or a right can be vindicated through some remedy other than exclusion, while a centrality of the evidence exception could be justified in rare cases where epistemic and proportionality arguments against exclusion are overwhelming.

Having looked at the rationales for exclusion, the countervailing arguments against exclusion, and the most common exclusionary doctrines from domestic exclusionary rules, one can begin to see how a sophisticated approach to the interpretation of article 69(7) of the *Rome Statute* should develop. As a basic matter, the idea that evidence should be excluded if its admission "would be antithetical to and would seriously damage the integrity of the proceedings" should be understood to mean that exclusion of tainted evidence is necessary whenever the benefits of exclusion (in terms of the achievement of any of the collective rationales for exclusion) outweighs the harms of exclusion (that are measured by reference to one of the recognized countervailing factors against exclusion). More importantly, by understanding the theory that underpins this basic proposed test for exclusion, one can see how many domestic

exclusionary rules fail to achieve their stated or implied purposes, and how the ICC can avoid the same pitfall in interpreting article 69(7) if the Court adheres to the principles set forth in this thesis, and applies them faithfully to various classes of evidence and exclusionary doctrines drawn from domestic and international criminal jurisprudence.

CHAPTER 10 – CONCLUSION

While it might be tempting for judges of the ICC to borrow hastily from jurisprudence of previous international tribunals or domestic courts when developing a comprehensive approach to the interpretation of article 69(7) of the *Rome Statute*, the Court has a valuable opportunity to think about exclusionary rules from first principles and to create a new test that is truly tailored to its own unique circumstances. As the theoretical discussion in Chapter 2 of this thesis has shown, there are many good reasons why exclusion is necessary as a consequence of rights breaches, and these reasons often overlap and intertwine with one another in ways that domestic exclusionary rules frequently fail to recognize (in their reliance on only one or two recognized rationales for exclusion). Furthermore, even once one has carefully selected logical bases for the foundation of an exclusionary rule, the comparative analysis in Chapters 4, 5, and 6 of this thesis has shown how many doctrines that form part of domestic exclusionary rules are unconnected with and fail to advance the purported rationales of particular exclusionary rules.

If the ICC is to achieve its numerous and ambitious purposes, then the Court would be wise to seize the opportunity that is now within its grasp by divorcing itself from mistakes of past courts and tribunals, and by building an exclusionary test that is defensible in principle, and flexible enough to recognize that factors in favour of and against exclusion are heavily dependent on the facts of a given case. The basic test proposed within this thesis is that evidence obtained through a rights breach should be excluded whenever exclusion will advance objectives of deterrence, dissociation, vindication or compensation, and the gains that exclusion will bring in one or more of

these areas is larger than any social costs of exclusion in terms of public safety, efficiency, proportionality, or epistemic sacrifices or risks. This test can be applied to any known or new class of evidence, and any aspect of an exclusionary doctrine borrowed from another jurisdiction, because it is simple and based on easily understood principles of exclusion. Over time, it will lead to predictable and logical results, and it lends itself well to judicial justifications for their exclusionary decisions. In short, the test proposed within this thesis offers the ICC the solution to exclusionary uncertainty for which the Court should be striving.

BIBLIOGRAPHY

International Instruments and Treaties

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force 3 September 1953.

Extraordinary Chambers in the Courts of Cambodia, *Internal Rules* (Rev 8), as revised on 3 August 2011, online: http://www.eccc.gov.kh/en/document/legal/internal-rules-rev8.

Extraordinary Chambers in the Courts of Cambodia, *Law on the Establishment of the Extraordinary Chambers* (Cambodia), with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), online: http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 U.N.T.S. 171, entered into force 23 March 1976.

International Criminal Court, *Rome Statute,* U.N. Doc. A/CONF. 183/9 (July 17, 1998).

ICTR *Statute* (as adopted by UNSCR 955 (1994))

ICTR *Rules of Procedure and Evidence*, online: http://www.unictr.org/Portals/0/English/Legal/ROP/100209.pdf.

ICTY *Rules of Procedure and Evidence*, online: http://www.icty.org/sid/136.

ICTY *Statute* (as adopted by UNSCR 827 (1993)).

Legislation and Case Law – Domestic

Bunning v. Cross, [1978] HCA 22 (High Court of Australia).

Burdeau v. McDowell, (1921) 256 US 465 (USSC).

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

Code of Criminal Procedure (Taiwan) (February 6, 2003).

Constitution of Greece, 18 April 2001.

Cour de Cassation de Belgique, Arrêt no P.03.0762.N, 14 Oct 2003 (Antigone Case).

Crawford v. Washington, (2004) 541 US 36 (USSC).

Criminal Procedure Act (Slovenia), Official Gazette of the Republic of Slovenia 8/2006, January 26, 2006.

Criminal Procedure Code (Serbia), PR No 89, September 28, 2011.

Elkins v United States, (1960) 364 US 206 (USSC).

Evidence Act, 2006, Public Act 2006 No 69 (New Zealand).

Hamed v. R., [2011] NZSC 101, [2012] NZLR 305 (New Zealand Sup Ct).

Herring v. United States, (2009) 129 S Ct 695 (USSC).

Hudson v Michigan, (2006) 547 US 586 (USSC).

Issacharov v. Chief Military Prosecutor, Criminal Appeal 5121/98 [2006] (Israel Sup Ct).

Linkletter v Walker, (1965) 381 US 618 (USSC).

Mapp v Ohio, (1961) 367 US 643 (USSC).

McKinney v. University of Guelph, [1990] 3 SCR 229.

Mthembu v. The State (379/2007), [2008] ZASCA 51 (South African Court of Appeal).

Nix v. Williams (1984), 467 US 431 (USSC).

Olmstead v. United States, (1928) 277 US 438 (USSC).

People v. Martin, (1955) 45 Cal2d 755 (Calif Sup Ct).

Police and Criminal Evidence Act, 1984 (England), c. 60.

R. v. Bacon, [2010] BCJ No 48 (BC Prov Ct).

R. v. Belnavis, [1997] 3 SCR 341.

R. v. Buhay, [2003] 1 SCR 631.

R. v. Collins, [1987] 1 SCR 265.

R. v. Côté, [2011] SCJ No 46.

R. v. Edwards, [1996] 1 SCR 128.

R. v. Grant, [2009] 2 SCR 353.

R v. Leatham (1861), 8 Cox CC 498 (England QB)

R. v. Martin, [2010] NBJ No 138 (NB Court of Appeal)..

R. v. Williams, [2007] NZCA 52, [2007] NZLR 207 (New Zealand Court of Appeal).

Stone v Powell, (1976) 428 US 465 (USSC).

United States v Calandra, (1974) 414 US 338 (USSC).

United States v Janis, (1976) 428 US 433 (USSC).

United States v. Leon, (1984) 468 US 897 (USSC).

Weeks v. United States, (1914) 232 US 383 (USSC).

Evidence Act 2008, No 48 of 2008, Victorian Consolidated Acts (Uniform Evidence Act, Australia).

Case Law – International

Prosecutor v. Brdjanin, Trial Chamber II, IT-39-66-T, 3 October 2003, Decision on the Defence "Objection to Intercept Evidence," (ICTY).

Prosecutor v. Delalic et al., Trial Chamber, IT-96-21, 2 September 1997, Decision on Zdravko Mucic's motion for the exclusion of evidence (ICTY).

Prosecutor v. Ieng, Co-Investigating Judges, 002/19-19-09-2007-ECCCC-OCIJ-D130-8, 28 July 2009, Order on use of statements which were or may have been obtained by torture (ECCC).

Prosecutor v. Karadzic. Trial Chamber, IT-95-5/18-T, 30 September 2010, Decision on the accused's motion to exclude intercepted conversations (ICTY).

Prosecutor v. Stanisic and Zupljanin, IT-08-91-T. Decision Denying the Stanisic Motion for Exclusion of Recorded Intercepts. 16 December 2009 (ICTY).

Prosecutor v. Thomas Lubanga Dyilo, 'Decision on the Confirmation of Charges', Pre-Trial Chamber I, ICC-01/04-01/06 (29 January 2007).

Prosecutor v. Thomas Lubanga Dyilo, 'Decision on Admission of Material from the "Bar Table"', Trial Chamber I, ICC-01/04-01/06 (24 June 2009).

SECONDARY MATERIAL – DOMESTIC COMPARATIVE

Ally, Dave Ashley Vincent. *Constitutional Exclusion Under Section 35(5) of the Constitution of the Republic of South Africa, 1996*, (LL.D. Thesis, University of Pretoria, South Africa, 2009).

---. "Determining the Effect (Social Costs) of Exclusion Under the South African Exclusionary Rule: Should Factual Guilt Tilt the Scales in Favour of the Admission of Unconstitutionally Obtained Evidence?" (2012) 15 Potchefstroom Electronic L J 477.

Arenson, Kenneth J. "Rejection of the Fruit of the Poisonous Tree Doctrine in Australia: A Retreat from Progressivism." (2011) 13 U Notre Dame Austl L Rev 17.

Beernaert, Marie-Aude, and Philip Traest, "Belgium: From Categorical Nullities to a Judicially Created Balancing Test" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 161.

Bloom, Robert M., and David H. Fentin. "'A More Majestic Conception': The Importance of Judicial Integrity in Preserving the Exclusionary Rule" (2011) 13 U Pa J Const L 47.

Blum, Binyamin. "Doctrines Without Borders: The "New" Israeli Exclusionary Rule and the Dangers of Legal Transplantation" (2008) 60 Stan L Rev 2131.

---. "'Exclude Evidence, You Exclude Justice'? A Critical Evaluation of Israel's Exclusionary Rule After *Issacharov*" (2010) 16 Sw J Int'l L 385.

Borgers, Matthias J., and Lonneke Stevens, "The Netherlands: Statutory Balancing and a Choice of Remedies" in in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 183.

Brkić, Snežana. "Serbia: Courts Struggle With a New Categorical Statutory Exclusionary Rule" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 309.

Cammack, Mark E. "The United States: The Rise and Fall of the Constitutional Exclusionary Rule" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 3.

Chen, Yu-Jie. "One Problem, Two Paths: A Taiwanese Perspective on the Exclusionary Rule in China" (2011) 43 NYU J Int'l L & Politics 713.

Cho, Kuk. "The Japanese 'Prosecutorial Justice' and its Limited Exclusionary Rule" (1998) 12 Colum J Asian L 39.

Daly, Yvonne Marie. "Exclusion of Evidence: *DPP (Walsh) v Cash*" (2011) 15 Int'l J Evidence & Proof 62.

Davies, Michael. "Alternative Approaches to the Exclusion of Evidence Under s. 24(2) of the Charter" (2002) 46 Crim L Q 21.

Farrar, Salim. "Degrading Searches and Illegally Obtained Evidence in the Malaysian Criminal Justice System" in Paul, Roberts and Jill Hunter, eds., *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*. (Oxford: Hart Publishing, 2012), 103.

Giannoulopoulos, Dimitrios. "The Exclusion of Improperly Obtained Evidence in Greece: Putting Constitutional Rights First" (2007) 11 Int'l J Evidence & Proof 181.

Gless, Sabine. "Germany: Balancing Truth Against Protected Constitutional Interests" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 113.

Illuminati, Giulio. "Italy: Statutory Nullities and Non-Usability" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 235

Jackson, John. "Human Rights, Constitutional Law and Exclusionary Safeguards in Ireland" in Paul, Roberts and Jill Hunter, eds., *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*. (Oxford: Hart Publishing, 2012), 119.

Lewis, Margaret K. "Controlling Abuse to Maintain Control: The Exclusionary Rule in China" (2011) 43 NYU J Int'l L & Politics 629.

Ma, Yue. "The American Exclusionary Rule: Is There a Lesson to Learn From Others?" (2012) 22 Int'l Crim Justice Rev 309.

Madden, Mike. "Marshalling the Data: An Empirical Analysis of S. 24(2) Case Law in the Wake of *R. v. Grant*" (2011) 15 Can Crim L Rev 229.

Mujuzi, Jamil Ddamulira. "The Admissibility of Evidence Obtained as a Result of Violating the Accused's Rights: Analysing the Test Set by the Hong Kong Court of Final Appeal in *HKSAR v Muhammad Riaz Khan*" (2012) 16 Int'l J Evidence & Proof 425.

Optican, Scott. "*Hamed*, *Williams* and the Exclusionary Rule: Critiquing the Supreme Court's Approach to s. 30 of the *Evidence Act 2006*" [2012] NZ L Rev 605.

---. "'Lessons from Down Under": The Exclusion of Improperly Obtained Evidence in New Zealand as a Model for a Changing United States Exclusionary Rule" [2011] J Commonwealth Crim L 226.

Perrone, Lawrence Joseph. "Curing the Real Problem: Cleaning Up Fourth Amendment Jurisprudence by Altering Our Exclusionary Rule to Conform with an International Model" (2009) 16 Tulsa J Comp & Int'l L 67.

Ruiha, Chen. "China's New Exclusionary Rule: An Introduction" (2011) 24 Colum J Asian L 229.

Penney, Steven. "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under s. 24(2) of the Charter" (2003) 49 McGill L J 105.

Schwikkard, P.J. "A Constitutional Revolution in South African Criminal Procedure?" in Paul, Roberts and Jill Hunter, eds., *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*. (Oxford: Hart Publishing, 2012), 25.

Siyuan, Chen. "The Judicial Discretion to Exclude Relevant Evidence: Perspectives from an Indian Evidence Act Jurisdiction" (2012) 16 Int'l J Evidence & Proof 398.

Stark, Findlay, and Fiona Leverick, "Scotland: A Plea for Consistency" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 69.

Thaman, Stephen C., ed., *Exclusionary Rules in Comparative Law*. (Springer: New York, 2013).

---. "'Fruits of the Poisonous Tree' in Comparative Law" (2010) 16 Sw J Int'l L 333.

Triantafyllou, Georgios. "Greece: From Statutory Nullities to a Categorical Statutory Exclusionary Rule" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 261.

Wang, Jaw-Perng. "Taiwan: The Codification of a Judicially-Made Discretionary Exclusionary Rule" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 355.

Winter, Lorena Bachmaier. "The Constitutional Court's Move from Categorical Exclusion to Limited Balancing" in Stephen C. Thaman, ed., *Exclusionary Rules in Comparative Law*, (Springer: New York, 2013), 209.

Secondary Material – International Comparative

Ashworth, Andrew. "The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence" in Paul, Roberts and Jill Hunter, eds., *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*. (Oxford: Hart Publishing, 2012), 145.

Naymark, Daniel. "Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy" (2008) 4 J Int'l L & Int'l Rel 1.

Vanderpuye, Kweku. "The International Criminal Court and Discretionary Evidential Exclusion: Toeing the Mark?" (2006) 14 Tul J Int'l & Comp L 127.

Young, Rebecca. "'Internationally Recognized Human Rights' Before the International Criminal Court" (2011) 60 ICLQ 189

SECONDARY MATERIAL – EXCLUSIONARY THEORY

Amar, Akhil Reed. "The Future of Constitutional Criminal Procedure" (1996) 33 Am Crim L Rev 1123.

Bryant, Alan, W., Marc Gold, H. Michael Stevenson, and David Northrup, "Public Attitudes Toward the Exclusion of Evidence: Section 24(2) of the Canadian Charter of Rights and Freedoms" (1990) 69 Cdn Bar Rev 1.

Coughlan, Steve. "Good Faith, Bad Faith and the Gulf Between: A Proposal for Consistent Terminology" (2011) 15 Can Crim L Rev 195.

Davies, Thomas Y. "A Hard Look at What We Know (and Still Need to Learn) About the 'Costs of the Exclusionary Rule: The NIJ Study and Other Studies of 'Lost' Arrests" (1983) Am B Found Res J 611.

Duff, Antony, Lindsay Farmer, Sandra Marshall and Victor Tadros, "Introduction: Towards a Normative Theory of the Criminal Trial" in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, eds., *The Trial on Trial Volume 1: Truth and Due Process*, (Oxford: Hart Publishing, 2004).

---. *The Trial on Trial Volume 3: Towards a Normative Theory of the Criminal Trial*, (Oxford, Hart Publishing, 2007).

Fuller, Steven. "Private Security and the Exclusionary Rule" (1980) 15 Harv Civ Rts-Civ Liberties L Rev 649.

Gibson, Dale. "Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms" (1983) 61 Cdn Bar Rev 377.

Gross, John P. "Dangerous Criminals, The Search for Truth, and Effective Law Enforcement: How the Supreme Court Overestimates the Social Costs of the Exclusionary Rule" (2011) 51 Santa Clara L Rev 545.

Hildebrant, Mireille. "Trial and 'Fair Trial': From Peer to Subject Citizen" in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, eds., *The Trial on Trial Volume 2: Judgment and Calling to Account*, (Oxford: Hart Publishing, 2006), 15.

Jacobi, Tonja. "The Law and Economics of the Exclusionary Rule" (2012) 87 Notre Dame L Rev 585.

Kamisar, Yale. "Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather than an Empirical Proposition'?" (1983) Creighton L Rev 565.

---. "In Defence of the Search and Seizure Exclusionary Rule" (2003) 26 Harv J L & Pub Pol'y 119.

Halliburton, Christian. "Leveling the Playing Field: A New Theory of Exclusion for a Post-PATRIOT Act America" (2005) 70 Mo L Rev 519.

Laudan, Larry. *Truth, Error and Criminal Law: An Essay in Legal Epistemology* (New York: Cambridge UP, 2006).

Milhizer, Eugene R. "Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule" (2012) 211 Mil L Rev 211.

---. "The Exclusionary Rule Lottery" (2008) 39 U Tol L Rev 755.

Paciocco, David M. "Section 24(2): Lottery or Law – The Appreciable Limits of Purposive Reasoning" (2012) 58 Crim L Q 15

Pattenden, Rosemary. "Admissibility in Criminal Proceedings of Third Party and Real Evidence Obtained by Methods Prohibited by UNCAT" (2006) 10 Int'l J Evidence & Proof 1.

Perigoe, Kelly. "Exclusion of Evidence for Failure to Advise Suspects of the Right to Counsel and to Silence Before Custodial Police Interrogation: Comparing the United States and Canadian Doctrines and the Reasons for their Difference in Scope" (2009) 14 UCLA J Int'l L & Foreign Affairs 503.

Roberts, Paul. "Normative Evolution in Evidentiary Exclusion: Coercion, Deception and the Right to a Fair Trial" in Paul, Roberts and Jill Hunter, eds., *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*. (Oxford: Hart Publishing, 2012), 163.

Roberts, Paul, and Jill Hunter, eds., *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*. (Oxford: Hart Publishing, 2012).

Skolnick, Jerome. *Justice Without Trial: Law Enforcement in Democratic Society*, (New York: John Wiley & Sons, 1966).

Thaman, Stephen. "Constitutional Rights in the Balance: Modern Exclusionary Rules and the Toleration of Police Lawlessness in the Search for Truth" (2011) 61 UTLJ 691.

Secondary Material – International Criminal Procedure

Bibas, Stephanos, and William W. Burke-White, "International Idealism Meets Domestic-Criminal-Procedure Realism" (2010) 59 Duke L J 637.

Boas, Gideon, James L. Bischoff, Natalie L. Reid and Don Taylor III. *International Criminal Procedure*. (Cambridge, Cambridge UP, 2011).

Cassese, Antonio. ed. *The Oxford Companion to International Criminal Justice*. (Oxford: Oxford UP, 2009).

Croquet, Nicolas A.J. "The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?" (2011) 11 Hum Rts L Rev 91.

deGuzman, Margaret. "Gravity and the Legitimacy of the International Criminal Court" (2009) 32 Fordham Int'l L J 1400.

Damaška, Mirjan. "The International Criminal Court: Between Aspiration and Achievement" (2009) 14 UCLA J Int'l L & Foreign Aff 19.

---. "Reflections on Fairness in International Criminal Justice" 10 J Int'l Crim Just 611.

---. "What is the Point of International Criminal Justice?" (2008) 83 Chi.-Kent L Rev 329.

Drumbl, Mark. "A Hard Look at the Soft Theory of International Criminal Law" in Leila Nadya Sadat and Michael P. Scharf, eds., *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni*, (Leiden: Martinus Nijhoff Publishers, 2008), 1.

Galbraith, Jean. "The Pace of International Criminal Trials" (2010) 31 Mich J Int'l L 79.

Gaynor, Fergal. "Uneasy Partners – Evidence, Truth and History in International Trials" (2012) 10 J Int'l Crim Just 1257.

Jackson, John. "Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy" (2009) 7 J Int'l Crim Just 17.

Jackson, John, and Sarah Summers. *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*. (Cambridge: Cambridge UP, 2012).

Rauxloh, Regina E. "Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining" (2010) 10 Int'l Crim L Rev 739.

Robinson, Darryl. "The Identity Crisis of International Criminal Law" (2008) 21 Leiden J Int'l L 925.

Safferling, Christoph. *International Criminal Procedure*. (Oxford: Oxford UP, 2012).