MONETARY COMPENSATION AS A REMEDY FOR FAIR TRIAL VIOLATIONS UNDER INTERNATIONAL CRIMINAL LAW

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When international criminal courts face violations of the right to a fair trial, they encounter a dilemma: if they provide a significant remedy, such as a stay of proceedings, the remedy inevitably undermines the ability to punish the perpetrators of international crimes; on the other hand, if they grant a minimal remedy or no remedy at all, the right to a fair trial is undermined. This dilemma has led to the adoption of an interest-balancing approach to remedies. Under this approach, sentence reduction plays a prominent role in remedying fair trial violations that do not undermine the court's ability to accurately determine the accused's guilt. This Article argues that sentence reduction is an inadequate remedy, since it inevitably either harms the goals of international criminal sentencing or does not provide an effective remedy for violations of the right to a fair trial. Instead, monetary compensation should be the remedy for such violations. By granting monetary compensation, the court creates a separation between the punishment and the remedy and thus can usually provide an effective remedy for the accused without harming the main goals of international criminal justice.

Keywords: *international criminal law, remedies, international criminal procedure, fair trial*

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INTRODUCTION

An accused at the International Criminal Court (ICC) is charged with severe war crimes involving the deaths of thousands of people. His right to be tried without undue delay is violated, and the trial spans over ten years. What is the appropriate remedy for the fair trial violation? This question lies at the heart of this Article.

When we think of international criminal justice, we often turn our attention to the horrors that underlie the cause of action. International criminal law seeks to "put an end to impunity for the perpetrators of these crimes."[1] However, as judicial bodies charged *inter alia* with the goal of protecting human rights and promoting the rule of law,[2] international criminal courts must not violate the rights of those accused of committing even the worst atrocities.[3] Ignoring their rights would violate the goals of International Criminal Law (ICL) and undermine the legitimacy of international criminal tribunals. A potential conflict exists between these differing goals, punishing the perpetrators of atrocities while defending the rights of the accused:[4] if the court provides a significant remedy for the violation of the right to a fair trial, such as a stay of proceedings, the remedy inevitably undermines the ability to punish the perpetrators of international crimes; on the other hand, if it grants a minimal remedy or no remedy at all, the right to an effective remedy for violations of the right to a fair trial is undermined.

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1. Rome Statute of the International Criminal Court, pmbl., July 12, 1998, 2187 U.N.T.S. 900 [hereinafter Rome Statute].

2. *See*, *e.g.*, Jens D. Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. INT'L L. & FOREIGN AFF. 77 (2009); Jenia I. Turner, *Policing International Prosecutors*, 45 N.Y.U. J. INT'L L. & POL'Y 175, 206 (2012).

3. *See*, *e.g.*, Turner, *supra* note 2, at 204–05; Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 712–13 (2008); SALVATORE ZAPPALÀ, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 6 (2003) [hereinafter ZAPPALÀ, PROCEEDINGS].

4. ICL has additional goals, such as giving voice to the victims of the crimes and providing an accurate historical record; *see*, *e.g.*, Turner, *supra* note 2, at 207; Mirjan Damaška, *What is the Point of International Criminal Justice*, 83 CHI.-KENT L. REV. 329, 331, 340–43 (2008) (criticizing those two goals). The present article is mainly focused on the punishment of the accused, which holds the most prominent place among the different goals, Moreover, the tension between this latter goal and the remedial goals is most significant.

Violations of the right to a fair trial can be divided into two types.[5] The first type includes fair trial violations that might affect the outcome of a case (hereinafter First Type violations). For example, in the *Lubanga* case litigated at the ICC, the prosecution did not disclose to the defense or to the court numerous documents containing potentially exculpatory evidence; the prosecution withheld the evidence in compliance with agreements made between the prosecution and the evidence providers.[6] Such conduct potentially obscures the truth, making it impossible to determine whether the outcome of a trial is just.

The second type of fair trial violation includes those that do not affect the reliability of the outcome in terms of whether the defendant committed the crime (hereinafter, Second Type violations). For example, a two-week delay in the initial appearance of the accused constitutes a violation of his rights.[7] Yet this delay does not usually affect the ability of the court to determine the accused's guilt.

This Article focuses on *ex post* remedies for Second Type violations, in which the outcome of a case is widely believed to be accurate, despite violations of an accused's right to a fair trial. In the context of such Second Type violations, the tension between the competing goals is most clearly visible: when a court grants a remedy for a First Type violation, its discretion is limited, since it must ensure that the remedy safeguards the judgment's accuracy. The remedy in these cases is an integral part of the quest for punishing the perpetrators of the crimes. Remedies for Second Type violations, on the other hand, are not concerned with ensuring the accuracy of judgments; hence, if a remedy were to affect an accused's sentence, it would create a tension between the competing goals. Moreover, Second Type violations, such as undue delay in the initial appearance and violations of the right to a speedy trial, are quite common in international criminal tribunals, and an adequate solution to

5. Starr, *supra* note 3, at 761; Kevin J. Heller, *NYU JILP Symposium: The Rhetoric of Remedies*, Opinio Juris (Apr. 5, 2013, 1:00 P.M.), http://opiniojuris.org/2013/04/05/nyu-jilp-symposium-the-rhetoric-of-remedies/.

6. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1401, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e), Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008 (June 13, 2008), http://www.icc-cpi.int/iccdocs/doc/doc511249.pdf.

7. See *infra* Section I.

the remedial dilemma is needed.[8] Finally, the current case law and literature on *ex post* remedies for Second Type violations do not provide an adequate solution to the problem of balancing the competing goals, as explained bellow.

Several authors have recognized the core problems of international criminal courts' remedial doctrine.[9] In essence, these studies recognize that by granting significant remedies for violations of the rights of the accused, international criminal courts might, and often will, damage other central goals of ICL. For example, the "absolutist approach"[10] to remedies, which was endorsed in some cases by international criminal tribunals, mandated a stay of proceedings where a severe violation of the accused's rights took place, and thereby significantly undermined the court's ability to punish the perpetrators of crimes. The solution adopted in the case law, and supported by significant parts of the literature, is an interest-balancing approach to remedies.[11] The interest-balancing approach grants more moderate remedies and usually offers sentence reduction as a prominent remedy for Second Type violations in the event of a conviction. Hence, for example, the International Criminal Tribunal for Rwanda (ICTR) has recognized sentence reduction in several instances as a favorable remedy for Second Type violations.[12]

8. The present article does not discuss *ex ante* remedies to fair trial violations, which have a very important role when addressing the need to minimize and redress violations. *Ex ante* solutions were widely discussed in the literature and in the case law. *See*, *e.g.*, David Tolbert & Fergal Gaynor, *International Tribunals and the Right to a Speedy Trial: Problems and Possible Remedies*, 27 LAW IN CONTEXT 33 (2009); ZAPPALÀ, PROCEEDINGS, *supra* note 3, at 253.

9. Starr, *supra* note 3; Turner, *supra* note 2; Daniel Naymark, *Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy*, 4 J. INT'L L. & INT'L REL. 1 (2008).

10. *See* Turner, *supra* note 2, at 184 (describing the absolutist approach as a doctrine under which "once the court concludes that a violation of certain rights has occurred, it has to order a full and effective remedy, regardless of its cost").

11. *Id.* at 184–204; Starr, *supra* note 3, at 752–66.

12. *See*, *e.g.*, Gatete v. Prosecutor, Case No. ICTR-00-61-A, Appeals Judgment, ¶ 286 (Oct. 9, 2012) [hereinafter *Gatete* Appeals Judgment], http://www.unictr.org/Portals/0/Case/English/Gatete/judgement/121009%20-%20Appeal%20Judgement.pdf; Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment, ¶ 1107 (Dec. 3, 2003) [hereinafter *Barayagwiza* Judgment; note that Nahimana and Barayagwiza were co-accused, and this Article refers only to issues relevant to Barayagwiza], http://www.unictr.org/Portals/0/Case/English/Ngeze/judgement/Judg&sent.pdf; Kajelijeli v. Prosecutor, Case No. ICTR-98-

However, sentence reduction in these cases is problematic. Indeed, sentence reduction can usually balance the tension between the competing goals better than a stay of proceedings. However, as will be argued *infra*, sentence reduction inevitably involves a compromise that harms the main goals of international criminal justice: a significant reduction would undermine the goals of sentencing, including retribution and deterrence, as well as the expressive function of sentencing; whereas an insignificant reduction would fail to achieve the primary goals of remedies: compensating the accused and deterring the authorities from violating rights.

As a solution to the remedial dilemma for Second Type violations, this Article argues for the adoption of monetary compensation, even in cases that result in conviction. Monetary compensation, which to date has been recognized as a remedy only in acquitted cases, is best suited to accommodate the tension between the different goals of ICL, since it does not harm the goals of international criminal sentencing and can usually provide an effective remedy for Second Type violations—or at least, no less effective a remedy than sentence reduction.

Part I of this Article begins with a description of the development of the remedial doctrine for Second Type violations. It describes the shift from the absolutist approach to remedies to an interest-balancing approach with regard to the right for an initial appearance without undue delay, and suggests a potential recent evolution toward the balancing approach in the context of violations of the right to a speedy trial. Part I focuses on the ICTR, since most of the litigation on Second Type violation remedies took place there. This part also addresses the case law of other international criminal tribunals, where the ICTR remedial doctrine seems to have gained (at least some) support. Part II of the Article discusses the current remedial doctrine adopted by various tribunals, and provides a critique of the literature on the subject, demonstrating the inadequacy of sentence reduction as the main remedy for Second Type violations in cases that result in conviction. Finally, Part III presents the argument for adopting monetary compensation as the optimal remedy in these situations.

44A-A, Appeals Judgment, ¶ 324 (May 23, 2005) [hereinafter *Kajelijeli* Appeals Judgment], http://www.unictr.org/Portals/0/Case/English/Kajelijeli/judgement/appealsjudgement.doc.pdf.

I. REMEDIES FOR SECOND TYPE VIOLATIONS

A. The *Barayagwiza* Case

The question of what remedy to provide in the event of a violation of a defendant's right to a fair trial first arose at the ICTR in the case of Jean Bosco Barayagwiza. Barayagwiza was indicted for being one of the founders and operators of RTLM, the main radio station that incited against the Tutsis in Rwanda before and during the 1994 genocide. In its decision from November 3, 1999, the Appeals Chamber dismissed the indictment against Barayagwiza "with prejudice" and ordered his immediate release,[13] holding that Barayagwiza's rights under the ICTR statute had been violated, including, *inter alia*, the failure to inform him of the charges against him for eleven months and an undue delay of 96 days before his initial appearance. The Appeals Chamber concluded that dismissal was the only proper remedy in this case.[14]

The response to the Appeals Chamber's decision was swift and negative. Human rights organizations criticized the decision, and more importantly, the Rwandan government threatened to suspend all cooperation with the Tribunal.[15] In March 2000, the Appeals Chamber took the exceptional step of reviewing its decision, in light of new evidence not known at the time of the original decision.[16] It changed its original ruling of November 1999 and found that new evidence demonstrated that the delays were less extreme than originally believed. Among other issues, the Appeals Chamber determined that there was an undue delay of only twenty days in Barayagwiza's initial appearance. The Appeals Chamber ruled that the appropriate remedy for the violations was not dismissal of all charges, but

13. Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision (Nov. 3, 1999) [hereinafter *Barayagwiza* November Decision], http://www.unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs991103.pdf.

14. *Id.* at ¶ 108.

15. Mercedeh Momeni, *Why Barayagwiza is Boycotting His Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics*, 7 ILSA J. INT'L & COM. L. 315, 319 (2001); William. A. Schabas, *Barayagwiza v. Prosecutor (Decision and Decision (Prosecutor's Request for Review or Reconsideration)) Case No. ICTR-97-19-AR72*, 94 AM. J. INT'L L. 563, 565 (2000).

16 Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision (Prosecutor Request for Review or Reconsideration), ¶ 74 (Mar. 31, 2000) [hereinafter *Barayagwiza* March Decision], http://www.unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs20000331.pdf.

rather a reduced sentence in the event of conviction and monetary compensation in the event of acquittal.[17] The court stated, however, that the original ruling was still valid with regard to the evidence available at that time, thereby suggesting that a future egregious violation would, in fact, result in release and dismissal.[18]

Taken jointly, these two Appeals Chamber decisions ostensibly provided the ICTR's remedial doctrine: the appropriate remedy for a severe breach of the rights of the accused is dismissal and release; a less severe breach should be remedied by sentence reduction in the case of conviction (in addition to the mandatory deduction of the preconviction detention)[19] and monetary compensation in case of acquittal. In later ICTR case law, declaratory relief was added to the remedial doctrine as a remedy to be applied where the prejudice to the accused is minimal.[20]

The *Barayagwiza* decisions demonstrate the notable tension at hand. The Tribunal explicitly stated that the March 2000 decision was not affected by political considerations.[21] However, the reaction to the November 1999 decision—most notably the Rwandan government's threat to suspend its cooperation with the tribunal—seems to have significantly influenced the March 2000 decision.[22] In Daryl Levinson and Sonya Starr's terminology, the inability to award a stay of proceedings results where there is "remedial deterrence."[23] Remedial deterrence occurs when the price of a remedy is higher than its benefit. In such cases, courts will not apply the prescribed remedy and will instead find ways around it. In the

17. *Id.* at ¶ 75.

18. *Id.* at ¶ 51.

19. Rome Statute, *supra* note 1, art. 78(2); ICTR, Rules of Procedure and Evidence, Rule 101(C) (Apr. 10, 2013), http://www.unictr.org/Portals/0/English/Legal/Evidance/English/130410amended%206_26.pdf; ICTY, Rules of Procedure and Evidence, Rule 101(C), IT/32/Rev.48 (Nov. 19, 2012), http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev48_en.pdf; Johan D. Michels, *Compensating Acquitted Defendants for Detention before International Criminal Tribunals*, 8 J. INT'L CRIM. JUST. 407, 417 (2010).

20. Prosecutor v. Bagosora (Military I), Case No. ICTR-98-41-T, Judgment and Sentence, ¶ 97 (Dec. 18, 2008) [hereinafter *Bagosora* Judgment], http://www.unictr.org/Portals/0/Case/English/Bagosora/Judgement/081218.pdf.

21. *Barayagwiza* November Decision, *supra* note 13, at ¶ 34.

22. Momeni, *supra* note 15, at 323; Jacob K. Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 135 (2002).

23. Starr, *supra* note 3; Daryl L. Levinson, *Essentialism and Remedial Rights Equilibration*, 99 COLUM. L. REV. 857 (1999).

case of ICL, where the expectation for perpetrators' accountability is high, the release of an accused would generally be regarded as too high a price; such a remedy will almost never be applied. Instead, courts tend to adopt an interest-balancing approach, granting less dramatic remedies.

In fact, the November decision was not only overturned by the March decision, but has never been followed by any international tribunal. Even in the *Lubanga* case, where First Type violations—those that might affect the accuracy of the court's finding—were at issue, the ICC Trial Chamber ordered (in two separate decisions) the release of the accused, but, the ICC Appeals Chamber reversed the decisions, finding that less drastic remedies should be granted.[24] The ICTR abstained from granting a stay of proceedings in all post-*Barayagwiza* fair trial violations cases.[25] Finally, the International Criminal Tribunal for the former Yugoslavia (ICTY) explicitly rejected the absolutist approach in cases where the violations of the right to a fair trial are not exceptionally severe in its Appeals Chamber decision in *Nikolić*, declining to dismiss the charges and stating that "[t]he correct balance must therefore be maintained between the fundamental rights of the accused and essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law."[26]

B. Post-*Barayagwiza* Remedial Case Law

Since *Barayagwiza*, most of the case law regarding Second Type violations has involved two rights, the right to an initial appearance without undue delay and the right to be tried without undue delay.

24. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 12, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled "Decision on the Release of Thomas Lubanga Dyilo" (Oct. 21, 2008), http://www.icc-cpi.int/iccdocs/doc/doc578365.pdf; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 18, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 Entitled "Decision on the Prosecutor's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU" (Oct. 8 2010) [hereinafter *Lubanga* Remedial Appeal], http://www.icc-cpi.int/iccdocs/doc/doc947768.pdf.

25. See *infra* Section I.B.

26. Prosecutor v. Nikolić, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, ¶ 30 (ICTY, June 5, 2003), http://www.icty.org/x/cases/dragan_nikolic/acdec/en/030605.pdf. *See* James Sloan, *Prosecutor v. Dragan Nikolić: Decision on Defence Motion on Illegal Capture*, 16 LEIDEN J. INT'L L. 541 (2003).

1. The right to an initial appearance without undue delay

The standard for a violation of the right to appear before a judge without delay, as was recognized in the November *Barayagwiza* decision, is clear cut: any delay that exceeds a few days is a breach of this right.[27] In the *Barayagwiza* case itself, the Appeals Chamber found in its March decision that a 20-day delay constituted a violation of Barayagwiza's rights.[28] Hence, the Tribunal's margin of discretion to determine whether a violation had occurred is rather limited.

Indeed, in several cases, the court determined that the rights of the accused to be brought before a judge without delay had been violated.[29] Following the March *Barayagwiza* decision, in such cases the ICTR chose to apply the remedies of reduced sentence following a conviction and monetary compensation following an acquittal. Barayagwiza himself received a reduced sentence of 35 years instead of life.[30] Likewise, Kajelijeli received a reduced sentence of 45 years instead of two life sentences plus 15 years (to run concurrently);[31] Rwamakuba, who was acquitted, got $2,000 compensation, granted for a violation of his right to legal assistance.[32] In *Semanza*, the Tribunal reduced six months of a 25-year sentence for a violation of the accused's right to be promptly informed of the charges against him.[33] In the *Bagosora et al.* judgment, however, the Tribunal took a different path. Here, it determined that the right to an initial appearance without undue delay was violated, but granted only declaratory relief, since the accused's failure to raise the issue for a long time indicated minimal, if any, prejudice suffered.[34]

27. *Barayagwiza* November Decision, *supra* note 13, at ¶ 70.

28. *Barayagwiza* March Decision, *supra note* 16, at ¶ 62.

29. *Bagosora* Judgment, *supra* note 20, at ¶¶ 93, 96; *Kajelijeli* Appeals Judgment, *supra* note 12, at ¶ 253; Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, Judgment and Sentence, ¶ 217 (Sept. 20, 2006), http://www.unictr.org/Portals/0/Case/English/Rwamakuba/judgement/060920-rwamakuba.pdf.

30. *Barayagwiza* Judgment, *supra* note 12, at ¶ 1107.

31. *Kajelijeli* Appeals Judgment, *supra* note 12, at ¶ 324.

32. Rwamakuba v. Prosecutor, Case No. ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, ¶¶ 28, 31 (Sept. 13, 2007) [hereinafter *Rwamakuba* Remedial Appeal], http://www.unictr.org/Portals/0/Case/English/Rwamakuba/decisions/070913.pdf.

33. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 590 (May 15, 2003), http://www.unictr.org/Portals/0/Case/English/Semanza/decisions/index.pdf.

34. *Bagosora* Judgment, *supra* note 12, at ¶¶ 93, 96–97.

2. The right to be tried without undue delay[35]: From remedial deterrence toward a possible interest-balancing approach to remedies

Although violation of the right to a speedy trial might affect the accuracy of witnesses' memory and be accompanied with a loss of some physical evidence,[36] leading to classification as a First Type violation, this type of violation is often considered a Second Type fair trial violation.[37] In some domestic systems, the right to a speedy trial exists only in cases where the accused is held in detention.[38] This practice supports the position that the main goals of the right are "to limit infringement on personal freedom" during criminal proceedings and to minimize the emotional stress of the accused while awaiting judgment.[39] In international criminal adjudication, where the accused is usually held in detention, protecting this right is most significant.[40] Moreover, in every case claiming such a violation adjudicated before the ICTR, the accused was unable to establish that the long duration of the proceedings prejudiced his defense.[41] This Article concentrates only on Second Type violations: those cases in which it is established that the violation of the right to a speedy trial did not lead to material injustice in the trial. This follows the path taken by some domestic law remedial doctrines, wherein different remedies exist, depending on whether the violation of the right to a speedy trial was a First or Second Type violation.[42] The violation of the right to be tried without undue delay, then, generally falls within this Article's scope.

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35. Also referred to as the "right to a speedy trial."

36. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 285–86 (1993); Brian Farrell, *The Right to a Speedy Trial before International Criminal Tribunals*, 19 S. AFR. J. ON HUM. RTS. 98, 99(2003).

37. Starr, *supra* note 3, at 761; Heller, *supra* note 5.

38. Bassiouni, *supra* note 36, at 286.

39. *Id.* at 285.

40. For a criticism on ICL detention policy, *see*, *e.g.*, Andrew Trotter, *Pre-Conviction Detention in International Criminal Trials*, 11 J. INT'L CRIM. JUST. 351 (2013); Caroline L. Davidson, *No Shortcuts on Human Rights: Bail and the International Criminal Trial*, 60 AM. U. L. REV. 1 (2010); Daniel J. Rearick, *Innocent until Alleged Guilty: Provisional Release at the ICTR*, 44 HARV. INT'L L.J. 577 (2003).

41. *See*, *e.g.*, *Gatete* Appeals Judgment, *supra* note 12, at ¶¶ 242–43; *Bagosora* Judgment, *supra* note 20, at ¶ 83.

42. EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), CAN EXCESSIVE LENGTH OF PROCEEDINGS BE REMEDIED? 34 nn.127–28 (2007) [hereinafter CAN EXCESSIVE LENGTH OF PROCEEDINGS BE REMEDIED?].

a. Remedial deterrence—No violation, no remedy. Until recently, neither the ICTR nor the ICTY had ever held that the right to a speedy trial had been violated, even in cases involving very long trial proceedings that took place while the accused were being held in detention.[43] The Tribunals' jurisprudence on this issue has received much criticism, centering on a claim that they failed to comply with appropriate fair trial standards.[44] As discussed above, Sonja Starr offered the concept of remedial deterrence as a possible explanation for this jurisprudence. Indeed, the reasoning of the *Barayagwiza* November decision implies that violation of the right to a speedy trial would result in dismissal of the charges and immediate release.[45] The ICTY interpreted the *Barayagwiza* decision in this manner in an Appeal Chamber decision in *Karadžić*, but limited it to "egregious violation of his rights."[46] The Tribunals, which following the *Barayagwiza* cases have been unwilling to grant a stay of proceedings again, have been using their interpretive tools to avoid the remedial problem.

The Tribunals' approach can be seen in a decision, in which the justices extended their reasoning quite far to avoid concluding that a violation of the right to a speedy trial occurred. In *Mugenzi*, the Appeals Chamber determined that no undue delay took place,[47] despite 12 and a half years

43. *See*, *e.g.*, Prosecutor v. Šešelj, Case No. IT-03-67-T, Decision on Oral Request of the Accused for Abuse of Process, ¶¶ 19–23, 27–30 (ICTY, Feb. 10, 2010), http://www.icty.org/x/cases/seselj/tdec/en/100210a.pdf; Prosecutor v. Karemera, Case No. ICTR-98-44-T, Judgment and Sentence, ¶ 42 (Feb 2, 2012), http://www.unictr.org/Portals/0/Case/English/Karemera/Judgement/120202%20-%20JUDGEMENT.pdf; Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Appeals Judgment, ¶¶ 1076–77 (Nov. 28, 2007), http://www.unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgement.pdf; *Bagosora* Judgment, *supra* note 20, at ¶ 84.

44. *See*, *e.g.*, Starr, *supra* note 3, at 720–23; Tolbert & Gaynor, *supra* note 8, at 33–34; Yvonne McDermott, *Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law*, *in* THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES 165, 165–66 (William. A. Schabas, Yvonne McDermott, & Niamh Hayes eds. 2012); *but see* Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT'L L.J. 323 (2009).

45. *Barayagwiza* November Decision, *supra* note 13, at ¶ 108; Starr, *supra* note 3, at 722.

46. Prosecutor v. Karadžić, Case No. IT-95-5/18-AR73.4, Decision on Karadžić's Appeal on Trial Chamber's Decision on Alleged Holbrooke Agreement, ¶¶ 46–47 (ICTY, Oct. 12, 2009), http://www.icty.org/x/cases/karadzic/acdec/en/091012.pdf.

47. Mugenzi v. Prosecutor, Case no. ICTR-99-50-A, Appeals Judgment, ¶ 37 (Feb 4, 2013) [hereinafter *Mugenzi* Appeals Judgment], http://www.unictr.org/Portals/0/Case/English/Mugenzi/Judgment/130204-Appeal%20Judgment.pdf.

of detention pending judgment by the Trial Chamber, almost 14 years between the initial detention and the Appeals Chamber judgment, and especially, nearly three years between the final trial submissions and the issuance of the Trial Chamber's judgment.[48] In his dissenting opinion, Judge Robinson found that the long period spent drafting the judgment violated the rights of the accused, and sought to grant each of them, following their acquittal, $5,000 as compensation for their moral damage.[49] In another case, the *Nyiramasuhuku et al.* case, one of the co-accused, Ndayambaje, was arrested on 28 June 1995, but the judgment was not handed down until 24 June 2011. The nearly 16 years of detention Ndayambaje endured constitute the longest prejudgment detention in the history of ICL. However, the Trial Chamber reached the conclusion that there was no undue delay in the proceedings, despite some delays that were clearly not attributed to the defense, including eight and a half months of delay due to the court's own judge appointment process. The appeal on the Trial Chamber's judgment is still pending.[50]

b. A possible shift toward a balancing approach to remedies. Initial signs of change are emerging regarding the remedial doctrine concerning the right to a speedy trial. In the *Gatete* judgment of October 2012, the ICTR recognized for the first time that an accused's right to a trial without undue delay had been violated.[51] The case involved a pretrial phase of more than seven years, part of which resulted from undue delays attributed to the prosecution and the Trial Chamber.[52] The Appeals Chamber chose to turn away from the former considerations applied in other cases to avoid needing to provide remedy, such as the fact that some of Gatete's submissions were impermissible expansions of his appeal, or that he did not

48. Two of the co-accused in Prosecutor v. Bizimungu (Government II) were acquitted by the Trial Chamber, *see* Prosecutor v. Bizimungu, Case No. ICTR-99-50-T, Judgment and Sentence (Sept. 30, 2011) [hereinafter *Bizimungu* Judgment], http://41.220.139.29/tabid/128/Default.aspx?id=78&mnid=2; the other two were acquitted by the Appeals Chamber following their appeal, see *Mugenzi* Appeals Judgment, *supra* note 47.

49. *Mugenzi* Appeals Judgment, *supra* note 47, Partially Dissenting Opinion of Judge Patrick Robinson.

50. Prosecutor v. Nyiramasuhuku, Case No. ICTR-98-42-T, Judgment and Sentence, ¶ 135 (June 24, 2011), http://41.220.139.29/tabid/128/Default.aspx?id=83&mnid=2.

51. *Gatete* Appeals Judgment, *supra* note 12, at ¶ 45.

52. *Id.* at ¶ 23.

demonstrate a specific prejudice.[53] The Tribunal reduced the accused's sentence from life imprisonment to 40 years, referring to the *Barayagwiza* March decision precedent.[54] This decision, together with Judge Robinson's dissenting opinion in the *Mugenzi* Appeal Judgment and with Judge Short's dissenting opinion in the Trial Chamber judgment of the same case[55] (which sought to grant a five-year sentence reduction), may be signs of change in the Tribunal's position in regard to the appropriate remedy for violations of the right to a speedy trial. In his concurring opinion in the decision on continuation of proceedings in *Šešelj* at the ICTY, Judge Antonetti suggested that reduction of sentence in case of conviction and compensation in case of acquittal should be used when the accused's right to a speedy trial has been violated.[56] This possible change may be explained, in part, by the justified criticism the Tribunals were facing regarding their failure to adequately protect the right to a speedy trial.[57]

3. Sentence reduction as a remedy for Second Type violations in other international criminal tribunals

Some evidence indicates that the ICTR's interest-balancing approach to remedies for Second Type violations has gained (at least some) support in both the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the ICTY. The ECCC's Trial Chamber in *Duch* explicitly adopted the ICTR's remedial doctrine[58] and granted the accused a five-year sentence reduction for violations of his rights to a trial within a reasonable time and

53. *Id.* at ¶¶ 20, 44; see Starr, *supra* note 3, at 725–28; *Bagosora* Judgment, *supra* note 20, at ¶¶ 93, 96.

54. *Gatete* Appeals Judgment, *supra* note 12, at ¶¶ 286–87.

55. *Bizimungu* Judgment, *supra* note 48, Partially Dissenting Opinion of Judge Emile Francis Short.

56. Prosecutor v. Šešelj, Case No. IT-03-67-T, Decision on Continuation of Proceedings, Concurring Opinion of Judge Antonetti (ICTY, Dec. 13, 2013), http://www.icty.org/x/cases/seselj/tdec/en/131213.pdf. The other Judges did not address the issue.

57. See *supra* note 44.

58. Prosecutor v. Kaing Guek Eav (Duch), Case No. 001/18-07-2007-ECCC/TC, Decision on Request for Release, ¶¶ 35–37 (June 15, 2009), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E39_5_EN.pdf.

detention in accordance with the law.[59] The Supreme Court Chamber reversed the decision of the Trial Chamber, determining that no remedy should be given in the absence of abuse of process or responsibility of the ECCC for the violations of the accused's rights. The Supreme Court Chamber did not address the remedial issue directly, but its rhetoric seems to accept the jurisprudence of the ICTR on the subject.[60] Moreover, in their joint dissenting opinion, Judges Klonowiecka-Milart and Nihal Jayasinghe determined that the accused's rights were violated and granted a reduction of sentence as a remedy.[61] At the ICTY, although the Tribunal has not yet granted a reduction of sentence, the *Karadžić* Trial Chamber seems to have adopted the ICTR remedial doctrine, suggesting that the remedy is dependent on the outcome of the trial—sentence reduction in the event of conviction and monetary compensation in the event of acquittal.[62] Judge Antonetti's concurring opinion in *Šešelj*, discussed above, strengthens this position. The ICC position regarding sentence reduction is less clear: the Court declined to reduce the accused's sentence as a remedy for alleged fair trial violations in the *Lubanga* case, although it did not deny the availability of such a remedy in other cases,[63] and Jenia Turner even suggests that, in effect, the court had granted sentence reduction in the *Lubanga* case in an indirect manner, through the framework of rewarding

59. Prosecutor v. Kaing Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 625–27 (July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf.

60. Prosecutor v. Kaing Guek Eav (Duch), Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶¶ 390–97 (Feb. 3, 2012) [hereinafter *Duch* Appeal], http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf.

61. *Id.* Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe, at ¶¶ 17–20.

62. Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Decision on the Accused's Motion for Remedy for Violation of Rights in Connection with Arrest ¶ 5 (Aug. 31, 2009), http://www.icty.org/x/cases/karadzic/tdec/en/090831.pdf. For similar interpretation of the decision see Karl de Meester et al., *Investigation, Coercive Measures, Arrest and Surrender*, in INTERNATIONAL CRIMINAL PROCEDURE—RULES AND PRINCIPLES 361–62 (Goran Sluiter et al. eds. 2013) [hereinafter INTERNATIONAL CRIMINAL PROCEDURE].

63. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute, ¶ 90 (July 10, 2012), http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/court%20records/chambers/trial%20chamber%20i/Pages/2901.aspx; INTERNATIONAL CRIMINAL PROCEDURE, *Id.* at 367.

cooperation with the court.[64] In other international and internationalized criminal tribunals, no case law on the subject exists, though it seems that granting lesser remedies, such as monetary compensation, is possible under their rules of procedure.[65]

The international case law regarding remedies demonstrates the tension between furthering the goal of punishing those who committed atrocities and protecting the rights of an accused. An extensive remedy jeopardizes the first goal, while failing to provide effective remedies undermines the second. As a solution to this problem, international criminal courts seem to be generally moving toward a more balanced remedial doctrine, whereby sentence reduction and in some cases declaratory relief are the main remedies applied. However, this approach, as demonstrated below, is inadequate.

II. THE INSUFFICIENCY OF THE CURRENT REMEDIAL DOCTRINE

The change in the remedial doctrine toward interest balancing has gained support in the literature in the last few years. Specifically, scholars have come to support sentence reduction as the main remedy for Second Type violations in cases that result in conviction.[66] For instance, Turner suggests that the ICC should adopt sentence reduction as a remedy for Second Type violations, as the best means to balance the competing goals of international criminal justice.[67]

Indeed, sentence reduction provides a better remedial tool than either releasing the accused or issuing a declaratory relief. As mentioned above, remedies for fair trial violations are intended to serve two main goals:[68] the first, which some view as the main goal of such remedies,[69] is to compensate the accused, putting him in the position he was in prior to

64. Turner, *supra* note 2, at 224.

65. International Criminal Procedure, *supra* note 62, at 371–72.

66. Starr, *supra* note 3, at 758–59; Turner, *supra* note 2, at 217–25; Naymark, *supra* note 9, at 16 (claiming that the *Barayagwiza* March Decision should be adopted).

67. Turner, *supra* note 2, at 221.

68. *See*, *e.g.*, *id*. at 215–16; *Barayagwiza* November Decision, *supra* note 13, at ¶ 108.

69. Dina Shelton, Remedies in International Human Rights Law 38 (1999); Starr, *supra* note 3, at 699–700.

the violation;[70] the second is to deter authorities from violating rights. In addition, appropriate remedies serve to enhance respect for human rights and the rule of law, and to maintain the court's legitimacy.

In almost all cases of Second Type violations, releasing the accused cannot adequately address the different remedial goals. With regard to compensation, release is usually a gross overcompensation.[71] The moral damage that a guilty person suffers—for example, from a ten-year delay in trial—is incommensurate with the waiver of lifetime in prison or even a dismissal of 15-year sentence.[72] It is important to stress in this regard that the harm of the convicted in Second Type violations cases is usually a nonpecuniary damage; it involves neither any undue time spent in detention nor a material damage to the defense. Second, the remedy is an inflexible one. The damage caused to a defendant is not the same in every case. If charges are simply dismissed in all cases of delay, unequal violations will be treated as if they were equal.[73] Moreover, as noted, given the remedial deterrence that prevents courts from applying this remedy, it will be rarely used and thus, in effect, will bear almost no deterrent effect. Lastly, releasing the accused might harm the legitimacy of the court, since it will be regarded as a windfall to the defendant and a severe blow to other goals of international criminal justice.[74]

Declaratory relief for violations of the accused's rights, on the other hand, usually involves under-compensation and under-deterrence.[75] Its use by the European Court of Human Rights (ECtHR) as a remedy for human rights violations, including fair trial ones, has drawn much criticism.[76] Indeed, in the case of conviction, the damage to the accused is mostly a moral damage, which is usually less severe than material damage to his defense or wrongful detention. However, the damage of the violation is usually not a marginal one. For example, violations of the right to

70. SHELTON, *id.*; Starr, *id.*

71. Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1537 (2009) [hereinafter Starr, *Sentence Reduction*].

72. A ten-year delay is common at the ICTR. The length of sentences in international criminal courts is usually high, although differences exist between the different courts. *See* Barbora Holá, Alette Smeulers, & Catrien Bijleveld, *Facts and Figures—Sentencing Practice at the ICTY and ICTR*, 9 J. I. CRIM. JUST. 411 (2011).

73. Starr, *Sentence Reduction*, *supra* note 71, at 1547–48.

74. *Id.* at 1538.

75. Turner, *supra* note 2, at 230; SHELTON, *supra* note 69, at 213; Starr, *supra* note 3, at 762.

76. Starr, *supra* note 3, at 733.

a speedy trial often involve the stress caused by uncertainty regarding the outcome of the case. Moreover, the violation also involves a nonpecuniary damage caused by the expressive harm of the violation: the violation of the right to a speedy trial takes place prior to a decision being made regarding the accused's guilt, and therefore, taking into consideration the presumption of innocence, it expresses disrespect to the accused's rights, especially his right to liberty.[77] It is not surprising, therefore, that the court concluded that the damage suffered in cases involving the violation of the right to a speedy trial at the ICTR and the ECtHR involved prejudice per se that requires compensation beyond declaratory relief.[78]

Despite its clear advantage over some alternatives, sentence reduction is far from being an ideal remedy. First, to be an effective remedy, sentence reduction will probably harm the other goals of international criminal sentencing—retribution and deterrence, in particular, but also the expressive function of sentencing.[79] Turner accepts the possibility that in some cases, granting a significant sentence reduction might harm these goals, but claims that employing a proportionality test would guarantee that the remedial goal be achieved while "the ultimate sentence does not significantly underrepresent the defendant's blameworthiness."[80] However, it seems that this balance cannot be achieved, since the specific years of imprisonment in the accused's sentence plays a significant role in both retribution and deterrence.[81] Therefore, any significant change in

77. Starr, *Sentence Reduction*, *supra* note 71, at 1533, 1535.

78. *See*, *e.g.*, *Gatete* Appeals Judgment, *supra* note 12, at § 44; Kashavelov v. Bulgaria, App. no. 891/05, ¶ 56 (ECtHR, 2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx? i=001-102908.

79. There are other goals of sentencing in both domestic and international law. However, this article focuses on these three goals, since the first two seem to be the most prominent goals adopted by international criminal courts, while the expressive function has been gaining prominence in the literature. *See*, *e.g.*, Sam Szoke-Burke, *Avoiding Belittlement of Human Suffering—A Retributive Critique of ICTR Sentencing Practices*, 10 J. Int'l Crim. Just. 561, 568 (2012); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 Stan. J. Int'l L. 39 (2007); *but see* William A. Schabas, *Sentencing by International Tribunals: a Human Rights Approach*, 7 Duke J. Comp. & Int'l L. 461, 467 (1997) [hereinafter Schabas, *Sentencing*].

80. Turner, *supra* note 2, at 223.

81. *See*, *e.g.*, Szoke-Burke, *supra* note 79, at 570; Allison M. Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 Va. L. Rev. 415, 438 (2001); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

sentencing will probably affect both goals. Indeed, if the reduction is insignificant, it might not affect retribution and deterrence.[82] However, as Turner herself points out, in such cases, sentence reduction will not serve as an effective remedy.[83] For example, in the *Gatete* judgment, the sentence was reduced from life imprisonment to 40 years, which means that Gatete will be released at the age of 90. Under these circumstances, even after the reduction, Gatete is essentially being sentenced to life imprisonment. This is the situation in nearly all of the cases in which the ICTR has granted sentence reduction.[84]

Moreover, sentence reduction might involve a significant harm to the expressive function of sentencing. From an expressive perspective, punishment by international courts serves, *inter alia*, to communicate the moral denunciation and condemnation of international crimes.[85] The expressive function of the punishment can inform deterrence and especially retribution, and might mitigate some of the criticisms raised regarding these two goals in the ICL context.[86] In relation to retribution, no punishment seems to really fit the severity of ICL crimes—at least not one that complies with international human rights law (IHRL).[87] A partial solution to this problem can be found in what Robert Sloan defines as the "expressive proportionality" of sentencing. On not-too-lenient cardinal proportionality, "punishment should convey the right degree of international condemnation *relative* to other defendants within the jurisdiction of the relevant tribunal."[88] This can be achieved through a system in which "more culpable crimes [are] more severely punished," taking into account the nature of the crimes and the relevant mitigating and aggravating circumstances.[89] Thus, we acknowledge that the punishment cannot fit the crimes, but it can be a symbol of moral condemnation.

82. However, even an insignificant sentence reduction might affect the expressive function of sentencing, as explained *infra*.

83. Turner, *supra* note 2, at 222.

84. *Id.*

85. *See*, *e.g.*, David Luban, *Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW, 569, 576 (Samantha Besson & John Tasioulas eds., 2010); Sloane, *supra* note 79, at 83; Danner, *supra* note 81, at 490.

86. *See*, *e.g.* Danner, *supra* note 81, at 489–90; Sloane, *supra* note 79, at 65–85.

87. Sloane, *id.* at 82.

88. *Id.*

89. *Id.*

In the same way, the remedy for the fair trial violation serves an expressive purpose: the condemnation of the violation and the desire to compensate the accused.[90] Some scholars argue that it will not be difficult for courts to communicate a mixed message, and therefore sentence reduction might be consistent with the expressive function of sentencing.[91] However, sentence reduction can significantly harm the expressive function of sentencing. By reducing the accused's sentence according to Second Type fair trial violations, the court places the crime and the fair trial violation on the same scale; an inconceivable crime becomes something that we can measure against other—much less severe—violations of rights. To maintain the "expressive proportionality" function of punishment, the punishment itself must be separated from the influence of considerations that are not relevant to the culpability of the accused.

Another reason for the inadequacy of sentence reduction as a remedy for Second Type violations relates to the question of the relevant community that ICL addresses. Although the interest in punishing the accused is common to the entire international community, it is possible to claim that the society that suffered from the atrocities has a larger share in this interest. As William Schabas notes with regard to the ICTR, the Rwandan "people are supposed to be the principal beneficiaries of this international effort at justice and accountability."[92] Not by coincidence, the harshest response to the November *Barayagwiza* decision came from the Rwandan government, while the rest of the international community remained relatively untroubled. Accordingly, it might be unjust to reduce a sentence, because doing so would affect a domestic community more significantly than the international community at large, but that community may not be responsible for the misconduct that the sentence reduction was designed to remedy.[93]

90. *See*, *e.g.*, Starr, *Sentence Reduction*, *supra* note 71, at 1534–37.

91. Starr, *Sentence Reduction*, *supra* note 71, at 1543; Oren Bick, *Remedial Sentence Reduction*, 51 CRIM. L.Q. 199, 224–25 (2006).

92. Schabas, *supra* note 15, at 566–67; Antony Duff, *Authority and Responsibility in International Criminal Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW, 589, 601 (Samantha Besson & John Tasioulas eds., 2010) (arguing that the jurisdiction of international tribunals is additional to the one of the domestic community); *but see* Sloane, *supra* note 79, at 47–56 (accepting the dual interests but claiming that ICL should focus primarily on the interests of the international community).

93. One may argue that when the domestic community is unable or unwilling to mete justice themselves, this is a small price they pay for internationalizing the criminal process (this notion is relevant to a complementarity regime much more than to the ad hoc

Consequently, even under the sentence reduction rubric, international criminal courts still face a dilemma: significant sentence reduction harms the goals of international criminal sentencing, whereas a minimal, symbolic reduction harms remedial goals.[94] Sentence reduction is just a tool, a proxy to the damage done to the accused; when it affects significantly and more severely a wider audience than the authorities who caused the harm, it might not be a suitable remedy. Second Type violations are actions of the authorities that are unrelated to the proof of the case against the accused. As such, the remedy ought not to be related to the punishment, which should fit the crime.

III. MONETARY COMPENSATION AS A REMEDY FOR SECOND TYPE VIOLATIONS OF FAIR TRIAL RIGHTS

A. The Case for Monetary Compensation as a Remedy for Second Type Violations

Monetary compensation is the remedy that can best address the tension between ICL's competing goals. The core argument in this regard is that monetary compensation does not harm the goals of international sentencing. In contrast to a stay of proceedings and sentence reduction, monetary compensation is independent from the punishment of the accused. Thus, it enables courts to achieve their various remedial goals while not interfering with the main goals of sentencing, specifically retribution and deterrence. It does so by disconnecting the remedial adjudication from the main criminal one. This separation also supports the expressive function of both the punishment and the remedy, and guarantees that justice will be done and

tribunals). However, it is not clear that we should equate the government of a community and the community itself. Moreover, at least in cases in which the domestic community is unable to prosecute, replacing the domestic community's role does not necessarily justify international criminal courts in placing much of the burden of the remedies for their own fair trial violations on the domestic community.

94. Reducing the accused's sentence due to second type violations is quite different from weighing the personal circumstances of the accused as aggravating and mitigating factors. Unlike fair trial violations, these circumstances, and most of the other factors taken into account, express either the degree of culpability of the accused or the effect of the sentence on him (*see*, *e.g.*, Schabas, *Sentencing*, *supra* note 79, at 483–98). Therefore, they must be considered in order to achieve the main sentencing goals.

that the international community will believe it to be done. As discussed above, from an expressive point of view, punishment conveys a message of denunciation. Imprisonment is a symbol of this denunciation and not an accurate manifestation of the harm caused by the crime. In the same way, the remedy serves as a symbol that conveys a message of condemnation of the violation and of respect to the rights of the accused. By separating the two messages, the court can maintain their symbolic messages loud and clear.

The advantage of monetary compensation is dependent, however, on its ability to fulfill the remedial goals as well. In this regard it is important to emphasize that usually *ex post* remedies are only second best and cannot achieve their goals completely. Therefore, the argument in this part is rather limited: monetary compensation is at least as effective as the alternative remedies in fulfilling its remedial goals. As discussed earlier, the first purpose of remedial action is to make the accused whole again. Thus, when a remedy is available that gives the opportunity to return the accused his pre-harm position, the tribunal should use it.[95] However, it is often impossible to accomplish this in a direct or simple way. For example, if the accused was brought before a judge after 90 days, one cannot go back in time and bring him before the judge without delay. Consequently, the court must choose a remedy that comes closest to making the accused whole.

In domestic tort law, where the principle of making the injured party whole is the main remedial objective,[96] courts often deal with cases in which a full, direct compensation is not possible. Instead, they use the second best alternative and compensate the injured person monetarily for her loss. Doing so provides the closest available approximation of making her whole. Indeed, in domestic tort litigation cases that involve Second Type violations of fair trial rights can be decided by civil courts.[97] Moreover, tort law also compensates for nonpecuniary damages, where assessing the exact amount of compensation that is required for an effective remedy to the injured party is much harder. Although monetary

95. SHELTON, *supra* note 69, at 44.

96. Harry Kalven Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 160 (1958); *but see* John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2006).

97. *See*, *e.g.*, Guido Calabresi, *The Exclusionary Rule*, 23 HARV. J. L. & POL'Y III (2003).

compensation is often criticized as being incommensurable with nonpecuniary damages,[98] no one has yet proposed a better substitute for compensating the harm suffered.[99] The favored alternative, sentence reduction, fares no better in this regard, with similar problems regarding incommensurability and difficulty in quantifying the exact amount of reduction that should be granted. In addition, the ICC statute itself recognizes the use of money as compensation for damage suffered by the victims of the crimes and for some violations of the rights of accused individuals who have been acquitted.[100] If monetary compensation is recognized as a legitimate remedy in these situations, the same should apply to cases of Second Type violations. Indeed, the literature on remedies for IHRL violations supports monetary compensation as the main remedial tool to be used.[101]

Starr suggests that monetary compensation might seem inadequate to a person facing a long prison sentence.[102] However, as mentioned, in practice monetary compensation is the remedy that is used in any tort case that involves prisoners. Moreover, money can aid even people who serve criminal sentences: it can be used within prisons; some of those convicted eventually will be released; and some of those convicted have families who can use the money. Notably, the proposed remedy is being granted for fair trial violations in case of conviction. In these cases, the damage does not involve undue detention time but usually, as discussed above, some nonpecuniary moral damage. Hence, monetary compensation might not be ideal, but can still serve the first remedial goal, compensating the accused. This does not mean that any compensation will necessarily be justified; compensation is to be determined on a case-by-case basis, taking into account the circumstances of the specific case.

With regard to the second goal of remedies, deterrence, it is important to note that analysis of the deterrence power of any remedy is highly

98. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 410 (2000) [hereinafter Levinson, *Making Government Pay*].

99. *See*, *e.g.* Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 781 (1995).

100 Rome Statute, *supra* note 1, arts. 75, 85.

101. SHELTON, *supra* note 69, at 44–45; CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM, 355 (2nd ed. 2008).

102. Starr, *supra* note 3, at 715.

speculative without strong empirical evidence. Not much data exists regarding the remedial power of ICL remedies, including monetary compensation as well as sentence reduction, because of the relatively few cases in which remedies have been granted. The reaction to the November decision in the *Barayagwiza* case is considered an indication of the (too) strong remedial power of staying proceedings. In the same way, the reaction to other remedial decisions might shed some light on their deterrent power. In all cases of sentence reduction thus far, there has been no meaningful public reaction, and the prosecution has not appealed any of the decisions.[103] In contrast, the Registrar appealed the ICTR trial chamber's decision to award Rwamakuba monetary compensation following his acquittal.[104]

It is of course impossible to determine the actual deterrent power of these remedies from the few cases mentioned, but they might provide some indication that monetary compensation is not an inferior deterrent to sentence reduction in the ICL arena. A possible explanation for this situation can be found in the above discussion on the ICL stakeholders. Although ICL can be conceived of as a joint enterprise of the international community as a whole, the inevitable (and maybe unpleasant) truth is that the domestic community in which the crimes were committed is generally much more interested in punishing the perpetrators with respect to a specific case than is the rest of the international community. This is even more apparent with regard to the specific punishment of the accused.[105] The domestic community is obviously much more affected by the events that occurred; many citizens were the victims of the atrocities, and others knew or know victims. On the other hand, the international community and even the court staff are more distant from the events. Therefore, because the people who comprise ICL are less invested in the specific punishment, the deterrence effectiveness of sentence reduction is unclear. In contrast, monetary compensation directly affects the courts and the relevant states that fund the courts, so the remedy hits the relevant parties where it hurts,

103. In the *Duch* Appeal, *supra* note 60, the Supreme Court Chamber decided on its own initiative to reverse the trial chamber's judgment with regard to sentence reduction, and the prosecution did not appeal the first decision.

104. *Rwamakuba* Remedial Appeal, *supra* note 32, at ¶¶ 20–21.

105. Sloane, *supra* note 79, at 79, 90. For the minor significance of the specific punishment in ICL theory, see Luban, *supra* note 85, at 576.

thereby providing a deterrent value. This is especially true given that the costs of international trials have been widely criticized.[106]

Daryl Levinson claims that monetary compensation cannot function as a useful deterrent when governmental authorities are involved, since they respond to political incentives and not to market ones.[107] This argument is controversial,[108] and it is questionable whether it can be directly applied to the international criminal law arena. In any case, even if the deterrent power of monetary compensation is questionable, there is great doubt whether the deterrence power of any other remedy is better. Moreover, if monetary compensation is found to be suboptimal, it is possible to use direct sanctions against the prosecution, such as fines and disciplinary measures, as an additional tool to increase deterrence.[109] Direct sanctions have been criticized as a remedy that would be rarely used due to remedial deterrence, and indeed they have never imposed by the ICC.[110] The ICC's Appeals Chamber, however, has recognized their significance as a moderate instrument to incentivize the prosecution,[111] and both the ICTY and the ICTR have reprimanded prosecutors for their fair trial violations, although in the one instance it did so, the ICTY later reversed its decision following a motion for reconsideration.[112]

On the other hand, if monetary compensation acts as an efficient deterrent, concern might arise that it will cause remedial deterrence. This concern is based in part on the assumption that the relevant actors will prefer to use the limited tribunal budget for other purposes. It is not possible yet to refute this assumption. However, it seems that monetary compensation is

106. Eric Husketh, *Pole Pole: Hastening Justice at UNICTR*, 3 NW. U. J. INT'L HUM. RTS. i, viii (2005).

107. Levinson, *Making Government Pay*, *supra* note 98.

108. Myriam E. Gilles, *In Defense of Making government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001).

109. Turner, *supra* note 2, at 232–46.

110. *See*, *e.g.*, Starr, *Sentence Reduction*, *supra* note 71, at 1517.

111. *Lubanga* Remedial Appeal, *supra* note 24, at ¶¶ 59–60.

112. Prosecutor v. Haradinaj, Case No. IT -04-84bis-T, Decision on the Prosecutor's Motion for Reconsideration of Relief Ordered Pursuant to Rule 68*bis* with Partially Dissenting Opinion of Judge Hall (ICTY, Mar. 27, 2012), http://www.icty.org/x/cases/haradinaj/tdec/en/120327.pdf; Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68 (Sept. 22, 2008), http://www.unictr.org/Portals/0/Case/English/Ndindiliyimana/decisions/080922.pdf.

much less costly for the authorities than a stay of proceedings, in terms of deterrence power, and it is doubtful whether the burden that monetary compensation causes is so severe as to create remedial deterrence. The deterrent power of monetary compensation is related to the specific amount that will be granted. In most cases the financial cost of granting this remedy will be only a very small fraction of the tribunals' budget, even if we assume that it will be granted several times a year and even in cases of much larger compensation than the $2,000 that was granted to *Rwamakuba*.[113] As mentioned, the compensation in cases of conviction usually involves only pure nonpecuniary damage. The compensation in these cases will be probably much smaller than in cases involving pecuniary and nonpecuniary damages. As Johan Michels demonstrates, even in cases of compensation for acquitted defendants, the amount of compensation will constitute a small part of the budget.[114] The impact of a relatively small amount of compensation on the ability of the tribunals to function would be minimal, which minimizes the concern of remedial deterrence.

Turner has raised a similar argument. She discusses monetary compensation only in the event of acquittal, and supports it in cases where the prosecution is responsible for a grave misconduct.[115] Her main reservation is that, due to the limited budget of international criminal tribunals (she refers only to the ICC) and the need to compensate the victims of the atrocities as part of this budget, "it may also seem inappropriate to use [that budget] for compensation to acquitted persons."[116] However, the compensation of victims will probably be based, at least partially, on the Trust Fund for Victims' reparations reserve, which is separated from the ICC's budget and is funded mainly through voluntary contributions.[117]

113. For example, the program budget of the ICC for the year 2012 was €108,800,000; *see* Programme Budget for 2012, the Working Capital Fund for 2012, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2012 and the Contingency Fund, ICC-ASP/10/Res.4, 21 December 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.4-ENG.pdf.

114. Michels, *supra* note 19, at 423–24.

115. Turner, *supra* note 2, at 232.

116. *Id.* at 231.

117. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to be Applied to Reparations, ¶¶ 69–80 (Aug. 7, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf. The Trust Fund's financial info is available at http://trustfundforvictims.org/financial-info.

Moreover, the ICC Statute acknowledges monetary compensation as a legitimate remedy for some violations in the case of acquittal, which would typically involve a higher compensation than violations in cases of conviction and, therefore, bears the potential to affect the monetary resources of the court more significantly.

Surprisingly, little discussion in the case law and literature focuses on the problems associated with granting monetary compensation as a remedy. In the *Rwamakuba* Remedial Appeal, the Appeals Chamber determined that the tribunal would award monetary compensation only "in appropriate and limited circumstances."[118] However, it did not provide a reason for this limitation, and even rejected budgetary considerations as a reason to avoid using monetary compensation as a remedy.[119] Perhaps the best explanation for the tendency of criminal tribunals to prefer sentence reduction over monetary compensation lies in their criminal orientation. The Tribunals' regular toolbox involves criminal sanctions, mainly sentencing, so they might more naturally look to sentence reduction as a remedial tool. This explanation, however, cannot justify avoiding the use of monetary compensation when the latter provides a superior solution to the remedial dilemma.

In an article discussing sentence reduction within the United States context, Starr raises several additional arguments against monetary compensation.[120] Most of these arguments focus on problems related to tort actions by those accused under the U.S. legal system. Indeed, litigating a fair trial violation as a tort presents significant difficulties, such as the jury's reluctance to decide in favor of criminal defendants.[121] These difficulties may provide some explanation for the lack of enthusiasm among many U.S. scholars to use monetary compensation as a remedy for fair trial violations. For example, in an article discussing the exclusionary rule, Guido Calabresi seems to consider monetary compensation as the default remedy; he does not support it, however, only because of the difficulties attached to tort litigation.[122] These concerns are not relevant to

118. *Rwamakuba* Remedial Appeal, *supra* note 32, at ¶ 30.

119. *Id.*

120. Starr, *Sentence Reduction*, *supra* note 71, at 1518.

121. *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284 (1988); Calabresi, *supra* note 97, at 114.

122. *Id.*

international criminal adjudication, where the courts are the ones to grant the remedy.

B. The Availability of Monetary Compensation under Current ICL Remedial Doctrine

One of the major obstacles to the use of monetary compensation as a remedy could be the lack of specific provision in the relevant statutes, at least for some violations, and the lack of a specific budget for this purpose. Indeed, some authors have suggested that these are the main reasons that it is rarely used.[123] However, from a doctrinal perspective, using monetary compensation as a remedy for Second Type violations even in cases of conviction is consistent with ICL jurisprudence. Although this remedy is not explicitly mentioned in statutes of the various international criminal courts, the ICTR has already recognized its inherent power to grant effective remedies.[124] This follows from the inherent right to remedy in international law and especially in IHRL.[125] The ICTR specifically recognized its power to grant monetary compensation in case of acquittal in the *Barayagwiza* March Decision,[126] and one can infer from reasoning in the *Rwamakuba* Remedial Appeal that this power is not limited to compensation only in case of acquittal (though it does not form part of the Tribunal's current remedial doctrine).[127] In his dissenting opinion in the *Rwamakuba* Remedial Appeal, Judge Shahabuddeen referred to the lack of statutory authority to grant monetary compensation and predicted that as a result, the decision would ultimately be disregarded, since the registrar would be unable to comply with it.[128] This prediction was proved wrong, however, when the registrar paid Rwamakuba the compensation. Moreover, it seems that this problem is much less relevant to the ICC than to other international criminal tribunals, since its statue mentions monetary compensation as a remedy for some fair trial violations in case of acquittal,[129] and therefore a compensation mechanism already exists.

123. International Criminal Procedure, *supra* note 62, at 360–61, 367.
124. *Kajelijeli* Appeals Judgment, *supra* note 12, at ¶ 255.
125. Starr, *supra* note 3, at 699–700.
126. *Barayagwiza* March Decision, *supra* note 16, at ¶ 75.
127. *Rwamakuba* Remedial Appeal, *supra* note 32, at ¶¶ 24–26.
128. *Id.* Partly Dissenting Opinion of Judge Shahabuddeen, at ¶ 4.
129. Rome Statute, *supra* note 1, art. 85.

One may claim that the positive recognition of monetary compensation for some violations under the ICC statute denies the possibility of granting such a remedy for other violations.[130] But in light of the jurisprudence regarding the courts' inherent power to grant effective remedies, such an interpretation would be too strict. Furthermore, as Salvatore Zappalà notes, it seems that the ICC statute goes beyond the specific instances in which IHRL recognizes a right to monetary compensation following an acquittal.[131] Therefore, no good reason seems to exist for a narrower approach to the statute interpretation than the one adopted by the statute itself with regard to IHRL conventions. It is of course desirable that the remedies be provided in the court's particular Rules of Procedure and Evidence (RPE), as noted by Zappalà, who supports a wider right to remedy than the one provided by Article 85 of the ICC statute.[132] However, until the rules are amended, the court can use Rules 173 to 175 of the ICC RPE, which address compensation under Article 85, as a main reference point.[133] Indeed, international criminal courts have never applied monetary compensation as a remedy for Second Type violations in cases of conviction. However, the ECtHR and various domestic courts in Europe have recognized and applied this option as an appropriate remedy.[134]

CONCLUSION

As demonstrated above, a tension exists in ICL between the desire to punish the perpetrators of international crimes and the need to provide

130. Guido Acquaviva et al., *Trial Process, in* INTERNATIONAL CRIMINAL PROCEDURE—RULES AND PRINCIPLES 800 (Goran Sluiter et al. eds., 2013).

131. Salvatore Zappalà, *Compensation to an Arrested or Convicted Person*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, Vol. II, 1577, 1579 (Antonio Casses et al. eds., 2009).

132. ZAPPALÀ, PROCEEDINGS, *supra* note 3, at 255–56.

133. ICC Rules of Procedure and Evidence, Adopted by the Assembly of States Parties, R. 173–75, ICC-ASP/1/3 (Sept. 3–10, 2002), http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf.

134. SHELTON, *supra* note 69, at 272–78; European Commission for Democracy through Law (Venice Commission), *Study on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings* at 20 (Study No. 316/2004, 2006), http://www.venice.coe.int/webforms/documents/CDL-AD(2006)036rev-e.aspx; CAN EXCESSIVE LENGTH OF PROCEEDINGS BE REMEDIED?, *supra* note 42, at 32 n.117.

effective remedies when an accused's right to a fair trial has been violated. This Article divides fair trial violations into two types: First Type violations include violations that undermine the court's ability to accurately determine the accused's guilt; Second Type violations include those that do not affect the reliability of the outcome in terms of whether the defendant committed the crime. It focuses on remedies for Second Type violations, where the remedies are only aimed at compensating the accused and deterring the authorities from future violations, rather than safeguarding the judgment's accuracy, which is an additional inherent goal of remedies for First Type violations.

This Article demonstrates that with regard to Second Type violations, both the absolutist approach adopted by international criminal courts and the current interest-balancing approach endorsed by both the courts and the literature on this issue provide insufficient solutions to the above tension, which inevitably harm one or both of ICL's competing goals. Hence, this Article suggests the adoption of monetary compensation as the main remedy for Second Type violations. By granting monetary compensation, the court creates a separation between the punishment and the remedy and thus can, at least potentially, achieve both the goals of sentencing and the goals of remedying fair trial violations.