

RETHINKING “EFFECTIVE REMEDIES”: REMEDIAL DETERRENCE IN INTERNATIONAL COURTS

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One of the bedrock principles of contemporary international law is that victims of human rights violations have a right to an “effective remedy.” International courts usually hold that effective remedies must at least make the victim whole, and they sometimes adopt even stronger remedial rules for particular categories of human rights violations. Moreover, courts have refused to permit departure from these rules on the basis of competing social interests. Human rights scholars have not questioned this approach, frequently pushing for even stronger judicial remedies for rights violations. Yet in many cases, strong and inflexible remedial rules can perversely undermine human rights enforcement. Institutional constraints often make it impractical or highly costly for international courts to issue remedies for the violations they recognize. Inflexible remedial rules raise the collateral costs of providing remedies and often drive courts to circumvent those costs by narrowing their substantive interpretations of rights, raising the prejudice threshold required to trigger a remedy or erecting procedural hurdles that allow them to avoid considering the claim at all. This Article illustrates these “remedial deterrence” effects primarily with examples from the procedural rights case law of the International Criminal Tribunals for Rwanda and for the former Yugoslavia—two courts that face particularly stark remedial costs. It then argues that similar dynamics are likely at other international courts, though their degree, form, and consequences will vary based on each court’s particular objectives and constraints.

Although some degree of remedial deterrence is inevitable and legitimate, extreme remedial-cost pressures—like those often present in international criminal proceedings—result in severe doctrinal distortions that subvert the purpose of international courts’ strong remedial rules. Because victims cannot be granted lesser remedies, they often receive no remedy at all. This overkill effect is magnified because the doctrinal distortions spill over to other cases lacking similar remedial costs and to domestic courts and other actors that follow international judicial precedent, even though they do not share the same institutional constraints. To mitigate these consequences, this Article makes two sets of recommendations. First, international courts’ structures and procedures should be designed to avoid excessive remedial

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deterrence pressures. This Article offers specific proposals for international criminal tribunals. Second, international courts should modify their approach to the effective remedy requirement, allowing some degree of equitable balancing of interests. Such an approach would promote judicial candor and enable courts to avoid untenable remedial costs without unduly distorting other doctrines.

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INTRODUCTION

A bedrock principle of contemporary international human rights law is that victims of violations have a right to an “effective remedy.” Courts have largely treated this requirement as an absolute one and have adopted a set of strong specific remedial rules to implement it in particular situations. The most common formulation requires “full” reparation for human rights violations—a remedy, usually damages, that to the fullest extent possible makes the victim whole. Some international judicial remedies do not neatly track this “full remedy” ideal, in the sense of precisely calibrated responses to quantifiable injuries,

and may in fact go beyond it. Criminal procedure remedies in international criminal tribunals, for instance, tend to be blunt all-or-nothing instruments. When remedies are granted, they often amount to windfalls that do more than make the defendant whole. But even in such cases, international courts seek a fit between right and remedy. They treat remedies as being determined exclusively by the nature of a violation and the resulting injury, refusing to curtail the remedy on the basis of the competing social interests that are adversely affected by a particular remedial order. They reject, in short, the notion of permissible gaps between rights and remedies.

Existing human rights scholarship on remedies has almost uniformly endorsed this approach. With narrowly confined exceptions, scholars and international courts have yet to develop principles for identifying second-best remedies where the most "effective" ones are too costly or for determining whether remedial shortfall is permissible in a given situation. To the extent the scholarship mentions the possibility of right-remedy gaps, it typically decries them and pushes for stronger international judicial remedies for human rights violations. The principle that "there is no right without a remedy" has a powerful normative pull, especially given the gross disparities that have long existed between the sonorous human rights ideals set forth in treaties and the reality of weak enforcement. The scholarly emphasis on this principle is thus understandable, but it can be counterproductive. As this Article shows, strong remedial rules can undermine effective judicial enforcement of rights.

Institutional constraints and other competing interests sometimes make it highly impractical or undesirable for international courts to issue remedies for the rights violations they recognize. In these situations, strong remedial rules—by increasing the costs of remedies—may perversely make it less likely that victims of human rights violations will receive any remedy at all. Courts circumvent these remedial costs by adjusting doctrinal rules at various other stages of the proceedings so as to avoid recognizing a rights violation. They may narrow their substantive interpretations of rights, erect procedural hurdles to avoid hearing the claim, or adjust the burden of proof of prejudice required to trigger a remedy.

Borrowing from the U.S. constitutional scholar Daryl Levinson, I call these dynamics "remedial deterrence": The costs of remedies deter courts from vindicating rights.¹ I illustrate them with examples

¹ Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85 (1999). Levinson focuses on the effects of remedial deterrence on the interpretation of rights. *Id.* I apply his useful phrase slightly more broadly to encompass similar effects on courts' willingness to hear rights claims and on their prejudice doctrines.

drawn principally from the case law of the International Criminal Tribunals for Rwanda and for the former Yugoslavia (ICTR and ICTY, respectively; collectively, ICTs). Specifically, I draw from the ICTs' criminal procedure jurisprudence dealing with the internationally protected human rights of defendants (not those of atrocity victims) and remedies for procedural violations of those rights.² These Tribunals are important interpreters of human rights law, especially those aspects that relate to the criminal process. They aim to serve as models of fair trials and rule of law for countries throughout the world, particularly countries emerging from periods of violence. Their responses to rights violations committed within their own pretrial and trial proceedings are an important test of the viability of that model. Moreover, their perceived fairness to defendants may be crucial to their transitional justice objectives.

In the ICTs, the costs of *ex post* remedies for violations of defendants' rights are often extremely stark. Like other international courts, the ICTs have an effective-remedy requirement and reject the notion of permissible remedial shortfall. On paper, they have the same basic options available for implementing this requirement that domestic criminal courts have. When a trial is unfair, they can order a new one, and when a defendant's rights have been badly violated in other ways (e.g., various pretrial abuses), they can order release and dismissal of charges. In practice, however, neither retrial nor release is a tenable option. ICT trials typically last for years, cost millions of dollars, and involve scores of witnesses—a process that the Tribunals have neither the budget nor the will to repeat. Retrial is further precluded by the Tribunals' temporary nature and looming closure. And a Tribunal cannot simply release a convicted international criminal because of a procedural error. Doing so would undermine its goal of ending impunity for atrocities and moreover would be so politically explosive as to endanger the Tribunal's continued viability.

This Article shows that when faced with such intolerable remedial costs, the ICTs will adjust other doctrines to avoid granting remedies to the defendant. Sometimes, they do so by defining down the right itself, particularly in cases involving pretrial procedure, such as speedy trial cases. In other cases, the Tribunals use procedural mecha-

² While international criminal prosecution might itself be thought of as a sort of remedy for grave human rights abuses, this is not the sense in which I address the ICTs' treatment of the right-remedy relationship. I focus solely on their procedural jurisprudence, and thus when I refer to putative "victims" of human rights violations in the context of ICT procedure, I mean defendants who raise procedural rights claims. In their substantive jurisprudence, in contrast, the ICTs generally do not apply human rights law, but rather the law of armed conflict and international criminal law—related but distinct fields.

nisms—such as the appellate doctrine of waiver—to avoid hearing defendants' rights claims entirely. And a third strategy, which the Tribunals have used in cases involving procedural violations pertaining to the trial, is to impose a particularly burdensome harmless error standard: Defendants must prove by clear evidence that rights violations were prejudicial.

To some extent, remedial deterrence is inevitable and legitimate. At every stage of rights adjudication, international courts must grapple with the real-world consequences of their decisions, including remedial costs. But extreme remedial deterrence dynamics, like those at the ICTs, raise serious normative concerns. They give rise to overkill responses that subvert the purpose of the effective-remedy requirement: Because full compliance with the requirement is too costly, and lesser remedies are prohibited, victims often receive no remedy at all.

Sometimes this outcome is reached through ad hoc doctrinal manipulation on a case-by-case basis, rendering human rights enforcement arbitrary and confusing. Sometimes remedial deterrence results in rules that *are* subsequently followed in other cases—but this consistency itself may magnify the overkill problem. Rather than simply limiting the remedy in the particular case that poses high remedial costs, international courts instead adjust other doctrines in ways that spill over to cases in which such costs are absent. These spillover effects may extend beyond the international court's own docket, as other actors, including domestic authorities and other international courts, may follow the distorted doctrinal rules even if they do not share the institutional constraints that produced the rules. These dynamics also undermine judicial candor, because courts rarely admit openly that they are narrowing a right in order to avoid a particular remedial consequence.

Perhaps one could defend the choices that international courts have made when confronting difficult dilemmas, but it would certainly be better to reduce remedial costs so that courts would not face those dilemmas in the first place. This Article accordingly makes two sets of proposals for mitigating severe remedial costs in international courts. The first set pertains to institutional design. International courts' structures and procedures should be adjusted to avoid intolerable remedial costs. In the ICTs, possibilities include making retrial a realistic option by creating expedited retrial procedures and a retrial exception to temporary Tribunals' expiration dates, by providing more limited alternatives to retrials such as liberalized admission of new evidence on appeal, and by lowering hurdles for interlocutory appeals to allow lower-cost *ex ante* rights adjudication.

In the second set of proposals, I argue for modification of international courts' absolutist approach to the effective-remedy requirement. Specifically, international courts should shift from a "rights-maximizing" approach to remedies—in which remedies are designed to vindicate the underlying rights at all costs—toward an "interest-balancing" approach.³ After determining what the effective remedy for a particular case would be, courts should treat that remedy as presumptively required but should permit departure from that requirement in the face of strong, legitimate countervailing considerations. This interest-balancing approach has some doctrinal support in international law's sporadic embrace of equity, and it need not do violence to the core purposes of the effective-remedy requirement. Indeed, it could serve those purposes better than international courts' current approach, provided that the balancing calculus gives adequate weight to the rights at stake. In cases involving untenable remedial costs, interest balancing could allow the court to devise a less costly partial remedy—better for the victim than the outcome of remedial deterrence, which is usually no remedy. It would also promote judicial candor, empowering courts to grapple openly with remedial shortfall.

Part I of this Article briefly describes the basic remedial principles that have dominated the approaches taken by international courts and human rights scholars. It also briefly introduces a body of U.S. constitutional scholarship dealing with the relationship between rights and remedies, from which this Article draws a number of conceptual tools. Part II sets forth the Article's central descriptive claims about remedial deterrence dynamics, while Part III considers these dynamics' normative consequences and makes proposals for institutional design and remedial decisionmaking. Finally, the Conclusion offers preliminary thoughts about the implications of remedial deterrence at international courts for other actors, such as national courts and legislatures, that rely on international judicial doctrine when interpreting their own human rights obligations.

I

REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW

International courts and scholars habitually invoke the principle of *ubi ius ibi remedium*—"where there is a right, there is a remedy."⁴ This Part addresses the origins, scope, and current prevalence of that

³ See Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588–89 (1983) (using these terms to describe approaches to U.S. constitutional remedies).

⁴ E.g., Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51, 56–57 (2007).

principle. The first Section discusses the treatment of remedies in the case law of international courts. Section B then considers the limited existing human rights scholarship on this point and briefly introduces a much more extensive body of scholarship addressing right-remedy gaps in U.S. constitutional law.

A. Remedial Doctrine in International Courts

The leading international formulation of the “no right without a remedy” principle comes from the 1928 holding of the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case: “[I]t is a principle of international law, and even a general conception of law, that *any breach of an engagement involves an obligation to make reparation.*”⁵ The Court further specified—in “[o]ne of the most oft-quoted passages in international law”⁶—that the applicable remedial principle was restoration of the status quo ante:

The essential principle . . . is that reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. [It must consist of r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.⁷

This Article refers to this remedial principle as the “full remedy rule,” in that it permits no remedial shortfall (except in cases of impossibility); whatever damages cannot be corrected through in-kind restitution must otherwise be fully compensated. It has been reiterated repeatedly by the International Court of Justice (ICJ), the PCIJ’s successor and the most prominent international court, in a wide variety of international legal disputes.⁸ The ICJ’s continued adherence to the rule persists in some tension with its reliance on certain

⁵ *Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13) (emphasis added).

⁶ Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT’L L. 833, 835 (2002).

⁷ *Chorzów Factory*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (emphasis added).

⁸ See, e.g., *Armed Activities on Territory of Congo* (Dem. Rep. Congo v. Uganda), Gen. List No. 116, at 82 (I.C.J. Dec. 19, 2005), available at <http://www.icj-cij.org/docket/files/116/10455.pdf> (finding Uganda has obligation to make full reparations to D.R.C. for injuries caused); *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 198 (July 9) (finding Israel must make reparations for damages caused in constructing wall); *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, 59–60 (Mar. 31) (finding U.S. obligated to permit review of Mexican nationals’ cases to remedy violations); *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 31–32 (Feb. 14) (finding Belgium must cancel unlawful arrest warrant as remedy); *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 80–81 (Sept. 25) (finding both countries responsible and entitled to compensation).

equitable principles.⁹ Nonetheless, *Chorzów Factory* remains good law and is in fact “the cornerstone of international claims for reparations, whether presented by states or other litigants.”¹⁰ The International Law Commission’s recent report containing draft articles on state responsibility for internationally wrongful acts (Articles), a highly influential but not legally binding document, likewise requires violators not only to cease the offending conduct¹¹ but also to “make full reparation” for “any damage, whether material or moral.”¹² Commentaries on the Articles explain that they codify the *Chorzów Factory* rule,¹³ which the drafters considered uncontroversial.¹⁴

Chorzów Factory and its direct successors in the ICJ, as well as the Articles, concern the law of state responsibility, which governs disputes between states, i.e., violations of states’ obligations toward one another under treaties or customary international law.¹⁵ Human rights law, in contrast, governs the relationship between states and individuals. But the remedial principles governing human rights law, a younger field, are heavily influenced by the *Chorzów Factory* line.¹⁶

Nearly every major human rights treaty includes a provision establishing an individual right to an effective remedy for violations of the other rights outlined in the treaty.¹⁷ This right is generally under-

⁹ See *infra* Part III.C (discussing how to balance victim’s interest in effective remedies with countervailing considerations).

¹⁰ Shelton, *supra* note 6, at 836. For instance, the rule has long been followed at arbitral tribunals. *E.g.*, S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408, 1443–44 (2001) (NAFTA Arb. Trib. Nov. 13, 2000); Martini Co. (Italy v. Venez.) 2 R. Int’l Arb. Awards 975 (1949) (May 3, 1930), translated in 25 AM. J. INT’L L. 554, 584–85 (1931).

¹¹ G.A. Res. 56/83, Annex art. 30, U.N. Doc. A/RES/56/83/Annex (Jan. 28, 2002) [hereinafter ILC Articles].

¹² *Id.* art. 31.

¹³ THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 202, 211, 213–14 (James Crawford ed., 2002) [hereinafter COMMENTARIES].

¹⁴ *Id.* at 212; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 901 & n.3 (1990) (endorsing full remedy rule).

¹⁵ *But see* Reparation for Injuries Suffered in Service of United Nations, Advisory Opinion, 1949 I.C.J. 174, 184 (Apr. 11) (applying *Chorzów Factory* principle to claims brought by United Nations).

¹⁶ See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 99 (2d ed. 2005) (“[I]nstitutions applying [human rights law] return to the law of state responsibility to assess the nature and extent of the remedies.”); Shelton, *supra* note 6, at 834 (observing that ILC Articles are increasingly incorporated into unilateral treaties between states and individuals).

¹⁷ *E.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“Everyone has the right to an effective remedy . . . for acts violating the fundamental rights granted him”); International Covenant on Civil and Political Rights arts. 2(3), 9(5), 14(6), Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] (ensuring remedies and compensation for wrongful convictions and imprisonment); Convention on Elimination of All

stood to encompass both the procedural right of access to a hearing before an impartial decisionmaker and the substantive right to receive relief.¹⁸ This Article addresses only the substantive component; I use the term "remedy" to refer only to the actual relief ordered by a court after finding a human rights violation, not to the initial procedural right of access to a court to bring the human rights claim in the first place. The "effective remedy" treaty provisions directly govern remedies provided by national authorities and also indirectly support international courts' remedial rules.¹⁹ Some human rights treaties also directly authorize or require international judicial remedies. For instance, Article 63(1) of the American Convention on Human Rights requires the Inter-American Court of Human Rights to order, "if appropriate, that the consequences of [any Convention violation] be remedied and that fair compensation be paid."²⁰

These treaty provisions usually use general terms like "effective," "fair," or "adequate,"²¹ which appear to allow courts considerable flexibility. Yet international courts have typically construed them quite strictly. The most common interpretation, especially in cases involving claims for money damages, simply applies the *Chorzów Fac-*

Forms of Racial Discrimination art. 6, Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195 ("State Parties shall assure to everyone within their jurisdiction effective protection and remedies."); Convention on Elimination of All Forms of Discrimination Against Women art. 2(c), Dec. 18, 1979, S. EXEC. DOC. R, 96-2 (1980), 1249 U.N.T.S. 13 (establishing legal protection of women's rights against any act of discrimination); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 ("Each State Party shall ensure in its legal system that the victim . . . obtains redress and has an enforceable right to fair and adequate compensation . . ."); Int'l Comm'n of Jurists, Written Statement to Ad-Hoc Committee on Disability Rights Convention, *Need for an Effective Domestic Remedy in the Disability Rights Convention*, Jan. 2005, available at <http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5icj.rtf> ("The right to an effective remedy is so firmly enshrined . . . that any credible modern human rights treaty has to incorporate it.").

¹⁸ SHELTON, *supra* note 16, at 7–8. Human rights lawyers sometimes use the term "reparations" to refer to remedies in the substantive sense, although that term is similarly ambiguous. *Id.* at 7–8, 50. See generally S.L. Haasdijk, *The Lack of Uniformity in the Terminology of the International Law of Remedies*, 5 LEIDEN J. INT'L L. 245 (1992) (discussing inconsistent terminology for remedies and how ILC has dealt with this problem).

¹⁹ SHELTON, *supra* note 16, at 114.

²⁰ American Convention on Human Rights art. 63(1), Nov. 22, 1969, S. EXEC. DOC. F, 95-2 (1978), 1144 U.N.T.S. 143 [hereinafter American Convention]; see also Convention for Protection of Human Rights and Fundamental Freedoms art. 41, Nov. 4, 1950, Europ. T.S. No. 5, as amended by Protocol No. 11 [hereinafter European Convention] (requiring ECHR to give "just satisfaction" to injured party if only partial reparation has been made).

²¹ Various soft-law documents provide some elucidation. See, e.g., Comm'n on Human Rights, Gen. Comment 31, *Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (holding that remedy provision of ICCPR entails compensation and other measures); SHELTON, *supra* note 16, at 121–22 (discussing other human rights reports on restitution).

tory full remedy rule. The Inter-American Court, for instance, has held that Article 63(1) codifies the *Chorzów Factory* rule.²² In its first merits case, the Court specified: “Reparation of harm brought about by the violation of an international obligation consists in full restitution . . . which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages.”²³

The European Court of Human Rights (ECHR) has likewise interpreted the European Convention on Human Rights to essentially codify the full remedy rule in most cases. The Convention permits the ECHR, upon finding a violation, to remand the case to national authorities for the selection of an effective remedy²⁴—and the Court has consistently held that such a remedy must “restore as far as possible the situation existing before the breach.”²⁵ Where domestic law does not provide for full compensation, but instead “allows only partial reparation,” Article 41 provides that the Court shall make up the difference by ordering some form of “just satisfaction.”²⁶ The ECHR’s Article 41 jurisprudence has not been wholly consistent with the *Chorzów Factory* approach—one line of cases permits merely declaratory relief to be treated as just satisfaction for certain non-pecuniary injuries.²⁷ But in other cases, the Court typically grants damage remedies that are expressly designed to make the victim whole.²⁸ It has likewise interpreted some of the Convention’s substantive rights provisions to implicitly require remedies for their violation, including compensation commensurate with the damage.²⁹

²² Garrido & Baigorria Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, at 10 (Aug. 27, 1998); *accord* Durand & Ugarte Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 89, at 6 (Aug. 16, 2000) (“[A]ny violation of an international obligation carries with it the obligation to make adequate reparation.”).

²³ Velásquez-Rodríguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7, at 8 (July 21, 1989).

²⁴ *E.g.*, *Salah v. Netherlands*, App. No. 8196/02, ¶¶ 70–71 (E.C.H.R. Mar. 8, 2007), available at <http://www.echr.coe.int/echr/en/hudoc> (reading Articles 41 and 46 of the European Convention together to permit such remand). European Court of Human Rights judgments and decisions may be accessed at <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; then select “Decisions” and “Judgments” under “ECHR Document Collections” heading at left, and enter case title in “Case Title” field; then click “Search” button).

²⁵ *Lustig-Prean v. United Kingdom*, App. Nos. 31417/96, 32377/96, Judgment (Just Satisfaction), ¶ 22 (E.C.H.R. July 25, 2000), available at <http://www.echr.coe.int/echr/en/hudoc> (for instructions on locating documents within “HUDOC Database,” see *supra* note 24).

²⁶ European Convention, *supra* note 20, art. 41.

²⁷ See *infra* notes 217–19, 339 and accompanying text.

²⁸ See, e.g., *Gongadze v. Ukraine*, App. No. 34056/02, 2005-XI Eur. Ct. H.R. ¶¶ 195–98; *Scozzari v. Italy* [GC], App. Nos. 39221/98, 41963/98, 2000-VIII Eur. Ct. H.R. ¶¶ 249–50.

²⁹ See, e.g., *Öneryildiz v. Turkey*, App. No. 48939/99, Judgment (Merits and Just Satisfaction), ¶¶ 90–92, 113, 116, 121 (E.C.H.R. June 18, 2002), available at <http://www.echr.coe>.

The right to an effective remedy also governs cases involving criminal defendants' procedural rights, including those in International Criminal Tribunals (ICTs)—the principal focus of this Article. The ICTs are not "human rights courts" as such, but they regularly interpret and apply human rights treaties when considering defendants' procedural rights.³⁰ The jurisprudence of the ICTR and ICTY, including that of their shared Appeals Chamber, establishes that "any violation of the accused's rights entails the provision of an effective remedy."³¹ The case law does not go into much detail as to the content of this requirement.³² As Part II demonstrates, the ICTs rarely recognize prejudicial violations of defendants' human rights and therefore rarely reach the remedial stage. Thus, they have had little opportunity to elaborate on their remedial principles.

In the criminal procedure context, the *Chorzów Factory* approach is complicated by the types of remedies available. Criminal procedure remedies typically do not involve money damages, and thus courts usually do not attempt to quantify the harm and award precise relief. ICTs do sometimes use the remedy of sentence reduction; like damages, this remedy offers a continuum of possible outcomes and can be adjusted to reflect the magnitude of the particular injury.³³ But traditional criminal procedure remedies are blunter instruments—a defendant gets a new trial or not, gets charges dismissed or not, and so forth. When such remedies are granted, they can be windfalls to the defendant, making him better off than he would have been absent the

int/echr/en/hudoc (for instructions on locating documents within "HUDOC Database," see *supra* note 24).

³⁰ See *supra* note 2 and accompanying text (discussing law applied by ICTs); see, e.g., *Kajelijeli v. Prosecutor*, Case No. ICTR 98-44A-A, Judgment, ¶ 255 (May 23, 2005) [hereinafter *Kajelijeli Judgment*] (citing effective-remedy provision of ICCPR).

³¹ *Kajelijeli Judgment*, *supra* note 30, ¶¶ 254–55, 322; *Rwamakuba v. Prosecutor*, Case No. ICTR 98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, ¶¶ 23–26 (Sept. 13, 2007) [hereinafter *Rwamakuba Remedy Appeal*]; *Barayagwiza v. Prosecutor (Barayagwiza I)*, Case No. ICTR 97-19-A, Decision, ¶¶ 72, 108 (Nov. 3, 1999) [hereinafter *Barayagwiza I Decision*]; *Čelebići Case*, Case No. IT-96-21, Decision on Application for Leave To Appeal (Provisional Release) by Hazim Delić, ¶ 16 (Nov. 22, 1996).

³² Rule 5 of the Tribunals' respective Rules of Procedure and Evidence gives the Trial Chamber broad discretion over remedies for mere Rules violations, but this Rule is not typically cited in cases involving violations of human rights law. Int'l Criminal Tribunal for the Former Yugoslavia [ICTY], Rules of Procedure and Evidence, Rule 5, U.N. Doc. IT/32/Rev.40 (June 12, 2007), available at <http://www.un.org/icty/legaldoc-e/index.htm> [hereinafter *ICTY Rules*]; Int'l Criminal Tribunal for Rwanda [ICTR], Rules of Procedure and Evidence, Rule 5 (June 15, 2007), available at <http://69.94.11.53/ENGLISH/rules/150607/rop-150607.pdf> [hereinafter *ICTR Rules*].

³³ See *infra* note 42 and accompanying text (giving example of use of sentence reduction to correspond to magnitude of rights violation).

violation.³⁴ Criminal procedure remedies thus often *exceed* the requirements of the full remedy rule.

Despite these complexities, the ICTs' remedial approaches are consistent with those of other international courts in the most important sense. To use Paul Gewirtz's distinction, discussed at length in Part III.C, the ICTs have been "rights maximizers"—taking "the viewpoint of [defendants] alone"—rather than "interest balancers."³⁵ Under a rights-maximizing approach, the remedy is determined by the violation and the resulting injury, not by competing considerations such as broader social interests. The court asks only what harm was done to the victim of the violation, and seeks a remedy that is commensurate with that harm in some meaningful way—it does not ask about potentially harmful effects that the remedy might have on other people or institutions.³⁶ The ICTs do sometimes cite other considerations like deterrence of prosecutorial misconduct, but only to justify remedies that are *broader* than necessary to compensate the victim fully.³⁷ And once the Tribunals decide what kind of remedy is "effective" for a given category of violations, they do not suggest that this remedy could be cut back on the basis of high remedial costs.

Like other international courts, the ICTs seek a fit between rights and remedies. As the Appeals Chamber recently put it, "the nature and form of the effective remedy should be proportional to the gravity of the harm that is suffered."³⁸ For instance, having found that the defendant was unlawfully detained, the ICTR Appeals Chamber in the *Kajelijeli* case invoked the effective-remedy requirement of the International Covenant on Civil and Political Rights (ICCPR). The Appeals Chamber held that a sentence reduction, beyond mere credit for time served, was the remedy proportionate to the violation.³⁹ In *Barayagwiza*, discussed in the next Part,⁴⁰ the Appeals Chamber initially found that a lengthy unlawful detention merited dismissal of all charges with prejudice.⁴¹ Subsequently, upon introduction of new

³⁴ See, e.g., Note, *Constitutional Risks to Equal Protection in the Criminal Justice System*, 114 HARV. L. REV. 2098, 2111 (2001) (noting "oft-heard complaint" that dismissal remedies "are windfalls to defendants").

³⁵ See Gewirtz, *supra* note 3, at 588–89 (discussing rights-maximizing approach to U.S. constitutional law).

³⁶ *Id.* at 591.

³⁷ See, e.g., *Barayagwiza I* Decision, *supra* note 31, ¶ 76; see also *infra* note 366 and accompanying text (discussing Inter-American Court of Human Rights cases).

³⁸ *Rwamakuba* Remedy Appeal, *supra* note 31, ¶ 27.

³⁹ *Kajelijeli* Judgment, *supra* note 30, ¶¶ 255, 322 (citing effective-remedy provision of ICCPR); *accord Semanza v. Prosecutor*, Case No. ICTR 97-20-A, Judgment, ¶ 325 (May 20, 2005).

⁴⁰ See *infra* text accompanying notes 109–20.

⁴¹ *Barayagwiza I* Decision, *supra* note 31, ¶¶ 100–12.

facts, the Appeals Chamber changed its assessment of the underlying violations' seriousness, finding that the defendant had been detained impermissibly for less time and thus suffered a less serious injury. It reduced the remedy accordingly, granting a sentence reduction instead.⁴² Similarly, in the rare cases where the Appeals Chamber has identified prejudicial fair-trial violations, it has vacated convictions on the relevant charges and reduced sentences accordingly.⁴³

In sum, while the precise contours of the right to an effective remedy remain contested, international courts have consistently treated the right as a powerful constraint on their remedial discretion. They have been "rights maximizers" almost across the board. With the limited exception of some expropriation cases,⁴⁴ international courts have never openly endorsed the idea that a gap between rights and remedies could be justified by competing interests. The specific remedies that they adopt are determined by the nature of the violation and are, at least purportedly, designed to make the victim whole. They have not limited these remedies on the basis of countervailing interests, such as the public interest in punishing major crimes or other social welfare concerns. They have, in essence, treated the "right to an effective remedy" as an absolute right, or nearly so. Under this approach, if remedial costs are to be accommodated, it cannot be at the remedial stage—something else has to give.

⁴² *Barayagwiza v. Prosecutor (Barayagwiza II)*, Case No. ICTR 97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), ¶¶ 51–75 (Mar. 31, 2000) [hereinafter *Barayagwiza II* Decision].

⁴³ See *infra* notes 196–201 and accompanying text (arguing that these were low-remedial-cost situations).

⁴⁴ The law of takings is the sole area in which some international courts have rejected the *Chorzów Factory* rule—a surprising fact, given that *Chorzów Factory* itself was an expropriation case. Today, many treaties require "just" or "adequate" compensation for expropriation, which arguably permits compensation below full market value if valid competing considerations demand it. *Papachelas v. Greece*, App. No. 31423/96, 1999-II Eur. Ct. H.R. ¶¶ 44, 48; *Scordino v. Italy [GC]*, App. No. 36813/97, Judgment (Merits and Just Satisfaction), ¶ 257 (E.C.H.R. Mar. 29, 2006), available at <http://www.echr.coe.int/echr/en/hudoc> (for instructions on locating documents within "HUDOC Database," see *supra* note 24). Even in the takings area, however, the full remedy rule still predominates. See, e.g., *ADC Affiliate Ltd. v. Hungary, ICSID (W. Bank) Case No. ARB/03/16*, ¶¶ 497–500 (Oct. 2, 2006); *Papamichalopoulos v. Greece*, App. No. 14556/89, 330-B Eur. Ct. H.R. (ser. A) ¶ 36 (1995); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1990).

B. *Scholarship on Remedies in Human Rights Law*

Human rights scholarship on the substantive aspect of the right to a remedy is relatively limited.⁴⁵ But to the extent it has considered the question, existing scholarship has almost uniformly endorsed the proposition that all human rights violations require a remedy. As Dinah Shelton, the author of the leading book on remedies in human rights law, put it: “Rights without remedies are ineffectual, rendering illusory the government’s duty to respect such rights.”⁴⁶ Many scholars have specifically endorsed the *Chorzów Factory* formulation of the full remedy rule.⁴⁷ Two of the leading scholars, Theo Van Boven and M. Cherif Bassiouni, were appointed successively by the U.N. Commission on Human Rights as Special Rapporteurs on remedies. They produced Basic Principles that emphasize a right of reparation for human rights violations “proportional to the gravity of the violations and the harm suffered.”⁴⁸ This right includes restoration, so far as possible, of the status quo ante, as well as compensation for all damages.⁴⁹

Beyond invocation of the full remedy rule and the right to an effective remedy, however, human rights scholars have had little to say about the legal theories surrounding the relationship between rights and remedies.⁵⁰ They have treated that relationship as unidirec-

⁴⁵ There is a comparatively substantial literature that addresses the *procedural* aspect of the right to an effective remedy, see *supra* note 18 and accompanying text, including the scholarship on exhaustion of local remedies, e.g., SHELTON, *supra* note 16, at 7, 114.

⁴⁶ SHELTON, *supra* note 16, at 100; see also Laplante, *supra* note 4, at 54–57 (discussing right-remedy principle in modern reparations jurisprudence); Naomi Rohrt-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT’L & COMP. L. REV. 157, 157 (2004) (“It is a basic maxim of law that harms should be remedied.”); Shelton, *supra* note 6, at 835 (propounding basic principle that “an international delict generates an obligation of reparation”); Nagendra Singh, *Sustainable Development as a Principle of International Law*, in INTERNATIONAL LAW AND DEVELOPMENT 1, 12 (Paul De Waart et al. eds., 1988) (arguing focus should be on enforcement of remedies rather than on “rights without any method or machinery to enforce them”).

⁴⁷ E.g., Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 AM. J. INT’L L. 341, 343 (2001) (calling *Chorzów Factory* rule “the basic remedial norm for violations of international law”); Jeremy Sarkin, *Reparation for Past Wrongs: Using Domestic Courts Around the World, Especially the United States, To Pursue African Human Rights Claims*, 32 INT’L J. LEGAL INFO. 426, 430 & n.13 (2004) (endorsing full remedy rule); Shelton, *supra* note 6, at 835, 845 (endorsing full remedy rule but noting that some of its formulations “are too general to provide practical guidance”).

⁴⁸ U.N. Comm’n on Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, ¶¶ 11, 15–16, U.N. Doc. E/CN.4/2000/62, Annex (Jan. 18, 2000) (prepared by M. Cherif Bassiouni).

⁴⁹ *Id.* ¶¶ 21–23 (stating that restitution should restore victim to status quo).

⁵⁰ See SHELTON, *supra* note 16, at 7 (noting that theories of remedies are rarely discussed).

tional, with remedies flowing from the nature and scope of rights violations. No existing literature addresses the adverse effects that international courts' remedial rules may have on their interpretation of rights. Scholars have offered little guidance on dealing with situations in which full compensation may be impossible or undesirable. With two limited exceptions—namely, the respective literatures surrounding property expropriation and mass claims procedures for large-scale violations⁵¹—scholars have not developed principles for identifying second-best, less-than-full remedies, nor have they developed principles for determining whether remedial shortfall is permissible in a given situation.

To the extent that existing human rights scholarship mentions right-remedy gaps at all, it typically condemns them. It is commonplace in the literature to note the sharp disparity between ambitious treaty provisions and the stark realities of weak enforcement and widespread violation.⁵² Because of this disparity, contemporary human rights scholarship and advocacy have substantially shifted focus from rights articulation to enforcement⁵³—one factor driving the recent proliferation of international courts.⁵⁴ Scholars have pushed for new courts to have strong remedial powers,⁵⁵ and have often criticized courts that have been cautious in their remedial jurisprudence.⁵⁶ In short, the prevailing stance on remedies is "the more the better."

⁵¹ See *supra* note 44 (discussing international courts' occasional willingness to deviate from full remedy in expropriation cases); *infra* note 345 and accompanying text (discussing exception to full remedy in mass-abuse situations based on claim that full reparation is impossible).

⁵² E.g., Rohrt-Arriaza, *supra* note 46, at 157–58 (noting that few remedies are paid, despite availability of reparations); Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards?*, 25 LAW & INEQ. 467, 470 (2007) (noting weak enforcement); Singh, *supra* note 46, at 12 (finding it easier to define rights than to translate them into enforceable law); Beth Stephens, Book Review, 95 AM. J. INT'L L. 257, 257 (2001) (reviewing DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (1st ed. 1999)) (stating that rights are often violated in practice).

⁵³ Shelton, *supra* note 52, at 472 (arguing for "further development of independent bodies").

⁵⁴ See, e.g., Fausto Pocar, *The Proliferation of International Courts and Tribunals: A Necessity in the Current International Community*, 2 J. INT'L CRIM. JUST. 304, 307 (2004) (describing proliferation).

⁵⁵ E.g., Manfred Nowak, *The Need for a World Court of Human Rights*, 7 HUM. RTS. L. REV. 251, 254–58 (2007) (calling for new court of human rights); Shelton, *supra* note 52, at 471–72 (advocating continued development of regional bodies); see also Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?*, 2 J. INT'L L. & INT'L REL. 25, 39–44 (2006) (discussing International Criminal Court's novel reparations mechanism).

⁵⁶ E.g., Shelton, *supra* note 16, at 181 (noting that conservatism of European Court has "solidified into an unsatisfactory jurisprudence"); SALVATORE ZAPPALÀ, HUMAN

This stance, while attractive in many ways, is misguided. I do not deny or defend the enormous gap between human rights on paper and on the ground, and I welcome the shift in focus toward enforcement. But as Part II shows, strong remedial rules actually undermine effective rights enforcement in some cases. The existing literature has ignored these remedial deterrence effects and their normative consequences for remedial jurisprudence and institutional design.

In contrast, a broad and rich body of scholarship addresses analogous questions concerning the relationship between rights and remedies in U.S. constitutional law.⁵⁷ I draw from that scholarship a number of useful conceptual tools and therefore offer here a bit of background on U.S. constitutional remedies. The *Chorzów Factory* principles will look familiar to U.S. scholars (as they will to those of

RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 150 (2003) (arguing that international criminal procedure rules should include specific sanctions and exclusionary rules); see also Shelton, *supra* note 6, at 837 (criticizing ILC Articles).

⁵⁷ E.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (claiming that extensive judicial involvement in public law is desirable); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635–36 (2006) (arguing that availability of remedies influences justiciability doctrines); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1736 (1991) (arguing that there must be effective remedies for constitutional violations to limit government even where there are retroactivity concerns); Owen Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 44–58 (1979) [hereinafter Fiss, *Forms of Justice*] (arguing that rights and remedies are phases in judicial process of expounding public values); Owen Fiss, *The Jurisprudence of Busing*, 1975 LAW & CONTEMP. PROBS. 194, 194–96 [hereinafter Fiss, *Jurisprudence of Busing*] (examining remedial-cost trade-offs in constitutional suits); William Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 636 (1981) (distinguishing legitimate judicial remedial discretion from illegitimate remedial discretion); Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 738 (1992) (arguing that courts respond to popular will through process of remediation); Gewirtz, *supra* note 3, at 589 (examining pressure on courts to approve imperfect remedies); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2004 (1998) (exploring complications in defining rights and remedies when Equal Protection Clause applies in criminal adjudication); Levinson, *supra* note 1, at 859–60 (arguing for broader understanding of “right-remedy relationship in constitutional law”); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2538 (1998) (distilling “broader remedial principles from our constitutional text, structure, and tradition” and evaluating nonliability for and nonreviewability of certain constitutional violations); Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859, 861 (1991) (arguing that corrective justice cannot explain courts’ application of remedies in recognition of rights of third parties); Peter M. Shane, *Rights, Remedies, and Restraint*, 64 CHI.-KENT L. REV. 531, 533 (1988) (noting that rule of law may compel judicial opposition to political branches); Laurence H. Tribe, *The Curvature of Constitutional Space*, 103 HARV. L. REV. 1, 26–34 (1989) (arguing that courts’ applications of remedies affect landscape that those courts are addressing). For citations to other works, see Friedman, *supra*, at 736 n.4.

many other domestic systems⁵⁸). Although the U.S. Constitution does not codify a right to an effective remedy, the premise that violations of a right demand a remedy has been part of U.S. constitutional law since *Marbury v. Madison*,⁵⁹ with even older roots in the English common law.⁶⁰ Moreover, U.S. constitutional remedies long operated on a private law model, under which the remedy flowed more or less automatically from the violation; the remedy was whatever would make the victim whole.⁶¹

In recent decades, however, scholars have called these assumptions into question. They have recognized that in practice, although "[e]ffective remedies have always been available for *most* violations of [constitutional] rights,"⁶² right-remedy gaps have long been ubiquitous,⁶³ even since *Marbury* itself.⁶⁴ They have argued that in modern U.S. public law litigation, the simple make-whole remedial approach has been displaced by complicated, discretionary choices that take into account the broader social impact of court-ordered institutional reforms.⁶⁵ And they have demonstrated that fears concerning the costs of implementing remedies for rights violations influence U.S.

⁵⁸ See, e.g., J.A.E. Pottow, *Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24 (Part II)*, 44 CRIM. L.Q. 34, 60 (2000) (discussing relationship between rights and remedies in Canadian law).

⁵⁹ 5 U.S. (1 Cranch) 137, 163 (1803).

⁶⁰ See WILLIAM BLACKSTONE, 3 COMMENTARIES *23 (stating maxim that "where there is a legal right, there is also a legal remedy"); ALBERT V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 199 (10th ed. 1959) ("[T]he Englishmen whose labours gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds . . . on providing remedies for the enforcement of particular rights or . . . for averting definite wrongs . . ."). Indeed, prominent common law jurists once argued that all wrongful *injuries* required a remedy, but it has now long been recognized that not every interest that can be injured amounts to a legally protected right. See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1025–56 (discussing recognition of category of *damnum absque injuria*).

⁶¹ Chayes, *supra* note 57, at 1282–83 (describing private law model); Roach, *supra* note 57, at 868–69 (discussing traditional notion that victim should be made whole); see, e.g., *Davis v. Bd. of Sch. Comm'rs*, 402 U.S. 33, 37 (1971) (holding that remedy must repair violation "to the greatest possible degree").

⁶² Fallon & Meltzer, *supra* note 57, at 1786 (emphasis added).

⁶³ See *id.* at 1765, 1778, 1784 (arguing that damages do not make plaintiff whole); Fiss, *Forms of Justice*, *supra* note 57, at 52 (claiming that rights can exist in absence of remedies); Gewirtz, *supra* note 3, at 590–91 (noting that remedies will always be imperfect); Meltzer, *supra* note 57, at 2559, 2564 (noting right-remedy gaps in context of writ of habeas corpus and injunctive relief).

⁶⁴ Friedman, *supra* note 57, at 737 (observing that *Marbury* received no remedy because of "concocted" jurisdictional conflict).

⁶⁵ Chayes, *supra* note 57, at 1296–1302 (describing discretionary choices); Fiss, *Forms of Justice*, *supra* note 57, at 47 (rejecting deductive and formal notion of remedies); Roach, *supra* note 57, at 867 (noting that remedies flow from practical and equitable considerations); see *infra* Part III.C (discussing remedial interest balancing).

courts' interpretation of rights.⁶⁶ These contentions are contested even within the U.S. literature and certainly cannot just be transposed to the international setting. Nonetheless, international human rights law does face analogous questions about the right-remedy relationship. This Article seeks to bring insights from U.S. domestic scholarship to bear on those questions while exploring the implications of differences in the international law and criminal procedure context. I also hope to offer a modest contribution to those ongoing U.S. debates: some useful case studies of the consequences of strong remedial rules operating against the background of hard institutional constraints, and a few new thoughts on what to do about those consequences.

II

REMEDIAL DETERRENCE IN INTERNATIONAL COURTS

This Part demonstrates that remedial costs sometimes drive international courts to distort their jurisprudence substantially in earlier stages of human rights adjudication. Borrowing from U.S. constitutional scholarship, I refer to this phenomenon as “remedial deterrence.”⁶⁷ I illustrate my argument principally with criminal procedure cases from two international criminal tribunals. These tribunals face particularly potent remedial deterrence pressures. As Section A of this Part explains, the costs, length, and political prominence of their trials make it prohibitively costly for the tribunals to order the standard remedies for serious and prejudicial criminal procedure violations, namely release or retrial. These costs have driven the tribunals to avoid granting any remedy at all, by adopting one of the three strategies I describe in Sections B, C, and D: narrow construction of defendants' rights, reliance on procedural hurdles to avoid reaching the merits, and adjustment of the burden of proof of prejudice. The last strategy has served as an almost-impregnable barrier to rights claims relating to trial fairness, while the first two have been employed primarily with respect to other kinds of claims, especially alleged pretrial violations. Section E considers whether these observations can be extrapolated to other international courts that hear

⁶⁶ E.g., Fiss, *Jurisprudence of Busing*, *supra* note 57, at 195–96 (examining costs of desegregation decrees); Friedman, *supra* note 57, at 738 (noting that courts interpret rights in response to pressure from political majorities); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1370 (2001) (noting that institutional competence concerns lead to reduced remedies); Levinson, *supra* note 1, at 889–99 (discussing costs of expanding constitutional rights). For a more detailed discussion with examples of these dynamics, see *infra* notes 130–35 and accompanying text.

⁶⁷ See *supra* note 1 (discussing Daryl Levinson's use of this phrase).

human rights claims and briefly describes another strategy some such courts have employed—the dilution of their definition of effective remedies.

A. *The Cost of Remedies in International Criminal Proceedings*

The ICTY and ICTR are sister institutions established by the U.N. Security Council in 1993 and 1994, respectively.⁶⁸ Their jurisdiction, as defined by their respective statutes, is to try individual defendants for genocide, war crimes, and crimes against humanity committed during the Balkan conflicts of the 1990s or in Rwanda and neighboring states during 1994.⁶⁹ The two Tribunals share an Appeals Chamber,⁷⁰ have nearly identical Statutes and Rules of Procedure and Evidence, and have mostly harmonized their case law, though particular institutional concerns have created a few differences.⁷¹

Although the ICTs are not “human rights courts” as such, they are important interpreters of human rights law and are among the most prominent and influential modern international courts. They are the first international criminal tribunals since Nuremberg and Tokyo, setting the stage for the new, permanent International Criminal Court (ICC) and for several hybrid domestic/international criminal courts.⁷² They are bound by their statutes to respect the procedural human rights of their defendants⁷³ and have developed a rich body of jurisprudence on criminal procedure rights, some of which is discussed in this Part.

Human rights law constrains government misconduct in the criminal process in ways similar, but not identical, to the constraints pro-

⁶⁸ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, annex (1993) 32 I.L.M. 1192 (2003), *adopted in* S.C. Res 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, 33 I.L.M. 1602 (1994), *adopted in* United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda (with Annexed Statute), S.C. Res. 955, ¶ 106, 49 U.N. SCOR, 48th Sess., U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

⁶⁹ ICTY Statute, *supra* note 68, arts. 2–5; ICTR Statute, *supra* note 68, arts. 2–4.

⁷⁰ More precisely, the ICTY and ICTR Appeals Chambers have the same judges but are formally distinct, and they treat one another’s holdings as binding. Mark A. Drumbl & Kenneth S. Gallant, *Appeals in the Ad Hoc Criminal Tribunals*, 3 J. APP. PRAC. & PROCESS 589, 633–34 (2001).

⁷¹ See *infra* note 150 (discussing provisional release).

⁷² Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 Nw. U. L. REV. 1257, 1267 (2007) (noting that ICTY and ICTR case law has influenced hybrid tribunals and ICC).

⁷³ ICTY Statute, *supra* note 68, art. 21; ICTR Statute, *supra* note 68, art. 20; see also *supra* note 30 and accompanying text (discussing Tribunals’ invocation of human rights treaties in their jurisprudence).

vided by constitutional criminal procedure in the United States and other domestic systems. For instance, Article 9 of the ICCPR provides protections against arbitrary arrest and detention.⁷⁴ Article 14 provides for fair, speedy, and public trials before impartial tribunals, the presumption of innocence, the right to clear notice of charges, the right to counsel and to the time and resources necessary to prepare a defense, confrontation rights, freedom from self-incrimination, the right to an appeal, and protection from double jeopardy.⁷⁵ Article 17 bars unreasonable interferences with privacy.⁷⁶ Other human rights treaties provide similar sets of protections,⁷⁷ and criminal procedure cases have been a central part of human rights courts' dockets.⁷⁸ And as discussed in Part I.A, the ICCPR and other human rights treaties require "effective remedies" for violations of all of these rights,⁷⁹ and ICTs have taken a "rights-maximizing" approach to the enforcement of this requirement.⁸⁰

It may seem strange to focus on the ICTs' *procedural* jurisprudence—that is, on the rights of accused perpetrators of atrocities rather than those of the victims of the atrocities. After all, the victims rarely receive any direct remedy for their suffering; the ICTY and ICTR do not provide victim reparations,⁸¹ though the ICC is expected to do so.⁸² Notwithstanding this incongruence, however, human rights scholars and advocates should care about defendants' rights at the ICTs. First, of course, not all of the accused are necessarily guilty,⁸³ and they face grave sentences. Due process thus matters for the same well-accepted reasons it matters in domestic trials for serious crimes.

⁷⁴ ICCPR, *supra* note 17, art. 9.

⁷⁵ *Id.* art. 14.

⁷⁶ *Id.* art. 17.

⁷⁷ *E.g.*, European Convention, *supra* note 20, arts. 5–8 (providing protections for defendants); American Convention, *supra* note 20, arts. 5, 7, 8, 11 (same).

⁷⁸ STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 7 (2005).

⁷⁹ *See supra* notes 17–20 and accompanying text.

⁸⁰ *See supra* notes 35–37 and accompanying text.

⁸¹ Starr, *supra* note 72, at 1257 n.150.

⁸² *See, e.g.*, Di Giovanni, *supra* note 55, at 39–44 (discussing ICC reparations mechanism). Nonetheless, remedial deterrence dynamics at the ICTs may have potentially serious implications for the design and effectiveness of the new victim reparations mechanism at the ICC, and perhaps for other future tribunals. It is easy to imagine that victim reparations claims could impose significant remedial costs—for instance, that a mass claim in a single case could bankrupt the ICC's Trust Fund for Victims, which is designed to compensate victims where the perpetrators themselves have insufficient assets, *id.* at 49–50—and that courts could respond to these costs by cutting back either victims' rights or the underlying definitions of international crimes that trigger reparations awards.

⁸³ Most have been acquitted on the merits of at least some counts—and a few on all counts. *See* ICTY Cases and Judgments, Indictments and Proceedings, <http://www.un.org/icty/cases-e/index-e.htm> (compiling information on disposition of every ICTY case); ICTR, Status of Cases, <http://69.94.11.53/ENGLISH/cases/status.htm> (same for ICTR).

Moreover, perceived fairness is also crucial to many of the Tribunals' central transitional justice objectives: helping to stabilize fragile democratic governments and regional peace in the affected countries, contributing to the development of international jurisprudence, and serving as a model for human rights protection and the rule of law.⁸⁴ Trial fairness has thus been treated as a principal objective by nearly everyone involved with the ICTs' creation⁸⁵ and operation,⁸⁶ as well as nearly every scholar writing about them.⁸⁷ It is routinely invoked in the Tribunals' jurisprudence and the public statements of judges and prosecutors,⁸⁸ even if the Tribunals' doctrines in some respects fall short of fulfilling that objective in practice.

In addition, international institutions' treatment of their *own* human rights violations may be important to the credibility of international human rights law more broadly: When promoting norms throughout the world, it helps to keep your own house clean. At least some of the ICTs' judges see the Tribunals as models for other courts' treatment of defendants and point out that respecting due process is crucial to that mission.⁸⁹ Indeed, the ICTs' procedural rules and juris-

⁸⁴ E.g., Jacob Katz Cogan, *International Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 114 (2002) (noting that fairness of proceedings in ad hoc tribunals is essential to legitimacy); Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 TEX. INT'L L.J. 111, 115–16 (2002) (claiming that tribunals exist to try defendants fairly); Göran Sluiter, *Fairness and the Interests of Justice*, 3 J. INT'L CRIM. JUST. 9, 19 (2005) (arguing that trial unfairness will lead to criticisms of authority).

⁸⁵ See, e.g., ICTY Statute, *supra* note 68, art. 20 ("Trial Chambers shall ensure that a trial is fair and expeditious . . .").

⁸⁶ See *infra* notes 88–89.

⁸⁷ E.g., Cogan, *supra* note 84, at 114 (arguing that trials should not be perceived as unfair); Laurel E. Fletcher, *From Indifference to Engagement*, 26 MICH. J. INT'L L. 1013, 1082 (2005) (claiming that ad hoc tribunals must be respected as complying with notions of fundamental fairness); Sluiter, *supra* note 84, at 10–11 (2005) (contending that tribunal will be judged by fairness of its trials and that Trial Chamber emphasizes fairness in allowing self-representation).

⁸⁸ For instance, Richard Goldstone, the ICTY's first prosecutor, famously stated early in the Tribunal's history that the measure of its success would not be the number of convictions but rather "the fairness of the proceedings." Mark S. Ellis, 37 NEW ENG. L. REV. 949, 949 (2003) (quoting Richard J. Goldstone, Address Before the Central and East European Law Initiative [CEELI] Leadership Award Dinner (Oct. 2, 1996)); see also, e.g., Prosecutor v. Milošević, Case No. IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, ¶¶ 21–22 (Oct. 21, 2003) (Hunt, J., dissenting) (stating that tribunal will not be judged by number of convictions or speed of proceedings but by fairness of trials); Theodor Meron, *Procedural Evolution at the ICTY*, 2 J. INT'L CRIM. JUST. 520, 524–25 (2004) (stating, as then-President of ICTY, that courts must be procedural role models for human rights standards); Erik Møse, *Main Achievements of the ICTR*, 3 J. INT'L CRIM. JUST. 920, 933 (2005) (noting, as then-President of the ICTR, that lengthy cases are necessary to dispel doubts about compliance with international standards of justice).

⁸⁹ E.g., Prosecutor v. Ntagerura, Case No. ICTR 99-46-T, Judgment, Separate and Dissenting Opinion of Judge Dolenc, ¶ 5 (Feb. 25, 2004) ("[W]e cannot lose sight of the effect

prudence have repeatedly been cited by scholars discussing human rights in the context of domestic proceedings,⁹⁰ by other international courts and commissions and advocates before those bodies,⁹¹ and by domestic courts interpreting their own international legal obligations.⁹²

Finally, I use the international criminal procedure context as an example to illustrate a more general point about remedial deterrence that may have important implications for other international courts. Instances of remedial deterrence are generally difficult to document

of the Tribunal's jurisprudence on international and national guarantees to a fair trial. If the international tribunals fail to provide a model of fairness, we send the wrong message to other courts."); Judge Theodor Meron, President of the ICTY, Address to the United Nations General Assembly (Nov. 15, 2004), available at <http://www.un.org/icty/pressreal/2004/p912-e.htm>.

⁹⁰ See, e.g., Rosemary Byrne, *Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals*, 19 INT'L J. REFUGEE L. 609, 609–10 (2008) (arguing that domestic asylum adjudication should borrow procedural and evidentiary standards from ICTY and ICTR); Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165, 1191–92 (2007) (criticizing military commissions for falling short of procedural standards established at international tribunals); Guénaél Mettraux, *Comparing the Comparable: 2006 Military Commissions vs. the ICTY*, 5 J. INT'L CRIM. JUST. 59, 61–66 (2006) (same); Matthew Bloom, Note, *I Did Not Come Here To Defend Myself: Responding to War on Terror Detainees' Attempts to Dismiss Counsel and Boycott the Trial*, 117 YALE L.J. 70, 101–04 (2007) (citing, in discussion of Guantanamo military commissions, international tribunal precedent on right to self-representation).

⁹¹ E.g., Case C-397/03 P, *Archer Daniels Midland Co. v. Comm'n*, Opinion of Advocate General Tizzano, ¶ 97 (June 7, 2005), available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN> (fill in "Names of parties" field and hit enter; then follow hyperlinked case number to the left of "Opinion") (citing ICTY on double jeopardy); *Edwards v. Bahamas*, Case 12.067, Inter-Am. C.H.R., Report No. 48/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 131 n.63 (2001) (citing ICTY and ICTR on sentencing procedure); *Garza v. United States*, Case 12.243, Inter-Am. C.H.R., Report No. 52/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 56 (2001) (citing U.S. submissions referencing ICTY); *Murray v. United Kingdom* [GC], App. No. 18731/91, 1996-I Eur. Ct. H.R. ¶ 42 (citing Amnesty International submissions referencing the ICTY).

⁹² See, e.g., *Al-Moayad v. Germany*, App. No. 35865/03, Decision, ¶ 20 (E.C.H.R. Feb. 20, 2007), available at <http://www.echr.coe.int/echr/en/hudoc> (for instructions on locating documents within "HUDOC Database," see *supra* note 24) (quoting, in translation, Federal Constitutional Court of Germany decision following the ICTY); *MacCarthaigh v. Minister of Justice*, [2002] I.E.H.C. 149 (14th May, 2002) (H. Ct.) (Ir.), available at <http://www.baillii.org/ie/cases/IEHC/2002/149.html> (last visited Apr. 13, 2008) (citing ICTY and ICTR provision of simultaneous translation, though ultimately refusing to follow suit); *A. v. Secretary of State*, [2004] H.R.L.R. 38, ¶ 510 (A.C.) (U.K.) (Neuberger, L.J., dissenting) (citing ICTY decision on exclusion of evidence); *United States v. Burns*, [2001] 1 S.C.R. 283, 334 (Can.) (discussing inapplicability of death penalty in ICTY and ICTR); *Mohamed v. President of S. Afr.* 2001 (3) SA 893 (CC) at 910 n.30 (S. Afr.) (discussing U.N. Security Council's decision to remove death penalty as option in ICTY); see also Michael P. Scharf, *The Iraqi High Tribunal: A Viable Experiment in International Justice?*, 5 J. INT'L CRIM. J. 258, 259 (2007) (noting that procedures of Iraqi High Tribunal are modeled on those of ICTY and ICTR).

conclusively because courts do not candidly acknowledge them.⁹³ But one would expect that where remedial costs are especially high, remedial deterrence effects will be comparatively significant and easy to identify. As U.S. constitutional scholar Daryl Levinson states, remedial deterrence "reflects simple economics": If it is more costly to recognize a remedy, courts will be less likely to do so.⁹⁴ International criminal procedure provides a particularly good set of test cases for evaluating the impact of high remedial costs in international courts because in the ICTs, the available remedies are often extremely costly.

In general, criminal procedure cases, particularly those cases involving serious crimes, often produce especially thorny remedial dilemmas. In such cases, monetary compensation is often inadequate or inappropriate.⁹⁵ Money may seem a particularly inadequate remedy for a person facing a long prison sentence, and cash payments to criminals or their families may be politically untenable. The ICTs have granted financial compensation for a procedural violation only once, awarding \$2000 in the recent *Rwamakuba* case⁹⁶—and the Appeals Chamber made clear that this case, which involved a defendant who had been acquitted on all counts, was exceptional.⁹⁷ Instead of compensation, criminal courts usually turn to the other common remedies for procedural violations, such as excluding evidence,⁹⁸ reversing convictions, or dismissing charges.⁹⁹ The ICTY and ICTR (like some European courts) also sometimes grant sentence reductions on the basis of violations of a defendant's pretrial rights.¹⁰⁰

In the ICTs, the cost of these typical criminal procedure remedies is essentially prohibitive because the ICTs face institutional con-

⁹³ Fallon, *supra* note 57, at 660–61 ("[A]ssertions that particular doctrines reflect concerns about unacceptable remedies can not always be supported by rigorous proof."); Levinson, *supra* note 1, at 890 ("Individual examples of remedial deterrence are difficult to document with great confidence . . .").

⁹⁴ Levinson, *supra* note 1, at 889.

⁹⁵ See Karlan, *supra* note 57, at 2004 (explaining that monetary compensation is rare in U.S. criminal procedure cases).

⁹⁶ *Rwamakuba* Remedy Appeal, *supra* note 31.

⁹⁷ *Rwamakuba* Remedy Appeal, *supra* note 31, ¶¶ 27–30.

⁹⁸ This Article does not focus on the cost of exclusionary rules because the ICTs (like most domestic courts outside the United States) generally do not employ them, taking a relatively flexible approach to the admission of most kinds of unlawfully obtained evidence. See generally *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on the Defense "Objection to Intercept Evidence," ¶¶ 32–55 (Oct. 3, 2003) (discussing use of exclusionary rule in common law and civil law traditions and its application to international court decisions).

⁹⁹ Karlan, *supra* note 57, at 2004.

¹⁰⁰ See *supra* notes 39–42 and accompanying text. Dismissals have been more politically difficult. See *infra* notes 108–10 and accompanying text.

straints that domestic criminal courts or other international courts do not. Most importantly, after an appeal from conviction at trial at the ICTs, retrial is all but impossible. Trials at the ICTs have cost \$10.9 million per defendant,¹⁰¹ an extraordinary amount that the Tribunals can hardly afford to spend twice. Scores of witnesses are flown in to testify, an emotionally traumatic process that most would presumably be loath to repeat.¹⁰² Moreover, the ICTs are temporary institutions, currently required by U.N. Security Council resolutions to finish trials by 2008 and appeals by 2010,¹⁰³ although proceedings may in fact take a year or two longer.¹⁰⁴ Because proceedings typically last several years, a retrial would almost surely require the Security Council and General Assembly to authorize a significant extension of the tribunals' mandates.¹⁰⁵ Long delays may impair the Tribunals' goals in other ways, a point placed in sharp relief by the death of Slobodan Milošević during his trial's fifth year, widely considered a major setback to the ICTY.¹⁰⁶ The ICTs are thus under pressure to complete cases quickly, and this pressure shapes their procedural decisions.¹⁰⁷

¹⁰¹ Starr, *supra* note 72, at 1276 n.97. I further suggest that the trial costs will rise to \$15.3 million per defendant in the next few years. *Id.*

¹⁰² See Sluiter, *supra* note 84, at 15 (2005) (reviewing reasons potential witnesses may be reluctant to testify).

¹⁰³ S.C. Res. 1534, ¶ 3, U.N. Doc. S/RES/1534 (Mar. 26, 2004); S.C. Res. 1503, ¶ 7, U.N. Doc. S/Res/1503 (Aug. 28, 2003).

¹⁰⁴ See Letter of Fausto Pocar, President of the ICTY, to the President of the Security Council, Annex I, ¶ 2, S/2007/663, (Nov. 12, 2007) (stating that ICTY trials are expected to be completed by early 2010 and appeals by 2011).

¹⁰⁵ The ICTs usually avoid expressly invoking their completion strategies in their procedural decisions. See *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defense Case, ¶¶ 17–18 (Jan. 20, 2004) (suggesting that benefits of expediting trial for “convenience of the Tribunal” would be “inappropriate” consideration in procedural decisionmaking). One exception to this trend was the ICTY's decision in *Prosecutor v. Prlić*, where the court adopted specific measures to complete the presentation of cases in time. Case No. IT-04-74-T, Decision on Adoption of New Measures To Bring the Trial to an End Within a Reasonable Time, ¶¶ 13–23 (Nov. 13, 2006).

¹⁰⁶ See, e.g., David M. Crane, *Terrorists, Warlords, and Thugs*, 21 AM. U. INT'L L. REV. 505, 512 n.13 (2006) (“Time may also preclude a sense of justice, as seen recently in the reaction to the death of Slobodan Milošević.”).

¹⁰⁷ See, e.g., *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Assignment of Counsel, ¶ 16 (Aug. 21, 2006) (invoking completion strategy); Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 886 (2005) (describing effect of completion strategy); Michael P. Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT'L L.J. 911, 940–42 (2005) (describing ICTY reform of Rules of Evidence to expedite witness testimony); Patricia M. Wald, *To “Establish Incredible Events by Credible Evidence”: The Use of Affidavit Evidence in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535, 537 (2001) (describing movement toward use of affidavit evidence because of right to prompt trial).

Retrial in the face of this reality would be an extraordinary remedy indeed.¹⁰⁸

The main alternative to a retrial, releasing a suspected war criminal on a perceived technicality, is equally unappealing. This option contravenes the Tribunals' transitional justice objectives and is potentially politically disastrous. These stakes were made spectacularly clear the single time the Appeals Chamber attempted to do so. In the *Barayagwiza* case, early in the ICTR's history, the Appeals Chamber initially found that the defendant, an accused architect of the Rwandan genocide, had been improperly detained for several months and that the proper remedy was release and dismissal of the case with prejudice.¹⁰⁹ The Rwandan government reacted by threatening to cut off all cooperation, a response that would effectively shut down the Tribunal.¹¹⁰ In the face of this potential catastrophe, the Appeals Chamber hastily invented a pretense to rehear the case (purported "new facts") and to alter its interpretation of the merits, allowing it to reduce the remedy to a sentence reduction or (in the event of acquittal) financial compensation.¹¹¹

The Appeals Chamber's legal contortions in the *Barayagwiza* case are themselves examples of remedial deterrence. During the review proceeding, the Appeals Chamber did not have the authority to reconsider its remedial reasoning and began by "confirming its [original decision] on the basis of the facts it was founded on," emphasizing that its establishing Statute only permitted review on the basis of "new facts."¹¹² To alter the remedy, it thus needed both to loosely interpret the new-fact requirement—for which it has been roundly criticized¹¹³—and to effectively narrow the underlying procedural rights. For instance, in its initial decision, the Appeals Chamber had held that (among other violations) *Barayagwiza* had been impermis-

¹⁰⁸ Occasional dissents have argued for retrials. In *Prosecutor v. Blagojević*, the majority found that the Trial Chamber did not err by requiring Blagojević to be examined by his own counsel if he wished to testify in his defense. Case No. IT-02-60-A, Judgment, ¶¶ 26–29 (May 9, 2007). In his dissent, Judge Shahabuddeen disagreed, explaining that Blagojević was "unlawfully prevented from telling his story" since the right to appear in one's own defense is central to the right to a fair trial. *Id.* ¶ 1 (Shahabuddeen, J., dissenting) (emphasis added).

¹⁰⁹ See *infra* notes 114–16 and accompanying text.

¹¹⁰ ZAPPALÀ, *supra* note 56, at 256 (discussing political context of decision); Cogan, *supra* note 84, at 134–35 (same); Fleming, *supra* note 84, at 142–44 (same).

¹¹¹ *Barayagwiza II* Decision, *supra* note 42, ¶¶ 51–75.

¹¹² *Id.* ¶ 51.

¹¹³ E.g., Drumbl & Gallant, *supra* note 70, at 652; William A. Schabas, International Decisions, *Barayagwiza v. Prosecutor*, 94 AM. J. INT'L L. 563, 567–68 (Bernard H. Oxman ed., 2000).

sibly detained for eleven months without charge.¹¹⁴ It had held that while a detainee need not be formally indicted immediately, he is entitled to be promptly “notified, in simple, non-technical language that he can understand, [of] the essential legal and factual grounds for his arrest, so as to be able, as he sees fit, to apply to a court to challenge its lawfulness.”¹¹⁵

On review, the Appeals Chamber found that, in fact, Barayagwiza had only been held without charge for eighteen days, not eleven months.¹¹⁶ It relied on the Appellant’s statement at a hearing on his eighteenth day of detention that he should not be extradited to Rwanda because, as he put it, “[C]’est le tribunal international qui est compétent.”¹¹⁷ On this basis alone, the Appeals Chamber concluded “that it may accordingly be presumed that the Appellant was informed of the nature of the crimes he was wanted for by the Prosecutor.”¹¹⁸ This is a remarkable non sequitur. Even if Barayagwiza understood *which court* had sought jurisdiction over his case, that is a far cry from being informed in clear language of the “essential legal and factual grounds for his arrest”—that is, *what conduct* he was being charged with.¹¹⁹ The Review Decision did not even attempt to explain how the new evidence satisfied its earlier articulation of the right. And although the Appeals Chamber succeeded in averting the existential threat to the Tribunal posed by the Rwandan government’s backlash, the *Barayagwiza* affair is generally seen today as a blemish on the Tribunal’s history.¹²⁰

The lesson of the *Barayagwiza* debacle appears to have been a lasting one. Since then, neither the ICTR nor the ICTY has tried to release a defendant on the basis of a procedural violation. This is despite the fact that, although the ICTs’ trials have mostly been praised as generally fair,¹²¹ a number of problems have drawn signifi-

¹¹⁴ *Barayagwiza I* Decision, *supra* note 31, ¶ 78.

¹¹⁵ *Id.* ¶ 82.

¹¹⁶ *Barayagwiza II* Decision, *supra* note 42, ¶¶ 54–55.

¹¹⁷ *Id.* (“It is the international tribunal that has jurisdiction.”) (translation by author).

¹¹⁸ *Id.*

¹¹⁹ See Schabas, *supra* note 113, at 569 (“Nothing in the record suggests that the ICTR told [Barayagwiza] what the charges were on May 3 . . .”).

¹²⁰ See, e.g., Fleming, *supra* note 84, at 144 (“The catastrophic consequences of *Barayagwiza I* were direct results of two distinct misapprehensions of the Appeals Chamber’s role.”); Schabas, *supra* note 113, at 567 (“In the second decision, the appeals chamber ultimately distorts the law in an effort to achieve the desired result . . . [T]he chamber’s efforts to justify overturning its previous decision are surprisingly weak.”).

¹²¹ E.g., David Wippman, *The Costs of International Justice*, 100 AM. J. INT’L L. 861, 879 (2006) (“Although individual judgments have attracted criticism . . . most observers would agree that the work of the Tribunal has generally been of high quality.”). But see Gregory S. Gordon, *Toward an International Criminal Procedure*, 45 COLUM. J. TRANSNAT’L L. 635, 637 (2007) (criticizing various procedural problems, including lengthy pretrial detention).

cant criticism on human rights grounds—long delays,¹²² lengthy pre-trial detention,¹²³ prosecutorial disclosure failures,¹²⁴ other problems with defense access to evidence,¹²⁵ incompetent defense counsel,¹²⁶ and significant resource disparities threatening the equality of arms.¹²⁷ A few defendants have had convictions on particular charges vacated on procedural grounds, but only when the effect on the total sentence for all charges was relatively minor—no defendant has had all charges dismissed on such grounds.¹²⁸ Moreover, the ICTs' shared Appeals Chamber has *never* ordered a new trial of a convicted defendant on procedural grounds.¹²⁹ These results are consistent with what remedial deterrence theory would predict. The next three Sections use case studies to show how the Tribunals have avoided these remedies—by distorting doctrinal rules at other stages of the proceedings—and build the causal case that these distortions result from remedial-cost pressures.

¹²² See *infra* note 137 and accompanying text.

¹²³ See Gordon, *supra* note 121, at 691 (“[Rule 65, governing pretrial release,] was for many years extremely restrictive and placed on the accused the burden of showing ‘exceptional circumstances’ to justify release.”). See generally Daniel J. Rearick, Recent Developments, *Innocent Until Alleged Guilty: Provisional Release at the ICTR*, 44 HARV. INT’L L.J. 577 (2003) (criticizing failure of ICTR to allow for provisional release).

¹²⁴ E.g., Charmaine de los Reyes, *Revisiting Disclosure Obligations at the ICTY and Its Implications for the Rights of the Accused*, 4 CHINESE J. INT’L L. 583, 592–93 (2005) (criticizing ICTR’s broad interpretation of witness statements and exculpatory material).

¹²⁵ E.g., Cogan, *supra* note 84, at 121–27 (reviewing difficulties in gathering evidence or forcing release of probative information); Gordon, *supra* note 121, at 676–80 (explaining that statutory mechanisms allow state to avoid assisting defendants); Geert-Jan Alexander Knoops, *The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials*, 28 FORDHAM INT’L L.J. 1566, 1587–89 (2005) (arguing that defense teams lack access to exculpatory materials and witnesses).

¹²⁶ E.g., David Tolbert, *The ICTY and Defense Counsel*, 37 NEW ENG. L. REV. 975, 975 (2003) (“[I]t is fair to say that the defense counsel and legal aid systems have been the ICTY’s Achilles’ heel.”); Wippman, *supra* note 121, at 879–80 (“If the [ICTR] suffers from a substantial weakness . . . it has been the variable, and sometimes very low, caliber of some of the attorneys serving as defense counsel.”).

¹²⁷ See Knoops, *supra* note 125, at 1566 (“Recent practice before the [ICTY] displays a tension between the principle of equality of arms and that of judicial economy.”).

¹²⁸ See *infra* notes 197–201 and accompanying text.

¹²⁹ The Appeals Chamber has vacated one defendant’s guilty plea as insufficiently informed, but this remedy was much less costly. Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment, ¶ 20 (Oct. 7, 1997). Even if that defendant had been tried, it would have been his first trial and would not have been perceived as duplicative or wasteful (especially given that plea bargains are very unusual at the Tribunal). Moreover, a trial was an unlikely consequence—the parties had already indicated their willingness to plea bargain, and in fact, they quickly reached a new agreement. Prosecutor v. Erdemović, Case No. IT-96-22-Tbis, Sentencing Judgment, ¶ 8 (Mar. 5, 1998).

B. Remedial Deterrence Effects on Interpretation of Rights

Courts sometimes respond to remedial costs by substantively narrowing the definition of a right. These remedial deterrence effects are well documented in national courts.¹³⁰ Consider, for instance, problems of racial discrimination. U.S. courts are required to reverse criminal convictions in all cases involving racially discriminatory jury selection.¹³¹ Pamela Karlan has demonstrated that the adoption of this extreme remedy caused courts to narrow the circumstances under which they will find such discrimination.¹³² Larry Tribe suggests that the Supreme Court has refused to hold systematic racial discrimination in capital juries unconstitutional because there is no viable remedy for it, “short of a radical overhaul in the structure of the criminal justice system, and perhaps in the structure of our society.”¹³³ Bill Stuntz has documented that the U.S. Supreme Court’s adoption of the Fourth Amendment exclusionary rule resulted in limitations on the underlying rights,¹³⁴ while John Pottow has made a similar argument about exclusion of evidence in Canada.¹³⁵

Remedial deterrence effects appear to have substantially influenced the ICTs’ interpretations of defendants’ rights. A prime example is the right to a speedy trial.¹³⁶ At both the ICTY and the ICTR, pretrial and trial proceedings typically last for several years,¹³⁷ and pretrial release is either disfavored or (at the ICTR) nonexistent.¹³⁸ Defendants have thus been subject to many years of detention before and during trial, due to lengthy delays often triggered at least

¹³⁰ Daryl Levinson has studied the phenomenon in particular depth. See Levinson, *supra* note 1, at 889–99 (reviewing examples).

¹³¹ *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) (“If a trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with an explanation for his action, our precedents require that Petitioner’s conviction be overturned.”).

¹³² Karlan, *supra* note 57, at 2005, 2015.

¹³³ Tribe, *supra* note 57, at 33–34.

¹³⁴ See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 917–18 (1991) (“[T]he exclusionary rule not only changes the rationale for having warrants, it changes warrants’ constituency.”).

¹³⁵ Pottow, *supra* note 58, at 64 & n.100 (citing other Canadian and U.S. literature on remedial deterrence).

¹³⁶ See, e.g., ICTY Statute, *supra* note 68, art. 21, § 4(c) (protecting right “to be tried without undue delay”).

¹³⁷ Rearick, *supra* note 123, at 577–79; Wald, *supra* note 107, at 535–36; Jenny S. Martinez, *Troubles at the Tribunal*, WASH. POST, July 3, 2001, at A19 (“[T]he trials of even low-level offenders are endless—two years from opening statement to verdict is not unusual . . .”).

¹³⁸ See *supra* note 123 (noting ICTR chambers’ failure to grant provisional releases).

in part by the prosecution's requests for extensions of time.¹³⁹ The Tribunals have nonetheless consistently rejected claims of speedy trial violations.¹⁴⁰ In *Rwamakuba*, for instance, the defendant brought such a challenge after he had been held in detention for seven years prior to trial.¹⁴¹ The Trial Chamber explained that what counts as "undue delay" turns on factors including the complexity of the case, the seriousness of the charges, and the parties' conduct.¹⁴² Similar tests have been applied in other cases.¹⁴³

Because ICT cases are all complex, and the charges serious, this balancing calculus already tilts in the prosecution's favor. The Trial Chambers have furthermore been generous in accepting the prosecution's reasons for delays. For example, in *Rwamakuba*, the Trial Chamber accepted the prosecution's explanation that it had experienced "difficulty in the investigatory process" and that the prosecution's own decision to try *Rwamakuba* together with several co-defendants had created logistical difficulties.¹⁴⁴ *Rwamakuba* was ultimately tried and acquitted on all charges and released in September 2006, after more than eight years in detention.¹⁴⁵ In September 2007, the Appeals Chamber denied his request for compensation for this prolonged detention, instead upholding the Trial Chamber's \$2000 award for a separate procedural violation relating to the initial appointment of counsel.¹⁴⁶ Other ICTY and ICTR cases have demonstrated similar patterns. In *Bizimungu*, the defendant Mugiraneza had been detained for four and a half years; the Trial Chamber found

¹³⁹ Gillian Higgins, *Fair and Expeditious Pre-trial Proceedings*, 5 J. INT'L CRIM. JUST. 394, 394–95 (2007); Rearick, *supra* note 123, at 577–79.

¹⁴⁰ See, e.g., *Prosecutor v. Semanza*, Case No. ICTR 97-20-T, Judgment and Sentence, ¶¶ 582–84 (May 15, 2003) (involving seven-year detention of defendant); *Prosecutor v. Mugenzi*, Case No. ICTR 99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), ¶¶ 12–13, 31–32 (Nov. 8, 2002) [hereinafter *Mugenzi Decision*] (addressing situation in which defendant had been detained for over three years and trial had not yet commenced).

¹⁴¹ *Prosecutor v. Rwamakuba*, Case No. ICTR 98-44C-PT, Decision on Defense Motion for Stay of Proceedings, ¶ 26 (June 3, 2005) [hereinafter *Rwamakuba Motion Decision*] (noting that because reasonableness is judged on case-by-case basis, "a period of time of more than seven years does not necessarily amount to an excessive delay in the proceedings").

¹⁴² *Id.*

¹⁴³ *Prosecutor v. Bizimungu*, Case No. ICTR 99-50-T, Decision on Prosper Mugiraneza's Application for Hearing or Other Relief on His Motion for Dismissal for Violation of His Right to a Trial Without Undue Delay, ¶¶ 26, 30 (Nov. 3, 2004) [hereinafter *Bizimungu Motion Decision*]; *Mugenzi Decision*, *supra* note 140, ¶¶ 32–33.

¹⁴⁴ *Rwamakuba Motion Decision*, *supra* note 141, ¶¶ 29, 33.

¹⁴⁵ *Prosecutor v. Rwamakuba*, Case No. ICTR 98-44C-T, Judgment, ch. IV (Sept. 20, 2006).

¹⁴⁶ *Rwamakuba Remedy Appeal*, *supra* note 31, ¶¶ 13, 15, 23–30.

that this was not an undue delay in light of the complexity of the case and the lack of prosecutorial malfeasance.¹⁴⁷ As of this writing three years later, Mugiraneza remains in detention, his trial in progress.¹⁴⁸ An ICTY Trial Chamber likewise rejected a speedy trial challenge in the *Nikolić* case, although in that case, the defendant was convicted “only” three years and eight months after his arrest.¹⁴⁹

These outcomes are consistent with what remedial deterrence theory would predict. The traditional remedy for speedy trial violations, endorsed by the Appeals Chamber in *Barayagwiza*, is release and dismissal of charges.¹⁵⁰ But that remedy, as the *Barayagwiza* case ultimately illustrated, would be catastrophic for the ICTs. Thus, whenever defendants, *after* a long delay, have complained of speedy trial violations, the ICTs have construed that right narrowly and avoided granting remedies.

It is possible that this narrow reading is simply correct and that the ICTs would have adopted it regardless of the remedial cost. But some contrary evidence is provided by the ICTs’ greater willingness to enforce the speedy trial right when they consider its scope *before* a potential violation, in contemplation of some procedural development that would delay trial. For instance, in *Muvunyi*, the Trial Chamber cited that right in denying the prosecution’s motion to amend the indictment.¹⁵¹ In *Rwamakuba* itself, the Trial Chamber cited the speedy trial right to support severance of Rwamakuba’s case from

¹⁴⁷ Bizimungu Motion Decision, *supra* note 143, ¶¶ 31–33.

¹⁴⁸ See ICTR, Case Minutes for *Bizimungu*, <http://69.94.11.53/ENGLISH/cases/Bizimungu/minutes/index.htm> (last visited Feb. 13, 2008) (indicating recent developments).

¹⁴⁹ Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgment, ¶¶ 10, 270–71 (Dec. 18, 2003).

¹⁵⁰ *Barayagwiza I* Decision, *supra* note 31, ¶¶ 104–08. This passage arguably consists of dicta because *Barayagwiza* itself was not a speedy trial case—it involved delays in the indictment and initial appearance rather than the trial. The ICTR has, in any event, declined to find speedy trial violations even when defendants have merely sought *provisional* release as a remedy for long delays. *E.g.*, Prosecutor v. Kanyabashi, Case No. ICTR 96-15-T, Decision on the Defense Motion for Provisional Release of the Accused, ¶¶ 8–12 (Feb. 21, 2001); Mugenzi Decision, *supra* note 140, ¶ 36. This is unsurprising, as even provisional release is a prohibitive remedy in the ICTR because the Tribunal lacks the capacity to enforce defendants’ return to trial and to protect witnesses. In the ICTY, in contrast, provisional release is sometimes granted, and ICTY Trial Chambers generally consider the length of detention as a factor influencing provisional release determinations. *E.g.*, Prosecutor v. Blagojević, Case No. IT-02-60-PT, Decision on Vidoje Blagojević’s Application for Provisional Release, ¶ 58 (July 22, 2002).

¹⁵¹ Prosecutor v. Muvunyi, Case No. ICTR 2000-55A-PT, Decision on Prosecutor’s Motion for Leave To File Amended Indictment, ¶¶ 48–50, 53–54 (Feb. 23, 2005); *accord* Prosecutor v. Bizimungu, Case No. ICTR 99-50-AR5, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, ¶¶ 16, 21 (Feb. 12, 2004).

those of his co-defendants.¹⁵² Likewise, the ICTs have relied on the right when denying motions to recall witnesses¹⁵³ or to delay proceedings,¹⁵⁴ when issuing scheduling orders,¹⁵⁵ and when appointing pre-trial and pre-appeal judges to expedite motions.¹⁵⁶ Many of these cases involve much shorter delays than those challenged in the ex post assessment cases.

This disparity in treatment of the speedy trial right is also predictable: When there is less cost in interpreting the right broadly, as there is when potential violations are considered ex ante, courts are more likely to do so. Moreover, in such cases, defendants' speedy trial concerns often align with the Tribunals' institutional incentive to accelerate trials.¹⁵⁷ Remedial deterrence effects may nonetheless spill over into these cases to some degree: The legal tests adopted in high-cost cases carry precedential weight in lower-cost cases. In many ex ante assessment cases, the ICTs have rejected speedy trial arguments notwithstanding fairly long delays.¹⁵⁸ Still, the Tribunals have some room for maneuver in applying previously established legal tests to particular facts, and can sometimes recognize violations. All in all, although the Tribunals' conduct in ex ante assessment cases is inconsistent, they have shown at least some willingness to interpret and apply the right broadly, while they never do so when the speedy trial right is raised after trial.

Finally, ICTs' fears about enforcement difficulties can also influence rights interpretation. Such fears are likely when defendants

¹⁵² Prosecutor v. Karemera, Case No. ICTR 98-44-PT, Decision on Severance of André Rwamakuba and for Leave To File Amended Indictment, ¶ 31 (Feb. 14, 2005); *accord* Prosecutor v. Muvunyi, Case No. ICTR 2000-55-I, Decision Regarding Prosecutor's Motion for Leave To Sever Indictment and for Directions on Trial of Tharcisse Muvunyi, ¶ 7 (Dec. 11, 2003); *see also, e.g.*, Prosecutor v. Martić, Case No. IT-95-11-PT, Decision on Prosecution Motion for Joinder, ¶¶ 47–52 (Nov. 10, 2005) (relying on speedy trial concerns as basis for denying joinder motion).

¹⁵³ *E.g.*, Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Prosecution Motion To Recall Witness Nyanjwa, ¶ 6 (Sept. 29, 2004).

¹⁵⁴ *E.g.*, Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Certification of Interlocutory Appeal from Decisions on Severance and Scheduling of Witnesses, ¶ 10 (Sept. 11, 2003).

¹⁵⁵ *E.g.*, Prosecutor v. Milutinović, Case No. IT-05-87-T, Scheduling Order, ¶ 1 (Nov. 15, 2006).

¹⁵⁶ *E.g.*, Prosecutor v. Kupreškić, Case No. IT-95-16-A, Order Appointing Pre-appeal Judge (Mar. 14, 2001).

¹⁵⁷ *See supra* notes 105–07 and accompanying text (noting that pressure to complete cases quickly shapes procedural decisions).

¹⁵⁸ *See, e.g.*, Prosecutor v. Brđanin, Case No. IT-99-36, Decision on Filing of Replies, ¶ 3 (June 7, 2001) (approving late amendment to indictment); Prosecutor v. Tolimir, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against Trial Chamber's Decision on Joinder of Accused, ¶¶ 24–26 (Jan. 27, 2006) (denying challenge to joinder).

request orders against recalcitrant governments. The ICTs are dependent on state cooperation for many essential aspects of their operation.¹⁵⁹ Tribunals may be cautious about issuing orders that are likely to be disobeyed because noncompliance could undermine the Tribunal's credibility and effectiveness. For instance, Jacob Cogan has argued that fear of U.S. resistance shaped a recent ICTY order concerning defense access to evidence in U.S. possession.¹⁶⁰ Such instances are examples of remedial deterrence, as the high potential cost of the remedial order—namely, the risk of noncompliance—discourages enforcement of the underlying right.¹⁶¹

C. Procedural Avoidance

Another way for courts to avoid granting undesirable remedies is to find some procedural reason to avoid reaching the merits of a rights claim in the first place. Such reasons could include a lack of jurisdiction over a complaint, a party's waiver of an argument, or various justiciability or abstention doctrines. I refer to such strategies, which consist essentially of what Bickel called the "passive virtues,"¹⁶² as "procedural avoidance." U.S. domestic law scholars have argued that decisions about justiciability and jurisdiction often "represent concealed judgments on the merits,"¹⁶³ and Dick Fallon has demonstrated that they sometimes also represent concerns about remedies.¹⁶⁴

In the ICTs—in contrast to the regional human rights courts, as discussed in Part II.E below—there are generally no formal "admissibility" hurdles for defendants' rights claims. Procedural avoidance, nonetheless, is still occasionally a viable strategy. For instance, the ICTs have held that they lack jurisdiction to review national authorities' arrest methods and conditions of detention before transfer to Tribunal custody, even when the arrest and detention occur at the Tribunal Prosecutor's request.¹⁶⁵ That rule has been criticized on

¹⁵⁹ Wippman, *supra* note 121, at 876.

¹⁶⁰ Jacob Katz Cogan, *International Decisions, Prosecutor v. Milutinović*, 101 AM. J. INT'L L. 163, 167–69 (Daniel Bodansky ed., 2007).

¹⁶¹ See Fiss, *Forms of Justice*, *supra* note 57, at 54–55 (making similar argument in U.S. context); Friedman, *supra* note 57, at 775 (same).

¹⁶² See *infra* notes 248–51 and accompanying text (discussing and critiquing Bickel's praise of these strategies).

¹⁶³ Fallon, *supra* note 57, at 634–35; see also Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999) (arguing that standing is political, rather than legal, determination and that "judges provide access to the courts to individuals who seek to further the political and ideological agendas of judges").

¹⁶⁴ Fallon, *supra* note 57, at 635–37.

¹⁶⁵ See Gordon, *supra* note 121, at 672–76 (discussing such cases in both ICTR and ICTY).

human rights grounds.¹⁶⁶ But it has an obvious remedial-cost-avoidance advantage for the Tribunals, where the capture of suspects often depends on the cooperation of states with poor human rights records. If they were to assert jurisdiction to review arrest and detention methods, the Tribunals would probably be required to grant significant remedies (perhaps even release) in many cases.

Perhaps the most common procedural basis for dismissal of ICT defendants' human rights claims is the appellate waiver doctrine concerning arguments not raised at trial.¹⁶⁷ The Appeals Chamber has recognized exceptions to this doctrine, however, and applies it with varying and sometimes unpredictable strictness,¹⁶⁸ suggesting at least the possibility that its application may vary based on remedial costs. In *Akayesu*,¹⁶⁹ for instance, the Appeals Chamber held that the defendant had waived his unlawful detention claim.¹⁷⁰ This holding relied on a stricter application of the waiver doctrine than the Appeals Chamber had applied in other contexts,¹⁷¹ suggesting an ad hoc form of remedial deterrence. As the Appeals Chamber acknowledged, *Akayesu* had in fact filed a motion before the Trial Chamber arguing that he was detained in Zambia without being properly charged.¹⁷² But the Appeals Chamber held that *Akayesu* had failed to argue specifically that the Office of the Prosecutor was responsible for that failure.¹⁷³

This hairsplitting is sharply inconsistent with the liberal approach the Appeals Chamber has more often taken to the construction of defendants' submissions (many of which are poorly written).¹⁷⁴ It

¹⁶⁶ *Id.*

¹⁶⁷ *E.g.*, Prosecutor v. Musema, Case No. ICTR 96-13-A, Judgment, ¶¶ 337–41 (Nov. 16, 2001) (dismissing defendant's appeal based on failure to raise procedural fairness issues at trial).

¹⁶⁸ See Drumbl & Gallant, *supra* note 70, at 631 (discussing inconsistency in waiver doctrine). Compare Prosecutor v. Kamuhanda, Case No. ICTR 99-54A-A, Judgment, ¶ 21 (Sept. 19, 2005) [hereinafter Kamuhanda Judgment] (holding that in defective-indictment cases, Appeals Chamber should ignore appellant's failure to object below provided that he proves prejudice), with Prosecutor v. Kayishema, Case No. ICTR 95-1-A, Judgment, ¶¶ 91–96 (June 1, 2001) (failing to apply this exception in another defective-indictment case).

¹⁶⁹ Prosecutor v. Akayesu, Case No. ICTR 96-4-A, Judgment (June 1, 2001) [hereinafter *Akayesu* Judgment].

¹⁷⁰ *Id.* ¶¶ 367, 372–75.

¹⁷¹ See *infra* note 174 and accompanying text.

¹⁷² *Akayesu* Judgment, *supra* note 169, ¶¶ 367, 372–75.

¹⁷³ *Id.* ¶ 375.

¹⁷⁴ Indeed, a far more lenient application of the waiver doctrine appears within the *Akayesu* judgment itself. See *id.* ¶ 336 (holding that appellant could challenge ex parte communication despite failure to raise it below because receipt of communication was enough to put Trial Chamber on notice of potential objections); see also, *e.g.*, Prosecutor v. Ntakirutimana, Case No. ICTR 96-10-A, Judgment, ¶ 298 (Dec. 13, 2004) (stating that

might be understood best as a response to the *Barayagwiza* debacle less than a year earlier.¹⁷⁵ Akayesu's legal argument on appeal was based on the Appeals Chamber's original decision in *Barayagwiza*.¹⁷⁶ That precedent might have required release if the Appeals Chamber had found that Akayesu had similarly been detained impermissibly—which is at least a possibility, as Akayesu was arrested by Zambian officials several months before the ICTR issued an indictment against him.¹⁷⁷ And the Appeals Chamber, having barely managed to preserve the continued viability of the Tribunal via its forced retreat in the *Barayagwiza* Review Decision,¹⁷⁸ of course would have been anxious not to repeat that crisis. Again, while it is impossible to show conclusively that remedial costs drove the Appeals Chamber's application of the waiver doctrine, the circumstances are suggestive.

D. Remedial Deterrence at the Prejudice Assessment Stage

Like many countries' domestic courts, international courts decline to grant remedies for rights violations unless the victim shows that she has been or will be harmed.¹⁷⁹ As Dan Meltzer has commented in the U.S. context, such prejudice inquiries turn not only on "the likelihood that an error affected the outcome, but also [on] how great a likelihood the law should deem acceptable."¹⁸⁰ The subjective nature of both the empirical and normative inquiries makes possible another sort of remedial deterrence effect that, like procedural avoidance, does not require courts to narrow their substantive interpretations of rights: Courts can respond to high remedial costs by paring back the circumstances in which they find prejudice.

A court may find that a human rights violation has taken place, but set a high burden of proof of prejudice and find that the burden is

Appeals Chamber will consider all of defendant's arguments, even when it is unclear whether defendant is challenging Trial Chamber's legal or factual findings); *cf.* Prosecutor v. Blagojević, Case No. IT-02-60-A, Decision on Dragan Jokić's Request To Amend Notice of Appeal, ¶ 8 (Oct. 14, 2005) (holding that failure to clearly plead ground of appeal should be forgiven "where that ground could be of substantial importance").

¹⁷⁵ See *supra* notes 116–21 and accompanying text.

¹⁷⁶ Akayesu Judgment, *supra* note 169, ¶ 354.

¹⁷⁷ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 9–10 (Sept. 2, 1998); see also Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162, 169 n.37 (2005) (describing Zambia's arrest of Akayesu following Security Council Resolution).

¹⁷⁸ See *supra* notes 109–20 and accompanying text.

¹⁷⁹ See, e.g., Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT'L L. 147, 178–79 (1999) (discussing standards for exclusion of evidence in European countries); Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 175–76 (1983) (discussing harmless error review in France).

¹⁸⁰ Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 1 (1994).

not met. This phenomenon is common in U.S. domestic courts, especially in criminal procedure cases, where the harmless error doctrine provides courts of appeals with perhaps their strongest shield against reversal of convictions.¹⁸¹ U.S. scholarship has shown that the harmless error doctrine is easy for judges to adjust so as to grant a desired remedy or to avoid granting an undesired one.¹⁸² If similar discretion exists in international courts, given the extraordinary costs associated with appellate remedies at the ICTs, one would expect judges there to impose particularly demanding prejudice requirements.

And indeed, they have done so: The ICTs' shared Appeals Chamber applies an exacting prejudice requirement to virtually every kind of error related to trial procedure, even violations of defendants' international human rights.¹⁸³ In almost all such cases, the defendant is required to prove "by clear evidence" that the error affected the disposition in order to receive any appellate remedy.¹⁸⁴ This requirement is even more demanding than the famously stringent harmless error rule in U.S. courts, which requires the prosecution to prove beyond a reasonable doubt that constitutional errors are harmless, shifting the burden of proof to the defense only for errors not of constitutional magnitude.¹⁸⁵ It also appears to be more demanding than the approach of the European Court of Human Rights, which has held

¹⁸¹ See, e.g., Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 7 (2002) ("[D]uring a ten year period, over ninety percent of death sentences imposed by [California] trial courts were upheld on appeal even though nearly every case was found to have been tainted by constitutional error.").

¹⁸² E.g., *id.* at 62–72 (showing that in California, replacement of three anti-death penalty justices caused little change in rate of errors found in capital appeals but caused huge increase in rate at which errors were found harmless).

¹⁸³ See, e.g., *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment, ¶ 21 (Nov. 30, 2006) (describing standard of proof of prejudice for violations of right to fair trial); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, ¶¶ 282, 295, 298, 303 (July 29, 2004) [hereinafter *Blaškić Judgment*] (addressing disclosure violations); *Akayesu Judgment*, *supra* note 169, ¶¶ 340–41 (involving abuse of process).

¹⁸⁴ *Čelebići Case*, Case No. IT-96-21-A, Judgment, ¶ 630 (Feb. 20, 2001) [hereinafter *Čelebići Case Judgment*]. The most defendant-friendly standard that the Appeals Chamber has endorsed—that the defendant must show "gross professional negligence leading to a reasonable doubt as to whether a miscarriage of justice resulted"—appeared in two early cases concerning ineffective assistance of counsel: *Prosecutor v. Tadić*, Case No. IT-95-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, ¶ 49 (Oct. 15, 1998), and *Prosecutor v. Akayesu*, *Akayesu Judgment*, *supra* note 169, ¶ 78 (raising, but not answering, question of whether extreme cases of negligence might require per se reversal). Under this standard, the burden remains on the defendant, but he need only raise reasonable doubt. However, in both of those cases, the Appeals Chamber found that no gross negligence was proven, so it never applied the prejudice standard and does not appear to have invoked the standard since.

¹⁸⁵ See *Chapman v. California*, 386 U.S. 18, 24 (1967) (discussing harmless error in context of admitting prejudicial evidence).

that some categories of procedural errors require per se reversal.¹⁸⁶ The Appeals Chamber has identified just one exception to this burden of proof: An indictment defect is presumed prejudicial so long as the defendant has properly objected to it at trial.¹⁸⁷ But the prosecution may rebut the presumption, and the Appeals Chamber has not imposed a “beyond a reasonable doubt” standard for that rebuttal. The Appeals Chamber also has not identified any trial-related¹⁸⁸ errors requiring per se reversal of conviction.

The Appeals Chamber thus often refuses relief because the defendant has failed to prove prejudice. For instance, in *Krstić*, the Chamber found a raft of serious violations of the Prosecutor’s duty to disclose exculpatory evidence but declined relief because prejudice had not been proven.¹⁸⁹ In the *Čelebići Case* the Appeals Chamber chastised one of the trial judges for repeatedly falling asleep, stating that “litigants are in general entitled to the full attention of the judges who have to decide their case.”¹⁹⁰ Yet it still held that the appellants had failed to prove “by clear evidence” that judicial inattention had resulted in prejudice.¹⁹¹ This decision was unusual only in that—perhaps because the incident had embarrassed the Tribunal—it discussed the prejudice requirement at length. More often, the Appeals Chamber simply asserts that prejudice must be shown¹⁹² or cites its general standard of review, which requires that legal errors be shown to “invalidat[e] the Trial Judgement.”¹⁹³

I make no claim as to the merits of any of these specific prejudice determinations. But it is fairly striking that the requirement to prove prejudice is a barrier that *no* defendant alleging a fair trial violation has ever overcome. The Tribunals’ dockets are relatively small, to be sure, but not so small that this pattern can be ignored,¹⁹⁴ particularly

¹⁸⁶ See *Artico v. Italy*, App. No. 6694/74, 37 Eur. Ct. H.R. (ser. A) ¶ 35 (1980) (rejecting prejudice requirement for violations of fair trial rights).

¹⁸⁷ See *infra* notes 196–206 and accompanying text (discussing indictment defect cases).

¹⁸⁸ Pretrial violations, in contrast, have not usually been subjected by the Appeals Chamber to harmless error review—presumably, they could not be assessed for their effects on trial outcomes under any standard because the harm they inflict is independent of the trial itself. See *supra* notes 111–20 and accompanying text (discussing dismissal remedy ordered in *Barayagwiza*). Nonetheless, some Trial Chambers have required a showing that speedy trial violations have prejudiced trial fairness. *E.g.*, *Mugenzi Decision*, *supra* note 140, ¶¶ 12–13, 31–32.

¹⁸⁹ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶¶ 152–215 (Apr. 19, 2004).

¹⁹⁰ *Čelebići Case Judgment*, *supra* note 184, ¶ 629.

¹⁹¹ *Id.* ¶¶ 630, 650.

¹⁹² *E.g.*, *Blaškić Judgment*, *supra* note 183, ¶ 295.

¹⁹³ *E.g.*, *Prosecutor v. Kordić*, Case No. IT-95-14/2-A, Judgment, ¶ 119 (Dec. 17, 2004).

¹⁹⁴ The ICTY, for instance, has completed proceedings with respect to 106 defendants as of March 2008. See ICTY at a Glance: Key Figures of ICTY Cases, <http://www.un.org/icty/glance-e/index.htm> (follow “Key Figures” hyperlink) (last visited Mar. 25, 2008). If

given the recurrent trial-fairness criticisms from human rights advocates.¹⁹⁵

Only in the indictment-defect cases, where the burden is shifted to the prosecution, does the Appeals Chamber sometimes find prejudicial error. In these cases the remedial costs are lower because the failure to properly plead particular incidents or legal theories generally does not result in reversal of conviction on even a single count; rather, it results in partial vacatur of the findings of liability underlying a count. For instance, in *Simić*,¹⁹⁶ the Appeals Chamber found that the prosecution had failed to plead the joint criminal enterprise theory on the persecutions count and that it had failed to overcome the presumption of prejudice.¹⁹⁷ But the Appeals Chamber simply replaced the joint criminal enterprise conviction with a conviction for aiding and abetting persecutions.¹⁹⁸ In *Muhimana*,¹⁹⁹ the Appeals Chamber invalidated the finding that the defendant had committed a particular killing, an allegation that had not been pleaded clearly, but sustained his convictions on the basis of other conduct.²⁰⁰ In such cases, the Appeals Chamber may reduce the sentence to account for the reduced range of underlying criminal conduct, but only slightly: In *Simić*, the sentence was reduced from seventeen to fifteen years, and in *Muhimana*, the life sentence was affirmed.²⁰¹

In *Kupreškić*,²⁰² the Appeals Chamber did recognize a prejudicial indictment defect that, in theory, could have had a much more substantial consequence, perhaps including retrial of two defendants.²⁰³ But that error proved irrelevant to the outcome because the Appeals Chamber found that the evidence did not in any event support the

only because of the length and complexity of the trials, as well as the novelty of the justice system in which they took place, one might expect these cases to have produced many more serious procedural errors than would a typical sample of fifty-two trials in a reasonably well-functioning domestic justice system. ICT trials typically generate a large number of procedural disputes. See ICTY Cases and Judgments, Indictments and Proceedings, <http://www.un.org/icty/cases-e/index-e.htm> (last visited Feb. 16, 2008) (listing interlocutory decisions issued by each trial chamber).

¹⁹⁵ See *supra* notes 121–27 and accompanying text.

¹⁹⁶ Prosecutor v. Simić, Case No. IT-95-9-A, Judgment (Nov. 28, 2006) [hereinafter *Simić Judgment*].

¹⁹⁷ *Id.* ¶¶ 73–74.

¹⁹⁸ *Id.* ¶¶ 74, 233, 301.

¹⁹⁹ Prosecutor v. Muhimana, Case No. ICTR 95-1B-A, Judgment (May 21, 2007).

²⁰⁰ *Id.* ¶¶ 227–28.

²⁰¹ *Id.* ¶ 228; *Simić Judgment*, *supra* note 196, ¶¶ 300–01 (explaining that this two-year reduction in fact reflected combined remedy for indictment error *and* fact-finding error).

²⁰² Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgment, ¶¶ 113–14, 124–25 (Oct. 13, 2001) [hereinafter *Kupreškić Appeal Judgment*].

²⁰³ *Id.* ¶¶ 113–14, 124–25.

convictions.²⁰⁴ The defendants were therefore acquitted on the merits (a far more politically palatable result than release on a supposed technicality²⁰⁵ and more practical than retrial), and thus no remedy was necessary for the procedural violation.²⁰⁶ So *Kupreškić* represents, in essence, a zero-remedial-cost situation.

In sum, although it may be impossible to prove that any given finding of no prejudice was caused by remedial deterrence, the overall pattern of the Appeals Chamber's decisionmaking at least suggests that such deterrence is taking place. The Appeals Chamber occasionally finds prejudice in low-remedial-cost cases, but it uses a stringent prejudice standard to avoid remedies in all other cases in which it recognizes rights violations.²⁰⁷

E. Remedial Deterrence in Other International Courts

To what extent can these observations about international criminal tribunals fairly be extrapolated to other international courts? As discussed in Section A, the ICTs often face particularly high remedial costs. If another international court has relatively low-cost, effective remedies available, remedial deterrence effects will likely be mitigated. In addition, the ICTs may be especially likely to distort other doctrines in response to the remedial costs posed by one particular case because their temporary nature and relatively small dockets may

²⁰⁴ *Id.* ¶¶ 125, 245–46.

²⁰⁵ Although some political controversy has surrounded the few merits acquittals at the Tribunals, *e.g.*, Benoît Henry, *The Acquitted Accused, a Forgotten Party of the ICTR*, 12 *NEW ENG. J. INT'L & COMP. L.* 81, 85 (2005), none has been comparable to the near-catastrophic backlash that occurred in the *Barayagwiza* case, *see supra* notes 110–20 and accompanying text. Indeed, occasional acquittals may actually help the Tribunals' image by suggesting that they are truly providing fair trials. *E.g.*, Jacob A. Ramer, *Hate by Association: Joint Criminal Enterprise Liability for Persecution*, 7 *CHI.-KENT J. INT'L & COMP. L.* 31, 50 (2007); *see also* Mark S. Martins, *National Forums for Punishing Offenses Against International Law: Might U.S. Soldiers Have Their Day in the Same Court?*, 36 *V.A. J. INT'L L.* 659, 678 (1996) (discussing Nuremberg Tribunals).

²⁰⁶ *Kupreškić* Appeal Judgment, *supra* note 202, ¶ 246 & pt. X.A. (disposition).

²⁰⁷ The Tribunals also have a line of jurisprudence barring cumulative convictions for both greater and lesser included offenses. *See, e.g.*, Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, ¶¶ 168–74 (June 12, 2002) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932) and *Čelebići Case Judgment*, *supra* note 184, ¶¶ 412–13 (Feb. 20, 2001)). This line might be characterized as involving the defendant's procedural human rights, and the Appeals Chamber has found that the improper entry of cumulative convictions itself constitutes prejudice. *Id.* ¶ 169 (citing *Čelebići Case Judgment*, *supra* note 184, Separate and Dissenting Opinion of Judge David Hunt & Judge Mohamed Bennouna, ¶ 23). However, these cases involve extremely low-cost remedies as the sentence will still be based on the same underlying conduct and the more serious of the two legal characterizations. The Appeals Chamber thus rarely changes the sentence at all. *See, e.g.*, *Kamuhanda Judgment*, *supra* note 168, ¶¶ 77, 363 (affirming life sentence).

make them less big-picture oriented than other courts.²⁰⁸ The ICTs have finite dockets consisting of fewer than two hundred defendants each, spread out over more than a decade. *Every* trial is high profile, some extremely so. The Tribunals thus may not be able to afford to issue high-cost remedies in one case to preserve a better doctrinal rule for the long run. They may be forced to do whatever it takes to avoid granting a catastrophic remedy in *any* single case, even if it means distorting doctrines. In contrast, a permanent international court with thousands of cases might be able to place greater weight on the long term, absorbing high remedial costs in one case in order to avoid doctrinal spillover in other cases.

That said, there is no reason to think that remedial deterrence does not have considerable relevance beyond the ICTs. After all, it reflects basic economic rationality: The more costs a course of conduct imposes, the less likely any person or institution is to undertake it. And all three of the strategies described above—procedural avoidance, narrowing of rights, and adjustment of prejudice requirements—have also been documented in some form in U.S. domestic courts.²⁰⁹ They are all examples of a broader phenomenon that Richard Fallon and Daryl Levinson have termed “equilibration.”²¹⁰ As Fallon puts it, judges seek “an acceptable overall alignment of doctrines When facing an outcome or pattern of outcomes that it regards as practically intolerable or disturbingly sub-optimal,” a court often finds it equally easy “to reformulate applicable justiciability doctrine, substantive doctrine, or remedial doctrine.”²¹¹

U.S. courts are part of a justice system encompassing vast numbers of cases each year, so we would expect them to be big-picture oriented. They also face relatively few high-stakes, notorious cases, and are much less vulnerable to political backlash of the sort that can threaten the very existence of the ICTs.²¹² Thus, we would expect remedial costs to be less extreme. Yet equilibration takes place there as well—although perhaps often in a less drastic and more forward-looking form than that which prevails at the ICTs. It may be more oriented toward achieving, to use Fallon’s phrasing, an “acceptable overall alignment of doctrines” that gets the right “pattern of out-

²⁰⁸ See David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT’L L. 401, 404–05 (2006) (arguing that courts with “open-ended dockets” will pay more attention to precedent set in each case than courts with finite dockets).

²⁰⁹ See *supra* notes 130–35 and accompanying text.

²¹⁰ Fallon, *supra* note 57, at 637; Levinson, *supra* note 1, at 858.

²¹¹ Fallon, *supra* note 57, at 637.

²¹² See Caron, *supra* note 208, at 410 (discussing relative fragility of international courts compared to most countries’ domestic courts).

comes,” rather than being especially focused on the result of the particular case at hand.

Still, if remedial deterrence takes place in some form in systems as disparate as U.S. courts and the ICTs, it seems likely that it will also take place in other international courts. But the devil is in the details. Predicting the extent of remedial-cost pressure in a particular case, and the likely response, requires a detailed, court-specific inquiry such as that made by this Article with respect to the ICTY and ICTR. A number of questions might be relevant: What are the court’s major institutional objectives? To which states or other constituencies is it accountable, and what are their interests? What are the constraints on its budget, time, and human resources? What remedial and enforcement powers does it have? How much flexibility does the court have in manipulating remedial rules? Is it bound by codified rules, by its own precedents, or by decisions of some higher court? Is the remedial dilemma one that is likely to recur in other cases?

This kind of in-depth assessment of other international courts beyond the ICTs exceeds this Article’s scope. But a quick perusal of a few other courts’ case law suggests some of the range of variation. Here, I focus mainly on the European and Inter-American Courts of Human Rights (ECHR and IACHR, respectively), two supranational courts that hear individual complaints against states for violation of the respective regional human rights conventions.²¹³ Remedial deterrence effects are harder to detect at the ECHR than at the ICTs, probably because the remedies at the ECHR’s disposal are less costly. The ECHR usually either remands cases to national authorities to choose the remedy or grants relatively modest claims for financial compensation, even in criminal procedure cases.²¹⁴ And although the ECHR has occasionally strongly suggested (without formally ordering) that national authorities grant a retrial,²¹⁵ that remedy is less costly there than it would be in the ICTs—the defendants are not

²¹³ American Convention, *supra* note 20, art. 63(1); European Convention, *supra* note 20, art. 45.

²¹⁴ For instance, in speedy-trial cases, the European Court has usually been presented with rather modest claims for financial compensation—and has been more willing to recognize violations than the ICTs have been. *E.g.*, *Pietilainen v. Finland*, App. No. 35999/97, Judgment (Merits and Just Satisfaction), ¶¶ 45, 49 (E.C.H.R. Nov. 5, 2002), available at <http://www.echr.coe.int/echr/en/hudoc> (for instructions on locating documents within “HUDOC Database,” see *supra* note 24); *Eckle v. Germany*, App. No. 8130/78, 51 Eur. Ct. H.R. (ser. A) ¶ 96 (1982) (acknowledging claim for damages for excessive trial length but finding claim unripe); see also TRECHSEL, *supra* note 78, at 134–49 (collecting cases).

²¹⁵ See *Öcalan v. Turkey* [GC], App. No. 46221/99, 2005-IV Eur. Ct. H.R. ¶ 210 (discussing other cases in which “retrial without delay” had been deemed “most appropriate form of redress”).

notorious war criminals convicted after long, expensive, and high-profile trials.

Moreover, in some cases, the ECHR has proven willing to narrow the effective-remedy requirement itself, obviating the need to adjust other doctrines. In *Golder v. United Kingdom*,²¹⁶ the ECHR held that mere declaratory relief sufficed as "adequate just satisfaction" for non-pecuniary injuries, even when the claimant was seeking a remedy for past injuries rather than a determination of continuing rights.²¹⁷ The ECHR has since followed *Golder* a number of times, often over vociferous dissents.²¹⁸ Nonetheless, the majority of its case law follows the *Chorzów Factory* full-reparation formulation, and the *Golder* exception has never been extended to pecuniary injuries.²¹⁹

The IACHR does sometimes face significant remedial costs, particularly risks of state noncompliance.²²⁰ I would therefore expect to see some degree of circumvention of these remedial costs. That circumvention, however, is unlikely to take the form of narrowing the right at the merits stage. Most of the IACHR's merits cases involve alleged egregious violations of uncontroversial provisions of human rights law, such as torture or extrajudicial killing. In such cases, it

²¹⁶ App. No. 4451/70, 18 Eur. Ct. H.R. (ser. A) (1975).

²¹⁷ *Id.* ¶ 46 & Disposition.

²¹⁸ *E.g.*, *Öcalan*, ¶ 208 ("[A]ny damage the applicant may have sustained has been sufficiently compensated for by its findings of a violation of Articles 3 . . . , 5 and 6 of the Convention."); *Nikolova v. Bulgaria* [GC], App. No. 31195/96, 1999-II Eur. Ct. H.R. (partly dissenting opinion of Judge Bonello) [hereinafter *Nikolova Dissent*] (deeming it "wholly inadequate and unacceptable that a court of justice should 'satisfy' the victim of a breach of fundamental rights with a mere handout of legal idiom"); *Marckx v. Belgium*, App. No. 6833/74, 31 Eur. Ct. H.R. (ser. A) ¶¶ 4-7 (1979) (joint dissenting opinion of six judges) (arguing that compensation was supported in that case).

²¹⁹ See *supra* Part I.A. The Inter-American Court of Human Rights has a default rule that for nonpecuniary injuries—"a judgment of condemnation may be, *per se*, a form of compensation"—but it routinely departs from this default, citing the "grave circumstances" of the case in question. The "Street Children" Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 77, at 39 (May 26, 2001). In *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ likewise limited the remedy for Serbia's failure to prevent genocide to declaratory relief, but only because causation has not been proven sufficiently to justify a damage award. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), Gen. List No. 91, at 165-66 (I.C.J. Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>. This causation finding could well have been influenced by remedial costs, as a contrary finding could have exposed Serbia to massive liability—and many Western states feared the political consequences of that outcome. See Marlise Simons, *Court Declares Bosnia Killings Were Genocide*, N.Y. TIMES, Feb. 27, 2007, at A1. In other cases, the ICJ has granted only declaratory relief because that was what the complaining party requested. See Ian Brownlie, *Remedies in the International Court of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 557, 563 (Vaughn Lowe & Malgosia Fitzmaurice eds., 1996).

²²⁰ Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 41-44 (2005).

would be grossly inconsistent with the IACHR's human rights promotion objectives to narrow the right to avoid reaching the conduct.

Instead, at both the IACHR and ECHR, procedural avoidance is a likelier response to those remedial-cost pressures that do exist. Unlike the ICTs, both courts have formal admissibility requirements for claims. Until Protocol 11 of the European Convention went into effect in 1998, a separate entity—the European Commission on Human Rights—screened cases for the ECHR,²²¹ and a similar process is still in place in the Inter-American system.²²² In the European system, over ninety percent of claims are dismissed at the admissibility stage,²²³ and likewise in the Inter-American system, only a small fraction of petitions is ever decided on the merits.²²⁴

Scholars of both regional human rights systems have argued that admissibility proceedings before their Commissions have essentially served as proxy merits determinations.²²⁵ Indeed, both systems explicitly incorporate some merits-linked criteria into their admissibility requirements: Complaints are deemed inadmissible if they are “manifestly ill-founded” or are “incompatible” with the Convention (that is, if they fail to state a legally valid claim).²²⁶ In applying those criteria, the Commissions have had to resolve contested questions concerning the interpretation of their respective Conventions.²²⁷ Even the less obviously merits-linked admissibility provisions—especially the exhaustion of local remedies requirement—have been

²²¹ European Court of Human Rights, *The Court: Historical Background*, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/> (last visited Feb. 16, 2008).

²²² See *Velásquez-Rodríguez Case*, 1987 Inter-Am. Ct. H.R. (ser. C) No. 1, at 6 (June 26, 1987) (describing screening process).

²²³ See *infra* note 230 (providing statistics on dismissal rates).

²²⁴ James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217, 228–29 (2004).

²²⁵ E.g., TOM ZWART, *THE ADMISSIBILITY OF HUMAN RIGHTS PETITIONS* 4, 140–54 (1994); Françoise J. Hampson, *The Concept of an “Arguable Claim” Under Article 13 of the European Convention on Human Rights*, 39 INT'L & COMP. L.Q. 891, 896–97 (1990); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 313 (1997).

²²⁶ European Convention, *supra* note 20, art. 27(2); accord American Convention, *supra* note 20, art. 47 (similar wording for Inter-American Commission).

²²⁷ See *Pinzas de Chung v. Peru*, Petition 504/99, Inter-Am. C.H.R., Report No. 38/05, OEA/Ser.L./V/II.124, doc. 5 ¶¶ 56–59 (2005) (refusing to decide case because claim did “not tend to establish violations of the judicial guarantees protected by” American Convention); ZWART, *supra* note 225, at 140–41, 146–47 (describing examples where European Commission declared cases inadmissible as failing to claim violations of rights guaranteed by European Convention); Hampson, *supra* note 225, at 896–98 (discussing dispute between European Court and European Commission over whether “manifestly ill-founded” means “arguable”).

applied in ways intertwined with the merits.²²⁸ And admissibility determinations appear to have accommodated political constraints. Tom Zwart has argued that the European Commission regularly "rejected [petitions] at the admissibility stage because . . . [it] feared that a decision on the merits might alienate (potential) States parties."²²⁹

Although scholars have not yet analyzed as comprehensively the admissibility decisions of the ECHR after Protocol 11 phased out the Commission, similar patterns seem to have prevailed. Dismissal rates at the admissibility stage are no lower,²³⁰ and admissibility decisions continue to involve merits-like considerations.²³¹ Moreover, the ECHR appears in at least a few cases to have used the admissibility stage strategically to screen out politically explosive cases.²³²

²²⁸ The courts sometimes explicitly recognize this intertwining. *E.g.*, Velásquez-Rodríguez Case, 1987 Inter-Am. Ct. H.R. (ser. C) No. 1, at 16–17 (June 26, 1987); *Grievés v. United Kingdom* [GC], App. No. 57067/00, 2003-XII (extracts) Eur. Ct. H.R. ¶ 68. Both courts tend to deem local remedies inadequate (waiving the exhaustion requirement) if the nature of the alleged offenses and the surrounding circumstances demonstrate the government's unwillingness to take its human rights enforcement obligations seriously. *E.g.*, *Isayeva v. Russia*, App. No. 57950/00, Judgment (Merits and Just Satisfaction), ¶¶ 151–61 (E.C.H.R. Feb. 24, 2005), available at <http://www.echr.coe.int/echr/en/hudoc> (for instructions on locating documents within "HUDOC Database," see *supra* note 24); Velásquez-Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at 13 (July 29, 1988); see Jo M. Pasqualucci, *Preliminary Objections Before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate Tactics*, 40 VA. J. INT'L L. 1, 26–29 (1999) (discussing waiver of exhaustion requirements "in support of the defenseless victim").

²²⁹ ZWART, *supra* note 225, at 4. For example, the complainant in *Iversen v. Norway* challenged a mandatory public service requirement for dentists. 1963 Y.B. Eur. Conv. on H.R. 278 (Eur. Comm'n on H.R.). The Commission dismissed the complaint as "manifestly ill-founded"—a determination "influenced by political considerations." ZWART, *supra* note 225, at 5. The case had "caused considerable controversy in Norway," and Norway had just agreed to a one-year renewal of its accession to the Commission's jurisdiction over individual petitions. *Id.* It thus had the option of dropping out of the regime in a year's time—and might well have done so had the court angered it. *Id.*

²³⁰ Compare Christina G. Hioureas, *Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights*, 24 BERKELEY J. INT'L L. 718, 718–19 (2006) (stating that in twenty-first century, court dismisses between ninety and ninety-six percent of cases as inadmissible), with ZWART, *supra* note 225, at 5 (stating that Commission found 87.6% inadmissible in 1993).

²³¹ For example, the court continues to deem "manifestly ill-founded" applications that, while unmeritorious, are clearly not in its view frivolous. See, e.g., *Al-Moayad v. Germany*, App. No. 35865/03, Decision, ¶¶ 62–72, 95–108 (E.C.H.R. Feb. 20, 2007), available at <http://www.echr.coe.int/echr/en/hudoc> (for instructions on locating documents within "HUDOC Database," see *supra* note 24) (expressing concern as to U.S. interrogation methods, yet finding that "the assurance obtained by the German Government was such as to avert the risk of the applicant's being subjected to interrogation methods contrary to Article 3 following his extradition").

²³² For instance, in *Al-Moayad*, the court deemed inadmissible politically explosive challenges to Europe's extradition of terror suspects to the United States. *Id.* Likewise, in *Banković v. Belgium*, [GC], App. No. 52207/99, 2001-XII Eur. Ct. H.R. ¶ 82, the court

These cases do not necessarily involve *remedial* deterrence as such. But when admissibility criteria can readily be manipulated in response to merits-related concerns, they can also be manipulated in response to their remedial concerns—a point Fallon has demonstrated with respect to U.S. courts.²³³ The prevalent patterns in these courts thus suggest that procedural avoidance would be a likely strategy in cases posing high remedial costs. Adjustment of prejudice thresholds is another possible strategy, but this may be incorporated into the admissibility stage—both the ECHR and IACHR require a complainant to demonstrate that an alleged violation has caused injury before proceeding to the merits.²³⁴

A wide variety of other kinds of international court proceedings—both in the human rights area and outside of it—might well involve prohibitive remedial costs. For instance, the ICJ, which hears disputes between states, often deals with politically explosive matters. Accordingly, one would expect that remedial-cost pressures would be high and that remedial deterrence might result.²³⁵ The same might be said of bilateral boundary or claims commissions established after armed conflict, where the cost of state anger about (or noncompliance with) remedial orders might include the renewal of hostilities.²³⁶ All of these questions are, again, beyond the scope of this Article. How-

deemed a challenge to NATO's bombing of Kosovo inadmissible on jurisdictional grounds, a decision that has been widely criticized. See Loukas Loucaides, *Determining the Extra-Territorial Effect of the European Convention: Facts, Jurisprudence, and the Bankovic Case*, 2006 EUR. HUM. RTS. L. REV. 391, 392–93 (citing critics); see also Barbara Miltner, *Broadening the Scope of Extraterritorial Application of the European Convention on Human Rights: An Expansion Under Isaak v Turkey*, 2007 EUR. HUM. RTS. L. REV. 172, 176 (“It should be noted that this particular formulation of the principal exceptions to territorial jurisdiction has not re-emerged since the *Bankovic* decision, suggesting that it may not be representative of the Court's position.”). The decision was issued three months after September 11, 2001, and observers have speculated that it was motivated in part by a desire not to constrict states' responses to terrorism. Loucaides, *supra*, at 392–93.

²³³ See Fallon, *supra* note 57, at 635–37.

²³⁴ William J. Aceves, *Actio Popularis? The Class Action in International Law*, 2003 U. CHI. LEGAL F. 353, 384–85; Jacob D. Howley, Note, *Unlocking the Fortress: Protocol No. 11 and the Birth of Collective Expulsion Jurisprudence in the Council of Europe System*, 21 GEO. IMMIGR. L.J. 111, 113 (2006) (describing requirements of admissibility). In criminal procedure cases, the European Court's prejudice requirements are somewhat less exacting than those imposed by the ICTs. See *supra* note 186 and accompanying text.

²³⁵ One scholar recently documented another form of doctrinal equilibration at the ICJ—namely, an interrelationship between the court's admissibility decisions and its views on the merits of cases. Alexander Orakhelashvili, *Judicial Competence and Judicial Remedies in the Avena Case*, 18 LEIDEN J. INT'L L. 31, 31 (2005).

²³⁶ See, e.g., *New Eritrea-Ethiopia War Fears*, BBC NEWS, Nov. 5, 2007, <http://news.bbc.co.uk/2/hi/africa/7078869.stm> (stating that Boundary Commission deadline for border demarcation “could end up being a trigger for war”); Michela Wrong, *War Brews on the New Frontier*, NEW STATESMAN, Oct. 29, 2007, at 20–21 (arguing that example of “Eritrea-Ethiopia debacle,” in which Ethiopia has refused to comply with Boundary Commission's

ever, advocates in these other contexts should at least consider the possibility of remedial deterrence before pushing international courts to adopt stronger remedial rules.

III NORMATIVE IMPLICATIONS

International courts thus engage in a variety of doctrinal moves in order to avoid granting remedies that impose unacceptable costs. But are these moves normatively problematic, and if so, what should be done about them? This Part explores these questions, arguing in Section A that although the doctrinal strategies described in Part II may be defensible responses to serious institutional constraints, all of them undermine human rights enforcement to some extent. The remainder of Part III proposes possible solutions: Section B proposes institutional design changes to minimize remedial deterrence pressures, while Section C argues for an interest-balancing approach to remedies in international court cases that involve intolerable remedial costs.

A. *Is Remedial Deterrence a Problem?*

It is not immediately obvious that remedial deterrence in international courts, even if prevalent, should worry us. Indeed, some U.S. scholars, like Owen Fiss, have affirmatively defended similar processes:

[V]indications-at-any-cost is often thought to be one of the special attributes of a right deemed 'constitutional.' . . . But for [most rights,] the remedial costs are clearly relevant in determining whether there is a violation. . . . [T]he court must not only consider the harmfulness of the particular practice being challenged but also whether it is sufficiently harmful to warrant the costs of eliminating it.²³⁷

I agree that courts cannot ignore remedial costs, and I do not claim that the ways in which international courts have accounted for them are illegitimate *per se*. Indeed, as Daryl Levinson observes,

demarcation, will hamper "future attempts at peaceful arbitration" in other African border disputes).

²³⁷ Fiss, *Jurisprudence of Busing*, *supra* note 57, at 195–96; *see also* Fallon, *supra* note 57, at 638 ("[C]ourts . . . should weigh concerns about the acceptability of remedies in determining which substantive rights to recognize under particular provisions of law."). Friedman argues that when courts revise rights to accommodate popular resistance to remedies, they are permitting appropriate "majoritarian participation in defining rights." Friedman, *supra* note 57, at 777–78. This justification is harder to translate to the international context, since the relevant political resistance to international court decisions frequently comes not from any "majority" but rather from recalcitrant governments that are sometimes entirely nondemocratic.

remedial influence on rights interpretation is to some degree unavoidable, such that it would be nonsensical to contend that courts should completely divorce rights doctrines from remedial considerations.²³⁸ All judicial remedies will impose *some* costs, and moreover, some remedies may have benefits that encourage courts to broaden rights.²³⁹ In one way or another, courts will always “peek ahead” to the remedial stage.²⁴⁰ And perhaps they should. Courts cannot decide rights claims in a vacuum; they must create workable law for the real world.

But these realities do not mean that remedial deterrence is always harmless, or that all forms and degrees of it are interchangeable.²⁴¹ Part II outlined a particularly “extreme” dynamic: In many ICT cases, exorbitant remedial costs essentially preclude recognition of prejudicial rights violations, no matter how serious the challenged conduct. In such cases, remedial deterrence pressures are likely to distort other doctrines significantly and to undermine human rights enforcement. Even if those distortions were the best available responses to intolerable remedial costs, such consequences would still justify looking for ways to reduce those costs.

1. Normative Premises

I begin with some basic normative assumptions. First, I start with the basic belief that effective protection of the fundamental rights laid out in the major human rights treaties is generally desirable. More specifically, as discussed in Part II.A, I take for granted the impor-

²³⁸ Levinson, *supra* note 1, at 924.

²³⁹ Kamin’s study of harmless error in capital cases provides an example: Anti-death penalty judges may lower the required prejudice threshold so as to enable them to vacate the death sentence. Kamin, *supra* note 181, at 67–71.

²⁴⁰ Fallon, *supra* note 57, at 642.

²⁴¹ Thus, I do not agree with Levinson’s conclusion that the inevitability of *some* doctrinal equilibration makes it “senseless” to look for particular subcategories of cases in which rights interpretation is systematically slanted. See Levinson, *supra* note 1, at 894, 921. In the context of international human rights, I also resist his suggestion that because of the deep intertwining of rights and remedies, rights should be understood as consisting of nothing more than the remedy that a court will give if a particular harm is suffered. See *id.* at 924. It would be strange to imagine human rights as consisting merely of the doctrinal rules that international courts adopt to enforce them. Not only is there no international system of binding precedent, but international human rights law has never been primarily intended to be implemented by courts at all, much less *international* courts. Rather, its core operation has been as a political instrument intended to shape state behavior through persuasion, acculturation, and (mostly political) coercion mechanisms. See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 625–27 (2004) (discussing these three types of influence on state behavior).

tance of protecting the procedural rights of criminal defendants, even accused perpetrators of atrocities.

This general pro-human rights stance does not, however, translate into an automatic preference for broader rights interpretations or stronger remedies for violations. Although most human rights scholars today share certain core commitments, the more interesting legal questions lie closer to the periphery—where to draw the boundaries of particular rights, and what to do when their protection conflicts with other important interests. Because this Article is principally concerned with courts' decisionmaking processes rather than with the substance of any particular rule they have adopted, it generally refrains from taking a normative stance on these more difficult issues. In identifying remedial impacts on rights interpretation, I do not mean to espouse any particular view of the *correct* interpretation of the rights in question, in any abstract or absolute sense.²⁴²

Moreover, I believe that it is legitimate for judges to consider the institutional objectives of, and constraints on, their courts when adjudicating individual rights claims. Indeed, in many instances it would be irresponsible not to do so. By this, of course, I do not mean that courts should be self-interested in a narrow sense—for example, concerned with institutional prestige for the sake of judges' vanity. But the international community creates courts to serve particular purposes, and those courts should be concerned with preserving the institutional capacity they need to accomplish them.²⁴³ In the case of the ICTs, the courts' purposes include important human rights concerns, such as the interest of victims of atrocity in seeing justice done. Defendants' interests in broad rights and remedies cannot always trump these competing considerations. And even if an ICT *always* gave priority to defendants' interests over those of victims, it still would have to consider, in adjudicating each case, the long-run interests of defendants in *other* cases. I will develop these observations in more detail in Section C.

2. *Perverse Consequences and the Problem of Overkill*

Taking these assumptions as starting points, I conclude that the doctrinal strategies outlined in the previous Part, as responses to

²⁴² See Levinson, *supra* note 1, at 921 (criticizing search for "some hypothetical ideal of the 'pure' right").

²⁴³ See Kingsley Chiedu Mogdalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21, 22–23 (2002) ("[T]he effectiveness of international criminal tribunals as judicial institutions depends largely on the cooperation of states because they do not possess the automatic enforcement mechanisms of justice that are available to national jurisdictions.").

remedial costs, are all potentially normatively problematic for several reasons. First, they subvert the victim-protective purpose of the effective-remedy requirement itself: The remedial rules that ICTs have adopted to implement this requirement often perversely result in victims receiving no remedy at all. This effect is an “overkill” response to excessive remedial costs, as it is worse for victims than some partial remedy balancing victims’ interests with competing considerations.

Sometimes, these overkill effects may largely be confined to the particular case in which high remedial costs are present. Courts simply find a way to avoid recognizing a prejudicial rights violation on the facts of the particular case, but they do not necessarily establish precedents that they then follow consistently in other cases. For instance, the ICTs may have manipulated the appellate waiver doctrine to avoid reaching rights claims in high-remedial-cost cases, while liberally construing defendants’ trial submissions in cases not posing such costs.²⁴⁴ Such ad hoc doctrinal manipulation amounts to arbitrariness in human rights enforcement, undermining the rule-of-law norms that ICTs ostensibly seek to promote. The ICTs, like many other international courts, generally seek to produce doctrine that will help national authorities to identify and respect their own international legal obligations.²⁴⁵ But if the rules they adopt are inconsistent, the message they send to those national authorities is unclear. And if they manipulate facts to avoid applying the rules when they are inconvenient, the Tribunals risk sending the message that the rules need not be taken seriously.

Sometimes, remedial deterrence effects play out in more “principled” ways: International courts adopt a narrow rights interpretation or a strict admissibility or prejudice requirement in one case and then consistently apply that rule in other cases. For instance, the ICTs have applied the requirement that the defendant prove prejudice to virtually all kinds of procedural rights violations (except indictment defects). But this kind of consistency itself may lead to overkill in a second sense. Rather than simply dialing back the remedy in a particular case when that remedy is too costly, ICTs adopt doctrinal rules in other areas of the law that have broad spillover effects on other cases where those costs might not be present.

These two kinds of overkill effects suggest that an absolutist approach to the right to an effective remedy may be self-defeating—it undermines its own objective of making sure victims of rights viola-

²⁴⁴ See *supra* Part II.C (discussing manipulation of waiver doctrine).

²⁴⁵ See *supra* text accompanying note 89 (discussing objective of making ICTs into models for other courts).

tions receive remedies. A disturbing picture emerges from the various patterns described in Part II. To a very significant degree, the ICTs are institutionally incapacitated from *ex post* recognition of criminal procedure violations that are serious enough to require a significant remedy, such as release or retrial. In every sticky situation the tribunals have encountered, they have found some way out of doing so—mostly through narrow definitions of pretrial rights and a strict prejudice requirement that prevents relief for almost all trial-related errors.

Despite these patterns, I do not doubt that the ICTs' judges are sincere in their commitment to the protection of defendants' human rights. The fair trial ideal suffuses the Tribunals' case law and judges' public statements.²⁴⁶ There is simply no reason to believe the judges are biased against defendants; indeed, they are often criticized for over-accommodating uncooperative defendants and for issuing light sentences for serious crimes.²⁴⁷ But they are faced with institutional constraints that they cannot ignore. They grapple seriously with hard dilemmas and reach the best compromises they can. In doing so, they are not acting lawlessly—they are simply acting like courts. After all, remedial deterrence is also common in domestic courts; if it is more striking in the ICTs, it is probably because of the extreme remedial costs the Tribunals face.

3. *Comparison of Different Forms of Doctrinal Equilibration*

The ICTs' doctrinal strategies to avoid remedial costs are not interchangeable, and it is possible that some are normatively preferable to others.²⁴⁸ Procedural avoidance may seem less pernicious than remedial deterrence at the merits stage, since it avoids distorting rights interpretations. Indeed, Alexander Bickel famously argued in favor of employing the "passive virtues" to avoid merits rulings that endanger the court's institutional health.²⁴⁹ Bickel's argument has been critiqued by other scholars, including Gerald Gunther, who argued that manipulation of procedural doctrines is no more "passive"

²⁴⁶ See *supra* note 88 (citing prosecutors' and judges' statements on importance of fairness of proceedings).

²⁴⁷ See, e.g., Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 683–86 (2007) (finding that ICTY has consistently issued lenient sentences); Göran Sluiter, *Compromising the Authority of International Criminal Justice: How Vojislav Šešelj Runs His Trial*, 5 J. INT'L CRIM. JUST. 529, 533–35 (2007) (criticizing Appeal Chamber's accommodating response to accused's hunger strike).

²⁴⁸ See Fallon, *supra* note 57, at 638 ("[T]here should be no objection to allowing concerns about remedies to influence justiciability doctrines. But not all modes of influence merit equal embrace.").

²⁴⁹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 132 (1962).

than is a merits ruling.²⁵⁰ But assuming that Bickel was correct, that procedural avoidance is a superior response to remedial costs, it would still be better if the remedial costs themselves were reduced such that courts were not forced to rely so heavily on the so-called passive virtues. Procedural avoidance inarguably carries substantial costs. The procedural barriers to invoking a right substantially affect that right's practical value.²⁵¹ Erecting those barriers as a procedural avoidance strategy may have spillover effects on the court's enforcement of *all* rights. For instance, by holding that a pretrial rights claim is outside its jurisdiction because the underlying police misconduct occurred in another country, an ICT may be able to avoid remedial costs without setting a bad precedent as to the rights interpretation. But the jurisdictional rule itself sets a precedent.

Likewise, imposition of a strict prejudice requirement does not technically narrow rights. Indeed, some U.S. scholars have argued that the harmless error doctrine may affirmatively enable courts to adopt broad interpretations of rights by reducing those interpretations' remedial costs.²⁵² But the resulting expansion of procedural protections may not mean much to subsequent defendants if violations of those protections are consistently deemed harmless.²⁵³ In other words, strict prejudice requirements reduce the "cash value" of rights.²⁵⁴ If a right only entitles its holder to a remedy when he can prove prejudice, it is worth less to him than if he does not bear that

²⁵⁰ Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 14, 19 (1964); see also Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1149 (1995) ("[A] decision-making principle that dismisses a case as unripe when the traditional understanding of the ripeness doctrine would clearly show it to be ripe is not passive.").

²⁵¹ Fallon, *supra* note 57, at 686.

²⁵² Fallon & Meltzer, *supra* note 57, at 1799–1800 (arguing that as there is no Article III requirement to rule on harmless error first, "there exists a substantial body of case law . . . function[ing] more as a vehicle for the pronouncement of norms than for the resolution of particular disputes"); Ted Sampsell-Jones, *Reviving Saucier: Prospective Interpretations of Criminal Laws*, 14 GEO. MASON L. REV. 725, 766 (2007) ("Harmless error is another frequently used method of prospective rulings."). But see John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 405 (1999) (arguing that harmless error doctrine encourages "law-freezing" because court can "bypass the claim without deciding its merits").

²⁵³ See *United States v. Pallais*, 921 F.2d 684, 691–92 (7th Cir. 1991) (Posner, J.) ("The expansive code of constitutional criminal procedure . . . is like the grapes of Tantalus, since the equally expansive harmless error rule in most cases prevents a criminal defendant from obtaining any benefit from the code."); Kamin, *supra* note 181, at 6 ("[H]armless error . . . has the capacity to make the separation of rights from remedies permanent.").

²⁵⁴ Levinson, *supra* note 1, at 874, 887; see also *id.* at 904 ("At least since Legal Realism, no one has missed the point that the value of a right is a function of the consequences that will be brought to bear when the right is violated.").

burden. And if the right will be enforced in fewer circumstances, potential violators will be less deterred.²⁵⁵ Thus, prejudice and admissibility doctrines do not provide cost-free responses to remedial deterrence pressures—instead, all of the doctrinal strategies discussed in Part II risk substantially compromising human rights enforcement.

4. *Judicial Subterfuge*

International courts' responses to remedial deterrence pressures have often been inconsistent with the norm of judicial candor.²⁵⁶ Courts typically do not admit that they are changing a rights interpretation (or an admissibility or prejudice rule) in order to avoid a particular remedial consequence. Doing so might make them appear unprincipled. So for the most part, remedial deterrence processes occur *sub rosa*. For instance, it would have been almost unimaginable for the ICTR Appeals Chamber to admit in the *Barayagwiza* Review Decision that notwithstanding its earlier august declarations as to the importance of protecting the defendant's rights against detention without charge, it was now rescinding that protection because of political pressure from Rwanda. Indeed, the Appeals Chamber actually went out of its way to emphasize that this was *not* what it was doing—even though few observers ultimately believed it.²⁵⁷

Candor is broadly understood to be central to the judicial function.²⁵⁸ Many commentators have made this case in detail, and so I will only briefly sketch their main points. First, as David Shapiro argues,

[The] requirement that judges give reasons for their decisions . . . serves a vital function in constraining the judiciary's exercise of power. In the absence of an obligation of candor, this constraint would be greatly diluted In a sense, candor is the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if

²⁵⁵ See *Pallais*, 921 F.2d at 691–92 (stating that judicial admonitions do not effectively deter unlawful prosecutorial comments to jury because prosecutors know that comments are almost always deemed harmless).

²⁵⁶ Cf. Gunther, *supra* note 250, at 25 (“Bickel’s ‘virtues’ are ‘passive’ in name and appearance only: a virulent variety of free-wheeling interventionism lies at the core of his devices of restraint.”).

²⁵⁷ See *supra* note 111–120 and accompanying text.

²⁵⁸ See, e.g., Gewirtz, *supra* note 3, at 667–73 (“Candor and sincerity are part of the distinctive process that legitimates judicial power”); Robert A. Leflar, *Honest Judicial Opinions*, 74 Nw. U. L. REV. 721, 721–23 (1979) (arguing for greater judicial honesty in opinions); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 750 (1987) (“[T]he fidelity of judges to law can be fairly measured only if they believe what they say in their opinions and orders, and thus a good case can be made that the obligation to candor is absolute.”).

judges feel free to believe one thing about them and to say another.²⁵⁹

This argument has particular resonance in the context of ICTs, which generally recognize an internationally protected “right to a reasoned opinion.”²⁶⁰ That right has little meaning if the court’s stated reasoning is misleading.

Second, a “subterfuge that compromises an ideal without saying so creates a risk that the ideal will be weakened, that people will come to think that the ideal *means* only what has been imperfectly realized.”²⁶¹ This may be especially true where the subterfuge takes the form of remedial deterrence at the rights-interpretation stage. In such cases, the court apparently endorses the redefinition of the right, and since remedial costs are typically not even discussed, the reader has no reason to call the redefinition into question. When a court announces that no rights violation exists (rather than declaring itself unable to remedy the violation), it serves to “*legitimate* [the challenged] actions, and to relieve [other] actors of responsibility for solving these problems in institutionally appropriate ways.”²⁶²

This problem may pose a particular danger to international courts’ ability to contribute to human rights enforcement throughout the world. International courts’ doctrinal rules are often shaped by their specific institutional constraints and objectives, as Part II illustrated. But those rules take on a life beyond the institution. National authorities (and other international courts) often look to international judicial doctrine when determining their own human rights obligations.²⁶³ In determining what precedential weight to give that doctrine, they may well wish to consider the extent to which the rules each international court has adopted are contingent on its particular institutional concerns. When an international court has not been candid about the reasons for its decisions, however, that task is much more difficult. Judicial subterfuge—whether or not the product of conscious dissembling²⁶⁴—may hinder international courts’ ability to

²⁵⁹ Shapiro, *supra* note 258, at 737; *accord* Gewirtz, *supra* note 3, at 667; Hellman, *supra* note 250, at 1125.

²⁶⁰ *E.g.*, Prosecutor v. Naletilić, Case No. IT-98-34-A, Judgment, ¶ 603 (May 3, 2006).

²⁶¹ Gewirtz, *supra* note 3, at 673.

²⁶² Tribe, *supra* note 57, at 33–34.

²⁶³ *See supra* note 92 and accompanying text.

²⁶⁴ In many instances, “subterfuge” is probably an overstatement, as international judges are not really engaging in any deliberate deception. Remedial deterrence processes may take place at a more subconscious level. Prohibitive remedial costs cannot help but exert subtle pressure on judges’ decisionmaking at other stages of rights adjudication, even if the judges do not think consciously about the ways in which their decisionmaking is thereby altered. *See* Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 297–99 (1990) (arguing that while deliberate deception cannot be defended, “non-introspection” is ethi-

set clear and persuasive precedents for other actors in the international community, a goal that is among many of those courts' stated objectives.²⁶⁵

A number of scholars have advanced serious arguments *against* an obligation of judicial candor.²⁶⁶ Some have argued, for instance, that creative—i.e., misleading—readings of precedent enable courts to contribute to the gradual evolution of the law.²⁶⁷ In some cases, it may be more important for a court to *appear* principled than to *be* principled; frankly admitting to ends-oriented decisionmaking might unacceptably undercut the court's legitimacy.²⁶⁸ Judge Guido Calabresi has defended occasional use of subterfuge as arising in the context of "tragic choices" and "hid[ing] a fundamental value conflict, recognition of which would be too destructive for a particular society to accept."²⁶⁹ Even if we were to accept these arguments, however, there would still be reason to worry about the existence of remedial rules that systematically force courts to resort to less-than-candid reasoning. Few argue against candor as a *norm* in judicial decision-making,²⁷⁰ and nobody would dispute that it generally would be better

cally permissible); Martha L. Minow, *Judging Inside Out*, 61 U. COLO. L. REV. 795, 798 (1990) (arguing that judges lack "easy access to language to describe the inner experience of judging"). But remedial deterrence effects driven by this kind of self-deception, even if ethically innocuous, still carry significant costs. Where they tip the balance, they matter to the people whose rights thereby go unprotected. Moreover, even self-deception results in opinions that conceal the real reasons driving court decisionmaking—a disservice both to the parties and, in the case of international courts, to the development of international legal doctrine.

²⁶⁵ See, e.g., Meron, *supra* note 89 ("Our judgments on both procedural and substantive law now supply a foundation for all international criminal courts . . .").

²⁶⁶ See, e.g., Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 429 (1979) (describing candor as "no less but no more significant a value than any of the other ideals" that judges must take into account).

²⁶⁷ See Lon L. Fuller, *The Law in Quest of Itself* 12 (1940) ("Is [a judge's] primary duty one of fidelity to the existing law, or has he a more creative role?").

²⁶⁸ See MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 27 (1964) ("It would be fantastic indeed if the Supreme Court, in the name of sound scholarship, were to disavow publicly the myth upon which its power rests."); Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court*, 20 STAN. L. REV. 169, 236–41 (1968) (arguing that "the Court's symbolic role severely limits the applicability of any requirement of 'candor' in measuring that institution's achievements"). *But see* Gewirtz, *supra* note 3, at 671 (arguing that "dishonesty always creates the risk of its detection, and, with detection, harm to the courts' stature").

²⁶⁹ GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 172–73 (1982); *accord* GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 17–28 (1978) (discussing difficulties in making decisions that will have societal consequences); *see also* Martha Minow, *Which Question? Which Lie? Reflections on the Physician-Assisted Suicide Cases*, 1997 SUP. CT. REV. 1, 23–30 (defending Supreme Court's lack of candor about ubiquity of physician-assisted suicide on similar grounds).

²⁷⁰ See Shapiro, *supra* note 258, at 738–39 ("I would surely be hard-put to identify anyone who advocates deception across the board . . ."); *id.* at 748 ("[S]ubterfuge can

if judges did not face situations in which they feel required to lie. The controversy is really about whether candor should be an absolute obligation, or whether strong competing interests can ever justify judicial dissembling. My concern, however, is simply that international courts' absolutist approach to the effective-remedy requirement creates too many situations in which judges are faced with this ethical dilemma. They cannot openly argue in favor of remedial shortfall; instead, they must adjust some other doctrinal rule. Consequently, they must choose whether to be honest about the reason for that adjustment or instead to engage in subterfuge.

Perhaps the choices international courts have made in the face of such dilemmas are, in fact, the right ones. Perhaps the various doctrinal choices described in Part II, even if they *do* result in underprotection of some human rights, are simply necessary evils—courts faced with potentially catastrophic remedial costs cannot reasonably be expected to choose to absorb those costs. To pick an extreme example, few would contend that in the *Barayagwiza* review proceeding, the Appeals Chamber should have, at the cost of the complete breakdown of the Tribunal, stuck to its guns, freed the defendant, and let Rwanda make good on its threat to cease cooperation.²⁷¹ Nonetheless, it would still be better to minimize remedial deterrence pressures by providing other ways for courts to avoid untenable remedial costs without spillover effects on other doctrines. In the next two Sections, I consider some possibilities for doing so.

B. Institutional Design Recommendations

When rights violations occur but remedial costs are prohibitive, international courts are faced with intractable dilemmas. All of the strategies described in Part II are damaging to human rights enforcement to some degree, as would be failure to provide an effective remedy. The first thing to consider, then, is whether and how these dilemmas can be prevented from arising by making effective remedies available at lower cost. The prevalence of remedial deterrence effects ought to influence the design of international courts and their procedural rules. Most obviously, the likelihood of such effects turns on the remedial options at the court's disposal. But many other institutional design factors affect the costliness of remedies—for instance, the procedural posture in which rights disputes are typically presented to the

bring us peace only for a while; since we are 'born to reason,' honesty causes the tragic choice to reappear." (quoting CALABRESI & BOBBITT, *supra* note 269, at 49)).

²⁷¹ Even the harshest critics of the *Barayagwiza* debacle usually do not so contend; instead, they criticize the Appeals Chamber's initial decision as shortsighted. *E.g.*, Fleming, *supra* note 84, at 144.

court. This Section illustrates these points with specific recommendations related to the design of international criminal tribunals. Although it is late in the day for the ICTY and ICTR, they remain several years from closing their doors and still adopt amendments to their rules of procedure several times each year.²⁷² Moreover, most of these recommendations are equally applicable to the permanent International Criminal Court and any future ad hoc tribunals.

The most obvious and drastic remedy—release and dismissal of charges with prejudice—will never be a tenable remedy for procedural violations in international criminal trials, except perhaps in truly extraordinary cases. The charges are simply too serious. It will always be politically disastrous to free a convicted major war criminal or *genocidaire*, without the possibility of retrial, because of a procedural mistake made by the tribunal or its prosecutor—and in many cases it may be morally unacceptable as well. It would be perceived as a slap in the face of victims, as it was in *Barayagwiza*, and would accordingly be a blow to the Tribunal's transitional justice objectives. Furthermore, it would be a windfall to the perpetrator of atrocities. Instead, for serious pretrial violations, some remedy must be found that does not result in impunity for the underlying crime.²⁷³ And for violations undermining the fairness of the trial, reversal of convictions must be followed by retrial, as is the usual procedure in domestic courts around the world.²⁷⁴

This brings us to perhaps the most glaring problem driving remedial deterrence effects at the ICTs: the practical unavailability of retrial as an appellate remedy. ICT procedure simply must be redesigned to make retrial a viable option. Retrial would be more feasible if trials in general were shorter and less expensive, and so any design proposal that improves both time efficiency and cost efficiency will also tend to reduce remedial deterrence.²⁷⁵ Every proposal for

²⁷² For a list of past and recent amendments to the Rules, see ICTY, Basic Legal Documents, <http://www.un.org/icty/legaldoc-e/index.htm> (in lefthand menu, follow "Rules of Procedure and Evidence" hyperlink; then, in same menu, follow "Previous Versions" hyperlink), and ICTR, Basic Legal Texts, <http://69.94.11.53/default.htm> (in lefthand menu, follow "Basic Legal Texts" hyperlink; then follow "Rules of Procedure and Evidence" hyperlink).

²⁷³ Part III.C., *infra*, discusses possible remedies for such violations from an interest-balancing perspective.

²⁷⁴ *Cf.* *Stoichkov v. Bulgaria*, App. No. 9808/02, Judgment (Merits and Just Satisfaction), ¶ 81 (E.C.H.R. Mar. 24, 2005), available at <http://www.echr.coe.int/echr/en/hudoc> (for instructions on locating documents within "HUDOC Database," see *supra* note 24) (noting that retrial is "most appropriate" remedy for significant criminal procedure violations).

²⁷⁵ I will not focus here on the problem of lengthy and expensive trials generally, as that issue has already been widely discussed. See *supra* note 137 (citing scholarship); see also

improving this situation has its limits, though, so none would eliminate remedial deterrence pressures entirely. The special character of these trials guarantee such pressures—mass-scale crimes typically require complex proof, delays are sometimes necessary to enable defendants to prepare their defenses, and some special costs (like translation) are inherent to the international setting.²⁷⁶

Beyond proposals for improving trials generally, however, there may be other ways to expedite retrials. Presently, the ICTs' Rules do not provide for any special procedures for trials on remand,²⁷⁷ so presumably, such trials would be governed by the ordinary Rules. This is a mistake. Within the strictures of the right to a fair trial, substantially different procedures should be created for retrials. For instance, the entire trial need not be repeated if parts of it were untainted by error. Instead, the case could be remanded to the same Trial Chamber to redo only the affected portions.²⁷⁸ Even if the whole trial were tainted or otherwise had to be repeated in front of new judges, the Tribunal could at least allow the parties to agree to admit some witnesses' testimony in the form of videotapes or transcripts of the first trial. Defendants might well agree to waive their procedural rights to some extent, since they may prefer not to repeat (while in continued preventive detention) a long ordeal of a trial.

Another barrier to retrials at the ad hoc ICTs is the Tribunals' temporary nature, particularly the "expiration dates" imposed by their completion strategies.²⁷⁹ That barrier, fortunately, will not be a problem at the permanent International Criminal Court. But at the ICTY and ICTR—and at any future temporary tribunals—it can and should be removed. This is not to say that the Tribunals should be made permanent. But there should be some procedure that allows for retrial beyond the expiration date in the event of appellate recognition of procedural violations—either an exception to the completion

Eric Husketh, Note, *Pole Pole: Hastening Justice at UNICTR*, 3 *Nw. U. J. INT'L HUM.*, Spring 2005, available at <http://www.law.northwestern.edu/journals/jihr/v3/8> (reviewing efficiency problems and making several proposals).

²⁷⁶ See Wippman, *supra* note 121, at 880 (arguing that despite ICTY's recent attempts to cut costs, "there is an irreducible minimum that must be spent . . . if the quality of the proceedings is to be maintained").

²⁷⁷ Rule 117 simply states that "the Appeals Chamber may order that the accused be retried according to law." ICTY Rules, *supra* note 32, Rule 117.

²⁷⁸ Such an approach could work even if not all of the judges are available; the Tribunals already permit substitution of one judge mid-trial. See ICTY Rules, *supra* note 32, Rule 15 *bis*.

²⁷⁹ See *supra* note 105 and accompanying text.

strategy or a referral to some standing international tribunal or domestic court.²⁸⁰

Even if retrials remain implausible, other steps could be taken to reduce remedial costs. Recall that the ICTs have been more willing to protect the speedy trial right when presented with the issue prospectively than when asked to remedy a violation retrospectively. This points to a general strategy: Design procedures so that courts can, wherever possible, engage in *ex ante* enforcement of rights instead of more costly *ex post* relief. Specifically, the ICTs should liberalize the requirements for interlocutory appeals, allowing more rights interpretation to take place at an earlier stage with lower remedial costs.²⁸¹

The ICTs' Statutes do not provide for interlocutory review specifically; such review is established by the judge-created Rules of Procedure and Evidence.²⁸² The interlocutory appeal procedure is quite limited. The Appeals Chamber occasionally refers to it as "liberal," but that is only true in comparison to especially restrictive domestic systems.²⁸³ Decisions on procedural motions are presumptively not subject to interlocutory appeal (unless they pertain to jurisdiction), and whether to depart from this presumption and certify an interlocutory appeal is within a Trial Chamber's discretion.²⁸⁴ Trial Chambers have denied certification even when it is evident that delay in appellate resolution could significantly prejudice the defendant. For

²⁸⁰ The ICTY already has a mechanism for referring defendants to domestic jurisdictions within the former Yugoslavia. Rule 11 *bis*, which applies "prior to the commencement of trial," could be amended to extend to proceedings on remand. ICTY Rules, *supra* note 32, Rule 11 *bis*. Rule 13 presumably would also have to be amended. That Rule requires the President to request termination of any criminal proceedings instituted by "a court of any State for a crime for which [the defendant] has already been tried by the Tribunal." *Id.* Rule 13. It is designed to address double jeopardy concerns, which should be inapplicable where the new trial is the result of appellate correction of a procedural error.

²⁸¹ Allowing interlocutory appeals would not solve all remedial costs—sometimes, even by the time of the interlocutory appeal, it is too late for an *ex ante* preventive approach. That was the case in *Barayagwiza v. Prosecutor*, which concerned the defendant's initial arrest and detention. *Barayagwiza I* Decision, *supra* note 31, ¶ 2. Nevertheless, interlocutory appeals can still minimize delays. *Id.* ¶ 72 (allowing interlocutory appeal because judges saw "no purpose in denying the Appellant's appeal, forcing him to undergo a lengthy and costly trial, only to have him raise, once again, the very issues currently pending before this Chamber").

²⁸² See Drumbl & Gallant, *supra* note 70, at 608–09, 613 (describing relationship of Rules to Statute and discussing extent of interlocutory appeals allowed).

²⁸³ See *Barayagwiza I* Decision, *supra* note 31, ¶ 72 (accepting policy arguments in favor of "liberal approach to admitting interlocutory appeals"). U.S. federal courts, for instance, generally do not allow such appeals except in certain exceptional circumstances. See *Richardson v. United States*, 468 U.S. 317, 320–21 (1984) (discussing limitations on interlocutory appeals under 28 U.S.C. § 1291 (2000)).

²⁸⁴ ICTY Rules, *supra* note 32, Rule 72(B).

instance, in *Bizimungu*, the Trial Chamber denied certification of appeal from its denial of release on speedy trial grounds, even though the magnitude of the purported violation would obviously have increased by the time of eventual post-conviction appellate review. It explained that Rule 73 “is clear with regard to the exceptional nature of the [interlocutory appeal] procedure ‘This general rule is consistent with some important national jurisdictions around the world in which interlocutory appeals are not allowed in criminal cases, or allowed only in very limited circumstances.’”²⁸⁵

Commentators have sometimes cited efficiency concerns to justify limiting interlocutory review in the ICTs.²⁸⁶ This concern is valid; interlocutory appeal cannot be permitted for every trivial issue. But if interlocutory appeal proceedings were themselves made more efficient, the prospect of delays might not deter otherwise necessary certifications. The time limits for interlocutory appeals are expedited relative to appeals from convictions, and one recent improvement has been made: Permission to appeal need no longer first be granted by a three-judge appellate bench.²⁸⁷ Still, the briefing of interlocutory appeals often takes months because of translation-related delays,²⁸⁸ and the Appeals Chamber often takes several months to issue its decision after the briefs are filed.²⁸⁹

Understandably, the Appeals Chamber wants to take the time to get its decisions right. Interlocutory appeals often set precedents on important questions of first impression. But some of the delays go beyond what is necessary. The briefing process could be accelerated

²⁸⁵ Prosecutor v. Bizimungu, Case No. ICTR 99-50-T, Decision on Prosper Mugiraneza’s Motion for Leave To Appeal from the Trial Chamber’s Decision of 3 November 2004, ¶ 8 (Feb. 24, 2005) (quoting Prosecutor v. Nyiramasuhoko, Case No. ICTR 97-21-T, Decision on Ntahobali’s and Nyiramasuhoko’s Motions for Certification To Appeal “Decision on Defence Urgent Motion to Declare Parts of Evidence of Witnesses RV and QBZ Inadmissible,” ¶ 14 (Mar. 18, 2004)).

²⁸⁶ Cf. Fleming, *supra* note 84, at 115 (discussing importance of speed and warning that appellate courts should not “interpos[e] appellate proceedings where they are not warranted”).

²⁸⁷ Compare ICTY Rules, *supra* note 32, Rule 72 (current Rule not requiring approval of three-judge bench), and ICTR Rules, *supra* note 32, Rule 72 (same), with ICTY Rules of Procedure and Evidence, Rule 72(E), IT/32/Rev.34 (Feb. 11, 2005), available at <http://www.un.org/icty/legaldoc-e/index.htm> (former Rule requiring approval of three-judge bench), and ICTR Rules of Procedure and Evidence, Rule 72(E) (June 7, 2005), available at <http://www.ictor.org/ENGLISH/rules/070605/070605.pdf> (same).

²⁸⁸ E.g., Prosecutor v. Karemera, Case No. ICTR 98-44-AR116, Decision on Request for Extension of Time, ¶¶ 1–4 (Jan. 27, 2006).

²⁸⁹ E.g., Prosecutor v. Karemera, Case No. ICTR 98-44-AR72.5, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, ¶¶ 7, 9 & nn.16, 18 & 25 (Apr. 12, 2006) (announcing decision nearly four months after filings); Prosecutor v. Haradinaj, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj’s Interlocutory Appeal Against Trial Chamber’s Decision Denying His Provisional Release, ¶¶ 1, 3 (Mar. 9, 2006) (same).

by requiring the Tribunals' registries to give more urgent priority to the necessary translations or by requiring the prosecution (which is expected to be competent in both of the Tribunals' official languages) to file its briefs in the defense counsel's working language. Another possibility is for the Appeals Chamber to announce its disposition of the appeal as soon as the judges have decided on it, and only then take time to refine its written reasoning.²⁹⁰

Even when violations cannot be identified until after a trial is complete, judges (and designers of tribunals) should think creatively about remedies short of a new trial that could allow them to be corrected. The Tribunals already have procedures for reopening trial proceedings if necessary between the end of trial and the issuance of the trial judgment.²⁹¹ These procedures could perhaps be liberalized further. The appeal process usually takes at least a year, sometimes several. If procedural errors are discovered during that time, perhaps the Trial Chamber could be permitted, at the Appeals Chamber's request, to hear new evidence on a particular issue and to modify its judgment if necessary.

Alternatively, the Appeals Chamber could create a new basis for admission of new evidence on appeal. Where its initial review of the appeal briefs and trial record (in advance of the appeal hearing) suggests a likely procedural error, the Appeals Chamber could call for new evidence to replace the portion of the trial infected by the error, and draw its own factual conclusions based on the new evidence. The Appeals Chamber in some cases already hears new evidence and modifies the Trial Chamber's findings of fact accordingly.²⁹² The only difference would be the conditions for admission of the new evidence.

These suggestions are not at all exhaustive—even as to the ICTs—and obviously different procedures could be adopted by different international courts in response to their particular institutional constraints. The general point is that if the designers of international

²⁹⁰ The Appeals Chamber has occasionally followed such a procedure with its merits judgments. *E.g.*, Prosecutor v. Ntagerura, Case No. ICTR 99-46-A, Judgment, ¶ 10 (July 7, 2006).

²⁹¹ *See, e.g.*, Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment, ¶ 9 (July 21, 2000) (describing Trial Chamber's order reopening proceedings); Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶¶ 183–93 (Mar. 22, 2006) (citing *Furundzija* in support of proposition that reopening trials, not mistrial, was appropriate remedy).

²⁹² *See* ICTY Rules, *supra* note 32, Rule 115; ICTR Rules, *supra* note 32, Rule 115. Most new evidence is introduced upon one of the parties' request, and the moving party must meet Rule 115's fairly strict conditions. The Appeals Chamber occasionally requests new evidence *proprio motu*, however, relying on its Rule 98 authority. *See e.g.*, Prosecutor v. Bagilishema, Case No. ICTR 95-1A-A, Judgment (Reasons), ¶ 63 (July 3, 2002) ("The Trial Chamber does, however, have a clear power . . . to direct the Prosecution to obtain material which may be relevant to the case of the accused.").

courts are concerned with effective human rights enforcement, an important prerogative should be the creation of low-cost but effective remedial mechanisms for rights violations. For the most part, all this will take is a little creativity and the flexibility to change procedural rules if a court's initial experience demonstrates serious remedial deterrence effects.

C. Remedial Interest Balancing

Creative institutional design will not prevent *all* remedial dilemmas from arising, even in the best of circumstances. And international judges are not faced with the best of circumstances. Rather, they often face serious remedial costs that require hard choices. What should a court do when an "effective" remedy for a rights violation would pose unacceptable costs? Must it always grant the remedy? If not, should it openly confront the necessity of remedial shortfall, or should it find some other way to avoid the remedial question? This Section argues for a candid interest-balancing approach to remedies for human rights violations in international courts. That approach would give heavy weight to the victim's interest in receiving an effective remedy for rights violations, but courts would be permitted to choose lesser remedies (or in some cases, no remedy) in the face of sufficiently compelling countervailing considerations.

1. Background on Remedial Interest Balancing

In an influential 1983 article, U.S. constitutional scholar Paul Gewirtz outlined the differences between "rights-maximizing" and "interest-balancing" approaches to constitutional remedies. Following Gewirtz, the distinction is between pure plaintiff-centered approaches and broader, policy-oriented interest balancing. Under the rights-maximizing approach,

[T]he only question a court asks once it finds a violation is which remedy will be the most effective for the victims. . . . The costs of alternative remedies are therefore irrelevant except when such costs actually interfere with a remedy's effectiveness, or when the alternatives are equally effective and a criterion other than maximum effectiveness must be the basis for selection.²⁹³

Remedial shortfall might occasionally be justified under such an approach,²⁹⁴ perhaps because full remedies are literally impossible, because multiple remedial goals conflict,²⁹⁵ or because a lesser remedy

²⁹³ Gewirtz, *supra* note 3, at 591; *see supra* notes 35–37 and accompanying text.

²⁹⁴ Gewirtz, *supra* note 3, at 589–92, 597.

²⁹⁵ *Id.* at 593–96.

may for some reason ultimately be more effective for victims.²⁹⁶ But it cannot be justified on the basis of competing interests other than those of the plaintiffs themselves.

In contrast, an interest-balancing approach would permit courts to justify remedial shortfall based on *other* interests beyond those of the plaintiffs. As Gewirtz describes it: "[R]emedial effectiveness for victims is only one of the factors in choosing a remedy; other social interests are also relevant and may justify some sacrifice of achievable remedial effectiveness. . . . Interest Balancing thus tolerates a gap between right and remedy that *could* be closed."²⁹⁷

As Fallon and Meltzer argue, "the interest in individual redress . . . must occasionally yield to other factors."²⁹⁸ For instance, Gewirtz points out that desegregation remedies can impose costs on "innocent" third parties—for instance, children of all races for whom busing will mean much longer rides to school.²⁹⁹ Gewirtz argues that such interests, at least, "cannot be totally ignored."³⁰⁰ Both Owen Fiss and Kent Roach have also argued for approaches to remedies that permit some interest balancing.³⁰¹

Can an analogous interest-balancing approach to remedies be justified in the international context? As discussed in Part I, international courts' approaches to human rights remedies are presently rights-maximizing. Criteria other than effectiveness may be relevant, but only with respect to the question of which *form* of full reparation to require (e.g., compensation or restitution³⁰²) or, in the ICTs' case, as a justification for more-than-full windfall remedies. Given the prevalence of remedial deterrence effects, however, this rights-

²⁹⁶ For instance, in school desegregation cases, Gewirtz argues that rights-maximizing courts could justifiably take white resistance into account—not to accommodate racist preferences but rather to protect plaintiffs from the consequences of a social backlash against unpopular remedies like busing. *Id.* at 609. Thus a court could decide that the plaintiffs would be best served by some lesser remedy—e.g., slowed phase-in of desegregation or a less ambitious numerical objective for integration rates. *Id.* at 614–15, 635–42.

²⁹⁷ Gewirtz, *supra* note 3, at 591, 599.

²⁹⁸ Fallon & Meltzer, *supra* note 57, at 1791; *see id.* at 1793 (discussing factors militating for modified remedies in case of new rules); *see also* Meltzer, *supra* note 57, at 2559–60 (asserting that presumption in favor of "individually effective redress . . . can be outweighed by practical imperatives").

²⁹⁹ Gewirtz, *supra* note 3, at 600 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30–31 (1971)).

³⁰⁰ Gewirtz, *supra* note 3, at 593.

³⁰¹ Fiss, *Forms of Justice*, *supra* note 57, at 48–49 (discussing "other values" that "should be considered" in crafting remedies); Roach, *supra* note 57, at 859–64 (supporting "equity" approaches to remedies because of their flexibility and because they allow for interest balancing).

³⁰² *See, e.g.*, ILC Articles, *supra* note 11, arts. 35–37 (discussing criteria for requiring remedies of restitution, compensation, and satisfaction).

maximizing approach is self-defeating. Instead, some degree of interest balancing is necessary.

The proposal I set forth below is similar in many ways to those of the U.S. scholars mentioned thus far in this Section, but some qualification is necessary. With the exception of Fallon and Meltzer, who offer a broader “theory of constitutional remedies,”³⁰³ the scholars cited above all tailor their arguments to prospective injunctive relief in contemporary public law litigation, principally class actions,³⁰⁴ a setting in which U.S. courts have often used interest-balancing approaches.³⁰⁵ They do not apply those arguments to compensation for past injuries or to individual claims for prospective relief, much less to the procedural rights of individual criminal defendants. And few other U.S. scholars have argued for an interest-balancing approach to remedies in those other settings,³⁰⁶ even though courts may sometimes use such an approach in practice.³⁰⁷

By “public law litigation”³⁰⁸ (also known as “structural reform”³⁰⁹ or “institutional”³¹⁰ litigation), I mean lawsuits intended to

³⁰³ Fallon & Meltzer, *supra* note 57, at 1777. Fallon and Meltzer’s theory reaches both civil damages and criminal procedure remedies. *Id.* at 1787–91, 1808–20. But their main focus is on the retroactive application of “new law,” a particularly important source of right-remedy gaps in U.S. constitutional law, but less so in the ICT setting. Thus, they do not explore in detail the specific implications of their theory in broader contexts.

³⁰⁴ Fiss, *Forms of Justice*, *supra* note 57, at 48 (discussing various remedies, all of which are injunctions); Gewirtz, *supra* note 3, at 587–88 (“The problems of remedial limitation considered here involve a particular remedial instrument, the modern injunction.”); Roach, *supra* note 57, at 861–62 (focusing discussion of remedies on injunctions).

³⁰⁵ Gewirtz, *supra* note 3, at 642.

³⁰⁶ Some criminal procedure scholars have argued for interest balancing in the specific context of exclusion of unlawfully obtained evidence. *E.g.*, Gregory D. Totten et al., *The Exclusionary Rule: Fix It But Fix It Right*, 26 PEPP. L. REV. 887, 913–14 (1999); *see also* Friedman, *supra* note 57, at 741–43 (discussing interest-balancing argument in context of damage remedies); *cf.* Robert S. Stevens, *A Plea for the Extension of Equitable Principles and Remedies*, 41 CORNELL L.Q. 351, 385 (1956) (advocating incorporation of equitable balancing into courts of law).

³⁰⁷ *See* Fallon & Meltzer, *supra* note 57, at 1765 & n.191 (citing examples of interest balancing in contract remedies). In addition to express interest balancing on a case-by-case basis, various U.S. doctrines that affect plaintiffs seeking legal remedies (such as immunities) create right-remedy gaps, and those gaps are justified on the basis of competing interests. *Id.* at 1780–86; Friedman, *supra* note 57, at 746 (discussing right-remedy gap created by Supreme Court’s Eleventh Amendment jurisprudence). Adoption of similar doctrines could theoretically reduce remedial costs in the international context, at least in suits for damages. But because such doctrines would apply in all cases and not just in cases in which remedial costs are particularly high, they might also amount to overkill responses to excessive remedial costs. *See supra* Part III.A.2. *See generally* Daniel J. Meltzer, *Member State Liability in Europe and the United States*, 4 INT’L J. CONST. L. 39 (2006) (comparing European Court of Justice and U.S. approaches to immunities).

³⁰⁸ *See* Chayes, *supra* note 57, at 1284 (coining this phrase).

³⁰⁹ *E.g.*, Fiss, *Forms of Justice*, *supra* note 57, at 1–5 (giving overview of history of structural reform litigation).

achieve broad-based institutional reform rather than simply to make a particular defendant whole. Remedial shortfall is easier to justify in this context because of the very purpose of public law remedies. U.S. constitutional remedies were once principally modeled on a private law tradition³¹¹ in which the scope of a remedy flowed directly from the right—essentially, the *Chorzów Factory* approach. As Abram Chayes has written, the advent of public law litigation fundamentally transformed this model.³¹² Remedies in such cases often center on injunctive relief, an equitable remedy previously considered “extraordinary.”³¹³ Under the modern approach, remedies are discretionary policy choices rather than findings “derived logically from the substantive wrong adjudged. . . . In both the liability and remedial phases, the relevant inquiry is largely the same: How can the policies of a public law best be served in a concrete case?”³¹⁴

As the desegregation cases show, sometimes those policies may be best served by “second-best” remedies. In class actions, remedial shortfall may be inevitable, because class members’ interests may conflict such that some members may have to receive an incomplete remedy in order to serve the best interests of the class as a whole.³¹⁵ Moreover, interest balancing is relatively easy to justify when remedies involve broad structural reform, because such reforms profoundly and obviously affect innocent third parties whose interests are thus

³¹⁰ Fletcher, *supra* note 57, at 635; Shane, *supra* note 57, at 554.

³¹¹ I do not mean to imply that private law remedies have always been so straightforward as this “traditional” approach would suggest. See, e.g., DAVID I. LEVINE ET AL., REMEDIES: PUBLIC AND PRIVATE 8–9 (1996) (arguing that both private and public law remedies involve range of discretionary choices); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 481–86 (1980) (pointing out that “supervisory burdens” often imposed by remedies in public law litigation are akin to phenomena in traditional private law). The literature on private law remedies is broad-ranging and complex, and largely beyond the scope of this Article; some of the constitutional scholarship on which I draw in turn relies on insights initially developed in a private law context. See, e.g., Levinson, *supra* note 1, at 857–60 (applying insights from relationship of rights to remedies in private law to constitutional arena). Still, it is clear that while deviations abound, the dominant remedial approach in the U.S. private law tradition is still for courts to seek to make the victim whole for his injuries. E.g., DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 15–16 (3d ed. 2002) (describing “rightful position” standard—returning plaintiff to position she “would have been in but for the wrong”—as “essence of compensatory damages”).

³¹² Chayes, *supra* note 57, at 1296–97.

³¹³ *Id.*

³¹⁴ *Id.*; see also Fiss, *Forms of Justice*, *supra* note 57, at 47 (criticizing rights-maximizing principle for assuming that remedies can be derived logically and exclusively from violations); Fletcher, *supra* note 57, at 640 (arguing that courts in institutional suits cannot simply “provide a determinate and easily administered remedy”); Shane, *supra* note 57, at 554–55 (“Typically, the relief involved [in public law litigation] is intended to be corrective, not strictly compensatory.”).

³¹⁵ E.g., Gewirtz, *supra* note 3, at 606 & n.50, 620.

difficult to ignore. An interest-balancing approach is also a natural fit where the relief sought is an injunction, since injunctions are based in an equity tradition that has always required such balancing.³¹⁶

Some human rights litigation in international courts falls roughly within the above-described public law model. In particular, the remedial jurisprudence of the Inter-American Court of Human Rights has often emphasized institutional reform. While individual victims' families, rather than larger classes, have usually brought claims,³¹⁷ these claims often involve a background of mass abuses, and the Court has been creative and fairly aggressive in designing injunctive relief to prevent repetition of such abuses. In cases involving individual murders or disappearances, for instance, it has ordered the creation of a nationwide genetic databank to identify missing persons,³¹⁸ broad human rights education programs for the armed forces and police,³¹⁹ a comprehensive system of judicial records covering all government detainees,³²⁰ and a new legislative provision criminalizing enforced disappearance.³²¹ In such cases, an interest-balancing approach would require the Court, in deciding whether to order such broad remedies, to consider the various costs of implementation. The IACHR has not engaged in such interest balancing expressly, although it may be doing so implicitly and simply concluding that the remedies are worth the costs.

2. *Interest Balancing in the ICT Setting*

In contrast, the ICTs do not deal with public law litigation but rather with individual rights claims that arise in the criminal process. In this context, the case for interest balancing is more complicated. Can the extreme cost of remedying criminal procedure violations in a

³¹⁶ *Id.* at 603; Roach, *supra* note 57, at 862.

³¹⁷ A few international claims tribunals have developed special mass-claims procedures, although such tribunals generally only have the power to order compensation (or, sometimes, restitution of real property) and not institutional reform. M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203, 240–41 & 240 n.199 (2006) (discussing U.N. Compensation Commission); John R. Crook, *Thoughts on Mass Claims Processes*, 99 AM. SOC'Y INT'L L. PROC. 80, 80–83 (2005) (giving overview of international claims tribunals).

³¹⁸ Case of Molina-Theissen v. Guatemala, 2004 Inter-Am. Ct. H.R. (ser. C) No. 108, at 43–44 (July 3, 2004).

³¹⁹ Myrna Mack Chang Case, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, at 130 (Nov. 25, 2003).

³²⁰ Juan Humberto Sanchez Case, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, at 93 (June 7, 2003).

³²¹ Trujillo Oroza Case, 2002 Inter-Am. Ct. H.R. (ser. C) No. 92, at 33–35 (Feb. 27, 2002).

particular case ever justify departure from the remedy the Tribunal would otherwise deem "effective"?

Such shortfall would be hard to justify under a rights-maximizing approach, which would consider only the interests of the specific defendant whose rights have been violated. Consider the costliest remedies available to the Tribunals for procedural violation: release or retrial. Granting one of those remedies may undermine the Tribunals' objectives in a number of ways and may even ultimately harm defendants in other cases, but the defendant in the initial case receives a windfall. Of course, Part II showed that in practice, a requirement to provide such windfall remedies often actually harms defendants because the ICTs have found alternate strategies to avoid granting remedies entirely. But a rights-maximizing court could not defend this justification for departing from the rule, since the obvious rejoinder is that the court should simply reject those circumvention strategies as well.

Under an interest-balancing approach, however, the ICTs could take into account a whole new range of remedial costs—for instance, the affront to atrocity victims caused by the release of accused or even convicted perpetrators on procedural grounds perceived as technicalities. Such costs might also include likely future remedial deterrence effects and their consequences for future defendants. When adopting a particular remedial rule in one case, the court could consider the remedial costs that this precedent will impose in other cases. Such an approach might make remedies in the ICTs look more like remedies in class-action litigation, with remedial deterrence effects on other defendants treated something like the consequences of resistance to desegregation remedies. In both situations, a remedy that vindicates one claimant's rights may cause spillover effects that make it harder to vindicate the same rights for other members of the class.

But can an interest-balancing approach to remedies for criminal procedure violations be justified? It is easy to see the potential for abuse. Suppose a convicted defendant shows that he has suffered a procedural violation absent which he would not have been convicted. At a gut level, at least, it seems indefensible for the court to say, in effect, "Sorry, we know you have not been convicted based on a fair trial, but it would be politically disastrous to release you, so tough luck—you get no remedy." But consider instead the case in which a defendant has been detained unlawfully for several weeks before being charged, arraigned, and assigned counsel. After that initial period, the defendant's procedural rights are respected; he receives a fair trial, is convicted of overseeing the genocidal massacre of hundreds of thousands, and is sentenced to life in prison. In determining

what remedy to grant for the pretrial procedural violation—e.g., release and dismissal of the indictment, or a sentence reduction—is the Appeals Chamber limited to considering only the defendant’s interests? Must it entirely exclude from consideration both the magnitude of the defendant’s crime and the interest of the victims and international community in punishing that crime, such that the remedy for a few weeks’ unlawful detention is the same for a *genocidaire* as it would have been for a common thief?

In the latter situation, loosely parallel to that in *Barayagwiza*,³²² it is much easier to see the justification for interest balancing—and that balance might well tip against a remedy of dismissal and even against a significant sentence reduction. Essentially, two international wrongs have occurred—the defendant’s crime and his unlawful detention—and the Tribunal has only one kind of currency for responding to both of them, namely the defendant’s liberty.³²³ It can punish the crime by depriving the defendant of his liberty, and it can remedy the procedural violation by restoring some or all of that liberty. But in the hypothetical, the two wrongs are not on the same order of magnitude. So canceling the defendant’s punishment for the crime, in whole or in significant part, seems wildly incommensurate, putting a few weeks’ ill treatment of one person on the same plane as the slaughter of hundreds of thousands.

Of course, perhaps the rationale for these strong remedial rules has never turned on the violation’s being “as bad as the crime.” Rather, it may be about restraining the abuse of power.³²⁴ We tolerate the occasional windfall to the major criminal because vigorous protection of defendants’ rights may deter the police from rounding up whomever they want and holding them for weeks at a time. Even so, however, there is certainly room for such deterrence rationales in an interest-balancing calculus. Indeed, consideration of broader rule-of-law objectives probably fits better in an interest-balancing approach than in a *Chorzów Factory*-type rights-maximizing approach, as it is not about making the defendant whole for his own sake. An interest-balancing court could sometimes grant more-than-full remedies on the basis of deterrence or expressive rationales.³²⁵

³²² See *supra* Part II.A. Two differences are that in *Barayagwiza*, the matter reached the Appeals Chamber in an interlocutory posture, and the countervailing interests included potentially catastrophic political consequences.

³²³ See *supra* notes 94–101 and accompanying text (discussing unavailability or inappropriateness of financial remedies in most ICT cases).

³²⁴ See Fallon & Meltzer, *supra* note 57, at 1787–89 (arguing that most “unyielding” purpose of U.S. constitutional remedies is to check governmental abuses).

³²⁵ Cf. Roach, *supra* note 57, at 862–63 (arguing in U.S. context that equity should support expansive remedies).

For instance, in a case of egregious abuse of process, an ICT could determine that even after taking into account all the countervailing interests, the windfall remedy of release with prejudice is necessary to send the message to the prosecution that such conduct will not be tolerated.

More generally, an interest-balancing court need not simply weigh the relative magnitudes of the rights violation and the crime. Rather, it could—and should—give a heavy presumption in favor of remedying rights violations, and depart from that norm only when very strong countervailing considerations are present. As Gewirtz argues in the domestic context, “the social benefit of the right and the interest in undoing effects of its violation must be given exceptional weight in the balance; otherwise the . . . allocation of rights would be subject to a *de novo* utilitarian reevaluation in particular cases.”³²⁶

In some cases, however, interest balancing would result in curtailment of remedies. For instance, suppose the Appeals Chamber concludes that a defendant has been convicted of genocide after a fair trial, but that before that trial, he faced many years’ delay in violation of his speedy trial rights. Under the ICTs’ current remedial doctrine, he would be entitled to dismissal of the charges with prejudice and release. But an interest-balancing approach might deem this remedy unacceptable and either deny relief entirely or grant some lesser remedy, such as a sentence reduction. This shortfall may make some human rights advocates uncomfortable. But if we accept an interest-balancing approach to remedies for other serious human rights violations, there is nothing so sacrosanct about criminal defendants’ rights that would make such analysis categorically inappropriate.

Interest balancing, moreover, is inherent to criminal procedure—even if it has been largely excluded from the *remedial* stage.³²⁷ The “reasonable doubt” standard, for instance, strikes a balance that errs on the side of avoiding wrongful conviction but does not require certainty. And routinely, defendants’ rights—e.g., the rights to bail, appointed counsel, and “equality of arms”—are limited in ways that accommodate the public’s legitimate interest in punishing and deter-

³²⁶ Gewirtz, *supra* note 3, at 607; *accord id.* at 602 (“Interest Balancing must be used with great caution to assure that the right receives sufficient weight in the balance.”).

³²⁷ Indeed, interest balancing is inherent to human rights adjudication generally. Likewise, competing interests and institutional constraints naturally affect other aspects of international courts’ operation, beyond human rights adjudication—for instance, the ICTs’ interpretations of substantive international criminal law and their prosecutors’ charging decisions. *Cf.* Gewirtz, *supra* note 3, at 676 (noting that “adaptive strategies and compromises with practicalities . . . pervade all aspects of law”).

ring crime as well as other interests, such as keeping the justice system operating at reasonable expense.³²⁸

Harmless error review, too, is a kind of interest-balancing approach—one that permits right-remedy gaps.³²⁹ If we only cared about ensuring that every rights violation was remedied, we would reverse automatically for every violation. Indeed, we would do so even if we only cared about ensuring that every *prejudicial* violation was remedied; because it is not always easy to identify and prove prejudice, sometimes errors that were in fact prejudicial will survive harmless error review.³³⁰ The ICTs' current approach to prejudice assessment, in which the defendant almost always bears that burden, makes mistakes even more likely. It can only be justified by a calculus that gives considerable weight to the international community's interest in finality of convictions. Indeed, the ICTs' standard gives too little weight to defendants' rights, especially because of its spillover effects—in response to high remedial costs in some cases, it places nearly insurmountable burdens on all defendants.

If we accept this kind of interest balancing in defining rights and assessing prejudice, it becomes difficult to justify excluding it entirely at the remedial stage. Of course, it might be argued that *because* competing interests are already balanced at earlier stages, they need not be reconsidered at the remedial stage.³³¹ But some costs are truly *remedial* in nature—that is, they are not inherent in the nature of the right but instead depend on what remedies the court chooses to vindicate that right. Remedial costs also may differ from case to case, depending on the procedural posture and factual circumstances. Such costs *can* be taken into account at earlier stages in the proceedings. Indeed, Part II demonstrated that ICTs often do so. But if it were possible for courts instead to balance those costs at the remedial stage, they would not need to take them into account earlier. Therefore, the court could avoid the twin overkill problems prevalent in courts' responses to remedial deterrence pressures: total, rather than partial,

³²⁸ See Eugene Cerruti, *Through the Looking Glass at the Brady Doctrine*, 94 KY. L.J. 211, 242 (2005) (discussing interest balancing in context of prosecutorial disclosure); Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1252 & n.373 (2004) (discussing interest balancing in context of double jeopardy, confrontation, compulsory process, and search and seizure); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1350 (2002) (“[I]nterest-balancing takes center stage in criminal procedure . . .”).

³²⁹ See Fallon & Meltzer, *supra* note 57, at 1771–73 (arguing that harmless error is determined by balancing risk of prejudice against burden of retrial).

³³⁰ See *id.* at 1772–73 (arguing that “beyond a reasonable doubt” standard does not require certainty of no risk for prejudicial error).

³³¹ See Gewirtz, *supra* note 3, at 603 (responding to this objection).

deprivation of remedies³³² and undesirable spillover effects on cases not presenting the same remedial costs.³³³

Why, then, does interest balancing seem so inappropriate in the first hypothetical I gave, in which the unfairly tried war crimes defendant is imprisoned to avoid undesirable political consequences? The problem is not the use of interest balancing but rather the inclusion of illegitimate interests in the balance. Gewirtz argues for an interest-balancing approach that would exclude all interests that conflict with the very nature of the right in question. For instance, in a desegregation case, the interests of white racists in maintaining segregation cannot count in the calculus.³³⁴ A similar analysis could be applied readily to the criminal procedure context. If the right to a fair trial means anything, it is that the state (or international community) cannot have a legitimate interest in punishing an accused who has not been fairly convicted, no matter how serious the accusations.

Perhaps one could differentiate an interest in avoiding political backlash (and its consequences for the court's legitimate objectives) from an interest in punishing unproven accusations, even if the potential backlash would itself be motivated by such illegitimate interests. But even if consideration of such an interest were deemed legitimate—a position I am reluctant to endorse—it would take extraordinary circumstances for an ICT to justify accommodating political resistance to the implementation of the fair trial right. Not only should that right itself weigh heavily in the interest-balancing calculus, but political backlash is often a speculative risk, and accommodating it may backfire. An ICT would not have much credibility left if it admitted to convicting a person without a fair trial; as discussed above, the fair trial norm is central to the effective implementation of the ICTs' transitional justice goals.

The interest-balancing approach probably would alter the ICTs' remedial analysis only when the rights violation has caused the defendant harm that does not impair the fairness of the trial. This category encompasses the serious violations most prevalent at the ICTs—namely, most pretrial violations, including speedy trial problems as well as unlawful arrests and initial detention. ICTs are especially vulnerable to these kinds of claims because of the length of their proceedings and the fact that they must often coordinate arrests with states that have poor human rights records.³³⁵ Interest balancing

³³² See *id.* at 606 (arguing that if injunctive relief is too costly, other remedies may still be available to courts).

³³³ See *supra* Part III.A.

³³⁴ Gewirtz, *supra* note 3, at 606–07.

³³⁵ See *supra* notes 137, 165–66 and accompanying text.

might also affect remedies for other non-outcome-linked violations, like those challenging the conditions of detention. But for rights claims related to the fairness of the trial, interest balancing is not likely to change remedial outcomes, and so its availability will not reduce remedial deterrence pressures. For those kinds of violations, the only viable strategy for reducing those effects is to develop lower-cost remedial options, as discussed above in Section B.

This interest-balancing approach would bear little resemblance to the strategy, taken by the European Court in *Golder v. United Kingdom*,³³⁶ of simply defining down full or effective remedies to include merely declaratory relief for past injuries.³³⁷ Under the interest-balancing approach, the court that chooses a second-best remedy would have to acknowledge candidly the remedial shortfall and justify it on the basis of strong, legitimate competing interests. The *Golder* approach, in contrast, fails to justify or even acknowledge any remedial shortfall. Rather, it claims to grant an effective remedy while in fact granting no remedy at all.³³⁸ The practical difference between the two approaches lies in the legal consequences for other cases. *Golder* sets the precedent that a judgment of condemnation amounts to full reparation for *all* nonpecuniary damages (no matter how severe) caused by human rights abuses, even absent some special competing interest. And indeed, several national courts in Europe have followed that precedent.³³⁹

In contrast, a candid approach to interest balancing will avoid leading other actors—like the European domestic courts that have followed *Golder*—to mistake a partial or nonexistent remedy for a full or effective one. As Gewirtz has argued, “[b]y candidly acknowledging that they are providing something less than a full remedy, courts leave the unfulfilled right as a beacon. This leaves open the possibility that at some point the courts themselves will be able to

³³⁶ App. No. 4451/70, 18 Eur. Ct. H.R. (ser. A) ¶ 46 (1975); *see supra* notes 216–17 and accompanying text.

³³⁷ I do not intend to suggest that declaratory relief has no proper role to play in human rights litigation; it may be an important tool for clarifying states’ continuing legal obligations and conceivably could facilitate and expedite subsequent domestic litigation over remedies. *Cf.* EDWIN BORCHARD, *DECLARATORY JUDGMENTS*, at xiii–xvi (2d ed. 1941) (discussing declaratory judgments in domestic courts). But to suggest that a declaratory judgment itself amounts to a sufficient remedy for injuries caused by past rights violations is, at least, a significant departure from the full remedy rule.

³³⁸ *Cf.* Roach, *supra* note 57, at 894 (“Equity . . . unmasks the judicial choices that corrective justice so easily hides. Instead of findings of no causal responsibility, equity forces judges to confront their discretion not to award remedies.”).

³³⁹ Nikolova Dissent, *supra* note 218 (“Except for those courts that now rely on the *Golder* incantation, I am not aware of any national court settling for a mere finding of breaches of rights as a substitute for a specific remedy . . .”).

furnish a more complete remedy," or that other actors will do so.³⁴⁰ That approach is especially attractive in the context of human rights law, which has an important aspirational component.³⁴¹ International courts' human rights rhetoric may help to shape international norms even when their actual enforcement of those rights falls short.³⁴²

3. *International Legal Foundations*

An interest-balancing approach to remedies in human rights cases would represent a fairly substantial departure from the *Chorzów Factory* full remedy rule and, more generally, from the rights-maximizing approach that has dominated international courts' remedial decisionmaking. It would not, however, be completely without an international law foundation. Departures from the full remedy rule have already been accepted by some courts in expropriation cases, replaced with a concept of "just compensation" that strikes a balance between the property owner's rights and the state's policy interests.³⁴³ And in cases involving mass human rights abuses, states and international tribunals have often issued less-than-full remedies.³⁴⁴ Scholars have defended those remedies on the basis that it would be impossible to provide full reparation to all of the victims; impossibility is a built-in exception to the full remedy rule under *Chorzów Factory*.³⁴⁵ But in mass-abuse situations, "impossibility" is often a legal fiction. In most such cases, it would not really be *impossible* to compensate all victims

³⁴⁰ Gewirtz, *supra* note 3, at 673; *see also* Tribe, *supra* note 57, at 29 ("Even in the extreme case of remedial impotence, what a court says and does can shape the political dialogue in profound ways."). For these reasons, I do not embrace Friedman's suggestion that "where the court's very ability to compensate is uncertain, it is fair to ask whether a declaratory judgment . . . is not remedy enough." Friedman, *supra* note 57, at 743. At the very least, the court should admit that it is *not* remedy enough but, due to extraordinary countervailing interests, is the only remedy available.

³⁴¹ *See, e.g.*, Philip Harvey, *Aspirational Law*, 52 *BUFF. L. REV.* 701, 717–19 (2004) (arguing human rights law's aspirational status is necessary for eventual enforcement); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of Human Rights Clinics*, 28 *YALE J. INT'L L.* 505, 512 (2003) (asserting that human rights law has "intrinsic aim of making the aspirational a reality"); Michael Kagan, *Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East*, 38 *COLUM. HUM. RTS. L. REV.* 263, 318 (2007) ("Treaty-based humanitarian and human rights law has always been and probably always will be aspirational.").

³⁴² *See, e.g.*, Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397, 1409–11 (1999) (discussing role of "law-declaring fora," including international courts, in norm-shifting processes).

³⁴³ *See supra* note 44.

³⁴⁴ SHELTON, *supra* note 16, at 389–90, 399.

³⁴⁵ *E.g., id.* at 399; Rohrt-Arriaza, *supra* note 46, at 181 (underscoring limits of individual reparation schemes and endorsing focus on collective nature of remedy); Drazen Petrovic, Book Review, 16 *EUR. J. INT'L L.* 1008, 1009–10 (2005) (discussing scholars who argue that full remedy may be neither beneficial nor possible).

who bring claims. Rather, other competing interests make it undesirable—for instance, paying out such claims would undermine the state's ability to provide services to other, innocent citizens. So a compromise approach is the best option. But if compromise is permissible in remedying the gravest human rights abuses, it is hard to see why it would not be permissible in smaller-scale cases.

In addition, international courts could find support for an interest-balancing approach in the tradition of equity, which has often been treated as a source of international law.³⁴⁶ The case law of the ICJ has increasingly incorporated certain equitable principles,³⁴⁷ and arbitral tribunals have long done so.³⁴⁸ One influential early argument for equity as a formal source of international law came from Judge Hudson's separate opinion in the *River Meuse* case, in which he argued for application of the "clean hands" principle.³⁴⁹ Judge Hudson wrote that "principles of equity have long been considered to constitute a part of international law" and, specifically, qualify as "general principles of law recognized by civilized nations"—a source of law under the ICJ Statute.³⁵⁰ While stating that the *Chorzów Factory* rule is "sound" as a "general principle," he argued that courts devising remedies in particular cases "cannot ignore special circumstances which may call for the consideration of equitable principles."³⁵¹

Equity has played a significant role in various aspects of the ICJ's jurisprudence in the delimitation of maritime boundaries.³⁵² The ICJ's formal basis for relying on equity remains a bit unclear, as

³⁴⁶ WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 197–98 (1964).

³⁴⁷ See Prosper Weil, *L'Équité dans la jurisprudence de la Cour Internationale de Justice* [*Equity in the Jurisprudence of the International Court of Justice*], in *FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE*, *supra* note 219, at 121–22 (noting that ICJ made frequent reference to concept of equity).

³⁴⁸ See CHRISTOPHER R. ROSSI, *EQUITY AND INTERNATIONAL LAW* 59 (1993) ("Equity was a common element in early general arbitration claims treaties.").

³⁴⁹ *River Meuse* (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 76, 78 (June 28) (Hudson, J., concurring).

³⁵⁰ *Id.* at 76; see also Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060 [hereinafter ICJ Statute] (listing sources of law).

³⁵¹ *River Meuse*, 1937 P.C.I.J. (ser. A/B) No. 70, at 78 (Hudson, J., concurring); see also ROSSI, *supra* note 348, at 155 (discussing impact of Hudson's opinion).

³⁵² See, e.g., *Maritime Delimitation in Area Between Greenland and Jan Mayen* (Den. v. Nor.), 1993 I.C.J. 38, 58–59, 65–67 (June 14); see *id.* at 258–73 (Weeramantry, J., separate opinion) (reviewing cases); ROSSI, *supra* note 348, at 193–213 (discussing Court's treatment of criteria for equity and relationship to distributive justice); Robert Y. Jennings, *The Principles Governing Marine Boundaries*, in STAAT UND VÖLKERRECHTSORDNUNG 397, 400–01 (Kay Hailbronner et al. eds., 1989) (discussing ICJ's reliance on equitable principles in sea boundary cases).

Article 38 of its Statute, which lists the sources of its law, makes no mention of equity.³⁵³ Occasionally, specific treaties that the Court applies invoke equity,³⁵⁴ but otherwise the Court sometimes suggests that equitable principles have customary international law status, sometimes treats them as general principles of law, and sometimes articulates no clear basis for them.³⁵⁵ Some scholars have suggested that equity is a "subsidiary" source of law that should guide the application of formal sources.³⁵⁶ This approach also finds some support in the ICJ's case law. The Court has referred to equity as a "method of interpretation of the law"³⁵⁷ and has suggested that where multiple possible legal principles could govern a given situation, the "requirements of justice" should guide the choice between them.³⁵⁸ In a famous dictum in the *Barcelona Traction* case, the Court asserted that "in the field of . . . international law, it is necessary that the law be applied reasonably," guided by "considerations of equity."³⁵⁹

Equitable principles have specifically influenced the international law of remedies, as the *River Meuse* passage above suggests.³⁶⁰ For instance, the International Law Commission's Articles on State Responsibility allow some degree of interest balancing.³⁶¹ To avoid "disproportionate" remedies that risk "crippling" the violating state, the Articles impose a proportionality requirement with respect to cer-

³⁵³ ICJ Statute, *supra* note 350, art. 38.

³⁵⁴ *See, e.g., Jan Mayen*, 1993 I.C.J. at 234 (Weeramantry, J., separate opinion) (discussing express inclusion of equity in Law of the Sea Convention).

³⁵⁵ *See* Weil, *supra* note 347, at 126 (describing differences as semantic).

³⁵⁶ *Id.* at 125.

³⁵⁷ *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 567–68 (Dec. 22).

³⁵⁸ *Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 18, 60 (Feb. 24); *see* Weil, *supra* note 347, at 125 (arguing that equity should guide choice of various means of interpreting or applying legal norm).

³⁵⁹ *Barcelona Traction (Belg. v. Spain)*, 1970 I.C.J. 3, 48 (Feb. 5). Some judges and scholars have criticized the Court's application of equitable principles as excessively ad hoc. *See, e.g., North Sea Continental Shelf (F.R.G. v. Belg. & Neth.)*, 1969 I.C.J. 3, 166 (Feb. 20) (Koretsky, V.P., dissenting) (arguing that ICJ's definition of equity provides too much discretion); *id.* at 196 (Tanaka, J., dissenting) (arguing that ICJ's use of equity is "unable to furnish any concrete criteria for delimitation"); Mohammed Bedjaoui, *L'Énigme des 'principes équitables' dans le droit des délimitations maritimes* [*The Enigma of "Equitable Principles" in the Law of Maritime Boundaries*], 42 *REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL* 367, 376 (1990) (providing overview of scholarly criticism of ICJ's use of equity). Others have argued that this flexibility is an asset, especially in "particular circumstances in which the strict rule of law would work an injustice." Robert Y. Jennings, *Equity and Equitable Principles*, 42 *ANNUAIRE SUISSE DE DROIT INTERNATIONAL* 27, 32 (1986).

³⁶⁰ *See supra* notes 349–51 and accompanying text.

³⁶¹ ILC Articles, *supra* note 11, arts. 35–37.

tain remedies, in particular restitution and satisfaction.³⁶² Still, equitable principles have hardly displaced the Articles' rights-maximizing approach. Instead, they have merely affected the choice *among* full remedies—the Articles require full compensation wherever the claimant is not made whole via restitution.³⁶³ And as a general matter, equity is a rather amorphous concept, and thus a court's reference to it cannot be read to endorse every aspect of traditional equitable decisionmaking. While interest balancing is traditionally an aspect of equitable analysis of remedies, equity is not necessarily synonymous with a form of interest balancing that permits avoidable remedial shortfall.³⁶⁴

International courts applying human rights law (as opposed to the law of state responsibility) do not yet appear to have engaged in such interest balancing, at least outside the mass-claims context.³⁶⁵ Equity in human rights cases has been invoked principally by the Inter-American Court to support broad remedies that go beyond full reparation;³⁶⁶ it has not been invoked to support remedial shortfall. Many scholars, judges, and human rights advocates might understandably be uncomfortable with the suggestion that the individual right to an effective remedy should be subject to balancing, rather than full vindication, in all cases. The principle of “no right without a remedy” has a powerful appeal, and remedial shortfall should not be permitted without good cause. But those who would prefer to allow *no* shortfall must confront the fact that international courts routinely circumvent both the principle and their own remedial doctrines when confronted with overly costly remedies. Sometimes, insisting on the most effective remedy means victims get no remedy at all.

CONCLUSION

The experience of the ICTY and ICTR shows that strong remedial rules in human rights law sometimes have perverse consequences.

³⁶² The remedy is proportional to the benefit gained by the injured state and the burden on the violating state. COMMENTARIES, *supra* note 13, at 212; *see also* Shelton, *supra* note 6, at 851 (describing this as incorporation of equitable principles).

³⁶³ ILC Articles, *supra* note 11, art. 36.

³⁶⁴ *See* Gewirtz, *supra* note 3, at 603 (“Equity evolved in part to ameliorate the rigidities of courts at law that interfered with fully adequate remedial vindication.”).

³⁶⁵ *See supra* Part I.A (describing human rights courts' adherence to full remedy rule); *supra* note 344 and accompanying text. *But see* Nikolova Dissent, *supra* note 218 (arguing that, instead of *Golder* approach providing only declaratory relief, European Court should engage in “careful balancing exercise when assessing the quantum of compensation”).

³⁶⁶ *See, e.g.*, Hilaire, Constantine, and Benjamin et al. Case, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, at 66 (June 21, 2002) (invoking equity to justify bar on execution *in addition to* new trial even if new trial resulted in reconviction).

Where compliance poses untenable costs, international courts will circumvent the rule by interpreting rights narrowly, raising prejudice thresholds, or using procedural mechanisms to avoid hearing rights claims. To some degree, such dynamics are inevitable and legitimate: Courts cannot decide rights claims as though they are pure abstractions. But where remedial costs are essentially prohibitive, remedial deterrence effects can so distort courts' decisionmaking as to make it impossible for them to recognize valid claims of rights violations. This dynamic can snowball as the doctrines developed in high-remedial-cost situations spill over to other cases.

This picture should raise serious concerns about the fairness of international criminal proceedings. Its implications, however, are potentially much broader. All courts, international and domestic, face remedial costs that may affect their doctrines. Of course, my specific conclusions about the ICTs cannot simply be transposed—generalizations are no substitute for in-depth analysis of each specific court's institutional characteristics and doctrinal strategies for responding to remedial costs. That analysis has so far been lacking and is a fertile ground for future research.

At the ICTs, and perhaps at other international courts, the perverse consequences described here could be mitigated. First, the courts' structures and procedures should be designed to minimize remedial cost pressures, both by diversifying the available remedies and by adjusting other rules so that rights claims can be decided in a procedural posture posing lower remedial costs. Second, international courts' absolutist approach to the right to an effective remedy should be replaced with a more flexible interest-balancing approach. This approach should give heavy weight to victims' interests but permit remedial shortfall if the countervailing considerations are strong enough.

This Article has explored the normative consequences of remedial deterrence only from the perspective of the international courts (and their creators) themselves, focusing on the courts' institutional design and remedial doctrine. But remedial deterrence in international courts may also have significant implications for other actors. International judicial doctrine is increasingly treated as an important source of international law. Domestic courts, other international courts, and political actors often rely on it when interpreting their own international legal responsibilities. This reliance further magnifies remedial deterrence effects—doctrinal distortions, although driven by remedial costs that are largely institution-specific or even case-specific, can spill over beyond an international court's own docket.

Accordingly, perhaps remedial deterrence effects should affect the persuasive weight that national authorities and other actors give to international judicial doctrine. One possibility is that some remedial deterrence situations should be understood as cases of “judicial under-enforcement” of human rights. Under such a theory, other actors’ international legal obligations could exceed those that international courts are willing to enforce. The practical import of this understanding would be that when considering the human rights case law produced by courts facing extreme remedial deterrence pressures (like the ICTs), other actors should proceed cautiously. They should treat the ICTs’ criminal procedure rules at most as baselines that do not necessarily exhaust their own international legal obligations.³⁶⁷

More generally, human rights scholars as well as courts need to develop a more sophisticated framework for understanding the inter-relationships—as well as the gaps—between rights and remedies. International remedies scholarship has consistently called for increased remedial powers for international courts, and it has essentially taken for granted the legal impermissibility of remedial shortfall. That tendency is understandable, given that human rights law is plagued by weak enforcement. But it may be misguided—as this Article has demonstrated, stronger remedies can mean weaker rights.

³⁶⁷ The concept of judicial underenforcement of rights is the subject of a significant body of U.S. constitutional scholarship. The seminal piece was Lawrence G. Sager’s *Fair Measure: The Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978), arguing that the Supreme Court may “underenforce” constitutional norms which still remain valid and fully enforceable by Congress. See also, e.g., Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1276 (2006) (linking underenforcement of constitutional provisions with search for “judicially manageable standards”); Levinson, *supra* note 1, at 923–25 (arguing that all rights are underenforced because they are shaped by judicial competence to provide remedy); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1652–55 (2005) (arguing that doctrinal rules that underenforce constitutional propositions become mistaken for propositions themselves). Human rights scholars have not yet explored its application to international courts or to the longstanding theoretical debates about the sources of international law. Although these questions exceed the scope of this Article, I hope to begin to fill this gap in my next project, examining the dependency of international courts’ doctrinal rules on institutional constraints and the consequences of that dependency for the precedential status of those rules.