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**Article 85: if someone is wrongfully detained or convicted, what recourse does he have? What compensation is he entitled to? Is this monetary, and if so, where does the money come from? What should the court take into consideration when deciding on compensation?**

Robert C. Bliss

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**CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES RESEARCH LAB**

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**MEMORANDUM FOR THE  
INTERNATIONAL CRIMINAL COURT**

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**ISSUE:**

**ARTICLE 85: IF SOMEONE IS WRONGFULLY DETAINED OR CONVICTED,  
WHAT RECOURSE DOES HE HAVE? WHAT COMPENSATION IS HE  
ENTITLED TO? IS THIS MONETARY, AND IF SO, WHERE DOES THE  
MONEY COME FROM? WHAT SHOULD THE COURT TAKE INTO  
CONSIDERATION WHEN DECIDING ON COMPENSATION?**

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**Robert Bliss  
Fall 2006**

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## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS**

### **A. Issue<sup>\*</sup>**

Article 85 of the Rome Statute of the Permanent International Criminal Court (“ICC”) contains a provision guaranteeing a right to compensation for the unlawfully detained and convicted. However, the Rome Statute lacks a statutory provision explaining how the ICC is to raise or distribute funds, what amount of compensation can be expected, and whether or not the ICC should be responsible for abuses by third parties acting as agents to the ICC in the capture and detention of the accused. Because no procedure for funding compensation for the unlawfully detained and convicted is enumerated in the Rome Statute, the ICC may face opposition to how it distributes funds to the unlawfully detained. This may be avoided if the ICC pays for restitution or compensation from its general operating budget, or if it sets up an endowment to pay for its breaches with the funds of member states who are willing to contribute specifically to that cause. The ICC could also face opposition if it pays for the unlawful acts of its third party contractors, and should avoid such liability by informing third parties of international standards to which they must comply.

### **A. Summary of Conclusions:**

#### **1. The mandate of the ICCPR is customary international law and is binding on the acts of the ICC.**

The ICCPR is binding on the actions of the ICC because almost every world state has ratified the ICCPR and its principles have been reproduced in several important

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<sup>\*</sup> ISSUE #3: Article 85; if someone is wrongfully detained or convicted, what recourse does he have? What compensation is he entitled to? Is this monetary, and if so, where does the money come from? What should the Court take into consideration when deciding on compensation?

treaties.<sup>1</sup> Among the principles espoused in the ICCPR is the right to compensation for unlawful arrest and detention, which ratifying parties to the ICCPR have committed to the practice and implementation of; not only in their international affairs, but in their domestic affairs as well.<sup>2</sup> For this reason, the principles of the ICCPR have become the customary practice for member-states and are legally binding upon them.<sup>3</sup>

Additionally, under the notion of *Opinio Juris*,<sup>4</sup> in order for a conduct or practice to become international law, it must be shown that states believe the practice is mandated by international law. Evidence that the principles of the ICCPR, which are espoused in the Rome Statute, are considered binding international law is illustrated by China's attempt to emulate them in China's own criminal code. This indicates that China, although not a member of the ICCPR, recognizes the force of the ICCPR to the international community, and realizes that it could be bound by the principles of the ICCPR.<sup>5</sup>

**A. Even though the ICCPR made the right to compensation for unlawful arrest and detention CIL, its application by ratifying parties has not been completely consistent because of reservations during the ratification process.**

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<sup>1</sup> Cecile Aptel, *Trial Without Undue Delay Before the International Criminal Tribunals*, in MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOR OF ANTONIO CASSESE (p. 539-566) (C. Vohran et al. ed., 2003). [Reproduced in accompanying notebook at Tab 63].

<sup>2</sup> John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on United States v. Alvarez-Machain*, 68 Notre Dame L. Rev. 723 P. 6 (1993) [reproduced in accompanying notebook at Tab 26].

<sup>3</sup> JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW (IRWIN LAW INCORPORATED 2001). Pp 160-164. [Reproduced in accompanying notebook at Tab 80].

<sup>4</sup> *Id.* at 168.

<sup>5</sup> XiXin Wang, *Suing The Sovereign Observed From The Chinese Perspective: The Idea and Practice of State Compensation in China*, 35 Geo. Wash. Int'l L. Rev. 681 (2003) [Reproduced in accompanying notebook at Tab 40].

Reservations occurred because member states were either too financially indebted to realistically provide compensation for unlawful arrest and detention, like many African nations;<sup>6</sup> parties wanted an escape route from the treaties mandate because they were concerned that political realities would change;<sup>7</sup> or reservations were a way to modify the procedures to compensate for unlawful arrest and detention that better fit with the states own legal codes and procedures.<sup>8</sup> Also In some cases, states saw ratification as a way to make the international community happy. However, regardless of the motivation for ratifying, all member-states to the ICCPR are bound by its principles. This allows the ICC some leeway in formulating procedures to award restitution or compensation for unlawful arrest and detention, but it will not allow the ICC to escape responsibility to compensate when compensation is due.

**B. Though no political or economic will existed to implement a right to compensation for the ad-hoc tribunals, the ICC must compensate its victims.**

These tribunals were the first courts of their kind and were created to prosecute the perpetrators of war crimes, genocide and crimes against humanity. The ad-hoc tribunals lacked the financial resources to compensate victims of the crimes they prosecuted, and was felt that compensation for victims should come before compensating their victimizers. Because the ad hoc tribunals were unable to compensate victims, it

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<sup>6</sup> Reservations to provisions of the ICCPR by Ratifying parties, *67 signatories and 160 parties*, 28 March 1979, no. 14668. (See Bangladesh's reservations to ICCPR Art 14 (6)). [Reproduced in accompanying notebook at Tab 9].

<sup>7</sup> *Id.* (See The Netherlands's reservations to ICCPR Art 14 (6)).

<sup>8</sup> *Id.* (See Australia's reservations to ICCPR provision 14(6)).

would have made little sense to compensate criminal perpetrators with thinly stretched funds.

A failure to compensate was permitted in part because the ad-hoc tribunals were directed at specific conflicts, which had mostly occurred, and the courts were temporary. But the era of failing to compensate victims of unlawful arrest and detention is over.<sup>9</sup> The ICC is permanent and must act as any permanent institution; by obeying the norms of international law, including restitution or compensation for unlawful arrest and detention.

The ICC will face similar budgetary problems to those of the ICTY and ICTR because the international community will have to pay for any costs that it accrues. This requires that the ICC streamline its expenses as much as possible to avoid political opposition and shortfalls that could threaten the credibility and future of the ICC. If the ICC can do this, it should enjoy considerable support from its ratifying parties.

**C. If the ICC takes appropriate precautions, the ICC should be able to avoid any responsibility for unlawful detention or abuse of detainees by third parties, while simultaneously minimizing their occurrence.**

Avoiding liability for third party actors will help the ICC compensate victims of its unlawful detention with fewer political hurdles, particularly if the ICC is able to keep detainee abuse to a minimum, which should not be hard if the ICC follows the mandates of the Rome Statute, and the requirements of international law.

**D. Because the Rome Statute creates a right to compensation for unlawful arrest and detention, but fails to specify where the money is to come from;**

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<sup>9</sup> *in re: World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939; at p. 11, 2000 [reproduced in accompanying notebook at Tab 67].

**the ICC should compensate its victims using the ICC's general operating budget.**

The Rome Statute does not provide that the Article 79 trust fund may be used to compensate those who are unlawfully detained. Such use of the trust fund would be contrary to its purpose and would constitute a violation of Article 79 of the Rome Statute. Because the money required to fill this fund comes from member states, the political implications of misuse of the fund could jeopardize the fund as well as the court. Had Drafters intended the fund to be used to compensate victims of unlawful detention and conviction, they would have enumerated such a use in Article 79. Even if the ICC were to torture a detainee, the Article 79 trust fund would be off limits because the fund was set-aside for victims of the war criminals that the ICC is trying, not victims of the ICC.<sup>10</sup> Because of a failure to enumerate the source for funding, the ICC's general operating budget should be used.<sup>11</sup>

## **II. BACKGROUND:**

### **I. Human rights treaties call for reparations for unlawful arrest and detention because these acts are acknowledged to be destructive to free and open societies.**

We must protect all individuals from unlawful arrest and detention, including suspected war criminals and the perpetrators of mass rape and genocide because individual liberty is necessary to the fabric of a democratic and free world. The Universal Declaration of Human Rights provides that the protection of spiritual, political, social,

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<sup>10</sup> Rome Statute of the International Criminal Court. <http://www.un.org/law/icc/statute/romefra.htm>. Art. 79.

<sup>11</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court [ICC-ASP], First Session, ¶ ICC-ASP/1/3/Corr.1. at p. 189 (September 3-10, 2002) [reproduced in accompanying notebook at Tab 82].

and economic freedom is fundamental to our shared values as world citizens<sup>12</sup>. These principles are considered international law and include the right to “life, liberty and security of person”; which should only be compromised through arrest and detention in exceptional circumstances.<sup>13</sup>

If a criminal justice system causes similar abuses to the ones that it seeks to discourage, its mission is compromised by its own acts. When an accused individual is apprehended and punished, they must be treated humanely. If a prisoner is abused, that individual is entitled to compensation to remedy that breach of international law.

## **II. The ICCPR, one of the most important human rights treaties in the world, recognizes a right to compensation for unlawful arrest and detention.**

The International Covenant on Civil and Political Rights (“ICCPR”) was ratified in 1966 and went into force on March 23, 1976, representing the culmination of 150 years of international cooperation to build a framework for basic human rights,<sup>14</sup> and has been ratified by the vast majority of world States. Since the ICCPR first recognized a right to compensation for unlawful arrest and detention, this principle has been imbedded in the constitutions of many nations, has been amended into the criminal code of others, and has been reproduced in many of the world’s international treaties. In practice, this ICCPR mandate has been applied in various ways,<sup>15</sup> and to varying degrees of effectiveness and

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<sup>12</sup> G.A. Res. 217A (III), Universal Declaration of Human Rights, (*The International Bill of Human Rights*), U.N. Doc A/810 at 71 (1948). <http://www.hri.org/docs/UDHR48.html>

<sup>13</sup> Stuart Beresford. *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, or Convicted by the Ad Hoc Tribunals*. 96 A.J.I.L. 628 (July, 2002) At 630. [Reproduced in accompanying notebook at Tab 38].

<sup>14</sup> YITHIHA SIMBEYE, IMMUNITY AND INTERNATIONAL CRIMINAL LAW p.9-15 (ASHGATE PUBLISHING 2004) [reproduced in accompanying notebook at Tab 77].

<sup>15</sup> *Kremzow v. Austria*, ECR I-2629; At 8 1997. Illustrates that the Austrian standard for compensation for unlawful arrest and detention is lower than the French, and British standard. [reproduced in accompanying notebook at Tap 47].

success.<sup>16</sup> But it is clear from its wide ratification that the ICCPR is controlling international law,<sup>17</sup> and that the ICC will be expected to follow the principles that it espouses.<sup>18</sup> This is reinforced by Article 85 of the Rome Statute that contains almost identical language to that of Article 14(6) of the ICCPR.<sup>19</sup>

**1. Though the United States has ratified the ICCPR, the majority of U.S. states do not have effective mechanisms in place to guarantee a right to compensation for unlawful arrest, detention and prosecution.**

By ratifying the ICCPR, the United States has a duty under Article 14(6) to compensate for unlawful arrest and detention. However, the US reservation to Article 14(6) states, “entitlement to compensation may be subject to reasonable requirements of domestic law.”<sup>20</sup> Because individual U.S. states enact their own criminal laws and procedures, most states lack “effective and enforceable mechanisms by which victims... of miscarriages of justice may seek, and where

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<sup>16</sup> John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 Harv. Hum. Rts. J. 59 (1993). P.2, States that the US ratified the ICCPR not to fulfill its human rights mandates, but to keep the international community from looking over the 1<sup>st</sup> Bush Administrations shoulders concerning domestic matters. [Reproduced in accompanying notebook at Tab 26].

<sup>17</sup> Natsu Taylor Saito, *Will Force Trump Legality after September 11? American Jurisprudence Confronts the Rule of Law*, 17 Geo. Immigr. L.J. 1 at 26-27 (2002) [reproduced at accompanying notebook at Tab 33].

<sup>18</sup> U.N. Hum. Rts. Committee, *WBE v. The Netherlands*, U.N. Doc. CCPR/C/46/D/432/1990, (Dec. 1, 1992). This case provides an example of enforcing the ICCPR’s requirements on a ratifying party, [reproduced in accompanying notebook at Tab 59].

<sup>19</sup> G. A. Res. 2200A (XXI), International Covenant on Civil and Political Rights. *Adopted and opened for signature* Dec. 16, 1966, *Entry into force* 23 March 1976 in Accordance with Article 49. Art. 14(6). [Reproduced in accompanying notebook at Tab 4].

<sup>20</sup> Reservations to provisions of the International Covenant of Civil and Political Rights by Ratifying parties, *67 signatories and 160 parties*, March 28, 1979, no. 14668. See the reservation of the United States. [Reproduced in accompanying notebook at Tab 9].

justified, obtain compensation.”<sup>21</sup> The U.S. federal compensation statute 28 U.S.C. 2513 provides for compensation for wrongful convictions occurring as a result of trials under federal criminal law. However, this federal statute “does not extend to the far greater number of wrongful conviction cases” which result from individuals tried under state criminal law.<sup>22</sup>

The United States is an example of an important world state, which has failed to ratify the Rome Treaty. The United States is also “alone in the international community in its refusal to recognize a guaranteed right to compensation in cases of wrongful conviction.”<sup>23</sup> Yet, U.S.C. 2513 indicates the intention to comply with Article 14(6), even if the majority of individual states are not in compliance. In any case, the United States is a unique example among developed democracies and its failure to completely comply with the mandate of the ICCPR Article 14(6) and represents an exception to the general rule, not the rule.

**2. The following states have not ratified the ICCPR and are unlikely to compensate for wrongful detention.**

With the exception of Saudi Arabia, China, Pakistan, Burma, Malaysia, Laos, East Timor, Western Sahara, and Cuba, every other country on earth has ratified the

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<sup>21</sup> Jason Costa, *Alone in the World: The United States' Failure to Observe the International Human Right to Compensation for Wrongful Conviction*, 19 Emory Int'l L. Rev. 1615 at 650-651 (2005) [reproduced in accompanying notebook at Tab 25].

<sup>22</sup> *Id.* at 650-651.

<sup>23</sup> *Id.* at 1641.

ICCPR. Over 160 world states have ratified the ICCPR and only nine have not.<sup>24</sup> While this does not mean that the 160 ratifying members always uphold their mandate, it does mean that an international mechanism is in place for the world community to reprimand those who fail to meet their mandate and the vast majority of world states are committed to the language of the ICCPR and have obligated themselves to be bound by its provisions. The countries listed above do not place the same value on human rights as the vast majority of world states do. Their failure to ratify does not call into question the right to compensation for unlawful detention in the rest of the world, but instead alerts the international community to the potential threat these countries pose to citizens and non-citizens while under their jurisdiction.<sup>25</sup> These states have incorporated no constitutional or statutory guarantee to meet the requirements of the ICCPR and do not generally award damages for unlawful detention. Yet, in some cases, states that have not incorporated the language of the ICCPR into their laws may still compensate victims of wrongful detention.<sup>26</sup>

China has not ratified the ICCPR but has established a civil code, which purports to guarantee citizens a right to sue the government for compensation for its unlawful acts. In China, a state that has not ratified the ICCPR, citizens had no constitutional right to compensation for government abuse until 1986, when the Peoples Congress enacted the General Principles of Civil Law; Article 21 of which provided that if state organs or

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<sup>24</sup> G. A. Res. 2200A (XXI), International Covenant on Civil and Political Rights. *Adopted and opened for signature* Dec. 16, 1966, *Entry into force* 23 March 1976 in Accordance with Article 49. [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm). The ICCPR has 160 ratifying parties and 9 non-ratifying parties. [Reproduced in accompanying notebook at Tab 4].

<sup>26</sup> XiXin Wang. *Suing The Sovereign Observed From The Chinese Perspective: The Idea and Practice of State Compensation in China*. 35 Geo. Wash. Int'l L. Rev. 681. (2003) At 683. Though China has not ratified the ICCPR, it has taken measures to provide a mechanism for compensation for governmental abuse. At 682. [Reproduced in accompanying notebook at Tab 40].

government officials infringed on individual rights or interests, individuals had a right to sue the government for compensation. However, winning a claim for compensation was extremely difficult because the law contained no criteria for assessing state liability.<sup>27</sup>

In 1989, the Chinese legislature enacted Administrative Litigation Law which created a system for judicial review over the acts of state agencies, and helped institutionalize the idea of state compensation. In 1994, the law was improved by defining the scope of state compensation, enumerating criteria for liability and immunity and by enumerating the precise procedures through which an individual could claim compensation.<sup>28</sup> In its provisions, Article 2 provides that citizens have a right to seek compensation from the state if state organs or state officers abuse their power and infringe upon citizens legal rights and interests and cause damages.<sup>29</sup> The laws in China provide that criminal compensation can be collected for wrongdoings by the police, prosecutors or the courts. However, because it is difficult to find examples of awards for compensation for unlawful acts, many believe the Chinese government never actually intended to compensate for its unlawful acts.<sup>30</sup>

**3. Because of the political realities facing the ad-hoc tribunals, their statutory provisions contain no right to compensation for unlawful arrest and detention.**

Though the vast majority of world States have ratified the ICCPR, the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal

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<sup>27</sup> *Id.* at 683.

<sup>28</sup> *Id.* At 683-684.

<sup>29</sup> *Id.* At 684-685

<sup>30</sup> *Id.* At 684-685

Tribunal for the former Yugoslavia (“ICTY”) contain no provision creating a right to compensation for the unlawfully detained.<sup>31</sup> The creation of the ICTY and ICTR without including a statutory provision enabling them to compensate the unlawfully detained and convicted was a troubling development in the attempt to create an international framework for the protection of human rights.<sup>32</sup> However, these were the first UN created ad-hoc tribunals and the violation of the rights of detainees may not have been fully contemplated at their creation.<sup>33</sup>

In response to the procedural delays, resulting in the unlawful detention of many detainees, the presidents of the ad-hoc tribunals, Judge Claude Jorda of the ICTY and Judge Navanethem of the ICTR, requested an amendment to the statutory provisions of the tribunals in 2000. They sent letters to the United Nations Secretary-General requesting he ask the Security Council to consider amending the ICTY and ICTR statutes to include a provision allowing for compensation for the wrongfully prosecuted or convicted, as well as for victims of unlawful arrest and detention.<sup>34</sup> The letters noted that victims of wrongful arrest, detention or conviction had achieved a right under international law to receive compensation, and that as courts which operate under

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<sup>31</sup> Statute of the Int’l Trib. For the Former Yugoslavia: Rules of Procedure and Evidence, U.N. ICTY, 32nd Plenary Mtg. at 38, U.N. Doc. IT/32/Rev.38 (June 13, 2006). <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf>, Statute of the Int’l Trib. for Rwanda: Rules of Procedure and Evidence. <http://www.icttr.org/ENGLISH/rules/310501/index.htm>

<sup>32</sup> Stuart Beresford. *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, or Convicted by the Ad Hoc Tribunals*. 96 A.J.I.L. 628 (July, 2002). At 629. [Reproduced in accompanying notebook at Tab 38].

<sup>33</sup> YVES BEIGBEDER, *INTERNATIONAL JUSTICE AGAINST IMPUNITY* at 221 (MARTINUS NIJHOFF PUBLISHERS 2005) [Reproduced in accompanying notebook at Tab 78].

<sup>34</sup> William A. Schabas. *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*. Cambridge University Press. Cambridge. (2006). At p. 537. [Reproduced in accompanying notebook at Tab 76].

international law, the ad-hoc tribunals had a responsibility to recognize that right.<sup>35</sup>

However, the Security Council chose not to amend the statutes.<sup>36</sup>

Because the creators of the ad-hoc tribunals needed to quickly create a court to hold war criminals responsible, they acted on what was politically feasible, and that was to create a mechanism for the prosecution of war criminals, and little else. The ad-hoc tribunals had no statutory mechanism to compensate victims of war crimes, so any compensation had to come from other organizations or by seizing the property of war criminals and distributing it to their victims, which proved to be insufficient and delayed.<sup>37</sup>

The individuals detained by the ad-hoc tribunals are accused of the most detestable crimes including genocide, mass rape and murder. Because the international community is appalled by these acts, they have focused on the punishment of the accused and not the protection of their rights.<sup>38</sup> The ICC however will need to strike a balance b/t detainee punishment and rights protection. This is because there is a fine line between

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<sup>35</sup> Letter from Claude Jorda to the UN Secretary General annexed to Letter dated 26 September 2000 from the Secretary –General Addressed to the President of the Security Council’, UN Doc. S/2000/904; Letter dated 26 September 2000 from the President of the International Criminal Tribunal for Rwanda Addressed to the Secretary-General, annexed to Letter dated 28 September 2000 from the Secretary-General Addressed to the President of the Security Council’, Un Doc. S/2000/925. [Reproduced in accompanying notebook at Tab 65].

<sup>36</sup> Stuart Beresford. Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, or Convicted by the Ad Hoc Tribunals. 96 A.J.I.L. 628 (July, 2002) [Reproduced in accompanying notebook at Tab 40].

<sup>37</sup> Statute of the Int’l Trib. for Rwanda: Rules of Procedure and Evidence. <http://www.ictt.org/ENGLISH/rules/310501/index.htm>, Statute of the Int’l Trib. For the Former Yugoslavia: Rules of Procedure and Evidence, U.N. ICTY, 32nd Plenary Mtg. at 38, U.N. Doc. IT/32/Rev.38 (June 13, 2006). <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf>

<sup>38</sup> YVES BEIGBEDER, INTERNATIONAL JUSTICE AGAINST IMPUNITY (MARTINUS NIJHOFF PUBLISHERS 2005). At 214. [Reproduced in accompanying notebook at Tab 78].

failing to compensate for breaches to the rights of war criminals and abusing the rights of the accused who may be innocent.

## **I. LEGAL DISCUSSION**

### **A. Language of the Rome Statute provides that victims of unlawful arrest and detention have a right to compensation.**

Under Article 85 of the Rome Statute, a right to compensation is granted in the event of an unlawful arrest or detention; or when a conviction is overturned because of grave or manifest miscarriages of justice, and the convicted person has served some of the sentence or has otherwise suffered from the punishment. However, if the reversal is due to the non-disclosure of facts, which the individual at issue had sole control over, then that individual's refusal to cooperate with the investigation may mean that he has forfeited his right to compensation.

Procedural provisions, which entitle a claimant to legal assistance when requesting compensation, accompany Article 85.<sup>39</sup> Under these procedures, a claimant has six months from the time of release to petition for compensation, and will also receive legal advice on how much compensation the individual can expect to receive for the particular breach.<sup>40</sup> Additionally, when the court awards compensation, it must take into consideration the effect of the miscarriage of justice on individuals, their families,<sup>41</sup> and their social and professional reputations.<sup>42</sup> It is important that when granting

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<sup>39</sup> Rome Statute Rules of Procedure. R 173 (4).

<sup>40</sup> *Id.* at R 173(2).

<sup>41</sup> Nancy Amoury Combs, *Procuring Guilty Pleas for Internatinal Crimes: The Limited Influence of Sentence Discounts*, 59 Vand. L. Rev. 69, at 131-132 (2006) [reproduced in accompanying notebook at Tab 41]. [Reproduced in accompanying notebook at Tab 31].

<sup>42</sup> *Id.* R 175.

compensation, the court does so quickly because immediately following detention, the needs for compensation are never higher.<sup>43</sup>

**B. Detention by the ICC seriously compromises the individual liberty of detainees.**

Because of the seriousness of the crimes to be prosecuted by the ICC, and because its courtrooms are open to the media and the public, individuals who are detained and prosecuted will likely be ridiculed by the press. In many cases, their reputations will be tarnished in their own communities before ever standing trial or receiving judgment. As was the case with the other ad-hoc tribunals, the wrongfully accused and detained by the ICC can expect to be labeled “war criminals” before they have a chance to prove or profess their innocence. This could have tragic consequences for the accused if they are acquitted or released to a state where they have been shunned, regardless of guilt or innocence.<sup>44</sup>

Despite a presumption of innocence, provisional releases have been uncommon for the other ad-hoc tribunals,<sup>45</sup> and have been very restrictive, amounting to a form of punishment in themselves. The trial chamber will only grant a provisional release if it is confident that the requesting individual will return for trial, and makes this determination “in light of the particular circumstances in each case.”<sup>46</sup> The ICTY granted Milan Simic

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<sup>43</sup> Bruce Ackerman, *The Emergency Constitution*, 113 Yale L.J. 1029 at note 88 (2004) [Reproduced in accompanying binder at Tab 20].

<sup>44</sup> Stuart Beresford, *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, or Convicted by the Ad Hoc Tribunals*. 96 A.J.I.L. 628 (July, 2002) At 631. [Reproduced in accompanying notebook at Tab 40].

<sup>45</sup> *The Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic and Simo Zaric*, Case No. IT-95-9-PT, decisions on Simo Zaric’s and Miroslav Tadic’s applications for provisional release, (April 4, 2000) [reproduced in accompanying notebook at Tab 51].

<sup>46</sup> *Id.* at p. 2.

a provisional release, requiring that he leave his passport with the International Police Task Force or with the prosecutor, that he stay within the city of Bosanski Simic, meet with police daily, consent to unannounced visits from the authorities, consent to random searches, avoid contact with the co-accused or anyone who might attend or testify at trial, and avoid discussing the case with anyone besides his counsel.<sup>47</sup> Individuals who are denied bail must endure incarceration until their trials, which could amount to a number of years. This illustrates how long-term detention before trial may be necessary to ensure the accused does not flee, and places a great toll on the incarcerated individual.<sup>48</sup>

Those who are convicted face the prospect of long-term incarceration in a foreign prison where they may face language and cultural barriers. They could also lose their jobs, and may never be employable again.<sup>49</sup> As a result of detention, individuals may also lose their homes and possessions, and can expect to face relationship complications, economic hardship for their families, and community stigmatization.<sup>50</sup>

For this reason, the ICC must ensure that when it compensates individuals who were proven innocent that the compensation is sufficient to dispel any resentment caused by having their fundamental rights compromised. This is particularly important when individuals argued that they were innocent throughout and were detained for prolonged

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<sup>47</sup> Prosecutor v. Simic, Case No. IT-95-9-PT, Application for Provisional Release (May 29, 2000) [Reproduced in accompanying notebook at Tab 53].

<sup>48</sup> Stuart Beresford, *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, or Convicted by the Ad Hoc Tribunals* 96 A.J.I.L. 628 at 632 (July, 2002) [Reproduced in accompanying notebook at Tab 40].

<sup>49</sup> Shawn Armbrust, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41. Am. Crim. L. Rev. 157 at 178-179 (2004) [reproduced in accompanying notebook at Tab 43]. [Reproduced in accompanying notebook at Tab 36].

<sup>50</sup> *Id.* at 630.

periods of time.<sup>51</sup> A failure to do this would set a dangerous precedent for international justice and would promote the degradation of human rights standards in other judicial systems, something that the ICC must be very cautious to avoid.<sup>52</sup>

**C. Article 85 of the Rome Statute promotes efficiency through accountability, which is an improvement to the system of the ad-hoc tribunals.**

Because the ICC was built by reviewing the mistakes and successes of the ad-hoc tribunals, the ICC mirrors them in some ways and departs from their codes and policies in others. In particular, the drafters of the Rome Statute viewed long delays in the proceedings of the ad-hoc tribunals as corrosive, and as violations of the rights of individuals they detained.<sup>53</sup> Much can be learned from the political apprehension the ICTR faced from the international community after it became clear that many of its cases would require more than a decade to fully adjudicate. Also, a difficult blow to the ICTY was dealt when Milosevic, the tribunals most notorious defendant, died before his proceedings could be completed.<sup>54</sup>

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<sup>51</sup> *Id.* at 633.

<sup>52</sup> Stuart Beresford, *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, or Convicted by the Ad Hoc Tribunals*, 96 A.J.I.L. 628 (July, 2002) At 633. [Reproduced in accompanying notebook at Tab 40].

<sup>53</sup> Daryl A. Mundis and Fergal Gaynor, *Current Developments at the Ad Hoc International Criminal Tribunals*, 3 J. Int'l Crim. Just. 1134 notes on Tadic (2005) [reproduced in accompanying notebook at Tab 22].

<sup>54</sup> Prosecutor v Semanza, Case No. ICTR-97-20-A, Decision to reduce sentence due to unlawful detention, (May 31, 2000). After being detained for 211 days, 147 of which he had no counsel, the accused received 2 life sentences plus 45 years, which was reduced to 2 life sentences plus 15 years as reparation for the unlawful detention. This would not have been necessary had lengthy delays not occurred. See Also Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Appeals Chamber, (Nov. 2, 1999). The request to transfer a detainee to the custody of the ICTR was delayed for 260 days. The detainee was on provisional detention for more than three years without being officially charged. "In light of the numerous violations of the Appellant's rights, the Appeals Chamber decided to dismiss the charges and to release him." [Reproduced in accompanying notebook at Tab 50].

From the bigger and more complicated cases before the ad-hoc tribunals that involved scores of charges and scores of defendants, the drafters of the Rome Statute were constantly reminded of the need to ensure efficient and speedy access to trial for those detained by the ICC. This is where Article 85 of the Rome Statute proves to be so crucial not only to the protection of detainees rights, but to the accountability of the ICC and for assurance of swift and efficient justice. If the ICC gets sloppy or backlogged, the ICC may be forced to grant its detainees compensation for the unreasonable length of their detention. Because the ratifying member states to the Rome Statute must cover the cost of compensation, they will ridicule the ICC for excessive payouts for detainee mistreatment. This will promote efficiency, and the protection of detainee rights. In this sense, Article 85 gives to the international community a mechanism to ensure that the ICC fulfills its mandate.

**D. The ICC should compensate for unlawful arrest and detention under the Rome Statute according to the mandates of the ICCPR, the ECHR, The New Zealand Law Commission, and the British Criminal Justice Act of 1988.**

The right to compensation has been reproduced in several important treaties, constitutions, and legal codes including the ICCPR, the European Charter on Human Rights “ECHR”, the African Charter on Peoples and Human Rights “ACHR”,<sup>55</sup> and the British Criminal Justice Act of 1988.<sup>56</sup> Article 14(6) of the ICCPR states, “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to

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<sup>55</sup> John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on United States v. Alvarez-Machain*, 68 Notre Dame L. Rev. 723 P. 5 (1993) [reproduced in accompanying notebook at Tab 26].

<sup>56</sup> *Criminal Justice Act 1988*. (Britain) 1988 c. 33 Section 133 Miscarriages of Justice. [Reproduced in accompanying notebook at Tab 3].

compensation.”<sup>57</sup> This same language, which was adopted by the Rome Statute, was incorporated into the ECHR, and illustrates binding principles for the ICC.<sup>58</sup>

Article 5(5) of the ECHR states that anyone illegally arrested or detained has an enforceable right to compensation.<sup>59</sup> It was also incorporated into Article 6 of the ACHR, which states: “no one may be arbitrarily arrested or detained.” Article 27 states “If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”<sup>60</sup> Because this right to compensation has been reproduced by several important instruments, it constitutes international law and must be followed.<sup>61</sup>

New Zealand adopts the standards of the ICCPR. In *Manga v. Attorney-General*, a detainee who was imprisoned for 252 days longer than his sentence proscribed, received an award of \$60,000 for his unlawful detention. In applying the standards of the ICCPR, and the New Zealand Bill of Rights Act of the court noted that the word “arbitrary” is used in the documents to “ensure that both illegal and unjust acts [by the detaining party] were caught.” The court also noted that lawful detentions “may also be

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<sup>57</sup> *International Covenant on Civil and Political Rights*. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 23 March 1976, in accordance with Article 49 [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)

<sup>58</sup> John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 Harv. Hum. Rts. J. 59 at 77 (1993) [reproduced in accompanying notebook at Tab 26].

<sup>59</sup> European Convention on Human Rights. ROME 4 November 1950 <http://www.hri.org/docs/ECHR50.html> Article 5(2)-5(5).

<sup>60</sup> African Charter of Human and Peoples Rights, Adopted 1981, entered for in 1986 with more than 40 member-states. Art. 6, 27 [reproduced in accompanying notebook at Tab 1].

<sup>61</sup> Philippe Kirsch, *The International Criminal Court: A New and Necessary Institution Meriting Continued International Support*, 28 Fordham Int'l L.J. 292 at p.6 (2005). [reproduced in accompanying notebook under Tab 34].

arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality.”<sup>62</sup> This is because unlawful acts are inherently arbitrary.<sup>63</sup> The court also noted that the compensation should include any damages for loss of salary or property, or projected medical expenses.

In *Quinn v. France*, the European Court of Human Rights awarded American criminal defendant Quinn damages and costs for unlawful detention, under Article 5 of the ECHR.<sup>64</sup> This occurred after an immediate release order was ignored for eleven hours to give the prosecutor’s office time to instigate an extradition proceeding and block Quinn’s release.<sup>65</sup> Eight hours after Quinn should have been released a fax from the investigating judge in Geneva requested Quinn’s arrest and deportation for charges of fraud and forgery. Three hours later, while still detained, Quinn was rearrested and placed in detention pending extradition, which occurred 1 year and 10 months later.<sup>66</sup>

The European Court of Human Rights found that Quinn’s eleven-hour detention pending an extradition request constituted a deprivation of liberty under Article 5(1) of the ECHR. The court also found that Quinn’s one year and 10 month detention pending extradition was too long to be lawful and also violated Article 5(1), requiring pecuniary damages, damages for any prejudice resulting of the excessive length of detention

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<sup>62</sup> *Manga v. Attorney-General*. 2 NZLR 65 at 13-18 (09/13/1999). [reproduced in accompanying notebook at 48].

<sup>63</sup> *Id.* At 19.

<sup>64</sup> Loanne A. Liu. *Quinn v. France*. 10 N.Y. Int’l. L. Rev. 137 (Summer 1997) (p.1) [reproduced in accompanying notebook at Tab 30].

<sup>65</sup> *Quinn v. France*, 21 Eur. Ct. H.R. Rep. 532, (1995) [reproduced in accompanying notebook at Tab 55].

<sup>66</sup> Loanne A. Liu. *Quinn v. France*. 10 N.Y. Int’l. L. Rev. 137 (Summer 1997) (p.1-2).

pending extradition<sup>67</sup> and costs and expenses during the proceedings.<sup>68</sup> Though the awards may be different for the ICC, the principle and reasons for awarding compensation are the same. The ICC must follow all of its statutory rules. If a breach of a rule occurs which injured a detainee in any way, no matter how slightly, the ICC must compensate that detainee for that injury.

The British Criminal Justice Act of 1988 was enacted to fulfill the British commitments to the ICCPR. The British Criminal Justice Act of 1988 designates the home secretary as the person responsible for paying out compensation to victims of unlawful arrest and detention.<sup>69</sup> Section 133 states that subject to certain specific enumerated exceptions, when a person has been convicted of a criminal offense, which later is reversed or the defendant is pardoned due to newly discovered facts which show beyond reasonable doubt that there has been a miscarriage of justice, the victim of the injustice will be paid compensation by the home secretary. If the victim is no longer alive, the victim's personal representatives will receive the compensation unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.<sup>70</sup>

In addition to the above safeguard, any legitimately detained individual may petition for compensation after acquittal. However to receive compensation in the absence of a grave or manifest miscarriage of justice, the acquitted individual must

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<sup>67</sup> *Quinn v. France*, 21 Eur. H.R. Rep. 544 (1995).

<sup>68</sup> Loanne A. Liu. *Quinn v. France*. 10 N.Y. Int'l. L. Rev. 137 (Summer 1997) (p.3).

<sup>69</sup> Criminal Justice Act, Miscarriages of Justice, 1988, c. 33, 133 (Uk.). [reproduced in accompanying notebook at Tab 3].

<sup>70</sup> *Id.* at c. 33.

convince the home secretary that he/she were likely to be innocent.<sup>71</sup> This essentially transfers a lower burden of proof to the petitioning individual. This enables innocent individuals to be compensated for the time they spent in detention, but not those who are unable to show the likelihood that they were innocent.<sup>72</sup>

In *R v. secretary of State for the Home Department*, The defendant was transferred from third party custody in Zimbabwe to the British government under a false pretense to be tried for a 1990 bombing. After the trial when the defendant petitioned for compensation for unlawful arrest and detention, the Home Secretary acknowledged that but for the illegal acts of the British government, the defendant would not have been tried in Britain. However, the Home Secretary also refused compensation because the evidence proved beyond a reasonable doubt that the defendant was guilty. On Appeal, the House of Lords explained that because the Criminal Justice Act of 1988 was enacted in order for Britain to fulfill their obligations to the ICCPR, the British reservation to Article 14(6) should also be read into the Criminal Justice Act of 1988, which objects to granting the clearly guilty compensation.<sup>73</sup> Because the defendant was clearly guilty, the court determined that the home secretary was correct in denying the defendant compensation based on Britain's reservation to the ICCPR article 14(6).<sup>74</sup> In two other cases concerning other state laws and similar reservations to

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<sup>71</sup> Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 *Crime & Just.* 1 at 16-17 (2005) [reproduced in accompanying binder at Tab 19].

<sup>72</sup> *Id.* at 17.

<sup>73</sup> *Regina v. Secretary of State for the Home Department*, (2003) UKHL 51 (H.L.) at 56 [reproduced in accompanying notebook at Tab 57].

<sup>74</sup> *Id.* at 57-62.

the ICCPR, the European Court of Human Rights permitted Sweden and The Netherlands to deny guilty individuals compensation for unlawful detention when no grave or manifest miscarriage of justice had occurred.<sup>75</sup> However, if grave miscarriages of justice had occurred, the defendants would be entitled to compensation. This is the standard by which the ICC must comply.<sup>76</sup>

Like the British system, the Rome statute also enables acquitted individuals to petition for compensation for the period of their legitimate detention.<sup>77</sup> Because the ICC deals with the most complicated and serious criminal cases, defendants who might not return for trial are unlikely to be released on bail, which means that detention could span years, increasing the harm to an innocent defendant. In this case, just like the British system, this petition process could serve to compensate individuals who have endured detention before acquittal if those individuals can demonstrate that they are likely to be innocent, and the time of detention constitutes an injustice in itself.

Because a petition for compensation under the ICC's system requires that the prosecutor see the request, the prosecutor may object to compensation if the petitioner was not proven innocent at trial. This ensures that the guilty do not get compensated unless there has been a grave miscarriage of justice. If a probability

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<sup>75</sup> Gerald Heckman and Lorne Sossin, *How Do Canadian Administrative Law Protections Measure up to International Human Rights Standards? The Case of Independence*, 50 McGill L.J. 193 FN 95 (2005) [reproduced in accompanying notebook at Tab 24].

<sup>76</sup> FREIBURG IM BREISGAU, THE PROSECUTOR OF A PERMINANENT INTERNATIONAL COURT (p. 32) (2000) [reproduced in accompanying binder at Tab 64].

<sup>77</sup> Rome Statute of the International Criminal Court, at. Rules of Procedure 173-175.

of innocence cannot be shown, the request to deny compensation by the prosecutor will likely be observed.<sup>78</sup>

**1. Chorzow set the standard for reparations under international law, which is preferred to compensation.**

The case concerning a *Factory at Chorzow*<sup>79</sup> judgment of the Permanent Court of International Justice set the standard for reparations and compensation under international law. *Chorzow* has been considered CIL since its decision was handed down in 1927 because of its wide acceptance and use as the international standard for the past 80 years. *Chorzow* held that international obligations come with the duty to repair any harm caused by their breach.<sup>80</sup> This standard requires that “reparation must, so far as possible, wipe-out a the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” If actual restitution of the victim to the place and situation they were in before the breach occurred is impossible, the award would need to be for damages for their loss and for any compensation not covered by restitution in kind or by payment. These are the principles “which should serve to determine the amount of compensation due for an act contrary to international law.”<sup>81</sup> This is the standard that must be applied to the ICC. Even though this standard originally concerned actions between states and industries, and not the actions between courts and individuals, it has become the international standard, and applies to the ICC.

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<sup>78</sup> *Id.* at 173-175.

<sup>79</sup> Reparations for Breach, *In Re Factory at Chorzów*, 1925 P.C.I.J. (Ser B) No. 3. [reproduced in accompanying notebook at Tab 45].

<sup>80</sup> Daniel Bodansky. *Righting Wrongs: Reparations in the Articles on State Responsibility*. 96 Am. J. Int’l L. 833 p. 2. (October, 2002). [reproduced in accompanying notebook at Tab 28].

<sup>81</sup> *In Re Factory at Chorzów*, 1925 P.C.I.J. (Ser B) No. 3. [reproduced in accompanying notebook at Tab 41].

The principle behind this rule is that there is a need to uphold the rule of law in the interest of the international community and there must be a definition and a mechanism for the promotion of international remedial justice.<sup>82</sup>

Restitution is defined under Article 35 of the Draft Articles as re-establishing the situation, which existed before the wrongful act was committed. Though the Draft Articles only apply to the acts of states, because the ICC is an international court with far reaching jurisdiction, these principles should also be applied to the ICC. Article 35 states that a “State responsible for an internationally wrongful act has an obligation to make restitution, or re-establish the situation, which existed before the wrongful act was committed, provided and to the extent that restitution: is not materially impossible; and does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”<sup>83</sup>

Prior to its clarification under the Draft Articles, the definition for restitution was unclear, meaning either the reestablishment of the status quo or placing the individual back in the situation he would have been in had the wrongful act never been committed.<sup>84</sup> While the Permanent Court of International Justice held that impossibility was the only reasonable basis for substituting compensation for actual restitution, Article 35’s proportionality test allows for an undue burden to permit compensation.

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<sup>82</sup> Daniel Bodansky. *Righting Wrongs: Reparations in the Articles on State Responsibility*. 96 Am. J. Int’l L. 833 p. 2. (October, 2002).

<sup>83</sup> The Articles on State Responsibility. *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, chp.IV.E.1) November 2001 [reproduced in accompanying notebook at Tab 17].

<sup>84</sup> Daniel Bodansky. *Righting Wrongs: Reparations in the Articles on State Responsibility*. 96 Am. J. Int’l L. 833 p.10. ( 2002) [reproduced in accompanying notebook at Tab 28].

This is the form of compensation that is preferred under international law. If the injured state requests restitution, the breaching state would be required to provide restitution. However, if restitution would create a burden for the breaching state that far outweighs the benefit conferred to the requesting state, the Draft Articles provide that the breaching state may instead provide financial compensation to cover the victim's loss. The ICC should adopt this standard, granting restitution when its cost equals the benefit received by a victim of unlawful detention, and only substituting an award of compensation if the victim prefers compensation, or when the cost of restitution far outweighs the benefit conferred to victim. This will help ensure that the ICC is able to use its funds appropriately to fulfill the mandates of international law.

- i) **Because the Rome Statute mentions no system to raise or distribute funds to victims of unlawful detention and conviction, funding should come directly from the ICC's general operating budget.**

Because the Rome Statute contains no provision enumerating a mechanism to compensate for wrongful detention, funding should come from The ICCs general operating budget. While the Rome Statute contained instructions to create a trust fund to collect and distribute funds to the victims of war crimes, genocide, and crimes against humanity, no such mechanism was included in the Rome Statute to distribute funds to the wrongfully detained and convicted. It would be contrary to the intentions of the victims of war crimes trust fund if it were used to compensate the wrongfully detained and convicted, so another mechanism to compensate these individuals is required.<sup>85</sup> Until

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<sup>85</sup> Rome Statute of the International Criminal Court. <http://www.un.org/law/icc/statute/romefra.htm> Art 79.

another mechanism is developed, the ICC should compensate victims from its general operating budget.

The general operating budget is a good source of funding because its use will affect the rest of the ICC budget. If funds are extracted from the general operating budget, the ICC will be pressured to ensure that fewer violations to detainee's rights occur. If this is not done, the ICC could face budgetary shortfalls in other areas. If too many abuses lead to a draining of the general fund, the ICC will be forced to request more funding from ratifying member-states. This will focus attention on ICC abuses, and will make the ICC accountable for failing to meet the Rome Statute's standards for detainee care. Additionally, member-states will be reluctant to fund the ICC if they believe that a large portion of the money will be wasted on compensating victims of unlawful detention.

**ii) A trust fund would be the ideal mechanism for the ICC to use to compensate victims of unlawful arrest and detention.**

The ICC should set up a trust fund to compensate victims of unlawful arrest and detention. This fund could draw on moneys from the ICC's general operating budget, or it could draw funds from member-states who would be willing to contribute specifically to the fund. Such a system would also take pressure off of the ICC's general operating budget. This is because funds taken from the general operating budget for a trust fund would constitute a predetermined percentage of the annual budget, instead of an unpredictable expense. This would send a clear message to the international community that the ICC is a permanent institution that is well funded and is not going to disappear.

**iii) The ad-hoc tribunals compensated the unlawfully detained by granting them sentence reductions, but this would be inappropriate for the ICC.**

After the request to transfer Barayagwiza to the custody of the ICTR was delayed for 260 days, the Appeals Chamber determined that he had been illegally detained, which entitled him to compensation in the event of an acquittal.<sup>86</sup> This resulted because the detainee was on provisional detention for more than three years without being officially charged. Because of the lengthy detention, the prosecutor dropped one charge against the defendant, citing “abuse of process.” But this caused uproar in Rwanda about the dismissal, and led to reconsideration.<sup>87</sup> Because the defendant was subsequently convicted of inciting genocide, he received compensation in the form of a lower sentence instead of a cash award when the ICTR commuted his life sentence to one of 35 years.<sup>88</sup> This case illustrates why the ad-hoc tribunals have avoided dealing with their third party agents failures to observe the detainee’s right to be brought promptly before a judge.<sup>89</sup>

In another case, Semanza was tried for his part in massacring of Tutsi civilians, and for inciting a crowd in Gikro commune to rape Tutsi women before murdering them. He was convicted for one count of complicity in genocide, and for rape, torture and murder as crimes against humanity. Because of an 18-day delay in informing Semanza of the crimes for which he was accused following his arrest, his 25-year sentence was

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<sup>86</sup> Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 Va. L. Rev. 1381 at 1405 (2001). [Reproduced in accompanying notebook at Tab 21].

<sup>87</sup> *Id.* at 1405-1406.

<sup>88</sup> *The Prosecutor v. Jean-Bosco Barayagwiza* - Case No. ICTR-97-19-AR72. Appeals Chamber 11/02/1999 [reproduced in accompanying notebook at Tab 50].

<sup>89</sup> Cecile Aptel, *Trial Without Undue Delay Before the International Criminal Tribunals*, in MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOR OF ANTONIO CASSESE (p. 541) (C. Vohran et al. ed., 2003). [reproduced in accompanying notebook at tab 63].

reduced by six months.<sup>90</sup> Later due to complicity in genocide and for ordering extermination as a crime against humanity, Semanza's sentence was increased by 10 years to 34 and ½ years.<sup>91</sup>

In a third example, before Kajelijeli was convicted by the ICTR for genocide, incitement to commit genocide and extermination as a crime against humanity; he was arrested at the request of the prosecutor and detained for 85 days before ever being served with an arrest warrant. Prior to his initial appearance, Kajelijeli was in ICTR custody for 211 days, 147 of which he was without counsel. He appealed his conviction arguing among other things that his arrest and detention was illegal. The appeals chamber found that the trial chamber had erred by finding that there was no violation of Kajelijeli's right to counsel, and found that the 211 day delay between Kajelijeli's transfer to the ICTR and his initial appearance constituted an extreme and undue delay.<sup>92</sup> The appeals chamber found that he was entitled to a sentence reduction, but not a dismissal. Kajelijeli's sentence was reduced from two life sentences plus 15 years to a single 45-year prison sentence as a result of his unlawful detention.<sup>93</sup>

Sentence reductions might have been an appropriate remedy for the ad-hoc tribunals, because they had no statutory provision providing for compensation, but this

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<sup>90</sup> Prosecutor v Semanza, Case No. ICTR-97-20-A, Decision to reduce sentence due to unlawful detention, (May 31, 2000). [reproduced in accompanying notebook at Tab 54].

<sup>91</sup> *Id.* note 53, at 3.

<sup>92</sup> *Id.* 201-207.

<sup>93</sup> *Id.* at 58, 320-325.

would not be appropriate for the ICC.<sup>94</sup> The above ad-hoc tribunal cases enabled war criminals to have their multiple life sentences reduced to sentences that they could serve and regain their freedom. Regardless of whether or not they would re-offend upon release, a failure in the ICC's detention process should not enable war criminals to walk free. If a convicted individual is released after serving his/her sentence, it should be because the court determined that the convicted individual deserved only a limited sentence or should regain his/her freedom after a specified number of years, not because of a technicality in the detention process.

Sentence reductions, which result in a remaining life-sentence, are also not appropriate. This is because they do not actually constitute compensation since convicted individuals must still spend the remainder of their lives in prison. Because the nature of the crimes committed often result in multiple life sentences for a defendant, the prosecutor may be tempted to approve sentence reductions, which do not reduce the remaining sentence to less than a life sentence. This is not acceptable because the ICC sacrifices nothing to the defendant for a flaw in its detention process, and the convicted individual gains nothing. If the ICC were to adopt this approach, opponents of the ICC could capitalize on the ICC's lack of real compensation to discredit the court. This would compromise the ICC's credibility in the world community, and the ICC would suffer political consequences that might even jeopardize the courts existence altogether. This

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<sup>94</sup> John R.W.D Jones, Clare Carlton-Hanciles, Kah-Jallow, Sam Scratch, Inriham Yillah, *The Special Court For Sierra Leone: A Defense Perspective*, 2 J. Int'l Crim. Just. 211 at FN 16 (2004) [reproduced in accompanying notebook at Tab 29].

would be a tragic consequence particularly because the Rome Statute goes much further than the ad-hoc tribunals in taking custodial responsibility for fates of their detainees.<sup>95</sup>

**iv) Financial awards and not sentence reductions should be granted to guilty war criminals that are victims of unlawful detention.**

Article 85 of the Rome Statute specifies that victims of unlawful arrest and detention shall have a right to compensation, but not that they should be able to escape justice because they were unlawfully detained.<sup>96</sup> It is important that the ICC does not undermine its deterrent value by releasing war criminals early on technicalities. Sentence reductions should be rejected, and the ICC should give victims financial awards based on the length of their unlawful detention. The ad-hoc tribunals elected to grant sentence reductions partly because they lacked the power to grant compensation.<sup>97</sup> The ad-hoc tribunals needed to do something to compensate victims of unlawful detention, and because they were unable to provide financial compensation, they were forced to instead grant sentence reductions. But this was a flawed system,<sup>98</sup> and fortunately for the ICC, Article 85 remedied this flaw.

*R v. Brockhill Prison* illustrates the importance of compensation opposed to a sentence reduction. In this case, a defendant was unlawfully detained for a prolonged

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<sup>95</sup> Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 Va. L. Rev. 1381 at 1409-1410 (2001)[reproduced in accompanying notebook at Tab 21].

<sup>96</sup> Rome Statute of the International Criminal Court. <http://www.un.org/law/icc/statute/romefra.htm> at Art. 85.

<sup>97</sup> Letter from Claude Jorda to the UN Secretary General annexed to Letter dated 26 September 2000 from the Secretary –General Addressed to the President of the Security Council’, UN Doc. S/2000/904; Letter dated 26 September 2000 from the President of the International Criminal Tribunal for Rwanda Addressed to the Secretary-General, annexed to Letter dated 28 September 2000 from the Secretary-General Addressed to the President of the Security Council’, Un Doc. S/2000/925.

<sup>98</sup> Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 Hastings Int’l & Comp. L. Rev. 157 at 168 (2004) [reproduced in accompanying notebook at Tab 32].

period. Initially to remedy the situation, the lower court reduced the defendant's final sentence by the period of the unlawful detention. However, The House of Lord found issue with a sentence reduction and not compensation because Article 5(5) of the ECHR requires "payment of compensation for unlawful detention" and not merely a sentence reduction. Because the Rome Statue also entitles victims of unlawful arrest and detention to compensation, the purpose and intention of Article 85 of the Rome Statute would not be met if the ICC were able to avoid compensating victims by ordering sentence reductions instead.<sup>99</sup>

**E. The ICC should limit its liability for the acts of third parties by informing them of the international standard under which they must operate.**

When the ICC makes a contract with a third party, it should provide the third party with a verbal and written disclaimer illustrating the appropriate method of apprehension and detention. This disclaimer should enumerate the standards of international law and make it clear that justice requires that the standards to be followed, and that any breach will fall on the third party actor. This should transfer liability to the third party. The ICC should take this precaution because there is "a fine line between punishing the requesting institution for the erroneous acts of its agents and allowing cover for violations of due process."<sup>100</sup>

If the ICC is informed of abuse or is aware of the abuse, the ICC should immediately inform the detaining party of the breach and request that the detaining

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<sup>99</sup> R. v. Brockhill Prison, (2000) 258 N.R. 201 at P. 25 (H.L.) [reproduced in accompanying notebook at Tab 56].

<sup>100</sup> Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 Va. L. Rev. 1381 at 1405(2001). [reproduced in accompanying notebook at Tab 21].

party's behavior be modified to meet the required standard of care. If possible, the ICC should also take custody of any detainees to ensure that the suspected abuse stops. If it is impossible for the ICC to take custody of the detainee, the ICC should warn the breaching party that if the conduct does not stop, it might jeopardize the trial process and could lead to a suit against the breaching party. If the ICC follows these steps, they should minimize the potential for abuse by third parties should alleviate the ICC of responsibility for the acts of third parties.

When the ICC did not request that an individual be detained, ICC responsibility should not be inferred. This is a danger that the ICC may encounter if third party states desire assistance from the ICC but before formally requesting it, they seize an opportunity to arrest an individual that they would like to be tried. Whenever dealing with a detainee that was abused by a third party, the ICC should make it clear that it is not responsible for those acts, even if the ICC elects to consider them in certain cases.

The ICC can expect to be held responsible for the abuse of 3<sup>rd</sup> party agents if the ICC receives a physically abused detainee and fails to provide access to the appropriate medical treatment.<sup>101</sup> If the ICC causes additional harm or worsens a detainee's condition by failing to provide medical treatment, the ICC should be liable. The ICC should also be held responsible if it fails the remind the third party of the international standard of care for treatment of detainees, when an abused detainee is received, or if the ICC fails to investigate ongoing abuse of incoming detainees from a particular source. The ICC

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<sup>101</sup> *Id.* at 1406. It is argued that victims of abuse by 3<sup>rd</sup> party actors should be able to seek reparations from the contracting tribunal.

should also be liable for the acts of a third party if the ICC requests that a third party abuse a detainee.<sup>102</sup>

The ICC should only be responsible for compensation for wrongfully detained or harmed victims while in ICC custody. Because the ICC must operate at the mandate of the international community, and with international money, it is important to limit its expenses to those that are absolutely necessary. A grave danger with the use of third party contractors is that they might destroy property during the apprehension of a suspect and they may abuse the suspect. The ICC can do this by limiting ICC responsibility to only their actions, which is consistent with notions of fairness and makes the mandate of the ICC more easily realizable.

**F. If a detainee is held without a reasonable suspicion of guilt, is physically or mentally tortured, is held for an unreasonable amount of time, or is acquitted upon proof of innocence; and the evidence was not previously unavailable due to the acts of the detainee, the ICC must compensate that individual.**

The line for when the standard of care has been breached, triggering a duty to compensate for wrongful prosecution, conviction and unlawful arrest and detention is enumerated in the ICCPR, article 9(5).<sup>103</sup> Arrest and pretrial detention do not automatically entitle the detained to compensation if they are acquitted. Compensation is only required if a detainee is held in custody without the reasonable suspicion that they have committed a crime. Additionally, to trigger an obligation to compensate this

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<sup>102</sup> *Id.* at 1405. Under the rules of the ad-hoc tribunals, supervisory responsibility does not attach to the tribunal until “the moment of transfer” to actual tribunal custody.

<sup>103</sup> WILLIAM S. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS* (CAMBRIDGE UNIVERSITY PRESS 2006). (p. 538) [reproduced in accompanying notebook at Tab 76].

category of persons, there must be a showing that a miscarriage of justice has occurred.<sup>104</sup> So if a detainee was reasonably suspected of a crime and detained for a reasonable amount of time pending trial, no compensation would be required regardless of whether or not a conviction occurred.

*Deumeland* sets the international standard for whether the length of a detention is reasonable based on three criteria: the reasonableness of the amount of time held in detention, the degree of complexity of the case, and the behavior of the applicant.<sup>105</sup> Though ICC cases will mostly be very serious and complex, in order for the ICC to ensure that detainees are held for a reasonable amount of time, detainees should stand before a judge as soon as they reach ICC custody. By placing detainees in front of a judge upon their arrival, the presiding judge becomes responsible for the timetable of the trial, and the existence of the detainee; and possible charges against him are entered into the judicial record. This ensures that the detainees presence is known, that proceedings are underway, and that a judge is in control of the timetable of detention.

A reasonable amount of time could be many years for the cases tried by the ICC. Because the ICC is charged with the task of handling some of the most complex and serious criminal cases ever to be tried, the ICC may need to detain individuals for a decade or more. However, the world community will reject this unless the ICC ensures that its detainees are serious suspects, and that sufficient evidence exists to link those individuals to crimes. If no evidence can be found to link detained individuals to crimes,

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<sup>104</sup> *WBE v. The Netherlands* (No. 432/1990), UN Doc. CCPR/C/46/D/432/1990, para. 6.5 [Reproduced in accompanying notebook at Tab 58].

<sup>105</sup> *Deumeland v. Germany*, Eur. Ct. H. R. app. No. 9384/81 (May, 29, 1986). [reproduced in accompanying notebook at Tab 44].

and they are held on detention long-term, compensation may not be sufficient for the ICC to overcome the ridicule it could face by the press and the international community.

In *Sabeur Ben Ali v. Malta*, The European Court of Human Rights held that an individual detained for drug possession was entitled to compensation for unlawful detention with interest. This occurred after the defendant petitioned to have his detention reviewed for lawfulness and stood before magistrates who didn't actually have the authority to examine the reasonableness of the suspicion against him. This was found to constitute a denial of a prompt proceeding on the matter. The court noted that the purpose of 5(3) of the ECHR "was to provide persons arrested or detained on suspicion of having committed a criminal offense with a guarantee against any arbitrary or unjustified deprivation of liberty." Because the magistrates who reviewed the matter didn't actually have the power to release the defendant upon a finding of lack of reasonable suspicion of guilt, the review failed the purpose of its objective.<sup>106</sup> This case illustrates the need to provide a defendant with a review of the legality of detention by arbiters who possess the power to grant a release if the evidence indicates that a release is necessary.

**G. Reparations are intended to benefit the unlawfully detained individual, but they can also benefit the ICC.**

There are several theories to rationalize the need for reparations. The most prominent theory, enumerated by the *Chorzow* decision holds that the purpose of remedial justice is to right any wrongs done to an injured party and mend the injustice by restoring the victim to the status quo which existed prior to its breach. Under this reasoning, reparations seek to place the victim in the same position they would have

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<sup>106</sup> *Sabeur Ben Ali v. Malta*, ECHR 35892/97, 2000 [reproduced in accompanying notebook at Tab 58].

occupied had no breach ever occurred, regardless of the cost or consequences to the breaching party. Additionally, punishment for the breaching behavior is not important, only the effect on the victim is of concern. This could be the rebuilding of a structure, which was damaged in the apprehension of an individual, it could be money damages for lost income due to a destroyed reputation, or it may be as simple as an acknowledgement of a wrongdoing by the judiciary, and an apology.<sup>107</sup>

Reparations could also be used as a mechanism to punish the wrongdoer. If victims of unlawful detention were awarded sanctions directed at the breach of the ICC's standard of care, the ICC would likely be compelled to modify its behavior to ensure that future breaches were avoided or else face consequences from ratifying parties. This solution could force the ICC into compliance but it might also anger ratifying parties who would be paying for the sanctions.<sup>108</sup>

A law and economics analysis might balance the cost of ensuring that the ICC does not breach its standards for detainee treatment against the cost of payouts to victims. This approach might question a solution which places the victim in a position they would have been in had no breach occurred because of its lack of efficiency compared to financial compensation. This is particularly true if the requested restitution would cause financial waste.<sup>109</sup> However this might also serve as a positive deterrent. Because of the

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<sup>107</sup> Shiva Eftekhari, *France and the Algerian War: From a Policy of "Forgetting" to a Framework for Accountability*, 34 Colum. Hum. Rts. L. Rev. 413 at 471. (Spring 2003) [reproduced in accompanying notebook at Tab 37].

<sup>108</sup> Stuart Beresford, *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, or Convicted by the Ad Hoc Tribunals*, 96 A.J.I.L. 628 at 845 (2002). [Reproduced in accompanying notebook at Tab 38].

<sup>109</sup> *Id.* at 845.

extra cost, if the ICC was forced to rebuild a home that was destroyed in the process of apprehending a detainee, they might be more careful in future apprehensions.

However, because the ICC must contract with third parties to make arrests, it is questionable as to whether or not the ICC would be responsible for the destruction of property or whether or not they could actually modify the behavior of third party agents. If the detainee has lost limbs, compensation and not reparations will have to be the method of making the detainee whole. Lost wages and loss of the enjoyment of the lost limb in addition to any property loss and job loss should be calculated.

On the other had, if the issue solely concerns unlawful detention, and the ICC were to merely reduce detainee sentences based on the amount of time they were unlawfully detained, the deterrent effect for the ICC would only be concern for releasing war criminals early, but not actual costs. In this way, restitution could be less effective than compensation, which would require detainee payouts.

However, if the unlawful detention also concerns torture or other forms of ill treatment, physical restitution might be impossible as the detainee could be disfigured and unable to work. In this case, compensation would include potential medical treatment, lost wages, and other forms of compensation, would be very costly, and would result in grave international condemnation. Regardless of whether the torture was performed by the ICC or its 3<sup>rd</sup> party agents, this would likely be an enormous problem for the ICC. If this occurred, the ICC would need to show how they would avoid this atrocity in the future, which might be seen as a form of reparation itself.

## **II. CONCLUSION**

The ICC represents the culmination of a hundred years by the international community at working for global justice. Because atrocities of the 20<sup>th</sup> century have made it necessary for the world community to act to ensure that such tragedies are less likely to occur in the future, the ICC and the other ad-hoc tribunals were born. Because world consensus demands that behavior modification and reparations address injustice, ICC has incorporated the strongest human rights protections into its statutory provisions, which include a right to compensation for unlawful detention. This is the first international tribunal to recognize such a right, and as the permanent International Criminal Court, the ICC must ensure that the future of world justice remains true to its mandate for the protection of human rights by fully enforcing Article 85 of the Rome Statute.

The language of Article 85 may be new to international criminal tribunals, but it is not new to world treaties and to world expectations. The ICCPR first enumerated the right, which has since been reproduced in Constitutions, Criminal Codes and other important treaties. These other domestic and international sources show that the mandates of Article 85 are required by international law and must be enforced. However, there are limits to the right of compensation for unlawful detention. Absent of a grave and manifest miscarriage of justice, and unless evidence at trial proves conclusively that a detained individual is innocent, the burden falls on the individual requesting compensation to prove his or her innocence.

As long as the court has a legitimate suspicion that an individual has committed a crime and is detaining that individual for that specific offense, the individual may not be

entitled to compensation because the court has not violated its statutory provisions.

Additionally, in the event that abuse occurs solely by third party actors, and outside of the control of the ICC, it is questionable as to whether or not the abused individual can recover from the ICC. In this case, the third party actor should be responsible for any abuse because they were the cause of it.

With the responsibility of being the first International Criminal Court, the ICC has the honor of setting the mood for global criminal justice, but the ICC also has the burden of proving to the world that this justice should be truly fair, and that it is worth the cost. Ultimately this will determine whether the International Community approves of true restitution for victims of unlawful detention, or sees such reparations as a waste of money and as payouts to war criminals.