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Intimidation of Defense Witnesses at the International Criminal Tribunals: Commentary and Suggested Legal Remedies

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Aloys Simba, a defendant at the International Criminal Tribunal for Rwanda ("ICTR"), has claimed that Rwandan prison guards threatened witnesses who could exculpate him. As a result, he says, the frightened witnesses decided not to testify, thus denying him a complete defense.1 Théoneste Bagosora, also on trial at the ICTR, has made similar claims.2 In both cases, the tribunal ruled that there was insufficient evidence to prove the allegation and never reached the legal merits of the claims.3 The issue is likely to arise again, and since it is novel to both the ICTR and the International Criminal Tribunal for the former Yugoslavia ("ICTY"), it deserves attention.

This Comment begins with a short discussion of the legal status and the goals of the tribunals in section I. Section II examines the question of whether intimidation of defense witnesses is a due process violation under international criminal law. The tribunals’ statutes and case law do not explicitly state whether witness intimidation is a violation of due process rights, but a plain-meaning reading of the statute, supported by evidence of customary international law, suggests that it is.

Section III compares the remedies the tribunals grant for due process violations caused by tribunal actors with the remedies granted for due process violations caused by United Nations ("UN") member states. The case law reveals that the tribunals have a significant tendency to grant greater remedies

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3 Simba, Judgment ¶ 48; Bagosora, Decision ¶ 9.
when tribunal officials are responsible for the violations, which is a worrisome trend. I suggest that if the tribunals wash their hands of state actions and make it more difficult for defendants to prove their innocence, substantive justice will suffer and the tribunals’ effectiveness will be eroded. To support this claim, I look at what US courts have done when defense witnesses are intimidated by third-party government actors. There are, of course, myriad differences between the tribunals and US courts, but the comparison is useful within strict boundaries. I suggest that the tribunals ought to grant a remedy that is identical to the remedy they would grant were they responsible for the process violations themselves.

Finally, in section IV, I argue that if an intimidated witness’s absence could have affected the outcome of the trial, then a suspended trial or retrial is the appropriate remedy. If the witness remains unavailable, however, then the appropriate remedy is a dismissal of the case. To support this position, I argue first that there are normative grounds for excluding the possibility of conviction if a defendant has been deprived of the ability to present an exculpating witness. Any lesser remedy would admit the possibility that a conviction might be secured through illegal action of an interested state. Second, I argue that this remedy provides the most reliable method for assuring future cooperation from the states on which the tribunal depends. Because interfering states are likely to be interested in convictions, they will have an incentive to avoid interfering with defense witnesses if there is a possibility that interference could lead to an acquittal. Still, this remedy may appear severe, so I address some serious challenges to it before concluding in section V.

I. THE LEGAL STATUS AND GOALS OF THE TRIBUNALS

Both the ICTR and the ICTY were established through resolutions passed by the UN Security Council under Chapter VII, Article 39 of the UN Charter. The resolutions adopt statutes defining the crimes to be prosecuted as well as procedural rules for prosecution. The statutes also establish the geographic and temporal jurisdiction for the tribunals, the rights of defendants, and the responsibilities of UN member states to the tribunals. Specifically, both statutes

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4 Throughout this Comment, I discuss the experience in both the ICTR and the ICTY, although there is an admitted emphasis on the ICTR. Even so, references to “tribunals” are to both the ICTR and the ICTY.


6 ICTR Resolution & Statute at arts 7, 20, 28 (cited in note 5); ICTY Report ¶¶ 60–63, 106–07, 125–27 (cited in note 5).
require that UN member states “shall cooperate with the [tribunals] in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.”

These resolutions bind all UN member states. And by reference to Chapter VII, the Security Council has the right to take measures up to and including the use of force to compel compliance with the resolutions. In spite of this power, the UN has never used force—or even a lesser penalty of sanctions—to compel a UN member state to cooperate with the tribunals. In view of the tribunals’ limited scope and the high political cost of using coercion to force compliance, it is unlikely that the Security Council will ever employ these measures.

Because neither the UN nor the tribunals have standing police forces, they regularly rely on the goodwill of member states to apprehend suspects and temporarily detain them. At the ICTR, where virtually all relevant evidence and witnesses are in Rwanda, the tribunal relies particularly on the cooperation of the Rwandan government to allow investigators access to the country and to deliver witnesses for trial. The ICTY likewise relies upon cooperation from all of the states of the former Yugoslavia.

Because of this ambiguous posture, the political relationship between the tribunals and the states in which they have jurisdiction can be rocky. Rwanda originally requested the Security Council to establish the ICTR, but ultimately cast the sole dissenting vote against the ICTR resolution. Rwanda was concerned primarily with the failure to impose the death penalty, but was also concerned about the lack of Rwandan judges in the proposed ICTR and the establishment of the tribunal outside Rwanda. Today, the ICTR shares concurrent but preemptory jurisdiction with Rwandan national courts, which has caused friction. While Rwanda has generally cooperated with the ICTR, its moments of non-cooperation will figure prominently into the analysis in this Comment.

The ICTY’s relationship with the states it has jurisdiction over is slightly different from the ICTR’s relationship with Rwanda. By the time the ICTY was established, the Balkan conflict had fractured power and sovereignty throughout the region, and there were allegations of human rights violations on all sides. To many, it appeared that war criminals involved in the conflict would never be

7 ICTR Resolution & Statute at art 28 (cited in note 5); ICTY Report at art 29 (cited in note 5).
11 Id at 228 (cited in note 10).
prosecuted fairly in any domestic setting.\textsuperscript{12} In response, the UN established the ICTY, which has limited jurisdiction over war criminals in the region.\textsuperscript{13} Notably, the ICTY was imposed on the states in the region by a concerned Security Council, in contrast to the ICTR. Similar to Rwanda’s general (though not unconditional) cooperation with the ICTR, however, the states of the former Yugoslavia generally cooperate with the ICTY.\textsuperscript{14}

The tribunals also have goals that reach beyond simple punishment of war criminals. The resolutions establishing the tribunals state that the situations in Rwanda and the former Yugoslavia “constitute[] threat[s] to international peace and security” and that the tribunals are established to end crimes created by the conflicts.\textsuperscript{15} Similarly, the Rwandan government initially requested the establishment of an international tribunal primarily to make the country safe for the return of refugees.\textsuperscript{16} Consistent with this, the world at large has an additional interest in prosecuting war criminals as a means of eliminating the “culture of impunity” that human rights violators are often said to enjoy. Prosecuting war criminals in the present, it is reasoned, will deter potential violators who might otherwise think they can escape punishment.

A related goal of the tribunals is to try international war criminals without the stain of victors’ justice.\textsuperscript{17} The ICTR, for example, was created without a role for Rwandan judges in order to distance itself from Rwandan influence.\textsuperscript{18} The ICTY, too, was created as a forum to try criminals on all sides of the Balkan conflict in a single, impartial court.

The elimination of the stain of victors’ justice serves several purposes. First, it performs the normative function of establishing the rule of law in the wake of human rights violations. An impartial tribunal assures that war crimes are met with justice rather than revenge. Second, it assures that war criminals on all sides of a conflict will be prosecuted. This presumably further eliminates the

\textsuperscript{15} UN Doc S/RES/808 at 2 (cited in note 13); ICTR Resolution & Statute at 1 (cited in note 5).
\textsuperscript{16} UN Doc S/1994/1115 at 3--4 (cited in note 9).
“culture of impunity” and deters war criminals among the victors as well as the vanquished. Finally, eliminating the stain of victors’ justice creates the impression that the world, not a particular state, is trying the war criminals. Promoters of global human rights norms will be especially concerned with conveying the message that the world is punishing war criminals.

States’ individual interests also play an important role in shaping the goals of the tribunals. Without state support, after all, the international criminal tribunals would not exist. Many states support the goals of the tribunals, but dislike how costly and slow the tribunals are. As a result, there is also a force that pushes the tribunals to reduce the process afforded the accused.

Success of the tribunals will largely be measured by the degree to which these goals are fulfilled. If the tribunals cannot timely and efficiently convict international war criminals whose crimes are widely known, then they will not be seen as successful. Likewise, though, if convictions of criminals are seen as dictated by interested member states or as the result of faulty process, then the tribunals are also likely to be viewed as ineffective.

II. INTIMIDATION OF DEFENSE WITNESSES AS A DUE PROCESS VIOLATION

Government intimidation of defense witnesses ought to be viewed as a due process violation, and the language of the statutes supports this. The statute of the ICTR provides: “In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to . . . obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.” The ICTY statute uses similar language.20 When a state actor interferes with a defendant’s witness, the actor violates the defendant’s due process rights by worsening the conditions under which the defendant can obtain a witness’ attendance. To be sure, the ICTR provides identical security protections for defense and prosecution witnesses.21 Additionally, though, the tribunal can—and frequently does—detain the accused before trial to prevent him or her from tampering with prosecution witnesses.22 Since the tribunals provide this procedural protection for prosecution witnesses, a similar procedural protection is due for defense witnesses as well.

19 ICTR Resolution & Statute at art 20 (cited in note 5).
20 ICTY Report at art 21(e) (cited in note 5).
21 Bagosora, Decision ¶ 11.
22 See, for example, Prosecutor v Ndayambaje, Case No ICTR 98-42-T, Decision on the Defence Motion for the Provisional Release of the Accused, ¶ 22 (Oct 21, 2002).
Of course, the statute does not make it clear that this right is a due process right. Nonetheless, the ICTR has done as much in dicta. For example, in the Bagosora decision, the trial chamber stated that "[n]on-cooperation, or active obstruction, could adversely affect the fairness of a trial. Threats or intimidation of confirmed or prospective witnesses by state officials would, if proven, be a serious violation of the duty of cooperation."\(^\text{23}\) The same chamber, sitting for the Simba case, paraphrased this dicta, stating that "proven threats or interference made by state officials towards prospective or confirmed witnesses . . . could result in a violation of an accused's fair trial rights."\(^\text{24}\)

The view that defense witness intimidation can be a due process violation is supported by domestic law sources, and the tribunals commonly look to such law as evidence of international customary law.\(^\text{25}\) A good example is US law, which shares significant similarities with the due process rights enshrined in the tribunals' statutes.

In comparing US law with ICTR and ICTY law, it is first necessary to establish statutory similarities. The Sixth and Fourteenth Amendments of the US Constitution provide criminal defendants with the right to "compulsory process for obtaining witnesses in his favor," and require that "[n]o state [shall] deprive any person of life, liberty, or property, without due process of law."\(^\text{26}\) Significantly, the ICTR and ICTY language is taken almost verbatim (except for the gender inclusive language) from the International Covenant on Civil and Political Rights ("ICCPR").\(^\text{27}\)

If anything, the right to present witnesses on behalf of defendants is more clearly stated in the tribunal statutes than in the US Constitution. Much, too, can be made of the fact that the statutory language comes directly from the ICCPR. First, the ICCPR language is often regarded as a more stringent protector of defendants' rights than the US Constitution.\(^\text{28}\) Additionally, by using the ICCPR

\(^{23}\) Bagosora, Decision ¶ 7.

\(^{24}\) Simba, Judgment ¶ 46.

\(^{25}\) See, for example, Prosecutor v Semanza, Case No ICTR-97-20-T, Judgment and Sentence, ¶ 393 (May 15, 2003).

\(^{26}\) US Const, amends VI, XIV.

\(^{27}\) International Covenant on Civil and Political Rights, 999 UN Treaty Ser 171, 177 art 14.3(e) (1966) ("(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.").

language, the UN drafters appear to incorporate into the statute the fairly robust ICCPR jurisprudence on defendants' rights to present evidence in their favor.29

At any rate, US law strongly supports granting full remedies when defendants' witnesses are intimidated. The landmark US case on defense witness intimidation is the Supreme Court's decision in *Webb v Texas.*30 In *Webb,* the judge at trial gave the sole defense witness a "gratuitous[]" and "lengthy" admonition on the "dangers of perjury."31 Hearing this, the witness chose not to testify on the defendant's behalf.32 On appeal, the Court granted a retrial. This precedent has been applied by lower courts in cases involving intimidating remarks from other government actors as well, including prosecuting attorneys and federal police agents.33 This is further discussed in the next section.

**III. GRANTING REMEDIES FOR THIRD-PARTY DUE PROCESS VIOLATIONS**

The more difficult question in granting remedies is whether and how the tribunals should take into account the fact that a third-party state, and not the tribunal, caused the violation of rights.

**A. TRIBUNAL CASE LAW**

The clearest indication of the tribunals' general attitude toward third-party state violations comes from two high-profile ICTR Appeals Chamber decisions in *Prosecutor v Barayagwiza.*34 The *Barayagwiza* Appeals Chamber decision in November 3, 1999 ("*Barayagwiza I*"), ordered the release of the defendant based

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29 See, for example, *Destrehem v France,* Eur Ct HR, No 56651/00 (2004) ("The applicant had thus been found guilty on the basis of testimony in relation to which his defence rights had been considerably restricted, and this was compounded by the fact that the Court of Appeal itself had described the penalty it imposed as 'severe.' The Court accordingly considered that Mr Destrehem had not had a fair trial and held unanimously that there had been a violation of Article 6 §§ 1 and 3 (d) [of the European Convention on Human Rights]." Summary available online at <http://www.echr.coe.int/eng/press/2004/may/chamberjudgments180504.htm> for English summary (visited Jan 15, 2007).

30 409 US 95 (1972). *Webb* was based on *Washington v Texas,* 388 US 14, 22–23 (1967), in which the Court held that a law that prevented a defendant's accomplice from testifying on his behalf violated the defendant's due process rights. *Washington* effectively incorporated the Sixth Amendment protections into the Fourteenth Amendment due process protections.

31 Id at 97.

32 Id at 96.

33 See *United States v Foster,* 128 F3d 949, 953 (6th Cir 1997); *United States v Hammond,* 598 F2d 1008, 1013 (5th Cir 1979); *United States v Thomas,* 488 F2d 334, 335–36 (6th Cir 1973).

34 *Prosecutor v Barayagwiza,* Case No ICTR-97-19-AR72, Decision (Nov 3, 1999) (hereinafter *Barayagwiza, Decision*).
on three separate periods of illegal detention. First was a period from April 17, 1996 to March 10, 1997, when Barayagwiza was held in Cameroon without being informed of the charges against him. Of this, the Chamber wrote:

> [W]e acknowledge that only 35 days out of the 11-month total are clearly attributable to the Tribunal. . . . [But] at this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal—and not any other entity—that is currently adjudicating the Appellant’s claims.\(^{35}\)

The next period was a seven month delay between the prosecutor’s Rule 40\textit{bis} transfer request on March 4, 1997, and Barayagwiza’s arrival in Arusha on November 19, 1997.\(^{36}\) The Chamber held that because Barayagwiza was not indicted until October 22, 1997, his entire detention in Cameroon was illegal because it violated the ninety-day Rule 40\textit{bis}(H) time limit for charging a suspect.\(^{37}\) The Chamber attributed this delay to the prosecutor’s negligence. The third period was a three-month delay between Barayagwiza’s arrival in Arusha and his first appearance in court on February 23, 1998. The Chamber ruled that this violated his right to be charged without delay upon arrival at the Tribunal, and attributed this failing to the Trial Chamber.\(^{38}\) In light of these three violations, the Chamber determined that the only appropriate remedy was Barayagwiza’s immediate release.\(^{39}\) Only an emergency motion filed by the prosecutor kept Barayagwiza in custody.

Five months later, in its March 31, 2000, decision (“\textit{Barayagwiza II}”), the Appeals Chamber reviewed \textit{Barayagwiza I} in light of “new facts” and in the face of Rwandan non-cooperation in response to Barayagwiza’s release.\(^{40}\) In truth, the reason for the review was the overwhelmingly negative public response over Barayagwiza’s release. Indeed, the “new facts” were almost certainly available at the time of the first decision and were likely identified only in order to

\(^{35}\) Id ¶ 85.

\(^{36}\) ICTR Rules of Procedure and Evidence (2005). Rule 40\textit{bis}(A) provides that “the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal.” Before the filing of the Rule 40\textit{bis} request, Barayagwiza was detained pursuant to a Rule 40 request on February 21, 1997.

\(^{37}\) \textit{Barayagwiza}, Decision ¶ 67.

\(^{38}\) Id ¶¶ 68–70.

\(^{39}\) Id ¶ 113.

Intimidation of Defense Witnesses at the International Criminal Tribunals

circumvent Rule 24, which allows reconsideration of a decision only if new facts come to light.\textsuperscript{41}

The Chamber began its consideration of the motion by “confirming its Decision of 3 November 1999 on the basis of the facts it was founded on.”\textsuperscript{42} The Chamber then proceeded to determine that Barayagwiza had in fact only been held in Cameroon for eighteen days without knowledge of the charges against him.\textsuperscript{43} Likewise, by reviewing the record of correspondence between defense counsel and the Trial Chamber, the Chamber determined that there was only a twenty day delay between when Barayagwiza agreed to have his first appearance in court and when he was formally indicted.\textsuperscript{44} Most significantly, the Chamber found that the seven month delay between the Rule 40bis request and Barayagwiza’s transfer to Arusha still violated Barayagwiza’s rights, but was attributable to Cameroonian politics, not prosecutorial negligence.\textsuperscript{45}

Based on these findings, the Appeals Chamber determined that although Barayagwiza’s due process rights had been violated, the appropriate remedy was not release but rather a sentence reduction or financial compensation.\textsuperscript{46} Barayagwiza II did not overturn the legal rulings in Barayagwiza I, but the Chamber’s emphasis on Cameroon’s responsibility for the longest period of illegal detention suggests that it will adjust a defendant’s remedy for a process violation based on whether the tribunal is at fault.

Two more decisions from the ICTR and one from the ICTY add nuances to the tribunals’ position. Because it is based on nearly identical facts, the May 31, 2000 Semanza Appeals Chamber decision closely mirrors the Barayagwiza II decision. Semanza was initially arrested in Cameroon at the same time as Barayagwiza, and was likewise uninformed of the charges against him for eighteen days.\textsuperscript{47} Also, as in Barayagwiza, the prosecutor filed a Rule 40bis request for Semanza’s transfer on March 6, 1997, but did not indict him until October 23, 1997. Semanza was transferred to UN custody on November 19, 1997.\textsuperscript{48}

\textsuperscript{41} See, generally, William A. Schabas, Barayagwiza v. Prosecutor (Decision, and Decision (Prosecutor’s Request for Review or Reconsideration)), 94 Am J Intl L 563 (2000); ICTR Resolution & Statute at art 24 (cited in note 5).

\textsuperscript{42} Barayagwiza, Prosecutor’s Request ¶ 51.

\textsuperscript{43} Id ¶ 54.

\textsuperscript{44} Id ¶ 62.

\textsuperscript{45} Id ¶ 58.

\textsuperscript{46} Id ¶ 75.

\textsuperscript{47} Prosecutor v Semanza, Case No ICTR-97-23-A, Decision, ¶ 87 (May 31, 2000) (hereinafter Semanza, Decision).

\textsuperscript{48} Id ¶¶ 9, 106.
Aside from the fact that Semanza did not face a delay upon arrival in Arusha, the Semanza decision differed from Barayagwiza II only in the approach the Chamber took toward the seven-month period between the Prosecutor’s Rule 40bis request and Semanza’s arrival in Arusha. Barayagwiza I held that Rule 40bis(H) requires that a suspect be released if not indicted within ninety days of the filing of a Rule 40bis request, and Barayagwiza II did not overrule this finding.49 Thus, while the Barayagwiza II Chamber emphasized that the delay between the Rule 40bis request and the indictment was Cameroon’s fault, there was still a nominal violation of Barayagwiza’s rights.50

In Semanza, however, the Chamber reinterpreted Rule 40bis(H) to require that a suspect be charged ninety days from the date of actual transfer to the Tribunal’s Detention Facility.51 Since Semanza’s indictment was confirmed before his transfer, the Chamber held that his rights were not violated. The Chamber added: “Moreover, the Appeals Chamber emphasizes that in any event, the Tribunal is not responsible for the time that elapsed before the Appellant was transferred to the Tribunal’s Detention Facility.”52 So while Semanza was given a sentence reduction for the eighteen days he was in custody without knowing the charges against him, he was not given any remedy for the months he spent in Cameroon before his indictment.53

Considered in broad context, Semanza supports the suggestion that the tribunals take little responsibility for procedural failings outside their control. The Semanza decision overturned an Appeals Chamber decision that was barely six months old, and showed that the ICTR was willing to go to significant lengths to insulate itself from failures of process caused by independent states.

At a more technical level, however, Semanza did not overturn the Barayagwiza holdings suggesting that the tribunals ought to provide remedy for due process violations outside the tribunals’ control. While it may be suspect that the Appeals Chamber reinterpreted its rules to show that there was no violation based on a fact pattern where a violation had been found before, it is significant that the legal argument for remedy remains intact.

This interpretation is buttressed by the recent Kajelijeli Appeals Chamber judgment, which suggests that the ICTR is perhaps moving again toward taking responsibility for failures of process that are only partially the fault of ICTR officials. Kajelijeli was arrested in Benin at the request of the prosecution but

49 Barayagwiza, Decision ¶ 67.
50 Barayagwiza, Prosecutor’s Request ¶ 58.
51 Semanza, Decision ¶ 97.
52 Id ¶ 101.
53 Id.
was not promptly informed of the charges against him. The Trial Chamber agreed with the prosecution that no remedy was available for this since the responsibility to inform the suspect of the charges against him lay with Benin. The Appeals Chamber overturned this decision, charging the ICTR with ensuring that a suspect is promptly informed of the charges against him regardless of who carries out the arrest. The Chamber provided a sentence reduction as remedy.

The most significant contribution the ICTY has made to the case law comes from a decision in Prosecutor v Nikolić. Nikolić had been kidnapped by “some unknown individuals” in the Federal Republic of Yugoslavia and turned over to the UN force in Bosnia-Herzegovina, which rendered him into the custody of the tribunal. Nikolić argued that the ICTY should decline to exercise jurisdiction over him based on, inter alia, the fact that the kidnapping was a violation of his process rights. The Chamber stated that it agreed with the relevant holdings in Barayagwiza, but also that:

The correct balance must . . . be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law . . . [and here] the treatment of the Appellant was not of such an egregious nature as to impede the exercise of jurisdiction.

The ICTY appears to affirm the holdings in ICTR cases and crystallize the determination of remedy as subject to a balancing test. The more serious the crime charged, the more serious the violation of rights must be in order for the tribunal to dismiss the case.

Ultimately, the case law is ambiguous, but it leans in the direction of not granting remedies when tribunal officials are not involved in defendants’ due process violations. Although the tribunals perhaps ought not to grant full remedies for all due process violations that take place out of their control, it would be a mistake to grant only limited remedies in cases of witness intimidation.

55 Id ¶ 225.
56 Id ¶ 320.
57 Case No IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest (June 5, 2003) (hereinafter Nikolić, Decision).
58 Id ¶ 2.
59 Id ¶ 15.
60 Id ¶¶ 30–31.
B. US LAW AS A REFERENCE POINT

US law is useful not because the US system is ideal, but rather because the relevant rights provided in the US Constitution are comparable to those provided in the tribunals' statutes as discussed in section III. Further, the US government's division of powers shares some important structural qualities with the UN and the tribunals.

The key US cases follow directly from Webb, and hold that witness intimidation by third-party state actors merit the same remedy as intimidation by judges or prosecutors. In United States v Hammond, a FBI agent threatened a defense witness testifying in the US District Court for Southern Florida with charges he was facing in Colorado telling him that if he continued to testify, there would be "nothing but trouble" [for him] ... in Colorado." The witness reported the threat to the court, and refused to continue to testify. A second defense witness who heard about the threat also refused to appear in court. The Fifth Circuit ruled that the agent's action had violated the defendant's right to present witnesses on his behalf and ordered a new trial.

A second case, United States v Thomas, has a similar holding. Here, a Secret Service agent told a defense witness that if he continued to testify, then he would be charged with misprision of felony. The witness reported the conversation and refused to continue his testimony. The Sixth Circuit reprimanded the Secret Service agent as well as a US Attorney who had apparently sent the agent and granted a retrial.

C. ANALOGY BETWEEN DOMESTIC THIRD PARTIES AND THIRD-PARTY STATES

If applied directly to the tribunals, the US model suggests that, at the very least, some significant remedy is appropriate for state-caused process violations outside the tribunals' control. But of course, the analogy between the tribunals and the US legal system is limited. Indeed, the executive power the UN wields over member states is at best a bare shadow of the power the US executive wields over its agents. But the US government and the UN share a similar legal structure. Much as the US judiciary relies on state- and federal-controlled police

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61 Hammond, 598 F2d at 1012.
62 Id at 1014.
63 Thomas, 488 F2d at 336.
64 Id at 335.
65 Id.
66 Id at 336.
forces to make arrests and conduct investigations, the tribunals rely on UN agents and UN member states to arrest suspects and assist in procurement of evidence. When a US court issues a subpoena, for example, it relies on the police to carry it out. The same is generally true for the tribunals, except that they rely ultimately on the cooperation of UN member states.

Of course, the Security Council’s reluctance to intervene and to force cooperation with the tribunals highlights the primary differences between the US and the UN system. In reality, UN member states are connected to the tribunals only very tenuously, while the US courts and police serve under the unifying power of the US Constitution. Both the US courts and the tribunals rely on police power vested in other bodies, but the tribunals’ inability to directly influence UN member states necessitates greater, not lesser, remedies for third-party process violations.

IV. WHAT REMEDIES SHOULD BE GRANTED FOR WITNESS INTIMIDATION?

A. THE ARGUMENT FOR FULL REMEDY

First, there is a strong normative argument for full remedy for third-party witness intimidation. This normative argument is recited in the Barayagwiza I decision that suggests when the tribunals take responsibility for administering justice to defendants, only the tribunals can grant remedies for due process violations. Because of this, the tribunals have an implicit responsibility to grant remedies even for violations that take place at the hands of independent states. Justice ought to be relative to the defendants, not the tribunals, and remedies should reflect this. The US model appears to follow this reasoning, even though US courts can more readily affect the actions of police agents. In Thomas, for example, the court granted a retrial along with a reprimand of the actors involved. The same is true in Webb.

Second, there is an instrumental argument for full remedies based on the tribunals’ inability to impose direct remedies on third-party states. Under a strong instrumental view, any judicial remedy is intended as much to discourage

67 ICTR Resolution & Statute at art 28 (cited in note 5); ICTY Report ¶ 125 (cited in note 5).
68 By “full remedy,” I mean a remedy equivalent to the remedy the court would grant if it were directly responsible for a process violation. I will discuss what an appropriate full remedy would be in later sections.
69 Barayagwiza, Decision ¶ 85.
70 See id.
71 Thomas, 488 F2d at 336.
72 Webb, 409 US at 95.
actors from treating other defendants unfairly as it is intended to treat a single defendant fairly. Thus, remedies are granted so that a prosecutor or biased judge who learns of remedies for other defendants will be discouraged from taking such actions in the future.

In the US system and among tribunal staff, the discouraging function of remedies might be carried out by sanctioning the infringing actors. But the tribunals have little or no power to impose sanctions on UN member states who infringe on defendants' rights. The Security Council technically has power to sanction non-cooperating member states, but political and historical realities suggest this is simply irrelevant. So the discouraging function must be carried out solely through the remedies themselves. Thus, from an instrumental point of view, violations outside of the tribunals' control should be met with a full remedy since this might be the only way to keep states from violating other defendants' rights.

Indeed, full remedies will probably be effective at curbing interference from most third-party states, since only states with an interest in seeing a defendant convicted are likely to intimidate witnesses. If the tribunals ignore or downplay states' interference, then they provide precisely the wrong incentives. Without full remedies, a state that interferes with at least a few legitimately exculpating witnesses would see an overall increase in convictions. A full remedy would presumably provide the opposite incentives. If remedies assure that witness intimidation is more likely to derail a conviction than it is to guarantee one, then states will not have good reason to engage in intimidation. 73

Finally, there is an additional argument for following the US model of granting full remedies. Because it is easier to intimidate defense witnesses in the tribunals than in domestic courts, a lesser remedy in the international setting would presumably lead to more intimidation than is seen in the domestic setting. At the ICTR, travel to and time spent at the trial chambers in Arusha, Tanzania can be frightening, burdensome, and time-consuming—especially for the many witnesses who have never left Rwanda. To a lesser degree, this is true for the ICTY at the Hague. At both tribunals, a significant number of defense witnesses are themselves facing domestic charges in connection with genocide or war crimes, giving governments easy leverage if intimidation is their goal. 74

73 As a practical matter, of course, a remedy that is identical to the remedy provided when a tribunal actor violates process rights may be insufficient to provide these incentives. I will address the issue of what specific remedy would provide the appropriate incentives to states in the next section.

74 This is especially true in Rwanda, where some eighty thousand citizens of a country of just eight million are still awaiting trial in connection with the genocide. See Rwanda's Grass Courts, NY Times A28 (July 10, 2004). As practically the only survivors of many of the massacres in Rwanda, testimony from participants in the genocide is invaluable to the tribunal.
tribunals want to avoid the appearance of victors' justice, then this presents a
difficult background. The easier it is for states to affect a defendant's ability to
present evidence, the more clearly the tribunals must show that any such action
will result in less punishment for the accused.

B. TRIBUNAL CASE LAW AND FULL REMEDY

The tribunal case law suggests that little regard has been given to these
arguments. While *Barayagwiza I* explicitly stated that the tribunals should grant
remedy for due process violations that took place elsewhere, the decisions that
have followed it have all but overturned this holding. The least cynical reading of
this jurisprudence is that the tribunals (ICTR in particular) want to demonstrate
that they take full responsibility for violations caused by any of their judges or
prosecutors, and, in so doing, take less responsibility for violations caused by
others. This most generous reading, however, reveals a striking logical flaw:
taking less responsibility for states' actions fails to prove the tribunals'
responsibility for their own actions.

A more cynical (and almost certainly more accurate) view recognizes
simply that the tribunals—constantly under pressure to produce convictions and
to do so expeditiously—do not want to take judicial responsibility for state
actions they cannot control. The *Nikolić* decision demonstrates this attitude most
explicitly by holding that in determining whether the tribunal should exercise
jurisdiction, the ICTY must balance the interest in trying a grave offender of
international law against the severity of the violation committed by a state. *Barayagwiza II* and *Semanza* do not use the “balancing” language, but they appear
to employ similar reasoning. Indeed, the *Barayagwiza* decisions demonstrate an
explicit and concerted effort to move away from granting remedies for violations
by UN member states.

At best, this interpretation ignores the positive arguments for granting full
remedy for state-caused process violations. But it appears to have other
weaknesses, as well. First, jurisprudence that relieves states of responsibility for
process violations undermines the role of the tribunals as superior forums for
trying international criminals. This is especially true when the violations are
carried out by the state that might have otherwise tried the defendant—as was
alleged in the recent ICTR cases involving witness intimidation.

This approach also appears to treat due process rights more like
substantive rights. The tribunals so far have only granted compensation

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75 *Barayagwiza*, Decision ¶ 85.
76 *Nikolić*, Decision ¶ 30.
77 *Barayagwiza*, Prosecutor's Request ¶ 58; *Semanza*, Decision ¶ 104.
(monetary or sentence reduction) for failings of due process, electing to allow prosecutions to continue.\textsuperscript{78} A better view would recognize these violations as skewing the trial process itself. To be sure, in \textit{Nikolić} and \textit{Semanža}, the process violations probably did not significantly affect the defendants' ability to present a defense. But it is fathomable that illegal detention or arrest could affect the defendants' ability to gather evidence or procure witnesses. At any rate, witness intimidation has as its \textit{primary} effect, the degradation of a defendant's case. Thus, the \textit{Barayagwiza} and \textit{Semanža} suggestion that sentence reduction or monetary compensation can remedy these violations fails to appropriately recognize the procedural nature of the rights violated.

Finally, the \textit{Nikolić} balancing test also fails here as a means of determining when to grant procedural remedies for violations of rights. Under \textit{Nikolić}, defendants charged with especially serious crimes will be tried even if there is a substantial risk that their ability to defend themselves has been compromised. This violates the right to a presumption of innocence because it allows the severity of the crime with which a defendant is charged to affect his or her right to present a defense.

\textbf{C. SUGGESTIONS FOR APPROPRIATE REMEDY}

If the tribunals determine that a full remedy is appropriate, then the next challenge is to determine an appropriate remedy. As noted above, the tribunals have most commonly granted sentence reductions or financial compensation for violations of defendants' process rights. There are reasons, however, why this is an inappropriate remedy for witness intimidation. The best remedy is a suspended trial or retrial if witnesses will become available, and dismissal if they remain unavailable.

Suspension or dismissal solves the normative problems caused by granting compensation as a remedy for a process right. If a defendant is deprived of a complete defense, then the trial will stop until the problem is fixed. If the problem cannot be fixed, then the trial will not continue. In no case will a defendant's right to present a full defense be exchanged for a shorter sentence or monetary compensation. This remedy is, of course, severe, and challenges to the remedy are discussed below. However, in most cases defendants whose cases are dismissed will be eligible to be tried elsewhere—just not at an international tribunal.

This remedy also eliminates the normative problems of the \textit{Nikolić} balancing test since even defendants accused of the most serious crimes would be afforded this remedy. To be sure, the tribunals would still have an interest in

\textsuperscript{78} See, for example, \textit{Kajuljeli}, Judgment \textsuperscript{¶} 325; \textit{Semanža}, Judgment \textsuperscript{¶} 533.
making sure defendants accused of very serious crimes are not arbitrarily released. This could be addressed by expending more effort and time in obtaining witnesses in especially serious cases.

Assuming for a moment that the tribunals’ primary goal in granting a remedy is deterrence from future interference, we might consider remedies that affect only the interfering country, not the accused. Under Chapter VII of the UN Charter, such remedies can include fines or sanctions imposed by the UN, and in the extreme case, forceful intervention. Any proposed fine, though, would probably have to range in the billions of dollars to even begin to affect the behavior of state governments, and collection provides a problem of its own. Sanctions would likewise need to be severe, would certainly be unpopular, and would likely harm populations that have recently experienced major conflict. Forceful intervention is by far the most impractical remedy, requiring political will far beyond what it took to establish the tribunals themselves. In reality, though, the Security Council has never even chastised non-cooperating states. These remedies directed solely at interfering states are simply infeasible and unlikely.

It also seems unlikely that a sentence reduction will have a strong effect on an interfering nation. If interference with defense witnesses could make conviction more certain for the price of a shorter sentence, then it would be unsurprising if interested nations determined that intimidation was in their interest. To be sure, it is possible that the risk of a short jail sentence for someone accused of genocide would keep states from intimidating witnesses. But if the response to the initial release of Barayagwiza is any indicator, states in reality care more about convictions than sentencing. This certainly seems intuitive considering the expressive value of a conviction—even if it is followed by a short sentence.

The preferred remedy is to suspend the trial pending the procurement of the intimidated witnesses. This remedy provides the right incentives for the interfering countries and conserves judicial resources. If upon resumption of the trial the witnesses can be timely obtained, then the chamber may consider only a minor remedy for this nominal violation of the defendant’s rights. Nonetheless, in the case where the witnesses cannot be obtained, the tribunal should cease to exercise jurisdiction over the defendant and release him or her.79

79 I do not suggest, however, that the tribunals apply a per se rule in granting remedies for witness intimidation, as some US courts have suggested. Mere witness intimidation is not enough; there must be a showing that the intimidation affected witnesses who are likely to affect a verdict. To be sure, there are strong arguments in favor of a per se rule. Most notable among these arguments is skepticism of courts’ abilities to determine whether an intimidated witness would have affected the outcome of a trial. But a per se rule threatens to render an already expensive and plodding
Suspension and dismissal provide the right incentives to states because these remedies will greatly reduce the chance that an interfering nation will determine it is in its interest to interfere with defense witnesses. In particular, the threat of dismissal encourages states to produce witnesses quickly if allegations have been proven. There is even a limited incentive created for states to monitor intimidating activities carried out by lower ranking officials since the political fallout of a dismissal could be costly. The remedy is not perfect; states may still interfere if they think they can do so undetected. And if the interfering state does not care about convictions, the remedy will have no effect. Security for witnesses (something that is already in place) can be improved to contravene problems of detection, though, and states unconcerned about convictions seem unlikely to interfere very often. Ultimately, suspension and dismissal provides the only way in which the tribunals can leverage the little power they have over UN member states to assure cooperation.

D. CHALLENGES TO RETRIAL, SUSPENDED TRIAL, AND RELEASE AS REMEDIES

Even a retrial or a suspended trial is a controversial remedy. The tribunals require support from individual nations, who are often concerned with the time required for and expense incurred by the tribunals. A suspended trial in the international context is unlikely to be resumed promptly, and retrial is often quite costly. States particularly concerned with these problems may argue instead for a kind of “rough justice.” These states may support the use of international criminal courts, but also see the desire for perfect process outweighed by the cost of that process.

Regardless of whether rough justice is necessary or appropriate in the international context, cutting costs here will cause disproportionate problems. If states wish to cut costs, then it might make the most sense to cut costs in a way that disadvantages prosecutors and defendants equally, for example, by limiting the case length for both sides. Indeed, states that wish to see faster trials but want to guard against setting guilty people free might even support limits only to the process afforded to defendants, disadvantaging them as a group. But cutting costs in the witness intimidation setting disadvantages only those defendants with whom states choose to interfere. Indeed, state interference with a defendant might imply that the defendant is more likely to be innocent in the first place.

system nearly unmanageable, and its abandonment is a concession to the political reality of the tribunals' functioning.
The strongest argument against releasing a defendant for process violations caused by UN member states is that the tribunals risk losing jurisdiction over a defendant through no fault of their own. The public reaction to the potential release of Barayagwiza after *Barayagwiza I* illustrates just how costly such a release is to the tribunals. Recall that the political pressure and the risk of non-cooperation from Rwanda were so great after this decision that the ICTR disregarded one of its own rules in order to reverse its decision and detain Barayagwiza. And complaints about the release of a war crimes suspect will come from all sides. Among the notable critics of Barayagwiza’s release was the traditionally left-leaning Human Rights Watch—although its complaint was mostly about the ineptitude of the ICTR prosecutors.

Part of the outcry about Barayagwiza’s release, though, was because of the exceptional circumstances. Generally, there is no prohibition on trying an international war criminal in an alternative forum if an international body has dismissed the case on technical grounds. The Genocide Convention, for example, specifically provides for genocide suspects to be tried either in an international forum or in the state where the offense was committed. In this case, though, Barayagwiza was supposed to return to Cameroon, where he was originally apprehended. At the time, Cameroon had not ratified the Genocide Convention, and it was not at all clear that it was prepared to extradite Barayagwiza to Rwanda for trial. Thus, there was a possibility that Barayagwiza would be freed.

In most cases, though, the losses to international justice would only be marginal. If a tribunal must forfeit jurisdiction, then while the accused may not stand trial in this preferred international setting, it is likely that the accused can be tried elsewhere. Indeed, the tribunals appear to have some latitude in choosing where to release detainees, and this could be used as a tool to maintain accountability for violators. Cases where there is no appropriate or fair secondary forum available are likely to be few.

These few cases do exist, though, and another strong argument against release is that it may prompt nations to boycott the tribunals. As long as the

82 Schabas, 94 Am J Int'l L at 569 (cited in note 41).
83 Id.
84 Id at 569–70.
85 This argument is made effectively by Momeni, 7 ILSA J Int'l & Comp L at 324 (cited in note 80).
Security Council will not force compliance from UN member states, the tribunals are at the mercy of states that may choose to cease cooperation with the tribunals altogether, as Rwanda threatened to do following Barayagwiza I. Freeing a defendant forces the hand of the tribunal, and the aftermath of Barayagwiza I suggests that the ICTR was more beholden to Rwandan interests than it had claimed to be. Had the ICTR not reversed its decision, some argue, the ICTR may have fallen apart due to lack of Rwandan cooperation—taking with it some of the international goodwill that has supported the emergence of international criminal law.\textsuperscript{86}

Nonetheless, the alternative is not necessarily superior. If it becomes clear that international tribunals are subject to hijacking when a single state dislikes their outcomes, then the objective of eliminating the stain of victors’ justice is lost. The result will be either that international tribunals (and potentially the International Criminal Court) will cease to be used, or, perhaps worse, the international community will bear the costs of sham proceedings.

V. CONCLUSION

With allegations of witness intimidation becoming more common at the ICTR, and with the first arrest warrants being issued at the International Criminal Court, the problem of third-party state interference with international criminal proceedings will likely remain. The tribunals have yet to clearly demonstrate that they are unmoved by state influence. However, they have not had the urgent necessity to make such a showing. The opportunity is likely to arise in the coming years and the tribunals’ response is certain to influence the degree to which the world will rely upon and value international criminal justice. Treating intimidation of defense witnesses as a violation worthy of dismissal will be a step in the right direction in ensuring that the international community will respect and value the international criminal justice system.

\textsuperscript{86} Id.