# Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy

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## Introduction

International criminal tribunals pose a unique set of legal challenges, both substantive and procedural. Since the 'renaissance' of the international tribunal in the 1990s,[1] these challenges have proved fertile ground for commentary by criminal law scholars and international law scholars alike. One prominent area of scholarship has addressed the question of the protection of the rights of accused in the context of international criminal proceedings. Commentary in this area has typically addressed the normative question of which rights ought to be protected by the tribunals. Focus has centred on analyses of applicable sources of human rights law and identification of structural and political obstacles to protection,[2] with most commentators concluding that there are gaps in the existing protection and suggesting ways in which protection may be strengthened.[3]

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[1] Marked by the establishment of the first such tribunals since Nuremberg and Tokyo: the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, the International Criminal Tribunal for Rwanda (ICTR) in 1994 and International Criminal Court (ICC) in 2002.

[2] For a discussion of the sources of human rights norms at the existing international criminal tribunals, see Göran Sluiter, "International Criminal Proceedings and the Protection of Human Rights" (2003) 37 New Eng.L. Rev. 935, developed further in Alexander Zahar & Göran Sluiter, *International Criminal Law* (Oxford: Oxford University Press, 2008) at Chapter 8. For an attempt to systematically describe the obstacles to due process protection, as well as a detailed discussion of the history of institutional protection of human rights at international criminal tribunals, see Gregory Gordon, "Toward an International Criminal Procedure: Due Process Aspirations and Limitations" (2007) 45:3 Colum. J. Transnat'l L. 635.

[3] Other tribunal-specific criticisms include: Andrew J. Walker, "When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees" (2004) 106 W. Va L. Rev. 245 and Sara Stapleton, "Ensuring a Fair Trial in the International Criminal Court: Statutory interpretation and the Impermissibility of Derogation" (1999) 31 N.Y.U. J. Int'l L. & Pol. 535 with respect to the ICC; and Aparna Sridhar, "The International Criminal Tribunal for the Former Yugoslavia's Response to the Problem of

While the 'what' has therefore been given considerable attention, few commentators have given fulsome consideration to *how* rights accepted as falling within the scope of the tribunal process are to be protected. This question is particularly relevant in the context of providing remedies for rights violations, an area which, I argue, raises significant issues.

This article sets aside questions of 'what'–what human rights norms apply to international criminal tribunals, what institutional means are to be applied for their guarantee–and focuses on the substantive question of 'how': how can tribunals adequately and effectively remedy rights violations in respect of individual accused? It argues that the unique situation of international criminal tribunals renders traditional remedies inadequate. As a result, principled reform is needed in order for tribunals to function effectively while, at the same time, vindicating the principles underlying due process protection.

I first identify current systemic obstacles to the provision of effective remedies within the international criminal tribunal context. I then examine the provision of remedies within a number of national jurisdictions in order to draw out underlying principles. The article focuses primarily on Canadian law but includes an overview of approaches in other jurisdictions, which show significant common ground in their underlying values. Ultimately, these principles are evaluated in light of the unique context of international criminal tribunals and used to rethink and reformulate a more effective remedy scheme in the tribunal context.

## Problems in Remedying Violations of Rights of Accused

It is undisputed that, as in domestic proceedings, international tribunals must meet violations of (recognized) rights of the accused with adequate, effective remedies.[4] In practice, however, tribunals are presented with two distinct but mutually reinforcing systemic obstacles to the identification and application of such remedies in specific instances. Both obstacles stem from the unique severity of

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Transnational Abduction" (2006) 42 Stan. J Int'l L. 343 and Scott Johnson, "On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia" (1998) 10:1 Int'l Legal Persp. 111 with respect to the ICTY.

[4] This requirement has been explicitly recognized, for example, in *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72 Decision (November 3, 1999) (International Criminal Tribunal for Rwanda, Appeals Chamber) [*Barayagwiza*, "Decision"].

the charges with which international criminal tribunals are concerned.

The first barrier is a political one. The *Barayagwiza* case provides an epitomizing example of this problem:[5] Jean-Bosco Barayagwiza, considered the "lynch-pin of the conspiracy [to commit genocide against the Tutsis],"[6] was detained for an illegally lengthy period of time prior to his transfer to the ICTR.[7] Accordingly, the Appeals Chamber issued a stay of proceedings in November 1999 due to 'abuse of process'. The legitimacy of the tribunal was severely undermined in Rwandan public opinion; the Rwandan government immediately threatened to suspend cooperation with the ICTR and supported this threat by filing its own international arrest warrant and extradition request.[8] Within the space of five months, the Appeals Chamber had been reconstituted under a new President, accepted, on questionable grounds, the Prosecutor's appeal of its initial decision,[9] and overturned the decision to stay the proceedings, calling instead for an appropriate remedy to be determined after Barayagwiza's trial.[10]

This chain of events illustrates the potential force of political opposition to any meaningful remedy when the accused is regarded

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[5] *Ibid.* and *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision on the Prosecutor's Request for Review or Reconsideration, (March 31, 2000) (International Criminal Tribunal for Rwanda, Appeals Chamber) [*Barayagwiza*, "Decision on the Prosecutor's Request"].

[6] *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Judgement and Sentence (December 3, 2003) at para. 1100 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Nahimana*].

[7] The fact that this case dealt with lengthy detention makes it an even more appropriate illustration; the problem of pre-trial detention is likely the single biggest due process challenge currently facing international criminal tribunals (Zahar and Sluiter, *supra* note 2 at 286).

[8] William A. Schabas, "International Decisions: *Barayagwiza v. Prosecutor* (Decision, and Decision (Prosecutor's Request for Review or Reconsideration))" (2000) 94 Am. J. Int'l L. 563 at 565.

[9] *Ibid.* at 567: "In the second decision, the appeals chamber ultimately distorts the law in an effort to achieve the desired result--to compensate for its previous decision and... to enable the prosecution of Barayagwiza to proceed." Schabas' view was echoed by former ICTR Associate Legal Director Mercedeh Momeni in "Why Barayagwiza is Boycotting his Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics" (2001) 7 ILSA J Int'l & Comp L 315 at 316: "[t]he Tribunal's fear of the Rwandan threats [to sever relations with the ICTR] becoming a reality was in all likelihood, partly the reason for its poorly reasoned, but properly concluded, reversal of the November decision."

[10] *Barayagwiza*, "Decision on the Prosecutor's Request", *supra* note 5 at 75.

by an entire society as a villain of the highest order. Such opposition can do more than undermine the reputation of tribunals; it can erode the support among stakeholders necessary for the establishment and continued functioning of such highly politicized institutions. Momeni put it succinctly in commenting on the *Barayagwiza* crisis:

> When the Tribunal puts itself in situations where it is faced with non-cooperation from Rwanda, and forces the Appeals Chamber to render decisions with negative implications for the reconciliation process, it damages not only its own reputation, but also hampers the pursuit of international justice by extension.[11]

The second obstacle to adequate and effective remedy is a substantive legal one. In establishing remedies, the seriousness of the allegations against an accused inevitably enters the analysis. In the case of international criminal tribunals, where allegations can include crimes against humanity and war crimes, their consideration makes the implementation of effective remedies difficult. Sometimes, this difficulty arises due to an explicit requirement that, when considering the appropriate remedy, judges must balance the gravity of the violation against the gravity of the charges.[12] Such a requirement entails that the more serious the alleged offence, the higher the level of tolerable human rights abuse against the accused. For serious breaches of international humanitarian law, it is extremely difficult to justify throwing out a case no matter what abuse the accused has suffered, either directly through a setting aside of jurisdiction or indirectly through the exclusion of evidence necessary to prove the charges.[13]

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[11] Momeni, *supra* note 9 at 324. As a corollary, it should be noted that this problem is present with respect to any international criminal tribunal but is especially pertinent with respect to ad hoc tribunals; while the ICC can 'fail' in respect of a given situation without failing entirely as an institution, the former are set up to address only a single situation.

[12] As is the case, for example, with respect to applications for stays of proceedings (see *Prosecutor v. Nikolic*, IT-94-2-PT, Decision on the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal (October 9, 2002) at para. 72 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II).

[13] Sometimes this is the case more from a legal realism perspective than with respect to explicit analysis. In *Brdjanin*, for example, the judge seriously bent provisions on exclusion in order to admit the evidence. *Prosecutor v. Brdjanin*, IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence" (October 3, 2003) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II).

The seriousness of the charges may also enter the remedy analysis indirectly as, for example, ultimately occurred in *Barayagwiza*.[14] As previously noted, the Appeals Chamber in the second *Barayagwiza* decision held that a remedy for Barayagwiza's illegal detention was to be determined following his trial. Specifically, it ruled that Barayagwiza was to receive financial compensation in the event of his acquittal and a sentence reduction in the case of conviction.[15] Accordingly, in sentencing Barayagwiza following his conviction three years later, the Trial Chamber reduced his sentence from life to 35 years.[16] One can question the significance of this reduction, as it entailed Barayagwiza's imprisonment into his 80s– quite likely a life sentence in effect.[17] This judgment illustrates that, at least in respect of sentence reduction, it is difficult to impose a practically meaningful remedy when the accused is convicted on charges infinitely more serious than those carrying maximum sentences in domestic criminal law schemes. Where is the practical remedy in sentencing an accused found to be responsible for the deaths of 500,000 people as if he had only been responsible for the deaths of 100,000 people, for example?

## Principles Underlying Remedies for Violations of Rights of the Accused

Part of the difficulty in determining the applicability of international human rights law to international criminal tribunals lies in the fact that the body of law has been developed with state actors in mind. As a result, commentators such as Sluiter have found it necessary to break down, rethink and reformulate human rights law in order to adapt it to the tribunal context.[18] A similar approach is required with respect to determining appropriate remedies for violation of rights of

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[14] *Supra* note 6.

[15] *Barayagwiza*, "Decision on the Prosecutor's Request", *supra* note 5 at para. 75.

[16] *Supra* note 6 at 1106-1107. Barayagwiza's two co-accused each received life sentences. The Appeals Chamber later overturned conviction on some charges, reducing the sentences (Barayagwiza's to 32 years), *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement (November 28, 2007) (International Criminal Tribunal for Rwanda, Appeals Chamber)

[17] The Court was perhaps aware of the ineffectiveness of this remedy when it stated, "[t]he Chamber considers that a term of years, being by its nature a reduced sentence from that of life imprisonment, is the only way in which it can implement the Appeals Chamber decision," *ibid*.

[18] Sluiter, *supra* note 2.

accused; as the above discussion has shown, there are serious barriers to tribunals' application of the remedies available to domestic courts. To this end, this section will elaborate the underlying principles behind remedies for due process violations and attempt to reformulate them into remedies applicable to international criminal tribunals, having regard to both the nature and the objectives of tribunals. In elucidating these principles, reference will be made to Canadian laws and jurisprudence, which provide a nuanced example of due process protection and one whose principles translate well to the tribunal context. This examination will be supplemented by an overview of approaches in other jurisdictions, which reveals surprisingly consistent underlying principles.

*Remedies for Due Process Violations in Canada*

The *Canadian Charter of Rights and Freedoms* sets out all constitutionally protected civil and political rights of individuals in Canada.[19] Section 24 details the remedies available for a breach of a *Charter* provision. S. 24(1) is an extremely broad general provision entitling those whose rights have been violated to seek judicial remedy. General principles attached to this provision are that remedies should be responsive,[20] effective and meaningful.[21] The Canadian Supreme Court has also stressed the importance of a flexible judicial approach to remedies in order to meet evolving challenges and circumstances.[22]

In Canada, as in other jurisdictions, there are two specific remedies that typically apply in cases of due process violation: exclusion of evidence and stay of proceedings. The former is specifically provided for under s. 24(2), which is worth reproducing here:

> Where... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the

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

[20] That is, having regard to the purpose of the infringed right.

[21] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.

[22] *Ibid.*

> proceedings would bring the administration of justice into disrepute.[23]

This provision entails a noteworthy implication: due process violations do not automatically entail a remedy.[24] In analyzing a motion for the exclusion of evidence, courts are explicitly required to examine not only the nature of the *Charter* violation on which the motion is founded, but also 'all other circumstances' that may impact the effect of that evidence's admission on the reputation of the judicial process. Specifically, this analysis entails considerations of trial fairness,[25] the seriousness of the violation,[26] and the effect of *excluding* the evidence on the public reputation of the administration of justice, an effect dependent, *inter alia*, on the importance of the evidence to the prosecution and on the seriousness of the alleged offence.[27]

Specific policy considerations supporting the remedy of exclusion can be seen to include not only the provision of a personal remedy but also judicial integrity and the deterrence of future rights violations.[28] On the other hand, these considerations must be balanced against the loss of reliable evidence and potential loss of public confidence. These considerations can be further distilled into basic principles: violations should be compensated by personal remedies, trials should be fair, criminals should be punished, and judicial integrity must be preserved both actually and in the mind of the public.

The requirements for granting a stay of proceedings are further instructive. This remedy is provided on the basis of s. 24(1).

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[23] *Charter*, *supra* note 20, s. 24(2).

[24] An implication explicitly confirmed by several provincial courts of appeal, including *R. v. Erickson*, [1984] 5 W.W.R. 577 (B.C.C.A.); *R. v. Cutforth* (1987), 81 A.R. 213 (C.A.); *R. v. Blanchard* (1988), 11 M.V.R. (2d) 161 (Y.T.C.A.); *R. v. Davidson* (1988), 11 M.V.R. (2d) 95 (N.S.C.A.); *R. v. Simpson* (1994), 117 Nfld. & P.E.I.R. 110 (Nfld. C.A.). An accused may nevertheless have recourse to a civil action: *R. v. Davidson*; *R. v. Mailman* (1990), 96 N.S.R. (2d) 337 (N.S.C.A.).

[25] If a trial would be rendered unfair by the admission of evidence, that evidence is automatically excluded. However, trial fairness in this case is limited to a narrow analysis principally based on whether the evidence was brought into existence by the violation (see *R. v. Stillman*, [1997] 1 S.C.R. 607 at paras. 73-74).

[26] Which includes, *inter alia*, regard to good or bad faith on the part of the violator.

[27] *R. v. Collins*, [1987] S.C.R. 265 at paras. 89, 94-95.

[28] *Ibid.*; *R. v. Clayton* (2005), 194 C.C.C. (3d) 289 (Ont. C.A.), reversed on other grounds *R. v. Clayton* 2007 SCC 32.

The threshold for granting a stay is quite high; stays are considered exceptional remedies to be granted only in the 'clearest of cases' of abuse of process,[29] where either the prejudice to the ability of the accused to make full answer and defence cannot otherwise be remedied or the integrity of the judicial system would suffer "irreparable prejudice."[30] Abuse of process exists where, "[C]ompelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" as a result of "oppressive and vexatious proceedings."[31] On the basis of the principle of flexibility noted above, judges enjoy very broad discretion to craft alternative remedies, including discretion to alter trial procedures.[32]

The reputation of the administration of justice can thus be seen to play a central role in determining both whether an abuse of process has taken place and whether this abuse should result in a stay of proceedings. The related principle of trial fairness, specifically as regards the ability of the accused to make full answer and defence, is also a fundamental principle underlying this analysis. Thus, for example, the analysis for whether a delay in being brought to trial has been so unreasonably long as to warrant a stay of proceedings includes not only considerations of the complexity of the case and the inherent limits on judicial resources, but also looks at the respective actions of the prosecution and the accused and at the degree of prejudice suffered by the accused.[33]

To summarize, several principles govern the application of judicial remedies for breaches of due process rights:

- Criminals should be punished;
- Trials should be fair;
- Due process violations should be deterred;
- Where occurring, violations should be rectified by personal remedies that are responsive, effective and meaningful; and

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[29] *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 68.

[30] *R. v. Carosella*, [1997] 1 S.C.R. 80.

[31] *R. v. Young* (1984), 46 O.R. (2d) 520 (C.A.) at 329, affirmed in *R. v. Jewitt*, [1985] 2 S.C.R. 128 at para 25.

[32] *R. v. T. (J.N.)* (1995), 99 Man. R. (2d) 150 (Man. Q.B.).

[33] *R. v. Morin*, [1992] 3 S.C.R. 286 at 13.

- Judicial integrity and the reputation thereof are of paramount importance, a principle which encompasses regard to the severity of the charges.

These principles compete with each other, requiring judges to balance them in each case in order to determine the proper exercise of their discretion. The reputation of the administration of justice is ultimately the decisive, subsuming factor, serving as a lens through which other interests are balanced.[34]

*Remedies in Other Jurisdictions*

While a full comparative review of remedies for due process violations in countries around the word is beyond the scope of this article, it is worth briefly touching on the subject to show that the principles underlying the Canadian remedy analysis, with one important exception, inform the analyses of other countries as well. The focus here will be on rules for the most common remedy for due process violations, the exclusion of evidence.

Broadly speaking, there are three approaches to admitting illegally obtained evidence: general admissibility, discretionary exclusion and automatic exclusion. The general admissibility approach ignores the method of evidence's procurement, focusing narrowly on its relevance and probative value in determining admissibility. As attention to human rights has increased, however, this model has begun to disappear.[35] Today, most countries employ either an automatic exclusionary rule, following the example of the United States,[36] or a discretionary exclusion rule, following the example of Canada and England.[37] Even when the general

[34] While the ability of an accused to make full answer and defence is expressed as a separate heading under the stay of proceedings analysis, the right to a fair trial is subsumed into the overarching principle of reputation under 24(2). Under the 24(2) analysis, an unfair trial automatically entails prejudice to the reputation of the administration of justice and warrants the exclusion of evidence. A similar framing is possible with respect to the stay of proceedings analysis.

[35] See Craig M. Bradley (ed.), *Criminal Procedure: A Worldwide Study* (Durham, NC: Carolina Academic Press, 1999) at 230-1, 333-5 (describing South Africa and Israel as examples of countries that formerly employed this model and have since moved towards a discretionary exclusion approach based largely on Canada's–Israel more gradually, South Africa wholesale through its 1997 Constitution).

[36] *Ibid.* at 405, 17, 258-259 and 295 (other countries adopting the approach–at least nominally–include Argentina, Italy and Russia).

[37] See *ibid.* at 113, 155 and 195-6 (describing Germany and France as employing what could be termed a 'mixed' approach, whereby evidence produced by certain violations is

admissibility model was more popular, it was accompanied by alternative means of deterring due process violations such as disciplinary actions against violators as well as imposing civil or even criminal liability.[38]

Under the discretionary exclusion approach, judges have discretion as to whether to admit or exclude illegally obtained evidence. Countries employing this approach have developed a range of tests for exclusion, including impact on trial fairness,[39] balance between the seriousness of the violation and the interest in truth-finding,[40] and degree of harm to the defendant's interests.[41] Despite the variety of tests, however, similar fundamental public interests are implicitly balanced in each case: punishing wrongdoers, deterring police misconduct, and the moral interest in upholding human rights.[42] The specific factors considered in the Canadian test for exclusion are typical of those considered in respect of these broad interests elsewhere, including the seriousness of the violation, the importance of the infringed interest, the relevance of the evidence for the resolution of the case, and the seriousness of the offence.[43]

As its name implies, the automatic exclusionary approach always excludes illegally obtained evidence. The difference between this approach and the discretionary exclusion approach is based not on a difference in fundamental interests but on a different balance between the *same* interests; in this model, the interests in protecting human rights and deterring misconduct outweigh the interest in punishing wrongdoers. This latter interest is nevertheless present and can influence the analysis, for example, through greater judicial reluctance to deem police conduct 'illegal'.[44]

It can thus be seen that the fundamental principles underlying the Canadian approach–punishment of criminals, ensuring fair trials, deterring due process violations and providing

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automatically excluded while other illegally obtained evidence is excludable at the judge's discretion).

[38] Eg. *ibid.* at 231 and 333.

[39] See *ibid.* at 113 (describing the standard in England and Wales).

[40] See *ibid.* at 195-196 (describing the German standard).

[41] See Bradley, *supra* note 35 at 155 (describing the French standard).

[42] See e.g. *ibid.* at 113.

[43] See e.g. *ibid.* at 195-6.

[44] See e.g. *ibid.* at 406.

personal remedies where they occur–are the same principles underlying other countries' approaches. The originality of the Canadian model lies in its incorporation of the judiciary's reputation for integrity as an overarching principle within which these other principles are balanced.[45] In other words, Canada considers the same factors as other countries employing the discretionary exclusion approach, but introduces greater coherence through its use of reputation as a unifying interpretive principle. As we shall see, the explicit use of the reputation principle will be valuable in approaching the issue of remedies at international criminal tribunals.

## The Underlying Principles Applied to International Criminal Tribunals

### *The Objectives of International Criminal Tribunals*

In order to adapt these principles to the international tribunal context, it is necessary to keep in mind not only the unique practical situation of such tribunals, as discussed above, but also the unique purposes served by their existence. Perhaps unsurprisingly, given the political complexity of their origins, it is difficult to articulate a single motivating political objective behind the formation of international criminal tribunals, either individually or as a collective (aside from the superficial objective of prosecution of those responsible for serious humanitarian criminal violations). However, it is possible to derive certain objectives from the preambles of the establishing instruments of the various tribunals,[46] which reveal significant common ground. The general objectives that can thus be gleaned are the promotion of peace and stability, the punishment of those responsible for serious humanitarian crimes, and the facilitation of transitional justice (through redress and reconciliation). Included in these broad objectives is the promotion of democracy (at least in the

[45] *Ibid.* at 344 (other countries have begun to adopt the Canadian reputation-based approach, for example South Africa).

[46] Specifically, see regarding the ICTY UN SCOR, 48th Year, 3175th Mtg., UN Doc. S/RES/808 at Preamble, iterations 8 and 9; UN SCOR, 48th Year, 3217th Mtg., UN Doc. S/RES/827 (1993) at Preamble, iterations 6-8. See, regarding the ICTR, *Statute of the International Criminal Tribunal for Rwanda* (ICTR Statute), UN SCOR, 49th Year, 3453rd Mtg., Annex, UN Doc. S/RES/955 (1994) (notably similar but with an additional reference to "the process of national reconciliation"). See, regarding the ICC, *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9* (1998) at Premable.

case of the ICTY),[47] the stigmatization and deterrence of humanitarian abuses,[48] and the establishment of a historical record. In addition to these *ex ante* political objectives, international tribunals have other desirable effects, most notably with respect to uniformity in the application and development of international law.[49]

*The Applicability of the Underlying Principles*

The principles derived from the Canadian example, including the overarching principle of reputational integrity, are arguably even more resonant in the tribunal context than in the domestic one.

The principle of punishing criminals is, of course, directly relevant, given the tribunals' basic objective of punishing those responsible for serious humanitarian crimes.

In addition, the inherent focus of tribunals on human rights necessitates an exceptional emphasis on their own rigid adherence to human rights standards in their dealings with accused. The need for this emphasis is reinforced by the unique position of tribunals as interpreters and developers of international law, a sphere in which human rights law plays a dominant role. As such, the principles of fair trials, deterring due process violations, and providing meaningful personal remedies to compensate for violations possess great significance.

The goal of promoting democracy (in which rights protection is inherent) not only reinforces the significance of these principles, it also requires tribunals to maintain strong reputations for integrity.[50] Indeed, reputation is of the utmost importance for international criminal tribunals, not only to aid in promoting democracy specifically, but also because recognition of their authority is essential to their general promotion of peace and stability and to their ability

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[47] John Hagan & Sanja Kutnjak Ivkovich, "War Crimes, Democracy, and the Rule of Law in Belgrade, the Former Yugoslavia, and Beyond" (2006) 605 Annals 130 at 132.

[48] Antonio Cassese, *International Law*, 2nd Ed. (Oxford: Oxford University Press, 2005) at 460.

[49] *Ibid.*

[50] Hagan & Ivkovich, *supra* note 47 at 132-133, put it well: "intervention was necessary to help reestablish a functional democracy in the former Yugoslavia. Yet for such intervention to be successful in advancing democracy, it is not only necessary to meet procedural and due process standards in doing so but also to be broadly *perceived* as meeting these standards by members of the public who identify with both the victims and the parties accused of perpetrating crimes against them."

to facilitate projects of transitional justice. If a tribunal comes to be seen as an instrument of victor's justice without true regard to justice and human rights, it will necessarily fail in these objectives, even if it succeeds in punishing perpetrators of humanitarian crimes. At the same time, if it comes to be seen as a lame duck, unable to effectively prosecute accused due to an over-emphasis of the most minor due process violations, it will likewise fail in its objectives.

In assessing reputation, tribunals need to also be mindful of their situation within a broader project of international justice. The reputation to uphold is not only the narrow reputation of the tribunal itself, but also that of this broader project[51] This approach is analogous to domestic courts' focus on the reputation of the domestic administration of justice generally rather than the reputation of the specific court itself.[52]

## Implications for Remedy Application at International Criminal Tribunals: Proposals for Reform

### *A Discretionary Approach; the Importance of Reputation*

It is therefore reasonable, in assessing appropriate remedies, to continue the discretionary approach currently used by tribunals, while explicitly acknowledging a balancing between the underlying principles as the basis for exercising judicial discretion. In particular, tribunals should clearly establish the principle that they must uphold the reputation of the project of international justice with which they are associated. This overarching principle can then be used as an interpretive lens through which the interests represented by the other underlying principles are balanced. The application of reputation as an overarching principle is even more appropriate in the tribunal context than domestically, given tribunals' unique objectives of promoting peace and stability and facilitating transitional justice.[53]

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[51] In the case of *ad hoc*, situation-specific tribunals such as the ICTY and ICTR, the reputation they must uphold is that of the specific international intervention that gave rise to their creation. The ICC, whose remit extends across numerous situations, should focus on the reputation of the administration of international justice more generally.

[52] An added benefit of this broader approach to reputation is that it allows courts to take into account the actions of officials over which they do not have jurisdiction, such as improper arrests or treatment at the hands of national or international police and armed forces. For a discussion of this problem see Zahar & Sluiter, *supra* note 2 at 281.

[53] See *Barayagwiza*, "Decision", *supra* note 4 at 112. The first Appeals Chamber Decision in *Barayagwiza* recognizes the importance of reputation: "Nothing less than

This approach will help bring coherence to what is currently a largely piecemeal scheme. Accordingly, the balancing of the rights of the accused and the interest of the public in prosecution in the test for the determination of a stay of proceedings[54] should be subsumed into a more general analysis of the impact of trial continuation on the project of international justice's public reputation. Likewise, analyses of evidence exclusion under Rules 89(D) (with respect to assessing trial fairness) or 95 (with respect to assessing judicial integrity) of the ICTY and ICTR Rules of Procedure and Evidence (RPE)[55] and Articles 69(4) and (7) of the ICC's[56] should also apply reputation as an interpretive lens.[57]

*Implications of the Discretionary Approach: the Persistence of the Obstacles to Effective Remedies*

It is not enough, however, to recognize the applicability of these principles to the tribunal context and to suggest a discretionary approach to remedy provision: rather than avoid the obstacles to effective remedy provision at international criminal tribunals that were discussed above, this approach directly imports them into the principled remedy analysis.

The political obstacle of pro-punishment sentiment among victim populations is relevant because reputation must be considered not simply with respect to a hypothetical 'public' but with respect to very real stakeholder constituencies, given a tribunal's role in promoting peace and stability and facilitating transitional justice.

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the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals–including those charged with unthinkable crimes–would be among the most serious consequences of allowing [Barayagwiza] to stand trial in the face of such violations of his rights."

[54] A test set out in *Nikolic*, *supra* note 12.

[55] International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, UN Doc. IT/32/Rev.41, entered into force 14 March 1994, as amended 28 February 2008, online: <http://www.un.org/icty/legaldoc-e/index-t.htm>; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc. ITR/3/Rev.1, adopted 29 June 1995, as amended 14 March 2008, online: <http://69.94.11.53/default.htm>.

[56] International Criminal Court, Rules of Procedure and Evidence, UN Doc. ICC-ASP/1/3, adopted 9 September 2002, online: < http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf>.

[57] Although it is perhaps difficult to justify this inclusion on the basis of the wording of the provisions as they currently read. Some minor statutory revision may be a precondition for the application of such an analysis.

Furthermore, as the example of Canada and other countries employing discretionary approaches shows, the balancing of underlying interests (and resulting impact on reputation) is partly dependent on the severity of the allegations against the accused. As such, the second, substantive obstacle to the provision of effective remedies–the outweighing of the interests of the accused by the severity of their charges–can also be seen to have a legitimate basis in the fundamental principles underlying the establishment of remedies for due process violations.

The legitimate grounding of the systemic obstacles to the provision of effective remedies in the very principles according to which remedies should be established is problematic. . Given the range of criminal charges represented in national courts and the absence of broad victim groups in individual cases, the application of the discretionary, interest-balancing approach yields a balance between remedy application and denial that serves to uphold the domestic judiciary's reputation. In the case of international criminal tribunals, however, there is a long-term reputation problem. Tribunals demonstrate the observable trend of subsuming the principles of fair trial, deterrence of due process violations, and the provision of meaningful personal remedies to the interest in seeing the accused prosecuted. The unique obstacles to effective remedy faced by international criminal tribunals render the traditional methods of remedy–exclusions of evidence and stays of proceedings in particular–almost impotent in the tribunal context.

*Proposals for Effective Remedy Provision*

The solution cannot be to accept the status quo and permit a system which rarely remedies violations of due process. Indeed, such a system risks entirely undermining the reputation of the projects of which tribunals are part, resulting in a self-contradictory application of their own underlying principles. Why establish a tribunal in the first place if accused will never receive fair trials? The necessary alternative is to reformulate the remedy scheme in a way that more adequately responds to the need to vindicate its underlying principles.

As a substantive reform, the *cumulative* risk of inadequate protection should itself be incorporated into analyses respecting remedy. Specifically, in balancing interests, the inherent risk that the principles of fair trials, deterring due process violations and providing meaningful personal remedies will always go unfulfilled–

thereby seriously undermining the project of international justice's reputation–should automatically be taken into account as a potential detriment to reputation, weighing in favour of providing the remedy in question. This incorporation would, in practice, serve as a counterbalance to the severity of charges and thereby help to preserve the project's reputation for integrity.

Additionally, a more flexible, responsive approach to remedies must be taken. The second Appeals Chamber decision in *Barayagwiza* is commendable for proposing two alternative remedies–financial compensation and sentence reduction–after rejecting a stay.[58] While exclusions of evidence and stays of proceedings remain important potential remedies, courts must attempt to provide alternative remedies where exclusions and stays cannot be awarded despite a rights violation or where such an alternative would be more appropriate in a given situation. In order to be responsive, effective and meaningful, such remedies will have to be crafted with regard to the specifics of each case; it is therefore impossible to compose a comprehensive list *ex ante*. However, such remedies could include sentence reductions and financial compensation as in *Barayagwiza*,[59] return of unreasonably seized property, or adaptations to trial procedures. Hopefully, the process initiated in *Barayagwiza* will build upon itself, with each new alternative remedy awarded providing inspiration for future situations.[60]

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[58] *Barayagwiza*, "Decision on the Prosecutor's Request", *supra* note 5 at 74-75. These two remedies were presented as alternatives, the former in the even of acquittal and the latter in the event of conviction.

[59] With the caveat that sentence reductions must be meaningful, in conformity with the principle of meaningful, effective and responsive personal remedies, notwithstanding the difficulties noted earlier. (Barayagwiza's sentence reduction, as discussed, was not.) The rhetorical question that I posed earlier–should an accused be sentenced as if he had only been responsible for the murder of 100,000 people, instead of 500,000–is misleading. The appropriate principle is that the accused's sentence should be reduced such that he is actually released from custody earlier than otherwise. Admittedly, courts may be reluctant to apply this remedy in the cases of the most serious violators.

[60] A non-inherent obstacle has also arisen with respect to the ICTY and ICTR, namely, the lack of budgetary or Statutory provision for financial compensation available to accused whose rights have been violated (For example, *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Decision on appeal against Appropriate Remedy, (September 13, 2007) (International Criminal Tribunal for Rwanda, Appeal Chamber). The ICC Statute, however, apparently ensures that compensation will be available (Zahar & Sluiter, *supra* note 2 at 317). The availability of compensation funds is a necessity.

Finally, the principle that due process violations should be deterred can be partially vindicated without reliance on personal remedies through enhanced accountability for violating officials. Punishing violators of due process rights, for example through professional discipline or civil or criminal liability (as in many nation jurisdictions) could help compensate for the difficulty of providing personal remedies to the victims. Current provisions on misconduct of officials are quite narrow, especially in the case of the ICTR and ICTY, and are rarely applied.[61] Tribunal RPE must provide for the possibility of sanctions against all court officials responsible for violating the rights of accused.[62] Such rules could build on the existing provisions in the ICC RPE and must be detailed enough to provide for different levels of sanctions depending on the degree of responsibility.

Though controversial–and certainly unlikely to be popular among those involved in prosecutions–this proposal is justified by the heightened need of tribunals to deter due process violations and ensure fair trials and the limited availability of personal remedies.[63] It should be stressed that this proposal provides a complement, not a substitute, to the provision of personal remedies, and only in respect of the principles of violation deterrence and ensuring fair trials. The provision of personal remedies is itself a prominent principle. As such, courts must be careful not to allow increased personal accountability of perpetrators to serve as an excuse for not providing a personal remedy to victims.

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[61] Currently, limited accountability for Prosecutors can be inferred from rule 46 of the ICTR and ICTY Rules of Procedure and Evidence (RPE), *supra* note 55, which permit the tribunal to impose sanctions against 'counsel', including removal from a case and referral to the counsel's national bar. However, while theoretically applicable to prosecuting counsel responsible for due process violations, this provision has been used only with respect to misconduct of defence counsel (Momeni, *supra* note 9 at 327). The ICC RPE, *supra* note 56, contain much broader provisions relating to discipline against court officials, including not only Prosecutors and Deputy Prosecutors but also judges, Registrars and Deputy Registrars (see rules 23-32). Disciplinary measures provided for are reprimands, fines, and removal from office.

[62] A further problem is that violators are typically non-court officials, for example INTERPOL officers or soldiers in national armies or international ones such as NATO. While the ideal would be to hold these violators personally accountable as well, doing so will pose a serious practical challenge. The adoption of a reputation-based approach focused broadly on the reputation of the project with which a tribunal is associated does, however, allow tribunals to take the actions of such officials into account in applying personal remedies (see also note 52).

[63] Such a proposal is put forward by Momeni, *supra* note 9 at 328.

**Conclusion**

The above analysis points to a need to reform current practices respecting the application of remedies for the violation of the rights of accused. Any reform should take into account certain fundamental principles: fair trials; deterrence of violations; responsive, effective and meaningful remedies; and, as an overarching principle, maintenance of the project of international justice's reputation for integrity. Accordingly, this article's proposals for reform seek to overlay the *ad hoc* and often inconsistent approach of tribunals to their discretion to apply personal remedies with a unifying set of interpretive principles and to supplement it with complementary means of vindicating these principles.

The specific proposals contained in this article represent a first step towards reform. They are by no means the only possible way forward; rather, it is my hope that this article will spark further thought on the subject.