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# **Trial without undue delay:** a promise unfulfilled in international criminal courts

## **Julgamento sem atraso indevido: a promesa não cumprida pelos tribunais criminais internacionais**

Cynthia Cline

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# **Trial without undue delay:** a promise unfulfilled in international criminal courts*

# **Julgamento sem atraso indevido:** a promesa não cumprida pelos tribunais criminais internacionais

Cynthia Cline**

## Abstract

The right to a trial without undue delay is guaranteed using identical language in the Rome Statute of the International Criminal Court (ICC), the statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). All three mirror the guarantee in the International Convention for Civil and Political Rights that all persons charged with crimes are entitled "to be tried without undue delay". This paper will examine the reason for a right to a trial without undue delay and its origin in national and international law. It also will show how these national guarantees serve as the basis of the international law guarantee of trial without undue delay and how that guarantee has played out in the international courts. Finally, this paper will examine reasons why the right of trial without undue delay arguably has been ignored and/or violated in the ICTY, the ICTR and the ICC due to long delays in completing the cases.

**Keywords:** Trial without undue delay. Speedy trial. International Convention on Civil and Political Rights. International Tribunals.

## Resumo

O direito a um julgamento sem atrasos indevidos é garantido usando-se linguagem idêntica no Estatuto de Roma do Tribunal Penal Internacional (TPI), nos estatutos do Tribunal Penal Internacional para a ex-Iugoslávia (TPIJ) e no Tribunal Penal Internacional para Ruanda (TPIR). Todos os três espelham a garantia na Convenção Internacional para os Direitos Civis e Políticos de que todas as pessoas acusadas de crimes têm o direito de "ser julgadas sem atrasos indevidos". Esse artigo examinará a razão do direito a um julgamento sem demora indevida e sua origem no direito nacional e internacional. Também mostrará como essas garantias nacionais servem de base para a garantia internacional do julgamento sem atrasos indevidos e como essa garantia tem sido desempenhada nos tribunais internacionais. Finalmente, este artigo examinará as razões pelas quais o direito do julgamento sem demora indevida foi ignorado e / ou violado no ICTY, no ICTR e no ICC devido a longos atrasos na conclusão dos casos.

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**Palavras-chave:** Julgamento sem atraso indevido. julgamento rápido. Convenção Internacional sobre Direitos Civis e Políticos. Tribunais Internacionais.

## 1. Introduction

To Justin Mugenzi and Prosper Mugiraneza, the guarantee of trial without undue delay must seem hollow. Each was confined by the ICTR for about 14 years before being acquitted of all charges ranging from genocide to rape and murder. Mugiraneza and Mugenzi were not the only *ad hoc* tribunal defendants who spent more than a decade in pretrial detention before their cases were resolved. Theoneste Bagasora was in custody almost 15 years between his initial appearance at the ICTR and the decision on his appeal.[1] Joseph Kanyabash was in ICTR custody for almost 20 years before his appeal was resolved. He served almost all of a 20-year sentence in pretrial detention.

At the ICC, apparently only two cases have been to trial and appeals completed. One defendant, Germain Katanga, was arrested in October 2007. He was sentenced in May 2014. Both the prosecution and Katanga dismissed their appeals the following month. Thomas Lubanga Dyilo was arrested in March 2006. His trial ran from January 2009 through July 2012. His 14-year sentence was affirmed on appeal in December 2014, more than eight years after his arrest. Joseph Kanyabash was in ICTR custody for almost 20 years before his appeal was resolved. He served almost all of a 20-year sentence in pretrial detention.

The situation was similar at the ICTY. For example, six defendants in the *Prlic* case were in custody from 2004 through 2017 – about 13 years – before their appeals were decided. Two other ICTY co-defendants, Jovica Stanisic and Franko Simatovic, waited from their initial appearances in June 2003 through December 2015 – more than 12 years – for their cases to be completed.[2]

Former Croatian Defense Council fighter Vlatko Kupreskic, who was acquitted of all charges, recently was quoted as saying he cannot fathom why he spent almost a half decade in detention before his acquittal. "They never even said, sorry," he is quoted as saying.[3]

At the ICC, apparently only two cases have been to trial and appeals completed. One defendant, Germain Katanga, was arrested in October 2007. He was sentenced in May 2014. Both the prosecution and Katanga dismissed their appeals the following month. Thomas Lubanga Dyilo was arrested in March 2006. His trial ran from January 2009 through July 2012. His 14-year sentence was affirmed on appeal in December 2014, more than eight years after his arrest.

1 He was sentenced to 35 years incarceration.

2 These times are taken from reports of the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the Former Yugoslavia to the Security Council. *See* Report of the completion of the mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015, U.N. Doc. S/2015/884 (2015) Report of the completion of the mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015, U.N. Doc. S/2015/884 (2015) and Assessment and Report of Judge Carmel Agius, President of the International Criminal Tribunal for the former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), U.N. Doc. S/2017/1001 (2017). Assessment and Report of Judge Carmel Agius, President of the International Criminal Tribunal for the former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), U.N. Doc. S/2017/1001 (2017). The charts in the two reports will be consolidated and included herein as Tables A and B.

3 His initial appearance at the International Criminal Tribunal for the Former Yugoslavia was in January 1998. The Appeal Chamber's judgment acquitting him was handed down October 23, 2001, three years, 10 months after his initial appearance. BALKAN TRANSITIONAL JUSTICE. *War crimes convicts*: hague tribunal was a 'political court'. Available at: <http://www.balkaninsight.com/en/article/war-crimes-convicts-hague-tribunal-was-a-political-court-12-19-2017>.

## 2. The right to speedy trial: its origins

### 2.1. Origins of the right

The right to a speedy trial or trial without undue delay at common law can be traced to Henry II and the Assize of Clarendon in 1166. It included the following guarantee of speedy trial:

> 4. And when a robber or murderer or thief or the receivers of them be arrested through the aforesaid oath, if the justices are not to come quite soon into the county where the arrests have been made, let the sheriffs send word by some intelligent man to one of the nearer justices that such men have been taken; and the justices shall send back word to the sheriffs where they wish to have the men brought before them; and the sheriffs shall bring them before the justices; and also they shall bring with them from the hundred and the vill where the arrests have been made two lawful men to carry the record of the county and hundred as to why the men were arrested, and there before the justices let them make their law.[4]

A half century later, the right was enshrined in the Magna Carta as provision 40, which reads in full: "To no one will we sell, to no one will we refuse or delay, right or justice."[5]

In 1776, the right to a speedy trial was included in the Virginia Declaration of Rights. It reads:

> VIII That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgement of his peers.[6]

This and other guarantees in the Declaration of Rights were influential in what eventually became the United States Bill of Rights, the first 10 amendments to the U.S. Constitution. For example, Article VIII of the Declaration of rights mirrors the Sixth Amendment rights to speedy trial, trial by jury, confrontation, the right to be informed of the charges and the right of compulsory process.[7] It also includes the Fifth Amendment right against self incrimination and the right to due process before being deprived of liberty.[8] With minor stylistic changes, the Declaration of Rights is almost verbatim the Eighth Amendment rights against excessive fines and bail and cruel and unusual punishments.[9]

The right to a trial without undue delay of course is not limited to the United States of America. Numerous other states have found such a right. In general, states use one of two analyses of the right to a speedy trial. Some, such as the United States, create a separate, free standing right to a speedy trial. Others look at delays in trial as an adjunct to the right to a fair trial. The difference is crucial to the determination of whether the accused has been deprived of his rights.[10]

In jurisdictions in which there is no independent right to a speedy trial or to one without undue delay,

4 Quoted by the Constitution Society. CONSTITUTION SOCIETY. *Assize of Clarendon*: 1166. Available at: <http://www.constitution.org/eng/assizcla.htm>.

5 Quoted by the Constitution Society. CONSTITUTION SOCIETY. *The magna carta*: the great charter. Available at: < http://www.constitution.org/eng/magnacar.htm>.

6 THE AVALON PROJECT DOCUMENTS IN LAW, HISTORY AND DIPLOMACY. *Virginia declaration ofrights*. Available at: < http://avalon.law.yale.edu/18th_century/virginia.asp>.

7 U.S. Constitution, Amend. VIU.S. Constitution, Amend. VI.

8 U.S. Constitution, Amend. VU.S. Constitution, Amend. V.

9 Compare, Declaration of Rights Article IX, "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted," with the Eighth Amendment, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," U.S. Constitution, Amend. VIIIU.S. Constitution, Amend. VIII.

10 See *Sookermany v. Director of Public Prosecutions,* 1 BHRC 348 (Trinidad and Tobago Ct. App. 1996). Chief Justice De La Bastide's opinion in *Sookermany* contains a good discussion in the difference in treatment between states with an independent right to speedy trial and those common law jurisdictions in which the right to a speedy trial or a trial without undue delay is based on the individual's general right to a fair trial.

it is common to ask only whether delays caused the trial to be fundamentally unfair. In such circumstances, the trial court may either permanently stay the trial or instruct the jury (in some common law jurisdictions) as to any matter favorable to the accused due to the delay. An example is Director of Public Prosecutions v. Tokai,[11] case arising in Trinidad and Tobago. In states with an independent right to speedy trial, the right may be violated even if it still is possible for a defendant to get a fair trial.

## 2.2. States with an independent right to speedy trial

In jurisdictions with a specific right to speedy trial or trial without undue delay, the analysis normally centers on whether the accused has been deprived of *that* right. If so, the indictment can be dismissed or the trial permanently stayed. An example is *P.M. v. District Judge*[12]*,* where the Supreme Court of Ireland permanently stayed a sexual abuse of a child prosecution based on delays both before the formal charge and the between the filing of charges and the trial itself. The Court held that even where the delay did not prejudice the accused's right to fair trial, an order enjoining further prosecution was appropriate based on the unnecessary stress and anxiety on the accused due to the inordinate delay of trial.

The District Court of New Zealand used a similar analysis to permanently stay a sex abuse trial in R. v. *Churches,*[13] where a trial was barred based solely on delays in the investigation caused by police inaction. In *Martin v. Tauranga District Court,*[14] the High Court made it clear that the right to a speedy trial was independent of the right to a fair trial. Of importance to the analysis was the High Court's reliance on the guarantee of trial without undue delay in the International Convention on Civil and Political Rights (ICCPR), the guarantee imported verbatim into the ICC, ICTY and ICTR statutes.

While recognizing the interest of society in the trial of persons accused of crimes, the Court's analysis centered on the right of the accused guaranteed both by New Zealand's bill of rights and the ICCPR. The Court held that when a trial is delayed beyond the normal time for such cases to be disposed of – and a shorter time if the accused is in custody – the prosecutor has the burden of showing that the delays are not "undue delays." The Court also held that cases could be dismissed or trials permanently stayed based on what it called institutional or systemic delays, that is, delays cause by neither the accused nor the prosecution but inherent in the system. In determining whether institutional delay is "undue," the Court would look to the time periods in similar courts. Delay is not undue if it is caused by the actions of the accused or if he waives the right. However, the prosecutor bears the burden of proving that those delays are caused by or consented to by the accused. The fact that an accused fails to make a contemporaneous complaint about delays does not raise the presumption of waiver.

In some jurisdictions, there is a statutory rather than constitutional right to speedy trial. For example, in Scotland § 101 of the Criminal Procedure Act of 1975 sets a 110-day limit between the time a person is incarcerated on a charge and the completion of the trial. In the absence of exceptional circumstances not the fault of the prosecutor, if the trial is not completed within 110 days of incarceration, the accused is freed and the charges against him permanently dismissed. The Scottish courts apply this rule strictly. In *H.M. Advocate v. McTavish,*[15] the High Court of Justiciary refused to extend the time limit when the prosecutor asked for an extension of time to complete laboratory testing to determine if more serious charges could be filed against the accused.[16]

11 *Director of Public Prosecutions v. Tokai [1996] A.C. 856 (P.C.).*

12 *P.M. v. District Judge [2002] 2 I.R. 560.*P.M. v. District Judge [2002] 2 I.R. 560.

13 R. v. *Churches,* [2001) D.C.R. 581.R. v. Churches, [2001) D.C.R. 581.

14 *Martin v. Tauranga District Court [1995] 1N. Z.L.R. 491*

15 H.M. Advocate v. McTavish,[1974] SLT 246

16 The McTavish Court applied a predecessor statute, § 43 of the Criminal Procedure Actm (Scotland) 1887. It is effectively identical to the current statute.

## 2.3. The Right as Part of a Fair Trial Guarantee

In jurisdictions in which there is no independent right to a speedy trial or one without undue delay, it is common to ask only whether delays caused the trial to be fundamentally unfair. In such circumstances, the trial court may either permanently stay the trial or instruct the jury (in some common law jurisdictions) as to any matter favorable to the accused due to the delay. An example is *Director of Public Prosecutions v. Tokai,* a case arising in Trinidad and Tobago. In South Africa the right to a speedy trial is one of a number of rights associated with fair trials.[17] In South Africa the legal analysis is a balancing of the interests of the accused and of society. Overall, states analyzing speedy trial as an adjunct to a fair trial require a showing that a trial would be fundamentally unfair in order to trigger relief due to denial of a speedy trial.

The Scottish High Court of the Justiciary explained the analysis as follows:

> The right to a trial within a reasonable time figures in many constitutions and declarations of rights. Frequently, as in art 6 [of the European Convention on Human Rights], it figures alongside rights to a fair trial and an independent tribunal. However, the right to a trial within a reasonable time is a right of a somewhat different character from the other two rights, for the reasons explained by Justice Powell in his frequently quoted opinion in **Barker v Wingo**. Justice Powell observed that the right to a speedy trial is generically different from any other rights enshrined in the United States Constitution for the protection of the accused. He pointed out, first, that there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to the interests of the accused: and secondly that deprivation of the right could work to the accused's advantage and did not per se prejudice the accused's ability to defend himself. He continued: "Finally, and perhaps most importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial … Thus, as we recognized in Beavers v Haubert, any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case: … 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice'. The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.
>
> The view that discontinuance of the prosecution is the only possible remedy is, as I understand the position, derived from the particular provisions of the United States Constitution and is not necessarily to be taken as a general observation to be applied in relation to other constitutional instruments or declarations of rights. Justice Powell continued by discussing the appropriate approach to determining whether the right had been infringed. He rejected some suggested rigid rules and favoured a balancing test in which the conduct of both the prosecution and the defendant should be weighed. For the present purpose, I do not think that it is necessary to repeat what was said about the considerations which may be relevant in applying the test.
>
> There are thus two features of the right to trial within a reasonable time which may lead to difficulties and sometimes to unsatisfactory results in attempting to apply it, namely (1) that it is impossible to specify precisely what is a reasonable time and (2) that if the only remedy for a breach of the right is discontinuance of the prosecution, that may be unsatisfactorily severe from the public point of view. The difficulties are illustrated by the three, again very well known, decisions of the Judicial Committee of the Privy Council in **Bell v DPP of Jamaica, Darmalingum v The State** and Flowers v The Queen. In **Darmalingum***,* it was held that the only possible remedy, on the terms of the particular constitutional instrument involved and all the facts of the case, was discontinuance of the prosecution. In **Bell** and in **Flowers***,* a different result was reached. I do not think that it would really be helpful for the present purpose to attempt to analyse either the facts or the speeches in these cases in detail. There

17 Sanderson v. Attorney General, 3 BKRC 647 (S.A. Const. Ct. 1997)

is, I think, no doubt that if there has been such delay as to cause material prejudice to the fairness of any trial, the prosecution cannot proceed. Similarly, there would, I suppose, be no dispute that there may be cases in which delay has been so prolonged that it would be outrageous to allow criminal charges to proceed and discontinuance is the only remedy which can reasonably be regarded as appropriate, whatever general approach is being applied. **Darmalingum** might perhaps be regarded as a case of that kind. As regards the other two decisions, it is, in my view, sufficient to note that different results may easily be seen to be appropriate in different circumstances. What Justice Powell described as the "slippery character" of the right is also illustrated by the decision of the New Zealand Court of Appeal in **Martin v Tauranga District Council** in which a variety of opinions were expressed about the appropriate remedy, although it can perhaps be said that the majority tended to favour the view that discontinuance was not the only remedy for a breach.[18]

In that case, Lord Coulsfield was construing the application of the guarantee in Article 6 (1) of the European Convention on Human Rights and how they are applied to Scotland under legislation adopting the convention as national law.[19]

The House of Lords, like the Scottish court, views the right to a speedy trial under the convention and United Kingdom law as part of a package of fair trial rights. Deprivation of the right to a speedy trial does not necessarily result in the deprivation of a fair trial. The House of Lords wrote:

> [T]here is a right to a fair and public hearing; a right to a hearing within a reasonable time; a right to a hearing by an independent and impartial tribunal established by law; and (less often referred to) a right to the public pronouncement of judgment. It does not follow that the consequences of a breach, or a threatened or prospective breach, of each of these rights is necessarily the same.
>
> It is accepted as "axiomatic" that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all".
>
> In such a case the court must stay the proceedings. But this will not be the appropriate course if the apprehended unfairness can be cured by exercise of the trial judge's discretion within the trial process. Neither of these cases was based on the Convention, but neither is in any way discordant with the Convention jurisprudence. If it is established, after the event, that a trial was unfair, any resulting conviction will be quashed. This is what domestic law requires, and what the Convention requires.[20]

## 2.4. The United States of America

The United States' constitutional guarantee of a speedy trial differs from other states in several important ways, the most important being that it centers on the period between indictment or arrest and conviction. There is no U.S. right of a speedy appeal as is common in other jurisdictions.

The leading U.S. case on speedy trial is *Barker v. Wingo*.[21] *Barker* is notable for several reasons. First, it uses a balancing test to lay the blame for the delay on the prosecution or the defendant. Second, it recognizes that dismissal of charges is the only possible remedy for a deprivation of the right. Third, the Court listed the major reasons for the right to a speedy trial. The Court identified three interests protected by the right to a speedy trial:

> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire

18 *HM Advocate v. R* [2002] S.L.T. 834HM Advocate v. R [2002] S.L.T. 834, 837-38 (internal citations omitted).

19 The article reads in relevant part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

20 *Attorney General's Reference (No. 2 of 2001)* [2004] 1 Cr. App. R. 25Attorney General's Reference (No. 2 of 2001) [2004] 1 Cr. App. R. 25, paras. 13-14 (H.L.) (internal citations omitted).

21 *Barker v. Wingo,* 407 U.S. 514 (1972).

> system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.[22]

The Court rejected both a set time period in which a trial must commence and that the defendant demand a speedy trial.[23] Instead, the Court set four factors to be balanced to determine if a defendant's right to speedy trial was violated: 1) length of the delay;[24] 2) the reasons the government gives to justify the delay;[25] 3) the defendant's assertion of the right to speedy trial;[26] and 4) prejudice to the defendant.[27]

Generally, a delay approaching a year is sufficient to trigger a speedy trial claim and prejudice is presumed, *Doggett v. United States*.[28] The longer the delay, the greater the presumption of prejudice. *Id.* And, while the right to speedy trial does not accrue until a person is arrested or indicted, *United States v. McDonald,*[29] the government has a duty to arrest the defendant and bring him to trial once he is indicted or charged. *United States v. Cardona.*[30] So, if the government holds back on arresting the defendant to gain a tactical advantage, the pre-arrest delay weighs heavily against the government. Conversely, if the defendant is actively hiding and evading arrest, the delay weighs heavily against the defendant.

One factor especially relevant to trials before the ICC, the ICTY and ICTR is the availability of resources for the prosecution to try the accused. As will be shown, *infra,* the tribunals had significant shortfalls in resources such as courtroom space and the number of available judges.

In *Strunk v. United States*[31] and *Barker v. Wingo,* the Court held lack of resources – in *Strunk*, appropriations to hire sufficient prosecutors – was a factor weighing against the government. In *Barker v. Wingo,* the Court wrote:

> A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.[32]

The Sixth Amendment right to speedy trial centers on protecting the defendant from the prejudices and harms set out in *Barker v. Wingo.* A person may be entitled to a dismissal for violation of the Sixth Amendment right to speedy trial even though he could still receive a fair trial. This is the opposite of the view in jurisdictions such as the United Kingdom.

Additionally, the *Barker v. Wingo* analysis does not consider the interests of the government and the public in having criminal charges decided following a full trial. Stated simply, the Speedy Trial Clause of the Sixth Amendment can result in the freeing of a factually guilty person simply due to delay. A perfect example is *Cardona.* He was convicted of a drug conspiracy following a jury trial[33] yet in considering his appeal based on denial of speedy trial, the United States Court of Appeals for the Fifth Circuit held that based on his demand for a speedy trial after an unexplained five-year delay between indictment and arrest,[34]

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22 *Barker v. Wingo,* 407 U.S. 514 (1972), at 532.
23 *Barker v. Wingo,* 407 U.S. 514 (1972), at 529-30.
24 *Barker v. Wingo,* 407 U.S. 514 (1972), at 530-31.
25 *Barker v. Wingo,* 407 U.S. 514 (1972), at 531.
26 *Barker v. Wingo,* 407 U.S. 514 (1972), at 531-32.
27 *Barker v. Wingo,* 407 U.S. 514 (1972), at 532.
28 *Doggett v. United States,* 505 U.S. 647 (1992).
29 United States v. McDonald, 456 U.S. 1 (1982).
30 United States v. Cardona, 302 F., 3d 494 (5th Cir. 2002).
31 Strunk v. United States, 412 U.S. 434 (1973)
32 Strunk, 407 U.S., at 531.
33 Cardona, 302 F.3d, at 496.
34 The government filed a memorandum detailing its attempts to arrest Cardona but, in the words of the Fifth Circuit, "did not support its memorandum with a shred of evidence either then or at the later hearing." Cardona, 302 F.3d, at 497. If the government had shown diligence in attempting to arrest him, Cardona would have do shown actual prejudice rather than relying on a presumption. Cardona, 302 F.3d, at 497.

the government had the burden of showing a lack of prejudice.[35]

While *Cardona* is an outlier due to the government's failure to present apparently available evidence of attempts to arrest Cardona, it is an example of how the U.S. right to speedy trial can benefit a defendant who did not show he was actually prejudiced even by lengthy pretrial incarceration.[36] His guilt or innocence was not a factor in the appellate court's analysis and in fact was mentioned only when the opinion stated he was convicted after a jury trial.

## 3. Non-tribunal international jurisprudence

In this section, I will review jurisprudence from the two major and influential international bodies protecting human rights, the Human Rights Committee of the United Nations and the European Court of Human Rights. In 1966, the United Nations General Assembly adopted an optional protocol to the ICCPR establishing a Human Rights Committee to evaluate violations of the convention raised by individuals. The protocol went into effect in 1976.[37]

### 3.1. The human rights committee

The Human Rights Committee sets out its interpretation of the right of the convention in two ways. First, it issues "General Comments" on a variety of topics related to the ICCPR. Second, it decides individual cases.

#### *3.1.1. General comment 32 and speedy trial*

General Comment 32 gives the committee's views on Article 14 of the ICCPR's guarantees of fair trial[38] and the right to equality before the courts.[39] The comment first notes Article 14 contains "guarantees that States parties must respect, regardless of their legal traditions and their domestic law."[40] The general comment discusses the right to trial without undue delay in a single paragraph, which reads:

35 Cardona, 302 F.3d, at 499.

36 Cardona was indicted on April 23, 1995, but not arrested until October 28, 2000. He moved to dismiss on speedy trial grounds on January 28, 2001. *Id.,* at 496. His conviction was vacated and the indictment ordered dismissed by the Fifth Circuit on August 16, 2002.

37 Numerous states, including at least three permanent members of the U.N. Security Council, have not ratified the protocol. Non-party states include the United States, the United Kingdom, China, India, Egypt, Israel and Saudi Arabia. State parties to the optional protocol include Ireland, Italy, Mexico, the Republic of Korea and the Russian Federation. *See* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en>.

38 Article 14(3) of the Convention contains defendants' fair trial rights. It reads in full: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(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;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.
This section of the ICCPR was incorporated verbatim into the statues of the ICTY and ICTR.

39 General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (2007)

40 General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (2007), para. 4.

> The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused and the manner in which it was dealt with by the administrative and judicial authorities. In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible. This guarantee relates not only to the time between the formal charging of the accused and the time by which trial should commence, but also the time until the final judgment on appeal. All stages, whether in the first instance or on appeal must take place without "undue delay."[41]

It is noteworthy that the committee, charged with interpreting the ICCPR, interprets the guarantee of trial without undue delay to include not only the time between initiation of charges through commencement of the trial but the entire process including trial, deliberations on verdict and appeal. This is contrary to the practice in the United States, limiting the Sixth Amendment right to speedy trial to the period between arrest or initiation of formal proceedings through conviction.[42]

### *3.1.2. The committee's case law*

The committee strictly enforces the Article 14(3) (c) guarantee of trial without undue delay even in view of the governments' claims that lengthy investigations were required or that the government lacked the resources to provide a speedier trial or appeal. Additionally, once it is determined that the delay was excessive, the burden is on the government to show an acceptable reason for the delay.

An example is *Agudo v. Spain.*[43] Agudo was accused of a series of fraudulent bank transactions from 1971-83. Charges were initiated in 1983 and the trial judgment sentencing him to two years incarceration was delivered in 1994.[44] He was ordered incarcerated on the sentence in 1999, following appeal and a request for pardon.[45] He claimed the proceeding which lasted more than 15 years violated his right to a trial without undue delay.[46]

The committee granted Agudo relief. It held the Spanish government conceded the delay of 11 years through trial and 13 years through the appeal violated Agudo's rights under the ICCPR and that the government did not give an explanation for the delay.[47] It further held the government had an obligation to provide an effective remedy for denial of trial without undue delay, including compensation, and to ensure that defendants did not have to initiate a separate action to obtain compensation.[48]

Likewise, in *Hendricks v. Guyana,*[49] the committee found a violation in part due to the government's failure to explain a three-year delay between arrest and trial in a triple murder case in which the defendant was sentenced to death.[50] In a similar case, *Flipovich v. Lithuania,*[51] the committee found for a defendant charged with murder based on a four-year, three month investigation in a murder case.[52]

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41 General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (2007), para. 35 (internal citations omitted).
42 *Betterman v. Montana,* U.S. 136 S. Ct. 1609 (2016)
43 *Agudo v. Spain,* U.N. Doc. CCPR/C/76/D/864/1999 (2002)
44 *Agudo v. Spain*, U.N. Doc. CCPR/C/76/D/864/1999 (2002), para. 2.3.
45 *Agudo v. Spain*, U.N. Doc. CCPR/C/76/D/864/1999 (2002), para. 2.09-2.10.
46 *Agudo v. Spain*, U.N. Doc. CCPR/C/76/D/864/1999 (2002), para. 3.2.
47 *Agudo v. Spain*, U.N. Doc. CCPR/C/76/D/864/1999 (2002), para. 9.1.
48 *Agudo v. Spain*, U.N. Doc. CCPR/C/76/D/864/1999 (2002), para. 11.
49 *Hendricks v. Guyana,* U.N. Doc. CCPR/C/76/D/893/1998 (2002)
50 *Hendricks v. Guyana*, U.N. Doc. CCPR/C/76/D/893/1998 (2002), para. 6.3.
51 *Flipovich v. Lithuania, U.N. Doc. CCPR/C/78/D/875/1999 (2003)*
52 The offense was committed in September 1991 and the trial judgment delivered in January 1996. *Flipovich v. Lithuania*, U.N. Doc. CCPR/C/78/D/875/1999 (2003), para. 7.1.

> The Committee also takes note of the fact that the State party has not given any explanation of the reason why four years and four months elapsed between the start of the investigation and the conviction in first instance. Considering that the investigation ended, according to the information available to the Committee, following the report by the forensic medical commission and that the case was not so complex as to justify a delay of four years and four months, or three years and 2 months after the preparation of the forensic medical report, the Committee concludes that there was a violation of article 14, paragraph 3 (c).[53]

The committee applies the same failure to present proof of an excuse to delays in the appellate process. In *Mwamba v. Zambia,*[54] the committee considered a complaint of undue appellate delay in a case involving a former high-ranking police officer sentenced to death for the murder of a truck driver and theft 40 tons of copper cathodes. The offense occurred on March 24, 1999.[55] His trial began on September 1, 1999, and he was convicted on August 8, 2001.[56] He complained of a five-year delay in his appeal.[57] The government told the committee on February 9, 2007, that the appeal had yet to be heard due to "technical reasons" in that a verbatim transcript of the trial had not been typed.[58] The committee held:

> The Committee notes that the State party's only response to date to the author's allegations is that the appeal has not yet taken place "due to technical reasons" and it has provided no arguments on the substance of the author's claims. It reaffirms that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information. It is implicit in article 4, paragraph 2 of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.[59]

The committee ordered Zambia to afford Mwamba an unspecified relief including a review of his conviction and adequate reparations, including compensation.[60] However, a review of two cases from New Zealand shows the committee will find no violation of the convention if a state gives a reasonable explanation for the delay. In *Dean v. New Zealand,*[61] the committee reviewed a claim of undue appellate delay lodged by a man with a 40-year record of indecency convictions jailed indefinitely for fondling a 13-year-old boy in a movie theater. The offense occurred on June 24, 1995.[62] He pled guilty in district court, where she faced a maximum punishment of three years incarceration, but the judge transferred the case to the high court where he was liable for indefinite preventive detention. On November 3, 1995, the high court sentenced him to indefinite detention with a 10-year minimum sentence before parole.[63]

The initial appeal – where he was not represented by counsel – was denied on November 23, 1995. However, in subsequent appeals to the Privy Council and the Court of Appeals, the initial appeal was found flawed. He was granted appointed council and the Court of Appeal denied the subsequent appeal on December 17, 2004. The Supreme Court denied review on April 11, 2005.[64] He complained to the committee

53 As is the committee's practice, it ordered the government to provide the defendant with an effective but unspecified remedy (including compensation) and to ensure that future violations do not occur. *Flipovich v. Lithuania*, U.N. Doc. CCPR/C/78/D/875/1999 (2003), para. 10.
54 *Mwamba v. Zambia, U.N.* Doc. CCPR/C/98/D/1520/2006 (2010)
55 *Mwamba v. Zambia*, U.N. Doc. CCPR/C/98/D/1520/2006 (2010), para. 2.1.
56 *Mwamba v. Zambia*, U.N. Doc. CCPR/C/98/D/1520/2006 (2010), para. 2.3.
57 *Mwamba v. Zambia*, U.N. Doc. CCPR/C/98/D/1520/2006 (2010), para. 3.5.
58 *Mwamba v. Zambia*, U.N. Doc. CCPR/C/98/D/1520/2006 (2010), para. 4.
59 Mwamba v. Zambia, U.N. Doc. CCPR/C/98/D/1520/2006 (2010), para. 6.2.
60 Mwamba v. Zambia, U.N. Doc. CCPR/C/98/D/1520/2006 (2010), para. 8.
61 Dean v. New Zealand, U.N. Doc. CCPR/C/95/D/151/1512/2006 (2009)
62 Dean v. New Zealand, U.N. Doc. CCPR/C/95/D/151/1512/2006 (2009), para. 2.1.
63 Dean v. New Zealand, U.N. Doc. CCPR/C/95/D/151/1512/2006 (2009), para. 2.3.
64 Dean v. New Zealand, U.N. Doc. CCPR/C/95/D/151/1512/2006 (2009), para. 2.4.

that the appropriate remedy for the nine-year appellate delay was reduction of sentence from indefinite preventive detention to a finite term.[65]

The government, however explained the delays. According to the committee,

> The State party submits that the length of time taken in rehearing the author's appeal does not amount to a breach of article 14, and that even if it did, a reduction in sentence would not be an appropriate remedy as there was no harm to the author arising from the delay, and the rehearing of his appeal constituted a remedy for the flawed procedure followed in the determination of the author's first appeal. The State party submits that the initial appeal was heard and determined within reasonable time, on 21 March 1996. The author did not challenge the procedure by which his appeal was determined. After other appellants had challenged the procedure and as a result of consequent legislative amendments, the author was provided with an opportunity for a rehearing. He filed an application for a rehearing on 21 May 2003. The rehearing took place on 10 November and 15 December 2004. As admitted by the author, 12 months of that delay was due to unavailability of counsel. The State party therefore submits that the delay of seven years and three months in the determination of the author's appeal cannot be solely attributed to the State party.[66]

The committee accepted the government's explanation for the delay because it was backed up with facts. It wrote:

> The author has claimed that he is a victim of undue delay in the hearing of his appeal. The Committee notes that initially the author's appeal was heard in 1996, but that in 2002 a Privy Council and Court of Appeal judgement considered flawed the procedure applied in the hearing of the appeal. Subsequently the author was given an opportunity to apply for a rehearing of his appeal, which he did on 21 May 2003. The Court of Appeal rejected his appeal on 17 December 2004. In the specific circumstances of the case, the Committee considers that the delay in determining the author's appeal does not amount to a violation of article 14, paragraphs 3(c) and 5.[67]

Similarly, in *Jessop v. New Zealand,*[68] the case of a 15-year-old girl sentenced to four years incarceration for aggravated robbery, the committee found no violation of the right to trial without undue delay during a nine-year period between arrest and final appellate decision when the government accounted for the delays in detail. *Jessop* included a complex series of decisions, including transfer of the case from Youth Court to the High Court and numerous appeals. Further, the committee laid much of the blame for the appellate delay on Jessop and her attorney – who was out of the country and unavailable for two years, nine months of the appellate process.[69] She also was held responsible for considerable delays in rehearing of her case by the Court of Appeal after remand from the Privy Council and delay in seeking rehearing after the Supreme Court denied review.[70]

A significant factor in *Jessop* was the committee's lack of analysis. It simply held, "The issue of delay must be assessed against the overall circumstances of the case, including an assessment of the factual and legal complexity of the case,"[71] then without further analysis, decided,

> "In the specific circumstances of the case, the Committee considers that the delay in determining the author's appeal does not amount to a violation of article 14, paragraphs 3(c), paragraph 4 or paragraph 5 of the Covenant."[72]

### 3.2. The European Court of Human Rights

65 Dean v. New Zealand, U.N. Doc. CCPR/C/95/D/151/1512/2006 (2009), para. 3.4.
66 *Dean v. New Zealand*, U.N. Doc. CCPR/C/95/D/151/1512/2006 (2009) para. 4.6.
67 *Dean v. New Zealand*, U.N. Doc. CCPR/C/95/D/151/1512/2006 (2009), para. 7.2.
68 *Jessop v. New Zealand,* U.N. Doc. CCPR/C/101/D/1758/2008 (2011)
69 *Jessop v. New Zealand*, U.N. Doc. CCPR/C/101/D/1758/2008 (2011), para. 8.4.
70 *Jessop v. New Zealand*, U.N. Doc. CCPR/C/101/D/1758/2008 (2011), paras. 8.3-8.5.
71 *Jessop v. New Zealand*, U.N. Doc. CCPR/C/101/D/1758/2008 (2011), para. 8.2.
72 *Jessop v. New Zealand*, U.N. Doc. CCPR/C/101/D/1758/2008 (2011), para. 8.5.

The basic document containing the rights enforced by the ECHR is the European the general rights set out in Article 6(1). The relevant part is:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The language of the ECHR, unlike the ICCPR, does not grant a specific guarantee of speedy trial or trial without undue delay. Rather, the "fair and public hearing" must be within a "reasonable time." It follows that the right to hearing within a reasonable time is part of the general fair trial rights rather than a specific free-standing guarantee. It is not included in the guarantees for criminal defendants in Article 6 (3) of the convention.[73]

Like the Human Rights Committee, the ECHR publishes a handbook on the rights of defendants guaranteed by the convention, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)*.[74] I will examine both the guide and case law separately.

### *3.2.1. The guide on article 6*

Reasonable time for a hearing begins when charges are preferred.[75] When it ends is less definite. It continues through the final determination of guilt or innocence, even if the determination is by an appellate court[76] and at least until the sentence is definitely fixed.[77]

Factors to be considered in determining if the time for the proceeding is based on an overall evaluation of the proceeding. Thus, a "reasonable time" may be exceeded even if some stages of the proceeding are completed with acceptable speed and some not.[78] The ECHR looks to the complexity of the case, the defendant's conduct and the conduct of applicable administrative and judicial officials in determining whether the proceedings were within a reasonable time.[79]

Complexity is determined using numerous factors including the number of counts, the number of accused and witnesses, the international dimensions of the case such as the need to investigate in several countries and the type of case. The guide uses as an example "white collar" cases of large scale fraud involving numerous companies and complex transactions designed to hide fraud.[80] Even in complex cases, long periods of unexplained inactivity by the authorities generally are not considered reasonable.[81]

In reviewing the defendants' conduct, the court does not require them to cooperate with the authorities and they may take advantage of national criminal procedure resulting in delays. However, their conduct is a

73 Article 6(3) lists the following specific guarantees for defendants:
Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defense;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

74 *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)* Hereinafter "the guide." The English version is available on the internet at <http://www.echr.coe.int/ Documents/Guide_Art_6_criminal_ENG.pdf>. Versions are available in numerous other languages on the court's website.

75 *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb),* para. 182.

76 *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb),* para. 186.

77 *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb),* para. 187.

78 *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb),* para. 189.

79 *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb),* para. 191.

80 *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb),* para. 192.

81 *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb),* para. 193.

fact which is taken into consideration in determining if the overall time is reasonable.[82]

The authorities have a duty to design the judicial system to meet its requirements. Heavy workload and measures to redress them are rarely given decisive weight by the court. If an accused is in pretrial detention, the court finds protracted periods of inactivity unacceptable.[83]

### *3.2.2. ECHR jurisprudence*

Like the Human Rights Committee, the ECHR looks for reasonable explanations of delays from the authorities and, in their absence, will find that delays were unreasonable. For example, in *Bozkaya v. Turkey,*[84] the court simply repeated the mantra,

> "The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities,"[85]

then found a five and one half year delay between arrest and the end of the appellate process was unreasonable. Of importance to the court's decision were unexplained delays of 10 months and two years while the case was on appeal.[86]

The converse of *Bozkaya* is *Wemhoff v. Germany.*[87] In that case, involving a bank fraud, in which the defendant was arrested on November 9, 1961, and was indicted on July 7, 1964. He was convicted on April 7, 1965, and sentenced to six years, six months incarceration. His pretrial detention was credited to his sentence. His appeal was denied on December 17, 1965, and he was released on October 20, 1966, after serving two-thirds of his sentence. The court relied on evidence from the German government that the case was handled expeditiously and held:

> The Court therefore, having found no failure on the part of the judicial authorities in their duty of particular diligence under that provision, must a fortiori accept that there has been no contravention of the obligation contained in Article 6 (1) (art. 6-1) of the Convention. Even if the length of the review proceedings (Revision) is to be taken into account, it certainly did not exceed the reasonable limit.[88]

## 4. The themes of non-tribunal jurisprudence

Lord Coulsfield's view of Justice Powell's description of the right to speedy trial as "slippery"[89] is how the courts and the committee construe and apply the right to trial without undue delay or speedy trial. There are no fixed limits and no solid criteria to determine if the right has been violated. Rather, it is similar to U.S. Supreme Court Justice Potter Stewart's definition of obscenity: "I know it when I see it."[90] However, some themes run through the case law.

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82 Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb), para. 194.

83 Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb), paras. 198-99.

84 Bozkaya v. Turkey, No. 46661/09, ECHR 2017, <*https://hudoc.echr.coe.int/eng#{"itemid":["001-57595"]}*>. In citing ECHR cases, this paper uses the citation form recommended by the Court and includes the internet address for the decision.

85 Bozkaya v. Turkey, No. 46661/09, ECHR 2017, para. 59.

86 Bozkaya v. Turkey, No. 46661/09, ECHR 2017, para. 60. The court found that its finding of violations of the ECHR was sufficient "just satisfaction" for the defendant, especially in view of his right to request a new trial. It awarded him 2,000 Euros as compensation for non-pecuniary damages (paras. 69-70).

87 Wemhoff v. Germany, No. 2122/64, ECHR 1968, <https://hudoc.echr.coe.int/eng#{"appno": ["2122/64"],"itemid":["001-57595"]}>.

88 *Wemhoff v. Germany,* No. 2122/64, ECHR 1968*,* para. 20.

89 *Barker v. Wingo,* 407 U.S., at 523.

90 *Jacobellis v. Ohio,* 378 U.S. 184 (1964).

First, if the delay appears to be long, courts likely will find no violation of the right if the authorities acted expeditiously. However, in the absence of proof offered by the authorities to explain delays, a violation is more likely to be found. Second, a systemic lack of resources likely will be held against the government and relief is more likely to be granted. Third, if a defendant attempts to "game" the system by using procedural means to delay the proceeding, the claim is more likely to fail. This also is true if the defendant actively evades arrest.

Fourth, the complexity of the case matters. The more defendants, the more witnesses, the more charges, the more evidence, the more likely that long periods between arrest and resolution will be accepted as reasonable. Fifth, the authorities have to act reasonably and diligently to bring the case to resolution. Negligence or delay to gain advantages by the government makes it more likely a violation will be found. Sixth, prejudice to the defendant ranging from excessive pretrial detention to loss of witnesses makes a finding of violation more likely.

Seventh, while the courts rarely discuss it, society as a whole has an interest in trials without undue delay under the theory that justice delayed is justice denied. Eighth, the remedy is unclear. As the House of Lords held in *Attorney General's Reference No. 2,* if a person cannot be tried fairly, he should not be tried at all but that judges often can fashion remedies to protect defendants whose trials have been unreasonably delayed. On the other hand, some states such as the United States hold the sole remedy is dismissal of charges.

Ninth and most important, the courts either explicitly or implicitly use balancing tests. The U.S. Supreme Court and the European Court of Human rights are explicit in the factors used in their balancing factors while other courts are less so. However, as in all balancing tests, there is substantial room for the judge to "balance" the factors in such a way that the tribunal gets the outcome it wants.

## 5. The ICTY/ICTR/ICC and speedy trial

### 5.1. The *ad hoc* tribunals

The leading case – and the most hotly litigated case – on trial without undue delay at the *ad hoc* tribunals, the ICTY and the ICTR, involved Prosper Mugurineza, the former minister of civil service in Rwanda. It is the leading example how the *ad hoc* tribunals handled complaints of violation of the right to trial without undue delay.

Prior to the trial and after being incarcerated without bond for four years, Mugiraneza asked the Trial Chamber to dismiss the indictment against him.[91] The Trial Chamber denied relief, holding it had to balance Mugiraneza's rights against the fundamental purpose of the Tribunal, prosecuting those responsible for the Rwandan genocide.[92] The Trial Chamber held that Mugiraneza's rights under the statute had to be balanced with the need to ascertain the truth of the offenses with which he was charged.[93]

On interlocutory appeal, the Appeals Chamber vacated the Trial Chamber decision and adopted a five--prong test to determine whether the right to trial without undue delay was violated. The factors are:

91 *Prosecutor v. Bizimungu,* No. ICTR-99-50-I, Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20(c)(4) of the Statute, Demand for Speedy Trial and for Appropriate Relief (17 July 2003).

92 *Prosecutor v. Bizimungu,* No. ICTR-99-50-I, Decision on Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and Appropriate Relief (3 October 2003), para. 11.

93 *Prosecutor v. Bizimungu*, No. ICTR-99-50-I, Decision on Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and Appropriate Relief (3 October 2003), para. 12.

1. The length of the delay.

2. The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of law and fact.

3. he conduct of the parties.

4. The conduct of the relevant authorities.

5. The prejudice to the accused, if any.[94]

In effect, the Appeals Chamber adopted the *Barker v. Wingo* analysis with the addition of consideration of complexity of the case. The Appeals Chamber specifically disapproved the Trial Chamber's holding that there was no need to inquire into the actions of the Prosecutor.[95] It also disapproved using the "fundamental purpose" of the Tribunal – prosecuting those responsible for the 1994 genocide – as a factor in the equation.[96]

*Mugiraneza* is the leading case at the ICTY and ICTR for determining whether a defendant was deprived of his right to trial without undue delay. As will be shown, many ICTR trials and appeals involved defendants in pretrial confinement for years. Apparently no ICTR defendant was granted pretrial release.[97] The ICTY granted provisional release to several defendants but required them to return to custody during trial.

Of importance to the Tribunals' jurisprudence on trial without undue delay, the *Mugiraneza* Trial Chamber on remand continued to balance the right of trial without undue delay with the purpose of the Tribunal. It wrote:

[T]he Trial Chamber must also be vigilant to ensure that the right to a trial without undue delay is balanced with the need to ascertain the truth about the serious crimes with which the Accused is charged.[98]

The *Bizimungu* trial (also known as *Government II*) began November 6, 2003, about four and a half years after the accused were arrested in April 1999. The prosecution presented 57 witnesses over 178 trial days.[99] The defense case for all four defendants began November 1, 2005, and ended June 12, 2008. The four defendants presented a total of 114 witnesses over 221 trial days.[100] The Trial Chamber judgment was announced on September 30, 2011, and issued in written form on October 19, 2011.[101]

In both the Trial Chamber judgment and the Appeal Chamber judgment, there were partially dissenting opinions on denial of the right to trial without undue delay. Both centered on the delay between the end of the trial and the Trial Chamber judgment. In the Trial Chamber, Judge Short found violation based on administrative problems and delays caused by the Tribunal, including assigning the other judges to other cases. He would have reduced the sentences of Mugiraneza and co-defendant Justin Mugenzi from 30 years

94 *Prosecutor v. Mugiraneza,* No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand for Speedy Trial and Appropriate Relief (27 February 2004), at 3.

95 Prosecutor v. Mugiraneza, No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand for Speedy Trial and Appropriate Relief (27 February 2004),

96 Prosecutor v. Mugiraneza, No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand for Speedy Trial and Appropriate Relief (27 February 2004).

97 Until May 2003, the ICTR Rules of Procedure and Evidence made provisional release "exceptional." This is the reverse of Article 9(3) of the ICCPR which makes provisional release pretrial the standard.

98 *Prosecutor v. Bizimungu,* No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Application for a Hearing or other Relief on His Motion for Dismissal for Violation of His Right to Trial Without Undue Delay (3 November 2004), para. 32. The Trial Chamber denied leave to file an interlocutory appeal of that decision. *Prosecutor v. Bizimungu,* No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Leave to Appeal From the Trial Chamber's Decision of 3 November 2004 (24 February 2005).

99 *Prosecutor v. Bizimungu,* No. ICTR-99-50-T, Judgment (30 September 2011), Annex A Procedural History, para. 29.

100 *Prosecutor v. Bizimungu,* No. ICTR-99-50-T, Judgment (30 September 2011), Annex A Procedural History, para. 81.

101 *Prosecutor v. Bizimungu,* No. ICTR-99-50-T, Judgment (30 September 2011), Annex A Procedural History, para. 161.

to 25 years on the counts on which they were convicted.[102] In the Appeals Chamber, the claims of violation of the right to trial without undue delay were dismissed by the majority. Both defendants were acquitted on the two counts of conviction based on insufficiency of the evidence.[103] Judge Robinson agreed with Judge Short's analysis of the excessive time writing the trial judgment. He would have granted Mugiraneza and Mugenzi both $5,000 as compensation.[104]

In a decision handed down about two years later in the *Butare* case,[105] a similarly constituted Appeals Chamber – including Judge Khan, the presiding judge from the *Government II* trial – found a violation of the right to trial without undue delay based on arguments similar to those raised on appeal in *Government II*.

The *Butare* case differed from *Government II* in two important respects. First, the Appeals Chamber affirmed convictions as to all six *Butare* defendants while both *Government II* appellants were acquitted on appeal due to insufficiency of the evidence.[106] The second is the length of trial and pre-trial confinement. The *Butare* defendants had been in custody for varying periods beginning in 1995 and the trial did not commence until December 2001. It ended in December 2008 after 714 trial days. By the time the *Butare* appeal judgment was delivered, one of the defendants had been in custody almost 21 years.[107]

The *Butare* Appeals Chamber centered its analysis on two major factors: delays caused by the prosecution, especially delays in discovery; and delays caused by the assignment of the *Butare* judges to other cases during the *Butare*. As to the prosecutor's failure to disclose documents to the defense, the Appeals Chamber wrote:

> Although the Prosecution acknowledged its lack of readiness and belatedness in fulfilling its disclosure obligations, upon which the start of the trial depended, it does not provide any explanation as to why it was not in a position to disclose some of the relevant materials despite express orders from the Trial Chamber or why it repeatedly changed the date for its readiness to commence trial. While the trial was postponed by one month as a result of the death of Judge Kama, the record shows that the fact that the trial was delayed to spring 2001 was largely caused by the Prosecution's inability to meet its disclosure obligations and lack of readiness. In light of the foregoing, the Appeals Chamber finds that the Prosecution's failure to fulfill its disclosure obligations created unjustified delays in the start of the trial.[108]
>
> As to delays caused by the judges' participation in other trials, the Appeals Chamber held:
>
> 375. It is unquestionable that the pace of the trial was affected by the judges' obligations in other cases. Whereas the proceedings in this case needed interruptions so as to allow the parties to prepare, the judges' obligations in other cases prevented them from sitting in this case for approximately 36 weeks. In light of the time required to dispose of the motions filed in these other cases, deliberate on their merits, and write the judgements, these additional obligations also necessarily significantly reduced the time the Trial Chamber judges could devote to the present case.
>
> 376. The Appeals Chamber observes that it was practice for judges of the Tribunal to participate simultaneously in multiple proceedings given the workload of the Tribunal during the relevant period. It also notes that significant efforts were made by the authorities of the Tribunal to obtain the necessary resources to complete its mandate while ensuring the utmost respect for the rights of all accused. However, in the particular circumstances of this case where the co-Accused had already been in detention for nearly 4 to 6 years at the start of the trial and which had already suffered from significant delays, the Appeals Chamber concludes that the additional delays resulting from the judges' simultaneous participation to other proceedings caused undue delay. The Appeals Chamber recalls that

102 *Prosecutor v. Bizimungu,* No. ICTR-99-50-T, Judgment (30 September 2011), Annex A Procedural History, paras 5-7 (Short., J., dissenting).

103 *See generally, Mugenzi v. Prosecutor,* No. ICTR-99-50-A, Judgment (4 February 2013).

104 *Mugenzi v. Prosecutor*, No. ICTR-99-50-A, Judgment (4 February 2013), paras. 1-12 (Robinson, J., dissenting).

105 *Prosecutor v. Nyiramasuhuko,* No. ICTR-98-42-A, Judgment (14 December 2015).

106 Two *Government II* defendants were acquitted by the Trial Chamber and the prosecutor did not appeal the acquittals.

107 And his sentence was reduced on appeal to 20 years.

108 *Butare* appeal judgment, para. 372.

> logistical considerations should not take priority over the trial chamber's duty to safeguard the fairness of the proceedings. In the same vein, the Appeals Chamber is of the view that organisational hurdles and lack of resources cannot reasonably justify the prolongation of proceedings that had already been significantly delayed.[109]

The most important holding on right to trial without undue delay was the Appeals Chambers holding that unexplained lengthy detention alone can constitute prejudice for purposes of *Mugiraneza*. The Appeals Chamber held:

> However, the Appeals Chamber recalls its finding that the present proceedings were unduly delayed as a result of the Prosecution's conduct and the Trial Chamber judges' simultaneous assignment to multiple proceedings, delays which are not attributable to the co-Accused. These delays prolonged the detention of the co-Accused. The Appeals Chamber finds that these delays and the resulting prolonged detention constitute prejudice per se and that the Trial Chamber erred in concluding that the co-accused did not suffer prejudice.[110]

The Appeals Chamber granted the defendants relief in the form of sentence reductions.[111] The *Butare* Appeals Chamber holding is similar to the holdings of the Human Rights Committee and the ECHR in that *unexplained* delays can result in findings of speedy trial violations while delays with reasonable explanations likely will not. Also of importance in the *Butare* appeals judgement is the recognition that lengthy pretrial delay standing alone can be prejudicial to the accused.

Of importance to the analysis is the different positions taken by Judge Khan in *Government II* and *Butare*. In *Government II,* she did not join Judge Short in finding a violation of the right due to the length of the judgment drafting process caused by the assignment of the judges to other cases. However, in *Butare,* she found violations based on assignment of judges to other cases during the trial. This shows the slipperiness and lack of solid analytical factors in the determination of whether a defendant's right to trial without undue delay has been violated.

The Appeals Chamber of the Mechanism for International Criminal Tribunals, the successor to the ICTY and ICTR, recently followed the *Government II* holding, finding that a 12-year period of incarceration between arrest and trial judgment was not *per se* prejudicial.[112]

## 5.2. The International Criminal Court

The ICC apparently has not considered the application of the right to trial without undue delay in detail as the ICTR Appeals Chamber did in *Mugiraneza, Government II* and *Butare*. The discussions of that right usually are in conjunction with other matters and the right is mentioned in passing.

For example, in *Prosecutor v. Dyilo,*[113] a Trial Chamber cited the statutory provision,[114] and discussed it in light of the prosecutor's duty to disclose information it obtained under a confidentiality agreement as well as the prosecutor's duty to have the agreements lifted in a timely manner.[115] On appeal of that decision and related decisions, the Appeals Chamber again cited the right and stated the Trial Chamber equated the right to trial without undue delay with a fair trial.[116] It held that a Trial Chamber could stay proceedings in order

109 *Butare* appeal judgment, paras. 375-376.
110 *Butare* appeal judgment, para. 388.
111 *See generally, Butare* appeal judgment, paras. 3521-3538.
112 *Prosecutor v. Seselj,* No. MICT-16-99-A, Judgment (11 April 2018), para. 42 and n. 130.
113 *Prosecutor v. Dyilo,* N°. ICC-01/04-01/06, Public Decision Regarding the Timing and Manner of Disclosure and the Date of Trial (9 November 2007).
114 *Prosecutor v. Dyilo*, N°. ICC-01/04-01/06, Public Decision Regarding the Timing and Manner of Disclosure and the Date of Trial (9 November 2007), para. 1.
115 *Prosecutor v. Dyilo*, N°. ICC-01/04-01/06, Public Decision Regarding the Timing and Manner of Disclosure and the Date of Trial (9 November 2007), para. 19.
116 *Prosecutor v. Dyilo,* No. ICC-01/04-01/06 OA 13, Judgment on the appeal of the Prosecutor against the decision of Trial

to obtain release of information but,

> [T]he right of any accused person to be tried without undue delay (article 67 (1) (c) of the Statute) demands that a conditional stay cannot be imposed indefinitely. A Chamber that has imposed a conditional stay must, from time to time, review its decision and determine whether a fair trial has become possible or whether, in particular because of the time that has elapsed, a fair trial may have become permanently and incurably impossible. In the latter case, the Chamber may have to modify its decision and permanently stay the proceedings.[117]

However, the Appeals Chamber also held:

> If a trial that is fair in all respects becomes possible as a result of changed circumstances, there would be no reason not to put on trial a person who is accused of genocide, crimes against humanity or war crimes - deeds which must not go unpunished and for which there should be no impunity (see paragraphs 4 and 5 of the Preamble to the Statute).[118]

The Appeals Chamber's decision in *Dyilo* makes it likely that the ICC will construe the right to trial without undue delay as a component of the right to a fair trial. The ICC likely will follow the lead of the House of Lords in *Attorney General's Reference (No. 2 of 2001)* and allow trials to continue – and convictions stand – regardless of delays as long as the underlying trial is considered fair.

## 6. Reason for lengthy delays in international trials

In this section, I discuss reasons *why* it takes so long to complete trials in international courts. The length of time for trials runs from as short as 10 days in one ICTY case to multi-year marathons at both tribunals.[119] In examining the reasons for the length of trials, primarily at the ICTY and ICTR, I will examine systemic delays caused by the structure of the tribunals, delays caused by other internal United Nations problems, selection of defendants and the complexity of the litigation.

The ICC, which is a newer body, will be considered separately since it has completed only two cases through trial and appeal. In reviewing the reasons, I will rely on trial records such as judgments and motions, U.N. documents and my own experience as legal assistant and co-counsel at the two *ad hoc* tribunals.

### 6.1. Structure of the tribunals: number of judges

The initial statute of the ICTY was in a report to the Security Council by the Secretary General.[120] It provided for 11 judges – two trial chambers with three judges each and an appeals chamber with five judges.[121] The Security Council later added a third trial chamber with three additional judges.[122]

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Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008" (21 October 2008) paras. 80-81.

117 *Prosecutor v. Dyilo*, No. ICC-01/04-01/06 OA 13, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008" (21 October 2008), para. 81.

118 *Prosecutor v. Dyilo,* No. ICC-01/04-01/06 OA 13, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008" (21 October 2008), para. 80.

119 The International Military Tribunal at Nuremberg took only 218 trial days. The last two days were the reading in full of the judgment and sentences. The trial began with opening statements on November 20, 1945, and the final session – announcing sentences was on October 1, 1946. Twenty-one high-ranking government officials were tried in that case.

120 Statute of the ICTY, U.N. Doc. S/25704 (3 May 1993)

121 Statute of the ICTY, U.N. Doc. S/25704 (3 May 1993). para. 73.

122 U.N. Doc. S/RES/1116 (1998)U.N. Doc. S/RES/1116 (1998).

The ICTR was created by the Security Council on November 8, 1994.[123] The statute of the ICTR established two trial chambers with three judges each and five judges on the appeals chamber.[124] However, the ICTR appeals chamber was to be the ICTY appeals chamber,[125] effectively making the five ICTY appeals chamber judges members of both tribunals. The Security Council created a third ICTR trial chamber and added three judges in 2002.[126]

To further increase the number of judges, the Security Council created pools of *ad litem* judges, that is temporary judges who could be called to active service. The ICTY was authorized a pool of *ad litem* judges, up to nine could be in active service at any time.[127] The same resolution created two additional ICTR judges to serve on the appeals chamber at the ICTY. Thus, the appeals chamber for both tribunals consisted of seven judges – five from the ICTY and two from the ICTR – who sat in five-judge panels to hear appeals.

In 2002, the Security Council created a pool of *ad litem* judges for the ICTR with up to nine on active service at any time.[128] Essentially, the Security Council authorized up to 18 trial chamber judges at each tribunal or six three-judge trial chambers.

As originally created, each of the *ad hoc* tribunals effectively could try only two cases. Later, each could try three cases. The tribunals through creative scheduling could try more cases by, for example, trying one case in the morning and a second case in the afternoon or by scheduling trial sessions for multiple cases in which some trials were in session while others were adjourned. Each tribunal used both techniques to increase the number of trials being heard at a time.

However, the authorization of *ad litem* judges did not immediately impact the ICTR's ability to try cases. Although nine active *ad litem* judges were authorized, only five were initially assigned due to the lack of permanent judges required on each trial chamber panel. The U.N.'s board of auditors in its review of ICTR in 2003 found that too many permanent judges already were engaged in lengthy trials to allow use of the full complement of *ad litem* judges.[129]

In the "best practices" manual published by the ICTY, it was estimated that using the ICTY system of split day trials with one trial in the morning and other in the afternoon, there would be 3.5 effective trial hours per day or 17.5 hours per week.[130] Presumably, if only a single trial was conducted in each courtroom, there would be 7 hours per day or 35 hours per week.

## 6.2. Structure of the tribunals: physical plant

Both the ICTY and the ICTR were temporary organizations housed in facilities not designed as courthouses. The ICTY was in building formerly housing the headquarters of a Dutch insurance company and the ICTR was in a conference center/office complex, the Arusha International Conference Centre.

The ICTY initially converted a lobby area into a large courtroom with a public gallery which could accommodate multi-defendant trials or appeals. It subsequently added a small courtroom designed for motions hearings but later used for single defendant trials. That courtroom was not directly accessible to the public. Spectators and defense teams had to be escorted by security personnel to the room. The ICTY eventually added a third, large courtroom with a public gallery suitable for multi-defendant trials.[131]

123 Statute of the ICTR, U.N. Doc. S/RES/994 (1994)
124 Statute of the ICTR, article 11.
125 Statute of the ICTR, article 12(2).
126 U.N. Doc. S/RES/1411 (2002)U.N. Doc. S/RES/1411 (2002).
127 U.N. Doc. S/RES/1329 (2000). U.N. Doc. S/RES/1329 (2000).
128 U.N. Doc. S/RES/1512 (2003)
129 U.N. Doc. A/59/5/Add. 11 (2004). U.N. Doc. A/59/5/Add. 11 (2004) [hereinafter 2004 Audit Report], paras. 42-43.
130 INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA. *ICTY Manual on Developed Practices,* 2009. p. 73.
131 The author practiced in both of the large ICTY courtrooms but was never in the smaller courtroom.

The ICTR had a more difficult problem with courtrooms. It initially created three courtrooms by knocking out walls in the AICC office wings and turning them into long, narrow courtrooms with public galleries. All three were suitable for multi-defendant trials. It eventually converted space in the building to a fourth courtroom, albeit one without all of the audio-visual equipment in the other three courtrooms. The upshot was that an any given moment, the ICTY could conduct hearings in three cases and the ICTR in four.

### 6.3. Languages and translations

All three tribunals work in multiple languages. For the ICTY, it was English, French and Bosnian Serbo-Croatian. For the ICTR, it was English, French and Kinyarwanda. This creates two separate reasons for lengthy proceedings. In trials and hearings, all testimony and argument had to be translated from the language of the speaker into the other two languages. This necessarily slows proceedings. Estimating the delay from the number of pages of transcript, the *ad hoc* tribunals could take about half to two-thirds as much testimony in an eight-hour day as a trial in the United States conducted in one language.

Document translation likewise was a significant cause of delay. In each case, thousands of documents had to be translated from the original language into French and English. Most often the originals were in the native language of the defendants but at times, a document would be in one of the tribunal's working languages and it had to be translated into the other. This often was true for court documents. An example is the six-defendant *Butare* case.[132]

The first arrested defendant was taken into custody in 1995. The last was arrested in 1998. The trial began June 12, 2001, and testimony ended December 2, 2008, after 714 trial days.[133] The 1548-page trial chamber judgment was delivered in English only on July 14, 2011.[134]

Under the ICTR rules of procedure and evidence, notice of appeal listing grounds for appeal was due 30 days later, August 14, 2011.[135] Because one defense team worked in French, not English, the pre-appeal judge granted an extension of time to file the notice of appeal until 90 days after they were served with a French translation of the judgment.[136] When an English-speaking co-counsel was added to that defense team, the pre-appeal judge ordered the notice of appeal filed by May 1, 2012, and it was in fact filed April 26, 2012, almost two years after the Trial Chamber judgment was delivered.[137] On July 2, 2011, the pre-appeal judge granted an extension of time to file the defense appellate briefs until 60 days after service of the French trial judgment.[138] The French translation of the judgment was served on the parties February 1, 2013, and the defendants' appeal briefs were filed about two months later.[139] Thus, the appellate process in the *Butare* case was delayed about 16 months simply due to translation the trial judgment.[140]

Translations of documents in general also was a significant cause of cost and delay. In January 2004, the U.N. Office of Internal Oversight Services (OIOS)[141] delivered a report to the General Assembly on document translation at the ICTY. Of importance to delays and costs was the OIOS finding that the ICTY prosecutor was paying non-certified translators, that is translators who had not passed the U.N. translator's examination, $14 per page of translation with an average of 12 pages per day compared to six pages per day

132 *See* note 107, *supra*.
133 *Butare* case trial judgment, paras 6541 and 6597.
134 *Butare* case appeal judgment, Annex A, para. 2.
135 ICTR Rules of Procedure and Evidence, Rule 108.
136 *Butare* case appeal judgment, Annex A, para. 3.
137 *Butare* case appeal judgment, Annex A, para. 6.
138 *Butare* case appeal judgment, Annex A, para. 11.
139 *Butare* case appeal judgment, Annex A, para. 14.
140 The appeal judgment is 1307 pages long and is dated December 14, 2015, just a few weeks short of 21 years after the first defendant taken into custody.
141 OIOS essentially is the inspector general for the United Nations.

at $81 per page for translations by certified translators.[142]

At the ICTR, in 2003, it was standard practice for a translator to translate five pages of 300 words each per day.[143] As of April 2004, there was a backlog of 2,400 pages awaiting final translation.[144]

### 6.4. Complex litigation

By any standard, most trials before the *ad hoc* tribunals and the ICC are complex litigation. They involve multi-count indictments, often multiple defendants and complex factual and legal questions, often including legal issues of first impression. This is especially true in multi-defendant trials.

Multiple defendant trials add time and complexity for another reason. Each witness is subject to cross examination by each party. For example, in a four-defendant trial, each prosecution witness is subject to direct examination by the prosecutor and cross examination by each of the four defendants. At times, some or all of the parties will either have no cross examination or limited cross examination but other witnesses may be subjected to detailed and lengthy cross examination.

Logistical problems such as transporting witnesses to either The Hague or Arusha, Tanzania, also complicate the trials. Witness transportation must be coordinated with trials and housing for the witnesses while they are at the tribunals.[145]

### 6.5. Bureaucratic infighting within the ICTR

A dispute developed between the ICTR registrar and the prosecutor over who had the authority to hire members of the OTP staff. Article 15(5) of the ICTR Statute gives the prosecutor authority to select the OTP staff. However, in May 2002, the U.N. secretary general gave hiring authority to the head of office. The ICTR registrar took that to mean he had the authority to select and promote OTP staff.[146] Although not mentioned in the OIOS report, the dispute between the prosecutor and registrar also effected hiring and promotions of other members of the OTP staff, including line prosecutors.

This bureaucratic infighting within the ICTR[147] led to a delay of more than a year in filing two of the top jobs within the OTP, deputy prosecutor and chief of prosecutions.[148] This occurred during a period in which the ICTR and ICTY had a single chief prosecutor. So, the deputy prosecutor at the ICTR was an especially important post because he was the person in charge of the day-to-day operations of the OTP in Arusha.

### 6.6. The ICC

The ICC has 18 judges,[149] including five in the Appeals Division who cannot serve as trial or pre-trial judges.[150] The remaining 15 are in three-judge trial chambers or pre-trial chambers.[151] The court's new permanent headquarters has three courtrooms. Given the relatively short time the court has been in existence

142 U.N. Doc. A/58/667 (2004)U.N. Doc. A/58/667 (2004) [hereinafter OIOS report], para. 26.
143 2004 Audit Report, para. 77.
144 2004 Audit Report, para. 80.
145 The ICTY used commercial air to transport witnesses and staff between the former Yugoslavia and The Netherlands. The ICTR relied primarily on a chartered Beechcraft King Air which made two flights between Kigali, Rwanda, and Arusha, Tanzania, per week. ICTY witnesses were housed in hotels while ICTR witnesses generally were housed and fed in safe houses leased by the tribunal.
146 OIOS Report, para. 20.
147 And the prosecutor's failure to understand general U.N. recruitment and personnel regulations.
148 OIOS Report, para. 22.
149 Rome Statute, Article 36(1).
150 Rome Statute, Article 39(1) and 3(b).
151 Rome Statute, Article 39(2) (b).

and the few cases tried through appeals, it is impossible to determine how long it likely will take to try cases before the ICC.

However, the ICC Rules of Procedure and Evidence contain provisions likely to slow trials. For example, they have a preference for multi-defendant trials.[152] There also are provisions for interlocutory appeals in the Statute and Rules, especially Article 82(1)(d), allowing interlocutory appeals of a decision

> that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

## 7. Remedies for violation of the right

As discussed, *supra.,* several remedies have been used when violations of the right to trial without undue delay are found. They range from dismissal of the charges to the simple satisfaction to a defendant that the violation has been noted by the authorities. In this section of this paper, I will discuss the strengths and limitations of the various proposed remedies.

### 7.1. Dismissal

In *Strunk,* Chief Justice Burger, writing for a unanimous Court, held that dismissal is the only available remedy to cure a violation of the Sixth Amendment right to speedy trial. The Chief Justice reasoned:

> By definition, such denial [of the right to speedy trial] is unlike some of the other guarantees of the Sixth Amendment. For example: failure to afford a public trial, an impartial jury, notice of charges, or compulsory service can ordinarily be cured by providing those guaranteed rights in a new trial. The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial or of receiving a sentence longer than, or consecutive to, the one he is presently serving – uncertainties that a prompt trial removes.
>
> It is true that **Barker** described dismissal of an indictment for denial of a speedy trial as an "unsatisfactorily severe remedy." Indeed, in practice, "it means that a defendant who may be guilty of a serious crime will go free, without having been tried." **407 U.S., at 522**. But such severe remedies are not unique in the application of constitutional standards. [153]

The Chief Justice is correct that no remedy other than dismissal can truly remedy a denial of a speedy trial. While one deprived of other trial rights can receive a remedy in the form of a new trial, a new trial cannot turn back the calendar and remove the taint of a denial of speedy trial.

However, the harsh remedy makes judges reluctant to find a violation of the right. Instead, they can rely on the flexible standards set out in *Barker* to find no speedy trial violation. The alternative is freeing a criminal, often one already convicted by a jury. That was the result in *Cardona.*

On the other hand, remedies for other constitutional violations also can result in the release of a demonstrably guilty man. A person caught with a kilogram of cocaine is equally guilty regardless of whether he is convicted by a jury or freed because a judge suppressed the evidence due to a lack of probable cause for the search.

152 ICC Rules of Procedure and Evidence, Rule 136(1).

153 *Strunk,* 412 U.S., at 438-39.

### 7.2. Dismissal if the defendant cannot be tried fairly

The remedy adopted by the House of Lords – try the defendant if he can be tried fairly or dismiss the case – addresses some of the prejudice experienced by a defendant due to unreasonable delays but not others. So, for example, if a key defense witness dies or is otherwise unable to testify, the case can be dismissed. Juries can be instructed that due to delays not the fault of the defendant, evidence has been lost or witnesses memories have faded and that should be taken into account in reaching a verdict. But it does nothing to cure the other prejudices recognized in *Barker v. Wingo* including the uncertainty of the future, relations between the defendant and his family, loss of job due to pretrial confinement or other reasons. While the UK approach is attractive, it does not eliminate the harm caused by unreasonable trial delays.

### 7.3. Reduction in sentence

Judge Short in his dissent in the *Government II* case suggested a sentence reduction as the appropriate remedy for violation of the right to trial without undue delay. This is an appropriate remedy for those eventually convicted of a crime but it fails to take into account prejudice to the defendant's ability to defend himself. Faded memories or missing evidence may result in a conviction when an acquittal might have been possible if the trial had not been delayed unduly.

### 7.4. Cash payments

Judge Robinson in his dissent in the *Government II* appeal would have awarded two defendants acquitted of all charges $5,000 each after being incarcerated almost 14 years. That seems a small sum for such a long incarceration along with the mental stress of facing charges including genocide and crimes against humanity.

The ECHR jurisprudence would give cash awards for monetary losses caused by the violation of the right to trial without undue delay but the defendant must prove his losses. And, these are direct losses and include nothing for loss of freedom or mental anguish caused by the charges and delay in the trial.

### 7.5. Conclusion as to remedy

There is no perfect remedy for deprivation of the right to a speedy trial. The possible remedies either are so harsh – dismissal of charges – that judges will be unlikely to find a violation of the right and victims will feel betrayed by the system. Focusing on the fairness of the trial effectively makes the right to speedy trial a right without a remedy unless the prejudice is so severe that the defendant cannot get a fair trial. Reduction of sentence for a convicted person is an equitable remedy which takes some of the harm out of the violation but which also fails to recognize the possibility that an acquittal would have been possible if the trial had been held expeditiously. And, cash awards for those acquitted are likely to be inadequate and difficult to determine.

Giving an acquitted defendant a cash award also raises the issue of other innocent defendants who were tried expeditiously. Do they get compensation for their pretrial confinement? If not, do acquitted persons deprived of the right to trial without undue delay receive compensation for the entire pretrial confinement or simply for the period of undue delay? And if it is the latter, how is the period of undue delay determined?

It seems likely that international courts enforcing the right to trial without undue delay will struggle with fashioning a remedy. Given the gravity of the crimes heard by international courts, it is unlikely that they will opt for dismissal except in the most extreme circumstances. It is more likely that they will adopt some

combination of the dissents from Judges Short and Robinson: reduction of sentence if convicted or cash payments if acquitted.

## 8. Suggestions to speed trials

In 2009, the ICTY studied its procedures and wrote the ICTY Manual on Developed Practices (ICTY Manual). Many of the developed practices or best practices could shorten the length of proceedings. Some examples include:

### 8.1. Pretrial poceedings

Two of the most important suggestions in the ICTY Manual are readiness for trial at the time an indictment is presented and not "overloading" indictments. As to preparation for trial, the ICTY recognized that ideally cases should be ready for trial when the indictment is presented but that is not always possible. The manual states at 35:

> Ideally a case should be ready for trial before an indictment is issued and it should be the object of the Prosecutor's investigation to gather all necessary evidence before any charges are brought. However, ICTY experience has shown that in large, complex war crime cases investigations will continue well beyond the stage at which sufficient material has been assembled to justify charging an accused. In practice it is not possible to have the final indictment ready at the very outset of the case. Moreover, waiting until the investigation is "complete" may mean losing a unique opportunity to arrest the accused. The timing of the decision to issue an indictment will therefore have to balance the need to arrest the accused with the desire for further investigation.

The ICTY also recognized the temptation of prosecutors to load indictments with charges, often based on a single set of facts, to ensure that all bases are covered by the indictment. The manual urges caution in including numerous charges in an indictment. It states:

> One of the most important lessons to be learned from the ICTY experience is that, given the complex nature of war crime trials, there is a tendency for indictments to become overloaded with charges, thus making it difficult for the criminal process to cope with the extent of issues to be proved. The problem becomes particularly acute in leadership cases or cases involving genocide and crimes against humanity, which inevitably involve massive prosecutorial undertakings. The criminal conduct of an accused in such a case is likely to extend over a lengthy period of time, and across broad geographical areas involving many individual victims and perpetrators. In leadership cases, it may be difficult to link commanders, especially political leaders, with individual incidents on the ground. In high-profile prosecutions, there may also be a desire to ensure that the charges properly reflect the full criminality of the accused in a way that will adequately be recorded in history. **These factors sometimes encourage prosecutors to bring indictments that are unwieldy to the point of making trials unmanageable within a reasonable timeframe.** It is, therefore, a good practice when drafting an indictment to estimate how long it is likely to take to try the case, bearing in mind the right of the accused to an expeditious trial.[154]
>
> The ICTY manual also recommends joint trials wherever possible.[155] The manual states:
>
> The decision to try a number of accused together should be based upon policy and practical considerations. While there may be a clear preference for trying all those allegedly involved in a crime at the same time, so that judges can evaluate a transaction as a whole and can utilize resources more efficiently, practical issues may prevent joint trials. At the ICTY, for example, the number of fugitives, and the fact that individual fugitives may be apprehended at different times, has sometimes made it

154 ICTY Manual on Developed Practices (ICTY Manual), 36 (emphasis added).

155 The author disagrees that joint trials should be the norm. Each case of joinder should be decided on its own merits but joinder of multiple defendants carries the risk of lengthy trials.

> difficult to jointly prosecute all individuals accused of one criminal transaction. However, the ICTY experience has shown that given the length and complexity of a trial, joinder of accused where possible is advisable. Separate trials can be difficult because they require additional resources, and create witness fatigue by requiring key witness to give what is essentially the same evidence on multiple occasions. This multiple testimony may create resentment on the part of the witness and may result in contradictions between depositions provided at different times.[156]

The ICTY also developed a procedure in which the judges "suggested" that the prosecutor reduce the scope of the indictment, either by dismissing counts or agreeing not to present evidence of some crime sites. The prosecutor often "declined" the suggestions.[157]

## 8.2. Trial practices

### *8.2.1. Time limits on presentation of evidence*

The ICTY trial judges often would set time limits for the presentation of evidence by a side. The manual gives this reasoning:

> In light of the voluminous materials presented, the period of alleged criminal acts spanned in the indictments, and the inherent case management issues arising during the litigating of international criminal matters, particularly in multi-accused cases, the presentation of evidence could conceivably continue indefinitely. Consequently, the imposition of global time limits is viewed as a necessary and useful measure. The Tribunal's general practice has been to set global time limits during the pre-trial phase of the case, but after the parties have filed their witness and exhibit lists, which are generally required to be set forth in accordance with Rule 65*ter* (E) for the Prosecution and Rule 65*ter* (G) for the Defence. In relation to the Prosecution's case, the establishment of time limits may occur in the pre-trial phase, but generally happens only after the case has been assigned to a Trial Chamber for the trial phase. For the Defence, the establishment of time limits occurs after the close of the Prosecution's evidence, and thus in the trial phase.[158]

While such time limits can force the parties to pare their cases and concentrate on what the party believes to be important evidence, arbitrary time limits can deprive a party of the right to a fair trial. Especially in multi-defendant trials, even a short direct examination of a prosecution witness can lead to lengthy cross--examinations by the defendants. An example is the examination of a prosecution expert, Allison des Forges, in the *Government II* trial. Her direct testimony took only 76 pages of transcript including objections to admission of some exhibits offered through her.[159] Cross examination included about 18 pages of transcript that day and further cross examination lasted 12 full trial days.

If time limits are set, they cannot be fairly used to limit cross examination nor can the time for cross examination be subtracted from the time of the party presenting the witness. Des Forges is a perfect example. The prosecution limited her testimony and presented most of her evidence through her report and a book she had written and which was introduced into evidence. It was short. Yet, it opened the door to extensive cross examination.[160]

And, in multi-defendant trials, setting time limits for the defense or allotting time to each co-defendant can create substantial problems involving the rights of each defendant. The ICTY manual explains the procedure this way:

156 ICTY Manual on Developed Practices (ICTY Manual), 41.
157 ICTY Manual on Developed Practices (ICTY Manual), 66-67.
158 ICTY Manual on Developed Practices (ICTY Manual), 78.
159 *Prosecutor v. Bizimungu,* Tr. (31 May 2005), pages 3-79.
160 The Mugiraneza defense team, of which the author was a part, cross examined des Forges forthreeand a half days and introduced 24 exhibits during the cross.

> It is important that the Trial Chamber not feel strictly bound to grant the Defence the same time as the Prosecution. In order to ensure a fair trial, the Chamber should carefully assess the amount of time the Defence requires to present its evidence. Additionally, the Chamber, in assigning time to each Defence team, must carefully consider the proposed evidence submitted in the exhibit and witness list submissions, and assign time for Defence evidence based upon the principles of a fair and expeditious trial.[161]

### *8.2.2. Use of documentary evidence*

Both the ICTR and ICTY adopted rules of evidence allowing admission of written statements under some circumstances, including if the evidence is commutative, relates to historical background, relates to the impact of the offenses on victims or the character of the accused.[162] The ICTY manual describes the advantages in this way:

> The use of written evidence may be a more efficient mode for presentation of certain types of evidence, particularly evidence dealing with factual portions of a case, evidence relating to sites where crimes are alleged to have occurred ("crime based evidence"), and background historical, sociological, and statistical evidence. The admission of written statements in lieu of oral evidence, when used to prove a matter other than the accused's acts and conduct, has enhanced the chambers' ability to manage trials of a vast scale, and does not impinge fair-trial rights, provided that the statement declarant can be called for cross examination. However, the use of such statements has been complicated by lengthy statements, as well as by issues related to the evidential status of documents referred to as sources in such statements (*e.g.,* footnoted reports that the statement-maker's conclusions are based on other information). Another disadvantage of relying on written evidence is that the public may find it more difficult to follow the proceedings. However, this disadvantage is not sufficient to outweigh the advantages gained.[163]

The use of Rule 92*bis* in both *ad hoc* tribunals shortened trials by relieving both parties of the obligation to bring witnesses to present evidence such as additional alibi witnesses. One or two live witness' testimony could be supported by a series of written statements, thereby shortening the procedure – and relieving the tribunal of the cost of transporting and housing the witness.

### *8.2.3. Guilty pleas*

Guilty pleas obviously shorten the process. When a defendant pleads guilty, there is no need for presentation of witnesses. Additionally, it frees judicial and courtroom resources for other trials. The plea bargaining process is well known in the United States, with most indictments resulting in guilty pleas rather than trials. However, unless the trial judges imposing sentences are limited in the punishment they can impose and unless defendants are properly represented in the plea negotiation process, one case can result in essentially the end to guilty pleas. The ICTY recognized this in its manual:

> Although some may refer to the guilty plea and plea agreement process as "plea bargaining", this characterization is inaccurate for two reasons. First, a guilty plea may be entered without the benefit of a plea agreement, and without regard to the Prosecutor's views. Second, any agreement that is reached on the basis of mutual negotiations is not binding on the Trial Chamber. In fact, the non-binding nature of plea agreements creates a disincentive to plead guilty and is probably the single largest reason that more guilty pleas do not occur, as an accused cannot be sure that the sentence or sentencing range negotiated with the Prosecutor and submitted by the Prosecutor to the Trial Chamber as appropriate will in fact be accepted by the Trial Chamber. In practice, it takes only one instance wherein a Trial Chamber significantly exceeds the recommended sentencing range for other accused, to disregard the prospective

161 ICTY Manual on Developed Practices (ICTY Manual), 99 (internal footnote omitted).

162 ICTR Rules of Procedure and Evidence, Rule 92*bis,* ICTY Rules of Procedure and Evidence,Rule92*bis*.

163 ICTY Manual on Developed Practices (ICTY Manual), 80.

benefits of pleading guilty pursuant to plea agreements.[164]

An example is the case of Jean Kambanda, the former prime minister of Rwanda, who was the first person to plead guilty at the ICTR. He was sentenced to life in prison[165] and that sentence was affirmed on appeal.[166] That sentence was a disincentive for any other defendant to plead guilty. In discussions with ICTR accused, the author was told there was no reason to plead guilty if they are going to get life in any case.

### 8.3. Conclusion on shortening trials

The ICTY manual is correct in criticizing the prosecution for overloading indictments and being unready for trial at the time indictments are issued. Further, there commonly were delays in disclosure which slowed both the pretrial and trial process. These delays can be laid at the feet of the prosecution.

While the tribunals have a preference for multi-defendant trials, these can contribute to lengthy trials. By their very nature, much of the prosecution case and much of each defendant's case likely is irrelevant to other defendants yet they are forced to sit through lengthy proceedings contributing to unreasonable delays.

Single defendant trials or multi-defendant trials involving only the same offenses would speed the trials considerably. This would to a great extent eliminate the problem of presentation of evidence irrelevant to some defendants in multi-defendant trials.

The *ad hoc* tribunals never sanctioned the prosecution for failure to disclose evidence, including exculpatory evidence. Assessing meaningful sanctions such as exclusion of evidence, dismissal of charges or even money sanctions against individual prosecutors could be an incentive to produce documents in a timely manner, thereby reducing delays.

It is more difficult to eliminate delays in the defense cases. Even if the prosecution is trial ready the day the indictment is presented, the defense requires time to prepare for trial. Given the number of counts and accusations in an indictment and the necessity to conduct investigations in locations far from the offices and homes of defense counsel and staff, it takes considerable time for the defense to investigate the case and to prepare for trial.[167] Early and complete disclosure of information and specific allegations by the prosecutor could shorten the time for pretrial preparation by the defense.

The attached charts prepared by the two *ad hoc* tribunals for the Security Council show that the length of trials varied greatly from a relatively short time to multi-year marathons. This leads to the question of selection of defendants.

International courts can *never* try all persons accused of crimes during armed conflicts. There simply are too many possible defendants. Most of the defendants will have to be tried in national courts. The international courts should be reserved for the most important defendants, such as military and political leaders.

The ICTR generally limited its indictments to Hutu military and political leaders or community leaders such as clergy who took part in crimes.[168] The ICTY on the other hand indicted and tried numerous defendants who can best be described as small fry such as Esad Landzo in the *Celebici* case. Concentrating on high-ranking or influential defendants would free resources and shorten the length of delays between arrest and disposition of the cases.

164 ICTY Manual on Developed Practices (ICTY Manual), 69-70.

165 *Prosecutor v. Kambanda,* No. ICTR-97-23-S, Judgment (4 September 1998).

166 *Kambanda v. Prosecutor,* No. ICTR-97-23-A, Judgment (19 October 2000).

167 In the *Government II* case, the defense team of which the author was a member interviewed witnesses in Canada, Finland, Switzerland and Italy as well as Rwanda.

168 The ICTR has been criticized for its failure to indict any Tutsis even though there was evidence that the Tutsi rebels committed war crimes. *See e.g.,* Human Rights Watch, *Rwanda: International Tribunal Closing its Doors* (December 23, 2015), <https://www.hrw.org/news/2015/12/23/rwanda-international-tribunal-closing-its-doors>.

Finally, international courts must have the resources in terms of judges and courtrooms to try those cases expeditiously. Eighteen judges – only 13 of whom can try cases – and three courtrooms at the ICC will be insufficient if large numbers of defendants are indicted and arrested.

International courts are costly. The two *ad hoc* tribunals at their peaks had hundreds of employees ranging from secretaries to judges and lawyers. If the international community does not provide the resources, it will be impossible to expeditiously dispose of these complex cases. At the same time, leaders who engage in criminal activity be it in the former Yugoslavia, Rwanda, Syria or Sudan should be held liable for their crimes. It is important that leaders know they will face criminal sanctions for violations of international law.

However, the trials must not only be fair, they must be seen to be fair. The International Military Tribunal at Nuremberg is an example of how a trial can be both expeditious, fair and previewed as being fair. The IMT trial of the major war criminals involved 24 high-ranking defendants. It began on November 20, 1945, and the verdicts were delivered on October 1, 1946, the 218th trial day.[169]

Just as determining whether a person is deprived of his right to a speedy trial is "slippery," the proper remedy also is slippery. International courts trying the most serious cases such as the ICTY, ICTR and now the ICC, must organize themselves in such a way that they can try defendants promptly and without undue delays. Lengthy delays do nothing but deprive the courts of legitimacy. Both the defendants and the victims deserve speedy resolutions of the cases.

**Table A -** Cases from the ICTR

| Case No. | Name | Former title | Initial appearance | Judgements of the Tribunal: genocide (Statute of the Tribunal, para. 2 (3) a-e); crimes against humanity (Statute, para. 3 a-i); violations of article 3 common to the Geneva Conventions and of Additional Protocol II (Geneva) (Statute, para. 4 a-h).<br>**Appeals Chamber disposition (bold text)** | Trial judgement date<br>**Appeal judgement date (bold text)** |
|---|---|---|---|---|---|
| 1 | J.-P. Akayesu | Bourgmestre of Taba | 30 May 1996 | Genocide (genocide, direct and public incitement to commit genocide), crimes against humanity (all counts) | 2 September 1998 |
| **Sentence of life imprisonment affirmed on appeal** | | | **1 June 2001** | | |
| 2 | J. Kambanda | Prime Minister | 1 May 1998 | Genocide (genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide), crimes against humanity (murder, extermination) | 4 September 1998 (guilty plea) |
| **Sentence of life imprisonment, appeal dismissed** | | | **19 October 2000** | | |
| 3 | O. Serushago | Businessman, Interahamwe leader | 14 December 1998 | Genocide, crimes against humanity (murder, extermination, torture) | 5 February 1999 (guilty plea) |
| **Sentence of 15 years of imprisonment affirmed** | | | **14 February 2000** | | |

169 For anyone interested, the complete IMT record is available on line at <http://www.loc. gov/rr/frd/Military_Law/NT_major-war-criminals.html>. It includes *.pdf copies of all 42 volumes of the trial record including transcripts of proceedings and exhibits.

| Case No. | Name | Former title | Initial appearance | Judgements of the Tribunal: genocide (Statute of the Tribunal, para. 2 (3) a-e); crimes against humanity (Statute, para. 3 a-i); violations of article 3 common to the Geneva Conventions and of Additional Protocol II (Geneva) (Statute, para. 4 a-h).<br>**Appeals Chamber disposition (bold text)** | Trial judgement date<br>**Appeal judgement date (bold text)** |
|---|---|---|---|---|---|
| 4 | C. Kayishema | Préfet of Kibuye | 31 May 1996 | Genocide | 21 May 1999 (joinder) |
| **Sentence of life imprisonment affirmed** | | | | | |
| | O. Ruzindana | Businessman | 29 October 1996 | Genocide | **1 June 2001** |
| **Sentence of 25 years of imprisonment affirmed** | | | | | |

**Fonte**: Copied Verbatim from the Tribunal's Final Report to the Security Council

**Table B -** Cases from the ICTR

**1 Trial Judgments**

| Case number | Case name | | Date | Date of initial appearance | Number of accused | Number of pagesa |
|---|---|---|---|---|---|---|
| IT-94-1-T | Prosecutor v. Duško Tadić | | 7 May 1997 | 26 April 1995 | 1 | 304 |
| IT-96-21-T | Prosecutor v. Hazim Delić, Zdravko Mucić, Zejnil Delalić and Esad Landžo<br>or<br>Mucić et al. (Čelebići case) | | 16 November 1998 | 11 April 1996 Zdravko Mucić<br>9 May 1996 Zejnil Delalić<br>18 June 1996 Hazim Delić and Esad Landžo | 4 | 487 |
| IT-95-17/1-T | Prosecutor v. Anto Furundžija | | 10 December 1998 | 19 December 1997 | 1 | 122 |
| IT-95-14/1-T | Prosecutor v. Zlatko Aleksovski | | 25 June 1999 | 29 April 1997 | 1 | 93 |
| IT-95-10-T | Prosecutor v. Goran Jelisić | | 14 December 1999 | 26 January 1998 | 1 | 46 |
| IT-95-16-T | Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić<br>or<br>Kupreškić et al. | | 14 January 2000 | 8 October 1997 Zoran Kupreškić, Mirjan Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić<br>16 January 1998 Vlatko Kupreškić | 6 | 349 |
| IT-95-14-T | Prosecutor v. Tihomir Blaškić | | 3 March 2000 | 3 April 1996 | 1 | 290 |

| Case number | Case name | | Date | Date of initial appearance | Number of accused | Number of pagesa |
|---|---|---|---|---|---|---|
| IT-96-23-T | Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković<br>or<br>Kunarac et al. | | 22 February 2001 | 9 March 1998 Dragoljub Kunarac<br>4 August 1999 Radomir Kovač<br>29 December 1999 Zoran Vuković | 3 | 323 |
| IT-95-14/2-T | Prosecutor v. Dario Kordić and Mario Čerkez | | 26 February 2001 | 8 October 1997 | 2 | 370 |
| IT-98-33-T | Prosecutor v. Radislav Krstić | | 2 August 2001 | 7 December 1998 | 1 | 260 |
| IT-98-30/1-T | Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić and Dragoljub Prcać<br>or<br>Kvočka et al. | | 2 November 2001 | 16 December 1998 Miroslav Kvočka, Mlađo Radić, Milojica Kos and Zoran Žigić<br>10 March 2000 Dragoljub Prcać | 5 | 245 |
| IT-97-25-T | Prosecutor v. Milorad Krnojelac | | 15 March 2002 | 18 June 1998 | 1 | 237 |
| IT-98-32-T | Prosecutor v. Mitar Vasiljević | | 29 November 2002 | 28 January 2000 | 1 | 122 |
| IT-98-34-T | Prosecutor v. Mladen Naletilić and Vinko Martinović | | 31 March 2003 | 12 August 1999 Vinko Martinović<br>24 March 2000 Mladen Naletilić | 2 | 296 |
| IT-97-24-T | Prosecutor v. Milomir Stakić | | 31 July 2003 | 28 March 2001 | 1 | 290 |
| IT-95-9-T | Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić<br>or<br>Simić et al. | | 17 October 2003 | 17 February 1998 Miroslav Tadić<br>25 February 1998 Simo Zarić<br>15 March 2001 Blagoje Simić | 3 | 370 |

## 2 Appeals Chamber Judgments

| Case number | Case name | Date | Number of accused | Number of pages |
|---|---|---|---|---|
| IT-96-22-A | Prosecutor v. Dražen Erdemović | 7 October 1997 | 1 | 18 |
| IT-94-1-A | Prosecutor v. Duško Tadić | 15 July 1999 | 1 | 177 |
| IT-95-14/1-A | Prosecutor v. Zlatko Aleksovski | 24 March 2000 | 1 | 87 |
| IT-95-17/1-A | Prosecutor v. Anto Furundžija | 21 July 2000 | 1 | 106 |

| | | | | |
|---|---|---|---|---|
| IT-96-21-A | Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo<br>or<br>Mucić et al. (Čelebići case) | 20 February 2001 | 4 | 364 |
| IT-95-10-A | Prosecutor v. Goran Jelisić | 5 July 2001 | 1 | 77 |
| IT-95-16-A | Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić<br>or<br>Kupreškić et al. | 23 October 2001 | 5 | 209 |
| IT-96-23 and IT-96-23-A/1 | Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković<br>or<br>Kunarac et al. | 12 June 2002 | 3 | 144 |
| IT-97-25-A | Prosecutor v. Milorad Krnojelac | 17 September 2003 | 1 | 135 |
| IT-98-32-A | Prosecutor v. Mitar Vasiljević | 25 February 2004 | 1 | 91 |
| IT-98-33-A | Prosecutor v. Radislav Krstić | 19 April 2004 | 1 | 136 |
| IT-95-14-A | Prosecutor v. Tihomir Blaškić | 29 July 2004 | 1 | 301 |
| IT-95-14/2-A | Prosecutor v. Dario Kordić and Mario Čerkez | 17 December 2004 | 2 | 328 |
| IT-98-30/1-A | Prosecutor v. Miroslav Kvočka, Mlađo Radić, Zoran Žigić and Dragoljub Prcać<br>or<br>Kvočka et al. | 28 February 2005 | 4 | 303 |
| IT-97-24-A | Prosecutor v. Milomir Stakić | 22 March 2006 | 1 | 195 |
| IT-98-34-A | Prosecutor v. Mladen Naletilić and Vinko Martinović | 3 May 2006 | 2 | 250 |

| IT-95-9-A | Prosecutor v. Blagoje Simić<br>(formerly Simić et al.) | 28 November 2006 | 1 | 158 |
|---|---|---|---|---|
| IT-98-29-A | Prosecutor v. Stanislav Galić | 30 November 2006 | 1 | 247 |
| IT-99-36-A | Prosecutor v. Radoslav Brđanin | 3 April 2007 | 1 | 201 |
| IT-02-60-A | Prosecutor v. Vidoje Blagojević and Dragan Jokić | 9 May 2007 | 2 | 165 |
| IT-03-66-A | Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu<br>or<br>Limaj et al. | 27 September 2007 | 3 | 136 |
| IT-01-48-A | Prosecutor v. Sefer Halilović | 16 October 2007 | 1 | 116 |
| IT-01-47-A | Prosecutor v. Enver Hadžihasanović and Amir Kubura | 22 April 2008 | 2 | 153 |
| IT-03-68-A | Prosecutor v. Naser Orić | 3 July 2008 | 1 | 108 |
| IT-01-42-A | Prosecutor v. Pavle Strugar | 17 July 2008 | 1 | 190 |
| IT-95-11-A | Prosecutor v. Milan Martić | 8 October 2008 | 1 | 154 |
| IT-00-39-A | Prosecutor v. Momčilo Krajišnik | 17 March 2009 | 1 | 338 |
| IT-95-13/1-A | Prosecutor v. Mile Mrkšić and Veselin Šljivančanin<br>or<br>Mrkšić et al. | 5 May 2009 | 2 | 202 |
| IT-98-29/1-A | Prosecutor v. Dragomir Milošević | 12 November 2009 | 1 | 178 |
| IT-04-82-A | Prosecutor v. Ljube Boškoski and Johan Tarčulovski | 19 May 2010 | 2 | 125 |
| IT-04-84-A | Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj<br>or<br>Haradinaj et al. | 19 July 2010 | 3 | 152 |

| | | | | |
|---|---|---|---|---|
| IT-06-90-A | Prosecutor v. Ante Gotovina and Mladen Markač | 16 November 2012 | 2 | 139 |
| IT-98-32/1-A | Prosecutor v. Milan Lukić and Sredoje Lukić | 4 December 2012 | 2 | 292 |
| IT-04-81-A | Prosecutor v. Momčilo Perišić | 28 February 2013 | 1 | 77 |
| IT-95-5/18-AR98 bis.1 | Prosecutor v. Radovan Karadžić | 11 July 2013 | 1 | 57 |
| IT-05-87-A | Prosecutor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić<br>or<br>Šainović et al. (formerly Milutinović et al.) | 23 January 2014 | 4 | 824 |
| IT-05-87/1-A | Prosecutor v. Vlastimir Đorđević | 27 January 2014 | 1 | 444 |
| IT-05-88-A | Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević<br>or<br>Popović et al. | 30 January 2015 | 5 | 792 |
| IT-05-88/2-A | Prosecutor v. Zdravko Tolimir | 8 April 2015 | 1 | 446 |
| IT-03-69-A | Prosecutor v. Jovica Stanišić and Franko Simatović | 9 December 2015 | 2 | 101 |
| IT-08-91-A | Prosecutor v. Mićo Stanišić and Stojan Župljanin | 30 June 2016 | 2 | 570 |
| IT-04-74-A Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić<br>or<br>Prlić et al. | | | | |

**Fonte:** Copied Verbatim from the Tribunal's Final Report

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