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International criminal tribunals and human rights law: Adherence and contextualization

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CHAPTER 6 THE RIGHT TO BE TRIED WITHOUT UNDUE DELAY

1. Introduction

The ICTR has reiterated the maxim that ‘justice delayed is justice denied’.¹ Similarly, the ICC has considered that ‘delays are inimical to the proper administration of justice’.² Nevertheless, the length of international criminal proceedings has been one of the most criticized aspects of the practice of the ICTs.³ An average trial has lasted six years and two months before the ICTY, and nine years and two months before the ICTR.⁴ The ICC has recently completed its first trial up to the Appeal, but the pace of its proceedings thus far does not seem promising. Many studies have addressed the pace of international criminal justice.⁵ That is not the primary aim of this Chapter. Instead, focus is on the interpretation and application of the right to be tried without undue delay by the ICTs. As will be seen, despite the staggering

¹ ICTR, Decision on the Defence Motion for Severance and Separate Trial Filed by the Accused, *Prosecutor v. Kamuhanda* (ICTR-99-54-T), 7 November 2000, 5.

² ICC, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-2259), 12 July 2010, 45.

³ Similarly William Schabas, ‘Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights’ (2011) 9 *J Int’l Crim Just* 609, 627, who observes that the ‘extraordinary lengths’ of international criminal proceedings has been ‘one of the most unsatisfactory aspects of procedure’ at the ICTs. See also David Tolbert and Fergal Gaynor, ‘International Tribunals and the Right to a Speedy Trial: Problems and Possible Remedies’ in Magda Karagiannakis (ed), *Critical Assessments of International Criminal Courts* (Federation Press 2009), who mention the ‘poor, and in some instances shocking, record in respect of the requirement that trials be expeditious.’ See also Yvonne McDermott, ‘The Right to a Fair Trial in International Criminal Law’ (PhD Thesis, National University of Ireland Galway 2013), 115.

⁴ For the purposes of this Chapter, the average lengths of proceedings before the ICTs have been calculated. The data that has been processed was collected from the websites and decisions of the ICTs. The table containing this data is reproduced in Annex 1 to this dissertation and the full database containing a complete overview is on file with the author. The numbers presented here relate to the total length of the proceedings, from the moment of the arrest of the suspect until the final judgment in her/his case.

⁵ See, among many others: Hafida Lahiouel, ‘The Right of the Accused to an Expeditious Trial’ in Richard May and others (eds), *Essays on ICTY Procedure in Honour of Gabrielle Kirk McDonald* (Kluwer Law International 2001); Stephane Bourgon, ‘Procedural Problems Hindering Expeditious and Fair Justice (2004) 2 *J Int’l Crim Just* 526; Jeremy Rabkin, ‘Global Criminal Justice: an Idea Whose Time Has Passed’ (2005) 38 *Cornell Int’l L J* 753, 768, who criticizes the ‘glacial pace’ at which he claims the ICTs move; Eric Husketh, ‘Pole Pole: Hastening Justice at the UNICTR’ (2005) 3 *Nw U J Int’l Hum Rts* 1; Binaifer Nowrojee, “‘Your Justice is Too Slow”, will the ICTR Fail Rwanda’s Rape Victims?”, (United Nations Research Institute for Social Development 2005), available online: < <http://www.unrisd.org/80256B3C005BCCF9/%28httpPublications%29/56FE32D5COF6DCE9C125710F0045D89F> >; James Meernik and Rosa Aloisi, ‘Is Justice Delayed at the International Criminal Tribunals?’ (2008) 91 *Judicature* 276; Jean Galbraith, ‘The Pace of International Criminal Justice’ (2009) 31 *Mich J Int’l L* 79; Robert Heinsch, ‘How to Achieve Fair and Expeditious Trial Proceedings before the ICC: Is it Time for a More Judge-Dominated Approach?’ in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Koninklijke Brill NV 2009), which provides an analysis of the causes of the slow pace of the ICC thus far, and offers some possible solutions; Alex Whiting, ‘In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered’ (2009) 50 *Harv Int’l L J* 323.

lengths of many of their cases, the ICTs have only once found a violation of this right, which can largely be explained by the specific way in which they have interpreted and applied it.

The first part of this Chapter addresses the framework applicable to the right to be tried without undue delay in IHRL. It addresses the scope of this right, as well as the parameters that are generally used to assess whether this right has been violated. The second and third parts of this Chapter discuss the practice of the ad hoc Tribunals and the ICC, respectively. The formers' practice is far more substantial than that of the latter, as a result of which the conclusions arrived at in this Chapter primarily pertain to the ad hoc Tribunals. However, as will be seen, the early practice of the ICC discloses an approach similar to that of the ad hoc Tribunals, which strengthens the value of this Chapter's findings for the future practice of the Court.

2. IHRL Framework

IHRL provides the right to be tried without undue delay. This section discusses the basis and scope of this right, which derives from two distinct rights—fair trial and the right to liberty—and addresses the parameters developed to assess whether delays have been undue.

The right to a fair trial includes the right to be tried without undue delay. The terminology, however, differs per convention. While the ICCPR speaks of the right to be tried without undue delay,⁶ the ECHR, ACHR and ACHPR refer to the right to be tried within a reasonable time.⁷ Other terms, such as the right to an expeditious or a speedy trial can also be found in case law and academic literature. Arguably, the meaning of these phrases is more or less identical, since a determination of whether the length of proceedings has been reasonable hinges on the question whether there has been undue delay.⁸ There is no evidence that the different terminology has led to diverging interpretations, quite the contrary, as will be seen below, the ECtHR, IACtHR, and the HRC's interpretation of their respective provisions is highly similar. As a result, these phrases can be used interchangeably. This study will consistently use the right to be tried without undue delay as the preferred term, since this term is used in the Statutes of the ICTs, unless external sources are quoted.

The right to be tried without undue delay creates an obligation for states to organize their judicial system in such a way so as to enable expeditious pre-trial, trial and appeal proceedings, and the right of each individual to have her/his particular case finished within a

⁶ Art 14(3)(c) ICCPR.

⁷ Art 6(1) ECHR; Art 8(1) ACHR; Art 7(1)(d) ACHPR.

⁸ Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005), 135.

reasonable time. The guarantee governs the entire period of judicial proceedings: from the moment that a person is charged until the proceedings against her/him come to a final end. The purpose of this guarantee is two-fold. First, there is a public interest in avoiding delays in the judicial system. This is thought to enhance public faith in the system, and thereby its legitimacy. Similarly, economic considerations militate in favor of expeditious judicial proceedings. Second, and more importantly for this study's purposes, the accused has a judicially enforceable right to be tried without delay. The impact of criminal proceedings on a person's life is considerable, particularly when s/he is provisionally detained. As stated by the ECtHR, this right 'is designed to avoid a person charged remaining too long in a state of uncertainty'.⁹ Similarly, the IACtHR has considered that 'the purpose of the principle of "reasonable time" ... is to prevent accused persons from remaining in that situation for a protracted period and to ensure that the charge is promptly disposed of.'¹⁰ Finally, according to the HRC, the guarantee is 'designed to avoid keeping persons too long in a state of uncertainty about their fate' and to ensure that provisional detention is not too long, but also serves the more abstract interests of justice.¹¹

The right to liberty also includes the right to be tried without undue delay for provisionally detained persons.¹² As will be seen, the standards used to determine whether a delay has been undue are slightly stricter in this context than under the general heading of a fair trial, because of the invasive nature of liberty deprivations.¹³ The period covered by this particular right commences with arrest, and lasts until the day on which a decision is made on the charges, ie when a court of first instance renders a judgment of conviction or acquittal.¹⁴

Nonetheless, the parameters to determine a violation of provisionally detained persons' right to be tried without undue delay are similar to those employed for determinations of undue delay as a part of the right to a fair trial. There is one apparent difference. The ECtHR has developed the obligation to conduct proceedings against provisionally detained persons, who still benefit from the presumption of innocence, with 'special diligence'. At the same time, the ECtHR has applied this obligation in the context of the general right to a fair trial, in cases that involved persons who were provisionally detained. As a result, this obliga-

⁹ ECtHR, Judgment, *Grigoryan v. Armenia* (App No 3627/06), 10 July 2012, 129.

¹⁰ IACtHR, Judgment, *Suárez Rosero v. Ecuador* (Case No 11.273), 12 November 1997, 70.

¹¹ HRC, General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial (2007) UN Doc CCPR/C/GC/32, 35.

¹² Art 9(3) ICCPR, Art 5(3) ECHR and Art 7(5) ACHR.

¹³ Trechsel, *Human Rights in Criminal Proceedings* (n 8), 137.

¹⁴ ECtHR, Judgment, *Suslov v. Russia* (App No 2366/07), 29 May 2012, 84; ECtHR, Judgment, *Idalov v. Russia* (App No 5826/03), 22 May 2012, 112; ECtHR, Judgment, *Borisenko v. Ukraine* (App No 25725/02), 12 January 2012, 37.

tion of special diligence seems to exist in the context of both the right to be tried without undue delay as a part of the right to a fair trial, and of provisionally detained persons' right to be tried within a reasonable time, as a part of the right to liberty. Furthermore, in the practice of the ICTs, provisional detention has been the rule, not the exception.¹⁵ Although the ICTY has become more permissive in allowing provisional release over the years, the ICC has ordered release on only one occasion—in a case not involving core crimes—and the ICTR has never granted provisional release.¹⁶ Therefore, this study will not employ a strict separation between the two rights. Instead, it discusses the parameters to determine a violation of the right to be tried without undue delay mainly based on jurisprudence concerning the right to a fair trial, and adds a section discussing the requirement of special diligence and possible distinctive aspects of provisionally detained persons' right to be tried without undue delay.

2.1. Scope of the right to be tried without undue delay

The right to be tried without undue delay governs the entirety of pre-trial, trial and appeal proceedings. The period commences when the suspect becomes aware that s/he is subject of a criminal investigation, or when s/he is charged with a criminal offence.¹⁷ The moment of being charged has an autonomous meaning in the case law of the ECtHR, and the Court has held that this can be when a person is arrested, officially notified that s/he will be prosecuted, or when the preliminary investigations are opened.¹⁸ Another definition given by the ECtHR to the term is 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'.¹⁹ This definition corresponds to another test—often used by the ECtHR with reference to the activation of fair trial rights—of whether a person has been 'substantially affected'.²⁰ The period to be assessed extends to the point where

¹⁵ See *supra* Chapter 5.

¹⁶ See *supra* Chapter 5; significantly, however, the ICC also works with summons to appear in a number of its cases, as opposed to arrest warrants, in which case defendants await their trial in freedom; see Art 58(7) ICC Statute.

¹⁷ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: UN Doc CCPR Commentary* (NP Engel 2005), 334.

¹⁸ See eg ECtHR, Judgment, *Grigoryan v. Armenia* (App No 3627/06), 10 July 2012, 126; ECtHR, Judgment, *Bak v. Poland* (App No 7870/04), 16 April 2007, 73; ECtHR, Judgment, *Hozee v. Netherlands* (App No 21961/93), 22 May 1998, 43; ECtHR, Judgment, *Foti and others v. Italy* (App. Nos 7604/76; 7719/76; 7781/77; 7913/77), 10 December 1982, 52; ECtHR, Judgment, *Eckle v. Germany*, (App No 8130/78), 15 July 1982, 73.

¹⁹ ECtHR, Judgment, *Bak v. Poland* (App No 7870/04), 16 April 2007, 73.

²⁰ ECtHR, Judgment, *Bak v. Poland* (App No 7870/04), 16 April 2007, 73; ECtHR, Judgment, *Pedersen and Baadsgaard v. Denmark* (App No 49017/99), 17 December 2004, 44; ECtHR, Judgment, *Kangasluoma v. Finland* (App No 48339/99), 20 January 2004, 26; ECtHR, Judgment, *Hozee v. Netherlands* (App No 21961/93), 22 May 1998, 43; ECtHR, Judgment, *Foti and others v. Italy* (App. Nos 7604/76; 7719/76; 7781/77; 7913/77), 10 December 1982, 52; ECtHR, Judgment, *Eckle v. Germany*, (App No 8130/78), 15 July 1982, 73; see also Trechsel, *Human Rights in Criminal Proceedings* (n 8), 138.

the case comes to a final end and thus includes possible appeal stages.²¹ All stages of the proceedings must take place without undue delay.²² The period continues to run if the case is sent back to lower courts for a retrial.²³

2.2. Relevant parameters to determine a violation

There are no absolute time limits that define reasonableness of the duration of judicial proceedings. What constitutes a reasonable period is determined by a number of factors, and must be assessed in light of the circumstances of the case. The parameters to determine whether delays have been undue are the conduct of the defendant, the conduct of the authorities, the complexity of the case, and what was at stake for the applicant in the dispute.²⁴

²¹ See eg ECtHR, Judgment, *Grigoryan v. Armenia* (App No 3627/06), 10 July 2012, 127; IACtHR, Judgment, *Suárez Rosero v. Ecuador* (Case No 11.273), 12 November 1997, 71; HRC, General Comment No 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial (2007) UN Doc CCPR/C/GC/32, 35.

²² David Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff 2001), 125.

²³ See eg ECtHR, Judgment, *I.A. v. France* (App No 28213/95), 23 September 1998, 115; Trechsel, *Human Rights in Criminal Proceedings* (n 8), 141; Nowak (n 17), 337.

²⁴ ECtHR, Judgment, *Sizov v. Russia* (App No 58104/08), 25 July 2012, 59; ECtHR, Judgment, *Grishin v. Russia* (App No 14807/08), 24 July 2012, 170; ECtHR, Judgment, *Grigoryan v. Armenia* (App No 3627/06), 10 July 2012, 127; ECtHR, Judgment, *Idalov v. Russia* (App No 5826/03), 22 May 2012, 186; ECtHR, Judgment, *Bak v. Poland* (App No 7870/04), 16 April 2007, 75; ECtHR, Judgment, *Kangasluoma v. Finland* (App No 48339/99), 20 January 2004, 29; ECtHR, Judgment, *Jablonski v. Poland* (App No 33492/96), 21 December 2000, 102; ECtHR, Judgment, *Trzaska v. Poland* (App No 25792/94), 11 July 2000, 83; ECtHR, Judgment, *Ledonne v. Italy* (App No 35742/97), 12 May 1999, 21; ECtHR, Judgment, *Pélissier and Sassi v. France* (App No 25444/94), 25 March 1999, 67; ECtHR, Judgment, *Portington v. Greece* (App No 28523/95), 23 September 1998, 21; ECtHR, Judgment, *Hozee v. Netherlands* (App No 21961/93), 22 May 1998, 50; ECtHR, Judgment, *Philis v. Greece (No. 2)* (App No 19773/92), 27 June 1997, 35; ECtHR, Judgment, *Süssmann v. Germany* (App No 20024/92), 16 September 1996, 48; ECtHR, Judgment, *Süssmann v. Germany* (App No 20024/92), 16 September 1996, 59; ECtHR, Judgment, *Hentrich v. France* (App No 13616/88), 22 September 1994, 59; ECtHR, Judgment, *Abdoella v. Netherlands* (App No 12728/87), 25 November 1992, 20; ECtHR, Judgment, *Kemmache v. France* (App No 12325/86, 14992/89), 27 November 1991, 60; ECtHR, Judgment, *B. v. Austria* (App No 11968/86), 28 March 1990, 49; ECtHR, Judgment, *Milasi v. Italy* (App No 10527/83), 19 July 1987, 15; ECtHR, Judgment, *Eckle v. Germany*, (App No 8130/78), 15 July 1982, 80; IACtHR, Judgment, *Valle Jaramillo et al v. Colombia* (Case No 12.415), 27 November 2008, 155; IACtHR, Judgment, *Nineteen Tradesmen v. Colombia* (Case No 11.603), 5 July 2004, 190; IACtHR, Judgment, *Suárez Rosero v. Ecuador* (Case No 11.273), 12 November 1997, 72; IACtHR, Judgment, *Genie Lacayo v. Nicaragua* (Case No 10.792), 29 January 1997, 77; HRC, *Sayada and Vinck v. Belgium (Comm No 1472/2006)*, UN Doc CCPR/C/94/D/1472/2006. 22 October 2008, 10.10; HRC, General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial (2007) UN Doc UN Doc CCPR/C/GC/32, 35; see also Sarah Joseph and others (eds), *The International Covenant on Civil and Political Rights, Cases, Materials, and Commentary* (2nd edn, OUP 2004), 432; Wolfgang Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights' (2009) 8 Nw U J Int'l Hum Rts 1, 14; Stefan Trechsel, 'Rights in Criminal Proceedings under the ECHR and the ICTY Statute – a Precarious Comparison' in Bert Swart, Göran Sluiter and Alexander Zahar (eds), *The Legacy of the International Criminal Tribunal for the former Yugoslavia* (OUP 2011), 168.

2.2.1. Conduct of the defendant

Insofar as the defendant is her/himself responsible for causing delays in the proceedings, these delays cannot be attributed to the state.²⁵ Such delays can therefore not lead to a violation of the right to be tried without undue delay. For example, the submission of frivolous motions or other dilatory tactics such as a boycott of the proceedings or a hunger strike have been found to be attributable to the defendant, thereby clearing the authorities at least partially of the responsibility for any resulting delays.²⁶ The same goes for delays caused by a defendant who absconded for a certain period.²⁷ However, the defendant has the right to use all procedural remedies at her/his disposal and is by no means under an obligation to actively cooperate with the authorities conducting judicial proceedings against her/him.²⁸ The genuine use of procedural remedies may thus not be construed as a sort of implicit waiver of the right to be tried within a reasonable time.²⁹ Still, the ECtHR has held that while the defendant cannot be reproached for making full use of procedural remedies, ‘such conduct constitutes an objective fact, not capable of being attributed to the respondent State, which is to be taken into account when determining whether or not the proceedings exceeded a “reasonable time”.’³⁰ At the same time, the ECtHR has affirmed that the fact that a portion of the delays in the judicial proceedings is attributable to the defendant does not absolve the state from its responsibility. In that sense, it has found violations of the right to be tried without undue de-

²⁵ ECtHR, Judgment, *Grishin v. Russia* (App No 14807/08), 24 July 2012, 175; ECtHR, Judgment, *Idalov v. Russia* (App No 5826/03), 22 May 2012, 189; ECtHR, Judgment, *Salapa v. Poland* (App No 35489/97), 19 December 2002, 90; ECtHR, Judgment, *Trzaska v. Poland* (App No 25792/94), 11 July 2000, 89; HRC, *Brown v. Jamaica* (Comm No 775/1997), UN Doc CCPR/C/65/D/775/1997, 23 March 1999, 6.11; see generally: Trechsel, *Human Rights in Criminal Proceedings* (n 8), 142-144; Nowak (n 17), 335.

²⁶ ECtHR, Judgment, *Salapa v. Poland* (App No 35489/97), 19 December 2002, 88-89: where the ECtHR considered that the numerous motions and appeals filed by the applicant cast doubt on his intention to have the proceedings conducted expeditiously; ECtHR, Judgment, *I.A. v. France* (App No 28213/95), 23 September 1998, 121, where the ECtHR considered deliberate delaying tactics by the applicant; ECtHR, Judgment, *Ringeisen v. Austria* (App No 2614/65), 16 July 1971, 110, where the ECtHR considered the numerous motions submitted by the defendant to replace judges; see also ECtHR, Judgment, *Jablonski v. Poland* (App No 33492/96), 21 December 2000, 104, where the ECtHR considered that while the applicant contributed significantly to the length of the proceedings, by going on a hunger strike and inflicting injuries on himself, there was still a violation since this could not explain the total length of the proceedings.

²⁷ ECtHR, Judgment, *Girolami v. Italy* (App No 13324/87), 24 January 1991, 15.

²⁸ ECtHR, Judgment, *Süssmann v. Germany* (App No 20024/92), 16 September 1996, 66; ECtHR, Judgment, *Ledonne v. Italy* (App No 35742/97), 12 May 1999, 25.

²⁹ However, see also Stephanos Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: an Analysis of the Application of the Convention and a Comparison with other Instruments* (Martinus Nijhoff 1993), 98.

³⁰ ECtHR, Judgment, *Ledonne v. Italy* (App No 35742/97), 12 May 1999, 25; see also ECtHR, Judgment, *Calleja v. Malta* (App No 75274/01), 7 April 2005, 22; ECtHR, Judgment, *Pedersen and Baadsgaard v. Denmark* (App No 49017/99), 17 December 2004, 49; ECtHR, Judgment, *Eckle v. Germany*, (App No 8130/78), 15 July 1982, 82.

lay despite the defence having also contributed to such delays.³¹ The ECtHR followed this line of reasoning even in a case where the defendant had contributed the delays by evading the authorities for a certain period.³²

2.2.2. *Conduct of the authorities*

The conduct of the authorities is the key factor determining whether or not the right to be tried within a reasonable time has been violated.³³ Under this criterion, human rights courts and supervisory bodies assess the conduct of all state authorities, including the government, prosecutorial authorities, and the judiciary. States have been found to have violated this right because of certain acts that can be said to have directly contributed to a delay in proceedings. However, it appears that states have more often been found to be in violation for a failure to explain or justify the lengths of proceedings that were considered unreasonable.

For example, the ECtHR has held states responsible for failing to ensure the appearance of witnesses whose absence caused delays in the judicial proceedings.³⁴ It has also criticized states for ordering investigative measures that it considered unnecessary.³⁵ At the same time, the ECtHR has held that delays that were due to foreign authorities, in a case that included international aspects, were not attributable to the government.³⁶

The central premise of the approach to delays is that the burden of justifying *prima facie* unreasonably long proceedings rests with the state. If it is found that the proceedings have been unreasonably lengthy, it will be for the government to explain and justify this and when it fails to do so, there will be a violation. Substantial periods of inactivity or excessive delays for which states fail to offer an acceptable justification will thus result in a violation.³⁷

³¹ ECtHR, Judgment, *Ledonne v. Italy* (App No 35742/97), 12 May 1999, 25; similarly ECtHR, Judgment, *Calleja v. Malta* (App No 75274/01), 7 April 2005, 132; ECtHR, Judgment, *Portington v. Greece* (App No 28523/95), 23 September 1998, 29.

³² ECtHR, Judgment, *Girolami v. Italy* (App No 13324/87), 24 January 1991, 15, where it considered that a trial of more than eight years was still ‘inordinately long’.

³³ Similarly Trechsel, *Human Rights in Criminal Proceedings* (n 8), 136.

³⁴ ECtHR, Judgment, *Sizov v. Russia* (App No 58104/08), 25 July 2012, 62; ECtHR, Judgment, *Trzaska v. Poland* (App No 25792/94), 11 July 2000, 90.

³⁵ ECtHR, Judgment, *Szeloch v. Poland* (App No 33079/96), 22 February 2001, 110.

³⁶ ECtHR, Judgment, *Neumeister v. Austria* (App No 1936/63), 27 June 1968, 21.

³⁷ ECtHR, Judgment, *Grishin v. Russia* (App No 14807/08), 24 July 2012: ‘the State remains responsible for the efficiency of its system and the manner in which it provides for mechanisms to comply with the reasonable time requirement – whether by automatic time-limits and directions or some other method – is for it to decide. If a State allows proceedings to continue beyond the “reasonable time” prescribed by Article 6 of the Convention without doing anything to advance them, it will be responsible for the resultant delay’; ECtHR, Judgment, *Ledonne v. Italy* (App No 35742/97), 12 May 1999, 26-27; ECtHR, Judgment, *Portington v. Greece* (App No 28523/95), 23 September 1998, 33; ECtHR, Judgment, *Philis v. Greece (No. 2)* (App No 19773/92), 27 June 1997, 40; ECtHR, Judgment, *Abdoella v. Netherlands* (App No 12728/87), 25 November 1992, 24; ECtHR, Judgment, *Süssmann v. Germany* (App No 20024/92), 16 September 1996, 69-70; HRC, *Sextus v. Trinidad and*

In addition, the ECtHR has considered that inexplicable breaks in the proceedings may lead to a violation of the Convention.³⁸ In a similar vein, the ECtHR has criticized authorities for failing to act with the requisite diligence in bringing a person to trial expeditiously.³⁹ Notable efforts by the authorities to speed up proceedings are also taken into consideration as a factor militating against a finding of a violation.⁴⁰

When it comes to assessing what justifications are acceptable, the ECtHR has clarified that an overworked court-system cannot excuse delays. The Court has consistently held that states have an obligation to ‘organize their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time’.⁴¹ Similarly, a backlog of cases has not been accepted as a justification for unreasonably lengthy proceedings.⁴² The HRC and the ACnHPR have clarified that a difficult economic situation cannot excuse an ineffective judicial system.⁴³

Finally, joinder of cases may lead cases against individual co-accused persons to last longer than they would have, had they been tried individually. Joinder cannot justify ‘substantial delay’ in the proceedings against one of the co-accused.⁴⁴ However, the ‘good administration of justice’ may require joinder, which is primarily a matter for national authorities to determine. Only when severance would have been compatible with the good administration of justice and would have expedited the proceedings will the ECtHR consider failing to sever

Tobago (Comm No 818/1998), UN Doc CCPR/C/72/D/818/1998, 23 July 2001, 7.3; HRC, *Brown v. Jamaica* (Comm No 775/1997), UN Doc CCPR/C/65/D/775/1997, 23 March 1999, 6.11, where the HRC found that, in the absence of a satisfactory explanation, 23 months of pre-trial investigation was excessive; HRC, *Finn v. Jamaica* (Comm No 617/1995), UN Doc CCPR/C/63/D/617/1995, 31 July 1998, 9.4: two years and five months of proceedings; HRC, *Hill v. Spain* (Comm No 526/1993), CCPR/C/59/D/526/1993, 2 April 1997, 12.4: pre-trial investigation of one year and four months and total period of trial of another year and eight months in a case that was not at all complex; HRC, *Cid Gómez v. Panama* (Comm No 473/1991), UN Doc CCPR/C/54/D/473/1991, 19 July 1995, 8.5; see also David Weissbrodt and Rüdiger Wolfrum (eds), *The Right to a Fair Trial* (Springer 1997), 129.

³⁸ ECtHR, Judgment, *Muradkhanyan v. Armenia* (App No 12895/06), 5 June 2012, 85; ECtHR, Judgment, *Toth v. Austria* (App No 11894/85), 12 December 1991, 76-77.

³⁹ ECtHR, Judgment, *Kangasluoma v. Finland* (App No 48339/99), 20 January 2004, 35; ECtHR, Judgment, *Pélissier and Sassi v. France* (App No 25444/94), 25 March 1999, 73.

⁴⁰ ECtHR, Judgment, *Bak v. Poland* (App No 7870/04), 16 April 2007, 79.

⁴¹ ECtHR, Judgment, *Cocchiarella v. Italy* (App No 64886/01), 29 March 2006, 74; ECtHR, Judgment, *Portington v. Greece* (App No 28523/95), 23 September 1998, 33; ECtHR, Judgment, *Philis v. Greece (No. 2)* (App No 19773/92), 27 June 1997, 40; ECtHR, Judgment, *Süssmann v. Germany* (App No 20024/92), 16 September 1996, 55; ECtHR, Judgment, *B. v. Austria* (App No 11968/86), 28 March 1990, 54; ECtHR, Judgment, *Milasi v. Italy* (App No 10527/83), 19 July 1987, 18.

⁴² ECtHR, Judgment, *Hentrich v. France* (App No 13616/88), 22 September 1994, 61.

⁴³ HRC, *Lubuto v. Zambia* (Comm No 390/1990), CCPR/C/55/D/390/1990, 31 October 1995, 7.3; HRC, *Fillas-tra, Bizouarn v. Bolivia* (Comm No 336/1988) CCPR/C/43/D/336/1988, 5 November 1991, 6.5; ACnHPR, *Article 19 v. Eritrea* (Comm 275/2003), 16-30 May 2007, 99; see also Alex Conte and Richard Burchill, *Defining Civil and Political Rights: the jurisprudence of the United Nations Human Rights Committee* (2nd edn, Ashgate 2009), 129.

⁴⁴ David Harris, Michael O’Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009), 280; ECtHR, Judgment, *Hentrich v. France* (App No 13616/88), 22 September 1994, 61.

the proceedings a factor indicating a possible violation of the right to be tried without undue delay.⁴⁵

2.2.3. Complexity of the case

Complex cases may legitimately take longer to investigate and to try.⁴⁶ To determine the complexity of a case, the ECtHR has considered, among other things, the scope of the charges,⁴⁷ the number of defendants,⁴⁸ the number of victims and witnesses,⁴⁹ the distance between the location of the trial and the location of evidence or witnesses,⁵⁰ the number of expert reports that needed to be drawn up,⁵¹ the volume of the evidence and the size of the case file,⁵² and the added complexity of investigating crimes that have been covered up.⁵³ Complexity may thus pertain to both factual and legal issues. Still, the complexity of a case does not absolve the state from its obligation to act with due expedition. When the proceedings are lengthy, complexity alone cannot be the only factor to justify their entire length, and there might still be a violation.⁵⁴

⁴⁵ For examples of cases where the ECtHR did not find a violation despite allegations that severance would have sped up the proceedings, see eg ECtHR, Judgment, *Coëme et al v. Belgium* (App No 32492/96; 32547/96; 32548/96; 33209/96; and 33210/96), 20 June 2000, 139; ECtHR, Judgment, *Boddaert v. Belgium* (App No 12919/87), 12 October 1992, 38-39; ECtHR, Judgment, *Neumeister v. Austria* (App No 1936/63), 27 June 1968, 21; for examples of cases where the ECtHR considered that there was no reason why the cases could not have been severed, see eg ECtHR, Judgment, *Kemmache v. France* (App No 12325/86, 14992/89), 27 November 1991, 70; ECtHR, Judgment, *Hentrich v. France* (App No 13616/88), 22 September 1994, 61.

⁴⁶ ECtHR, Judgment, *Pedersen and Baadsgaard v. Denmark* (App No 49017/99), 17 December 2004, 50; ECtHR, Judgment, *Hozee v. Netherlands* (App No 21961/93), 22 May 1998, 51-54; similarly HRC, *Sayada and Vinck v. Belgium* (Comm No 1472/2006), UN Doc CCPR/C/94/D/1472/2006, 22 October 2008, 10.10; HRC, *Wolf v. Panama* (Comm No 289/1988), UN Doc CCPR/C/44/D/289/1988, 26 March 1992, 6.4.

⁴⁷ ECtHR, Judgment, *Sizov v. Russia* (App No 58104/08), 25 July 2012, 60; ECtHR, Judgment, *Grishin v. Russia* (App No 14807/08), 24 July 2012, 171; ECtHR, Judgment, *Idalov v. Russia* (App No 5826/03), 22 May 2012, 188.

⁴⁸ ECtHR, Judgment, *Sizov v. Russia* (App No 58104/08), 25 July 2012, 60; ECtHR, Judgment, *Grishin v. Russia* (App No 14807/08), 24 July 2012, 171; ECtHR, Judgment, *Idalov v. Russia* (App No 5826/03), 22 May 2012, 188; ECtHR, Judgment, *Bak v. Poland* (App No 7870/04), 16 April 2007, 76; ECtHR, Judgment, *Hozee v. Netherlands* (App No 21961/93), 22 May 1998, 53.

⁴⁹ ECtHR, Judgment, *Grishin v. Russia* (App No 14807/08), 24 July 2012, 171; ECtHR, Judgment, *Bak v. Poland* (App No 7870/04), 16 April 2007, 76; ECtHR, Judgment, *Hozee v. Netherlands* (App No 21961/93), 22 May 1998, 53.

⁵⁰ ECtHR, Judgment, *Grishin v. Russia* (App No 14807/08), 24 July 2012, 171.

⁵¹ *ibid.*

⁵² ECtHR, Judgment, *Bak v. Poland* (App No 7870/04), 16 April 2007, 76; ECtHR, Judgment, *Trzaska v. Poland* (App No 25792/94), 11 July 2000, 88; ECtHR, Judgment, *Hozee v. Netherlands* (App No 21961/93), 22 May 1998, 53; similarly IACtHR, Judgment, *Genie Lacayo v. Nicaragua* (Case No 10.792), 29 January 1997, 78.

⁵³ ECtHR, Judgment, *Hozee v. Netherlands* (App No 21961/93), 22 May 1998, 52.

⁵⁴ ECtHR, Judgment, *Sizov v. Russia* (App No 58104/08), 25 July 2012, 60; ECtHR, Judgment, *Grishin v. Russia* (App No 14807/08), 24 July 2012; similarly IACtHR, Judgment, *Valle Jaramillo et al v. Colombia* (Case No 12.415), 27 November 2008, 156; similarly HRC, *Francis et al v. Trinidad and Tobago* (Comm No 899/1999), UN Doc CCPR/C/75/D/899/1999, 25 July 2002, 5.4.

Three early ECnHR cases related to charges of war crimes and crimes against humanity, where defendants had spent lengthy periods of over six years in provisional detention without being granted release. The Commission did not tie the length of their detention to amount to undue delay because of the importance of thorough investigations into these types of crimes. The ECnHR acknowledged the difficulties of investigating and trying such cases, particularly because of the fact that the acts charged had happened twenty or more years prior to the trial, the number of accused, the complex contextual elements that had to be established by the Prosecution, the number of witnesses, and the fact that many of these witnesses as well as a portion of the evidence were located abroad.⁵⁵ In all three cases, the Commission relied heavily on the importance of conducting war crimes trials and emphasized that the right to be tried within a reasonable time must not stand in the way of the judges who must do their work properly and carefully.⁵⁶ The Commission thus allowed a certain leeway for cases of genuine complexity. This added leeway in the context of cases that are considered inherently complex and of particular importance, may be of relevance to the work of the ICTs, the cases before which are generally complex, and involve allegations of very serious crimes.⁵⁷

2.2.4. 'What is at stake' for the defendant

The ECtHR has developed a fourth criterion, where it considers what is at stake for the applicant. This factor seems a less prominent consideration in criminal cases, which could be explained by the fact that in criminal cases, there is arguably always much at stake; even more so where the defendant might be deprived of her/his liberty, or risks a high sentence.⁵⁸ Criminal cases therefore require the authorities to act especially diligently. In addition, the ECtHR has found that the authorities have an obligation to act with 'particular diligence' when the suspect is provisionally detained.⁵⁹

⁵⁵ ECnHR, Opinion, *Jentzsch v. Federal Republic of Germany* (App No 2604/65), 30 November 1970, 163; ECnHR, Decision, *W.R. v. Federal Republic of Germany* (App No 3376/67), 4 February 1969, 14-15; ECnHR, Decision, *X. v. Federal Republic of Germany* (App No 920/60), 19 December 1961, 2-3.

⁵⁶ ECnHR, Opinion, *Jentzsch v. Federal Republic of Germany* (App No 2604/65), 30 November 1970, 172; ECnHR, Decision, *W.R. v. Federal Republic of Germany* (App No 3376/67), 4 February 1969, 15; ECnHR, Decision, *X. v. Federal Republic of Germany* (App No 920/60), 19 December 1961, 2-3.

⁵⁷ However, see: McDermott, 'The Right to a Fair Trial in International Criminal Law' (n 3), 119, who is very critical of reliance on such reasoning to justify derogations from fair trial standards by the ICTs.

⁵⁸ Harris, O'Boyle and Warbrick (n 44), 281; Trechsel, *Human Rights in Criminal Proceedings* (n 8), 144.

⁵⁹ This particular obligation applies in the context of the right to be tried within a reasonable time as a part of the right to a fair trial. It arguably operates in conjunction with provisionally detained persons' right to be tried within a reasonable time, as a part of the right to liberty. See eg ECtHR, Judgment, *Sizov v. Russia* (App No 58104/08), 25 July 2012, 64; ECtHR, Judgment, *Grishin v. Russia* (App No 14807/08), 24 July 2012, 182; ECtHR, Judgment, *Jablonski v. Poland* (App No 33492/96), 21 December 2000, 102; ECtHR, Judgment, *Abdoella v. Netherlands* (App No 12728/87), 25 November 1992, 24; ECtHR, Judgment, *Jablonski v. Poland* (App No

2.2.5. *Special diligence: Provisional detention and undue delay*

Provisionally detained persons have the right to be tried within a reasonable time, or to release pending trial.⁶⁰ This right extends up to the first instance judgment; its scope is thus more limited than that of the right to be tried without undue delay as a part of the right to a fair trial. The defining characteristic of this right is that it applies to persons deprived of their liberty who have not yet been convicted in a judicial procedure, and thus still benefit from the presumption of innocence. Therefore, the authorities have an obligation to display special diligence in the conduct of court proceedings.⁶¹ Similarly, provisionally detained persons are entitled to their case being given priority.⁶²

The assessment of undue delay in proceedings against provisionally detained persons is essentially similar to that of trial proceedings generally. Reasonableness cannot be determined in the abstract, but must be assessed in light of the specific circumstances of each case.⁶³ The parameters developed to determine undue delay are also similar: the conduct of the accused person, the conduct of the authorities, and the complexity of the case.⁶⁴ The state bears the burden to prove that the authorities acted with ‘special diligence’. If the period of provisional detention has been lengthy, it is for the authorities to justify and explain this, and if they fail to do so, there will be a violation.⁶⁵ Furthermore, the ECtHR has clarified that in

33492/96), 21 December 2000, 102; similarly HRC: HRC, *Francis et al v. Trinidad and Tobago* (Comm No 899/1999), UN Doc CCPR/C/75/D/899/1999, 25 July 2002, 5.4; HRC, *Sextus v. Trinidad and Tobago* (Comm No 818/1998), UN Doc CCPR/C/72/D/818/1998, 23 July 2001, 7.2; HRC, *Cid Gómez v. Panama* (Comm No 473/1991), UN Doc CCPR/C/54/D/473/1991, 19 July 1995; see also HRC, General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial (2007) UN Doc CCPR/C/GC/32, 35.

⁶⁰ Art 9(3) ICCPR; Art 5(3) ECHR; Art 7(5) ACHR.

⁶¹ ECtHR, Judgment, *Suslov v. Russia* (App No 2366/07), 29 May 2012, 93; ECtHR, Judgment, *Stögmüller v. Austria* (App No 1602/62), 10 November 1969, 5 (p. 35); similarly IACnHR, *Bronstein et al v. Argentina* (Case No 11.205 and others), 11 March 1997, 40; IACnHR, *Giménez v. Argentina* (Case No 11.245), 1 March 1996, 83.

⁶² ECtHR, Judgment, *Wemhoff v. Germany* (App No 2122/64), 27 June 1968, 17.

⁶³ ECtHR, Judgment, *Muradkhanyan v. Armenia* (App No 12895/06), 5 June 2012, 80; ECtHR, Judgment, *Idalov v. Russia* (App No 5826/03), 22 May 2012, 139; ECtHR, Judgment, *Ricardi v. Romania* (App No 3048/04), 3 April 2012, 72; ECtHR, Judgment, *Borisenko v. Ukraine* (App No 25725/02), 12 January 2012, 49; ECtHR, Judgment, *Chraid v. Germany* (App No 65655/01), 26 October 2006, 35; ECtHR, Judgment, *McKay v. United Kingdom* (App No 543/03), 3 October 2006, 45; ECtHR, Judgment, *G.K. v. Poland* (App No 38816/97), 20 January 2004, 82; ECtHR, Judgment, *Smirnova v. Russia* (App Nos 46133/99 and 48183/99), 24 July 2003, 61; ECtHR, Judgment, *Jablonski v. Poland* (App No 33492/96), 21 December 2000, 79; ECtHR, Judgment, *Barfuss v. Czech Republic* (App No 35848/97), 31 July 2000, 65; ECtHR, Judgment, *Jėčius v. Lithuania* (App No 34578/97), 31 July 2000, 93; ECtHR, Judgment, *Punzelt v. Czech Republic* (App No 31315/96), 25 April 2000, 73; similarly IACnHR, *Bronstein et al v. Argentina* (Case No 11.205 and others), 11 March 1997, 18; IACnHR, *Giménez v. Argentina* (Case No 11.245), 1 March 1996, 67-70; ACNHR, *Article 19 v. Eritrea* (Comm 275/2003), 16-30 May 2007, 97.

⁶⁴ Harris, O’Boyle and Warbrick (n 44), 181.

⁶⁵ See eg ECtHR, Judgment, *Suslov v. Russia* (App No 2366/07), 29 May 2012, 96; similarly ECtHR, Judgment, *Barfuss v. Czech Republic* (App No 35848/97), 31 July 2000, 71-73; ECtHR, Judgment, *Punzelt v. Czech Re-*

their assessment of the period of provisional detention, ‘the complexity and special characteristics of the investigation are factors to be considered’.⁶⁶ Having already discussed these factors in previous sections, little can be added here. Nonetheless, this obligation of ‘special diligence’ exemplifies the more stringent standards that apply to the length of the proceedings conducted against persons who are deprived of their liberty, particularly because suspects and accused persons before the ICTs are generally kept in provisional detention pending trial.⁶⁷

In addition, the ECtHR has considered a number of factors under the right to liberty that are of particular interest to the present study. Like in the context of the right to be tried within a reasonable time under the heading of fair trial, the ECtHR has explained that in its evaluation of complexity of the case under the right to be tried without undue delay, as applicable to provisionally detained persons, it will take into account the number of defendants, victims and witnesses, the volume of the evidence, the complexity of the determination of the exact role of the accused in cases of organized crimes.⁶⁸ Cases involving large-scale criminality, such as terrorism or organized crime, are inherently complex which can be of influence on the length of trials and investigations. For example, in a case that involved charges of terrorism, the ECtHR held that a period of five years and five months of provisional detention did not constitute a violation of the Convention, due to the case’s extreme complexity, the number of co-accused, the number of 169 witnesses, and the international nature of the case.⁶⁹ This was justified by emphasizing that the obligation to act with special diligence should not impede authorities to examine the case with the appropriate care.⁷⁰

2.3. Interim conclusion

The right to be tried without undue delay as a part of the right to a fair trial applies from the moment when a person is ‘substantially affected’ by criminal investigations and until the fi-

public (App No 31315/96), 25 April 2000, 78-81; HRC, *Shaw v. Jamaica* (Comm No 704/1996), CCPR/C/62/D/704/1996, 2 April 1998, 7.4; HRC, *Shalto v. Trinidad and Tobago* (Comm No 447/1991), CCPR/C/53/D/447/1991, 4 April 1995, 8.7; similarly IACnHR, *Giménez v. Argentina* (Case No 11.245), 1 March 1996, 101: ‘[i]n cases of prima facie unacceptable duration it rests upon the respondent government to adduce specific reasons for the delay. Such reasons will be subject to the Commission’s closest scrutiny.’

⁶⁶ ECtHR, Judgment, *Muradkhanyan v. Armenia* (App No 12895/06), 5 June 2012, 82.

⁶⁷ See *supra* Chapter 5.

⁶⁸ ECtHR, Judgment, *Suslov v. Russia* (App No 2366/07), 29 May 2012, 94; ECtHR, Judgment, *Contrada v. Italy* (App No 27143/95), 24 August 1998, 67; ECtHR, Judgment, *Van der Tang v. Spain* (App No 19382/92), 13 July 1995, 75.

⁶⁹ ECtHR, Judgment, *Chraidi v. Germany* (App No 65655/01), 26 October 2006, 43.

⁷⁰ ECtHR, Judgment, *Suslov v. Russia* (App No 2366/07), 29 May 2012, 96; ECtHR, Judgment, *Contrada v. Italy* (App No 27143/95), 24 August 1998, 67; ECtHR, Judgment, *W. v. Switzerland* (App No 14379/88), 26 January 1993, 42; ECtHR, Judgment, *Tomasi v. France* (App No 12850/87), 27 August 1992, 102; ECtHR, Judgment, *Toth v. Austria* (App No 11894/85), 12 December 1991, 77.

nal judgment. There are no absolute time limits that determine the reasonableness of the length of proceedings. Instead, the specific circumstances of each case must be assessed in light of a number of factors. These factors are the conduct of the defendant, the conduct of the authorities, the complexity of the case, and, to a lesser extent, what is at stake for the defendant. The conduct of the authorities is the most relevant parameter, which can be explained by the fact that the obligation to ensure a trial without undue delay rests with the state, including its prosecutorial, judicial, and executive authorities, which are responsible for setting up the justice system. This serves to explain why the state bears the burden to justify lengthy periods of trial proceedings. When it comes to complexity, IHRL recognizes that cases of genuine complexity may legitimately take longer. At the same time, this should not be taken as absolving the state from its responsibility to prevent undue delay. Even in complex cases, the authorities must act diligently and must ensure that trials are concluded within a reasonable time. Similarly, the authorities have a responsibility to act with ‘special diligence’ in cases where the defendant is detained provisionally. Finally, the ECnHR has acknowledged the importance of conducting war crimes trials, and has recognized that such cases are inherently complex. It has therefore been held that the duty to prevent undue delay must not stand in the way of the judges to do their work properly and carefully. However, these cases were decided in the early 1960s, which raises the question of their present-day relevance. This will be further addressed when evaluating the ICTs’ approach to the right to be tried without undue delay.

3. Trial without Undue Delay before the ad hoc Tribunals

The Statutes of the ad hoc Tribunals provide that every accused person has the right to be tried without undue delay.⁷¹ The Statutes also impose an obligation on the Chamber to ensure that trials are fair and expeditious.⁷² The former is formulated as a right of the accused, and follows the wording of the ICCPR.⁷³ The latter, on the other hand, is an obligation of the Tribunals.⁷⁴ This duty to ensure expeditious trials is broader than the right of the accused to be tried without undue delay. The Chambers must ensure expeditiousness not only for the accused, but also for the Prosecution, who acts on behalf of the international community and

⁷¹ Art 21(4)(c) ICTY Statute; Art 20(4)(c) ICTR Statute.

⁷² Art 20(2) ICTY Statute; Art 19(2) ICTR Statute.

⁷³ Erik Møse and Cécile Aptel, ‘Trial Without Undue Delay before the International Criminal Tribunals’ in Lal Chand Vohrah and others (eds), *Man’s Inhumanity to Man, Essays in International Law in Honour of Antonio Cassese* (Kluwer Law International 2003), 540.

⁷⁴ Brian Farrell, ‘The Right to a Speedy Trial before International Criminal Tribunals’ (2003) 19 Afr J Hum Rts 98 (2003), 105.

has therefore been held to also have an ‘interest’ in an expeditious trial.⁷⁵ Similarly, it has been held that not only accused persons have a right to an expeditious trial, as a result of which they cannot waive this right.⁷⁶ Although the other beneficiaries of the right were not specified, the Chamber probably had similar interests of the Prosecution, victims, or the international community in mind. The ICTY Appeals Chamber has indeed held that the victims also have the ‘right’ to an expeditious trial.⁷⁷ This obligation to ensure expeditious trials thus does not imply a higher standard than provided for by the right to be tried without undue delay. Instead, it is seen as emphasizing the general importance of speediness in the Tribunals’ work.⁷⁸ This broader focus on expeditiousness as a duty owed to the victims or the international community at large may have had an impact on the Tribunals’ approach to the right to be tried without undue delay.

There are two main ways in which the Tribunals have addressed the right to be tried without undue delay. First, the Judges have used this right as a device to control the proceedings.⁷⁹ It has been employed to limit the use by both parties of certain procedural actions in order to prevent delay. Amendments of the indictment and requests for joinder and severance have been examined in light of the right to be tried without undue delay, and more specific procedural actions, such as (re)calling witnesses and admitting evidence, have also been assessed in light of this right. Second, the Tribunals have, to a limited extent, addressed allegations of violations of the right to be tried without undue delay. This case law is most relevant for present purposes, since it discusses the core of this right. However, attention will also be devoted to the former since that will properly reflect the use of the right to be tried without undue delay in the case law of the Tribunals. On top of that, the case law regarding alleged violations of the right to be tried without undue delay is relatively limited.⁸⁰

⁷⁵ ICTY, Decision on Interlocutory Appeal by the Accused Zoran Žigić against the Decision of Trial Chamber I dated 5 December 2000, *Prosecutor v. Kvočka et al* (IT-98-30/1-AR73.5), 25 May 2001, 21; ICTY, Decision on Motion of Accused Naletilić for a Trial Schedule which Incorporates Reasonable Breaks, *Prosecutor v. Naletilić and Martinović* (IT-98-34-T), 3 April 2002, 3; ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009, 54. See also Yvonne McDermott, ‘General Duty to Ensure the Right to a Fair and Expeditious Trial’ in Göran Sluiter and others (eds), *International Criminal Procedure – Principles and Rules* (OUP 2013), 805; Trechsel, ‘Rights in Criminal Proceedings under the ECHR and the ICTY Statute’ (n 24), 167.

⁷⁶ See eg ICTY, Decision on Adoption of New Measures to Bring the Trial to an End within a Reasonable Time, *Prosecutor v. Prlić et al* (IT-04-74-T), 13 November 2006, 14.

⁷⁷ ICTY, Decision on Appeal against Decision on Continuation of Proceedings, Dissenting Opinion of Judge Afande, *Prosecutor v. Šešelj* (IT-03-67 –AR15bis), 6 June 2014, 29.

⁷⁸ Patrick Robinson, ‘Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the former Yugoslavia’ (2000) 11 *Eur J Int’l L* 569, 583.

⁷⁹ See Farrell (n 74), 106, who calls this ‘procedural streamlining’.

⁸⁰ The ICTY’s case law in particular, is quite limited in number. Its first decision on this issue was rendered in 2007: ICTY, Decision on Motion for Sanctions for Failure to Bring the Accused to Trial without Undue Delay, *Prosecutor v. Perišić* (IT-04-81-PT), 23 November 2007, 12.

3.1. Scope of the right to be tried without undue delay

Before the Tribunals, the time period relevant for the right to be tried without undue delay commences with the arrest of the suspect.⁸¹ The Tribunals' practice further confirms this, since assessments of undue delay have always taken the arrest of the defendant as their starting point. However, at least in one case, the ICTR held that the relevant time period commences when the Tribunal charges a person.⁸² Similarly, the ICTY once followed the standard developed by the ECtHR in that the time period commences when the accused is 'substantially affected' by the proceedings, for example by being investigated, or when s/he is arrested.⁸³ It seems legitimate to consider the moment of arrest as triggering the protection of the right to be tried without undue delay before the Tribunals. This may seem at odds with the standards developed in IHRL, because a person would normally be investigated prior to being charged, and would perhaps be charged prior to being arrested. However, the system of the Tribunals is such that once an indictment is confirmed, this decision is usually joined by a warrant for the arrest of the person in question.⁸⁴ The moment of charging and arresting a suspect should therefore coincide. Generally, if there is a significant time period between the issuing of an indictment and the actual arrest of an accused person, this passage of time cannot be attributed to the Tribunal. States might be reluctant to transfer certain accused persons, or accused persons themselves choose to evade arrest. If this results in significant time periods between the 'charging' of an accused person and her/his arrest and transfer, such delay cannot be attributed to the Tribunals. It therefore seems legitimate that, as a rule, the Tribunals have taken the date of the arrest of a suspect as the commencement of the time period relevant for her/his right to be tried without undue delay.⁸⁵

However, accused persons may have spent considerable time in domestic detention prior to being indicted by the Tribunals. The question then arises whether to take their arrest

⁸¹ See, eg: ICTY, Decision on Motion for Sanctions for Failure to Bring the Accused to Trial without Undue Delay, *Prosecutor v. Perišić* (IT-04-81-PT), 23 November 2007, 21; Similarly ICTR, Reasons for the Decision on the Prosecutor's Request for Leave to Amend the Indictment, *Prosecutor v. Kanyabashi* (ICTR-96-15-T), 12 August 1999, 6; ICTR, Decision on Defence Motion for Stay of Proceedings, *Prosecutor v. Rwamakuba* (ICTR-98-44C-PT), 3 June 2005, 24.

⁸² ICTR, Decision on Defence Motion for Stay of Proceedings, *Prosecutor v. Rwamakuba* (ICTR-98-44C-PT), 3 June 2005, 19.

⁸³ ICTY, Sentencing Judgement, *Prosecutor v. Mrđa* (IT-02-59-s), 31 March 2004, 102.

⁸⁴ Arts 19 and 20 ICTY Statute; Arts 18 and 19 ICTR Statute; Gideon Boas and others, *International Criminal Procedure* (CUP 2011), 179.

⁸⁵ Similarly Lahiouel (n 5), 200. Of course, it is not unimaginable that persons have been substantially affected by investigations into their conduct prior to being indicted by the ad hoc Tribunals. However, no examples of this have been found in the practice of the Tribunals.

as the starting point, or the date of their transfer to the Tribunal. The ICTR has clarified that the relevant period only commences once a person is detained at the request of the Tribunals themselves, be it the Prosecutor or a Chamber.⁸⁶ Any prior domestic detention is not relevant for the Tribunals' responsibility to ensure a person's right to be tried without undue delay.

Furthermore, the Tribunals have confirmed that the right to be tried without undue delay also applies to (interlocutory) appellate procedures.⁸⁷ The total period governed by this right before the Tribunals thus runs from arrest until the final – appeal – judgment is rendered. This has led the judges of the ICTY to create the previously inexistent institution of a pre-appeal judge, who is responsible for ensuring the expeditiousness of the (pre-)appeal process.⁸⁸ The judges of the Tribunal thus created a procedure, or procedural power that was not provided for in the Tribunal's legal framework, yet was considered necessary in order to ensure respect for the rights of the accused.

3.2. Relevant parameters to determine a violation

The Tribunals have repeatedly held that the assessment of whether proceedings have been unduly delayed must be done on a case-by-case basis, with reference to the specific circumstances of each case.⁸⁹ There is no absolute time-limit at which point the length of proceed-

⁸⁶ ICTR, Decision on the Prosecutor's Motion to Amend the Indictment, *Prosecutor v. Kabiligi and Ntabakuze* (ICTR-97-34-I), 8 October 1999, 8; ICTR, Decision, *Barayagwiza v. Prosecutor* (ICTR-97-19-AR72), 3 November 1999, 61; ICTR, Decision on the Prosecutor's Motion for Joinder, *Prosecutor v. Ntagerura* (ICTR-97-36-I), 11 October 1999, 14; ICTR, Decision on the Prosecutor's Motion for Joinder, *Prosecutor v. Bagosora* (ICTR-96-7), 29 June 2000, 152.

⁸⁷ ICTY, Order Appointing a Pre-Appeal Judge, *Prosecutor v. Delalić et al* (IT-96-21-A), 12 October 1999, 2; ICTY, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, *Prosecutor v. Halilović* (IT-01-48-A), 27 October 2006, 17.

⁸⁸ ICTY, Order Appointing a Pre-Appeal Judge, *Prosecutor v. Delalić et al* (IT-96-21-A), 12 October 1999, 3; ICTY, Order Appointing a Pre-Appeal Judge and Scheduling Order, *Prosecutor v. Blaskić* (IT-95-14-A), 8 June 2000, 2; see also Farrell (n 74), 106.

⁸⁹ ICTY, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, *Prosecutor v. Kovačević* (IT-97-24-AR73), 2 July 1998, 30; ICTY, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, *Prosecutor v. Halilović* (IT-01-48-A), 27 October 2006, 17; ICTR, Judgement, *Prosecutor v. Bagosora et al* (ICTR-98-41-T), 18 December 2008, 75.

ICTR, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of the Proceedings, *Prosecutor v. Kanyabashi* (ICTR-96-15-I), 23 May 2000, 59; ICTR, Decision on the Defence Motion for Separate Trial, *Prosecutor v. Ndayambaje* (ICTR-96-8-T), 25 April 2001, 18; ICTR, Decision on the Motion for Separate Trials, *Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-97-21-T), 8 June 2001, 23; ICTR, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), *Prosecutor v. Mugenzi et al* (ICTR-99-50-I), 8 November 2002, 33; ICTR, 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 for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-I), 2 October 2003, 13; ICTR, Decision on Prosper Mugiraneza's Third Motion to Dismiss Indictment for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 10 February 2009, 15; ICTR, Judgement and Sentence, *Prosecutor v. Karemera and Ndirumpatse* (ICTR-98-44-T), 2 February 2012, 34.

ings becomes unreasonable.⁹⁰ The length of proceedings alone thus says little about the reasonableness of the delay.

The ICTR was first to identify the relevant parameters to establish undue delay. As will be seen, there have been different approaches to these parameters. Early case law of the ICTR provided that the relevant factors to determine whether a given delay would be undue were the length of the delay, the gravity of the crimes charged, the complexity of the case, and the prejudice that the accused may suffer.⁹¹ Another early line of ICTR case law referred to the complexity of the case, the conduct of the authorities and the accused, and whether the case has been pursued with sufficient diligence.⁹² In *Mugiraneza et al*, the Appeals Chamber formulated the five most recurrent factors: the length of the delay, the complexity of the case, the conduct of the parties, the conduct of the relevant authorities, and the prejudice to the accused.⁹³ These criteria have most consistently been cited in the case law of the ICTR.⁹⁴ The ICTY has also endorsed them.⁹⁵

⁹⁰ ICTY, Decision on Motion by Accused to Discontinue Proceedings, *Prosecutor v. Šešelj* (IT-03-73-T), 29 September 2011, 27; ICTR, Decision on Defence Motion for Stay of Proceedings, *Prosecutor v. Rwamakuba* (ICTR-98-44C-PT), 3 June 2005, 26; ICTR, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 27; ICTR, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 14 June 2007, 15; ICTR, Decision on Prosper Mugiraneza's Third Motion to Dismiss Indictment for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 10 February 2009, 15; ICTR, Decision on Jérôme-Clement Bicomumpaka's Motion Seeking Permanent Stay of Proceedings, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 27 February 2009, 14; ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009, 31; ICTR, Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 11.

⁹¹ ICTR, Decision on the Prosecutor's Request for Leave to Amend the Indictment, *Prosecutor v. Bagosora et al* (ICTR-96-7-T), 12 August 1999, 5; ICTR, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, *Prosecutor v. Ndayambaje* (ICTR-96-8-T), 2 September 1999, 5; ICTR, Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings, *Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-98-42-T), 7 April 2006, 75.

⁹² ICTR, Decision on the Prosecutor's Motion for Joinder, *Prosecutor v. Ntagerura* (ICTR-97-36-I), 11 October 1999, 13; ICTR, Decision on the Prosecutor's Motion for Joinder, *Prosecutor v. Bagosora* (ICTR-96-7), 29 June 2000, 147; ICTR, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Joseph Nzizorera, *Prosecutor v. Bizimana et al* (ICTR-98-44-T), 12 July 2000, 24; ICTR, Decision on the Defence Motion Seeking a Separate Trial for the Accused Sylvain Nsabimina, *Prosecutor v. Nsabimina et al* (ICTR-97-29A-T), 8 September 2000, 38.

⁹³ ICTR, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-AR73), 27 February 2004, 3.

⁹⁴ ICTR, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 14; ICTR, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 14 June 2007, 11; ICTR, Appeals Judgement, *Prosecutor v. Nahimana et al* (ICTR-99-52-A), 28 November 2007, 1074; ICTR, Judgement, *Prosecutor v. Bagosora et al* (ICTR-98-41-T), 18 December 2008, 75; ICTR, Decision on Prosper Mugiraneza's Third Motion to Dismiss Indictment for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 10 February 2009, 11; ICTR, Decision on Jérôme-Clement Bicomumpaka's Motion Seeking Permanent Stay of Proceedings, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 27 February 2009, 9; ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009, 30; ICTR, Decision on Prosper Mugiraneza's Fourth Motion

Still, decisions of both Tribunals prior and subsequent to this decision have also relied on other sets of parameters. For example, in *Rwamakuba*, the ICTR relied on the gravity of the charges, the complexity of the case, the complexity of the proceedings, including the complexity of the investigations, the joinder of accused, the conduct of the accused, the number of motions filed by the parties, and the conduct of the organs of the Tribunal, including the Prosecution and the Registry.⁹⁶ In *Karemera et al*, the Chamber assessed the complexity of the case, the complexity of the investigations, the joinder of Accused, and the number of motions filed by the parties.⁹⁷ In *Ntahobali*, the Chamber had regard to the complexity of factual or legal issues, the conduct of applicants and competent authorities, and what is at stake for the applicant.⁹⁸ In *Šešelj*, the ICTY said to have considered the complexity of the case, the large number of witnesses heard and exhibits tendered, the behavior of all the parties involved, and the seriousness of the charges against the accused, in determining that the accused's right to be tried without undue delay had not been violated.⁹⁹

On the one hand, there is clear overlap between these various approaches, although the wording may differ. Some of the factors repeatedly referred to as relevant are the same, albeit under different labels. Furthermore, a number of factors can be joined under a similar heading. For example, the number of motions filed by a party clearly falls within the scope of the more general factor of the conduct of the parties. At the same time, however, there is a

to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 3; ICTR, Judgement, *Prosecutor v. Gatete* (ICTR-2000-61-T), 31 March 2011, 57; ICTR, Judgement and Sentence, *Prosecutor v. Nyiramasuhuko et al* (ICTR-98-42-T), 24 June 2011, 137; ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 73; ICTR, Judgement and Sentence, *Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-T), 2 February 2012, 34; ICTR, Decision on Protais Zigiranyirazo's Motion for Damages, *Zigiranyirazo v. Prosecutor* (ICTR-2001-01-073), 18 June 2012, 33; ICTR, Appeals Judgement, *Prosecutor v. Gatete* (ICTR-00-61-A), 9 October 2012, 18; ICTR, Appeals Judgement, *Prosecutor v. Mugenzi and Mugiraneza* (ICTR-99-50-A), 4 February 2013, 30; ICTR, Appeals Judgement, *Prosecutor v. Ndindiliyimana et al* (ICTR-00-56-A), 11 February 2014, 43; ICTR, Appeals Judgement, *Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-A), 29 September 2014, 69.

⁹⁵ ICTY, Decision on Motion for Sanctions for Failure to Bring the Accused to Trial without Undue Delay, *Prosecutor v. Perišić* (IT-04-81-PT), 23 November 2007, 12; ICTY, Decision on Appeal against Decision on Continuation of Proceedings, *Prosecutor v. Šešelj* (IT-03-67 –AR15bis), 6 June 2014, 63.

⁹⁶ ICTR, Decision on Defence Motion for Stay of Proceedings, *Prosecutor v. Rwamakuba* (ICTR-98-44C-PT), 3 June 2005, 19.

⁹⁷ ICTR, Decision on Continuation of the Proceedings, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 6 March 2007, 78.

⁹⁸ ICTR, Decision on Ntahobali's Motion for a Stay of Proceedings for Undue Delay, *Prosecutor v. Ntahobali* (ICTR-97-21-T), 26 November 2008, 58.

⁹⁹ ICTY, Decision on Oral Request of the Accused for Abuse of Process, *Prosecutor v. Šešelj* (IT-03-73-T), 10 February 2010, 30; reiterated in: ICTY, Decision on Accused's Claim for Damages on Account of Alleged Violations of his Elementary Rights during Provisional Detention, *Prosecutor v. Šešelj* (IT-03-73-T), 12 March 2012, 89, 91.

certain lack of consistency with regard to a number of factors.¹⁰⁰ Notably, prejudice to the accused is not always examined, nor is the gravity of the crimes charged, which was not included by the Appeals Chamber in its authoritative listing of relevant criteria and yet remained a relevant factor in a number of decisions. Similarly, the ICTY, faced with a number of motions alleging undue delay in *Šešelj*, has not followed the *Mugiraneza et al* criteria like it did in *Perišić*, but instead considered the complexity of the case, the conduct of all parties involved, and the seriousness of the charges against the accused.¹⁰¹ However, the ICTY Appeals Chamber did subsequently endorse these five criteria in *Šešelj*.¹⁰² This inconsistency raises problems in and of itself. It creates inequality between defendants, and complicates the conduct of an effective defence. It will be difficult for defence counsel to convince a Chamber of proceedings having suffered from undue delay if they cannot predict the criteria that it may use to assess delays.

The criteria used by the Tribunals to assess delay are clearly inspired by IHRL. Interestingly, however, the Appeals Chamber did not refer to any sources of human rights law when it first elaborated these criteria. In addition, although the criteria seem inspired by IHRL, they are not identical. The subsequent sections address each parameter, followed by a section on other relevant aspects of the Tribunals' approach to undue delay.

3.2.1. *Length of the delay*

A large number of decisions have considered the length of the delay as a relevant factor in determining whether the right to be tried within a reasonable time had been violated. Naturally, however, even in decisions where the length of the period was not explicitly termed a separate 'factor', it was still considered. In order to enable a determination of whether an accused person was tried within a reasonable time, the actual length of proceedings must first be established.

The Tribunals have not given much attention to the concrete implications of this factor on the overall determination of reasonableness. As a general rule, longer proceedings militate towards unreasonableness. However, as stated above, there are no absolute time limits for trial proceedings, and the reasonableness of the length of the proceedings must be as-

¹⁰⁰ See also Farrell (n 74), 113, who identified this lack of consistency early on in the case law of the Tribunal. Although the authoritative determination by the Appeals Chamber in *Mugiraneza et al*, cited above, took away a part of this inconsistency, it has not disappeared completely.

¹⁰¹ ICTY, Decision on Oral Request of the Accused for Abuse of Process, *Prosecutor v. Šešelj* (IT-03-73-T), 10 February 2010, 30.

¹⁰² ICTY, Decision on Appeal against Decision on Continuation of Proceedings, *Prosecutor v. Šešelj* (IT-03-67-AR15bis), 6 June 2014, 63.

sessed by reference to a number of factors. The actual length of the proceedings or the delay does not appear to be that crucial for a determination of reasonableness. Periods of up to fifteen years have been justified by means of arguments comparable to those justifying proceedings that took three years or less. Furthermore, in *Šešelj*, the Trial Chamber has issued a total of four consecutive decisions denying defence motions alleging undue delay without adding substantial reasoning over a period of almost four years.¹⁰³ In the first few decisions, the Chamber essentially reiterated its previous findings without justifying the additional time that had passed since. Although the fourth decision did acknowledge the additional time passed, the delays were still justified by means of the same arguments as in previous decisions.

3.2.2. Complexity of the case

The complexity of the case is an important consideration in the case law of the ad hoc Tribunals on undue delay.¹⁰⁴ The Tribunals have considered a number of factors to determine to the complexity of a case. In general terms, the difficulty of on-site investigations has been referred to often as a component of complexity.¹⁰⁵ More specifically, the international nature of the investigations has been cited as adding to a case's complexity: the broad scope, both geographic and temporal, of the crimes charged, as well as the fact that witnesses and evidence are situated around the world have been said to render the investigation in international

¹⁰³ ICTY, Decision on Oral Request of the Accused for Abuse of Process, *Prosecutor v. Šešelj* (IT-03-73-T), 10 February 2010, 29-30, where the Chamber relied on several arguments related mainly to the complexity of the case to dismiss the allegations that the accused's right to be tried without undue delay had been violated; ICTY, Decision on Motion by Accused to Discontinue Proceedings, *Prosecutor v. Šešelj* (IT-03-73-T), 29 September 2011, 29, where the Chamber referred back to its previous arguments; ICTY, Decision on Accused's Claim for Damages on Account of Alleged Violations of his Elementary Rights during Provisional Detention, *Prosecutor v. Šešelj* (IT-03-73-T), 12 March 2012, 29, where the Chamber again referred back to its previous findings without adding any reasoning. The Chamber's subsequent decision did add some, albeit limited, reasoning to justify additional delays: ICTY, Decision on Continuation of Proceedings, *Prosecutor v. Šešelj* (IT-03-67-T), 13 December 2013, 18-22, where the Chamber reiterated its previous findings, and 23, where the Chamber held that the additional time taken since the previous decisions was 'reasonable', in light of the complexity of the case; see also ICTY, Decision on Appeal against Decision on Continuation of Proceedings, *Prosecutor v. Šešelj* (IT-03-67-AR15bis), 6 June 2014, in this decision, however, the Appeals Chamber did not consider delays up to that point, but possible future undue delay resulting from the disqualification of Judge Harhoff from the bench of the Trial Chamber.

¹⁰⁴ See eg ICTY, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaskić* (IT-95-14-T), 20 December 1996, 7; ICTY, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, *Prosecutor v. Kovačević* (IT-97-24-AR73), 2 July 1998, 31; ICTY, Decision on Filing of Replies, *Prosecutor v. Brđanin and Talić* (IT-99-36-PT), 7 June 2001, para.3; ICTY, Decision on Motion for Sanctions for Failure to Bring the Accused to Trial without Undue Delay, *Prosecutor v. Perišić* (IT-04-81-PT), 23 November 2007, 22; ICTY, Decision on Motion by Accused to Discontinue Proceedings, *Prosecutor v. Šešelj* (IT-03-73-T), 29 September 2011, 30.

¹⁰⁵ ICTY, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaskić* (IT-95-14-T), 20 December 1996, 7; ICTR, Decision on Defence Motion for Trial to Proceed before Trial Chamber II, Composed of Judges Sekule, Maqutu and Ramaroson and for Termination of the Proceedings, *Prosecutor v. Kanyabashi* (ICTR-96-15-T), 20 February 2004, 3; ICTR, Decision on Defence Motion for Stay of Proceedings, *Prosecutor v. Rwamakuba* (ICTR-98-44C-PT), 3 June 2005, 34.

crimes particularly difficult.¹⁰⁶ Another aspect of the international nature of investigations is the unavoidable reliance on state cooperation, which can also cause delays.¹⁰⁷ Furthermore, the fact that the adjudication of the crimes takes place a considerable time after their occurrence may have an impact on the complexity of the cases.¹⁰⁸

The size of cases has also been a prevalent factor adding to complexity. The number of witnesses and the volume of the evidence, whether actually specified or not, have been cited most often.¹⁰⁹ The number of accused has been considered to add to complexity,¹¹⁰ as well as the number of crimes that the defendants were charged with.¹¹¹ The number of mo-

¹⁰⁶ ICTR, Reasons for the Decision on the Prosecutor's Request for Leave to Amend the Indictment, *Prosecutor v. Kanyabashi* (ICTR-96-15-T), 12 August 1999, 6; ICTR, Judgement, *Prosecutor v. Bagosora et al* (ICTR-98-41-T), 18 December 2008, 79, 81; ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 77; ICTR, Appeals Judgement, *Prosecutor v. Bagosora and Nsengiyumva* (ICTR-98-41-A), 14 December 2011, 37.

¹⁰⁷ Whiting (n 5), 336.

¹⁰⁸ Møse and Aptel (n 73), 550-553; see also Whiting (n 5), 335-336.

¹⁰⁹ ICTY, Decision on Oral Request of the Accused for Abuse of Process, *Prosecutor v. Šešelj* (IT-03-73-T), 10 February 2010, 29; ICTR, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-AR73), 27 February 2004, 3; confirmed in: ICTR, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 14 June 2007, 16; ICTR, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 30; ICTR, Appeals Judgement, *Prosecutor v. Nahimana et al* (ICTR-99-52-A), 28 November 2007, 1076; ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009, 30; ICTR, Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 13; ICTR, Judgement, *Prosecutor v. Gatete* (ICTR-2000-61-T), 31 March 2011, 60; ICTR, Judgement and Sentence, *Prosecutor v. Nyiramasuhuko et al* (ICTR-98-42-T), 24 June 2011, 139; ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 77; ICTR, Judgement and Sentence, *Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-T), 2 February 2012, 38; ICTY, Decision on Continuation of Proceedings, *Prosecutor v. Šešelj* (IT-03-67-T), 13 December 2013, 23.

¹¹⁰ ICTR, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-AR73), 27 February 2004, 3; ICTR, Decision on Defence Motion for Stay of Proceedings, *Prosecutor v. Rwamakuba* (ICTR-98-44C-PT), 3 June 2005, 29; ICTR, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 30; ICTR, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 14 June 2007, 16; ICTR, Appeals Judgement, *Prosecutor v. Nahimana et al* (ICTR-99-52-A), 28 November 2007, 1076; ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009, 30; ICTR, Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 13; ICTR, Judgement and Sentence, *Prosecutor v. Nyiramasuhuko et al* (ICTR-98-42-T), 24 June 2011, 139; ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 76; ICTR, Appeals Judgement, *Prosecutor v. Bagosora and Nsengiyumva* (ICTR-98-41-A), 14 December 2011, 37; ICTR, Judgement and Sentence, *Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-T), 2 February 2012, 35.

¹¹¹ ICTR, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-AR73), 27 February 2004, 3; confirmed in: ICTR, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 14 June 2007, 16; ICTR, Appeals Judgement, *Prosecutor v. Nahimana et al* (ICTR-99-52-A), 28 November 2007, 1076; ICTR, Judgement, *Prosecutor v. Bagosora et al* (ICTR-98-41-T), 18 December 2008, 78; ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009, 30; ICTR,

tions filed by the parties and the number of decisions rendered by the Chamber have also been weighed as adding to the complexity of cases.¹¹² Several decisions have also referred to the—large—number of trial days as a part of the complexity of a case.¹¹³ Another typical feature of international crimes cases relates to the necessity of translation of documentary evidence, testimony and trial proceedings generally into the two working languages of the Court, and/or into the language of their respective areas of jurisdiction. This translation can be very time-consuming and has been considered to add to the complexity of a case.¹¹⁴

A related concern is the legal complexity of the crimes charged. This includes the complexity of having to prove indirect modes of perpetration, as well as other aspects that make international crimes more complex than regular crimes.¹¹⁵ Although the Tribunals have not clarified what such legal complexity entails, it is true that the Tribunals faced complex and novel legal questions. Their sources of law include their own Statutes, their RPEs, but also a variety of sources stemming from international law and domestic law, both in their

Judgement, *Prosecutor v. Gatete* (ICTR-2000-61-T), 31 March 2011, 60; ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 75; ICTR, Appeals Judgement, *Prosecutor v. Bagosora and Nsengiyumva* (ICTR-98-41-A), 14 December 2011, 37; ICTY, Decision on Continuation of Proceedings, *Prosecutor v. Šešelj* (IT-03-67-T), 13 December 2013, 23.

¹¹² ICTR, Decision on Defence Motion for Stay of Proceedings, *Prosecutor v. Rwamakuba* (ICTR-98-44C-PT), 3 June 2005, 29; ICTR, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 30; ICTR, Judgement, *Prosecutor v. Bagosora et al* (ICTR-98-41-T), 18 December 2008, 78; ICTR, Judgement, *Prosecutor v. Bagosora et al* (ICTR-98-41-T), 18 December 2008, 81; ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 76; ICTR, Judgement and Sentence, *Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-T), 2 February 2012, 38.

¹¹³ ICTR, Judgement and Sentence, *Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-T), 2 February 2012, 38; ICTR, Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 13; ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 76; ICTR, Judgement and Sentence, *Prosecutor v. Nyiramasuhuko et al* (ICTR-98-42-T), 24 June 2011, 139.

¹¹⁴ ICTR, Judgement, *Prosecutor v. Bagosora et al* (ICTR-98-41-T), 18 December 2008, 81; ICTR, Appeals Judgement, *Prosecutor v. Bagosora and Nsengiyumva* (ICTR-98-41-A), 14 December 2011, 37.

¹¹⁵ ICTY, Decision on Oral Request of the Accused for Abuse of Process, *Prosecutor v. Šešelj* (IT-03-73-T), 10 February 2010, 29; ICTR, Decision on the Prosecutor's Motion for Joinder, *Prosecutor v. Bagosora* (ICTR-96-7), 29 June 2000, 152; ICTR, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Joseph Nzizorera, *Prosecutor v. Bizimana et al* (ICTR-98-44-T), 12 July 2000, 26; ICTR, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-AR73), 27 February 2004, 3; confirmed in: ICTR, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 14 June 2007, 16; ICTR, Appeals Judgement, *Prosecutor v. Nahimana et al* (ICTR-99-52-A), 28 November 2007, 1076; ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009, 30; ICTR, Judgement, *Prosecutor v. Gatete* (ICTR-2000-61-T), 31 March 2011, 60; ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 75; ICTR, Appeals Judgement, *Prosecutor v. Bagosora and Nsengiyumva* (ICTR-98-41-A), 14 December 2011, 37; ICTR, Judgement and Sentence, *Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-T), 2 February 2012, 35; ICTY, Decision on Continuation of Proceedings, *Prosecutor v. Šešelj* (IT-03-67-T), 13 December 2013, 23; see also Whiting (n 5), 338.

substantive and procedural law.¹¹⁶ Moreover, they have had to apply modes of individual criminal responsibility that either had not fully developed in international law, or were completely novel.

Generally, the complexity of cases before the Tribunal has thus been a recurring factor relied on to justify the length of their proceedings. The Tribunals appear to consider it the most important factor in determining undue delay.¹¹⁷ The relative importance of complexity is further illustrated by the fact that the ICTR has held that proceedings that took up to sixteen years did not violate the accused's right to be tried without undue delay, based on the size and complexity of the case alone.¹¹⁸

This particular importance attached to the complexity of the cases by the ICTs seems to have a strong connection to the Tribunals' failure to truly assess the responsibility of the judicial and prosecutorial authorities. As seen in the above, the ICTs have routinely relied on the complexity of the cases before them as the most important, if not the sole justification for the length of the proceedings. To a certain extent, this seems reasonable. IHRL acknowledges the impact of the complexity of a case on its length, and the cases before the ICTs are generally more complex than ordinary domestic criminal cases. In addition, the factors relied on by the ICTs to justify the complexity of the cases before them seem to correspond to those that have been accepted by human rights supervisory bodies, such as the ECtHR.

However, most decisions blanketly assert the complexity of the case as an absolute and unqualified justification of delays, no matter their length. There are few discussions of how the complexity of a case actually contributed to its length, and varying lengths of cases have been justified in similar ways. A pertinent example is the case against *Gatete*, which had witnessed a pre-trial delay of over seven years, while the trial itself had proceeded rather quickly. Still, the Trial Chamber held that there had been no undue delay.¹¹⁹ The Appeals Chamber corrected the Chamber and found an on its part, considering that the case was far less complex than other cases before the ICTR, and that the complexity was not sufficient to justify a seven year pre-trial delay, particularly because the trial proceedings themselves lasted only 30 days, and the volume of the evidence was limited.¹²⁰ However, this has not dissuaded the Tribunal from blanketly relying on complexity in other cases. For example, the

¹¹⁶ Møse and Aptel (n 73), 550.

¹¹⁷ See also Heinsch (n 5), 482.

¹¹⁸ ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 75-79; ICTR, Appeals Judgement, *Prosecutor v. Mugenzi and Mugiraneza* (ICTR-99-50-A), 4 February 2013, 32; ICTR, Appeals Judgement, *Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-A), 29 September 2014, 71.

¹¹⁹ ICTR, Judgement, *Prosecutor v. Gatete* (ICTR-2000-61-T), 31 March 2011, 64.

¹²⁰ ICTR, Appeals Judgement, *Prosecutor v. Gatete* (ICTR-00-61-A), 9 October 2012, 29.

case against Karemera and Ngirumpatse took sixteen years to complete, which the Appeals Chamber found not to have been undue based on the size and complexity of the case alone.¹²¹

Another neglected issue is the fact that the complexity of a case does not absolve the judicial and prosecutorial authorities from their responsibility to protect the accused's right to be tried without undue delay.¹²² The ICTs have failed to recognize this in their case law on this right. Most decisions assert the complexity of the case and mention a number of factors that have added to this complexity, such as the number of accused, the number of charges and the volume of the evidence. This is a very one-dimensional approach to the complexity of a case, as it fails to assess how this complexity has in fact impacted on the length of the proceedings. It also ignores the fact that both the Prosecutor and the Chamber itself have a significant responsibility in determining the complexity of a case.¹²³ The discussion of the conduct of the authorities below further builds on this aspect of the case law of the Tribunals.

3.2.3. *Conduct of the parties*

The conduct of the parties is the third factor that the Tribunals address in their assessments of undue delay. According to the ICTR Appeals Chamber, the conduct of the parties, including that of the prosecutor, is a central factor that a Chamber must consider in determining undue delay.¹²⁴ The ICTR has considered that both parties have a duty to expedite proceedings.¹²⁵

The conduct of the defence is one prong of the analysis. Where the defence contributed to possible delays, this militates against a finding of undue delay. However, the Tribunals have rarely relied on this factor. The ICTY once held that where the conduct of the defence, for example in filing numerous motions, adds to the delay, this is a factor that militates against a finding of undue delay.¹²⁶ In *Šešelj*, the ICTY weighed the time-consuming contempt proceedings that resulted in a conviction for the accused as a factor significantly con-

¹²¹ ICTR, Appeals Judgement, *Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-A), 29 September 2014, 71.

¹²² As also confirmed by the practice of human rights courts and supervisory bodies: ECtHR, Judgment, *Sizov v. Russia* (App No 58104/08), 25 July 2012, 60; ECtHR, Judgment, *Grishin v. Russia* (App No 14807/08), 24 July 2012; IACtHR, Judgment, *Valle Jaramillo et al v. Colombia* (Case No 12.415), 27 November 2008, 156; HRC, *Francis et al v. Trinidad and Tobago* (Comm No 899/1999), UN Doc CCPR/C/75/D/899/1999, 25 July 2002, 5.4.

¹²³ See also Göran Sluiter, 'Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law' (2010) 8 Nw U J Int'l Hum Rts 248, 251.

¹²⁴ ICTR, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-AR73), 27 February 2004, 3.

¹²⁵ ICTR, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of the Proceedings, *Prosecutor v. Kanyabashi* (ICTR-96-15-I), 23 May 2000, 69.

¹²⁶ ICTY, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaskić* (IT-95-14-T), 20 December 1996, 7.

tributing to the delays in this case.¹²⁷ Similarly, the ICTR has discussed the conduct of a defendant as having contributed to delays, while it did emphasize that the majority of his contribution to the delays were legitimate procedural actions.¹²⁸ The ICTY has held that the exercise of defence rights cannot in itself be invoked by the Chamber as leading to a delay of the proceedings; in other words, it cannot imply some sort of waiver of the right to a speedy trial.¹²⁹ At the same time, extensive pre-trial litigation, resulting from the numerous motions filed by the defence, was considered to have added to the complexity of the case, thus legitimizing a portion of the delays.¹³⁰ Similarly, the defence has been held to have a responsibility to complain about delays in a timely manner, to prevent forfeiting its right to complain about it. For example, an ICTR Chamber has held that the defendant had contributed to his own lengthy detention by failing to request provisional release, and by failing to appeal several decisions amending the indictment.¹³¹

Chambers have an obligation to ensure the fairness and expeditiousness of the proceedings, which apparently extends beyond respecting the right of the accused to a trial without undue delay. This could explain the fact that Chambers of both tribunals have limited the exercise of defence rights, where they considered this to negatively impact on the expeditiousness of the proceedings.¹³² For example, Karemera's request for postponement of his

¹²⁷ ICTY, Decision on Oral Request of the Accused for Abuse of Process, *Prosecutor v. Šešelj* (IT-03-73-T), 10 February 2010, 29.

¹²⁸ ICTR, Judgement and Sentence, *Prosecutor v. Karemera and Ntirumpatse* (ICTR-98-44-T), 2 February 2012, 29.

¹²⁹ ICTY, Decision on Motion by Accused to Discontinue Proceedings, *Prosecutor v. Šešelj* (IT-03-73-T), 29 September 2011, 26; similarly ICTY, Decision on Appeal against Decision on Continuation of Proceedings, *Prosecutor v. Šešelj* (IT-03-67 –AR15bis), 6 June 2014, 65.

¹³⁰ ICTR, Appeals Judgement, *Prosecutor v. Ndirilyimana et al* (ICTR-00-56-A), 11 February 2014, 45.

¹³¹ ICTR, Decision on Protais Zigiranyirazo's Motion for Damages, *Zigiranyirazo v. Prosecutor* (ICTR-2001-01-073), 18 June 2012, 38, 40; similarly ICTR, Judgement and Sentence, *Prosecutor v. Karemera and Ntirumpatse* (ICTR-98-44-T), 2 February 2012, 32: 'Karemera, however, did not raise the issue of delay during any of his initial hearings or in motions that challenged various other aspects of the proceedings. It also does not appear that the matter was mentioned at any later period until his closing brief, some 13 years after these delays occurred. The Chamber considers that Karemera's failure to promptly bring this challenge indicates that any prejudice he suffered is minimal at most.' Similarly ICTR, Appeals Judgement, *Prosecutor v. Ndirilyimana et al* (ICTR-00-56-A), 11 February 2014, 44, where the Appeals Chamber held that the accused could no longer complain about the delays in his case related to its joinder with those against other accused persons, because he had failed to do so earlier.

¹³² ICTR, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, *Prosecutor v. Muhimana* (ICTR-95-18-I), 6 November 2001, 12; ICTR, Decision in the Matter of Proceedings under Rule 15Bis(D), *Prosecutor v. Nyiramasuhuko et al* (ICTR-98-42-T), 15 July 2003, para 33(f); confirmed on appeal: ICTR, Decision in the Matter of Proceedings under Rule 15bis (D), *Prosecutor v. Nyiramasuhuko et al* (ICTR-98-41-A15bis), 24 September 2003, 24; ICTY, Reasons for Decision on Assignment of Defence Counsel, *Prosecutor v. Milošević* (IT-02-54-T), 22 September 2004, 54; ICTY, Decision on Joint Defence Interlocutory Appeal against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, *Prosecutor v. Prlić et al* (IT-04-74-AR73.2), 4 July 2006, 4; confirmed on appeal: ICTY, Decision on Defendants Appeal against

trial was denied because of his own right to be tried without undue delay.¹³³ The ICTY also often assess defence requests for procedural actions, such as amending its witness list, or for more time to present their case, in light of the Chamber's obligation to prevent undue delay, or the accused's own right to be tried without undue delay.¹³⁴ The ICTY has held that 'the Trial Chamber has a duty to be proactive in ensuring that the accused is tried without undue delay, regardless of whether the accused her/himself asserts that right.'¹³⁵ Such limiting of defence rights in order to expedite proceedings has been subject to criticism both from within and outside the Tribunals.¹³⁶

Generally, slightly more attention has been paid to the importance of the conduct of the Prosecutor in contributing to possible delays.¹³⁷ The burden of proof regarding possible delays caused by the Prosecution, however, is consistently imposed on the defence.¹³⁸ It has been held that the Prosecutor has a duty to act with 'due diligence' in order to ensure the ac-

"Décision portant Attribution du Temps à la Défense pour la Présentation des Moyens à Décharge", Prosecutor v. Prlić et al (IT-04-74-AR73.7), 1 July 2008; ICTR, Order on Mathieu Ngirumpatse's Brief Following the 17 April 2008 Decision on the Presentation of Defence Evidence, Prosecutor v. Karemera et al (ICTR-98-44-T), 25 June 2008, 11; ICTR, Decision on Ndindilyimana's Motion to Recall Identified Prosecution Witnesses and to Call Additional Defence Witnesses, Prosecutor v. Ndindilyimana et al (ICTR-00-56-T), 4 December 2008, 6.

¹³³ ICTR, Decision on Édouard Karemera's Motion for Postponement of the Commencement of his Case as well as on the Prosecutor's Crossmotion for Enforcement of Rule 73ter and Remedial and Punitive Measures and the Prosecutor's Request for Temporary Transfer of Witness AXA pursuant to Rule 90bis, *Prosecutor v. Karemera et al (ICTR-98-44-T)*, 27 February 2008, 14.

¹³⁴ ICTY, Decision on Appeal from Decision on Duration of Defence Case, *Prosecutor v. Karadžić (IT-95-5/18-AR73.10)*, 29 January 2013, 16; ICTY, Decision on Accused's Motion to Vary List of Witnesses, *Prosecutor v. Karadžić (IT-95-5118-T)*, 21 February 2013, 8; ICTY, Decision on Accused's Motion to Substitute Witness, *Prosecutor v. Karadžić (IT-95-5118-T)*, 25 February 2013, 5; ICTY, Decision on Accused's Motion to Vary List of Witnesses: Srebrenica Component, *Prosecutor v. Karadžić (IT-95-5/18-T)*, 13 September 2013, 8; ICTY, Decision on Accused's Motion to Vary List of Witnesses: (Sarajevo Component), *Prosecutor v. Karadžić (IT-95-5/18-T)*, 10 October 2013, 7; ICTY, Decision on Accused's Motion to Vary List of Witnesses: Srebrenica & Municipalities Components, *Prosecutor v. Karadžić (IT-95-5/18-T)*, 4 November 2013, 9; ICTY, Decision on Accused's Motions for Severance of Count 1 and Suspension of Defence Case, *Prosecutor v. Karadžić (IT-95-5118-T)*, 2 August 2013, 16; ICTY, Decision on Tolimir's Motion for Extension of Time for Filing Amendments to the Brief in Reply, *Prosecutor v. Tolimir (IT-05-88/2-A)*, 29 February 2014, 2.

¹³⁵ ICTY, Appeals Judgment, *Prosecutor v. Sainović et al (IT-05-87-A)*, 23 January 2014, 100, where the Appeals Chamber reiterated that the Prosecution acts in the interests of the international community, for which reasons the accused cannot waive aspects of his right to a fair trial.

¹³⁶ See, eg: ICTR, Decision in the Matter of Proceedings under Rule 15bis (D), Dissenting Opinion of Judge David Hunt, *Prosecutor v. Nyiramasuhuko et al (ICTR-98-41-A15bis)*, 24 September 2003, 30; McDermott, 'General Duty to Ensure the Right to a Fair and Expeditious Trial' (n 75), 805; see also Yvonne McDermott, 'Rights in Reserve: a Critical Analysis of Fair Trial Rights under International Criminal Law' in William Schabas, Yvonne McDermott and Niamh Hayes, *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013); this question, however, exceeds the scope of the present inquiry which focuses on the right to be tried without undue delay itself.

¹³⁷ ICTR, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza (ICTR-99-50-AR73)*, 27 February 2004, 3; ICTR, Decision on Prosper Mugiraneza's Application for a Hearing or other Relief on his Motion for Dismissal for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al (ICTR-99-50-T)*, 3 November 2004, 32.

¹³⁸ ICTR, Appeals Judgement, *Prosecutor v. Mugenzi and Mugiraneza (ICTR-99-50-A)*, 4 February 2013, 33, where the Appeals Chamber dismissed the defence's arguments regarding the prosecution's behavior having caused delay as 'speculative' and/or 'unsubstantiated'.

cused's right to be tried without undue delay.¹³⁹ In *Barayagwiza*, the Appeals Chamber severely criticized the Prosecutor for her failure to act diligently in order to prevent delays in the transfer of the accused to the Tribunal, and in order to ensure a timely first appearance of the accused.¹⁴⁰ Although this decision did not relate to the general right to be tried without undue delay, the Appeals Chamber did emphasize that the Prosecutor has a duty to ensure that 'the case proceeds to trial in a way that respects the rights of the accused'.¹⁴¹ Similarly, in *Rwamakuba*, the lack of diligence on the part of the Prosecutor was one of the constitutive reasons for denying his request for further adjournment, in order to prevent undue delay.¹⁴²

This duty has also been reiterated often in decisions related to amending indictments. Prosecution requests to amend the indictment have often been denied because of possible delays it would cause.¹⁴³ The standard is that the Prosecutor must show diligence in requesting the relevant amendments, including doing so in a timely fashion.¹⁴⁴ Amendments unduly delay the proceedings when the request results from any 'improper tactical advantage sought by the prosecutor'.¹⁴⁵ Some decisions have imposed the burden of proof with regard to due

¹³⁹ ICTY, Decision on Motion for Sanctions for Failure to Bring the Accused to Trial without Undue Delay, *Prosecutor v. Perišić* (IT-04-81-PT), 23 November 2007, 24.

¹⁴⁰ ICTR, Decision, *Barayagwiza v. Prosecutor* (ICTR-97-19-AR72), 3 November 1999, 99.

¹⁴¹ *ibid.*

¹⁴² ICTR, Decision on Prosecution Motion for Reconsideration or, in the alternative, Certification to Appeal Chamber's Decision Denying Request for Adjournment, *Prosecutor v. Rwamakuba* (ICTR-98-44C-T), 25 September 2005, 23.

¹⁴³ ICTY, Decision on the Prosecutor's Motion to Hold Pre-Trial Motions in Abeyance, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-PT), 28 January 1998, 12(c); ICTY, Decision on Fourth Amended Indictment, *Prosecutor v. Brđanin and Talić* (IT-99-36-PT), 23 November 2001, 17; ICTY, Decision on Prosecutor's Motion for Leave to Amend the Indictment, *Prosecutor v. Halilović* (IT-01-48-PT), 17 December 2004, 39, 41; ICTY, Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, *Prosecutor v. Delić* (IT-04-83-PT), 30 June 2006, 74; ICTY, Decision on Motion and Supplementary Motion for Leave to Amend the Indictment, *Prosecutor v. Stanišić and Župljanin* (IT-08-91-PT), 28 April 2009, 41; ICTR, Decision on the Prosecutor's Request for Leave to Amend the Indictment, *Prosecutor v. Bagosora et al* (ICTR-96-7-T), 12 August 1999, 5.

¹⁴⁴ ICTY, Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, *Prosecutor v. Delić* (IT-04-83-PT), 30 June 2006, 68; see also ICTR, Decision on Defence Motion to Set a Date for Trial, *Prosecutor v. Nchamihigo* (ICTR-2001-63-I), 21 April 2006, 9; ICTR, Decision on the Prosecutor's Application for Severance and Leave to Amend the Indictment against Ildephonse Hategekimana, *Prosecutor v. Nizeyimana and Hategekimana* (ICTR-00-55-I), 25 September 2007, 8; ICTR, Decision on Prosecutor's Request for Leave to File an Amended Indictment, *Prosecutor v. Ndahimana* (ICTR-2001-68-PT), 3 February 2010, 4; ICTY, Decision on the Prosecution's Motion to Amend the Revised Second Indictment, *Prosecutor v. Stanišić and Simatović* (IT-03-69-PT), 4 July 2008, 25; ICTY, Decision on Motion and Supplementary Motion for Leave to Amend the Indictment, *Prosecutor v. Stanišić and Župljanin* (IT-08-91-PT), 28 April 2009, 13; ICTR, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, *Prosecutor v. Karemera et al* (ICTR-98-44-AR73), 19 December 2003, 20.

¹⁴⁵ ICTR, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, *Prosecutor v. Karemera et al* (ICTR-98-44-AR73), 19 December 2003, 20.

diligence on the prosecutor.¹⁴⁶ However, these decisions also show that little importance was attached to the finding of a failure to show the requisite diligence. For example, the ICTY once deplored the lack of diligence with which the Prosecution was disclosing materials, yet still considered that the delays also resulted from the defence strategy of filing numerous motions, which led it to conclude there was no unreasonable period of detention.¹⁴⁷ Furthermore, in decisions where the defence alleged an actual violation of the right to be tried without undue delay, it appears that the burden to prove a lack of due diligence on the part of the Prosecution was imposed on the defence.¹⁴⁸ At the same time, it has been emphasized that the Prosecutor also has a right to make use of the procedures provided for in the legal frameworks of the Tribunals, and that where the use of such procedures causes delay, this does not necessarily imply that the delay was undue.¹⁴⁹ All in all, there appears to be a limited number of decisions that offer in-depth discussion of the conduct of, particularly, the Prosecutor and her/his obligation of due diligence in the context of the right to be tried without undue delay, which is further discussed in the subsequent section.

3.2.4. *Conduct of the authorities*

The ad hoc Tribunals have not been consistent as to the behavior of which authorities they consider under this heading. The conduct of the Prosecutor, who is considered an ‘authority’ in IHRL, has mostly been assessed under the heading of the conduct of the parties, albeit not consistently. The conduct of judicial authorities has been assessed under this heading, although, as will be seen, this parameter has been given limited attention.

Chambers have adopted a variety of measures to expedite proceedings and thus prevent undue delay. For example, the *Perišić* Chamber held status conferences every 120 days,

¹⁴⁶ ICTR, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, *Prosecutor v. Karemera et al* (ICTR-98-44-AR73), 19 December 2003, 22; ICTR, Decision on Defence Motion to Set a Date for Trial, *Prosecutor v. Nchamihigo* (ICTR-2001-63-I), 21 April 2006, 29; ICTR, Decision on the Prosecutor’s Application for Severance and Leave to Amend the Indictment against Ildephonse Hategekimana, *Prosecutor v. Nizeyimana and Hategekimana* (ICTR-00-55-I), 25 September 2007, 21.

¹⁴⁷ ICTY, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaskić* (IT-95-14-T), 20 December 1996, 7.

¹⁴⁸ ICTR, Decision on Prosper Mugiraneza’s Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 33; ICTR, Decision on Justin Mugenzi’s Motion Alleging Undue Delay and Seeking Severance, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 14 June 2007, 18; ICTR, Decision on Prosper Mugiraneza’s Third Motion to Dismiss Indictment for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 10 February 2009, 17.

¹⁴⁹ ICTR, Decision on Defence Motion for Stay of Proceedings, *Prosecutor v. Rwamakuba* (ICTR-98-44C-PT), 3 June 2005, 32-33; ICTR, Judgement and Sentence, *Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-T), 2 February 2012, 41.

in order to ensure that the trial moves forward as expeditiously as possible.¹⁵⁰ In *Prlić et al*, the Chamber adopted special guidelines for the conduct of trial proceedings, in order to ensure the expeditiousness of the case.¹⁵¹ Furthermore, Chambers often rely on their obligation to ensure expeditious trial proceedings to justify denying defence requests for certain procedural actions. More often, however, have Chambers limited the prosecutor's use of certain procedures because of the accused's right to be tried without undue delay, for example, through limiting the amount of Prosecution evidence, and the time allotted for its presentation.¹⁵² Generally, Prosecution requests that may lead to more lengthy proceedings are assessed in light of the accused's right to be tried without undue delay.¹⁵³ However, the sometimes-limited importance attached to this factor is illustrated by a decision in which it was admitted that prosecutorial conduct had caused delays, but that the accused had already been compensated for that conduct by being granted two extra trial days.¹⁵⁴

Generally, the right to be tried without undue delay has been a central consideration in decisions related to joinder and severance. Both Tribunals have refused Prosecution request for joinder because it would delay the proceedings.¹⁵⁵ One Chamber explained that the joinder of particular accused would lead to one of the accused having large amounts of evidence presented that would be irrelevant to her/his own case.¹⁵⁶ Another Chamber held that the

¹⁵⁰ ICTY, Decision on Motion for Sanctions for Failure to Bring the Accused to Trial without Undue Delay, *Prosecutor v. Perišić* (IT-04-81-PT), 23 November 2007, 25.

¹⁵¹ ICTY, Decision Adopting Guidelines on Conduct of Trial Proceedings, *Prosecutor v. Prlić et al* (IT-04-74-PT), 26 April 2004.

¹⁵² ICTY, Decision on the Prosecutor's Motion to Hold Pre-Trial Motions in Abeyance, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-PT), 28 January 1998, 2; ICTY, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 bis, *Prosecutor v. Blagojević and Jokić* (IT-02-60-T), 12 June 2003, 20; ICTY, Decision on Adoption of New Measures to Bring the Trial to an End within a Reasonable Time, *Prosecutor v. Prlić et al* (IT-04-74-T), 13 November 2006, 21.

¹⁵³ ICTY, Decision on Prosecution Motion for Additional Time for Completion of its Case-In-Chief, *Prosecutor v. Hadžić* (IT-04-75-T), 23 April 2013, 4; ICTY, Order Issuing a Public Redacted Version of the Trial Chamber Decision on Motion for Leave to Amend the Prosecution's Witness and Exhibit List of 9 July 2007, *Prosecutor v. Delić* (IT-04-83-A), 12 July 2013, 5; ICTR, Decision on Joseph Kanyabashi's Motion to Amend his Notice of Appeal, *Prosecutor v. Nyiramasuhuko et al* (ICTR-98-42-A), 5 April 2013, 10, 20, 28.

¹⁵⁴ ICTR, Appeals Judgement, *Prosecutor v. Ndindiliyimana et al* (ICTR-00-56-A), 11 February 2014, 46.

¹⁵⁵ ICTY, Decision on Prosecutor's Motion for Joinder, *Prosecutor v. Kvočka et al* (IT-98-30-PT), 19 October 1999, 5; ICTY, Decision on Joinder of Trials, *Prosecutor v. Kunarac and Kovač* (IT-96-23-PT), 9 February 2000, 10-11; ICTY, Decision on Stojan Župljanin's Motion for Joinder, *Prosecutor v. Stanišić and Župljanin* (IT-08-91-PT), 6 January 2009, 32.

ICTR, Decision on the Motion of the Prosecutor to Sever, to Join in a Superseding Indictment and to Amend the Superseding Indictment, *Prosecutor v. Kayishema et al* (ICTR-95-1-T), 27 March 1997, 5.

¹⁵⁶ ICTR, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvenal Kajelijeli, *Prosecutor v. Bizimana et al* (ICTR-98-44-T), 6 July 2000, 35; similarly, an ICTR Chamber once ordered the severance of a case, despite objection of all the defendants and the prosecution, because the illness of one of the accused would cause delays that would prejudice the other defendants. This Trial Decision was, however, overturned on appeal and subsequently vacated by the Trial Chamber. See: ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009; ICTR, Decision on Appeal Concerning the Severance of Matthieu Ndirumpatse, *Prosecutor v.*

joinder of a new accused to a running trial would lead to delays and violate the co-accused's right to be tried within a reasonable time.¹⁵⁷ Similarly, Chambers have ordered severance of cases in order to ensure particular accused persons' right to be tried without undue delay.¹⁵⁸

The ICTR has relied on case law of the ECtHR to support the contention that even if joinder leads to delays in the procedures, this is not necessarily incompatible with the good administration of justice.¹⁵⁹ At the same time, Chambers have emphasized that joinder of cases ensures quicker trials overall: trying one case with several co-accused is considered quicker than conducting several separate trials.¹⁶⁰ An example of an argument raised in favor of joint trials was that severance might cause unnecessary pressure on survivors and other witnesses who may be repeatedly called upon to testify.¹⁶¹ Furthermore, it has been considered important to try defendants jointly in order to properly reflect the joint nature of their crimes. Chambers have also held that the right of an accused to trial without undue delay must be assessed in light of other accused persons' rights, both of co-accused in the same case, as well as of accused persons in other cases that might be impacted by the severance of specific cases.¹⁶² Specifically, the ICTR has held that individual trials for all accused before

Karemera et al (ICTR-98-44-AR.73), 19 June 2009; ICTR, Decision on Remand on Resumption of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44), 10 September 2009.

¹⁵⁷ ICTY, Decision on Motion for Joinder, *Prosecutor v. Tolimir* (IT-05-88/2-PT), 20 July 2007, 47.

¹⁵⁸ ICTY, Decision of Trial Chamber I in respect of the Motion of 19 June 1997 Requesting Separation of Trials, *Prosecutor v. Aleksovski* (IT-95-14/1-PT), 25 September 1997, 2; ICTY, Decision of Trial Chamber II Concerning Separation of Trials, *Prosecutor v. Dokmanović* (IT-95-13a-PT), 28 November 1997, 2; ICTY, Decision on Prosecution's Oral Request for the Separation of Trials, *Prosecutor v. Brđanin and Talić* (IT-99-36-PT), 20 September 2002, 26.

¹⁵⁹ ICTR, Decision on André Rwamakuba's Motion for Severance, *Prosecutor v. Rwamakuba* (ICTR-98-44-T), 12 December 2000, 38; ICTR, Decision on the Defence Motion for Separate Trial, *Prosecutor v. Ndayambaje* (ICTR-96-8-T), 25 April 2001, 19; ICTR, Decision on the Motion for Separate Trials, *Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-97-21-T), 8 June 2001, 24; ICTR, Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings, *Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-98-42-T), 7 April 2006, 75.

¹⁶⁰ ICTY, Decision on Defence's Motions for Separate Trials and Severance of Counts, *Prosecutor v. Prlić et al* (IT-04-74-PT), 1 July 2005, 24; ICTY, Decision on Radivoje Miletić's Interlocutory Appeal against the Trial Chamber's Decision on Joinder of Accused, *Prosecutor v. Miletić et al* (IT-04-80-AR73.1), 27 January 2006, 25; ICTY, Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder, *Prosecutor v. Gotovina et al* (IT-01-45-AR73.1), 25 October 2006, 43.

¹⁶¹ ICTR, Decision on the Defence Motion Seeking a Separate Trial for the Accused Sylvain Nsabimina, *Prosecutor v. Nsabimina et al* (ICTR-97-29A-T), 8 September 2000, 39; ICTR, Decision on the Defence Motion for Separate Trial, *Prosecutor v. Ndayambaje* (ICTR-96-8-T), 25 April 2001, 20; ICTR, Decision on the Motion for Separate Trials, *Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-97-21-T), 8 June 2001, 25; ICTR, Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings, *Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-98-42-T), 7 April 2006, 77; ICTR, Decision on Continuation of the Proceedings, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 6 March 2007, 82.

¹⁶² ICTY, Decision on Joinder of Trials, *Prosecutor v. Kunarac and Kovač* (IT-96-23-PT), 9 February 2000, 11; ICTR, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Joseph Nzizorera, *Prosecutor v. Bizimana et al* (ICTR-98-44-T), 12 July 2000, 27; ICTR, Decision on the Defence Motion Seeking a Separate Trial for the Accused Sylvain Nsabimina, *Prosecutor v. Nsabimina et al* (ICTR-97-29A-T), 8 September 2000, 37, 40; ICTR, Decision on André Rwamakuba's Motion for Severance, *Prosecutor v. Rwamakuba* (ICTR-98-44-T), 12 December 2000, 37; ICTR, Decision in the Mat-

the Tribunal would lead to a large number of accused persons being in custody considerably longer, particularly given the fact that the ICTR had 40 accused in the docket at the time.¹⁶³ As such, the overall speed of the Tribunal would be significantly diminished, which the Chamber considered not to be in the interests of justice and the public interest. This relates to the limited facilities of the Tribunals: the number of courtrooms, judges and staff is finite. In a similar vein, a Chamber has also held that severance would lead to additional expenditures, which it weighed against severance in that case.¹⁶⁴ The ICTR has held that although the joinder of an accused's case to that against other caused substantial delays, joinder was provided by the Tribunal's legal framework, and had never been challenged by the accused, thus supporting the conclusion that the accused's right to be tried without undue delay had not been violated.¹⁶⁵

At the same time, Chambers have often emphasized that accused persons in joined cases are entitled to the same procedural rights as if they were tried individually.¹⁶⁶ This is also provided by the Tribunals' RPEs.¹⁶⁷ This does not appear to be in line with other decisions by the Tribunals, cited above, where it was held that an accused right to be tried without undue delay must be weighed against that of her/his co-accused, as well as that of other accused in different cases that might be impacted.

The Prosecution and the Chamber, in respectively requesting and deciding on questions of joinder and severance, could perhaps be held responsible, at least partly, for the number of accused persons, a factor which is commonly cited as adding to the complexity of a case. The case law of the Tribunals insufficiently acknowledges this partial responsibility of the authorities for the complexity of a case. For example, the ICTR Appeals Chamber has held that '[a]lthough the size and complexity of the case resulted from the Prosecution's decision to jointly charge four senior government officials, Mugiraneza fails to demonstrate that

ter of Proceedings under Rule 15Bis(D), *Prosecutor v. Nyiramasuhuko et al* (ICTR-98-42-T), 15 July 2003, 33(g).

¹⁶³ ICTR, Decision on the Prosecutor's Motion for Joinder, *Prosecutor v. Bagosora* (ICTR-96-7), 29 June 2000, 155; similarly ICTY, Decision on Joinder of Trials, *Prosecutor v. Kunarac and Kovać* (IT-96-23-PT), 9 February 2000, 11.

¹⁶⁴ ICTR, Decision on Continuation of the Proceedings, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 6 March 2007, 82.

¹⁶⁵ ICTR, Appeals Judgement, *Prosecutor v. Ndindilyimana et al* (ICTR-00-56-A), 11 February 2014, 44.

¹⁶⁶ ICTR, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvenal Kajelijeli, *Prosecutor v. Bizimana et al* (ICTR-98-44-T), 6 July 2000, 30; ICTR, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Joseph Nzizorera, *Prosecutor v. Bizimana et al* (ICTR-98-44-T), 12 July 2000, 22; ICTR, Decision on Ndindilyimana's Motion to Recall Identified Prosecution Witnesses and to Call Additional Defence Witnesses, *Prosecutor v. Ndindilyimana et al* (ICTR-00-56-T), 4 December 2008, 7.

¹⁶⁷ Rule 82(A) ICTY RPE; Rule 82(A) ICTR RPE.

this decision improperly prolonged his trial.’¹⁶⁸ This illustrates the high burden of proof that the accused bears in this regard. Although the Appeals Chamber conceded that the decision to join the cases impacted on its size and complexity, and subsequently justified the length of the proceedings, exceeding thirteen years, relying precisely on the size and complexity of the case, it still considered that the accused had failed to discharge his burden of proof to show that the decision to join the cases improperly prolonged his trial.¹⁶⁹ Instead, the number of accused persons has consistently been treated as a given by Chambers confronted with allegations of undue delay, which neglects the responsibility of the Prosecution and the chamber itself in joining cases or refusing to sever them. This is particularly striking given the length of several multi-accused trials before both the ICTR and the ICTY thus far.¹⁷⁰

The number of crimes and incidents charged also depends on choices made by the Prosecution and, to a lesser extent, the Chamber. Prosecutorial practice with regard to the indictments has been criticized as causing significant delays. First, indictments are often amended, a very time-consuming process since the amendment itself is litigated and, when granted, often necessitates extra time for defence preparation. Second, the Prosecution determines the number of counts in the indictment, which is, in turn, confirmed by a Chamber. The Prosecutor’s practice of cumulative indictments that charge large amounts of crimes, which in turn requires large amounts of evidence, has often been criticized as adding to delays.¹⁷¹ Judge Robinson has held that the main reason for the long duration of trials is ‘the large number of Prosecution witnesses, numbering over a hundred in several cases.’¹⁷² It might therefore be proper for Chambers, faced with allegations of undue delay, to assess the amount of crimes charged and of evidence adduced more critically. It has been suggested that the Prosecution should abandon its practice of ‘charging every possible crime site’, which was argued to be motivated by a desire to satisfy the victims.¹⁷³ A former ICTY Judge has similarly noted that the complexity of cases is ‘to some extent ... attributable to the initial Prosecution policy of indicting individuals for a great number of offences, encompassing

¹⁶⁸ ICTR, Appeals Judgement, *Prosecutor v. Mugenzi and Mugiraneza* (ICTR-99-50-A), 4 February 2013, 33.

¹⁶⁹ *ibid.*, 33, 32.

¹⁷⁰ For example, *Bizimungu et al.*, before the ICTR, took almost eight years from the commencement of trial until the first instance judgement; and *Popović et al.*, before the ICTY, took a little under four years from the commencement of trial until the first instance judgment.

¹⁷¹ Sluiter (n 123), 251; Lahiouel (n 5), 203.

¹⁷² Patrick Robinson, ‘Fair but Expeditious Trials’ in Hiram Abtahi and Gideon Boas (eds), *The Dynamics of International Criminal Justice* (Brill 2006), 169.

¹⁷³ Gideon Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (CUP 2007), 276.

long periods and numerous crime sites.’¹⁷⁴ This tendency has also been linked to the alleged aim of the Tribunals to create a historical record.¹⁷⁵ For example, an experienced international criminal defence lawyer has called for increased judicial intervention to limit the number of counts and/or limit the number of crime sites or incidents charged in order to allow for quicker trials.¹⁷⁶ Similarly, a former Legal Officer at the ICTY concluded that 80 percent of the Prosecution case in *Milošević* focused on the underlying offences, instead of on the personal responsibility of the accused.¹⁷⁷ For this and other reasons, he recommended an approach that focuses on the ‘core criminal conduct of the accused’ in which the Prosecution selects representational crimes, instead of charging as many crimes as possible.¹⁷⁸

These considerations do not seek to argue that the practice of the Tribunals with respect to joinder and the size of the indictments has actually violated defendants’ rights to be tried without undue delay. However, Chambers, when confronted with allegations of delay, should not treat the number of accused, the number of charges and the volume of the evidence as a simple given, beyond their, or the Prosecution’s control. The impact of such decisions by the Prosecution and the judges on the right to be tried without undue delay should be properly considered when allegations of delay arise. This has not been the approach of the Tribunals thus far. Although delay is often a factor that is considered in decisions related to joinder, amending indictments and, to a far lesser extent, the admission of evidence, such consideration is often brief and rather superficial. What is more, these facts are rarely examined by Chambers faced with allegations of actual violations of the right to be tried without undue delay.

Generally, the Tribunals have not considered the conduct of the authorities as a prominent factor in the determination of alleged violations of the right to be tried without undue delay. Where it was discussed, the defence’s arguments have been rejected. For example, one decision simply noted that the Chamber was mindful of its duty since expeditiousness had been a constant concern in the proceedings.¹⁷⁹ The case law that does exist with regard to this factor shows that the defence bears the burden of proof regarding the conduct of the authori-

¹⁷⁴ Schomburg (n 24), 15.

¹⁷⁵ Galbraith (n 5), 90.

¹⁷⁶ Gillian Higgins, ‘Fair and Expeditious Pre-Trial Proceedings, the Future of International Criminal Trials’ (2007) 5 J Int’l Crim Just 394, 398.

¹⁷⁷ Boas (n 173), 137.

¹⁷⁸ *ibid*, 128.

¹⁷⁹ ICTR, Decision on Ntahobali’s Motion for a Stay of Proceedings for Undue Delay, *Prosecutor v. Ntahobali* (ICTR-97-21-T), 26 November 2008, 59.

ties, which departs from IHRL.¹⁸⁰ In repeated undue delay decisions in *Bizimungu et al*, the allegations of the defence were rejected because the Chamber regarded them insufficiently detailed. However, in the latest decisions in this case, one of the Judges dissented on this matter. According to Judge Short, the fact that no judgment had been rendered 24 months after the case had been closed, violated the defendants' rights to be tried without undue delay.¹⁸¹ Judge Short argued that 'the UN Security Council and the General Assembly have failed to organize the judicial systems of the ad hoc Tribunals in such a manner as to enable them to comply with the right to be tried without undue delay', an obligation he based on case law of the ECtHR.¹⁸² Specifically, he alleged that the fact that judges and legal staff became involved in new cases once the closing arguments were heard, but while the judgment had not yet been written, had contributed significantly to the delay in this case.¹⁸³ In the Judgment that followed, the Chamber conceded that the increased workload of the judges had contributed to the delay. At that point, three years had passed between the closing of the case and the rendering of the Trial Judgment.¹⁸⁴ However, the majority still held that the accused's right to be tried without undue delay had not been violated, essentially based on the complexity of the case alone.¹⁸⁵ Judge Short, however, reiterated his previous dissent, and found that the accused's right to be tried without undue delay had been violated, but the majority did not engage with his argumentation.¹⁸⁶

¹⁸⁰ ICTR, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 36; ICTR, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 14 June 2007, 20; ICTR, Decision on Prosper Mugiraneza's Third Motion to Dismiss Indictment for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 10 February 2009, 20; ICTR, Decision on Jérôme-Clement Bicamumpaka's Motion Seeking Permanent Stay of Proceedings, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 27 February 2009, 17; ICTR, Decision on Proseper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 16.

¹⁸¹ ICTR, Decision on Proseper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, Partially Dissenting Opinion of judge Short, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 5; reiterated in: ICTR, Judgement and Sentence, Partially Dissenting Opinion of Judge Emile Francis Short, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 5, by which time the delay had added up to three years.

¹⁸² ICTR, Decision on Proseper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, Partially Dissenting Opinion of judge Short, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 3; reiterated in: ICTR, Judgement and Sentence, Partially Dissenting Opinion of Judge Emile Francis Short, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 5.

¹⁸³ Similarly McDermott, 'The Right to a Fair Trial in International Criminal Law' (n 3), 132.

¹⁸⁴ ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 74; see also Tolbert and Gaynor (n 3), 58-59, who are similarly critical of the lengthy periods of judgment-drafting in a number of cases before the ad hoc Tribunals.

¹⁸⁵ ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 79.

¹⁸⁶ ICTR, Judgement and Sentence, Partially Dissenting Opinion of Judge Emile Francis Short, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011, 7.

The Appeals Chamber subsequently sided with the Chamber's majority, and considered that the accused had failed to show 'the relative significance of the judges' workload distribution, overlapping duties, and outside activities, or the relative significance of any related staffing issues, for the conduct of this case.'¹⁸⁷ The Appeals Chamber emphasized that the Trial Chamber had conceded the total period of twelve years between the arrest and the judgment had been 'lengthy', and that the heavy workload of the judges may have had an impact on the length of the Trial, but considered 'that it is not unusual for judges of the Tribunal to participate in multiple proceedings, impacting the pace of those respective proceedings.'¹⁸⁸ These two findings appear to contradict each other. The Appeals Chamber seems, on the hand, to concede that the judges' workload impacted on the length of the proceedings, but at the same time, to deny that the accused have shown how this workload impacted on the length of proceedings.

Judge Robinson dissented from the Appeals Chamber's majority and held that the delay resulted 'from the manner in which the Tribunal has organized and managed its resources', which could not legitimately be invoked as a justification for delays.¹⁸⁹ He found that the Trial Chamber failed to properly consider the arguments of the defence in this regard, noting also that in other multi-accused cases before the ICTR and ICTY, judgment drafting had been much quicker.¹⁹⁰ He therefore found that the defendants' right to be tried without undue delay had been violated, leading him to state that he would award the – acquitted – defendants – who had been detained for almost fourteen years, compensation in the amount of \$ 5,000.¹⁹¹ One ICTY Judge has relied on this dissent to substantiate his argument that Šešelj should also be awarded monetary compensation or sentence reduction, because the delays in his case were due to 'faulty administrative operations'.¹⁹² In that case, the majority and, subsequently, the Appeals Chamber considered the issue of delay premature, because the actual consequences of the addition of a new judge to the bench were not yet clear.¹⁹³ Inter-

¹⁸⁷ ICTR, Appeals Judgement, *Prosecutor v. Mugenzi and Mugiraneza* (ICTR-99-50-A), 4 February 2013, 35.

¹⁸⁸ *ibid.*

¹⁸⁹ ICTR, Appeals Judgement, Partially Dissenting Opinion of Judge Patrick Robinson, *Prosecutor v. Mugenzi and Mugiraneza* (ICTR-99-50-A), 4 February 2013, 2.

¹⁹⁰ *ibid.*, 4.

¹⁹¹ *ibid.*, 12.

¹⁹² ICTY, Decision on Continuation of Proceedings, Concurring Opinion of Judge Antonetti, *Prosecutor v. Šešelj* (IT-03-67-T), 13 December 2013, 37-38.

¹⁹³ ICTY, Decision on Continuation of Proceedings, *Prosecutor v. Šešelj* (IT-03-67-T), 13 December 2013, 56; ICTY, Decision on Appeal against Decision on Continuation of Proceedings, *Prosecutor v. Šešelj* (IT-03-67 - AR15bis), 6 June 2014, 67.

estingly, the Trial Chamber held that the then one-and-a-half years of deliberations were reasonable in light of the complexity of the case.¹⁹⁴

Instead of blanketly relying on the complexity of cases to justify lengthy proceedings, the Tribunals should more critically examine the role and responsibility of the judicial and prosecutorial authorities for the delays. As stated, although the complexity of international criminal trials may add significantly to their length, Chambers still have an obligation to do everything within their power to protect the right of the accused to a trial without undue delay. The role of the Chambers themselves herein has been left largely unexamined by the Tribunals. For example, a former ICTR trial attorney has criticized the Tribunal's policy of working with sessions as causing unnecessary delays.¹⁹⁵

Furthermore, despite strongly worded dissents in which members of the bench have criticized their own institutions for failing to provide trials without undue delay, the majority of these Chambers have summarily discarded their colleagues' arguments by relying on the complexity of the case. However, complexity should not absolve the Chamber of its responsibility to ensure a trial without undue delay. In *IHRL*, a time period of three years between closing a trial and rendering a judgment would have probably constituted a *prima facie* delay, for the justification of which the authorities would have borne the burden of proof. However, the majority of the Chamber did not address the substance of the defence's arguments, which were endorsed by Judge Short, and instead relied on the complexity of the case. In addition, the Appeals Chamber's response to this protracted period of three years of judgment drafting was limited to observing that 'it is not unusual' for judges to be involved in multiple cases. However, the length of judgment drafting in this case was, in fact, highly unusual. Before the ICTY, the average period between closing arguments and the rendering of the judgment is about six months. Before the ICTR, this period is a little under one year.¹⁹⁶ Not only is the ICTR thus considerably slower than the ICTY, the period taken for the *Bizimungu et al* judgment is about triple the ICTR's average. What is more, judgment drafting in another multi-accused case, *Nyiramasuhuko et al*, took a little over two years, which is considerably quicker, though still well below average.

Furthermore, the ICTR has, albeit sparingly, relied on insufficient physical and logistical resources as one of the causes of delays in their trials. This explanation for delays be-

¹⁹⁴ ICTY, Decision on Continuation of Proceedings, *Prosecutor v. Šešelj* (IT-03-67-T), 13 December 2013, 23.

¹⁹⁵ Iain Morley, 'The Fairness of the Proceedings: Thoughts on How Proceedings at the International Criminal Tribunal for Rwanda Might be Improved' (2008) 14 *New Eng J Int'l & Comp L* 293, 295-296; see also Tolbert and Gaynor (n 3), 39-60, where they offer several constructive suggestions aimed at expediting international criminal proceedings.

¹⁹⁶ See Annex 1 for a table containing an overview of the data collected.

fore, particularly the ICTR, can be found in the literature on this topic as well. Especially during the early years of their mandate, the Tribunals had a limited amount of personnel, resources and even courtrooms, as a result of which delays occurred.¹⁹⁷ Although measures, such as the creation of an extra Trial Chamber and extra courtrooms as well as the installment of a large number of *ad litem* Judges have increased the Tribunals' capacity, the limited human and physical resources of the Tribunals have impacted on the length of their trials. In IHRL, this is not an acceptable justification for delays. States have an obligation to 'organize their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time'.¹⁹⁸ Judges Short and Robinson relied on this obligation in their dissents in *Bizimungu et al*, arguing that the defendants' rights to be tried without undue delay had been violated. The system of assigning judges and their staff new cases prior to finalizing the judgment in their old cases was necessitated by the limited resources of the Tribunal, and the delays caused by this would therefore be attributable to the Tribunal. However, as stated above, the majority of the Chamber disregarded these arguments, and the responsibility of the Tribunal itself has never been thoroughly examined by either of the Tribunals.

The Tribunals' interpretation and application of the parameter of the conduct of the authorities thus differs significantly from the parallel consideration of this parameter in IHRL. The parameter has rarely been thoroughly considered, despite allegations regarding the responsibility of both the prosecutorial and the judicial authorities for undue delays. When ICTs do address this factor, the burden of proof is consistently imposed on the defence and, by and large, their arguments have been discarded for lack of specificity. Instead, Chambers overrely on the complexity of the case, without truly substantiating how such complexity has caused specific delays. The Tribunals have invoked IHRL to support their reliance on the complexity of the case as a justification for delay. However, their treatment of this case law has been highly selective.

3.2.5. *Prejudice*

The fifth factor in determining whether or not an accused's right to be tried without undue delay has been violated is that of 'prejudice'. The defence bears the burden of proof regarding

¹⁹⁷ Lahiouel (n 5), 207; Christina Carroll, 'An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994' (2000) 18 *B U Int'l L J* 164, 181.

¹⁹⁸ See *supra* section 2.1.

this factor.¹⁹⁹ However, although many decisions have referred to this factor, there has been no real explanation of what it entails, or how it can generally be established. The purpose of the addition of this factor seems to be to ensure that only delays that have in fact prejudiced an accused in her/his legitimate interests are considered undue.

The Tribunals' approach to this factor has thus been highly casuistic. For example, in *Bagosora et al*, the Chamber concluded that there was no prejudice because the accused had received life sentences.²⁰⁰ This suggests that persons who are convicted and receive lengthy sentences are not prejudiced by delays in their cases, because they are going to remain incarcerated for a long period regardless. Another decision denied prejudice because the date of the judgment was thought to be near.²⁰¹ Allegations that delays had caused the memory of witnesses to fade and that this had prejudiced the defendant were also rejected.²⁰² In another case, the Chamber found that the defendant had suffered no prejudice since he had been able to present her/his case.²⁰³ The Chamber further conceded that the delay could not be explained by the complexity of the case which was limited in comparison to other cases before the Tribunal, and that there had been unjustifiable delays caused by the Prosecution; yet it concluded that the delay was not 'undue' because the defence had failed to show prejudice.²⁰⁴ The Appeals Chamber overturned this finding, and considered that a pre-trial delay of over seven years, given the limited complexity of the case, was prejudicial in and of itself.²⁰⁵ In determining the remedy for this violation of the accused's right to be tried without undue delay, the Appeals Chamber did emphasize that it considered the defence's failure to show

¹⁹⁹ ICTR, Decision on Prosper Mugiraneza's Application for a Hearing or other Relief on his Motion for Dismissal for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 3 November 2004, 33; ICTR, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 38; ICTR, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 14 June 2007, 21; ICTR, Judgement, *Prosecutor v. Bagosora et al* (ICTR-98-41-T), 18 December 2008, 82; ICTR, Decision on Jérôme-Clement Bicamumpaka's Motion Seeking Permanent Stay of Proceedings, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 27 February 2009, 18; ICTR, Decision on Proseper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 18; ICTR, Judgement and Sentence, *Prosecutor v. Nyiramasuhuko et al* (ICTR-98-42-T), 24 June 2011, 140; ICTR, Appeals Judgement, *Prosecutor v. Bagosora and Nsengiyumva* (ICTR-98-41-A), 14 December 2011, 36; ICTR, Appeals Judgement, *Prosecutor v. Gatete* (ICTR-00-61-A), 9 October 2012, 41; ICTR, Appeals Judgement, *Prosecutor v. Mugenzi and Mugiraneza* (ICTR-99-50-A), 4 February 2013, 36.

²⁰⁰ ICTR, Judgement, *Prosecutor v. Bagosora et al* (ICTR-98-41-T), 18 December 2008, 83.

²⁰¹ ICTR, Decision on Proseper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 18.

²⁰² ICTR, Decision on Prosper Mugiraneza's Third Motion to Dismiss Indictment for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 10 February 2009, 23.

²⁰³ ICTR, Judgement, *Prosecutor v. Gatete* (ICTR-2000-61-T), 31 March 2011, 63; partly confirmed: ICTR, Appeals Judgement, *Prosecutor v. Gatete* (ICTR-00-61-A), 9 October 2012, 42-43.

²⁰⁴ ICTR, Judgement, *Prosecutor v. Gatete* (ICTR-2000-61-T), 31 March 2011, 63.

²⁰⁵ ICTR, Appeals Judgement, *Prosecutor v. Gatete* (ICTR-00-61-A), 9 October 2012, 44.

how the delays prejudiced the preparation of his case or the conduct of his defence, and decided to shorten the sentence from life, to forty years.²⁰⁶ This is the only decision that has been identified in which an ad hoc Tribunal actually considered the right to be tried without undue delay to have been violated, and one of two decisions where an accused person was found to have been ‘prejudiced’. The other decision that admitted prejudice acknowledged that lengthy detention was prejudicial to the accused by its nature, but the defence still bore the burden to prove that the delay was ‘undue’, and the Chamber denied the allegations for procedural reasons.²⁰⁷

The requirement of ‘prejudice’ as a parameter establishing whether a delay has been undue finds no support in IHRL and is arguably inconsistent with the object and purpose of the very right to be tried without undue delay.²⁰⁸ The idea behind this right is that undue delays are, by their nature, prejudicial to defendants. The Tribunals, however, have denied prejudice in cases because the defendants had received life sentences, and because the defence had failed to show what prejudice it had suffered as a result of the delay. This turns the right to be tried without undue delay on its head. This right protects against the uncertainty of being tried without knowing the provisional outcome. Such a lengthy state of uncertainty is the very prejudice that this right seeks to protect against. Requiring defendants to show that they have suffered prejudice from undue delay in order to establish that such a delay has been undue is tautological and finds no support in international human rights law.²⁰⁹ What is more, finding that the defendants have not been prejudiced by excessive delays because they have received life sentences fundamentally ignores the presumption of innocence as a governing consideration of an international criminal trial because it suggests that convicted persons, and particularly persons who have received severe sentences, are less, or not at all, protected by this right. In other words, this approach retroactively denies protection of this right to persons who have been convicted.

²⁰⁶ *ibid*, 284.

²⁰⁷ ICTR, Decision on Protais Zigiranyirazo’s Motion for Damages, *Zigiranyirazo v. Prosecutor* (ICTR-2001-01-073), 18 June 2012, 36, see also 42, where the Chamber denies the motion because of the accused’s failure to assert his right to be tried without undue delay earlier.

²⁰⁸ See eg Masha Fedorova and Göran Sluiter, ‘Human Rights as Minimum Standards in International Criminal Proceedings’ (2009) 3 *Hum Rts & Int’l Legal Discourse* 9, 53, who call it a ‘puzzling adjustment’.

²⁰⁹ Two later decision of the ICTR seems to have a more appropriate understanding of this factor, holding that lengthy detention is by its nature prejudicial to the accused: ICTR, Decision on Protais Zigiranyirazo’s Motion for Damages, *Zigiranyirazo v. Prosecutor* (ICTR-2001-01-073), 18 June 2012, para 36; ICTR, Appeals Judgment, *Prosecutor v. Gatete* (ICTR-00-61-A), 9 October 2012, 44. However, both cases emphasize that the delays in these cases were prejudicial because of the limited complexity of the case.

3.2.6. Other relevant aspects of the Tribunals' approach

As stated above, the Tribunals have not consistently relied on the five factors discussed in the foregoing. Several other factors have played a role in determinations of violations of the right to be tried without undue delay. The seriousness of the charges against accused persons has been weighed in a number of decisions.²¹⁰ For example, the gravity of the charges and the importance of those charges representing 'the totality of the alleged conduct of the accused' were cited in *Bagosora et al* as mitigating possible delays that might result from the amendment of the indictment at that point.²¹¹ Several decisions also based their finding that the delays in question were not undue on the gravity and the complexity of the crimes charged.²¹² In addition, the gravity and the seriousness of the crimes charged have been cited as an element of the complexity of a case.²¹³ Finally, a number of other decisions have held that the importance of expeditiousness must be weighed against the importance of finding the truth about the serious crimes with which the Tribunal deals.²¹⁴

²¹⁰ ICTY, Decision on Oral Request of the Accused for Abuse of Process, *Prosecutor v. Šešelj* (IT-03-73-T), 10 February 2010, 30; ICTY, Decision on Accused's Claim for Damages on Account of Alleged Violations of his Elementary Rights during Provisional Detention, *Prosecutor v. Šešelj* (IT-03-73-T), 12 March 2012, 89; ICTR, Decision on Prosecutor's Request for Leave to File an Amended Indictment, *Prosecutor v. Nsabimana and Nteziryayo* (ICTR-97-29-1), 12 August 1999, 5; ICTR, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, *Prosecutor v. Ndayambaje* (ICTR-96-8-T), 2 September 1999, 9; ICTR, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Joseph Nzizorera, *Prosecutor v. Bizimana et al* (ICTR-98-44-T), 12 July 2000, 24; ICTR, Decision on the Defence Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana, *Prosecutor v. Nsabimana et al* (ICTR-97-29A-T), 8 September 2000, 38; ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, *Prosecutor v. Kanyabashi* (ICTR-96-15-T), 21 February 2001, 12; ICTR, Decision on Defence Motion for Stay of Proceedings, *Prosecutor v. Rwamakuba* (ICTR-98-44C-PT), 3 June 2005, 19; ICTR, Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings, *Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-98-42-T), 7 April 2006, 75.

²¹¹ ICTR, Decision on the Prosecutor's Request for Leave to Amend the Indictment, *Prosecutor v. Bagosora et al* (ICTR-96-7-T), 12 August 1999, 5; see also ICTR, Reasons for the Decision on the Prosecutor's Request for Leave to Amend the Indictment, *Prosecutor v. Kanyabashi* (ICTR-96-15-T), 12 August 1999, 6.

²¹² ICTR, Decision on Defence Motion for Trial to Proceed before Trial Chamber II, Composed of Judges Sekule, Maqutu and Ramarason and for Termination of the Proceedings, *Prosecutor v. Kanyabashi* (ICTR-96-15-T), 20 February 2004, 3; idem: ICTR, Decision on Defence Motion for a Stay of Proceedings and Abuse of Process, *Prosecutor v. Nyiramasuhuko* (ICTR-97-21-T), 20 February 2004, 4; ICTR, Decision on Continuation of the Proceedings, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 6 March 2007, 78; ICTR, Decision on Ntahobali's Motion for a Stay of Proceedings for Undue Delay, *Prosecutor v. Ntahobali* (ICTR-97-21-T), 26 November 2008, 60.

²¹³ ICTY, Decision on Oral Request of the Accused for Abuse of Process, *Prosecutor v. Šešelj* (IT-03-73-T), 10 February 2010, 29; ICTR, Appeals Judgement, *Prosecutor v. Bagosora and Nsengiyumva* (ICTR-98-41-A), 14 December 2011, 37.

²¹⁴ ICTR, 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 for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-I), 2 October 2003, 12; ICTR, Decision on Prosper Mugiraneza's Application for a Hearing or other Relief on his Motion for Dismissal for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 3 November 2004, 30; ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009, 29.

Certain decisions have held that the right to be tried without undue delay must be ‘reconciled with the fundamental purpose of the Tribunal’. It was held that this right must be ‘interpreted and applied within the context of the sole purpose of the Tribunal, to prosecute persons responsible for genocide and other violations of IHL’.²¹⁵ The fact that the Tribunal’s mission concerns the most serious violations of international law was thought to militate against finding delays undue. However, the ICTR Appeals Chamber held that this factor could not legitimately be weighed against the accused’s right to be tried without undue delay.²¹⁶ This factor does not seem to have been relied upon since this decision.

Furthermore, several decisions have referred to more practical aspects of the specific context in which the Tribunals operate. An ICTR Chamber has held that since the Tribunal has limited human and physical resources and depends on the UN for funding, it cannot be compared to domestic legal systems, and held up to the same standards of speediness.²¹⁷ The ICTR also considered that the cases before it could not be compared to domestic cases, because of its specific mandate and the inherent complexity of the cases before it. According to the Tribunal, this makes it reasonable to expect that the judicial process before the Tribunal will not always be as expeditious as before domestic courts.²¹⁸

These additional factors find no support in IHRL. Considering the gravity of the crimes charged is particularly problematic. Persons accused of serious crimes are not less entitled to a trial without undue delay. Although it is impossible to ascertain whether this is truly what the Tribunals intended to argue when relying on gravity, it is also difficult to see what else might have been meant. Some decisions have examined gravity as a factor adding to the complexity of a case, which seems legitimate, but others have simply asserted gravity as an independent factor relevant for the assessment of delays. This finds no support in IHRL.

At the same time, however, a limited number of cases of the ECnHR, discussed in the above, have considered that the importance of proper investigations and trials in cases involving war crimes and crimes against humanity, grant the authorities more leeway in the context

²¹⁵ ICTR, Decision on Justin Mugenzi’s Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), *Prosecutor v. Mugenzi et al* (ICTR-99-50-I), 8 November 2002, para 30; ICTR, 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 for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-I), 2 October 2003, 11.

²¹⁶ ICTR, Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-AR73), 27 February 2004, 3; reiterated in: ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009, 29.

²¹⁷ ICTR, Decision on the Defence Motion for Release, *Prosecutor v. Bagosora et al* (ICTR-98-41-T), 12 July 2002, 25-26.

²¹⁸ ICTR, Appeals Judgement, *Prosecutor v. Nahimana et al* (ICTR-99-52-A), 28 November 2007, 1076; ICTR, Judgement and Sentence, *Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-T), 2 February 2012, 39.

of delays. The ECnHR acknowledged the inherent difficulties associated with investigating and trying cases concerning crimes of an international nature, committed on a massive scale, many years prior to the proceedings. In addition, it considered the importance of conducting war crimes trials and emphasized that the right to be tried within a reasonable time must not stand in the way of the judges to do their work properly and carefully.²¹⁹ These decisions of the Commission might be cited in support for more leeway for the Tribunals in the context of the right to be tried without undue delay. However, it has been convincingly argued that these decisions should be treated as an anomaly, rather than as standing and applicable jurisprudence. The decisions were issued a very long time ago, and recent judgments pertaining to atrocity crimes prosecutions contain no references to them.²²⁰ More fundamentally, the importance of prosecuting suspects of heinous crimes and ‘ending impunity’ should not absolve the judicial authorities from their duty to protect the ‘internationally recognized human rights’ of accused persons, including their right to be tried without undue delay.

One final aspect of the Tribunals’ approach to the right to be tried without undue delay, which has already been alluded to, is that they consistently impose the burden of proof with regard to violations of the right to be tried without undue delay on the defence.²²¹ Similarly, they have also imposed the burden with regard to the specific parameters, notably the conduct of the parties, the conduct of the authorities, and the requirement of prejudice, on the defence. Although some decisions have held that the Prosecutor should bear the burden of proof with regard to due diligence on her/his own part, other decisions have also required the defence to prove failure to act with diligence by the Prosecution. In IHRL, on the other hand, it has been consistently held that the Prosecution bears the burden to prove diligence on their part in bringing the case to trial and trying it within a reasonable time. The same goes for the court authorities. The ECtHR generally requires the defence to assert, on a *prima facie* level, that the proceedings have been lengthy, or that there have been periods of inactivity, where-

²¹⁹ See *supra* section 2.2.5.

²²⁰ McDermott, ‘The Right to a Fair Trial in International Criminal Proceedings’ (n 3), 119: ‘[g]iven that the Commission applied Article 6 as normal to a later war crimes suspect in *Menten*, and more recent European Court of Human Rights jurisprudence has considered the fair trial rights of those accused of war crimes, it is submitted that we can treat *X v. FRG* as a curiosity rather than established precedent. This means that the complexity of the case should be seen as a consideration to be taken into account when assessing whether a delay was undue rather than a factor excluding the defendant from the full scope of protection afforded by international human rights standards.’

²²¹ See also ICTR, Decision on Prosper Mugiraneza’s Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 18; ICTR, Appeals Judgement, *Prosecutor v. Nahimana et al* (ICTR-99-52-A), 28 November 2007, 1077; ICTR, Decision on Jérôme-Clement Bicamumpaka’s Motion Seeking Permanent Stay of Proceedings, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 27 February 2009, 14-18; ICTR, Decision on Protais Zigiranyirazo’s Motion for Damages, *Zigiranyirazo v. Prosecutor* (ICTR-2001-01-073), 18 June 2012 42.

upon it is for the authorities to prove they acted diligently. The very basis of the ICTs' approach to the right to be tried without undue delay thus differs significantly from IHRL. However, the Tribunals have never acknowledged or justified this apparent departure.

3.3. Comparison and the Tribunals' use of IHRL

The right to be tried without undue delay before the Tribunals is clearly based on IHRL, as their Statutes reproduce Article 14(3)(c) of the ICCPR verbatim. As has been explained, the ECHR, ACHR, and ACHPR enshrine the right to be tried within a reasonable time, and the content of these guarantees is identical.²²² The ICTY has confirmed that its Statute reflects IHRL with regard to the right to be tried without undue delay.²²³ The ICTR has also emphasized the fact that the right to be tried without undue delay was laid down in the Statute as well as other international human rights instruments.²²⁴ The latter statement led the *Ntagerura et al* Trial Chamber to determine the factors relevant to establishing undue delay based on 'human rights case law' and 'human rights standards'.²²⁵ In this case, the ICTR referred to parameters that correspond with those employed in IHRL: the complexity of the case, the conduct of the authorities, and the conduct of the accused. However, there was no discussion of these parameters and the Chamber mentioned the complexity of the case alone to justify the length of the proceedings up to that point.²²⁶

Furthermore, subsequent case law of the Tribunals has relied on the criteria discussed above, which do not comport with those in IHRL. The Tribunals have referred to the conduct of the parties and the conduct of the authorities, whereby the Prosecution is considered a party, not an authority. But in IHRL the criteria are the conduct of the accused and the conduct of the authorities (including the Prosecution). Arguably, assessing the Prosecution's conduct as that of an 'authority' better reflects her/his responsibility as an organ of the Tribunals in terms of ensuring respect for the rights of accused persons. In addition, while the conduct of the authorities is the most important parameter in IHRL to determine a violation, the Tribunals have focused mostly on the complexity of the case as an almost blanket justification for lengthy proceedings. Finally, the Tribunals have invented the additional requirement of prej-

²²² See *supra* section 2.

²²³ ICTY, Decision on the Prosecutor's Motion to Hold Pre-Trial Motions in Abeyance, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-PT, 28 January 1998, 8.

²²⁴ ICTR, Decision on the Prosecutor's Motion for Joinder, *Prosecutor v. Ntagerura* (ICTR-97-36-I), 11 October 1999, 13; ICTR, Decision on the Prosecutor's Motion for Joinder, *Prosecutor v. Bagosora* (ICTR-96-7), 29 June 2000, 147.

²²⁵ ICTR, Decision on the Prosecutor's Motion for Joinder, *Prosecutor v. Ntagerura* (ICTR-97-36-I), 11 October 1999, 54.

²²⁶ *ibid*, 56.

udice, which, as has been argued above, goes against the very nature of the right to be tried without undue delay.

The Tribunals have never justified their invention of this additional requirement, have not acknowledged the departure of their legal test from IHRL, and have not explained their focus on the complexity of the case or different interpretation of the conduct of the authorities. This is striking given that they have cited case law from the ECtHR and human rights supervisory bodies to justify other aspects of their approach. In particular, the Tribunals have often emphasized that in IHRL decisions regarding undue delay depend heavily on the circumstances of the case. One oft-quoted decision in *Kanyabashi* relied on the HRC, IACnHR, and the ECtHR essentially to underline the flexibility of IHRL when it comes to assessing when delays are undue. The Chamber held that ‘[t]he reasonableness of the period cannot be translated into a fixed number of days, months or years, since it is dependent on other elements which the judge must consider.’²²⁷ In the same vein, the Chamber held that ‘the Strasbourg organs have deemed trials that even lasted longer than 10 years to be compatible with Article 6(1) of the ECHR, holding, on the other hand, others lasting less than one year to be in violation of the provision.’²²⁸ This paragraph has been reiterated in numerous subsequent decisions.²²⁹ Other decisions that did not rely on this specific quote have similarly emphasized that whether delays are undue depends on the circumstances of the case, relying for example, on the HRC²³⁰ and the ECtHR.²³¹ Similarly, several decisions have emphasized the

²²⁷ IACnHR, Judgement, *Firmenich v. Argentina* (Resolution No. 17/89), 13 April 1989; quoted in: ICTR, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of the Proceedings, *Prosecutor v. Kanyabashi* (ICTR-96-15-I), 23 May 2000, 68.

²²⁸ ICTR, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of the Proceedings, *Prosecutor v. Kanyabashi* (ICTR-96-15-I), 23 May 2000, 68; see also ICTY, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaskić* (IT-95-14-T), 20 December 1996, 6-7, where the ICTY relied on a number of ECtHR cases to emphasize that the Court has found five years of, in that case, pre-trial detention, not to exceed a reasonable time.

²²⁹ ICTR, Decision on Justin Mugenzi’s Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), *Prosecutor v. Mugenzi et al* (ICTR-99-50-I), 8 November 2002, 33; and partly reiterated in: ICTR, 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 for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-I), 2 October 2003, 12; ICTR, Decision on Defence Motion for Trial to Proceed before Trial Chamber II, Composed of Judges Sekule, Maqutu and Ramaroson and for Termination of the Proceedings, *Prosecutor v. Kanyabashi* (ICTR-96-15-T), 10 February 2004, 15; ICTR, Decision on Prosper Mugiraneza’s Application for a Hearing or other Relief on his Motion for Dismissal for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 3 November 2004, 31; ICTR, Decision on Prosper Mugiraneza’s Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 26; ICTR, Decision on Prosper Mugiraneza’s Third Motion to Dismiss Indictment for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 10 February 2009, 12; ICTR, Decision on Jérôme-Clement Bicamumpaka’s Motion Seeking Permanent Stay of Proceedings, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 27 February 2009, 10.

²³⁰ ICTY, Decision Stating Reasons for Appeals Chamber’s Order of 29 May 1998, *Prosecutor v. Kovačević* (IT-97-24-AR73), 2 July 1998, 28.

importance of a case-by-case assessment of undue delay, without referring to IHRL explicitly.²³² Such use of IHRL is highly selective, as it fails to acknowledge other aspects of the right to be tried without undue delay with which the ICTs' approach is not in line.

There are also several examples of references to case law of the ECtHR, where the parameter of 'complexity' alone was singled out by the ICTR as justifying lengthy periods of detention.²³³ Similarly, the ICTY based its decision regarding the length of the provisional detention in *Perišić* almost entirely on the ECtHR's reasoning in one specific case, which was 'very complex', and where the ECtHR had accepted a period of more than five years of pre-trial detention as not exceeding a reasonable time because of the complexity of the case and the fact that detention had been subject to continuous review.²³⁴

The Tribunals have cited a variety of legal bases to support their reliance on human rights law and jurisprudence. In the *Perišić* decision, the ICTY explained that it considered the case law of the ECtHR as 'persuasive and not controlling authority'.²³⁵ It did not further venture into questions regarding the basis of this authority. Several other decisions that relied on sources of IHRL did justify why they did so. For example, several ICTR decisions have held that 'generally accepted norms of human rights' are binding on the Tribunal.²³⁶ The ICTY has also held that 'internationally recognized standards apply to the Tribunal'.²³⁷ How-

²³¹ ICTY, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaskić* (IT-95-14-T), 20 December 1996, 6; ICTR, Decision on the Defence Motion for Separate Trial, *Prosecutor v. Ndayambaje* (ICTR-96-8-T), 25 April 2001, 18; idem: ICTR, Decision on the Motion for Separate Trials, *Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-97-21-T), 8 June 2001, 23; ICTR, Decision on Protais Zigiranyirazo's Motion for Damages, *Zigiranyirazo v. Prosecutor* (ICTR-2001-01-073), 18 June 2012, 34: [the ECtHR] has established that the issue of whether a period of detention is reasonable cannot be assessed in the abstract'.

²³² ICTY, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, *Prosecutor v. Halilović* (IT-01-48-A), 27 October 2006, 17; ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009, 30; ICTR, Decision on Proseper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 4.

²³³ ICTR, Decision on the Defence Motion for Separate Trial, *Prosecutor v. Ndayambaje* (ICTR-96-8-T), 25 April 2001, 18: '[i]t however stems from the case law of the European Court of Human Rights that "the reasonableness of the length of the proceedings needs to be assessed in each instance according to the particular circumstances" and with regard to, "among other things, the complexity of the case";' idem: ICTR, Decision on the Motion for Separate Trials, *Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-97-21-T), 8 June 2001, 23.

²³⁴ ICTY, Decision on Motion for Sanctions for Failure to Bring the Accused to Trial without Undue Delay, *Prosecutor v. Perišić* (IT-04-81-PT), 23 November 2007, 24-25.

²³⁵ *ibid.*, 21.

²³⁶ ICTR, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 20; ICTR, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 14 June 2007, 10; ICTR, Decision on Proseper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 6.

²³⁷ ICTY, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, *Prosecutor v. Kovačević* (IT-97-24-AR73), 2 July 1998, 26.

ever, these decisions failed to clarify the content and the nature of these standards, as well as the legal basis for their binding nature.

In several decisions in *Bizimungu et al*, the ICTR accepted the persuasive authority of the jurisprudence of the ECtHR and the HRC but considered that the Tribunal should only have recourse to such authorities to the extent that its statutory instruments and jurisprudence are deficient.²³⁸ Such jurisprudence was thus identified as a possible gap-filler.²³⁹ This is further illustrated by the Chamber's statement that it would rather have 'recourse to jurisprudence that is binding on it', which was case law of the Tribunal itself.²⁴⁰ The same Chamber has emphasized that the Statute of the ICTR was its primary source of law.²⁴¹ Another Chamber has held that ECtHR jurisprudence cannot be considered as binding customary international law because it covers a limited geographical area.²⁴² It did find the jurisprudence of the ECtHR to be 'persuasive' because that Court 'has adjudicated issues relating to delay in criminal cases in a variety of legal systems'.²⁴³ In that decision, the ICTR held that the ECtHR has 'adopted the same criteria as the ICTR Appeals Chamber for review', neglecting the aforementioned substantial differences between the respective approaches of the Tribunals and the ECtHR.²⁴⁴ Subsequently, the Chamber did refer specifically to the responsibility of the authorities and their obligation to display 'special diligence', and it held that it was 'incumbent on the authorities to explain any periods of inactivity or inertia'.²⁴⁵ Still, it found that the right to be tried without undue delay had not been violated because the accused should have invoked it earlier in the proceedings.

Overall, the Tribunals' use of IHRL on the issue of undue delay can be characterized as selective. They have referred to decisions of the ECtHR, IACtHR, and HRC in support of

²³⁸ ICTR, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 20; ICTR, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 14 June 2007, 10; ICTR, Decision on Prosper Mugiraneza's Third Motion to Dismiss Indictment for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 10 February 2009, 10; ICTR, Decision on Proseper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 6.

²³⁹ ICTR, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 20.

²⁴⁰ ICTR, Decision on Prosper Mugiraneza's Third Motion to Dismiss Indictment for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 10 February 2009, 10; ICTR, Decision on Proseper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 7.

²⁴¹ ICTR, Decision on Proseper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 23 June 2010, 6.

²⁴² ICTR, Decision on Protais Zigiranyirazo's Motion for Damages, *Zigiranyirazo v. Prosecutor* (ICTR-2001-01-073), 18 June 2012, 34.

²⁴³ *ibid.*

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*

their reliance on the complexity of cases before them to justify their length, or to underline that human rights law sets no predetermined limits for the length of criminal proceedings. However, many other aspects of their case law are not supported by IHRL, and the Tribunals have neither acknowledged this nor justified any departure from it. In particular, the addition of the requirement of prejudice cannot be traced back to IHRL. Quite the contrary, it is arguably in contravention of the nature of the right to be tried without undue delay.²⁴⁶ In addition, the ICTs' recurring reliance on the gravity of crimes as a parameter relevant to the determination of undue delay finds no support in IHRL. Finally, the Tribunals' actual application of the parameters determining undue delay has also been different from the approach in IHRL. The Tribunals have over-relied on the complexity of cases before them and have neglected to truly assess the responsibility of the prosecutorial and judicial authorities for possible delays. One commentator concluded that the Tribunals' reference to human rights law in their case law on undue delay is mere lip service.²⁴⁷

This is further supported by an examination of the actual length of the proceedings before the Tribunals. On average, the total length of the proceedings has been six years and two months before the ICTY and nine years and two months before the ICTR.²⁴⁸ Furthermore, the period between arrest and the first instance judgment, when the presumption of innocence still fully applies, has been four years and five months before the ICTY and seven years and eleven months before the ICTR. Another striking number is the time between arrest and the commencement of trial, the time that is generally spent in detention, which has been two years and seven months before the ICTY and three years and eleven months before the ICTR. Although IHRL does not set specific limits for the length of criminal proceedings, the length of proceedings before the Tribunals is substantial. It is therefore suspect that the Tribunals have only found the right to be tried without undue delay to have been violated once.²⁴⁹ This can be attributed to their very different approach to this right, as compared to IHRL, which has made it well-nigh impossible for defendants to establish a violation of their right to be tried without undue delay.

If human rights courts and supervisory bodies had been confronted with proceedings of the length comparable to that of the proceedings before the Tribunals, they would have probably required the state in question to provide justifications. In IHRL, the conduct of the authorities is determinative of the question whether the right to be tried without undue delay

²⁴⁶ See *supra* section 3.2.5. and Fedorova and Sluiter (n 208), 53.

²⁴⁷ Christoph Safferling and others, *International Criminal Procedure* (OUP 2012), 387.

²⁴⁸ See Annex 1 for a table containing an overview of the data collected.

²⁴⁹ ICTR, Appeals Judgement, *Prosecutor v. Gatete* (ICTR-00-61-A), 9 October 2012, 44.

has been violated. However, the Tribunals have downplayed the importance of this factor, focusing on the complexity of cases instead. It is questionable whether this can be justified by the specific circumstances in which they operate. Admittedly, the cases before ICTs are far more complex than an average domestic criminal trial, which could, to a certain extent, justify their increased reliance on this factor. However, there are significant differences both within and between the Tribunals. The ICTR is significantly slower than the ICTY, which is a fact that has never been addressed in the former's case law. Nor have the decisions of the ICTR truly engaged with the arguments raised by two dissenting judges regarding the lengthy deliberation process.²⁵⁰ Instead of simply asserting the complexity of the cases before them, the Tribunals should critically inquire into the prosecutorial and judicial authorities' possible responsibility for delays, including their responsibility for the complexity of cases and for ensuring expeditious trials despite such complexity. At the very least, they should justify how the complexity of a case has impacted on its length, instead of operating on an assumption of complexity without further substantiation. The fact that there are substantial differences in the length of cases both within and between the Tribunals is an additional reason why such an explanation is necessary. For example, one of the longest and most complex cases before the ICTY was *Popović et al*, which took a little under four years from the commencement of trial until the first instance judgment. A comparable case before the ICTR, *Bizimungu et al*, took almost eight years from the commencement of trial until the first instance judgment.²⁵¹ Perhaps the latter case was much more complex than the former, and perhaps this could justify the length of the proceedings. However, the Tribunals have not critically engaged with the reasons for such substantial differences in length between arguably comparable cases. The blanket reliance on 'complexity' oversimplifies the matter and does not do justice to accused persons' right to be tried without undue delay.

4. Trial without Undue Delay before the ICC

The ICC has not thus far addressed the question whether the right to be tried without undue delay has been violated in a particular case.²⁵² Its case law is therefore less instructive for the purposes of the present Chapter than that of the ad hoc Tribunals. That does not mean that the ICC has not engaged with this right at all. However, its references have mainly been limited

²⁵⁰ In *Bizimungu et al*, Trial Judge Short and Appeal Judge Robinson both considered the defendants' rights to be tried without undue delay to have been violated. See *supra* section 3.2.4.

²⁵¹ To be able to compare these multi-accused cases, the pre-trial periods have been omitted because they differ between accused persons.

²⁵² The only exception is a dissenting opinion by Judge Christine van den Wyngaert, discussed below.

to cases of procedural streamlining aimed at preventing undue delay. Article 67(1)(c) of the ICC Statute provides the right to be tried without undue delay. It thus follows the wording of the ICCPR and of the Statutes of the ad hoc Tribunals. Like in the ad hoc Tribunals' Statutes, there is also a provision that enshrines a duty of the Trial Chamber to ensure that trials are fair and expeditious.²⁵³ The Court has also emphasized that expeditiousness is also in the interests of victims.²⁵⁴ It has held that an expeditious trial relieves victims 'as soon as possible of the anxiety of having to appear in court to give evidence'.²⁵⁵ The Court also held that delays would 'diminish public interest and public support for, and cooperation with, the Court', and it held that '[w]ithout such support and cooperation the Court would find it difficult to have its decisions and orders respected or enforced.'²⁵⁶

4.1. The right to be tried without undue delay in the case law of the ICC

The ICC has held that its legal system evinces that expeditiousness is a recurring theme.²⁵⁷ It has limited the use of procedures by the parties in order to ensure that trials proceed expeditiously. The Appeals Chamber has held that all defence rights must be exercised in a manner that does not frustrate the aims of a fair trial, which includes the reasonableness of the time in which the proceedings must be completed.²⁵⁸ For example, the translation of documents has been limited in order to prevent delays.²⁵⁹ The number of witnesses the defence may call for the purpose of the confirmation hearing has also been restricted for the same reason.²⁶⁰ Similarly, a Chamber, when establishing a timetable for trial, determined the time allotted to the

²⁵³ Art 64(1) ICC Statute.

²⁵⁴ ICC, Decision on the Admission into Evidence of Materials Contained in the Prosecution's list of Evidence, *Prosecutor v. Bemba* (ICC-01/05-01/08-1022), 19 November 2010, 23; see also ICC, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", *Prosecutor v. Katanga and Ngudjolo* (ICC- 01/04-01/07-2259), 12 July 2010, 47.

²⁵⁵ ICC, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", *Prosecutor v. Katanga and Ngudjolo* (ICC- 01/04-01/07-2259), 12 July 2010, 46.

²⁵⁶ *ibid.*

²⁵⁷ *ibid.*, 43.

²⁵⁸ ICC, Reasons for "Decision of the Appeals Chamber on the Defence application 'Demande de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau Conseil de la Défense' filed on 20 February 2007" issued on 23 February 2007, *Prosecutor v. Lubanga* (ICC-01/04-01/06-844), 9 March 2007, 15.

²⁵⁹ ICC, Decision on the Defence's Request Related to Language Issues in the Proceedings, *Prosecutor v. Bemba* (ICC-01/05-01/08-307), 4 December 2008, 15.

²⁶⁰ ICC, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, *Prosecutor v. Samoei Ruto, Kiprono Kosgey and Arap Sang* (ICC-01/09-01/11-221), 25 July 2011, 11; ICC, Urgent Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, *Prosecutor v. Kirimi Muthaura, Muigai Kenyatta and Hussein Ali* (ICC-01/09-02/11-226), 10 August 2011, 16.

defence presentation of evidence with reference to the right to be tried without undue delay.²⁶¹ In this light, one Chamber has held that the defence strategy must respect both the procedural framework established by the Court's legal instruments and the overall interests of the administration of justice.²⁶²

The right of victims to call witnesses has been considered to be subject to the accused's right to be tried without undue delay.²⁶³ Chambers have also urged the Prosecution to proceed more expeditiously with various matters, such as disclosure and the translation of documentary evidence, in order to prevent delays in the trial process.²⁶⁴ Similarly, the defence has been urged to carefully select portions of its evidence that had to be translated, in order to safeguard the accused's right to be tried without undue delay.²⁶⁵ Similarly, Chambers have kept a tight hold on the scheduling of trial proceedings, emphasizing that promptness is crucial in light of the right to be tried without undue delay.²⁶⁶ Furthermore, the Appeals Chamber has found that a Chamber must weigh the effect of admission of evidence against this right.²⁶⁷ In that regard, it has been held that the broad admission of evidence will speed up proceedings, since this avoids extensive arguments about the evidence.²⁶⁸ However, it has

²⁶¹ ICC, Decision on the "Submissions on Defence Evidence", *Prosecutor v. Bemba* (ICC-01/05-01/08-2225), 7 June 2012, 11.

²⁶² ICC, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-2259), 12 July 2010, 77.

²⁶³ ICC, Directions for the Conduct of the Proceedings and Testimony in accordance with Rule 140, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-1665-Corr), 1 December 2009, 22.

²⁶⁴ ICC, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-1336), 27 July 2009, 16; ICC, Decision regarding the Timing and Manner of Disclosure and the Date of Trial, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1019), 9 November 2007, 19; ICC, Public Redacted Version of the Chamber's 11 November 2011 Decision regarding the prosecution's witness schedule, *Prosecutor v. Bemba* (ICC-01/05-01/08-1904-Red), 26 October 2011, 34.

²⁶⁵ ICC, Decision on the "Demande de la Défense aux fins de traduction en kinyarwanda de certains des principaux éléments de preuve", *Prosecutor v. Ntaganda* (ICC-01/04-02/06-115), 24 September 2013, 12.

²⁶⁶ ICC, Decision Setting the Date of the Confirmation Hearing, *Prosecutor v. Bemba* (ICC-01/05-01/08-335), 28 December 2008, 14; ICC, Redacted version of "Decision on legal assistance for the accused", *Prosecutor v. Bemba* (ICC-01/05-01/08-567-Red), 26 November 2009, 105; ICC, Decision on the Prosecution's Request for the Postponement of the Confirmation Hearing, *Prosecutor v. Mbarushimana* (ICC-01/04-01/10-207), 31 May 2011, 9; ICC, Decision Requesting Observations on the Schedule for the Confirmation of Charges Hearing, *Prosecutor v. Samoei Ruto, Kiprono Kosgey and Arap Sang* (ICC-01/09-01/11-272), 17 August 2011, 8.

²⁶⁷ ICC, Judgement on the Appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III entitled "Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence", *Prosecutor v. Bemba* (ICC-01/05-01/08-1386), 3 May 2011, 70.

²⁶⁸ ICC, Decision on the Admission into Evidence of Materials Contained in the Prosecution's list of Evidence, *Prosecutor v. Bemba* (ICC-01/05-01/08-1022), 19 November 2010, 27.

also been held that a Chamber should exclude evidence if the time anticipated for its presentation is disproportionate to its potential probative value.²⁶⁹

Like the ad hoc Tribunals, the ICC has addressed the right to be tried without undue delay in joint trials. In one decision, the Court appears to have found that the right of one co-accused to a trial without undue delay may not be invoked to prevent the other from using procedural remedies.²⁷⁰ However, two later decisions have held that the rights of accused persons rights must be ascertained in light of their co-accused's rights to be tried without undue delay.²⁷¹ Finally, a Prosecution request to amend the indictment has been rejected because this would result in undue delay.²⁷²

The decisions quoted in the above contain no more than perfunctory references to the right to be tried without undue delay. There are only a few examples of more extensive discussions of this right, and the parameters used that determine its violation. One example, touching upon issues of delay was the *Katanga and Ngudjolo Chui* Chamber's decision to sever the cases against the two accused, and use Regulation 55 to recharacterize the facts charged against Katanga in November 2012 ('Notice Decision'). The majority of the Chamber acknowledged that employing regulation 55 at such a late stage of the proceedings might result in delays, but noted that establishing whether this would be undue would depend on the facts and circumstances of the case.²⁷³ In justifying its approach, it relied on case law of the ECtHR, and noted specifically that the Chamber could compensate for possible delays by granting the accused a reduction of his sentence.²⁷⁴ On a general level, the Appeals Chamber had already found that a recharacterization of facts charged was not prohibited under the

²⁶⁹ ICC, Decision on the Prosecutor's Bar Table Motions, *Prosecutor v. Katanga and Ngudjolo* (ICC -01/04-01/07-2635), 17 December 2010, 41.

²⁷⁰ ICC, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", *Prosecutor v. Katanga and Ngudjolo* (ICC- 01/04-01/07-2259), 12 July 2010, 82-84.

²⁷¹ ICC, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, *Prosecutor v. Samoei Ruto, Kiprono Kosgey and Arap Sang* (ICC-01/09-01/11-221), 25 July 2011, 13; ICC, Urgent Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, *Prosecutor v. Kirimi Muthaura, Muigai Kenyatta and Hussein Ali* (ICC-01/09-02/11-226), 10 August 2011, 17.

²⁷² ICC, Decision on the "Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", *Prosecutor v. Ruto and Sang* (ICC-01/09-01/11-859), 16 August 2013, 42.

²⁷³ ICC, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3319-tENG/FRA), 21 November 2012, 43; see also ICC, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", *Prosecutor v. Lubanga* (ICC-01/04-01/06-2205), 8 December 2009, 86.

²⁷⁴ ICC, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3319-tENG/FRA), 21 November 2012, 43.

ECHR or the ACHR, or in the case law of their respective Courts.²⁷⁵ The Chamber further noted that it was premature to assess whether its decision would cause undue delay, and held that its decision was necessary to ‘close accountability gaps’.²⁷⁶

Judge Christine van den Wyngaert strongly dissented from the majority’s approach, because, amongst other things, the recharacterization of facts charged would necessarily cause undue delay. She argued that a proper trial on the new charges would ‘entail lengthy additional proceedings at a point in time where the trial should already have come to an end.’²⁷⁷ She employed the criteria developed in IHRL to support her conclusion, noting the limited complexity of the case, the diligent defence presented by the accused, and the fact that therefore, any and all substantial delays caused by the Notice Decision ‘would be entirely attributable to the Majority itself’.²⁷⁸ Nevertheless, the Appeals Chamber subsequently confirmed the approach of the Trial Chamber’s majority. It held that the defendant’s arguments regarding undue delay were ‘premature’, although it did caution the Trial Chamber to be ‘particularly vigilant’ in guarding against delays.²⁷⁹ Judge Cuno Tarfusser dissented from the majority, but his dissent did not touch upon the issue of delay.²⁸⁰

The Judgment in the case followed in March 2014, one year and four months after the Notice Decision. Regarding the issue of delay, the Trial Chamber considered that it had constantly been guided by considerations of expeditiousness, and that the right to be tried without undue delay had been fully respected.²⁸¹ The majority’s consideration of this issue occupied one paragraph, which is striking given the strongly worded and extensive dissent of

²⁷⁵ ICC, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, *Prosecutor v. Lubanga* (ICC-01/04-01/06-2205), 8 December 2009, 84.

²⁷⁶ ICC, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3319-tENG/FRA), 21 November 2012, 45.

²⁷⁷ ICC, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Dissenting Opinion of Judge Christine van den Wyngaert, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3319-tENG/FRA), 21 November 2012, 49.

²⁷⁸ *ibid.*, 51.

²⁷⁹ ICC, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, *Prosecutor v. Katanga* (ICC-01/04-01/07-3363), 27 March 2013, 98.

²⁸⁰ ICC, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, Dissenting Opinion of Judge Cuno Tarfusser, *Prosecutor v. Katanga* (ICC-01/04-01/07-3363), 27 March 2013, 98.

²⁸¹ ICC, Jugement rendu en application de l’article 74 du Statut, *Prosecutor v. Katanga* (ICC-01/04-01/07-3436), 7 March 2014, 1590, 1591: ‘pour la Chambre, les exigences de l’article 67-1-c ont donc été pleinement respectées.’ As a result, its subsequent sentencing judgement thus did not lower the sentence, which the Chamber had suggested earlier as a possible compensation for delays: ICC, Décision relative à la peine (article 76 du Statut), *Prosecutor v. Katanga* (ICC-01/04-01/07-3484), 23 May 2014.

Judge Christine van den Wyngaert. Amongst other things, she considered the accused's right to be tried without undue delay to have been violated, a finding which she supported with many references to IHRL, including the ICCPR, ECHR, ACHPR, and ACHR, and to the jurisprudence of their supervisory mechanisms.²⁸² Furthermore, she quoted the parameters employed in human rights law to determine whether a delay has been undue, relying on case law of the ECtHR, and she considered that, while complexity may impact on the length of the proceedings, the 'decisive element' is the conduct of the authorities.²⁸³ In her opinion, the Chamber was itself solely responsible for the delays subsequent to the Notice decision and these could have been prevented 'had the Notice Decision been rendered in due time and with sufficient specificity.'²⁸⁴ Regarding the complexity of the case, she noted that '[t]he charges now concern one accused and are based on a single attack on a single location on a single day, which renders the case factually far less complex than many multi-accused cases before other international courts and tribunals. In these circumstances, the delays are inexplicable and unjustifiable.'²⁸⁵ She therefore concluded that 'the extreme tardiness of the Notice Decision, in combination with the poor handling of the ensuing proceedings, has resulted in inexcusable delays', which she considered to have violated the accused's right to be tried without undue delay.²⁸⁶ Finally, referring to case law of the ECtHR, Judge van den Wyngaert cited the specificity of international criminal trials as requiring a more stringent obligation for the authorities to act diligently, because any case before the ICC 'necessarily involves very high stakes for the accused'.²⁸⁷

Before assessing these decisions, two further decisions that have touched upon the issue of delay are first discussed. In *Gbagbo*, the Chamber tested its decision to postpone the confirmation of charges hearing against the right to be tried without undue delay, recalling its obligation under article 21(3) to respect internationally recognized human rights.²⁸⁸ The Chamber cited the ECtHR in support of the contention that assessments of undue delay must

²⁸² ICC, Jugement rendu en application de l'article 74 du Statut, Minority Opinion of Judge Christine van den Wyngaert, *Prosecutor v. Katanga* (ICC-01/04-01/07-3436 -AnxI), 7 March 2014, 120.

²⁸³ *ibid.*, 122.

²⁸⁴ *ibid.*, 126.

²⁸⁵ *ibid.*, 128; similarly ICC, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Dissenting Opinion of Judge Christine van den Wyngaert, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3319-tENG/FRA), 21 November 2012, 51.

²⁸⁶ ICC, Jugement rendu en application de l'article 74 du Statut, Minority Opinion of Judge Christine van den Wyngaert, *Prosecutor v. Katanga* (ICC-01/04-01/07-3436 -AnxI), 7 March 2014, 131.

²⁸⁷ *ibid.*, 125.

²⁸⁸ ICC, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-432), 3 June 2013, 39.

be ‘determined on a case-by-case basis, taking into account the particularities of the case’.²⁸⁹ Despite its initial reliance on ECtHR case law, including of the parameters used by it to determine undue delay, the Chamber subsequently balanced the possible delays caused by the postponement against the seriousness of the charges, the complexity of the case, and the fact that postponement was provided for by the ICC Statute.²⁹⁰ Judge Fernandez de Gurmendi dissented, amongst other things, because she believed the postponement would be ‘to the detriment’ of the accused’s right to be tried without undue delay.²⁹¹ Neither the majority nor the dissenting Judge provided extensive reasoning in supporting their conclusion.

In *Kenya*, the Chamber weighed the Prosecution’s request to adjourn the trial date against the possible implications this would have for the accused’s right to be tried without undue delay.²⁹² Although the Chamber was quite critical of the conduct of the Prosecutor thus far, it nonetheless considered that the relative complexity of the case, as well as the fact that he was awaiting trial in freedom, made that ‘an adjournment of limited duration ... would not be inconsistent with the rights of the accused.’²⁹³

These three examples reflect an approach to the right to be tried without undue delay that is comparable to that of the ad hoc Tribunals, particularly of the ICTR. The decision in *Kenya* relied mainly on the case’s complexity to justify further delays in the commencement of the trial, without substantiating what this complexity entailed, or reflecting on the possible responsibility of the judicial or prosecutorial authorities for this. The decision in *Gbagbo* also relied on the complexity of the case without adding any substantiation, and on the seriousness of the charges, which is not an acceptable parameter in IHRL that may impact on assessments of undue delay. Finally, the decisions in *Katanga* fail to engage with serious allegations of undue delay raised by one of the members of the bench. Her and the defence’s allegations of delay were summarily discarded, with no reference to IHRL, which raises questions regarding the ICC’s obligation to adhere to internationally recognized human rights, enshrined in Article 21(3) of the Statute. On a general level, the ICC has found that the complexity of cases mitigates possible delays. In assessing such complexity, various as-

²⁸⁹ *ibid.*

²⁹⁰ *ibid.*, 41 and 39, n 55, where the Chamber said to ‘pay heed to the criteria established by the ECtHR including the complexity of the case and the conduct of the applicant and the relevant authorities.’

²⁹¹ ICC, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, Dissenting opinion of Judge Silvia Fernández de Gurmendi, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-432-Anx), 3 June 2013, 28.

²⁹² ICC, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, *Prosecutor v. Kenya* (ICC-01/09-02/11-908), 31 March 2014, 80.

²⁹³ *ibid.*, 97.

pects specific to the context in which the ICC operates have been mentioned. For example, one Chamber has specified that both the fact that all the evidence is situated abroad, as well as the enormous amount of it significantly complicate the pre-trial process.²⁹⁴ A Single Judge has similarly considered that the volume of the evidence, the disclosure process and the number of filings contribute to the case's complexity.²⁹⁵ Another has examined the multiplicity of the crimes alleged, the distance between the accused's actions and the scene of the actual crimes, and the reliance on novel forms of individual responsibility as contributing to the complexity.²⁹⁶

4.2. Analysis: Comparison and the ICC's use of IHRL

To a certain extent, not much can yet be said about the ICC's approach to the right to be tried without undue delay. Like the ad hoc Tribunals, it has employed this right as a device to streamline its proceedings, and to limit certain procedural actions by the parties. However, it has not to date addressed the question whether a specific accused person's right to be tried without undue delay has been violated. Having commenced its operations eleven years ago, it is too early to judge the ICC's performance regarding the right to be tried without undue delay. Thus far, the pace of the proceedings before the Court seems similar to that of those before its ad hoc predecessors. In addition, it has followed in the footsteps of their problematic approach to the right to be tried without undue delay.

When it comes to reliance on IHRL, the ICC's case law regarding the right to be tried without undue delay has included summary references to the ECHR, ICCPR, ACHR, and the ACHPR.²⁹⁷ The Court has also referred to the case law of the ECtHR²⁹⁸ and the IACtHR,²⁹⁹

²⁹⁴ ICC, Decision on the Application for Interim Release of Thomas Lubanga Dyilo, *Prosecutor v. Lubanga* (ICC-01/04-01/06-586), 3 October 2006, 7.

²⁹⁵ ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba* (ICC-01/05-01/08-321), 16 December 2008, 47.

²⁹⁶ ICC, Review of Detention and Decision on the "Third Defence Request for Interim Release", *Prosecutor v. Mbarushimana* (ICC-01/04-01/10-428), 16 September 2011, 55.

²⁹⁷ ICC, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, *Prosecutor v. Samoei Ruto, Kiprono Kosgey and Arap Sang* (ICC-01/09-01/11-221), 25 July 2011, 12; ICC, Urgent Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, *Prosecutor v. Kirimi Muthaura, Muigai Kenyatta and Hussein Ali* (ICC-01/09-02/11-226), 10 August 2011, 16.

²⁹⁸ ICC, Decision regarding the Timing and Manner of Disclosure and the Date of Trial, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1019), 9 November 2007, 21; ICC, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, *Prosecutor v. Bemba* (ICC-01/05-01/08-75), 25 August 2008, 17; ICC, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-1336), 27 July 2009, 6.

as well as to the observations of the HRC.³⁰⁰ None of its decisions discussed the basis on which the Court referred to these sources. It is difficult to draw general conclusions from this limited amount of case law about the impact of IHRL on the ICC's practice – even more so because the decisions that did refer to IHRL, including precedents from human rights courts and supervisory bodies, did so in a perfunctory way. The Chambers tend to include a reference to either the provisions of human rights treaties or case law of the ECtHR and the IACtHR, but have failed to engage with the content of respective guarantees and principles developed in the case law. In one case, the Court held that an excessive workload cannot excuse violations of the right to be tried without undue delay, which it supported by a reference to ECtHR case law.³⁰¹ At the same time, the Court has emphasized the relevance of its own specific context and has stated that although it paid careful attention to the case law of 'other international bodies', the Court's decisions must always be taken in the context of its own work and the requirements of the particular case before it.³⁰² This has been held to impact on the expeditiousness of its trials. According to the Court, the complexity of the crimes that it adjudicates renders it essential that a trial be properly managed.³⁰³ On a general level, however, the ICC has thus far only made limited use of IHRL regarding the right to be tried without undue delay. It has included references to human rights conventions or case law of human rights courts and supervisory bodies, but it has not truly engaged with the content of such sources.

The average length of proceedings before the ICC thus far is somewhere between the ICTY and the ICTR. To date, the ICC has completed three trials at first instance, which took around four-and-a-half, six, and six-and-a-half years for Ngudjolo, Lubanga, and Katanga respectively. The appeal in *Lubanga* has taken more than two-and-a-half years. Two further trials have commenced but are not proceeding expeditiously: Bemba has been in ICC custody for around six-and-a-half years and closing arguments have taken place in November 2014.

²⁹⁹ ICC, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, *Prosecutor v. Bemba* (ICC-01/05-01/08-75), 25 August 2008, 17.

³⁰⁰ ICC, Decision regarding the Timing and Manner of Disclosure and the Date of Trial, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1019), 9 November 2007, 21; ICC, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, *Prosecutor v. Bemba* (ICC-01/05-01/08-75), 25 August 2008, 17.

³⁰¹ ICC, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-1336), 27 July 2009, 6.

³⁰² ICC, Decision regarding the Timing and Manner of Disclosure and the Date of Trial, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1019), 9 November 2007, 21.

³⁰³ ICC, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-2259), 12 July 2010, 45.

Furthermore, Ruto and Sang, who are not provisionally detained, waited around two-and-a-half years between indictment and the commencement of trial in September 2013. Some of the cases currently at the pre-trial stage have been plagued with delays. Gbagbo has been in ICC custody since late 2011, the confirmation of charges hearings have been completed on 28 February 2013 and the decision confirming the charges was issued in June 2014, but it is difficult to predict when his actual trial might commence.³⁰⁴ The charges against incumbent Kenyan president Kenyatta were confirmed on 23 January 2012, less than a year after he was summoned. However, after almost three years of uncertainty, the Prosecutor dropped the charges against him in December 2014.³⁰⁵ Finally, Ntaganda has been in ICC custody since March 2013, the confirmation of charges hearings have been concluded on 14 February 2014, and the charges have been confirmed in June 2014. His trial is set to commence in June 2015, so the relatively swift progress in this case so far is promising.³⁰⁶

It may be premature to judge the ICC's performance on the numbers presented here, particularly given the fact that the length of these proceedings cannot be attributed to the Court alone.³⁰⁷ However, the conduct of prosecutorial and judicial authorities has undoubtedly contributed to delays in several of these instances. For example, the proceedings against Lubanga have been stayed twice for a total of around eight months as a result of prosecutorial misconduct.³⁰⁸ Although the Appeals Chamber has noted the negative impact of those stays on the accused's right to be tried without undue delay,³⁰⁹ the trial judgment contained no con-

³⁰⁴ ICC, Decision on the Confirmation of Charges against Laurent Gbagbo, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-656-Red), 12 June 2014.

³⁰⁵ ICC Website, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta (5 December 2014) < http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx > (accessed 10 December 2014).

³⁰⁶ ICC Website < http://icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/Pages/icc%200104%200206.aspx > accessed 28 October 2014.

³⁰⁷ For example, the trial against Kenyatta has been complicated and delayed because Kenya has been withholding cooperation. See eg T. McConnell, 'How Kenya Took on the International Criminal Court', *the Global Post* (Nairobi, 25 March 2014) <<http://www.globalpost.com/dispatch/news/regions/africa/kenya/140325/how-kenya-beat-the-international-criminal-court>> accessed 7 May 2014; similarly, the trial against Bemba has been seriously delayed as a result of allegations of offences against the administration of justice against Bemba and his attorneys. See eg ICC, 'Press Release - Bemba case: Four suspects arrested for corruptly influencing witnesses; same charges served on Jean-Pierre Bemba Gombo', < http://www.iccpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr962.aspx > accessed 18 August 2014.

³⁰⁸ ICC, *Prosecutor v. Lubanga Dyilo*, Case Information Sheet, <<http://www.iccpi.int/iccdocs/PIDS/publications/LubangaENG.pdf>> accessed 12 May 2014, 3; ICC, 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, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1401), 13 June 2008; ICC, Decision on Prosecution's Urgent request for variation of the time-limit to disclose the identity of intermediary 132 or alternatively to stay proceedings pending further consultations with the VWU, *Prosecutor v. Lubanga* (ICC-01/04-01/06-2517-Red), 8 July 2010, 31.

³⁰⁹ ICC, 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

sideration of possible violations of this right. In addition, the consequences of the decision to recharacterize the facts charged in *Katanga* have been subject to criticism, including from one of the members of the Chamber. In that regard, it is even more striking that the majority failed to properly consider the possible violation of the accused's right to be tried without undue delay. Instead of assessing the parameters established in IHRL, like Judge Van den Wyngaert did in her dissent, the majority simply asserted that it had constantly been guided by considerations of expeditiousness.³¹⁰ Similarly, the two other decisions that contained a more than perfunctory reference to the right to be tried without undue delay failed to properly consider these parameters.³¹¹ Even though one of them cited these parameters, the Chamber instead relied on the seriousness of the charges and the complexity of the case to justify its decision to postpone the confirmation hearing.³¹²

5. Conclusion

Much has been written about the slow pace of international criminal justice. From the perspective of this study, the interesting question is how this has impacted on the ICTs' interpretation and application of the right to be tried without undue delay. As has been seen, the ICTs' claim to be guided by IHRL and practice regarding this right. Upon closer scrutiny, however, it appears that the ICTs' use of IHRL is quite selective. They often rely on case law of human rights courts and supervisory bodies to underline the casuistic nature of this right, and that there are no absolute time limits for the length of proceedings to remain reasonable. Similarly, they have often referred to IHRL to support their reliance on the complexity of the cases before them as a justification of the length of proceedings. However, other aspects of the ICTs' practice regarding the right to be tried without undue delay significantly depart from IHRL, but the ICTs' have not thus far justified, or even acknowledged such departures.

The ICTs rely far more on the complexity of the cases before them than would appear admissible in IHRL. In addition, they have failed to truly connect the complexity of their cases to the length of their proceedings. When defendants raise allegations of undue delay, the

Application to Stay the Prosecution of the Accused, together with Certain other Issues Raised at the Status Conference on 10 June 2008", *Prosecutor v. Lubanga* (ICC-01/04-01/06-1486) 28 October 2008, 81.

³¹⁰ See *supra* section 4.1.

³¹¹ ICC, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-432), 3 June 2013; ICC, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, *Prosecutor v. Kenyatta* (ICC-01/09-02/11-908), 31 March 2014.

³¹² ICC, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-432), 3 June 2013, 41.

ICTs' generally invoke the case's complexity without truly substantiating this, or, importantly, assessing the possible responsibility of the judicial and prosecutorial authorities for that complexity, or ways in which the case could have proceeded more expeditiously despite such complexity. In IHRL, the conduct of the authorities is the key factor in determining whether a delay has been undue, another aspect of IHRL that the ICTs have not recognized. Furthermore, the ICTs have relied on parameters additional to those that have been recognized in IHRL as relevant to determinations of undue delay. The ad hoc Tribunals have invented the requirement of 'prejudice', which, in their reigning approach to undue delay, must be proven by the defence in order for delays to be found undue. In addition, Tribunals and the ICC have relied on the gravity of the crimes charged as a factor impacting on undue delay assessments, which suggests that individuals who are accused of serious crimes are entitled to a lesser degree of human rights protection, a notion that goes against the very foundation of IHRL. Finally, the ICTs have consistently imposed the burden of proof regarding the parameters to establish undue delay on the defence. The reigning approach in IHRL is the opposite: the defence must show that the proceedings were lengthy, on a *prima facie* level, whereupon the burden of proof shifts to the authorities to explain and justify this length.

It thus appears that the ICTs have a very distinct approach to the right to be tried without undue delay, as compared to IHRL. However, the ICTs themselves have not rationalized their approach as a departure from internationally recognized human rights, which renders it more difficult to assess whether their approach might be justifiable from the perspective of the unique context in which they operate. Admittedly, the inherent complexity of an international criminal trial should grant the ICTs a certain measure of leeway regarding the length of their proceedings. However, the blanket and at times unsubstantiated manner in which they have invoked the complexity of their cases detracts from such a justification, particularly in the context of several cases, discussed in the above, where the defence and even members of the bench have claimed that delays resulted from the ICTs' own actions. Proper contextualized interpretations of the right to be tried without undue delay would require better substantiation and justification. What is more, ICC Judge Van den Wyngaert has argued that the particular context of an ICT, where so much is at stake for defendants, would perhaps imply a stronger obligation of special diligence on the part of the judicial authorities.³¹³

³¹³ See *supra* section 4.1.