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Undue Delay in International Criminal Proceedings

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A thesis submitted for the degree of Doctor of Philosophy at
Monash University in 2018
Law School

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Abstract

In international criminal proceedings, it is not uncommon for an accused to be detained for over a decade pending completion of the trial. Despite this, the International Criminal Tribunal for Rwanda has found that the accused was not subjected to undue delay in the majority of cases in which it applied the legal test for undue delay, and the legal test has rarely been applied before the International Criminal Tribunal for the Former Yugoslavia and is yet to be applied before the International Criminal Court. To determine if an accused has been subjected to undue delay, international tribunals apply criteria that have been transplanted from domestic criminal courts. This thesis argues that in applying criteria that do not account for the differences between international and domestic criminal proceedings, international tribunals have failed to protect the rights of the accused.

This thesis examines how the criteria for assessing if an accused has been subjected to undue delay have been applied by regional human rights courts and international tribunals. It will highlight differences in the application of the law of undue delay in international criminal proceedings, and examine reasons relied on by international tribunals in finding that an accused was not subjected to undue delay. By examining differences in the reasoning processes of judges applying the law of undue delay in regional human rights courts and international tribunals, this thesis will demonstrate that international tribunals have failed to safeguard the rights of the accused because the legal test for undue delay is not adapted to an international criminal justice context. This thesis proposes an adapted legal test for assessing undue delay that balances the unique context in which international tribunals operate with the right to a fair trial.

Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

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Chapter 1- Introduction

Although several international criminal trials have lasted well over a decade,[1] international tribunals[2] have rarely found that an accused was subjected to undue delay.[3] Consistent with the presumption of innocence, the right to be tried without undue delay seeks to protect an accused from unnecessarily long trials, ensure that they do not remain too long in a state of uncertainty about their fate, and that they are detained no longer than justice requires.[4] However, in arguably the longest criminal trial in history, the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) highlighted the 'unprecedented and considerable length of proceedings', but initially held that the accused had not been subjected to undue delay after 16 years.[5] Although the Appeals Chamber later overturned this decision, in doing so, they stressed it was 'not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts.'[6] The legal test for

[1] See eg, *Prosecutor v Bizimungu et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *The Prosecutor v Šainović et. al.* (Judgment) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No IT-05-87, 23 January 2014). In the case of *Bizimungu*, the accused were held for 14 years before being acquitted by the ICTR and the Appeals Chamber held they were not subjected to undue delay. Mr Šainović was convicted by the ICTR after being detained for 12 years and the issue of undue delay was never raised in this case.

[2] The term 'international tribunals' will be used throughout this thesis to apply to the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court.

[3] There were no cases before the ICTY where it was found the accused was subjected to undue delay and in the 35% of cases where the criteria for assessing undue delay were considered, it was found the accused was subjected to undue delay in 25% of cases. See discussion in Chapter 4 pages 174-175.

[4] *Stögmüller v Austria* [1969] ECHR 2 [5]; *H v France* (1990) 12 EHRR 74 [58]; *Bottazzi v Italy* App. 34884/97, 28 July 1999, ECHR 1999-V; *Wemhoff v. Germany* [1968] ECHR 2 [110], [19]; General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial, 90th Session, UN Doc CCPR/C/GC/32 (23 August 2007).

[5] *The Prosecutor v Nyiramasuhuko* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-98-42-A, 24 June 2011).

[6] *The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 Dec 2015) [359].

undue delay[7] has been transplanted from domestic criminal proceedings and consists of an examination of the circumstances of the case by considering the following factors: the complexity of the case, the conduct of the authorities, the conduct of the accused and what is at stake for the accused.[8] In applying the legal test for undue delay, the complexity of the case has been the main justification relied on by international tribunals to explain lengthy proceedings and find an accused was not subjected to undue delay.[9] Although these criteria were developed for application in domestic jurisdictions, there has been limited scrutiny of their suitability to an international criminal justice context.[10] This thesis will argue that there are differences between international and domestic criminal justice that mean the current legal test for undue delay is not adapted to an international criminal justice context, and does not assist judges in balancing the competing principles, objectives, rights and interests that come into play in a way that safeguards the overall fairness of proceedings.

In interpreting international criminal procedure, international tribunals must balance a range of competing principles, objectives, rights and interests for a range of parties including the accused, victims, witnesses, the prosecutor and the international community. In one of the few studies that has considered the interpretation of the legal test for undue delay, it has been suggested that

[7] This term will be used in this thesis to refer to the criteria for assessing undue delay that include the complexity of the case, the conduct of the authorities, the conduct of the accused and what is at stake for the accused.
[8] *Nahimana et. al. v. The Prosecutor* (*Judgment*) (International Criminal Tribunals for Rwanda, Appeals Chamber, Case No. ICTR-99-52-A, 28 November 2007) [1074] (‘*Nahimana Judgment’*).
[9] See discussion in Chapter 4 pages 194-196.
[10] Krit Zeegers, *International Criminal Tribunals and Human Rights: Adherence and Contextualisation* (TMC Asser Press, 2016); Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press, 2016).

international tribunals should draw on human rights law in applying the criteria to better safeguard the rights of the accused.[11] However, international criminal justice is victim-focussed,[12] and in balancing the rights of the accused with the rights and interests of victims, a human rights law interpretive method will naturally lend itself to expansive legal interpretations.[13] In an international criminal law setting, this can promote the rights of victims over those of the accused. As Rauschenbach and Scalia have argued:

> The increasing importance attached to the victim in criminal proceedings might hamper the achievement of the aims of those proceedings and in some cases impede the accused in exercising his/her right to defence.[14]

The 'strong emergence of the victim' in international criminal law and the 'sacrali[s]ation' of victims in international criminal justice have led to difficulties in the 'ability to firmly arbiter fundamental issues of procedure'.[15] Both victims and the accused have laid claim to 'the language of rights' and this has weakened 'human rights law's resolute power whenever their interests clash.'[16]

International tribunals must also strive to meet the broad goals and objectives of international criminal justice, which often come into conflict with the fair trial

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[11] Zeegers, above n 10, 355-395.
[12] Mina Rauschenbach and Damien Scalia, 'Victims and International Criminal Justice: a vexed question?' (2008) 90 *International Review of the Red Cross* 441.
[13] Joseph Powderly, 'Judicial Interpretation at the Ad Hoc Tribunals: Method From Chaos?' in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010) 17, 41; Patricia Pinto Soares, 'Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism' (2012) 23 *Criminal Law Forum* 161.
[14] Rauschenbach and Scalia, above n 12, 449-450.
[15] Frederic Megret, 'Beyond "Fairness": Understanding the determinants of International Criminal Procedure' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 37, 39, 57.
[16] Ibid 56-57.

rights of the accused. In balancing these competing rights and interests, Zappala advocates that:

> [T]hese decisions must be based on the fundamental principles governing international criminal procedure, which grant clear primacy to the rights of the accused and the notion of a fair trial. Under no circumstances may the rights of victims prevail over the rights of the defendant, nor may the interest in discovering the truth. There is no need to recall that one of the main teachings of the Nuremburg legacy is that the fairness of the proceedings to defendants is the main yardstick against which the whole legitimacy of the exercise will be measured.[17]

This thesis will argue that in balancing competing rights, goals and interests in interpreting the legal test for undue delay, an emphasis by international tribunals on human rights principles that use expansive interpretive methods has promoted the rights and interests of other parties over those of the accused. The current legal test for undue delay is not adapted to an international criminal justice context and this thesis will propose an adapted legal test for undue delay that seeks to assist judges in balancing competing rights, goals and interests to better safeguard the rights of the accused.

This chapter will analyse the problem of undue delay in international criminal proceedings. Research in this area initially focussed on criticising the effectiveness of international tribunals and developing ways to increase the pace of international criminal proceedings through a range of procedural reforms. However, these reforms failed to address the problem of delay in international criminal proceedings, and in some cases, actually lengthened

[17] Salvatore Zappala, 'The Rights of Victims v the Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* 137, 164.

proceedings.[18] Current research has therefore evolved from focussing on ways to expedite proceedings to accepting that international proceedings will take longer than domestic criminal trials. Despite this, there has been almost no evaluation of whether the criteria for assessing undue delay is adapted to an international criminal justice context, and while it is argued that international tribunals' application of the law of undue delay has resulted in under-protection of the rights of the accused,[19] the relevant standard of fairness that international tribunals should adhere to in interpreting the right to be tried without undue delay remains unclear. Consistent with the presumption of innocence, it is important that the fair trial rights of the accused are protected in lengthy proceedings. As such, it will be argued that a consideration of the differences between domestic and international criminal justice is required to determine whether the legal test for undue delay is adapted to the international criminal justice context in which international tribunals operate. This chapter will conclude by setting out the research aims of this thesis and provide an outline of subsequent chapters that seek to address these aims.

1. The problem of delay in international criminal proceedings

The length of proceedings 'has been one of the most critici[s]ed aspects of the practice' of international tribunals.[20] It has been said that international criminal

[18] Maximo Langer and Joseph Doherty, 'Managerial Judging Goes International, buts Its Promise Remains Unfulfilled: An Empirical Assessment of ICTY Reforms' (2011) 36 *The Yale Journal of International Law* 241.
[19] Zeegers, above n 10, 377.
[20] Ibid 289-290. See also, Stephane Bourgon, 'Procedural problems hindering expeditious and fair justice' (2004) 2 *Journal of International Criminal Justice* 526; Ralph Zacklin, 'The failings of Ad Hoc International Tribunals' (2004) 2 *Journal of International Criminal Justice* 541; Gillian Higgins, 'Fair and expeditious Pre-Trial proceedings' (2007) 5 *Journal of*

proceedings progress at an 'agonisingly slow pace'[21] and that international tribunals have proven to be 'too costly, too inefficient and too ineffective'.[22] In evaluating the success of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in fulfilling its mandate, Bourgon has argued that 'one issue…stands out that has had a permanent negative impact. I refer to the length of proceedings, at all stages, which appears to be uncontrollable.'[23]

The average length of proceedings at the ICTR was nine years, with proceedings for one accused lasting 20 years.[24] While the average length of criminal proceedings before the ICTY is slightly less at 5.6 years, proceedings have lasted over six years for just under half of all accused.[25] Those who defend the pace of international criminal justice and argue that proceedings are only 'modestly slower' than complex criminal cases in Western domestic jurisdictions have even conceded that the ICTR has heard cases which have taken an 'intolerably long time'.[26] The International Criminal Court (ICC) has

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International Criminal Justice 394; Claude Jorda, 'The Major Hurdles and Accomplishments of the ICTY' (2007) 5 *Journal of International Criminal Justice* 572; Mia Swart, 'Ad Hoc Rules for the Ad Hoc Tribunals? The Rule Making Power of the Judges of the ICTY and the ICTR' (2002) 18 *South African Journal on Human Rights* 570; William A. Schabas, 'Prosecutorial Discretion vs Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice* 731; Langer and Doherty, above n 18; McDermott, *Fairness in International Criminal Trials*, above n 10; James Meernik and Rosa Aloisi, 'Is Justice Delayed at the International Criminal Tribunals?' (2007-2008) 91 *Judicature* 276; Dominic Raab, 'Evaluating the ICTY and its Completion Strategy – Efforts to achieve accountability for war crimes and their Tribunals' (2005) 3 *Journal of International Criminal Justice* 82.

[21] Jeremy Rabkin, 'Global Criminal Justice: An Idea Whose Time Has Passed' (2005) 38 *Cornell International Law Journal* 753, 768.

[22] Zacklin, above n 20, 545.

[23] Bourgon, above n 20, 527.

[24] *The Prosecutor v Nyiramasuhuko* (International Criminal Tribunal for Rwanda, Case No. ICTR-98-42-T).

[25] See discussion in Chapter 4 pages 165-167.

[26] Jean Galbraith, 'The Pace of International Criminal Justice' (2009) 31 *Michigan Journal of International Law* 79,142.

also been criticised for the pace of proceedings, having completed three trials since it was established in 2002.[27] As McDermott has argued:

> The ICC's record on expedience to date has been rather disappointing. In particular, the case against Lubanga has been fraught with delay … [it] cannot be viewed in isolation as an inexpedient trial: the second accused brought before the court, Germain Katanga, was transferred to the ICC in October 2007 and his case was still at the trial stage in 2012. The formative practice of the ICC was even less productive than that of the ad hoc Tribunals, with no trial completed in the first eight years of the Rome Statute's entry into force. By contrast, in the years 1994 to 2002, the ICTY delivered trial and appeal judgments in cases of no fewer than 33 individuals.[28]

The Court Capacity Model of the ICC projected an average trial to last slightly less than three years from arrest until final judgment.[29] Yet of the ICC's three completed cases, the average length of proceedings is 8.6 years.[30] It has therefore been projected that the ICC will proceed at a pace similar to, or slower than the ICTY and ICTR.[31] Although the ICC has only completed a small number of cases, it is argued that if it continues at its current pace, there

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[27] See discussion in Chapter 4 page 167, which provides the example of the *Lubanga* trial at the ICC, which lasted for just over 12 years. Christine Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44(1-2) *Case Western Reserve Journal of International Law* 475; Bridie McAsey, 'Victim Participation at the International Criminal Court and its Impact on Procedural Fairness' (2011) 18 *Australian Journal of International Law* 105; Yvonne McDermott, 'Some are More Equal Than Others: Victim Participation in the ICC' (2008) 5 *Eyes on the ICC* 23; William A. Schabas, 'The International Criminal Court at 10' (2011) 22 *Criminal Law Forum* 493; Siobhan Kelly, 'The Role of Victims in the International Criminal Court: Challenges & Opportunities' (2012) 18 *New England Journal of International and Comparative Law* 243.

[28] Yvonne McDermott, 'General Duty to Ensure the Right to a Fair and Expeditious Trial' in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev and Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) 796, 798.

[29] *Report on the Court Capacity Model*, ICC Assembly of State Parties, 5th Session, ICC-ASP/5/10 (2006) para 23; See also, William Schabas, 'The Rights of the Accused' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Hart, 2008) 1259.

[30] See discussion in Chapter 4 page 167.

[31] Galbraith, above n 26, 142.

is a ‘danger’ that cases before it will also be unnecessarily lengthy and inefficient.[32]

There is no consensus in the literature as to what constitutes a reasonable timeframe in international criminal proceedings, yet timeframes in complex domestic criminal proceedings have been used as a measure of expected international timeframes.[33] Based on comparisons with more complex cases from domestic jurisdictions, Galbraith has argued that a timeframe of four to five years from custody to completion is a reasonable expectation for the duration of international criminal proceedings.[34] Based on these averages, it would appear that the pace of international criminal justice is just outside the expected timeframes for complex domestic criminal cases. While comparisons with the most complex of domestic criminal cases may constitute a ‘reasonable’ expectation for international criminal law timeframes, they fail to explain why there are several cases in international criminal law where the accused has been detained without judgment for substantially longer periods, a trend which appears to be continuing at the ICC.[35]

The causes of delay in international criminal proceedings and how they may be addressed to expedite proceedings is not the focus of this thesis and these

[32] 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* (Martinus Nijhoff, 2009) 482.
[33] Galbraith, above n 26. See also, Stuart Ford, ‘Complexity and Efficiency at the International Criminal Courts’ (2014) 29 *Emory International Law Review* 1.
[34] Galbraith, above n 26, 101.
[35] See discussion in Chapter 4 page 167.

matters have been examined extensively elsewhere.[36] Yet the reasons for lengthy trials in international criminal proceedings are instructive in understanding the context in which international tribunals operate. In conducting criminal proceedings, international tribunals face different challenges to those encountered by domestic criminal courts and it has been argued that, 'there are a number of factors unique to international criminal justice that account for the extreme duration of trials in that context'.[37] The amount of evidence, problems with self-representation, victim participation and role of judicial and prosecutorial authorities in streamlining proceedings have all been identified as factors contributing to delay in international criminal proceedings.[38] The complexity of international criminal law also impacts on the effectiveness of reforms aimed at expediting proceedings, and it has been argued that:

> … efforts may be stymied by three recurring phenomena unique to international criminal prosecution: (1) the fragmentation of enforcement over two or more jurisdictions; (2) the integration of two distinct, and often contradictory, legal systems – the common and civil law; and (3) the extreme gravity of the crimes involved.[39]

These factors can further contribute to delays in international criminal proceedings, for example, additional time may be required where an accused may needs to be arrested by external law enforcement officials.[40] It is clear that international criminal proceedings incorporate a number of practical

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[36] Bourgon, above n 20; Zacklin, above n 20; Higgins, above n 20; Jorda, above n 20; Swart, above n 20; Schabas, *Prosecutorial Discretion vs Judicial Activism at the International Criminal Court*, above n 20; Langer and Doherty, above n 18.
[37] Alexander Zahar and Goran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press, 2008) 301.
[38] Heinsch, above n 32, 480-496.
[39] Gregory S. Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations' (2006-2007) 45 *Columbia Journal of Transnational Law* 635, 670-671.
[40] Goran Sluiter, 'International Criminal Proceedings and the Protection of Human Rights' (2002-2003) 37 *New England Law Review* 935, 941.

challenges that set them apart from domestic criminal trials and impact on the ability of the international tribunals to conduct expeditious proceedings.

1.1. Attempts to expedite proceedings

Despite efforts to expedite proceedings before international tribunals, procedural reforms appear to have had no impact on the length of trials, and in some cases, have even lengthened proceedings further. Langer and Doherty conducted an analysis of procedural reforms introduced at the ICTY between July 1997 and August 2003 which included the adoption of seven new rules of procedure, nine amendments and introduced two changes to the fee system for defence attorneys.[41] However, the study indicated that rather than expedite proceedings as intended, the implementation of procedural reforms at the ICTY actually increased the average duration of proceedings:

> We found that for both the pre-trial and trial phases of the ICTY, the effective number of reforms significantly lengthened the proceedings…pre-trial proceedings were as much as two hundred days longer, and trial proceedings were one hundred days longer...[w]e find that managerial reforms increased the length of proceedings, even when controlling for other factors that also affected the length of proceedings (court capacity, guilty plea, number of pre-trial motions, etc.). The effect was substantially and statistically significant.[42]

The study also demonstrated that any reduction in trial length was attributed mainly to increases in court capacity rather than procedural reform.[43] It was suggested that reforms that aimed to expedite proceedings actually lengthened proceedings because 'they added new procedural steps, requirements, and work without delivering promised results, such as lower

[41] Langer and Doherty, above n 18, 251.
[42] Ibid 252, 260. See also, Gideon Boas, 'Case Management Challenges in the Milosevic´ Trial' in Gideon Boas *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge University Press, 2007) 131, 199-204.
[43] Langer and Doherty, above n 18, 265.

numbers of incidents under discussion at trial, fewer live witnesses testifying at trial, or fewer interlocutory appeals entertained by the appeals chamber'.[44] The ICC has introduced *ad litem* judges[45] to increase court capacity, however as Bourgon has observed, when this reform was introduced at the ICTY, it failed to expedite proceedings due to the judges' lack of experience, their failure to accelerate pre-trial proceedings as planned, and a lack of incentives for judges to end trials quickly.[46]

The ICTY Completion Strategy provides another example of a proposal that was aimed at expediting international criminal proceedings yet met with limited success. The ICTY Completion Strategy was a proposal approved by the UN Security Council in December 2000.[47] The Completion Strategy comprised of three stages and initially included a deadline of 2010 for all completion of work at the Tribunal,[48] however, the ICTY's mandate continued until it closed on 31 December 2017.[49] The ICTY Completion Strategy was criticised for its focus on expediting trials through procedural reform because this process has undermined the credibility of international criminal proceedings.[50] Yet this focus on expediting proceedings, which is about efficiencies in trial proceedings, is distinct from the right to be tried without undue delay that focuses on the accused. As Boas has argued:

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[44] Ibid 243. See also Megan A. Fairlie, 'The Abiding Problem of Witness Statements in International Criminal Trials' (2017) 50 *New York Journal of International Law and Politics* 75.
[45] Rather than being appointed as permanent judges, *ad litem* judges are appointed to sit on a particular case.
[46] Bourgon, above n 20, 527. See also, See also, Michael G. Karnavas, 'The ICTY Legacy: A Defense Counsel's Perspective' (2011) 3 *Goettingen Journal of International Law* 1053, 1059-1065.
[47] UN Security Council Resolution 1329 (2000) 30 November 2000 UN DOC S/RES/1329 2000.
[48] UN Security Council Resolution 1503 (2003) 28 August 2003 UN DOC S/RES/1503 2003.
[49] See UN Security Council 8120th mtg. 6 December 2017 UN DOC S/PV.8120.
[50] Meernik and Aloisi, above n 20; Raab, above n 20.

> While the judges have invoked the right of the accused to a speedy trial as the motivation behind these efforts [procedural developments], the primary driving force has clearly been the completion strategies, a development that has exposed the judges to changes of corner cutting that ultimately undermines, rather than vindicates, the accused's rights.[51]

Various reforms have been implemented in the ICTY to address the procedural complexity of trials yet these have not significantly impacted on the timeframes of international criminal proceedings.[52]

While this focus on expediting proceedings has failed to address the problem of undue delay, it has also neglected to consider the impact these procedural reforms have had on other fair trial rights. For example, the proposal that the ICC increase its use of live testimony and permit the use of leading questions in certain circumstances has the potential to infringe other fair trial rights of the accused.[53] Another example is provided by the case of *Bemba* before the ICC, where the Trial Chamber decided to allow the Prosecution to tender all witness statements prior to making a determination on their admissibility to avoid the technical formalities of the common law system of admissibility of evidence in favour of the flexibility of the civil law system.[54] While this procedural flexibility may allow for more expeditious proceedings, it may limit other aspects of the right of the accused to a fair trial, such as the right of the

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[51] Gideon Boas, 'Self-Representation before the ICTY - A Case for Reform' (2011) 9 *Journal of International Criminal Justice* 53, 81.
[52] International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, DOC NO IT/32/Rev.44 (adopted 10 December 2009) ('ICTY Rules') r 65ter, 79bis, 92bis and 94.
[53] For a discussion of proposals to expedite proceedings, see: War Crimes Research Office. 'Expediting Proceedings at the International Criminal Court' (International Legal Analysis and Education Project, *American University Washington College of Law*, June 2011).
[54] *Prosecutor v Bemba* (*Decision on the admission into evidence of materials contained in the prosecution's list of evidence*) (International Criminal Court, Trial Chamber, ICC-01/05-01/08-1022, 19 November 2010) [17].

accused to examine or have examined witnesses against him or her.[55] While expeditious international criminal proceedings are desirable, care must be taken to ensure that procedural reforms aimed at expediting proceedings do not infringe on the rights of the accused in other ways by compromising the accuracy and fairness of trials.

Despite various attempts to address the causes of delay and expedite proceedings, lengthy trials remain one of the main criticisms of international courts and tribunals.[56] Over the past ten years it has become apparent that procedural reforms introduced at the ICTY and ICTR have failed to address the problem of undue delay, and in some cases, have further lengthened proceedings.[57] There is now some acceptance in international criminal justice that delays in international criminal proceedings are inevitable.[58] As Whiting has argued, the view that delays in international criminal law are inevitable is 'considered so unexceptional, that those who express it rarely examine it, focussing instead on the problems caused by delays and the need to expedite cases in the future.'[59] Delay in international criminal proceedings may therefore be unavoidable, however, it is of the utmost importance to ensure the right of the accused to a fair trial is adequately protected and the impact of delays on the accused is minimised as much as possible.

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[55] For example, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) article 20(4)(c).
[56] Bourgon, above n 20, 526; Zacklin, above n 20; Higgins, above n 20; Jorda, above n 20; Swart, above n 20; Schabas, *Prosecutorial Discretion vs Judicial Activism at the International Criminal Court*, above n 20; Langer and Doherty, above n 18.
[57] Langer and Doherty, above n 18, 243.
[58] See Alex Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered' (2009) 50(2) *Harvard International Law Journal* 323, 324; Langer and Doherty, above n 18.
[59] Whiting, above n 58, 324.

1.2. The Problem of Provisional Release

Provisional release is one way in which the impact of delays on the accused can be reduced yet international tribunals have rarely considered this option. If delays are inevitable in international criminal proceedings, consistent with the presumption of innocence, options such as provisional release should be considered in order to minimise the prejudice suffered by the accused. Before the ICC, article 60(4) of Rome Statute requires that 'a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor' and the Court is required to consider releasing persons subject to such delay, with or without appropriate conditions on that release.[60] An accused may be released upon consideration of the conditions in Article 58(1)(b) of the Rome Statute.[61] This article states that an accused should be released unless detention is necessary to ensure their appearance at trial, to ensure the person does not obstruct or endanger the investigation or trial, or to prevent the accused from continuing to commit the same offence or a related offence that arises out of the same circumstances.[62] In demonstrating grounds for provisional release, the burden of proof lies with the accused.[63] As Sluiter has explained:

> [T]he Prosecutor does not have to prove any grounds justifying detention, such as the risk of flight. Rather, the burden of proof lies with the defendant, in the context of an application for provisional release, to satisfy the Chamber that he will appear for trial and, if released, will not pose a danger to any victim, witness or other person. This reversal

[60] *Rome Statute of the International Criminal Court*, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1July 2002) ('*Rome Statute'*) Article 60(4).
[61] Ibid Article 58(1)(b).
[62] Ibid.
[63] International Criminal Court, *Rules of Procedure and Evidence,* DOC No ICC-ASP/1/2 (adopted 11 September 2009) r 65.

> of the burden – viewed in the absence of initial determination that grounds justifying arrest exist – violates human rights law.[64]

In domestic jurisdictions, there is a human rights obligation to release an accused prior to trial unless it can be demonstrated there is good reason not to.[65] This idea stems from the right to be presumed innocent and that no person should be held in detention unless it is reasonably necessary.[66] Yet there are differences in the characteristics of an accused in an international context that may require provisional release to be viewed differently.

An accused before international tribunals faces greater challenges in meeting the grounds for provisional release than an accused before domestic criminal proceedings. The accused in international criminal law are often senior members of government or the military and may have money, passports and contacts that would make fleeing to another State a very real possibility. The increased risk of flight and limited resources of international tribunals, coupled with the difficulties in apprehending an accused due to a lack of 'independent means of enforcing its arrest warrants', may require different considerations to be taken into account when balancing the rights of the accused in regard to provisional release.[67] In addition, the accused must demonstrate that a State

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[64] Goran Sluiter, 'Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law' (2010) 8(3) *Northwestern Journal of International Human Rights* 248, 261.

[65] See Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 Article 5.

[66] Ibid Article 5(1)(c). This Article states that 'the lawful arrest or detention of a person effected for the purposes of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered. See also, Caroline Davidson, 'No Shortcuts on Human Rights: Bail and the International Criminal Trial' (2010) 60(1) *American University Law Review* 1, 14-20.

[67] Gabrielle McIntyre, 'Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY' in Gideon Boas and William Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Brill Nijhoff, 2003) 226.

is willing to accept an accused if granted provisional release.[68] Before the ICTY, this required that an accused present evidence that their host state will arrest them and present them to the Tribunal if they fail to appear on a voluntary basis.[69]

Provisional release should be favoured given an accused in international criminal law differs from those accused of domestic crimes. As Davidson has argued:

> The accused are far from their families and support networks. At the ICTY, defendants are also often considerably older and in worse health than detainees in domestic jurisdictions. In addition, unlike in domestic jurisdictions, many international defendants are not direct perpetrators of the crimes …[and are therefore] unlikely to be dangerous if released.[70]

Therefore, the uniqueness of international criminal justice and those accused of crimes before international tribunals while used to argue against provisional release, can also be used as an argument to support this measure. International tribunals' application of the provisions governing provisional release, however, have raised concerns that international tribunals are not adhering to the human rights regime they purport to uphold when the framework for provisional release 'is clearly incompatible with their requirements'.[71] As such, an accused before international tribunals is likely to

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[68] *Situation in the Central African Republic, Prosecutor v Bemba* (*Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa*) (International Criminal Court, Pre-Trial Chamber II, ICC-01/05-01/08-475, Aug 14 2009) [54].
[69] *Prosecutor v Brdanin and Talic* (*Decision on Motion by Radislav Brdanin for Provisional Release*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-99-36-PT, 25 July 2000) [12-13].
[70] Davidson, above n 66, 4.
[71] McIntyre, above n 67, 238.

be held significantly longer with less chance of provisional release than an accused before domestic criminal courts.

1.3. The importance of the rights of the accused

While it could be argued that persons accused of gross human rights violations do not deserve human rights protection themselves, human rights apply equally to all individuals, regardless of the seriousness of the crimes of which they are accused.[72] This is particularly so given the presumption of innocence. Meernik has argued that human rights protection is of particular importance for those accused of crimes under international law:

> For an individual who stands accused of criminal behaviour in an ordinary court of law facing the full power and prestige of government, the difference in status between the opposing parties is often considerable. For an individual who stands accused before an international criminal tribunal backed by the authority of the entire international community, the disparity between the parties is epic.[73]

Differences in the context in which crimes occur have also been highlighted by Stovel who has argued that '[i]n no other situation are so many implicated in such extreme violence against others – so many ordinary people who, when tested, did not rise above the pressures and temptations of a terrible situation.'[74] Psychological studies that have investigated the characteristics of those convicted of atrocity crimes have found that many perpetrators of atrocities see themselves as 'simply fulfilling their duty, void of any personal

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[72] See *Universal Declaration of Human Rights*, GA Resolution 217 (111) A (Dec 10, 1948), *('UDHR')* art 1.
[73] James Meernik, 'Victor's Justice of the Law? - Judging and punishing at the International Criminal Tribunal for the Former Yugoslavia' (2003) 47(2) *Journal of Conflict Resolution* 140, 140.
[74] Laura Stovel, 'When the enemy comes home: Restoring justice after mass atrocity' (2003) *Restorative justice conference*, Vancouver, June 1-4.

animosity.'[75] Despite this, there has been a tendency in international criminal justice to 'demonise' the accused, which can be used as an excuse to provide a lesser standard of human rights protection:

> When a defendant becomes a symbol, it is the exceptional nature of the crimes committed that encourage interpretations of the law in manner that would be detrimental to the accused … Similarly, in international criminal trials, although attenuated in manner, the sense of emergency and exception becomes the breeding ground for regression in fair trial standards. Consequently, such a state of exception not only determines the fate of the international criminal defendant, but it also becomes the first step towards demonising him as the 'other'… The presumption of innocence should serve as a reminder that fair trial rights are the achievements of a long struggle that are worth protecting. [76]

All accused are entitled to fair trial protections and, 'the rule of law faces its greatest test and makes its strongest statement' when used to protect those accused of serious human rights violations.[77] In circumstances where delay and detention are inevitable, and in the absence of a workable provisional release scheme, the legal test for determining if an accused has been subjected to undue delay must be adapted to the international context in which it operates in order to safeguard the rights of the accused.

1.4. Accepting lengthy trials in international criminal justice

International criminal proceedings have been criticised for the length of their proceedings and an accused before international tribunals can expect to be detained much longer than an accused before domestic criminal courts. Despite this, international criminal courts and tribunals have either rarely

[75] Frank Neubacher, 'How can it happen that horrendous State crimes are perpetrated?' (2006) 4 *Journal of International Criminal Justice* 787, 790.
[76] Stuti Kochhar and Mayeul Hieramente, 'Of Fallen Demons: Reflections on the International Criminal Court's Defendant' (2016) 29 *Leiden Journal of International Law* 223, 234, 244.
[77] Daniel J. Rearick, 'Innocent until alleged guilty: Provisional Release at the ICTR' (2003) 44 *Harvard International Law Journal* 577, 577.

applied the criteria for assessing if an accused has been subjected to undue delay, or in cases where this legal test was applied, have found the accused was not subjected to undue delay. Efforts to expedite proceedings through the introduction of procedural reforms have failed, and in some cases have further delayed proceedings or infringed on other fair trial rights of the accused. The idea that delays in international criminal proceedings are inevitable has gained acceptance in the international community and therefore, consistent with the presumption of innocence, alternatives to detention must be considered. Yet given the unique context in which international criminal law operates, an accused is rarely able to satisfy the grounds for granting provisional release. As such, an accused before international tribunals can expect to be detained for periods lasting well over a decade. Surprisingly, little attention has been given to examining the legal test for undue delay to determine whether it is adapted to an international criminal law context. The following section critiques the relatively few studies that have examined international tribunals' interpretation and application of the criteria for assessing if an accused has been subjected to undue delay.

2. The Right to be tried without undue delay in international criminal proceedings

This section will critically analyse research that has examined how international tribunals have interpreted and applied the right to be tried without undue delay. As discussed in the previous section, research examining the problem of undue delay initially focused on ways to expedite proceedings. This approach was based on the assumption that international criminal trials should proceed at a similar pace to domestic criminal proceedings.

Unfortunately, many of these reforms actually lengthened rather than expedited trials, and where they did manage to streamline proceedings, this was often at the expense of other fair trial rights of the accused.[78] The length of international criminal proceedings has been used to highlight the failings of international tribunals and brings into question the legitimacy of international criminal justice.[79] It is possibly for reasons of legitimacy that the focus of early research has been on expediting proceedings rather than on ways to better safeguard the rights of the accused.

Both expeditiousness and fairness have been identified as measures of the legitimacy of international tribunals.[80] Current research examining the problem of undue delay has moved away from approaches that seek to expedite proceedings and instead focussed on whether international tribunals' interpretation of the right to be tried without undue delay has adequately safeguarded the rights of the accused. The research examined in this section recognises that delays in international criminal proceedings may be unavoidable, and instead considers how international tribunals have interpreted and applied the right to be tried without undue delay, and whether they should be held to domestic standards of fairness. Some researchers have argued that international tribunals are justified in departing from domestic standards of fairness and should only be required to meet minimum

[78] Ibid.
[79] David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 579; Allan Fulford, 'The Reflections of a Trial Judge' (2011) 22 *Criminal Law Forum* 215, 216.
[80] Ibid. See also McDermott, *Fairness in International Criminal Trials*, above n 10, 140-141.

standards.[81] On the other hand, it has been argued that international tribunals have failed to safeguard the rights of the accused in interpreting and applying the right to be tried without undue delay and should adhere to the highest standards of fairness,[82] or meet international human rights norms.[83] To remedy this problem and safeguard the rights of the accused, it has been argued that international tribunals should ascribe to international human rights standards and interpret and apply human rights norms, such as the right to be tried without undue delay, using human rights principles designed for implementation before national courts.[84] While the research in this area has evolved from focussing on expediting proceedings, there have been no studies that have specifically considered the criteria for assessing undue delay. Research in this area has examined undue delay only in the context of a range of fair trial rights more broadly, and without considering whether the criteria for assessing undue delay are appropriate in an international criminal justice context. As such, the research is yet to fully address the inherent tensions in balancing the rights of the accused with the goals and objectives that international tribunals must meet in conducting international criminal proceedings.

The research on undue delay critiqued in this section centres around three key questions:

[81] Megret, above n 15, 60; Sergey Vasiliev, *International Criminal Trials – A Normative Thesis* (PhD Thesis, University of Amsterdam, 2014); Mirjan Damaska, 'Reflections on Fairness in International Criminal Justice' (2012) 10 *Journal of International Criminal Justice* 611.
[82] McDermott, *Fairness in International Criminal Trials*, above n 10.
[83] Zeegers, above n 10, 349-350.
[84] Ibid 355-395.

- Should international tribunals be expected to meet domestic standards of human rights protection?
- Are international tribunals meeting domestic standards of fair trial protections with respect to the right to be tried without undue delay?
- How can international tribunals better protect the right to be tried without undue delay?

Each section will first outline the main arguments put forward in the literature before engaging in a critical analysis of these studies. An examination of the literature considering international tribunals' application of the law of undue delay is illustrative in that it will highlight how the approach proposed in this thesis builds on existing work, but also demonstrate the ways this thesis is unique in developing a solution that seeks to achieve a balance between safeguarding the rights of the accused and maintaining the goals and objectives of international criminal justice.

2.1. Should international tribunals be expected to meet domestic standards of fair trial protections?

Although the legal test for undue delay has been imported from domestic criminal courts, there is no consensus in the literature about whether international tribunals should meet domestic standards of fair trial protections in safeguarding the right to be tried without undue delay.[85] The fundamental issue that has caused much disagreement amongst scholars is whether the unique context international criminal law operates within justifies a departure

[85] Megret, above n 15; Vasiliev, above n 81; Damaska, *Reflections on Fairness in International Criminal Justice*, above n 81; McDermott, *Fairness in International Criminal Trials*, above n 10; Zeegers, above n 10.

from domestic standards of fairness. The unique context that international criminal law operates within, and the *sui generis* nature of international criminal procedure, have been relied on to both support and oppose the contention that international tribunals are justified in departing from domestic standards of fairness.[86]

One the one hand, it has been suggested that international tribunals should be meeting international human rights law standards applied in domestic criminal courts,[87] or meet the highest standards of fairness as part of a standard setting function.[88] Proponents of this approach have argued that the unique context international criminal law operates within does not justify a reduction in the 'highest standards of fairness', and can indeed 'serve as too ready a justification for delays which are not exactly attributable to that context.'[89] The alternative view is that while international tribunals must adhere to minimum standards of fair trial requirements, departures from domestic criminal law fair trial standards are in fact admissible because of the unique context in which international criminal law operates.[90] These two distinct approaches are examined in detail in the following section.

[86] Megret, above n 15, 60; Vasiliev, above n 81; Damaska, *Reflections on Fairness in International Criminal Justice*, above n 81, 614; McDermott, *Fairness in International Criminal Trials*, above n 10, 126-147.
[87] Zeegers, above n 10, 349-350.
[88] McDermott, *Fairness in International Criminal Trials*, above n 10, 131-148.
[89] Ibid.
[90] Damaska, *Reflections on Fairness in International Criminal Justice*, above n 81, 614.

2.1.1. Arguments supporting departure from domestic fair trial standards

The argument that international criminal law is unique and should be influenced but not constrained by rules of domestic criminal procedure has been used to challenge the idea that the domestic fair trial standards should apply in an international context.[91] Vasiliev has suggested that the influence of domestic criminal procedure 'should not extend beyond providing a number of possible, i.e. not mandatory, starting positions' because:

> … whenever a procedural rule or practice is extrapolated onto the international context to form part of international criminal procedure, its rationale, functions, implications and, indeed, very nature will be informed and modified by a system in which it is set to work.[92]

International justice should therefore be responsive to its environment, and 'this response may require the abandonment, or relaxation, of some cherished domestic procedural arrangements' because international tribunals cannot meet their 'objectives by strictly abiding by the most demanding domestic rules of procedure.'[93] As Damaska has suggested:

> [I]deas on what is fair to the criminal defendant are not fixed, or independent from the environment in which criminal courts operate and from the objectives they seek to attain. Requirements of fairness developed against the background of domestic criminal law enforcement should therefore not unreflectively be projected into the arena of international criminal justice.[94]

Megret has argued that international tribunals have been successful in adapting requirements of fairness, and that international criminal procedure has developed to adapt to both the goals and values of international criminal

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[91] Megret, above n 15, 60; Vasiliev, above n 81; Damaska, *Reflections on Fairness in International Criminal Justice*, above n 81.
[92] Vasiliev, above n 81, 848.
[93] Damaska, *Reflections on Fairness in International Criminal Justice*, above n 81, 612.
[94] Mirjan Damaska, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' (2010-2011) 36 *North Carolina Journal of International Law and Commercial Regulation* 365, 387.

justice and the constraints imposed by the environment in which international tribunals operate.[95] While the 'hydraulic pressure of judging some of the worst crimes' may have impacted on the most liberal aspects of criminal procedure in domestic criminal law terms, it has been argued that the 'peculiar adaptations' that they have been required to make have resulted in a procedure that is 'deeply in tune with its environment.'[96] Viewed in this way, the influence of domestic criminal procedure on international criminal procedure is more a question of 'legal translation' rather than a 'legal transplantation'.[97]

In support of departing from domestic standards of fairness, it has been argued that judges may fail to adhere to due process protections where the standard is set too high.[98] This is because judges may disregard fair trial rights where they become strained because of pressures caused by the context or environment in which international criminal law operates.[99] Damaska has suggested that the objectives of international criminal justice, such as the responsibility for ending impunity and the perceived need of international tribunals to obtain convictions, the need to create a historical record and the importance of victims in the process, mean that the demands of fairness come under greater strain in an international criminal law context.[100] It has therefore been suggested that where 'fairness demands are

[95] Megret, above n 15, 75-76.
[96] Ibid 76.
[97] Vasiliev, above n 81, 848.
[98] Damaska, *Reflections on Fairness in International Criminal* Justice, above n 81, 614; Damaska, *The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals*, above n 94, 379-380.
[99] Ibid.
[100] Ibid 370.

perceived by the operators of the system as too high, these demands tend to be short-circuited in more of less subterranean ways'.[101] This can include provisions being disregarded or 'supplemented with vague substantial law doctrines capable of satisfying the repressed need'.[102] The criteria for evaluating fairness should therefore 'be crafted with an eye to the specific position of international criminal courts and the peculiar difficulties they face.'[103]

2.1.2. Arguments supporting adherence to domestic standards of fairness

Rather than arguing that international tribunals are justified in departing from domestic standards of fairness, McDermott has suggested that the *sui generis* nature of international criminal procedure supports the contention that international tribunals should adhere to the highest standards of fairness.[104] As international tribunals 'embody an idealized "mixed" procedural model', McDermott is of the view that there is a 'strong case to be made' that international criminal procedure can 'best illustrate how to ensure the fairness of proceedings in the context of converging procedural traditions.'[105] In addition, McDermott has suggested that international tribunals should meet the highest standards of fair trial protections because they already claim to do so, and fair trial provisions are explicit in statutes, jurisprudence and the

[101] Damaska, *Reflections on Fairness in International Criminal Justice*, above n 81, 614.
[102] Ibid.
[103] Ibid. Cf Andrew Trotter, 'Pre-Conviction Detention in International Criminal Trials' (2012) 20 *Journal of International Criminal Justice* 611. Trotter has argued that international tribunals were not justified in relying on factors related to the unique context of international criminal justice to justify departures from domestic standards for provisional release.
[104] Yvonne McDermott, *Fairness in International Criminal Trials*, above n 10, 126-147. See also, Vojin Dimitrijevic and Marko Milanovic, 'Human Rights Before International Criminal Courts' in Jonas Grimheden and Rolf Ring (eds), *Human Rights Law: From Dissemination to Application: Essays in Honour of Goran Melander* (Martinus Nijhoff, 2006) Vol 26, 167.
[105] McDermott, *Fairness in International Criminal Trials*, above n 10, 142.

external communications of international tribunals.[106] This approach recognises international criminal procedure as unique or a *sui generis* system of law, however, views this as a reason to hold it to the highest standards of human rights protection as a 'standard setting function' to which other institutions should aspire.[107]

While the goals of international criminal justice have been relied on as a reason supporting departures from domestic standards of fairness, McDermott has argued the reverse, stating that maintaining the highest standards of fairness is consistent with some of the main goals of international criminal justice.[108] For example, 'the need to set the fairest of procedural standards is clearly implicit in these two facets of post-conflict rebuilding and bringing perpetrators to justice through fair proceedings.'[109] Similarly, maintaining the highest standards of fairness has been said to be consistent with the objective of strengthening the rule of law:

> Although the international tribunals operate in a complex environment that reflects a *sui generis* procedural regime, and in spite of the fact that they put individuals on trial for the most serious crimes … they still need to respect the highest standards of fairness, for reasons of their own legitimacy and role in spreading the rule of law.[110]

McDermott highlighted a number of reasons supporting international tribunals adhering to the highest standards of fairness, centred on the theme of

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[106] Ibid 131-133.
[107] Ibid 145. See also, Julia Geneuss, 'Obstacles to Cross-fertilisation: The International Criminal Tribunals' "Unique Context" and the Flexibility of the European Court of Human Rights' Case Law' (2015) 84 *Nordic Journal of International Law* 404, 410, 412-413. Geneuss has also argued that the *sui generis* nature of international criminal law does not justify re-interpretation of international human rights law standards.
[108] McDermott, *Fairness in International Criminal Trials*, above n 10, 145.
[109] Ibid 130. See also, Dimitrijevic and Milanovic, above n 104, 167. Dimitrijevic and Milanovic argued that the highest standards of fairness must be followed if international tribunals are to assist in the 'process of reconciliation and transitional justice'.
[110] McDermott, *Fairness in International Criminal Trials*, above n 10, 147.

maintaining the overall legitimacy of criminal proceedings through setting the standards of fairness for criminal proceedings. For example, McDermott has argued that protecting against dangers that may arise from setting a lower standard of fairness, such as wrongful conviction, extends 'into the realms of illustrating "demonstrable principles of fairness."'[111] The overall legitimacy of international criminal justice has therefore been relied on to support that argument that international tribunals have a 'standard-setting' function in relation to fairness.[112]

2.2. What standard of fairness should international tribunals adhere to?

While this area of law remains nebulous, it is clear that in determining the relevant standard of fairness, the approach must strike a balance between protecting the fundamental rights of the accused and meeting the objectives of international criminal justice. Fair trial rights are intrinsic to criminal proceedings.[113] Yet where approaches do not acknowledge the differences between domestic and international criminal justice and fail to balance the rights of the accused with the objectives of international criminal justice, there is a risk that international tribunals will set aside due process protections where the pressure becomes too great. International criminal proceedings are inherently complex given the unique environment in which they operate. While some have argued that the complexity of international criminal proceedings 'should not itself serve as sufficient justification for judicial

[111] Ibid 137-140.
[112] Ibid 140-141. See also Dimitrijevic and Milanovic, above n 104,167.
[113] Stephan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005) 135; Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press, 2003) 1.

derogations from the right to a speedy trial',[114] this thesis suggests that there may be justifications for international tribunals departing from domestic standards of fairness because of the unique challenges international tribunals face in conducting proceedings in an international criminal justice context.

Recent research has demonstrated that the average international criminal trial is significantly more complex than the most complex domestic criminal proceedings.[115] International criminal trials are factually, legally and procedurally more complex than the average domestic criminal proceedings and often take place in multiple languages. Investigations take place in unstable States, where prosecutorial authorities rely on cooperation with the domestic authorities to locate witnesses and obtain evidence.[116] International criminal proceedings are different to domestic criminal proceedings and failing to critically engage with those differences weakens the argument that the context international tribunals operate within does not justify at least some departure from domestic standards of fairness.

The substantive question to be answered in determining the relevant standard of fairness therefore lies in determining how far international tribunals may depart from domestic standards without compromising core due process protections for the accused. Arguments supporting the idea that international criminal procedure should meet the highest standards of fairness are somewhat aspirational in nature and mostly relate to the overall legitimacy of

[114] McDermott, *Fairness in International Criminal Trials*, above n 10, 55.
[115] Stuart Ford, 'The Complexity of International Criminal Trials is Necessary' (2015-2016) 48 *George Washington International Law Review* 151.
[116] See discussion pages 14-16.

international criminal justice and international tribunals.[117] However, it is questionable whether the 'highest' standards of fairness are required to ensure due process rights are protected and the legitimacy of international tribunals and international criminal justice are maintained. While international tribunals may aspire to meeting the highest standards of fairness, this does not mean that this is necessarily achievable in practice. Arguably, all bodies administering justice seek to claim their practice adheres to the highest standards of fairness. International criminal procedure has adopted a number of practices from domestic criminal courts that operate in a different context. A full examination of the context in which international criminal law operates is required to gain an understanding of the reasons why international tribunals have failed to meet the highest standards of fairness in applying the right to be tried without undue delay.[118] Without this understanding, it should not be argued that international tribunals should ascribe to the highest standards, merely because they claim to do so.[119]

2.3. Are international tribunals meeting domestic standards of fair trial protections with respect to the right to be tried without undue delay?

While there is no consensus as to whether international tribunals should be meeting domestic standards of human rights protection, there is some agreement in the literature that while international tribunals may be meeting these standards for some fair trial rights, they are not meeting this standard in interpreting and applying the right to be tried without undue delay.[120] There

[117] McDermott, *Fairness in International Criminal Trials*, above n 10, 140-141.
[118] This argument will be examine further in the second part of this chapter.
[119] See McDermott, *Fairness in International Criminal Trials*, above n 10, 131.
[120] Ibid 169-172; Zeegers, above n 10, 348-350.

are two studies in particular that have examined this issue in some detail.[121] The first study by McDermott was briefly examined in the previous section and considers the standard setting function of international tribunals in the context of fair trial rights in general. [122] While the finding that international tribunals may be meeting the highest standards in respect of some fair trial rights is accepted, it will be argued that this study fails to acknowledge differences between domestic and international criminal justice which are critical in considering the issue of undue delay. As such, these differences need to be considered when determining an appropriate standard of fairness for international tribunals to meet in interpreting and applying the right to be tried without undue delay. A study by Zeegers will also be examined below. It considers both how international tribunals have interpreted and applied the right to be tried without undue delay and the way in which they have adhered to, and contextualised, international human rights norms.[123] While this study does account for contextual factors, this section will question Zeegers' suggestion that international tribunals have demonstrated adherence to international human rights norms in applying the right to be tried without undue delay.[124]

2.3.1. The standard setting function of international tribunals

As outlined in the previous section, McDermott has argued that international tribunals should be setting the highest standards of fairness.[125] A number of

[121] Zeegers, above n 10, 289-350; McDermott, *Fairness in International Criminal Trials*, above n 10.
[122] McDermott, *Fairness in International Criminal Trials*, above n 10, 52-64.
[123] Zeegers, above n 10, 289-350, 355-395.
[124] Ibid 358-361.
[125] McDermott*, Fairness in International Criminal Trials*, above n 10, 169-170.

fair trial rights were examined as part of her study and it was found that for the most part, international tribunals are maintaining the highest standards of fairness in protecting a range of fair trial rights.[126] In examining the right to be tried without undue delay, however, she concluded that 'the actual application of these standards has been inconsistent.'[127] McDermott found there were a number of reasons for this, such as:

> … a lack of coherence between decisions, between individual judges and broadly between tribunals. Another is a failure to evince international best practice in achieving the highest standards of fairness. This is evidenced by the number of hurdles which an accused person must jump before motions on his or her rights can succeed, which stands in remarkable contrast to the unfounded extension of rights to other parties at times, and the reverse application of rights in other instances.[128]

Despite these challenges in meeting the highest standards of fairness in interpreting the right to be tried without undue delay, McDermott found that international tribunals were performing a standard-setting function for the majority of fair trial rights.[129] In arguing that international tribunals should be held to the highest standards of fairness, however, McDermott's research failed to fully recognise the differences between domestic and international criminal justice.[130]

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[126] Ibid 41-103.
[127] Ibid 170.
[128] Yvonne McDermott, 'Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law' in William Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate research companion to international criminal law: critical perspectives* (Routledge, 2013) 182.
[129] McDermott, *Fairness in International Criminal Trials*, above n 10, 125-147. Areas where international tribunals have demonstrated a standard-setting function 'include the granting of provisional release by some tribunals; the proceedings on 'no case to answer' in most tribunals, which illustrate the presumption of innocence in action, and the jurisprudence on judicial impartiality which finds that a judge must not only be free from subjective bias, he or she must also be free from any appearance of bias. In addition, the expansive translation rights at the ICC, while they may be costly for the Court, are to be welcomed insofar as they illustrate the highest standards of fairness.'
[130] Ibid 143-145.

Before international tribunals, the criteria for assessing undue delay necessitate a consideration of factors that are different to the considerations made in carrying out this assessment before domestic criminal courts. As discussed earlier in this chapter, to assess if the right to be tried without undue delay has been violated, the reasonableness of the length of proceedings must be considered which involves an examination of the circumstances of the case: the complexity of the case, the conduct of the authorities, the conduct of the accused and what is at stake for the accused.[131] The context in which international criminal law operates means that proceedings are generally more complex, and the conduct of the authorities is more difficult to evaluate in a hybrid system of criminal procedure where both the prosecutor and judges may be responsible for delays.[132] In considering the conduct of the accused and what is at stake for the applicant, the influence of human rights law in international criminal procedure means that the balance will often tip in favour of victims and the interests of the international community.[133] While other fair trial rights may be easily transplanted from a domestic to international criminal law context, determining the relevant standard of fairness to be applied in interpreting the right to be tried without undue delay requires a consideration of the context in which international tribunals operate. Considering the complexity of international criminal proceedings alone, it is difficult to argue that the context in which international criminal law operates does not at least justify further examination of the standard of fairness to be applied. It could therefore be

[131] *Nahimana Judgment* (International Criminal Tribunals for Rwanda, Appeals Chamber, Case No. ICTR-99-52-A, 28 November 2007) 1074.
[132] This will be discussed in more detail in Chapter 5 pages 253-257.
[133] See discussion in Chapter 2 pages 79-83.

argued that while McDermott's view that international tribunals should meet the highest standards of fairness may be justified for a number of fair trial rights, this argument is weakened with respect to the right to be tried without undue delay.

2.3.2. Adherence and contextualisation

The second study considered in this section also examined a number of fair trial rights, but specifically analysed the way in which international tribunals have interpreted and applied the right to be tried without undue delay to conclude that they have departed from international human rights norms.[134] Zeegers found that international tribunals have interpreted and applied human rights norms in two ways: 1) requiring adherence to international human rights law, and 2) contextualisation of human rights norms based on the specific circumstances in which international tribunals operate.[135] These methods are considered further below.

2.3.2.1. Adherence

Firstly, international tribunals adhere to international human rights norms because their statutes and other legal instruments require it.[136] Zeegers contended that in interpreting the right to be tried without undue delay, international tribunals have demonstrated a mixture of 'implicit and explicit consistent interpretation'.[137] There is an explicit right to be tried without undue delay in the statutes of international tribunals, but also an implicit 'right to

[134] Zeegers, above n 10, 289-350.
[135] Ibid 355-358.
[136] Ibid 358-361.
[137] Ibid 359-360.

expeditious proceedings' through rules and procedures incorporated with the aim of expediting proceedings.[138] International tribunals adhere to international human rights norms using consistent interpretation (interpreting and applying legal instruments in a way that is consistent with international human rights norms).[139] In addition, Zeegers argued that the legal test for assessing if an accused has been subjected to undue delay is drawn from international human rights law, and interpretation and application of these factors is 'substantiated with references to case law of the ECtHR'.[140]

There are two problems with Zeegers' assertion that there is both implicit and explicit consistent interpretation of the right to be tried without undue delay with international human rights norms. Firstly, while the right to be tried without undue delay is enshrined in the legal instruments of international tribunals, the criteria used to assess if an accused has been subjected to undue delay are not identical to that established under international human rights law. For example, Zeegers has pointed out that a consideration of what is at stake for the applicant has been 'invented' by international tribunals and is not part of the legal test for undue delay in domestic jurisdictions.[141] Secondly, in arguing that there is implicit adherence, Zeegers has relied on a connection between the right to expeditious proceedings and the right to be tried without undue delay as evidence that international tribunals have interpreted and applied the law of undue delay in way that is consistent with

[138] Ibid 358.
[139] Ibid 358-361.
[140] Ibid 360. This is one example of how the legal test for undue delay has been modified by international tribunals because it is not adapted to an international criminal justice context.
[141] Ibid 349.

international human rights norms.[142] He argued that international tribunals have 'relied on the right to be tried without undue delay as a device to expedite proceedings, for example, limiting the parties' use of certain procedures'.[143] However, international tribunals' focus on expeditiousness does not show adherence with the right to be tried without undue delay. The right to expeditious proceedings focuses on providing a speedy trial, which as discussed earlier in this chapter, is not always in the interests of the accused, particularly when it is used to limit parties' use of certain procedures.[144] The right to expeditious proceedings is often at odds with other fair trial rights of the accused. Also, as will be discussed in Chapter 4 of this thesis, where the accused has raised the issue of undue delay before the ICTY, the legal test for undue delay has not been applied but instead the Tribunal has relied on procedural reforms aimed at expediting proceedings to address problems with undue delay.[145] While the focus of the right to undue delay is firmly on the rights of the accused and safeguarding due process protections, the right to expeditious proceedings is focussed more generally on international criminal procedure and ways of expediting the trial process for all parties.

Zeegers' argument is based on the erroneous premise that reliance on the right to be tried without undue delay in order to expedite proceedings demonstrates compliance with international human rights norms. It is therefore questionable that there has been implicit adherence in international tribunals' interpretation and application of the law of undue delay. Although it

[142] Ibid 359-360.
[143] Ibid.
[144] See discussion pages 16-19.
[145] See discussion Chapter 4 pages 177-185.

would appear that international tribunals have not fully demonstrated either implicit or explicit adherence in interpreting and applying the right to be tried without undue delay, Zeegers concluded by acknowledging that international tribunals display 'a limited measure of implicit consistent interpretation' but the outcome in interpreting the right to be tried without undue delay has been an approach that is not consistent with international human rights norms.[146] So while it is not agreed that international tribunals have demonstrated adherence with international human rights in interpreting the right to be tried without undue delay, there is agreement with the overall conclusion in Zeegers' study.

2.3.2.2. Contextualisation

The second part of Zeegers' examination of international tribunals' interpretation and application of the law of undue delay considered factors that have impacted on international tribunals' contextualisation of human rights norms.[147] Zeegers identified these factors 'have mostly been relied upon' by international tribunals to justify decreased human rights protection for the accused.[148] These factors included international tribunals' reliance on State cooperation, the gravity of the crimes, the complexity of the cases and the fundamental purpose of international tribunals.[149] While this thesis will

[146] Zeegers, above n 10, 359-360.
[147] Ibid 362-378.
[148] Ibid 362-363.
[149] Ibid 361-371. Other factors thought to have a 'reductive impact' or limit the scope of human rights and lower the general level of human rights protection in international criminal law are the gravity of offences, the combination of two procedural models in international criminal law, the non-State nature of the International Criminal Court and fragmentation of enforcement in international criminal justice. See Cristophe Deprez, 'Extent of Applicability of Human Rights Standards to Proceedings Before the International Criminal Court: On Possible Reductive Factors' (2012) 12 *International Criminal Law Review* 721, 740; Gordon, above n 39.

suggest that this list of factors may be somewhat limited and there are a number of additional factors that international tribunals have relied on to justify departing from domestic standards of fairness, it is agreed that in interpreting and applying the law of undue delay, international tribunals have considered a range of factors that are not accounted for by the current legal test for undue delay.

In considering the modalities of contextualisation, Zeegers' analysis found that international tribunals' interpretation and application of the law of undue delay has resulted in under-protection of the rights of the accused.[150] These modalities of contextualisation considered as part of the analysis included the methods, effects and quality of contextualisation.[151] Zeegers' research found that while international tribunals claim that they rely on international human rights law, in practice, their method of contextualisation is selective, with a much greater reliance on the complexity of the case 'than would appear admissible' under international human rights law.[152] As such, international tribunals have failed to recognise the importance of the conduct of the authorities in relation to assessing undue delay and have instead relied on additional parameters, such as the 'invented requirement of prejudice', the gravity of the charges and imposing a burden of proof on the defence.[153] This approach is argued to be a 'prime example' of an adaptation method of contextualisation where international tribunals are 'adjusting the normative content of human rights norms when applied in the context of the ICTs

[150] Zeegers, above n 10, 377. See also, McDermott, *Fairness in International Criminal Trials*, above n 10, 174; Deprez, above n 149, 741.
[151] Zeegers, above n 10, 371-379.
[152] Ibid 349.
[153] Ibid 333.

[international criminal tribunals].'[154] International tribunals, however, have not acknowledged the way in which they have adapted the legal test for undue delay. In considering the quality of contextualisation, Zeegers concluded that they 'do not sufficiently substantiate the legal reasoning underlying their contextual interpretation of human rights norms.'[155] This international tribunals' selective and adaptive approach to interpreting and applying the law of undue delay was thus said to have resulted in under-protection of the rights of the accused.[156]

Zeegers' theory of contextualisation outlined above is consistent with Damaskas' research examined in the previous section, which claimed that international tribunals may disregard due process protections where the demands of fairness become too great.[157] Zeegers identified a number of factors that are unique to the context in which international criminal law operates and have been relied on by international tribunals to justify 'decreased human rights protection for the accused.'[158] While McDermott also argued that international tribunals have failed to meet the domestic standards of fairness in applying the law of undue delay, there was no concession made based on contextual factors and it was argued that international tribunals should meet the highest standards of human rights protection because they have already purported to do so.[159] Zeegers' analysis is much more detailed in examining the way in which international tribunals have contextualised the

[154] Ibid 374. See also, Deprez, above n 149, 741; Dimitrijevic and Milanovic, above n 104, 26.
[155] Zeegers, above n 10, 378.
[156] Ibid 377.
[157] See above discussion pages 29-33.
[158] Zeegers, above n 10, 403-404. See also, Deprez, above n 149; Gordon, above n 39.
[159] See discussion pages 34-36.

legal test for undue delay and considered some of the factors that may prevent them from meeting the highest standards of fairness. While this section has disagreed with Zeegers' contention that international tribunals show a degree of both explicit and implicit adherence to international human rights norms, it concurs with his conclusion that international tribunals' contextualisation of the right to be tried without undue delay has resulted in an approach which fails to meet international human rights standards enforced by regional human rights courts.

2.4. How can international tribunals better protect the right to be tried without undue delay?

Research that has argued in support of international tribunals interpreting and applying the right to be tried without undue delay in a manner consistent with international human rights norms and domestic standards of human rights protection has also considered ways international tribunals could better protect the rights of the accused.[160] These approaches do not propose any changes to the legal test for undue delay itself, but suggest ways in which the current test could be interpreted and applied to better protect the rights of the accused.[161] McDermott's proposal is quite simple in that it consists of a number of recommendations for future practice to address deficiencies in international tribunals' current application of the law of undue delay, including that fair trial rights attach to the accused alone and not be extended to other parties to proceedings, and that motions alleging undue delay should be given greater attention along with the conduct of the parties, in particular, that of

[160] Zeegers, above n 10, 380-394; McDermott, *Fairness in International Criminal Trials*, above n 10, 177.
[161] Ibid.

judges and the prosecution.[162] The fairness of an accused who has been detained for over a decade being required to demonstrate prejudice was also highlighted by McDermott, who argued that it should at least be possible for an accused to make a *prima facie* case of prejudice based on the length of their detention.[163]

Contrastingly, Zeegers proposed that international tribunals apply a methodological framework drawing on human rights principles to better contextualise human rights norms in an international criminal law context.[164] Zeegers' methodological framework will be considered in some detail below as it provides the most considered examination in the literature to date of the right to be tried without undue delay. While both approaches properly refocus the attention of research on protecting the rights of the accused rather than expediency, this section will argue that imposing the highest standards of protection using an approach based on principles of fairness or human rights fails to properly account for the way in which the goals and objectives of international criminal justice impact on the length of proceedings. In addition, unlike the approach proposed in this thesis which addresses the right to be tried without undue delay in particular by proposing a new legal test, Zeegers' approach examined in this section is intended to apply more broadly to a range of human rights norms rather than the right to be tried without undue delay specifically. It also failed to address the question of whether the criteria for assessing undue delay are useful in an international criminal justice context.

[162] Ibid.
[163] Ibid 172.
[164] Zeegers, above n 10, 380-394.

As mentioned above, Zeegers' research concluded that the way in which international tribunals have contextualised the right to be tried without undue delay has resulted in under-protection of the rights of the accused.[165] To remedy this problem, he proposed that international tribunals should adopt a methodological framework for the 'interpretation and application of human rights norms' to better contextualise them in an international criminal justice setting.[166] This framework comprised of four steps that are outlined in detail in Table 1. The four steps are:

1) Determining the applicable human rights norm;
2) Determining the nature, scope and content of the applicable right;
3) Analysing the context in which the right must be applied; and
4) Interpreting and applying the right in an international tribunal context.

While Zeegers' methodological framework is useful in highlighting the problems with international tribunals' current interpretation and application of the law of undue delay, it is argued in this chapter that the framework is unlikely to address problems of consistency or allow international tribunals to either adapt human rights norms to the context of international criminal law, or adhere to domestic standards of protection set by international human rights norms.

[165] See above discussion page 43-46.
[166] Zeegers, above n 10, 404.

Table 1: Summary of Zeegers' proposed method for contextualizing human rights norms

Methodology	Concern the framework seeks to address with the current approach of international tribunals	Process
1) Determining the applicable human rights norm	International tribunals have an inconsistent approach	Main criterion for determining if a human rights issue arises is to look at the impact of the international tribunal exercising its functions on individual rights.
2) Determine the nature, scope and content of the applicable right	International tribunals have no consistent methodology and a selective approach which detracts from coherence	Assess the principles and interests the right is meant to protect and analyse the legal test used to determine whether the right in question has been violated.
3) Analysing the context in which the right must be applied	International tribunals cite of contextual factors without any analysis	Engage in an objective and thorough analysis to: • Consider how the specific context of the matter at hand may affect the interpretation and application of the right in question • Consider how it may affect the principles and interests the right seeks to protect • Assess the differences between the domestic context in which the right is normally applied
4) Interpreting and applying the right in an international tribunal context	Current practice of international tribunals results in under-protection	Assess how international tribunals can adhere to international human rights law and protect the right in question, despite the contextual factors that may necessitate an adaptation of the interpretation and application of this right.

Zeegers' framework envisages a way in which international tribunals can properly contextualise international human rights norms.[167] Firstly, international tribunals must establish whether the relevant human right norm has been engaged by looking at the impact of the international tribunal

[167] Ibid 380.

exercising its functions on individual rights.[168] The next step in the framework involves determining the nature, scope and content of the applicable right.[169] In doing so, Zeegers argued that international tribunals should use existing interpretations by international and regional human rights bodies as a 'starting point' to the extent that they are relevant, and can serve as a valid and useful analogy in arriving at the Tribunals' own legal finding.'[170] International tribunals were argued to have been selective in undertaking this task and it was contended that this step would ensure 'a proper understanding of the human rights norm in question, which is a necessary first step in ensuring the proper interpretation and application of human rights norms by the ICTs [international criminal tribunals].'[171] For example, in considering the right to be tried without undue delay, the practice of international tribunals repeatedly citing the complexity of the case to justify delays fails to 'do justice to the nature of the right to be tried without undue delay under IHRL [international human rights law]' and international tribunals should acknowledge their responsibility to prevent delays under international human rights law and be transparent in acknowledging the reasons for delays.[172]

The third step in the framework provides for an objective assessment of the context in which the human right is interpreted.[173] Zeegers has conceded that relying on some contextual factors will be more challenging than relying on

[168] Ibid 380-384.
[169] Ibid 384-386.
[170] Ibid 385.
[171] Ibid.
[172] Ibid 386.
[173] Ibid 386-387.

others.[174] In making this point, he noted that the common process of 'balancing the protection of human rights of an individual against the fundamental purposes of international criminal justice' is an 'inherently unfair interpretive tool' because the rights of the individual will most likely be outweighed.[175] The final step in the framework requires international tribunals to contextualise the human right in question.[176] The contextual interpretation of the human right should be 'proper and convincing' and based on the scope and content of the legal right in question, as the 'soundness of their [international tribunals] legal reasoning provides an ultimate benchmark for the propriety of the contextualised interpretation and application of human rights norms.'[177]

Zeegers' framework is intended to apply to the interpretation of human rights norms generally, which like McDermott's research, creates some difficulties in applying it specifically to the right to be tried without undue delay. For example, the framework lacks specific guidance on how the legal test for undue delay should be applied, or which factors are relevant to contextualising the right to be tried without undue delay. In determining the 'nature, scope and content of the applicable right' as part of the second step of the framework, Zeegers claimed that 'existing interpretations' should be used as a starting point to the extent they are 'valid and useful'.[178] As outlined in this chapter, there is no consensus on the relevant standard of protection for the right to be tried without undue delay and different factors have been

[174] Ibid 387.
[175] Ibid.
[176] Ibid 387-388.
[177] Ibid 394.
[178] Ibid 385.

'invented' and drawn on by international tribunals to assess whether an accused has been subjected to undue delay.[179] As such, both Zeegers and McDermott have agreed that international tribunals have applied the criteria inconsistently.[180]

If international tribunals are instructed to rely on 'existing interpretations' to 'the extent they are relevant', there may be a great deal of variation in both the interpretation and relevance of various elements of the nature, scope, and content of the right to be tried without undue delay. Also, as outlined in previous sections, international tribunals have not shown adherence to international human rights norms in interpreting the right to be tried without undue delay.[181] Similarly, unless the relevant contextual factors are identified, these could also vary considerably between cases. For example, Zeegers mentioned the seriousness of the offence as a contextual factor, yet seriousness can be quantified in a variety of ways and there is no evidence of its relevance to the issue of undue delay.[182] Similarly, various factors may also be incorporated in one case yet not considered in others. Without guidance on relevant and consistent factors to be considered, the concept of undue delay will remain nebulous. Greater guidance is required in relation both to the nature, scope and content of the right along with relevant contextual factors, to ensure consistent interpretation and application of this right before international tribunals.

[179] See above discussion pages 40-46.
[180] McDermott, *Fairness in International Criminal Trials*, above n 10, 169-170; Zeegers, above n 10, 348-349.
[181] See discussion on pages 41-43.
[182] Ford, above n 115, 179-182.

One final concern with Zeegers' methodological framework is that while it acknowledges the differences between domestic and international criminal proceedings, it does not allow departures from domestic standards of protection. Acknowledging contextual factors while recommending adherence to international human rights norms upheld in domestic jurisdictions or the highest standards of fairness will not address problems with international tribunals' interpretation and application of the law of undue delay. The legal test must provide the tools for judges of international tribunals to balance the rights of the accused with the objectives of international criminal justice and the overall fairness of proceedings. Specific guidance on applying these criteria in an international criminal law context, rather than a general methodology for incorporating human rights norms, is suggested as the most effective way to resolve these tensions.

2.5. Conclusions

This section has reviewed literature that has examined the way in which international tribunals have interpreted and applied the right to be tried without undue delay. It has demonstrated that there is no consensus as to the relevant standard international tribunals should meet in applying the right to be tried without undue delay. While some researchers have argued that international tribunals are justified in departing from domestic standards of fairness because of the unique context international criminal law operates within,[183] others have maintained that international tribunals should be 'setting the standards' and be held to the highest standards of fairness, or meet

[183] Megret, above n 15; Vasiliev, above n 81; Damaska, *Reflections on Fairness in International Criminal Justice*, above n 81, 614.

standards set by international human rights norms.[184] Some researchers have argued that there is a risk in holding international tribunals to the highest standards of protection because where the demands of fairness become too great, due process protections may be disregarded in order to meet the objectives of international criminal justice.[185] The relevant standard to which international tribunals should be held in applying the right to be tried without undue delay therefore remains unclear.

While there is some agreement amongst researchers that international tribunals are failing to meet domestic standards of fairness or international human rights norms, the concept of undue delay itself is nebulous, with the content and scope of the right to be tried without undue delay remaining unclear. For example, it has been argued that there has been an overreliance on the complexity of the case and not enough attention paid to the conduct of the authorities in international tribunals' application of the criteria for assessing undue delay, and as such, international tribunals have applied the right to be tried without undue delay inconsistently.[186] While international tribunals were found to have met the highest standards of fairness in respect of some fair trial rights, they have fallen short of their 'standard setting' function in interpreting and applying the right to be tried without undue delay, which has resulted in 'under-protection' of the rights of the accused.[187]

[184] Zeegers, above n 10, 359-361; Yvonne McDermott, *Fairness in International Criminal Trials*, above n 10.
[185] Damaska, *Reflections on Fairness in International Criminal Justice*, above n 81.
[186] Zeegers, above n 10, 348-350; McDermott, *Fairness in International Criminal Trials*, above n 10, 169-170.
[187] See discussion on pages 40-43.

The limited number of studies that have examined the interpretation and application of the law of undue delay have been undertaken within the context of a range of fair trial rights.[188] While requiring international tribunals to meet the highest standards of fairness may be appropriate for some fair trial rights, an examination of the criteria for assessing undue delay highlights some significant differences between international and domestic criminal justice. It is because of these differences that international tribunals have failed to meet domestic standards of fairness in applying the right to be tried without undue delay. Some studies have failed to acknowledge these differences and have argued that international tribunals should maintain the highest standards of fairness, while others have contended that it is because of the way in which international tribunals have contextualised the right to be tried without undue delay that the rights of the accused have been under-protected, and a new approach to interpreting and applying fair trial rights is required.[189]

While recent research has examined the interpretation and application of the right to be tried without undue delay and identified problems in the approach of international tribunals, it has not provided specific guidance on how these problems could be remedied to better protect the rights of the accused. While indicating that contextual factors related to the unique context international tribunals operate within have played a part in the approach of international tribunals to the problem of undue delay, the research has not provided guidance on the range of contextual factors that should be considered in every case. In addition, while studies have argued both for and against

[188] See discussion pages 37-39.
[189] See discussion pages 43-46.

adherence to domestic standards of fair trial protections in interpreting the right to be tried without undue delay, the standard to which international tribunals should be held in interpreting and applying fair trial rights remains unclear. Finally, current research has failed to address problems with consistency in applying the right to be tried without undue delay to provide a useful tool to assist international tribunals in balancing the rights of the accused with the objectives of international criminal justice and the overall fairness of proceedings.

3. Research aims, central thesis and original contribution of the research

As outlined in the beginning of this chapter, previous research examining the right to be tried without undue delay has not always engaged with the central purpose of the law of undue delay, which is to safeguard the rights of the accused and ensure that they do not remain too long in a state of uncertainty about their fate.[190] The criteria for assessing if an accused was subjected to undue delay were developed to be applied in domestic jurisdictions and must be adapted to account for the unique context that international tribunals operate within. For example, in domestic criminal proceedings, an examination of the complexity of the case seeks to distinguish unusual cases where the complexity has caused significant delays. However, the complexity of the case is of limited utility in an international criminal law context because the majority of cases before international tribunals are complex, particularly where no guidance is provided on how complexity should be assessed. While

[190] *Stögmüller v Austria* [1969] ECHR 2 [5]; *H v France* (1990) 12 EHRR 74 [58]; *Bottazzi v Italy* (App. 34884/97), 28 July 1999, ECHR 1999-V.

some studies have acknowledged the differences between domestic and international criminal proceedings and argued that international tribunals are justified in departing from domestic standards of fair trial protections, others fail to acknowledge these differences and have argued that international tribunals should adhere to the highest standards of protection. Imposing the highest standards of human rights protection on international tribunals without allowing for contextual factors, fails to balance the rights of the accused with the goals and objectives of international criminal justice.

The thesis of this research is that the legal test for undue delay, which has been developed in domestic criminal jurisdictions, is not adapted to the unique context in which international criminal law operates. To bring certainty to the law of undue delay and clarify the relevant standard to which international tribunals should be held, the thesis aims to:

- Identify differences in the reasoning processes of judges applying the legal test for undue delay before regional human rights courts and international tribunals, and determine if the approach of international tribunals has failed to safeguard the right to be tried without undue delay;
- Examine the reasons international tribunals have relied on in departing from domestic standards of fairness and whether they are legitimate in light of the objectives of international criminal justice and the unique context international tribunals operate within; and
- Propose a new legal test for undue delay that is adapted to the context in which international criminal law operates.

This thesis will argue that while the accused must be afforded a fair trial and the minimum standards of human rights protection be maintained, adaptation of the legal test for undue delay necessitates some departure from domestic standards of human rights protection. This study will specifically examine the legal test for undue delay to suggest how it could be contextualised to both protect the rights of the accused and recognise the unique environment international criminal law operates within. It will clarify the relevant standard of fairness to which international tribunals should be held in interpreting and applying the right to be tried without undue delay. Unlike previous studies, it will specifically consider the right to be tried without undue delay and examine the criteria for assessing undue delay with a view to determining whether they can be adapted to an international criminal justice context. In doing so, it will propose changes to the legal test for undue delay so it is consistently applied by international tribunals, by clarifying the nature, content and scope of the right, and providing guidance on how international tribunals can balance the rights of the accused with the context international criminal law operates within and the overall fairness of proceedings.

4. Overview of subsequent chapters

This thesis is divided into three parts. The first part (Chapters 2 and 3) will provide the foundation for the case analysis in later chapters by outlining the research methodology to be applied. It will also interrogate how international tribunals balance a range of competing principles, objectives, rights and interests in interpreting the right to a fair trial and the right to be tried without

undue delay. The second part (Chapters 4 and 5) constitutes the doctrinal analysis of cases considering the law of undue delay. By undertaking a textual analysis, Chapters 4 will identify the object and purpose of the law of undue delay as viewed by judges using teleological interpretive methods, before aspects of grounded theory methodology will be drawn upon to identify common themes in the reasoning processes of judges interpreting the law of undue delay. Chapter 5 will then examine these reasoning processes in more detail to consider whether departures from domestic fair trial standards are legitimate in light of the objectives of international criminal justice and the context international tribunals operate within. The final part of this thesis (Chapter 6 and Chapter 7) will draw on the principles outlined in the first part of this thesis and the findings in the case analysis to propose an adapted legal test for undue delay. The elements of the adapted legal test will be examined in the first part of this chapter, before applying the criteria to two case examples using two completed cases from the ICC. The final chapter of this thesis will conclude by explaining how the research methodology and structure of this thesis addressed the research aims, summarising the main findings.

Chapter 2 – Theoretical framework and methodology

This chapter sets out the principles and methodology that will be applied in undertaking a doctrinal analysis of the law of undue delay.[1] The principles underpinning the reasoning processes of judges interpreting the law of undue delay will be examined in the first part of this chapter. International criminal law is influenced by a number of distinct legal disciplines including criminal law, human rights law and public international law, and as such, it lacks a coherent interpretive approach.[2] This chapter will argue that in the absence of a coherent approach, international tribunals have placed too much emphasis on expansive human rights interpretive principles in applying the criteria for assessing undue delay, which tend to promote the rights and interests of victims, witnesses, the prosecutor and the international community over those of the accused.

[1] See Terry Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 117(2) *Deakin Law Review* 83. Hutchinson describes doctrinal analysis as research into the law and legal concepts and stresses the importance of having methodological clarity in any doctrinal analysis to ensure both the quality of legal research, and to allow it to be robustly examined from a multidisciplinary perspective.

[2] Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 *International Criminal Law Review* 121; Noah Weisbord and Matthew A Smith, 'The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure' (2010–2011) 36 *North Carolina Journal of International and Commercial Regulation* 255; Salvatore Zappala, 'Comparative Models and the Enduring Relevance of the Accusatorial – Inquisitorial Dichotomy' in Goran Sluiter, Hakan Friman, Suzannah Vasiliev and Salvatore Zappala (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) 44-45.

Different legal fields employ different interpretive methods.[3] While human rights law tends to rely on expansive methods to allow for flexibility, criminal law tends to employ strict or literal rules of interpretation in order to constrain the powers of the decision maker.[4] This chapter argues that when there is too much emphasis placed on human rights interpretive principles in international criminal law, it allows for more expansive interpretation of procedural rules that promote the rights and interests of other parties over those of the accused. It will therefore be suggested that interpretive principles applied in international criminal law should be consistent with the central purpose of international criminal justice in determining criminal responsibility and protecting the overall fairness of proceedings. As Zappala has explained:

> Fairness is the standard for assessing the behaviour of public authorities towards the individual against whom criminal charges are laid and who is then subjected to criminal prosecution. The purpose of criminal procedure is to ensure that the individual is protected against any potential abuse or error by the public authorities carrying out investigations, prosecutions and trials.[5]

Prioritising fairness in determining individual criminal liability will ensure that in reconciling competing principles, objectives, rights and interests, international tribunals will achieve a balance that safeguards the rights of the accused. The principles examined in this section will lay the foundation for analysing the reasoning processes of judges applying the law of undue delay in Chapters 4 and 5.

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[3] Elies van Sliedregt, 'Introduction' in Markus D. Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press, 2014) 1140-1141; Mahmoud Cherif Bassiouni, *Introduction to International Criminal Law* (Martinus Nijhoff, 2nd ed, 2014) vol 1, 15.
[4] Joseph Powderly, 'Judicial Interpretation at the Ad Hoc Tribunals: Method From Chaos?' in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010) 17, 39.
[5] Salvatore Zappala, 'The Rights of Victims v the Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* 137, 149.

The second part of this chapter will outline the methodology to be applied in this thesis. The methodological framework for the case analysis in Chapters 4 and 5 comprises of three parts:

- Rationale for the selection of cases;
- Examining the object and purpose of the law of undue delay as outlined by judges using teleological interpretation (Chapter Four); and
- Identifying themes in cases applying the law of undue delay using coding methods based in grounded theory methodology (Chapters Four and Five).

The rationale for the selection of jurisdictions and cases will be examined, before considering the process for analysing cases before the regional human rights courts and international tribunals. Teleological interpretation, as used by international tribunals and regional human rights courts to interpret treaty provisions,[6] will be applied in this thesis to identify the object and purpose of the law of undue delay in the reasoning of judges of regional human rights courts and international tribunals.[7] In interpreting and analysing the text of judgments of regional human rights courts and international tribunals, elements of grounded theory methodology will provide a structured framework to identify reasoning processes used by judges in reaching findings on undue delay.

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[6] Neha Jain, 'Interpretive Divergence' (2017) 57(1) *Virginia Journal of International Law* 45; Mia Swart, 'Is There a Text in This Court? The Purposive Method of Interpretation and the Ad Hoc Tribunals' (2010) 4 *Heidelberg Journal of International Law* 767, 775; Andre Nollkaemper, 'The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the former Yugoslavia' in Thomas A.J.A. Vandamme and Jan-Herman Reestman (eds), *Ambiguity in the Rule of Law, the Interface between National and International Legal Systems* (Europa Law Publishing, 2001) 18; Masha Fedorova and Goran Sluiter, 'Human Rights as Minimum Standards in International Criminal Procedure' (2009) 3 *Human Rights and International Legal Discourse* 9, 33.

[7] See *Vienna Convention of the Law of Treaties*, opened for signature 23 May 1969, (entered into force 26 June 1987) 1155 UNTS 331, art 31(1).

1. Principles underpinning the interpretation of the law of undue delay

International criminal law inherently involves a doctrinal struggle.[8] It must reconcile general principles of public international law with aspects of criminal law, human rights law and humanitarian law while also striving to meet the competing goals and objectives of international criminal justice and international criminal procedure. Given that international criminal law is a mix of several legal fields that 'differ as to their nature, values, goals, contents, methods, subjects and techniques', it is difficult to formulate a framework that reflects its 'polyvalent nature'.[9] As such, the meeting of these different legal fields in international criminal law has been described as an 'uncomfortable merger'.[10]

While international criminal law shares common goals and objectives with public international law, human rights law and humanitarian law, there are dangers in fusing these distinct fields.[11] This is because different legal fields have specific principles of interpretation.[12] For example, Van Sliedregt has highlighted that '[w]hile criminal lawyers generally value strict and specific

[8] Van Sliedregt, above n 3, 1140-1141; Bassiouni, above n 3,15; Robert Cryer, 'Introduction: What is International Criminal Law?' in Robert Cryer, Hakan Friman and Daryl Robinson, *Introduction to International Criminal Law and Procedure* (Cambridge University Press, 3rd Edition, 2014); Marieke de Hoon, 'The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy' (2017) 27 *International Criminal Law Review* 591.
[9] Bassiouni, above n 3, 15.
[10] Van Sliedregt, above n 3, 1140.
[11] Cryer, above n 8, 13-15.
[12] Ibid 14-16.

rules, public international lawyers have no problem in relying on loosely defined rules of customary law.'[13] Similarly, Cryer has argued:

> [W]hereas human rights norms may be given a broad and liberal interpretation in order to achieve their objects and purposes, in international criminal law there are countervailing rights of suspects that are protected through principles requiring that the law be strictly construed and that ambiguity be resolved in favour of the accused.[14]

Similarly, humanitarian law with its focus on protecting the human dignity of victims means that international criminal law has a 'hybrid identity' and that 'embodies within itself contradictions and distortions that result from a mix of principles of criminal law on the one hand and assumptions stemming from human rights and humanitarian law on the other.'[15] In interpreting the law of undue delay, international tribunals must therefore reconcile these different bodies of law that often have different goals, content and interpretive principles. Interpretive methods used by different legal fields will be discussed in more detail later in the chapter.[16]

In addition to reconciling tensions between different legal fields, international tribunals must also balance the broad and often competing objectives of international criminal justice with the rights and interests of different parties to proceedings, including victims. The goals of international criminal justice are broad and extend beyond finding the guilt or innocence of an accused to include setting a historical record, peace building and restorative justice.[17] As Damaska has argued, '[t]he list of goals proclaimed by international criminal

[13] Van Sliedregt, above n 3, 1140.
[14] Cryer, above n 8, 14.
[15] Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57(1) *Harvard International Law Journal* 111, 146.
[16] See discussion pages 89-95.
[17] UN Security Council, Security Council resolution 808 (1993) International Criminal Tribunal for the former Yugoslavia (ICTY)], 22 February 1993, S/RES/808 (1993).

courts and their affiliates is very long … [i]t does not require pause to reali[s]e that the task of fulfilling all these self-imposed demands is truly gargantuan.'[18]

These objectives also have conflicting 'assumptions, rationales and objectives' which make them difficult to reconcile:

> It is simply not possible to make no sacrifice on either front by conflating mutually exclusive roles for the Court or the trial. Punitive justice and restorative justice often require different choices in whether, who and how to prosecute, or instead explore alternative transitional justice mechanisms. Historical truth-telling in a trial requires different context analysis methods than investigating the criminal responsibility of an individual for selected conduct, yet are blended in the international criminal trials that the international courts and tribunals have undertaken … But what else can a court do, really? By nature, its own logic as a criminal court of law frames a situation in terms of criminal accountability.[19]

The role of victims in international criminal proceedings is an additional element that international tribunals must factor into this balancing exercise. The implied procedural status of victims before the International Criminal Tribunals for Rwanda (ICTR) and International Criminal Tribunal for the Former Yugoslavia (ICTY)[20] has been further elevated in the Rome Statute of the International Criminal Court (ICC) to provide 'a comprehensive victims' rights system'.[21] Victim participation in international criminal proceedings should be safeguarded, however the current framework is inefficient and has caused significant delays that are not in the interests of either party.[22] For

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[18] Mirjan Damaska, '*What is the Point of International Criminal Justice?*' (2008) 83 *Chicago Kent Law Review* 329, 331.
[19] De Hoon, above n 8, 612.
[20] The procedural status of victims is implied from Article 21 ICTR Statute and Article 22 ICTY Statute that provide for that the Rules of Procedure and Evidence must provide for the protection of victims and witnesses. See Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure* (Oxford University Press, 2016) 167-168.
[21] Ibid 169. The four aspects of this system are assistance, participation, protection, and reparation.
[22] Susana SaCouto and Katherine Cleary, 'Victims' Participation in the Investigations of the International Criminal Court' (2008) 17(1) *Transnational Law and Contemporary Problems* 73, 83-84; David S. Sokol, 'Reduced victim participation: a misstep by the Extraordinary Chambers in the Courts of Cambodia' (2011) 10(1) *Washington University Global Studies*

example, delays have resulted from difficulties in determining the appropriate level of victim participation due to problems both defining the nature of 'victim standing', and a lack of definition between the roles of the pre-trial chamber and that of the Prosecutor.[23] This has also meant that victims have been unable to participate in proceedings in a meaningful way.[24] In recognition of tensions between the rights of accused and victims, Articles 64 and 68(3) of the Rome Statute highlight the need for the ICC to balance victims' participation in proceedings with the right of the accused to a fair and impartial trial.[25] However, as will be discussed later in this chapter, victims are the 'raison d'etre' of international law and the influence of human rights and humanitarian law principles in international criminal justice have meant that victims' rights have a tendency to prevail over those of the accused.[26]

Law Review 167, 184. See also, Harry Hobbs, 'Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice' (2014) 49(1) *Texas International Law Journa*l 1, 16.

[23] Jerome De Hemptinne and Francesco Rindi, 'ICC Pre-Trial Chamber allows victims to participate in the investigation phase of proceedings' (2006) 4(2) *Journal of International Criminal Justice* 342; Mugambi Jouet, 'Reconciling the conflicting rights of victims and defendants at the International Criminal Court' (2007) 249 *St Louis University Public Law Review* 249.

[24] De Hemptinne and Rindi, above n 23; Jouet, above n 23; Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court' (2015) 26(2) *Criminal Law Forum* 255; Marianna Tonellato, 'The Victims' Participation at a Crossroads: How the International Criminal Court Could Devise a Meaningful Victims' Participation while Respecting the Rights of the Defendant' (2012) 20 *European Journal of Crime, Criminal Law and Criminal Justice* 315.

[25] *Rome Statute of the International Criminal Court*, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1July 2002) ('*Rome Statute'*).

[26] Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2013) 76 *Law & Contemporary Problems* 235, 239; Julia Geneuss, 'Obstacles to Cross-fertilisation: The International Criminal Tribunals' "Unique Context" and the Flexibility of the European Court of Human Rights' Case Law' (2015) 84 *Nordic Journal of International Law* 404, 412; Goran Sluiter, 'Human Rights Protection in the ICC Pre-Trial Phase' in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 461; Stephen Smith Cody, 'Procedural Justice, Legitimacy, and Victim Participation in Uganda' in Nobuo Hayashi and Cecilia M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press, 2007) 377; Frederic Megret, 'In whose name? The ICC and the search for constituency' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 38. See also discussion on pages 79-80.

International criminal law lacks a cohesive theory as to its function and its range of doctrinal influences pull in different interpretive directions. Recognising the need for an integrated theory, modern international criminal procedure's focus has been on engaging in discussions about the principles that underpin the purpose of procedural rules.[27] These principles and goals provide the context for interpreting elements of international criminal procedure and have been described as the 'general framework'. As Zappala has explained, the 'general framework':

> …refers to a set of structural elements which are not part of the criminal process as such but which shape the way in which procedural law develops or is applied. Such elements include institutional terms of reference, aspirations, and goals as well as operational constraints within which international criminal courts and tribunals are set to operate. Thus, 'general framework' encompasses a variety of issues which have a bearing on the object and purpose of specific rules or principles of international criminal procedure or can assist in explaining them. These elements determine the overall context in which international criminal justice functions.[28]

The objectives and principles adopted as part of a general framework of international criminal law are significant in determining how international tribunals interpret these procedural rules and due process protections, including the law of undue delay. This is because due process protections are enshrined in rules of criminal procedure. The way in which international tribunals balance the competing objectives encompassed within its general framework therefore influence the way victims' interests are balanced with the rights of the accused.

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[27] See Zappala, *Comparative Models and the Enduring Relevance of the Accusatorial – Inquisitorial Dichotomy*, above n 2, 44; Van Sliedregt, above n 3; Bassiouni, above n 3; Bantekas, above n 2.

[28] Salvatore Zappala, 'Introduction' in Goran Sluiter, Hakan Friman, Suzannah Vasiliev and Salvatore Zappala (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) 40, 40.

1.1. The foundations of international criminal procedure

Scholarly interest in international criminal procedure has historically been 'rather limited'.[29] While there have been attempts to describe the features of international criminal procedure, it is debatable whether a theory of international criminal procedure even exists.[30] Instead, international criminal procedure comprises of a range of legal traditions that emanate from the different fields of law that have influenced its development.[31] It has been suggested that an approach that views international criminal procedure as a system lacking in coherency 'ignore[s] the existence of a common '*toile de fond*' – a shared general context in which all procedural systems for international criminal courts and tribunals have functioned so far, and which has influenced procedural rules and principles resorted to by such courts.'[32] Others have argued that principles in international criminal law are often discerned 'on a crudely selective and arbitrary basis',[33] and point to a 'lack of a methodology in the courts' decisions' as evidence.[34] Even those who support the existence of a coherent theory of international criminal procedure argue that because it emerged out of domestic criminal procedure, 'limited thought was given in theoretical terms to the identification of the procedures that would best suit international criminal courts.'[35] While it is acknowledged that methodological problems arising from national law transplants exist in

[29] Zappala, *Comparative Models and the Enduring Relevance of the Accusatorial – Inquisitorial Dichotomy*, above n 2, 44.
[30] Ibid; Bantekas, above n 2, 121; Van Sliedregt, above n 3; Bassiouni, above n 3; Noah Weisbord and Matthew A Smith, 'The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure' (2010–2011) 36 *North Carolina Journal of International and Commercial Regulation* 255, 274.
[31] Van Sliedregt, above n 3; Bassiouni, above n 3.
[32] Zappala, *Introduction*, above n 28.
[33] Bantekas, above n 2,121.
[34] Ibid 126.
[35] Zappala, *Comparative Models and the Enduring Relevance of the Accusatorial – Inquisitorial Dichotomy*, above n 2.

other areas of international criminal law,[36] it has been argued that the 'lack of settled premises' in this area have frustrated further development of international criminal procedure and 'place even the most promising efforts on thin ice.'[37] The following section examines the different principles and objectives that international tribunals must balance in considering the law of undue delay. This examination will provide the foundation for the analysis of reasoning processes of judges applying the legal test for undue delay in Chapters 4 and 5.

1.1.1. The objectives of international criminal justice

In conducting international criminal proceedings, international tribunals are faced with the daunting task of reconciling a range of broad and often-conflicting objectives that extend far beyond the role assigned to domestic criminal courts. Domestic criminal proceedings are mainly concerned with determining the guilt or innocence of the accused and seek to ensure the right to a fair trial is upheld:

> [T]he criminal trial exists to give a judicial power a check on executive behaviour in the area of punishment. The criminal trial is structured with the appropriate procedures to ensure that each defendant is given due process of law.[38]

As in domestic criminal trials, the goals of deterrence and retribution have also been given prominence in international criminal justice,[39] however, as discussed earlier in this chapter, international criminal justice incorporates

[36] For example, theories of international criminal responsibility and *mens rea* are equally open to criticism of methodologically unsound transplants from national law.
[37] Weisbord and Smith, above n 30.
[38] Jens David Ohlin, 'A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 77, 93.
[39] Damaska, above n 18, 329.

much broader objectives that go beyond the 'conventional purpose of domestic procedures to convict those guilty of crimes'[40] and pull in different directions 'diminishing each other's power and creating tensions' about the purpose of international criminal justice.'[41]

The lack of clarity around the central purpose of international criminal justice has given rise to literature on its legitimising constituency.[42] It has been argued that victims are the 'raison d'etre' of international criminal justice, and the interests of victims has been 'invoked 'as a telos of the work of the ICC-sometimes together with other ends such as "the rule of law" or "ending impunity."'[43] In describing the role of the ICC, Kofi Annan has argued that, 'the overriding interest must be that of victims, and of the international community as a whole … [i]t must be an instrument of justice, not expediency'.[44] While legally, the ICC Prosecutor is accountable to the Assembly of State Parties, it has been argued that victims are their main constituents:

> Rhetorically … 'the victims' have become the overriding justification of the Prosecutor's decisions, of the Court and of the international criminal justice movement … A national prosecutor acts on behalf of the state; the international criminal justice movement has elevated 'the victims' to the level of its sovereign … Cabined into one monolithic category, 'the victims' that are the alpha and omega of the international criminal justice movement are not concrete persons of flesh, blood and water, with individual names and individual opinions, but a deity-like

[40] John Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy' (2009) 7 *Journal of International Criminal Justice* 20-23.
[41] Damaska, above n 18, 339. See above discussion pages 65-67.
[42] Kendall and Nouwen, above n 26; Sarah Nouwen, 'Justifying Justice' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 327, 340; Megret, *In whose name? The ICC and the search for constituency*, above n 26, 45.
[43] Kendall and Nouwen, above n 26.
[44] UN Press Release, 'UN Secretary-General Declares Overriding Interest of International Criminal Court Conference must be that of Victims and World Community as a Whole' 15 June 1998, L/ROM/6.r1.

> abstraction that is disembodied, depersonified, and most of all, depoliticised.[45]

Victims are therefore seen as the legitimising constituency of international criminal law, which has been described as 'self-consciously victim centric, in that victim protection is seen as a central, even dominant aim of the enterprise.'[46] Alternatively, while Megret has claimed that this general focus on victims is 'well-documented', the ICC's 'ultimate constituency is nothing but itself', and, '"humanity," "civil society," "state parties," "societies," "communities," or "the international community," are all signifiers that international criminal tribunals invoke for their own ends.'[47] Although there is a lack of certainty about the ultimate benefactor of international criminal justice, it is clear that the focus is on victims and the interests of the international community, so that in practice, when balancing competing rights and interests, the rights of the accused will be outweighed.

International criminal justice is a 'highly complex political decision-making process' that requires choices to be made in terms of prioritising 'needs and interests of various actors and on various levels' and which transitional justice processes 'can contribute to post-conflict societal repair.'[48] As such, international criminal justice often struggles to give its 'grand principles' concrete effect.[49] Given these challenges, it has been argued that expectations for international criminal justice have been set too high:

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[45] Nouwen, above n 42.
[46] Jain, *Judicial Lawmaking and General Principles of Law in International Criminal Law*, above n 15.
[47] Megret, *In whose name? The ICC and the search for constituency*, above n 42.
[48] De Hoon, above n 8, 605.
[49] Frederic Megret, 'Beyond "Fairness": Understanding the determinants of International Criminal Procedure' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 37, 76.

> In its justification for existence, the ICC and its proponents have created unrealistically high expectations of what a court in The Hague can do in terms of addressing atrocity crimes throughout the world and ending impunity for them. Credos like 'ending impunity' and 'delivering justice' would never be found credible in a domestic criminal law system, since all criminal law can do is strive after reducing impunity and contributing to feelings that justice is served, in close cooperation with other enforcement and support systems that aid these causes too. With the added complications that the transnational space brings, such strange and utopian promises should have no place in international criminal law.[50]

Apart from challenges raised by external sources in international criminal law, complexity is also introduced through the parties themselves. The diverse goals of international criminal justice may come into conflict where they aim to protect the interests of different parties. For example, the goals of holding those responsible for serious violations of international humanitarian law to account and creating a historical record tend to promote the rights and interests of victims, and sometimes the prosecutor, over those of the accused.

When the goals of international criminal justice pull in different directions, this can strain the ability of international tribunals to protect the rights of the accused, including the right to be tried without undue delay. Where a goal that favours the rights and interests of victims, conflicts with a goal that seeks to protect the rights of the accused, the balance often tips in favour of victims. For example, the right to a fair trial can come into conflict with the 'fight against impunity'.[51] Another example of this is where the central purpose of international criminal justice in determining criminal responsibility conflicts with the goal of setting a historical record. Conflicts arise in meeting both the

[50] De Hoon, above n 8, 598.
[51] Elies van Sliedregt and Sergey Vasiliev, 'Pluaralism: A New Framework for International Criminal Justice' in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2014) 3, 32.

historical record objective and determining criminal accountability because 'legal and historical truths are far from identical.'[52] Creating a historical record requires the scope of the trial to be expanded beyond what is required to determine criminal accountability to include 'larger systemic factors such as political, social and economic structures that provided the setting and conditions in which the mass violence took place.'[53] However, as the scope of the trial widens, it becomes increasingly difficult to 'grasp' it in terms of the criminal accountability of the accused given 'legal procedure seeks to exactly exclude such factors and reduce occurrences down to single events, tangible conduct, and perpetrators against whom evidence is available.'[54] The goal of creating a historical record can increase the amount of evidence required, which in turn increases the complexity of proceedings:

> The historical function of international criminal law has only increased in relevance lately as the complexity of recent trials – lasting several years – has produced massive volumes of evidence. Indeed, in some cases the volume of evidence is so overwhelming that it presents a unique challenge to store and organize the information for use by both historians and the public, particularly in affected communities.[55]

As the complexity of proceedings increases, so does the potential for undue delay. While creating a historical record is an important goal of international criminal justice, unless properly managed, it may come at the expense of the rights of the accused by drawing attention away from the central purpose of criminal trials in determining the guilt or innocence of the accused in respect of the specific charges laid. This is because in interpreting international

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[52] De Hoon, above n 8, 604.
[53] Ibid.
[54] Ibid.
[55] Jens David Ohlin, 'Goals of International Criminal Justice and International Criminal Procedure' in Goran Sluiter (ed), *International Criminal Procedure and Rules* (Oxford University Press, 2013) 55, 60.

criminal law, a human rights oriented approach is taken, that results from a combination of expansive human rights law interpretive methods, the influence of humanitarian law and its focus on protecting victims, and the idea that victims are the legitimising constituency of international criminal justice.[56] To consider conflicts between the objectives of international criminal justice in more detail, an examination of the principles underpinning those objectives is required. The following section will analyse at the way in which international tribunals have balanced competing objectives in interpreting international criminal procedure.

1.1.2. The objectives of international criminal procedure

While the objectives of international criminal procedure serve a distinct purpose that relates specifically to the primary function of international tribunals in conducting criminal trials, they also relate to the expansive goals of international criminal justice.[57] In setting out the rules for conducting criminal trials, international criminal procedure seeks to give effect to the goals of international criminal justice.[58] For example, international criminal justice seeks to establish a process for finding 'historical truth' and for allowing victims to participate in proceedings, and rules of procedure provide the framework that allow these objectives to be realised.[59] The objectives of international criminal justice are therefore closely linked to the goals of international criminal procedure:

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[56] The concept of a human rights oriented approach to interpreting international criminal law will be examined further in Chapter 3 at pages 101,103.
[57] See Ohlin, above n 38, 81.
[58] Ibid 90.
[59] Ibid 85-99.

> On the surface the applicable law in international criminal procedure consists of individual rules. If we take a closer look we find that the rules form part of a system and that they are interrelated with each other, all in order to serve overlapping objectives to be found at a deeper level of the law. [60]

Goals of international criminal justice that are specific to the conduct of criminal proceedings include determining the guilt or innocence of the accused and ensuring due process protections and respect for human rights.[61] International criminal procedure seeks to affect these goals by putting processes in place to ensure expeditious proceedings and providing protection to witnesses and victims.[62] The following section will analyse at the way in which international tribunals have balanced competing objectives in interpreting international criminal procedure.

As with the goals of international criminal justice, the objectives of international criminal procedure also come into conflict with one another, particularly where they seek to provide rights and protections to victims that may delay proceedings and affect the right of the accused to a fair trial. International tribunals must also resolve internal conflicts between components of the right to a fair trial. For example, as discussed earlier in this chapter, some of the procedural rules governing victim participation can conflict with the right of the accused to be tried without undue delay. This section argues that in interpreting international criminal procedure, too much emphasis has been placed on human rights law with expansive interpretive

[60] Mark Klamberg, 'What are the Objectives of International Criminal Procedure? - Reflections on the Fragmentation of a Legal Regime' (2010) 79 *Nordic Journal of International Law* 279, 280.
[61] Ohlin, above n 38, 83-90; Klamberg, above n 60, 284.
[62] Klamberg, above n 60, 284.

methods that tend to promote the interests of victims, witnesses and the prosecutor over the rights of the accused. Further examples of how an emphasis on human rights law in interpreting elements of international criminal procedure as part of a human rights oriented approach can negatively affect the rights of the accused will be examined in Chapter 3.[63]

1.1.3. The influence of human rights law in international criminal procedure

The interpretation and application of human rights law has been described as 'complex and demanding'. [64] This is because it requires outlining the duties of States towards individuals 'in an infinite number of situations and why such duties must trump other duties the States have under particular conditions.'[65] As such, the 'core activity of international human rights treaty application involves subsuming particulars under generals in the domain of the relationship between the State and the individual'.[66] Given this, human rights law interpretive methods must bring flexibility and encourage rights to be interpreted in the most expansive way. Interpretive methods for human rights law must also be consistent with the principle of 'effectiveness', which requires '"effective, real, and concrete" protection of human rights provisions' where the 'core interpretive task for any interpreter is to make human rights treaty provisions "effective, real, and practical' for individuals as right-holders

[63] See discussion in Chapter 3 pages 121-133.
[64] Basak Cali, 'Specialised Rules of Treaty Interpretation: Human Rights' in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2012) 533.
[65] Ibid 531-532.
[66] Ibid 531. See also Martin Scheinin, 'The art and science of interpretation in human rights law' in Bård A. Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Elgar, 2017) 25.

under international law."'[67] Swart has explained that the principle of effectiveness is 'very well suited to interpreting human rights' and should be 'practical and effective and not theoretical and illusory' so that 'the rights must be interpreted extensively, and the limitations of these rights restrictively.'[68] Other interpretive principles for human rights include 'dynamic or evaluative interpretation' which 'implies the dynamic character of human rights and thus accords only limited value to preparatory work' and the 'autonomous concepts approach'.[69] This requires that conventional rights should be interpreted independently from their interpretation in domestic jurisdictions.[70] This expansive interpretive approach is appropriate to the field of human rights law because it provides the flexibility to interpret to individuals and societies in a wide range of contexts.

While an expansive interpretive approach may be ideal for interpretation of human rights treaties, other fields, such as criminal law, may require a narrower, more literal interpretive approach.[71] As Powderly has explained, literal interpretations are appropriate where constraints need to be imposed on the decision-maker:

> Absolute reliance on the ordinary or literal meaning of a provision is done for the express purpose of limiting the creative capacity of the adjudicator. In such circumstances it acts as an absolute rule rather than as part of a broader interpretational scheme. It is rare indeed that a literal conception will progressively develop the law; on the contrary, it is much more likely to limit its effectiveness.[72]

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[67] Ibid 537-538.
[68] Fedorova and Sluiter, above n 6, 32-33. See also, Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925, 934.
[69] Fedorova and Sluiter, above n 6, 33.
[70] Ibid.
[71] Powderly, above n 4, 39.
[72] Ibid.

Using the case of *Akayesu,*[73] Powderly provided an example of how a broad interpretive approach applied to criminal offences can expand the law in ways it was perhaps not intended.[74] In this case, it was argued that to 'ensure fidelity to the intentions of the drafters' the 'list of protected groups under the Genocide Convention could be expanded to include any stable and permanent group'.[75] This interpretation went against the 'Convention's *travaux* to a deliberate reluctance on the part of States to extend the ambit of protected groups.'[76] In criminal law, there must be certainty and consistency in interpretation and a literal interpretation assists in constraining judicial decision makers from expanding or developing the law beyond its stated meaning.

Human rights are inherent in many aspects of international criminal procedure, such as the right to a fair trial. However, a number of authors have highlighted the dangers in placing too much emphasis on human rights law in international criminal procedure.[77] Human rights law draws on expansive interpretive methods and in interpreting international criminal procedure, too much emphasis on this field of law has been said to undermine the integrity of international criminal procedure.[78] This is because expansive interpretation tends to favour victims of human rights violations, which results in the rights of the accused being interpreted narrowly. As outlined earlier in this chapter,

[73] *The Prosecutor v John Paul Akayesu* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998).
[74] Powderly, above n 4, 41. See also, Robinson, above n 68, 938.
[75] Powderly, above n 4, 41.
[76] Ibid.
[77] Patricia Pinto Soares, 'Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism' (2012) 23 *Criminal Law Forum* 161; Megret, *Beyond "Fairness": Understanding the determinants of International Criminal Procedure*, above n 49; Klamberg, above n 60; Robinson, above n 68.
[78] Robinson, above n 68; Pinto Soares, above n 77, 178.

human rights law, humanitarian law and criminal law also have different values, goals, contents, methods, subjects and techniques.[79] As Robinson has highlighted, transplanting human rights or humanitarian principles into international criminal law incorrectly assumes that the norms of these distinct legal fields are 'co-extensive' and:

> … [t]his substantive conflation is actually a problem of structural assumptions, because it overlooks that these bodies of law have different purposes and consequences and thus entail different philosophical commitments… norms are absorbed into criminal law without awareness that they may be novel to criminal law and hence without scrutiny of whether they comply with the fundamental principles peculiar to criminal law.[80]

Not all human rights violations necessarily lead to the assignment of criminal responsibility, and importing human rights directly into criminal law can blur this distinction. For example, in the case of *Barayagwiza*, the Prosecution argued that human rights violations caused by hate speech and incitement to violence through targeting a specific ethnic group were capable of reaching the gravity of crimes under Article 3 of the Statute and would thus be liable to criminal prosecution.[81] As Swart has explained:

> In the field of human rights purposive interpretation is nothing new. Human rights courts have frequently employed the idea of the object and purpose of the treaties they interpret to support an expansive interpretation of the rights contained in those treaties … It should however be borne in mind that [international criminal] Tribunals are *criminal* tribunals. A method of interpretation which is commendable in the context of human rights law cannot be employed in a criminal setting if this violates the principle of legality and fair trial standards.[82]

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[79] See discussion on pages 64-65.
[80] Robinson, above n 68, 946.
[81] *Barayagwiza v Prosecutor* (*Prosecutor's Request for Review or Reconsideration*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No CTR-97-19-AR72, 31 Jan 2000) [977].
[82] Swart, above n 6, 782-783.

If human rights law is to be incorporated into criminal law principles, it must be done according to a 'rationally driven method' otherwise it may be given 'wider application than it should or is prepared to have.'[83]

Proponents of human rights law interpretive methods have argued that it 'provides one of the best interpretive tools for the analysis of the procedural mechanisms of international criminal justice, since it helps identify the proper balance between the rights of individuals and the interests of society.'[84] However, using human rights law to interpret areas of ambiguity in international criminal law has resulted in expansive interpretations of fair trial rights that have undermined the rights of the accused.[85] Unlike in domestic criminal law settings where human rights law protects the individual against the State, in an international criminal law setting there is no State. International tribunals instead act on behalf of the international community, which becomes the entity from which the rights of the accused must be protected.[86] In undertaking this balancing exercise, it is argued that a human rights law approach may favour the rights of a multitude of victims over the accused:

> Against this backdrop, by grounding a teleological interpretation of international criminal law in human rights law rationales, judges will choose, among the available interpretative results, the one that ensures satisfaction to a larger number of human beings. In other words, there is the propensity under the human rights paradigm to equate the conviction of the accused with respect for victims' rights.[87]

[83] Pinto Soares, above n 77, 191.
[84] Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press, 2003) 1.
[85] See Pinto Soares, above n 77.
[86] Ibid 171.
[87] Pinto Soares, above n 77, 171-172.

Using human rights law interpretive methods unreflectively without considering the content, scope and methods of international criminal law and international criminal procedure has expanded the scope of rights and interests to be considered and undermined the rights of the accused. As mentioned above, examples of how expansive human rights interpretive methods and a human rights oriented approach have been drawn on to interpret ambiguities in international criminal procedure to the detriment of the accused will be discussed in Chapter 3.[88]

As will be discussed in the second part of this chapter, international tribunals have been inconsistent in their use of interpretive methods.[89] This may be as a result of the 'polyvalent'[90] nature of international criminal law, which incorporates a range of legal fields, each of which are suited to a different interpretive method.[91] It has therefore been suggested that international criminal law should be interpreted according to the 'scope and telos' of criminal law, which incorporates aspects of human rights law, rather than the 'scope and telos' of human rights law, which is grounded in different norms and principles.[92] In interpreting international criminal procedure, this thesis will argue that it is important to understand distinctions between different legal fields. This will ensure that principles and interpretive methods are only applied where there is a sound rationale for doing so, and that the outcome remains consistent with the values, goals, contents, methods, subjects and techniques of the field of criminal law, given the central purpose of

[88] See discussion in Chapter 3 pages 121-133.
[89] See discussion below on pages 91-95.
[90] Bassiouni, above n 3.
[91] See discussion pages 89-95.
[92] Pinto Soares, above n 77, 172–173.

international tribunals in determining criminal accountability. It is argued in this thesis that international tribunals have taken an expansive human rights interpretive method with respect to international criminal law that has limited due process protections for the accused.

This section has considered different principles used to interpret international criminal law. The current legal test for undue delay does not assist judges in reconciling tensions in balancing these competing goals, principles, rights and interests, or account for the unique context that international criminal law operates within. By identifying differences in the way in which judges of international tribunals interpret and apply the law of undue delay, this thesis will seek to adapt the legal test for undue delay to the context in which international criminal law operates so that the broad objectives of international criminal law can be balanced with principles of fairness to better safeguard the rights of the accused.

2. Methodological framework for analysis of cases considering the law of undue delay

This section considers the methodological framework that will be used to analyse cases of regional human rights courts and international tribunals in Chapters 4 and 5. The methodological framework is comprised of three parts:

- Rationale for selection of cases;
- Examining the object and purpose of the law of undue delay as outlined by judges using teleological interpretation (Chapters Four); and

- Identifying common themes in cases applying the law of undue delay using coding methods from grounded theory methodology (Chapters Four and Five).

2.1. Rationale for selection of cases

In this thesis I will draw on existing and emerging case law examining the right of the accused to be tried without undue delay in both international tribunals and regional human rights courts. I will be limiting the analysis of international criminal law to modern cases, and will utilise the substantial case law of the ICTY and the ICTR, along with the emerging case law of the ICC with the aim of informing its evolving practice and procedure. The ICTR and ICTY tend to refer to each other's decisions as persuasive statements of the law. The International Military Tribunal (IMT) and the Tokyo Tribunal (TT) will be excluded from the analysis. The IMT and TT were formed prior to the development of modern human rights regimes and International Covenant on Civil and Political Rights principles inherent in modern international tribunals. They were quickly established to perform a specific mandate and did not have detailed rules of procedure and evidence, and their practice did not reflect modern principles of international criminal procedure. As such, their case law will have limited applicability to the ICC.

The Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Court of Cambodia (ECCC) are 'mixed' or hybrid courts and have a mixed national and/or international legal basis, recruiting both national and

international judges.[93] A multi-lateral treaty between States created the ICC, and the ICTY and ICTR were created by a decision of the UN Security Council. Although supported by international treaty mechanisms, the SCSL and ECCC are were essentially established within national legal systems and have incorporated international elements. As these bodies have been constituted differently to the ICC, ICTY and ICTR, this may limit comparisons and they have therefore been excluded from the analysis. Primary legal materials, including the court and tribunal statutes, Rules of Evidence and Procedure, and trial transcripts, will be utilised in the analysis.

Judgments from the Inter-American Court on Human Rights (IACHR) and the European Court of Human Rights (ECtHR) will be included as part of the analysis of regional human rights courts. Rather than examining individual domestic jurisdictions, the analysis will focus on regional human rights courts that set the relevant standards and review the application of the law of undue delay in domestic jurisdictions. Regional human rights courts canvass a wide range of domestic jurisdictions with both adversarial and inquisitorial legal systems and incorporate a range of cultural traditions. In addition, regional human rights courts are comparable to international tribunals in terms of their constitution, oversight role, and enforcement mechanisms. Judgments of regional human rights courts are also available in English, which avoids any difficulties that may arise in arranging for accurate translations of legal documents. Given the methodology involves an analysis of the language in

[93] It has been argued that there are only two categories of criminal courts, domestic and international. While 'hybrid' or 'mixed' may be useful ways of describing the composition of some courts, they are not a formal legal category of court. See Roger O'Keefe, *International Criminal Law* (Oxford University Press, 2016) 86-87.

the text of judgments to identify reasoning processes and the object and purpose of undue delay, unofficial translations would limits claims made in the analysis. Limiting judgments to only those available in English avoids these difficulties and ensures that the textual analysis is accurate.

It is recognised that the work of regional human rights courts differs significantly to that of international tribunals. Regional human rights courts have different objectives and purposes to international tribunals. While regional human rights courts are somewhat removed in their decision making and assess the reasonableness of delays in domestic criminal courts, international tribunals consider the length of proceedings within their own institutions. The same criteria for making assessments about undue delay is thus being applied in very different contexts. Contextual factors will therefore be identified as part of the analysis as it is the central argument of this thesis that the legal test for undue delay fails to account for the unique context in which international tribunals operate.

2.2. Identifying the object and purpose of the law of undue delay using teleological interpretation

Teleological interpretation will used to analyse the text of judgements in cases considering the law of undue delay to identify the object and purpose of the right to be tried without undue delay as determined by individual judges in each case, and to identify any common principles used by judges in their reasoning to justify their findings. By identifying the object and purpose of the law of undue delay as determined by judges, the second part of the analysis will use grounded theory methodology to identify themes in the reasoning of

judges to justify their findings and consider whether their reasoning was consistent with their stated object and purpose.

Teleological interpretation is one of several interpretive methods provided for in the Vienna Convention on the Law of Treaties (VCLT), which states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[94] Teleological interpretation seeks to interpret laws by reference to their object, purpose and context.[95] The context in which the provision operates requires a consideration of 'not only it's wording, but also the context in which it occurs and the objects of the rules of which it is a part.'[96] A teleological approach therefore seeks to identify the object and purpose of a law, and the context within which it operates.

The following section outlines a model explaining the relationship between facts drawn from legal materials, the object and purpose of a law (normative proposition) and the interpretive method used by the court or tribunal.[97] Where the facts and interpretive method employed by a court are known, this

[94] *Vienna Convention of the Law of Treaties*, opened for signature 23 May 1969, (entered into force 26 June 1987) 1155 UNTS 331, art 31(1).
[95] It is not the intention of this chapter to provide a thorough examination of theories on the nature of law. While it is acknowledged that the proposed methodology strongly lends itself to interpretivism as described by authors such as Ronald Dworkin, this chapter is designed to provide an analytical framework to examine legal enquiries into the underlying goals of or justifications for international criminal procedure rather than theories on the nature of law itself. See generally, Ronald Dworkin, *Law's Empire* (Fontana, 1986); Ronald Dworkin, *Justice in Robes* (Harvard, 2008). See also Cali, above n 64, 805.
[96] *Merck v. Hauptzollamt Hamburg-Jonas*, (292/82) [1983] ECR 1-3781, 3792 [12]; See also, *Bosphorus v. Minister for Transport* [1996] ECR I- 3953; *Peter Leifer and Others* [1995] ECHR 1-3231 [22].
[97] This framework has been adapted from Letsas' explanation of how teleological interpretation does not tie a court to a single interpretive approach, See George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21(3) *The European Journal of International Law* 509.

can help to identify the object and purpose of the law in question, as the court understands it.

2.2.1. Facts

An interpreter uses facts to identify the object and purpose of a treaty. Facts can be drawn from a range of sources including treaty provisions, preambles, dictionary definitions or explanatory memorandums and 'which facts are relevant for interpreting a treaty must ultimately depend on some normative proposition about moral reason or values'.[98] As such, it has been it has been argued that 'uncertainty is rife within the judicial finding of facts' and that is a 'formidably problematic exercise'. [99] While acknowledging the problem of uncertainty, this thesis will identify facts in the judgments and statutes of international tribunals, along with judgments and treaties from regional human rights courts that consider the law of undue delay. The coding methodology discussed in the next section will be used to analyse the facts in the analysis of judgments in this thesis.

2.2.2. The object and purpose (normative propositions)

The normative proposition is the object and purpose of the law in question. As Letsas explains, 'the "purpose" in Article 31 VCLT simply means the normative 'point' or 'value' and … interpretation must be relative to the point or value of that which is interpreted.'[100] For example, if an examination of judgments determines that the court's reasoning in considering whether an

[98] Ibid 535.
[99] Edward W.Thomas, *Judicial process: The Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) 122.
[100] Letsas, above n 97, 533.

accused is subjected to undue delay always focuses on the conduct of the relevant authorities, the normative proposition may be that States have a moral obligation to ensure that their legal systems are organised in such a way that an accused is detained no longer than justice requires. The facts (text of judgments) are therefore relevant to identifying the object and purpose of the law of undue delay, which in this example, could be identified as being to protect the fundamental right of the accused to a fair trial. A court that focuses on other aspects in assessing whether an accused has been subjected to undue delay would have a different normative proposition and/or explanation and a different underlying object, purpose or normative proposition to the law of undue delay. The normative proposition or object and purpose of a law will determine the most appropriate interpretive method.

This thesis seeks to identify the normative propositions that explain the approach of international tribunals in cases that consider the law of undue delay. It is recognised that the normative proposition or object and purpose of a law may not always be readily discerned from the materials available and that transparent reasoning is not always provided as part of a judgment. It is argued, however, despite this, it remains worthy of study "since at the very least it represents an effort at self-conscious public justification" that "enables us to understand what are regarded as satisfactory and publicly acknowledgeable grounds for decision making".'[101]

[101] Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation' in Jeffrey L. Dunoff and Mark A. Pollak (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, 2012) 445, 449 quoting Bankowski Zeno, Neil MacCormick, Robert S. Summers and Jerzy Wroblewski, 'On Method and Methodology' in Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes: A Comparative Study* (Dartmouth Press, 1991) 9, 17.

2.2.3. Interpretive methods

Rather than mandating a specific method of interpretation, Article 31 of the VCLT instead provides for a 'general rule' of interpretation.[102] The International Law Commission have described this as the 'crucible approach', where in each case, a range of elements are 'thrown into the crucible' and 'their interaction would give the legally relevant interpretation.'[103] The crucible approach has received 'widespread support' and in interpreting provisions, requires that there be a 'fit between the 'wording, context, and the object and purpose'. [104] As Gardiner has explained:

> A key to understanding how to use the Vienna rules is grasping that the rules are not a step-by-step formula for producing an irrebuttable interpretation in every case. They do indicate what is to be taken into account (in the sense of text, preamble, annexes, related agreements, preparatory work, etc.) and, to some extent, how to approach this body of material (using ordinary meanings in context, in the light of the treaty's object and purpose, distinguishing a general rule from supplementary means, and so on). There is in the rules a certain inherent logical sequence. They are not, however, all of use every time or always sequentially applicable.[105]

It is generally agreed that the VCLT rules outline a method of interpretation that provides 'ample scope for manoeuvre and allows different tribunals to prioritize different interpretive methods or elements.'[106] This means that the VCLT method of interpretation allows a range of interpretive methods to be used within a general interpretive framework. Different interpretative approaches allow decision makers varying levels of freedom to expand or

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[102] Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 10.
[103] United Nations Conference on the Law of Treaties: Official Records: Documents of the Conference, A/CONF.39/11/Add.2, p 39, para 8 and [1966] Yearbook of the ILC, vol II, pp 219–20, para 8.
[104] Basak Cali, 'Specialised Rules of Treaty Interpretation: Human Rights' in Duncan B. Hollis (ed) *The Oxford Guide to Treaties* (Oxford University Press, 2012) 533.
[105] Gardiner, above n 102.
[106] Pauwelyn and Elsig, above n 101, 448.

constrain the law as required. While a literal or textual approach tends to limit the creativity of judges in interpreting the law, the VCLT 'crucible approach' lends itself to a more expansive interpretation of the law where there is uncertainty.[107]

2.3. Interpretive methods used by regional human rights courts and international tribunals

The International Court of Justice adopted teleological interpretation from 'an early date',[108] and it is argued that the judges of the ECtHR and IACHR have consistently taken a teleological approach in interpreting treaty provisions.[109] While regional human rights courts and other international judicial bodies have adopted a teleological interpretive approach, international tribunals have incorporated a range of interpretive methods and have been inconsistent in their use of interpretive methodologies.[110] Statutes of international tribunals incorporate elements of criminal, human rights and humanitarian law, and as discussed above, each of these fields of law require a different interpretive method. As such, Powderly has argued that international tribunals have used 'an overwhelming variety of interpretational methods', but have often 'neglected to exercise an appropriate degree of caution in relation to the source and scope of such methods.'[111] For example, the statutes of international tribunals 'at their very core … are penal instruments which,

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[107] See discussion page 62.
[108] Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20(3) *Fordham International Law Journal* 656, 678.
[109] See *Soering v. The United Kingdom* (European Court of Human Rights, Court (Plenary), Application No 14038/88, 7 July 1989) [87]; *Prosecutor v. Dusko Tadic (Appeal Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the former Yugoslavia, Appeal Chamber, Case No IT-94-1-AR72, 10 August 1995). See also Jain, above n 6, 74-75.
[110] Powderly, above n 4, 40-42.
[111] Ibid 42.

applying an analysis based on domestic practice, should be subject to strict construction.'[112] Despite this, it has been argued that it was 'logical' for international tribunals to assume VCLT principles applied to the interpretation of their statutes, which rather than advocating a strict construction approach, provide 'ample scope for judicial creativity'. [113] It has been suggested that it has been 'regrettable that the ad hoc Tribunals did not make use of them in a more systematic and coherent manner. [114]

Rather than being a problem of consistency, however, it may be that international tribunals have embraced a range of interpretive methods in order to reconcile the competing interpretive requirements of the different fields contained in their statutes. It has been argued that it was necessary for the ICTY to engage in purposive or teleological interpretation to expand the applicability of humanitarian law, because of the 'rudimentary nature' of international criminal law at the time the ad hoc tribunals were established.[115] Indeed, it has been argued that a literal approach has rarely been possible in interpreting the statues of the ICTY and ICTR due to their 'spare and loosely worded nature'.[116] In considering the object and purpose in light of the context, the ICTY and ICTR have interpreted context quite broadly to include 'the general context of the adoption of the statutes' and the 'character of the conflicts that preceded their establishment.'[117] The 'crucible approach' would

[112] Ibid 40. See also Robinson, above n 68, 946.
[113] Powderly, above n 4, 42.
[114] Ibid.
[115]. Jain, above n 6, 55. See also, Swart, above n 6, 771.
[116] Jain, above n 6, 55. See also Mia Swart, 'Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and "Adventurous Interpretation"' (2010) 70 ZaöRV, 459; Gardiner, above n 102, 480.
[117] Jain above n 6, 56.

therefore provide this flexibility by allowing for a range of methods. As Jain has argued, 'the VCLT not only permits, but positively encourages substantive indeterminacy. The VCLT's crucible approach is thus intended to let a thousand flowers bloom: the more the merrier.'[118] As such, it was suggested that it may be timely to 'embrace the potential of interpretive divergence in international law'.[119]

Although it is acknowledged that international tribunals have embraced a range of interpretive methods, on the whole they have adopted a teleological approach in interpreting treaty provisions.[120] It has therefore been argued that:

> The teleological or purposive school of treaty construction has played a prominent role in tribunal jurisprudence leading to an expansive construction of treaty terms based on the object and purpose of the ICTR and ICTY Statutes.[121]

Adopting a teleological approach does not tie a court to one interpretive method, but allows a range of interpretive methods to be employed depending on the purpose of the treaty.[122] Contrary to the approach of other international tribunals, however, the ICC has adopted a textual or literal method of interpretation.[123] One reason for the ICC taking a different approach to interpretation may be because the Rome Statute contains much more detailed provisions and there is less scope for the law to evolve and expand than

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[118] Ibid 93.
[119] Ibid 94.
[120] Ibid; Swart, above n 6, 775; Nollkaemper, above n 6, 18; Fedorova and Sluiter, above n 6, 33.
[121] Jain, above n 6, 56.
[122] Letsas, above n 97, 532.
[123] Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21(3) *The European Journal of International Law* 543.

provided for by the Statutes of the ICTY and ICTR.[124] In addition, the Rome Statute also requires that:

> The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.[125]

Consistent with this idea, Grover has suggested that the approach of the ICC is a result of the Rome Statute offering 'extraordinary advances' in terms of legal certainty when compared to the Statutes of the ICTY and ICTR, and that because of the detail contained in articles of the Rome Statute and the 'maturation of international criminal law in recent years', the guiding principle in interpretation should be legality.[126]

The approach of the ICC is consistent with the idea that literal interpretation may be the most appropriate approach in criminal cases because it provides legal certainty.[127] The textual approach of the ICC may also relate to the increased level of certainty in its provisions, whereas the teleological approach adopted by the ICTR and ICTR have simply been a product the vagueness of their respective statutes. Indeed, Article 22(2) refers to taking a strict construction approach the 'definition of crimes' specifically, rather than in interpreting provisions of the statute more generally. This interpretive approach requires 'textual primacy', where the object and purpose approach

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[124] Volker Nerlich, 'The Status of the ICTY and ICTR precedent in proceedings before the ICC', in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 323.
[125] *Rome Statute*, art 22(2).
[126] Grover, above n 123, 557.
[127] *Prosecutor v Delalic* (*Judgment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, IT-96-21-T, 16 November 1988).

of the VCLT 'cannot be invoked inappropriately to broaden, modify or override the plain meaning'.[128] However, as Grover has argued:

> To be clear, textual primacy is not incompatible with the 'crucible' approach to interpretation. In practice, dictionary meanings without consideration of the treaty's context, purpose and relevant interpretive aids may well prove unhelpful and should therefore be seen as a starting point rather than conclusive. Stated differently, it is acknowledged that the idea of textual determinacy is a myth and that context is highly relevant; it is, however, equally acknowledged that texts are not open to an infinite number of meanings and that context has a constraining function.[129]

This thesis suggests that given international criminal law comprises of several legal fields that lend themselves to different interpretive methods, it is the case that different provisions of the Rome Statute require different interpretive approaches, and what is actually required is a coherent approach to determining which interpretive methods are appropriate for different types of provisions.

While provisions relating to criminal offences may require a literal interpretation, where there is uncertainty or ambiguity, teleological interpretive methods could be applied. In considering the right to be tried without undue delay, teleological interpretation may be the only appropriate approach given that the criteria themselves are quite abstractly stated and its application is highly contextually dependant. Teleological interpretation will be used in the analysis of this thesis, as it is the most common interpretive method used by regional human rights courts and international tribunals. In addition, because this thesis will be examining judgments of the ICTR and ICTY considering the issue of undue delay, which as outlined in Chapter 1 is nebulous, a textual

[128] Grover, above n 123, 557.
[129] Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press, 2014) 112.

approach alone will be insufficient and teleological interpretive methods will be required to determine the object and purpose of the law.

2.4. Application of teleological interpretation to the research question

The traditional use of teleological interpretation by international tribunals has been to interpret legal provisions for the purpose of applying them to a set of given circumstances. However, the approach taken in this thesis will be to use this method to examine how judges have applied the law in practice. In considering the reasoning in cases examining the right to be tried without undue delay, this thesis will look at how judges have identified the object and purpose of the law of undue delay to justify a decision about whether an accused was subject to undue delay, and whether to grant a remedy through the abuse of process doctrine. By analysing the text of judgments to compare the object and purpose of the law of undue delay in international criminal proceedings with the object and purpose in regional human rights courts reviewing domestic criminal law cases, this thesis will determine whether different normative propositions apply with respect to the law of undue delay for an accused in international tribunals, than in regional human rights courts and domestic jurisdictions.

2.4. Identifying themes in reasoning processes of judges considering the law of undue delay using modified grounded theory methodology and coding

As part of the analysis, I will identify cases from international tribunals and regional human rights courts where the issue of undue delay was raised, and using aspects of grounded theory methodology, identify the reasoning

processes employed by judges applying the law of undue delay. Grounded theory methodology was first developed in 1967 by Glaser and Straus and was traditionally applied in sociological research.[130] More recently, it has been applied to research in a wide range of disciplines including medicine, health studies and socio-legal studies.[131] The methodology is 'developed from analysing empirical material or from studying a field or a process'[132] and its methods have been defined as consisting of 'systematic, yet flexible guidelines for collecting and analysing qualitative data to construct theories from the data themselves'.[133] In this thesis, grounded theory methodology will be adapted to examine the reasoning processes of judges in considering the criteria for assessing undue delay, and in providing remedies for an accused subjected to undue delay. While this thesis does strictly follow a grounded theory methodology, it will draw on coding methods in grounded theory methodology to apply them to analyse the text of judgments from regional human rights courts and international tribunals.

Coding has been described as the 'pivotal link' between collecting data and developing the theory to explain the data.[134] Grounded theory coding consists of two phases:

- *Initial coding*: an initial phase where each word, line or segment of the text is named; and

[130] Alexandra Sbaraini, Stacy M Carter, R Wendell Evans and Anthony Blinkhorn, 'How to do a grounded theory study: a worked example of a study of dental practices' (2011) 11 *BMC Medical Research Methodology* 128, 128.
[131] Ibid.
[132] Uwe Flick, *An Introduction to Qualitative Research* (Sage Publications, 2014) 538.
[133] Kathy Chamaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (Sage Publications, 2006) 1.
[134] Ibid 113.

- *Focused and Theoretical Coding*: a 'focused, selective phase' where the most significant codes are sorted and synthesised to form a theory.[135]

An example of how methods of coding will be applied in this thesis is provided in Table 1.

This thesis will adopt the methods of initial coding, focused coding and theoretical coding to analyse the text of judgments. While initial coding is used to generate as many ideas as possible and is 'provisional, comparative and grounded in the data', focused coding considers the most frequent or significant initial codes to further organise the data.[136] Theoretical coding further refines the focused codes and provides a structure for relating the codes to one another to develop theories about your data.[137] Throughout the process of coding, this study will adopt theoretical sampling techniques of grounded theory methodology, which seek to refine and develop the codes until they become 'saturated', where no new theories or insights can be found within the text.[138]

[135] Ibid.
[136] Chamaz, above n 133, 138; Sbaraini, Carter, Evans and Blinkhorn, above n 130.
[137] Sbaraini, Carter, Evans and Blinkhorn, above n 130.
[138] Chamaz, above n 133, 213.

Table 1: Examples of coding used in grounded methodology

Text	Initial coding	Focused coding	Theoretical coding
Bizimugu 2013: *Appeals Chamber is mindful that the right enshrined in Article 20(4)(c) is fundamental.*	Mindful of rights Right to be tried without undue delay is fundamental	Highlighting the fundamental rights of the accused.	The process of protecting the fundamental rights of the accused but justifying lengthy proceedings on the grounds of complexity.
Bizimungu 2013: *In the circumstances of this case, which is one of the largest ever heard by the Tribunal, the significant period of time which elapsed during these proceedings can be reasonably explained by its size and complexity.*	*Significant period of time* which elapsed. *Length of proceedings reasonably explained by complexity* of the case.	Acknowledging lengthy proceedings. Delay explained by complexity.	The process of protecting the fundamental rights of the accused but justifying lengthy proceedings on the grounds of complexity.

Using teleological interpretation to analyse the text of judgments considering the issues of undue delay, this thesis will first identify differences in how international tribunals and regional human rights courts have viewed the object and purpose of the law of undue delay. This thesis will then use grounded theory methodology as the framework for examining the reasoning processes of the courts and tribunals. The purpose of applying this methodology to the doctrinal analysis is to add structure and objectivity to an essentially subjective and qualitative process of textual analysis. This

methodology provides a more detailed textual analysis, which is appropriate in this thesis given the small number of cases that met the criteria for analysis.

Chapter 3 - The right to a fair trial and the law of undue delay

This chapter analyses differences in the application of the right to a fair trial and the law of undue delay in regional human rights courts and international tribunals. Regional human rights courts and international tribunals both aim to adhere to international human rights standards with respect to these rights. Despite this, the unique context in which international criminal law operates combined with an emphasis on a human rights oriented approach[1] in international criminal procedure has resulted in differences in the way these rights are interpreted and applied before international tribunals. These differences create tensions in balancing competing rights and interests in international criminal procedure that at times has resulted in international tribunals failing to adequately protect the rights of the accused. By examining these tensions, this chapter will build on the principles discussed in Chapter 2 to consider the main differences in the way in which regional human rights courts and international tribunals apply the right to a fair trial and the law of undue delay using key cases outlining the requisite elements of these rights.[2]

[1] A human rights oriented approach in international criminal law has resulted from a combination of a number of factors including the adoption of expansive human rights law interpretive methods, the influence of humanitarian law and its focus on victims, and the view that victims are the central focus and legitimising constituency of international criminal law. A human rights oriented approach in balancing competing rights and interests in international criminial procedure has resulted in a general tendency of the rights of victims to prevail over those of the accused. This approach is discussed further on page 103.

[2] Unlike Chapters 4 and 5 which consider a sample of cases that have considered the right to be tried without undue delay, this chapter will look at key cases before regional human rights courts that have set out of the requirements of the right to a fair trial and the right to be tried without undue delay.

This chapter is divided into two parts. The first part will examine the requirements of the right to a fair trial and the right to be tried without undue delay and lay the groundwork for the analysis. It will begin by briefly examining a range of sources, including international and regional legal instruments, to consider how fair trial standards have developed over the course of the 20th century. It will then analyse different approaches for determining how the right to a fair trial is breached. The approach taken by regional human rights courts and international tribunals in evaluating breaches of fair trial rights is important because this reflects how competing component rights are balanced by judges. While regional human rights courts favour the cumulative approach, where the overall fairness of the trial is assessed, it will be argued that international tribunals' consideration of whether fair trial rights have been infringed has been at best somewhat inconsistent. The problem of remedy for breach of fair trial rights before international tribunals will also be examined. It will be demonstrated that a consideration of the seriousness of the offence and the need to balance the rights of the accused with the interests of the international community limits the application of the abuse of process doctrine and remedies for breach of fair trial rights in an international criminal law context. The first part of this chapter will conclude by examining the right to be tried without undue delay, in particular, the purpose of the reasonable time requirement, how delays are measured and the criteria for assessing undue delay. As with the approach to considering if fair trial rights have been breached, international tribunals have demonstrated inconsistencies in measuring delays and have tolerated much lengthier proceedings than regional human rights courts.

The second part of this chapter will examine differences in the way fair trial rights and the right to be tried without undue delay have been applied in regional human rights and international tribunals. Firstly, it will look at how a human rights oriented approach in international criminal procedure has created tensions between balancing the fair trial rights and interests of victims, witnesses and the international community with those of the accused. A human rights oriented approach results from the confluence of expansive human rights interpretive methods,[3] the influence of victim-focused humanitarian law in international criminal justice and the idea that the victims are the group to which international criminal law is ultimately held to account. In practice, this has resulted in a tendency in international criminal procedure for the rights of victims to prevail over the interests of the accused.[4] This focus on victims in international criminal law has resulted in the accused being 'demonised' and viewed by the international community as the "worst of all offenders" and made it difficult for an accused to be provided with an effective remedy where their rights have been infringed.[5] Using case law examples, tensions that arise in considering the abuse of process doctrine and granting a stay of proceedings will be examined, and it will be suggested because this

[3] See discussion in Chapter 2 pages 79-83.
[4] Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57(1) *Harvard International Law Journal* 111, 146; Sarah Nouwen, 'Justifying Justice' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 327, 340; Frederic Megret, 'In whose name? The ICC and the search for constituency' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 38. See discussion in Chapter 2 pages 71-72.
[5] See Daniel Naymark, 'Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy' (2008) 4(2) *Journal of International Law and International Relations* 1. See also, Stuti Kochhar and Mayeul Hieramente, 'Of Fallen Demons: Reflections on the International Criminal Court's Defendant' (2016) 19 *Leiden Journal of International Law* 223, 243.

area of law focuses on the seriousness of the offence, the balance tips against the accused and in favour of promoting the interests of victims and the interests of the international community.

Secondly, factors related to the unique context in which international tribunals operate will be considered to examine how they have affected the way in which international tribunals have applied the criteria for assessing undue delay. It will be argued in this section that factors related to the unique context in which international criminal law operates, including self-representation of the accused, the complexity of international criminal investigations, a lack of resources, and differences in the structure of both international criminal justice institutions and procedure, have all contributed to the way in which international tribunals have interpreted the law of undue delay to promote the interests of the prosecutor, victims and witnesses at the expense of the accused.

1. The right to a fair trial and the law of undue delay

1.1. The right to a fair trial

The right to a fair trial is considered to be 'a key element of human rights protection and is of fundamental importance in safeguarding the rule of law.'[6] Yet while fair trial rights were referenced as early as the Magna Carta, there was no international statement on point until several centuries later. In 1948, the right to a fair trial was fully articulated in the *Universal Declaration of*

[6] UN Human Rights Committee (HRC), General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial, 90th Session, UN Doc CCPR/C/GC/32 (23 August 2007) ('*General Comment 32*').

Human Rights[7] (UDHR), representing 'the first universal recognition of the right to a fair trial as a primary civil right'.[8] Under the UDHR, the right to a fair trial comprises a number of separate yet interrelated rights, including the right to a fair and public hearing by an independent and impartial tribunal, the right not to be subject to arbitrary arrest, detention or exile, the right to be presumed innocent and the right to an effective remedy for violation of one's rights under law.[9]

Fair trial rights are now expressed in a number of international, regional and domestic legal instruments. The greatest overall contributions to the development of the right to a fair trial have been made by the *European Convention for the Protection of Human Rights* (ECHR) and the *International Covenant on Civil and Political Rights* (ICCPR), which came into effect in 1953 and 1976 respectively.[10] Like the UDHR, the ECHR and the ICCPR also safeguard a number of interrelated fair trial rights including the right to be presumed innocent; to be informed of the nature and cause of the charge; to have adequate time and facilities for the preparation of your defence and to communicate with a counsel your choosing; the right to be tried by an independent and impartial tribunal; the right to a public hearing; and the right

[7] Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess,183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UDHR'*)
[8] Ana Bostan, 'The Right to a Fair Trial: Balancing Safety and Civil Liberties' (2004) 12 *Cardozo Journal of International and Competitive Law* 1.
[9] UDHR arts 8-11.
[10] For other instruments see: *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) ('*African Charter on Human Rights*') art 7(1)(d); *Organization of American States* (OAS), American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), 22 January 1969, art. 8(1) ('*American Convention on Human Rights'*).

to be tried without undue delay.[11] The Statutes of the ad hoc tribunals contain similar provisions to the ICCPR, however, the *Rome Statute* also provides for additional rights including the right to make an unsworn statement in his or her defence, not to have any reversal of the burden of proof or onus of rebuttal imposed, and for the Prosecutor to disclose to the defence any evidence that may demonstrate the innocence of the accused.[12] The right to a fair trial is also incorporated into a range of international treaties including the *Fourth Geneva Convention and the Convention of the Rights of the Child*.[13]

International tribunals may look to international jurisprudence for guidance but have asserted that they will interpret fair trial rights in a relatively independent manner.[14] This position was clarified in the International Criminal Tribunal for Rwanda (ICTR) case of *Barayagwiza,* where it was held that international tribunals should be influenced but not bound by international human rights law jurisprudence:

> The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human

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[11] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23 1976) ('*ICCPR')* art. 14(2), 14(3)(a), 14(3)(b) and 14(3)(c); Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) ('ECHR') art. 6(1), 6(2), 6(3)(a) and 6(3)(b).

[12] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('Rome Statute'); SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) annex ('ICTR Statute'); SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (7 July 2009) ('ICTY Statute').

[13] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, art 40(2)(b)(iii).

[14] *Prosecutor v Barayagwiza* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999) [40] ('*Barayagwiza Appeal'*).

> rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and jurisprudence developed under, are persuasive authorities, which may be of assistance in applying and interpreting and Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.[15]

This view was supported in the case of *Bizimungu*, where the Trial Chamber held that 'whilst the jurisprudence of the European Court of Human Rights (ECtHR) and the Human Rights Committee (HRC) may be persuasive in nature to the Tribunal, the Chamber considers that it should only have recourse to such authorities to the extent that the Tribunal's statutory instruments and jurisprudence are deficient.'[16] Although international tribunals having gone to great lengths to assert their independence from international human rights law, like regional human rights courts, it has been argued that they have largely adopted the principles of the UDHR and ICCPR governing the right to fair trial.[17]

1.1.1. The requirements of a fair trial

The right to a fair trial is complex and consists of a set of individual rights that interact with one another in a variety of ways. Fair trial rights are more easily explained by viewing them as clusters or groups of rights, ranging from expansive rights or general principles of fairness, through to rights applied to individuals in specific situations. Viewed in this way, fair trial rights can be categorised into three groups: basic rules, minimum guarantees and other

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[15] Ibid.
[16] *Prosecutor v Bizimungu* (*Decision on Prosper Mugiraneza's Second Motion to dismiss for deprivation of his right to trial without undue delay*) (International Criminal Tribunal for Rwanda, Trial Chamber II, ICTR-99-50-T, 29 May 2007) ('*Mugiraneza's Second Motion*').
[17] See *ICTY Statute* art 21; *ICTR Statute* art 20.

provisions.[18] Basic rules are expansive rights or principles that include the right to be equal before the courts, the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, and the right to be presumed innocent.[19] The minimum guarantee group of rights are more specific and are procedural in nature, encompassing the right to be informed of the charge; the right to prepare a defence and communicate with counsel; the right to be present during trial and to legal representation; the right to call and examine witnesses; the right to free assistance of an interpreter; the privilege against self-incrimination; and the right to be tried without undue delay.[20] Rights included in the 'other provisions' category apply to particular groups of accused, for example, special guarantees for juvenile persons, and rights that apply following sentencing, such as the right to appeal, right to compensation for wrongful conviction, and the right against a second trial for the same offence.[21] Given these rights cover a range of issues throughout the trial process, components of the right to a fair trial may at times come into conflict with one another. For example, an accused's right to be tried without undue delay may create tensions with ensuring their right to adequate time and facilities to prepare a defence. The approach judges take to considering whether the right to a fair trial has been breached is important because this governs how conflicting rights are balanced and when a remedy will be provided to an accused where their rights have been infringed.

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[18] Jixi Zhang, 'Fair Trial Rights in ICCPR' (2009) 2(4) *Journal of Politics and Law* 39.
[19] Ibid; Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press, 2016) 38. See *ECHR* art 6(1) describing the basic rights.
[20] *ICTY Statute* art 21(4); *ICTR Statute* art 20(4); *Rome Statute* art 67(1). These articles set out the minimum guarantees. See also McDermott, *Fairness in International Criminal Trials*, above n 19, 23.
[21] Zhang, above n 18. See for example ECHR arts 2-4.

There are two main approaches used by the courts and tribunals in determining if a trial was fair: the 'minimum standards' approach and the 'cumulative approach'.[22] The minimum standards approach argues that each of the individual rights that comprise the right to a fair trial are minimum standards that need to be met for a trial to be fair overall.[23] This means that if one of the component rights is breached, the accused will not receive a fair trial. The cumulative approach considers that a fair trial may still be provided, even if not all the requirements of a fair trial are met.[24] Under this approach, depending on the circumstances of the case, the accused may still have been able to receive a fair trial overall, even if one or more of the component rights were breached. As McDermott explains:

> The notion of fairness of the trial as an umbrella concept has been proclaimed by the United Nations Human Rights Committee, the Inter-American Commission on Human Rights, and the European Commission on Human Rights. The ECtHR [European Court of Human Rights] has also taken a cumulative view when assessing the fairness of proceedings, asking whether proceedings in their entirety were fair as opposed to focusing on one specific aspect … the African [Banjul] Charter on Human and Peoples' Rights states that this right to have one's cause heard comprises a variety of rights, such as the right to appeal, the presumption of innocence, the right to a defence, and the right to trial without unreasonable delay.[25]

While this suggests that the HRC and regional human rights courts prefer a cumulative approach in assessing the right of the accused to a fair trial, the position is less clear before international tribunals. A clear approach to determining when the right to a fair trial has been breached is essential in mediating between competing components of the right to a fair trial.

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[22] Yvonne McDermott, 'General Duty to Ensure the Right to a Fair and Expeditious Trial' in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev and Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) 807.
[23] Ibid.
[24] Ibid.
[25] Ibid.

The judges of international tribunals, however, have been somewhat inconsistent in the way in which they determine whether an accused has been afforded a fair trial. Despite identical wording in the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and ICTR, there is some uncertainty as to whether the requirements are understood as 'minimum guarantees' where all must be met to ensure the trial as a whole is fair, or if having failed to meet all of the requirements, the trial could still be considered fair.[26] Generally, the ICTR and ICTY tend to favour the cumulative approach of regional human rights courts, where each right is viewed as one of several guarantees that make up the 'general requirement of a fair hearing' or an 'equitable trial'.[27] This approach was supported by Judge Shahabuddeen's separate opinion in the *Milosevic* case where it was held that 'the fairness of the trial need not require perfection in every detail' and that the main question to be considered is whether the accused had a 'fair chance of dealing with the allegations against him.'[28]

As stated above, understanding the approach taken by a court or tribunal in considering the right to a fair trial is important because it may also influence how component rights are balanced. It is suggested that the 'minimum standards' approach requires greater precision in balancing competing rights

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[26] Ibid.
[27] *Prosecutor v Karemera* (*Decision on the Prosecutor's Interlocutory Appeal Against Trial Chamber Decision III of 8 October 2003 Denying Leave to File and Amended Indictment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-AR73, 19 December 2003) [14].
[28] *Prosecutor v Milosevic* (*Separate Opinion of Judge Shahabuddeen Appended to Appeals Chamber's Decision Dated 30 September 2003 on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-54-AR73.4, 31 October 2003) [16].

given all component rights must be met. The cumulative approach however, allows for greater flexibility in balancing individual rights, because a more holistic view is taken with general concepts of fairness playing a greater role in ensuring the accused has been provided with a fair trial overall.

1.1.2. Remedies for breach of the right to a fair trial

The UDHR was an important first step in the recognition of fair trial rights, however it did not provide for remedies for an accused where it was found the right to a fair trial had been breached. The ICCPR and the ECHR were the first instruments to specifically incorporate remedies for breach of fair trial rights by providing the right to an 'effective remedy.'[29] Regional human rights courts rely on member states to provide a remedy to the accused, and can monitor and enforce their rulings where domestic jurisdictions do not comply. International tribunals, however, are responsible for providing a remedy to an accused where the reasonable time requirement has not been met. This can raise concerns about accountability and transparency as international tribunals are not subject to any oversight or enforcement mechanisms, and there is no supervising body to ensure that an accused is provided with an effective remedy where required.[30] This is particularly important in considering the conduct of the authorities as part of the law of undue delay, which will be discussed later in this chapter.

While the statutes of international tribunals do not specifically provide for the right to an effective remedy and have no enforcement mechanisms, regional

[29] *ICCPR* art 2(3); *ECHR* art 13.
[30] See discussion on pages 145-148.

human rights courts specifically provide for this right and rely on State parties to provide remedies through domestic courts. Article 13 requires the provision of an effective domestic remedy and to grant relief in the event of a violation of Convention rights.[31] For example, where it is determined that the requirements of a fair trial have not been met, the ECHR does not prescribe the required action, but rather leaves this to State parties to determine. A remedy is considered to be effective within the meaning of Article 13 where it will 'prevent the alleged violation or its continuation, or provide adequate redress for any violation that has already occurred'.[32] A State will also be held accountable under this Article where there is no internal remedy for violating the reasonable time requirement in Article 6.[33] While the IACHR provides for a remedy where a right under the Convention has been breached, international tribunals do not specifically provide for an effective remedy.[34] Instead, they rely on the abuse of process doctrine in determining if the accused will be provided with a remedy where it is determined that the right to be tried without undue delay has been breached.[35]

The abuse of process doctrine is applied on a case by case basis and can be relied on in two situations: when delay has made a fair trial for the accused impossible and; when in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due

[31] *Kudla v Poland* (2002) 35 EHRR 11.
[32] Ibid [157]-[158].
[33] Ibid [160].
[34] See *IACHR* art 63(1). As in *IACHR* art 63(1), *Rome Statute* art 85(1) provides for compensation where an accused has been released from detention following a final decision of acquittal or termination due to facts demonstrating that there 'has been a grave and manifest miscarriage of justice'.
[35] *Barayagwiza Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No, 3 November 1999) [77].

to pre-trial impropriety or misconduct.[36] The justification for invoking the abuse of process doctrine was outlined by the International Criminal Court (ICC) in the case of *Lubanga*, where it was held that:

> … [w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial … If no fair trial can be held, the object of the judicial process is frustrated and must be stopped.[37]

International tribunals invoke the abuse of process doctrine on a discretionary basis, and in considering whether to exercise their discretion, judges must balance the 'fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law'.[38] In exercising their discretion, judges may decline to exercise jurisdiction in light of serious and egregious violations of the accused's rights that would in turn prove detrimental to the court's integrity.[39] Unlike before domestic criminal courts where the accused could be charged with a range of offences, in international criminal law, the accused has often been charged with what are considered the most serious offences including war crimes, genocide and crimes against humanity.[40] In applying the legal test and balancing competing rights and interests, the seriousness of the offence and the interests of the international

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[36] Ibid.
[37] *Prosecutor v Lubanga Dylio* (*Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*) (International Criminal Court, Appeals Chamber, Case No CC-01/04-01/06-722, 14 December 2006) [37].
[38] *Prosecutor v Dragan Nikolić* (*Decision on Interlocutory appeal regarding legality of arrest*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No IT-94-2-AR73, 5 June 2003) [30] ('*Nikolić Decision'*).
[39] *Barayagwiza Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999) [74].
[40] Daniel Naymark, above n 5, 4. While not all offences before international tribunals will be more serious than domestic crimes (for example, where the accused may have been charged with one count of rape), the interests of victims and the international community are prioritised by international tribunals so an accused is demonised and their offences viewed as the most serious offences.

community almost always outweigh the right of the accused to a remedy. As such, it has been argued this 'requirement entails that the more serious the alleged offence, the higher the level of tolerable human rights abuses against the accused.'[41]

In considering remedies for breach of the reasonable time requirement, before regional human rights courts, the remedy provided to an accused depends on the circumstances of the case. The ECHR and IACHR also provide for compensation where convention rights have been breached.[42] While ordering a new trial or providing compensation may remedy a breach of the right to an independent and impartial tribunal, breach of the right to be tried without undue delay has traditionally been remedied by ordering a stay of proceedings.[43] In considering whether to order a stay of proceedings, the court looks at the seriousness of the charges and the stage of proceedings.[44] Granting a stay of proceedings where there has been an abuse of process is therefore difficult to justify in an international criminal law setting, as the seriousness of the allegations will almost always prevent a remedy being granted for violations of the rights of the accused. The tensions and issues that arise in balancing these competing rights and interests will be analysed in more detail in the second part of this chapter.

[41] Naymark, above n 5, 4.
[42] *IACHR* art. 63(1); *ECHR* art 41.
[43] Naymark, above n 5, 6.
[44] *Prosecutor v Karemera* (International Criminal Tribunal for Rwanda, Case No. ICTR-98-44-T).

1.2. The law of undue delay

The law of undue delay is expressed in Article 6 of the ECHR as the right to be tried 'within a reasonable time'.[45] Other regional human rights instruments such as the *American Convention on Human Rights* and the *African Charter on Human and Peoples' Rights* (ACHPR) also use the phrase 'reasonable time'.[46] International tribunals have adopted the terminology of article 14(3)(c) of the ICCPR that provides for the right to be tried 'without undue delay'. Article 9(3) of the ICCPR states than an accused 'shall be entitled to a trial within a reasonable time or to release' and this right is distinct from the right to be tried without undue delay.[47] In considering the ICCPR and ECHR provisions, it has been contended that these terms have identical meanings and 'the time used for the proceedings will be "reasonable" as long as there has been no "undue delay"'.[48]

While the statutes of the ICC, ICTR and ICTY all place an onus on the Trial Chamber to make sure that the proceedings are fair and expeditious,[49] only the ICC has distinguished between the duty on the court to provide 'fair and expeditious proceedings' and the right of the accused to be tried without undue delay. 'Undue delay' and 'expeditiousness' have been considered separate concepts, with the ICC arguing in the *Lubanga* case that the Rome Statute provides protections for both:

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[45] *ECHR* art 6; *ICCPR* art 14(3)(c).
[46] See *African Charter on Human Rights*; *American Charter on Human Rights*.
[47] Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press, 2nd ed, 2003) 117.
[48] Stephan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005) 135.
[49] *Rome Statute*, art 64(2); *ICTR Statute*, art 19(1); *ICTY Statute*, art 20(1).

> Expeditiousness denotes the speedy doing or transaction of something. The standard introduced by Article 64(2) of the Statute is more stringent than the one imported by the requirement of trial being held without undue delay, which is incorporated in the notion of a fair trial; a standard that the Court is duty bound to uphold.[50]

In distinguishing between the duty of the court and the rights of the accused, this case highlighted the distinction between the interest of all parties in expeditious proceedings and the right to be tried without undue delay that applies only to the accused. The decision also recognised that expeditiousness and fairness are distinct concepts, and that expeditiousness may not always be in the interests of fairness and at times may be inconsistent with protecting other fair trial rights of the accused, or ensuring a fair trial is provided overall.[51]

1.2.1. The purpose of the reasonable time requirement

The purpose of the reasonable time requirement is expressed in similar ways by both regional human rights courts and international tribunals: to uphold confidence in the justice system and to prevent the accused from 'living too long under the stress of uncertainty'.[52] The purpose of Article 6 was first considered in the case of *Wemhoff v Germany*, where the ECtHR held that the right to be tried within a reasonable time was to 'ensure that accused persons do not have to lie under a charge for too long and that the charge is

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[50] *The Prosecutor v Thomas Lubanga Dylio* (*Decision on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008*) (International Criminal Court, Case No ICC-01/04-01/060A12, 21 October 2008) ('*Lubgana Appeal Against Decision on Consequences of Non-Disclosure'*)

[51] See discussion in Chapter 1 pages 16-19.

[52] *Stögmüller, Merits, App No 1602/62, A/9, [1969] ECHR 2 [5];* (Stögmüller'); *H v France* (1990) 12 EHRR 74 [58]; *Bottazzi v Italy* [1999] ECHR 62 ('*Bottazzi'*).

determined'.[53] The HRC has affirmed this position, adding that where a person is held in detention during the trial, the reasonable time requirement should ensure that 'deprivation of liberty does not last longer than necessary in the specific circumstances of the case'.[54] The reasonable time requirement acknowledges that lengthy trials can put an accused under considerable stress as they face 'uncertainty as to the future, fear of conviction, and the threat of a sanction of an unknown severity'.[55] It also recognises that the passage of time may result in the loss or degradation of evidence, and that the reasonable time requirement maintains the interests of justice by protecting the right of the accused to an adequate defence.

1.2.2. When is a delay 'undue'?

The length of the proceedings is a factor in assessing undue delay before regional human rights courts and international tribunals, yet it is not always clear how it is applied in reaching a finding of undue delay. The ICC has held that the time period itself is considered 'an element in the configuration of a fair trial',[56] however no precise time period constituting undue delay has been defined in case law. The stated method for calculating the length of proceedings before the regional human rights courts and international tribunals is similar, and incorporates the time from when the accused is first notified of the alleged offence, until the court has reached a final decision.[57] In determining the time period to apply to the right to be tried without undue

[53] *Wemhoff v. Germany* [1968] ECHR 2 [110], [19].
[54] *General Comment 32*.
[55] Trechsel, above n 48, 135.
[56] *Lubanga Appeal Against Decision on Consequences of Non-Disclosure* (International Criminal Court, Case No ICC-01/04-01/060A12, 21 October 2008).
[57] *Eckle v Federal Republic of Germany* (1983) 5 EHRR 1 ('*Eckle*'); *Deweer v* Belgium [1980] ECHR 1.

delay, the HRC has stated that it applies to all stages of the proceedings and to make this right effective, procedures must exist to ensure that trials proceed without undue delay both at first instance and on appeal.[58] The period for assessing delay was further considered by the ECtHR in *Kangasluoma v. Finland*:

> [T]he period to be taken into account in the assessment of the length of the proceedings starts from an official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence or from some other act which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect. [59]

In has been suggested that a person's interests become 'substantially affected', at 'the moment at which a person becomes the focus of the suspicion of the competent authorities' or at 'the moment of his arrest'.[60] In determining the length of proceedings, the IACHR has defined it as beginning when the 'first procedural act' against the accused is commenced and ends when a 'final and firm judgment is delivered', including any appeal.[61] This means that the right to be tried without undue delay also requires that the right to a review of conviction and sentence must be provided without undue delay.[62] It has therefore been suggested that the length of proceedings acts as a trigger to assess whether an accused has been subjected to undue delay, and that 'for it to even be presumptively unreasonable, delay must first

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[58] *General Comment 32*.
[59] *Kangasluoma v. Finland* [2004] ECHR 29.
[60] 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) 84.
[61] *Case of López Álvarez v. Honduras* (*Merits*, *Reparations and Costs*) (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006) [129] ('*Álvarez*').
[62] *Pratt and Morgan v Jamaica*, Human Rights Committee, Communication Nos. 210/1986 and 225/1987, views of 6 April 1989.

cross a threshold of being, in the particular circumstances, inordinate or excessive.'[63]

The general approach to determining when the length of proceedings meets the threshold requirement of being 'inordinate or excessive' differs significantly between the regional human rights courts and international tribunals. The IACHR has held that in some circumstances, the time period alone may be a violation of the right to a fair trial.[64] The Court has held that where there is a prolonged delay in proceedings, the State is held accountable and must provide an explanation and proof as to why it needed more time than normally required to issue a final judgment in a particular case.[65] Contrary to the approach of regional human rights courts, the ICTR has held that 'because of the Tribunal's mandate and of the inherent complexity of the cases before the Tribunal, it is not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts.'[66]

1.2.3. The criteria for assessing undue delay

Regional human rights courts and international tribunals assess the reasonableness of the length of proceedings by considering the individual

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[63] David Young, Mark Summers and David Corker, *Abuse of Process in Criminal Proceedings* (Bloomsbury, 4th ed, 2014) 31.
[64] *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002) [145].
[65] Ibid.
[66] *Prosecutor v Bizimungu et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [32] ('*Bizimungu Appeal*').

circumstances of the case using set criteria.[67] As discussed in Chapter 1, the criteria for assessing the reasonableness of the length of proceedings are:

- The complexity of the case;
- The conduct of the relevant authorities;
- The conduct of the accused; and
- What is at stake for the applicant.[68]

While both regional human rights courts and international tribunals have adopted similar criteria to assess undue delay, there are a number of differences in the way they are applied, notably in relation to the complexity of the case and the conduct of the authorities. The interpretation of these criteria will be discussed in the second part of this chapter.

2. International tribunals' interpretation of the right to a fair trial

The second part of this chapter will analyse differences in the way that international tribunals have applied the right to a fair trial and the right to be tried without undue delay. It will focus on how the unique context in which international criminal justice operates has influenced the interpretation and application of the right to be tried without undue delay, and analyse how international tribunals have resolved tensions that arise in balancing

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[67] *Torres v Finland*, Report, 45th session, Communication 291/1988 (2 April 1990); *Prosecutor v Bizimungu* (*Judgment and Sentence*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 30 September 2011); *Prosecutor v Kanyabashi* (*Decision on the Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings*) (International Criminal Tribunal for Rwanda, Case No ICTR-96-15-I, Trial Chamber, 23 May 2000); *Gatete v The Prosecutor* (*Appeal Judgement*) (International Criminal Tribunal for Rwanda, Case No. ICTR-00-61-A, 9 October 2012) [18]; *Renzaho v The Prosecutor* (*Appeals Judgement*) (International Criminal Tribunal for Rwanda, Case No. ICTR-97-31-A, 1 April 2011) [238] ('*Renzaho Appeal'*); *The Prosecutor v Nahimana* (*Appeals Judgement*) (International Criminal Tribunal for Rwanda, ICTR-99-52-A, 28 November 2007) [1074].

[68] See discussion Chapter 1 pages 7-8.

competing fair trial rights and interests, often in a way that is to the detriment of the accused.

Firstly, the application of fair trial rights before international tribunals will be examined. In interpreting fair trial rights, it will be argued that an emphasis on a human rights oriented approach has broadened the scope of fair trial rights to apply to parties other than the accused and limited the provision of remedies for breach of fair trial rights in international criminal law. Secondly, the right to be tried without undue delay will be examined and it will be demonstrated how the approach of international tribunals has departed from that of regional human rights courts by relying on the complexity of the case and downplaying the conduct of the authorities to justify lengthy delays. A number of factors unique to international criminal justice that have influenced international tribunals' application of the law of undue delay will be examined in this context, including the complexity of international criminal investigations, the limited resources of international tribunals and structural and procedural differences to domestic criminal courts.

2.1. Tensions arising from the influence of human rights and humanitarian law on the right to a fair trial

As discussed in Chapter 2, international criminal law is a system *sui generis* that is comprised of three distinct branches of law: criminal law, human rights law and humanitarian law.[69] This section will further analyses the influence of human rights oriented approach[70] in international criminal procedure by

[69] See discussion in Chapter 2 pages 64-68.
[70] Above n 1. See also, above discussion on page 103.

considering international tribunals' approach to the right to a fair trial. Three examples will be used to demonstrate how these principles have influenced the interpretation of the right to a fair trial in a way that has diluted the rights of the accused:

- *Extending the scope of the right to a fair trial to parties other than the accused:* the application of expansive human rights interpretive methods to the equality of arms principle[71] has enabled international tribunals to extend fair trial rights to parties other than the accused. This has meant that unlike before domestic criminal courts where fairness considerations apply only to the accused, in considering the right to a fair trial before international tribunals, judges must balance the rights of victims, witnesses and the prosecutor against those of the accused.[72]
- *Conflating 'rights' with general notions of fairness and the right to expeditious proceedings:* the application of a human rights oriented approach to considering the right to a fair trial has led international tribunals to conflate the concept of 'rights' and with 'general notions of fairness' in relation to the right to expeditious proceedings.[73]
- *Limiting the right to an effective remedy for an accused labelled as the worst of all offenders:* a victim-focused human rights oriented approach can lead to the 'demonisation' of the accused before

[71] See discussion in Chapter 2 pages 65-68, 71-74.
[72] McDermott, *General Duty to Ensure the Right to a Fair and Expeditious Trial*, above n 22, 780.
[73] Anni Pues, 'A Victim's Right to a Fair Trial at the International Criminal Court? Reflections on Article 68(3)' (2015) 13 *Journal of International Criminal Justice* 951, 953.

international tribunals, which has made it difficult for an accused to access remedies where their fair trial rights have been breached.[74]

2.1.1. Extending the scope of the right to a fair trial to parties other than the accused

The emphasis on human rights interpretive principles in international criminal law has broadened of the scope fair trial rights to incorporate parties other than the accused. Traditionally, the purpose of the right to a fair trial has been to redress the imbalance between parties to criminal proceedings by protecting the accused against the State. As such, only the accused is afforded a right to a fair trial. International tribunals, however, have broadened the scope of this right and relying on the equality of arms principle, have extended the right to a fair trial to the prosecutor, victims and witnesses.

Both domestic criminal courts and international tribunals must balance components of the right to a fair trial when they conflict with one another, however, while domestic courts focus on balancing a range of competing rights that apply to the accused, international tribunals must balance a range of competing rights for several parties including the accused, victims, witnesses and even the prosecutor. While fair trial rights apply only to the accused, the way in which international tribunals have expansively interpreted the equality of arms principle has increased the number of parties that are entitled to fair trial rights. This in turn has increased the complexity of this balancing process and diluted rights safeguards afforded to the accused. In the case of *Tadic*, the ICTY held that the principle of equality of arms falls

[74] Above n 5.

under the Statute's fair trial guarantee and applies to both the prosecution and defence.[75] Reliance on this principle was further explained in the case of *Aleksovski*:

> Article 21 of the Statute provides that 'all persons should be equal before the International Tribunal'… [t]he application of the concept of a fair trial in favo[u]r of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged (in cases before the Tribunal the prosecutor acts on behalf of the international community). This principle of equality does not affect the fundamental protections given by the general law of the Statute to the accused, and the trial proceeds against the background of those protections. Seen in this way, it is difficult to see how a trial could ever be considered fair where the accused is favored at the expense of the Prosecution beyond strict compliance with those fundamental protections.[76]

McDermott has contended that interpreting the principle of equality of arms in a way that grants fair trial rights to parties other than the accused fails to recognise the contextual element of treaty interpretation.[77] By drawing on expansive interpretive methods applied in human rights law, *Tadic* equated the prosecutor and victims as 'persons' entitled to rights. The critical issue here is that the equality of arms principles exists to correct an imbalance of power, not to ensure fairness to the prosecutor. In these cases, international tribunals are permitted to balance the rights of the accused with those of the prosecution, instead of acknowledging the generally accepted principle that the 'rights of the accused that properly belong at the apex of any hierarchy of

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[75] *Prosecutor v Tadic* (*Judgment*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [44], [48].
[76] *Prosecutor v Aleksovski* (*Decision on Prosecutor's Appeal on Admissability of Evidence*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1, 16 February 1999) [23], [25].
[77] Yvonne McDermott, 'Rights in Reverse: A Critical Analysis of Some Interpretations of Fair Trial Rights Under International Criminal Law' in William Schabas, Niamh Hayes and Maria Varaki (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2013) 175.

considerations.'[78] This approach conflates general notions of fairness that are applied to a number of parties, with the right to a fair trial that is only provided to the accused.[79]

2.1.2. Conflating 'rights' with general notions of fairness and the right to expeditious proceedings

A further example demonstrating international tribunals' conflation of rights protection with general concepts of fairness can be found in examining the requirement to conduct expeditious proceedings. The Statutes of international tribunals state that '[t]he Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.[80] While this provision only requires that due regard be had for the protection of victims and witnesses, international tribunals have argued that 'the integrity of the proceedings means ensuring fairness in the conduct of the case as far as both parties are concerned'[81] and that the 'requirement of fairness is not uniquely predicated on the fairness accorded to any one party'.[82] The ICC has imposed a responsibility on all parties to the trial to be 'duty bound to

[78] Ibid 178. In this article, McDermott refers to the example of the case of *Proseuctor v Haradinaj* where she argues that the ordering of a retrial where the Prosecutor has failed to secure the testimony of two witnesses who were unwilling to testify on the grounds of fear was 'fundamentally flawed' and provides an example of the trend to extend fair trial rights to the prosecution.
[79] Ibid.
[80] ICTR Statute art 19(1), ICTY Statute art 20(1), *Rome Statute of the International Criminal Court*, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1July 2002) ('*Rome Statute'*) Article 64(2).
[81] *Prosecutor v Zigiranyirazo*, (*Decision on the Prosecution Joint Motion for Re-opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza Via Video-Link*) (International Criminal Tribunal for Rwanda, Trial Chamber, 16 November 2006) [18].
[82] *Prosecutor v Martic* (*Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Malin Babic*) (International Criminal Tribunal for the Former Yugoslavia, Case no IT-95-11–AR 73.2, 14 Sept 2006) [13].

ensure proceedings are carried out in an expeditious manner.'[83] However, as previously discussed, a duty to conduct expeditious proceedings should be a separate consideration to the right to be tried without undue delay.[84]

Expeditious proceedings are not a measure of fairness and may not always be in the interests of the accused.[85] In an international criminal law context, justice may require time in order to find the truth and provide a complete understanding of the circumstances of the case.[86] It may also require societies to stabilise after conflicts or mass atrocities so that investigations can be conducted more effectively and the truth ascertained.[87] Even in a domestic context, the ECtHR has recognised that justice delayed is not always justice denied, cautioning that while expeditiousness is important, it cannot prejudice the more general principle of the proper administration of justice.[88] Expeditiousness does not equate to fairness, and while an interest in expeditious proceedings may be applied to a range of parties, the right to be tried without undue delay is aimed solely at protecting the rights of the accused. A human rights oriented approach resulted in a broad interpretation of fair trial 'rights' that have been extended to victims, the focus of international criminal justice, and the prosecutor, who represents the

[83] *Situation in the Republic of Kenya* (*Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute*) (International Criminal Court, Pre-Trial Chamber, 10 December 2009) [9].
[84] See above discussion on page 110.
[85] See discussion in Chapter 1 pages 16-19 that examines how some procedural reforms aimed at expediting international criminal proceedings actually lengthened trials.
[86] Alex Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered' (2009) 50(2) *Harvard International Law Journal* 323-364, 340-341.
[87] Ibid 356-357.
[88] *Gast and Popp v Germany* [2000] 33 EHRR 37.

international community in upholding the principles of human rights and humanitarian law in seeing justice done.

This conflation of rights and interests may be responsible for the relatively small number of cases where undue delay has been considered by the ICTY. As will be discussed in Chapters 4 and 5, rather than applying the legal test for undue delay, the focus before the ICTY in cases where the accused has raised the issue of undue delay has been on whether measures could be used to expedite proceedings in future.[89] Where measures can be implemented to ensure expeditious proceedings going forward, any previous breach of the accused's right to be tried without undue delay is not considered. [90] In conflating rights and interests and extending fair trial rights to parties other than the accused, there has been a shift from protecting the rights of the accused against the State to a need to balance competing interests of several parties, including a 'right' to expeditious proceedings, to the detriment of the accused.

Contrary to views of the ICTY Appeals Chamber that the equality of arms principle also applies to the prosecution,[91] in considering the right to a fair trial, it has been suggested that 'it is crucial to distinguish the general idea of fairness from individual 'fair trial guarantees' or a 'right to a fair trial' which

[89] See discussion Chapter 4 pages 176-183.
[90] See for example, *Prosecutor* v *Perišić* (*Decision on motion for sanctions for failure to bring the accused to trial without undue delay*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-81-PT, 23 November 2007); *Prosecutor v Seselj* (*Decision on Oral Request of the Accused for the Abuse of Process*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-03-67-T, 10 February 2010).
[91] See discussion above at page 121.

acknowledges the fact that the accused is often at a disadvantage in proceedings compared to the prosecution.[92] While general notions of fairness are considered applicable to various types of legal proceedings, specific notions of fairness apply to the rights of an accused in criminal proceedings.[93] As Pues explains:

> Ensuring the reali[s]ation of different human rights at stake throughout criminal proceedings might be called the fundamental fairness of the trial. But this form of fairness should not be confused with the individually enforceable right to a fair trial for the accused in criminal trials.''[94]

Perhaps a more appropriate description of what has been provided to victims, witnesses and the international community is not a right to a fair trial but rather an interest in a fair trial. An example that supports this contention is the Victim Participation Scheme at the ICC. It is argued that the ICC does not provide fair trial guarantees for victims under this scheme because '[t]he practice of the Court reveals a tendency to collectivi[s]e thousands of victims to make these numbers fit into the very limited capacity of a criminal trial' and '[s]uch collective forms of participation contradict any claims of an individual right to a fair trial for victims.'[95] It is therefore suggested that rather than being a right, participation for victims is largely procedural and contingent on safeguarding the fair trial rights of the accused. Equating victim participation to unqualified substantive rights implies a false equivalency and demonstrates yet another significant difference between international and domestic criminal justice.

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[92] Pues, above n 73, 953.
[93] Ibid 956; Salvatore Zappala, 'The Rights of Victims v the Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* 137, 149.
[94] Pues, above n 73, 971.
[95] Ibid 972.

2.1.3. Limiting the right to an effective remedy for 'demonised' accused

The serious nature of offences under international criminal law and the unique circumstances under which international criminal trials are conducted have also impacted on the way international tribunals have interpreted the right to a fair trial. There is an understandable tendency for the international community to characterise persons accused of international crimes as among as the worst of all offenders given the seriousness of offences committed under international criminal law.[96] The seriousness of the offence may be a valid consideration before domestic criminal courts where the accused may be charged with a range of offences that vary in gravity. However, applying the abuse of process doctrine before international tribunals will always limit the availability of a remedy for violation of the rights of the accused because all offences are serious.[97]

It will be recalled that in considering whether to invoke the abuse of process doctrine, international tribunals must balance the 'fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law'.[98] The question of whether to invoke the abuse of process doctrine may arise while proceedings are ongoing. As Kocchar and Hiermante have argued, this is inconsistent with the presumption of innocence:

> What is remarkable then, is not that the label 'international criminal' comes with negative connotations; it is the relative ease with which this

[96] Above n 5.
[97] Ibid.
[98] *Nikolić Decision* (International Criminal Tribunal for Yugoslavia, Appeals Chamber, Case No IT-94-2-AR73, 5 June 2003) [30].

term (or some variant of it) comes to be placed upon those who are yet to be proven guilty'.[99]

In a manner inconsistent with the presumption of innocence, international tribunals are reluctant to provide a meaningful remedy where an accused has been subjected to undue delay and are "regarded by an entire society as a villain of the highest order".[100] While international tribunals have an inherent power to stay proceedings in order to maintain the integrity of the trial process[101], it is considered an 'exceptional measure' and before proceeding, it is necessary to consider other remedies that may be provided where the rights of the accused have been breached.[102] For example, in the *Lubanga* case, it was held that proceedings should be stayed where the 'essential preconditions of a trial are missing and there is no sufficient indication that this will be resolved during the trial process', and a stay should be lifted where the circumstances change and a fair trial becomes possible.[103] This is because where a fair trial is possible, the trial should proceed because those accused before international tribunal may have committed 'deeds which must not go unpunished.' [104]

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[99] Kochhar and Hieramente, above n 5, 224.
[100] Naymark, above n 5, 1.
[101] *Prosecutor v Blagojevic* (*Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-60-AR73.4, 7 November 2003) [7]; *Prosecutor v Brdanin* (*Decision on Second Motion by Brdanin to Dismiss the Indictment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-99-36, 16 May 2001) [5].
[102] McDermott, *General Duty to Ensure the Right to a Fair and Expeditious Trial*, above n 22, 800.
[103] *Lubanga Appeal Against Decision on Consequences of Non-Disclosure* (International Criminal Court, Case No ICC-01/04-01/06 0A13, Appeals Chamber) 21 October 2008) [76].
[104] Ibid 80.

In providing a remedy to an accused, international tribunals face both legal and political obstacles.[105] The political obstacles stem from the international community's unwillingness to terminate proceedings on the grounds of fairness against a person accused of serious human rights violations.[106] These obstacles are also linked to the influence of humanitarian law in international criminal justice. As Kocchar and Hieramente have explained:

> [S]ituations of mass atrocity – described famously as 'problem[s] from hell' – have been quite complex. They are rife with the ambiguity as to who did what, not to also mention the complicity (if not criminality) of the Allied Nations, the Great Powers, or the 'West' as they have variously come to be known. In such a scenario it has been deemed politically unwise to delve too deeply into the causes of these conflicts, making it convenient instead to uphold moral responsibility by indicting and trying certain individuals. This has entailed developing a narrative and history that emphasizes their blame and finds in them (alone) the primary locus of responsibility'.[107]

One example of where political pressure was responsible for preventing an accused being provided with a remedy for abuse of process was the ICTR case of *Barayagwiza*.[108] In this case, the accused was granted a stay of proceedings after it was determined that they had been subjected to undue delay and the abuse of process doctrine was invoked.[109] The response of the Rwandan government to this decision was to state they would no longer cooperate with the ICTR and to file an international arrest warrant and extradition request for the accused.[110] Five months after this decision was handed down, the new President of the Appeal Chamber accepted the Prosecutor's appeal on the stay of proceedings and it was overturned, with

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[105] Naymark, above n 5.
[106] Ibid 3-4.
[107] Kochhar and Hieramente, above n 5, 227.
[108] *Barayagwiza Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999).
[109] Ibid [113].
[110] *Jean Bosco Barayagwiza v The Prosecutor* (*Prosecutor's Request for Review or Reconsideration*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 31 March 2000) [56].

the Chamber stating that an appropriate remedy for the delay was to be determined following the trial.[111] It has been argued that this decision resulted from political pressure because international tribunals rely on State governments to function effectively and this consideration will always outweigh the need to provide a remedy to an accused for abuse of process.[112] It is evident that international tribunals must operate within much broader political complexities than domestic criminal courts.

The second obstacle in providing a remedy for an accused subjected to undue delay is legal, which relates once again to the seriousness of the charges.[113] In applying the abuse of process doctrine it is unclear how the assessment of the seriousness of the offence occurs, or how this is balanced with the interests of the international community. However, in exercising their discretion, international tribunals have cited the severity of the charges in considering the issue of undue delay to find the rights of the accused have not been infringed, without a detailed analysis of the facts or the individual circumstances of the case.[114] The seriousness of the offence and the 'exceptional nature of the charges' and 'sense of emergency and exception' have been argued to be a 'breeding ground for regression of fair trial

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[111] Ibid [74].
[112] Naymark, above n 5, 3-4.
[113] Ibid.
[114] *The Prosecutor v Rwamakuba* (*Decision on Defence Motion for Stay of Proceedings Article 20 of the Statute*) (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005)*; Barayagwiza Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999); *Prosecutor v. Nsengimana* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No. ICTR-01-69-T, 17 November 2009) ('*Nsengimana Judgment'*); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *Kajelijeli v The Prosecutor* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-98-44A-A, 23 May 2005); *Bagosora and Nsengiyumva v The Prosecutor* (*Appeal judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-98-41-A, 14 December 2011).

standards.'[115] Placing this emphasis on the gravity of the charges is also at odds with sentencing practices of international tribunals where sentences imposed are often shorter than those given in similar circumstances in a domestic context.[116] Indeed, as Drumbl has argued:

> A paradox emerges. International lawmakers have demarcated normative differences between extraordinary crimes against the world community and ordinary common crimes. However, despite the proclaimed extraordinary nature of atrocity crime, its modality of punishment, theory of sentencing, and process of determining guilt or innocence, each remain disappointingly, or perhaps reassuringly, ordinary.[117]

International tribunals consider all crimes under international criminal law as serious offences. As such, unlike before domestic criminal courts, it is difficult to envisage how an accused could be provided with a remedy for breach of their fair trial rights, where the seriousness of the offence is the main factor considered under the abuse of process doctrine. If the seriousness of the offence prevents a remedy being provided for abuse of process, both the utility of the criteria and the judicial reasoning of international tribunals must be questioned.

2.2. Tensions arising from international tribunals' approach to the law of undue delay

This section will first analyse how the complexity of international criminal proceedings affects the overall fairness of trials. Using the examples of self-representation and lack of defence resources, it will examine how in considering the complexity of the case, different issues are raised before

[115] Kochhar and Hieramente, above n 5, 234.
[116] Ian Bonomy, 'The Reality of Conducting a War Crimes Trial' (2007) 5 *Journal of International Criminal Justice* 348, 351; Mark B Harmon and Fergal Gaynor, 'Ordinary Sentences for Extraordinary Crimes' (2007) 5 *Journal of International Criminal Justice* 683.
[117] Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007) 6.

international tribunals than before domestic criminal courts. It will then examine how differences in the way regional human rights courts and international tribunals are structured have contributed to the way in which they approach the legal test for undue delay with respect to the conduct of the authorities. This section will argue that these differences in the composition of international criminal justice institutions, particularly in relation to the lack of oversight mechanisms, have drawn focus away from the conduct of the judicial or prosecutorial authorities to the detriment of the accused.

2.2.1. The complexity of international criminal proceedings

As it will be demonstrated in Chapter 5, it is generally recognised that international criminal proceedings are inherently complex.[118] The tendency of international tribunals to justify lengthy trials on the basis of complexity was highlighted in the ICTR case of *Bizimungu et al*:

> [T[he Appeals Chamber held that a period of seven years and eight years between the arrest of the Accused and the rendering of the judgement in the Nahimana et. al. case did not constitute undue delay. The proceedings involved 93 witnesses, called over the course of 23 trial days. Similarly, the *Bagosora et.al.* Trial Chamber concluded that a delay of approximately 11 years was not undue. The Trial Chamber in the *Nyiramasuhuko et. al.* case, which heard 189 witnesses over the

[118] Mark Harmon, 'The Pre-Trial Process at the ICTY as a Means of Ensuring Expeditious Trials' (2007) 5 *Journal of International Criminal Justice* 377; Salvatore Zappala, 'Symposium: How to Ameliorate International Criminal Proceedings: Some Constructive Suggestions – Forward' (2007) 5 *Journal of International Criminal Justice*, 346; Carla Del Ponte, 'Reflections based on the ICTY's experience' in Roberto Bellelli (ed), *International Criminal Justice - Law and Practice from the Rome Statute to Its Review* (Ashgate, 2010) 129; Claude Jorda, 'The Major Hurdles and Accomplishments of the ICTY' (1007) *5 Journal of International Criminal Justice* 572; O-Gon Kwon, 'The Challenge of an International Trial as Seen from the Bench' (2007) 5 *Journal of International Criminal Justice* 360; Bonomy, above n 116, 348; Gideon Boas, 'A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY' in Gideon Boas and William A. Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff, 2003) 31; Maximo Langer and Joseph Doherty, 'Managerial Judging Goes International but its Promise Remains Unfulfilled: An Empirical Assessment of ICTY Reforms' (2011) 36 *The Yale Journal of International Criminal Law* 241. See discussion in Chapter 5 pages 228-240.

course of 726 trial days, concluded that a case lasting 15 years did not amount to undue delay.[119]

As discussed in Chapter 1, a number of factors unique to international criminal law have been identified as the reason for lengthy proceedings.[120] These include the legal and factual complexity of international criminal trials,[121] the procedural complexity of international criminal law,[122] difficulties related to the conduct of investigations and collecting evidence in countries that may be politically unstable, and the victim participation scheme at the ICC.[123] The ECtHR has identified a number of factors that have contributed to the length of proceedings in its member States, including the number of accused persons and witnesses,[124] the facts that are to be established,[125] and 'international elements'.[126] While the ECtHR has rarely accepted that the complexity of the case justifies excessively long proceedings, it has been suggested that cases at the ICTR show 'a willingness to accept long periods of detention' and that 'many domestic systems would not tolerate the delays of years that often occur before the trial in the tribunals.'[127]

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[119] *Prosecutor v Bizimungu* (*Decision on Prosper Mugiraneza's Second Motion to dismiss for deprivation of his right to trial without undue delay*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 29 May 2007) ('*Mugiraneza's Second Motion*').
[120] See discussion in Chapter 1 pages 14-16.
[121] *Mugiraneza's Second Motion* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 29 May 2007).
[122] Goran Sluiter, 'The law of international criminal procedure and domestic war crimes trials' (2006) 6 *International Criminal Law Review* 605; Gillian Higgins, 'The impact of the size, scope and scale of the Milosevic trial and the development of Rule 73bis before the ICTY' (2009) 7(2) *Northwestern Journal of International Human Rights* 239; Kwon, above n 118; Bonomy, above n 116.
[123] See Christine Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise' (2008) 6(3) *Northwestern University School of Law* 459.
[124] *Angelucci v. Italy (Application No. 12666/87) (19 February 1991) Series A No. 196C* [17].
[125] *Triggiani v Italy* [1991] ECHR 20 [17].
[126] *Manzoni v Italy* [1991] ECHR 6 [18].
[127] *Karemera v The Prosecution* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014).

International tribunals have relied on the complexity of international criminal law as a reason to justify lengthy proceedings that would not be tolerated in domestic criminal jurisdictions.[128] The way in which international tribunals have relied on the complexity of the case to justify lengthy proceedings will be examined in detail in Chapter 5 of this thesis.[129] The following sections will examine the ways in which the context international tribunals operate within can increase the complexity of proceedings in ways not seen in domestic criminal proceedings. In particular, it will be considered how self-representation, the complex nature of investigations and limited defence resources in international criminal law can negatively impact on the fair trial rights of the accused.

2.2.1.1. Self-representation and complexity in proceedings

Self-representation of the accused in international criminal proceedings provides a unique example of how increased complexity in proceedings can cause lengthy delays.[130] While the conduct of the accused may also contribute to the lengthy and complexity of proceedings before regional human rights courts, this is generally only considered relevant in circumstances where the conduct of the relevant authorities is also a factor.[131] This is because the duty regional human rights courts impose on domestic courts to manage proceedings effectively to prevent delays extends to

[128] See discussion in Chapter 4 pages 177-185.
[129] See Chapter 5 pages 229-240.
[130] See Gideon Boas, 'Self-Representation before the ICTY - A Case for Reform' (2011) 9 *Journal of International Criminal Justice* 53.
[131] Stavros, above n 60, 96.

managing self-represented accused.[132] In regional human rights courts, an accused may contribute to the length of proceedings where they fail to appoint counsel,[133] or are obstructive by intentionally attempting to stall proceedings for personal gain.[134] In describing the conduct required of an accused, the ECtHR has held that it involves:

> … diligence in carrying out the procedural steps relevant to him [or her], to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening proceedings.[135]

In ensuring the that the accused does not delay proceedings, the court also has a role to play, and it has been suggested that 'a special duty therefore rests upon the domestic court to ensure that all those who play a role in proceedings do their utmost to avoid any unnecessary delay'.[136] Therefore, an assessment of the conduct of the accused before the regional human rights courts, by necessity, also entails an assessment of the conduct of the authorities.

In international criminal proceedings, however, self-representation often gives the accused an opportunity to disrupt proceedings and to use them to further a personal or political agenda, which has the potential to cause significant delays in the trial.[137] Delay may be caused by the accused's lack of legal expertise, lack of objectivity, or by abuse of the court where the right is used

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[132] Nuala Mole and Catharina Harby, 'The Right to a Fair Trial: A guide to the implementation of Article 6 of the European Convention on Human Rights' (Human Rights Handbook, No 3, Council of Europe, 2006) 27.
[133] *Corigliano v Italy (1983) 5 EHRR 334.*
[134] *Eckle* (1983) 5 EHRR 1.
[135] *Union Alimentaria Sander SA v Spain* (1990) 12 EHRR 25.
[136] Mole and Harby, above n 132.
[137] Boas, *Self-Representation Before the ICTY: A Case for Reform*, above n 130, 53-54; Nicole Camier, 'Controlling the Wrath of Self-Representation: The ICTY's Crucial Trial of Radovan Karadzic' (2010) 44(3) *Valparaiso University Law Review*, 957.

as a vehicle to make political statements.[138] One example that highlights some of the challenges caused by self-representation in international criminal proceedings is the *Milošević* case, where it has been observed that:

> … [d]uring the proceedings, Milošević made a mockery of the tribunal and consistently used stall tactics, such as making a long opening statement and submitting a huge witness list. Milošević also presented videos and slide shows, berated witnesses, and made political speeches. Additionally, the ICTY faced uncontrollable delays that can be attributed to Milošević's failing health during his trial.[139]

However, in considering cases before the ICTY involving self-representation, it has been suggested that, '[w]here you have an intransigent accused, and one who appears motivated not just by a desire to mount a forensic case but to assert a political position, it is difficult to implement an effective regime to ensure that the trial is fair and expeditious'.[140] The political context international tribunals operate within can increase the length of proceedings through self-representation, which is an issue rarely seen before domestic criminal courts.

Self-representation may be a particular problem in international criminal law because of the complex political context in which these crimes were committed. The right to self-representation is not absolute and may be limited where the accused, intentionally or unintentionally, is 'substantially and persistently obstructing to the proper and expeditious conduct of the trial'.[141] Scharf has argued that those accused of international crimes are more likely

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[138] Michael P. Scharf, 'Chaos in the Courtroom: Controlling Disruptive Defendants and Contimacious Counsel in War Crime Trials' (2006-2008) 39 *Case Western Reserve Journal of International Law* 155, 156.
[139] Camier, above n 137.
[140] Boas, *Self-Representation Before the ICTY: A Case for Reform*, above n 130, 81.
[141] *Prosecutor v Milošević (Decision on the Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber I, Case No IT-02-54-AR73.7, 1 November 2004).

to use proceedings to their advantage or to make a political statement than an accused in domestic criminal proceedings:

> Because of the political context and widespread publicity, leaders on trial are more likely than ordinary defendants to have concluded that they do not stand a chance of obtaining an acquittal by playing by the judicial rules. Instead, they seek to derail the proceedings, hoping for a negotiated solution (e.g. amnesty) outside the courtroom; to hijack televised proceedings, hoping to transform themselves through political speeches into martyrs in the eyes their followers; and to discredit the tribunal by provoking the judges into inappropriately harsh responses which will make the process appear unfair.[142]

The right of the accused to self-representation in an international criminal setting must therefore be considered in the context of broader interests of justice 'that the trial proceeds in a timely manner without interruptions, adjournments or disruptions'.[143]

2.2.1.2. Complexity in conducting investigations in international criminal law

While international criminal proceedings are complex, so too are international criminal investigations. In the absence of an international police force, parties to international criminal proceedings must conduct their own investigations that rely on cooperation with domestic authorities in the State where the offences took place and which may still be subject to political instability. International criminal proceedings require complex investigations that are both time and resource intensive, and generate large amounts of evidence.[144] This

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[142] Scharf, above n 138,156.

[143] *Prosecutor v Šešelj (Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with His Defense*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No IT-03-67-PT21, May 9 2003).

[144] See, Stefania Negri, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure' (2005) 5(4) *International Criminal Law Review* 513, 552; Elise Groulx, '"Equality of Arms": Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System' (2006) 3 *Oxford University Comparative Law Forum* 3; Charles Chernor Jalloh and Amy DiBella, 'Equality of Arms in International Criminal

has created tensions in balancing the right of the accused to be tried without undue delay and the equality of arms principle because the defence has limited resources to conduct such complex investigations. While resource limitations in international criminal justice will be examined more generally in the next section of this chapter, this section specifically considers how a lack of defence resources can affect the fair trial rights of the accused. It will also examine how the 'demonisation' of the accused in international criminal justice has further increased the complexity of investigations to the detriment of the accused.

As discussed above, the equality of arms principle is an element of the right to a fair trial and provides that each party is given a reasonable opportunity to present their case and that both parties should be equal before the courts.[145] There is also an element of fairness to the equality of arms principle, with Article 14(1) of the ICCPR stating that the equality of arms principle requires 'a fair and public hearing by a competent, independent and impartial tribunal established by law.'[146] The Statutes of international tribunals have adopted similar language to the ICCPR in explaining equality of arms.[147] In an effort to partly redress the equality of arms issue in conducting investigations where the defence has limited resources, the Statutes of international tribunals provide that while the defence may conduct investigations, it is actually the Prosecutor who is responsible for conducting investigations and collecting

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Law: Continuing Challenges' in Yvonne McDermott and William A. Schabas (eds), *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Routledge, 2013) 247; Geert-Jan Alexander Knoops, 'The Dichotomy between Judicial Economy and Equality of Arms within International and Internationalized Criminal Trials: A Defense Perspective' (2004-2005) 28(6) *Fordham International Law Journal* 1566, 1581-1587.

[145] See discussion above at pages 123-124.

[146] *ECHR* art 14(1).

[147] *ICTR Statute*; *ICTY Statute*.

evidence.[148] The ICC Statue has included an additional provision that outlines the purpose of the Prosecutor's investigation is to 'discover the truth' and to carry out this task, they 'must investigate incriminating and exonerating circumstances equally.'[149]

While requiring the prosecution to carry out investigations and also collect exonerating evidence for the defence undeniably reduces the expense and time required in conducting investigations, this process generates a voluminous amount of documentation, which must then be reviewed by the defence team. For example, in the *Lubanga* trial, the Prosecution submitted that there were 27 500 documents comprising of 92 500 pages in its document collection, which it estimated that just under 20 000 documents (74 000 pages) would need to be reviewed.[150] In considering the situation in this case, Heinsch has argued that:

> …the Defence is hopelessly disadvantaged in the preparation of the case and regularly the question of "equality of arms" arises. It will never have comparable human and technical resources and it is unrealistic to assume that a defence counsel will have the chance to properly investigate a genocide case far away from his [or her] home office.[151]

In combination with resource limitations in reviewing large amounts of evidence gathered by the prosecution, the defence must still undertake its own investigation to some extent, which will be further limited by available

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[148] The defence may conduct investigations (*ICTY Statute* art 20(4)(b)(e); *ICTR Statute* art 17(4)(b)(e); *Rome Statute* art 67(1)(b)(e)) and the Prosecutor shall conduct investigations (ICTY Statute art 16(1); *ICTY Statute* art 15(1); *Rome Statute* art 11(1)).
[149] *Rome Statute* art 54(1)(a).
[150] *The Prosecutor v Lubanga Dyilo* (*Decision regarding the Timing and Manner of Disclosure and the Date of Trial*) (International Criminal Court, Trial Chamber I, 9 November 2007) [2], referencing Transcript of a Hearing on 1 October 2007 page 11, line 7.
[151] 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 Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill Nijhoff, 2008) 479, 483.

resources in terms of accessing and gathering evidence and conducting site visits.[152]

Unfortunately, the disadvantage caused by lack of resources extends beyond the investigation stage to all aspects of the criminal trial, and is reinforced by structural inequality through a lack of institutional representation for the defence.[153] As such, it is contended that the 'perception of the equality of arms within the ICC remains problematic.'[154] As will be discussed in Chapter 5, international tribunals may acknowledge this difficulty by relying on the complexity of the case to justify delays that are caused by complex investigations that generate large volumes of evidence.[155] It has been argued that while the principle of equality of arms 'does not require absolute equality in the resources of parties', in practice, problems relating to allocation of resources, staffing, institutional inequality and financial resources at international tribunals 'hold far-reaching implications and can cause doubts as to the legitimacy of international criminal trials.'[156]

The 'demonisation' of the accused may also cause problems with the equality of arms principle in relation to the complexity of investigations. It has been suggested that States may be reluctant to cooperate with defence teams and deny access to documents, witnesses or crime sites, and that witnesses may not want to testify 'for fear of being on the "wrong side of history" or

[152] Drumbl, above n 117, 1134-1135.
[153] Ibid.
[154] Ibid 1135.
[155] See discussion in Chapter 5 pages 229-240. See also discussion in Chapter 3 pages 134-136.
[156] Mayeul Hieramente, Philipp Muller and Emma Ferguson Barasa, 'Bribery and Beyond: Offences Against the Administration of Justice at the International Criminal Court' (2014) 14 *International Criminal Law Review* 1123, 1134.

(inter)national politics.'[157] It has therefore been argued that the 'effects of demoni[s]ation [of the accused] are often subtler and may permeate ongoing proceedings in indirect and blurry ways.'[158] While this perception of the accused can cause problems with the equality of arms principle, in examining the nature of those accused of serious human rights violations, psychological studies have found that no deficits in their character are required to commit atrocities and many perpetrators see themselves as 'simply fulfilling their duty, void of any personal animosity.'[159] Clark has highlighted the complexity of perpetrator-based behaviour in an international setting:

> The "ordinariness" of those who took part in the Rwandan genocide reflects the fact the psychological processes necessary to make such crimes possible, in particular "us"/"them" differentiations are basic generic processes common to us all…A key explanatory factor is context, that is to say the particular circumstances within which a perpetrator's crimes were committed. Indeed, personality itself cannot be viewed in isolation from the broader social milieu.[160]

The serious nature of the crimes in international criminal law are often relied on to justify denying provisional release or a remedy to an accused whose fair trial rights have been infringed, yet it is important to consider the context in which these crimes have occurred. It has been argued that 'the perpetrator in mass atrocity commits crimes alongside masses of other individuals who are doing the same.'[161] These crimes often fall 'squarely within the parameter of widely accepted norms' and '[i]n the time, place and society in which they are committed, some crimes – even the most horrific of crimes – may be quite

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[157] Kochhar and Hieramente, above n 5, 235.
[158] Ibid.
[159] Frank Neubacher, 'How can it happen that horrendous State crimes are perpetrated?' (2006) 4 *Journal of International Criminal Justice* 787, 790.
[160] Janine Natalya Clark, 'Genocide, war crimes and the conflict in Bosnia: understanding the perpetrators' (2009) 11(4) *Journal of Genocide Research* 421, 426, 430.
[161] Saira Mohamed, 'Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law' (2015) 124 *Yale Law Journal* 1628, 1634.

frighteningly normal.'[162] The seriousness of the offences before international tribunals must be considered in the context in which they took place and should not be used to justify a watering down of the equality of arms principle in international criminal law.

2.2.2. The conduct of the authorities

In considering the legal test for undue delay, the conduct the authorities has been downplayed by international tribunals as a relevant factor contributing to lengthy proceedings. This is in direct contrast to the approach of the regional human rights courts that impose a duty on domestic courts to prevent lengthy proceedings.[163] The ECtHR has stated that members States must organise their legal systems so as to allow the courts to comply with the requirements of Article 6(1).[164] Before the ECHR, where the relevant domestic authorities have failed to take positive steps to deliver expeditious proceedings, the Court has found the right to be tried without undue delay has been breached.[165] The duty of member States to organise their legal systems in a way that meets the reasonable time requirement is part of the ECtHR's consideration of the conduct of the authorities.[166] Indeed, it has been argued that the conduct of the authorities is almost the sole consideration in considering the issue of undue delay:

> … [i]f one looks more closely at the case-law, it seems that, contrary to first impressions, the complexity of the proceedings is not a criterion which permits an evaluation of whether the duration of criminal

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[162] Ibid.
[163] *Buchholz v. the Federal Republic of Germany* (1981) 3 EHRR 97 [51] ('*Buchholz*').
[164] Ibid.
[165] Stavros, above n 60, 84,106; See also, *Eckle* (1983) 5 EHRR 1, where a delay of three years at the opening stage of proceedings resulting from exceptional backlog was found to be too lengthy.
[166] *Buchholz* (1981) 3 EHRR 97 [51].

> proceedings was excessive or not. The early jurisprudence seems to have been influenced by the notion of complexity but the later case-law has not confirmed this approach. …The *only* decisive element is, in fact, the way in which the authorities dealt with the case. Whether the case is complex or not is in essence entirely irrelevant.[167]

For some time now, the ECtHR has found violations of Article 6 where a backlog of the domestic court system has caused delays and adequate measures were not taken to manage the situation.[168] The ECtHR has long established that domestic courts are 'under an obligation to put sufficient resources at the disposal of the systems for the administration of justice to ensure that unacceptable delays did not occur'.[169] It has also been long established that arguments from States that delays have been caused by the authorities having to deal with excessive caseloads are not acceptable.[170]

This section will examine two areas where the unique context of international criminal justice has resulted in downplaying the conduct of the authorities in assessing undue delay will be analysed:

- *The structure of international tribunals*: the institutional structures of international tribunals in terms of levels of hierarchy and the experience of the judiciary will be examined. It will be suggested that a lack of oversight mechanisms and limited institutional resources in international criminal justice may influence the approach of

[167] Trechsel, above n 48, 145.
[168] *Zimmerman v Steiner v Switzerland (1984) 6 EHRR 17* [29].
[169] Mole and Harby, above n 132, referring to the case of *Guincho v Poland*, 10 July 1984, Series A no. 81.
[170] *Bagetta v Italy* (1987)10 EHRR 325 87/10 [23]; *Eckle* (1983) 5 EHRR 1 [92]; *Milasi v Italy* (1987)10 EHRR 333 [18]; *Abdoella v The Netherlands* (1992) 20 EHRR 585, 24; *Pelissier and Sassi v France* [1999] 30 EHRR 17 [74].

international tribunals to rarely find the conduct of the authorities has caused undue delay.[171]

- *The fused system of international criminal procedure*: incorporating elements of both inquisitorial and adversarial systems of law has seen a shift in the roles and responsibilities of parties to international criminal proceedings from the traditional two-party system comprising the accused and the State, to a multi-party system where the accused must defend themselves against the prosecutor, victims and the international community.[172]

2.2.2.1. The structure of international tribunals

Strikingly, international tribunals have rarely found that the conduct of the authorities has breached the right to be tried without undue delay.[173] The lack of oversight mechanisms in international criminal justice may be one reason why the conduct of the authorities is rarely considered as part of the legal test for undue delay before international tribunals. Domestic jurisdictions often have several levels of appeal with a hierarchical structure of judges. This means that an accused may appeal decisions at several levels, with judges at the highest levels of appeal being more experienced than those at courts of first instance.[174] International tribunals however, often have only one level of

[171] Heinsch, above n 151, 483; Negri, above n 144, 552; Groulx, above n 144; Jalloh and DiBella, above n 144, 247; Knoops, above n 144.
[172] Heinsch, above n 151, 490; Volker Nerlich, 'The Role of the Appeals Chamber' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 963, 966; Jacob N. Foster, 'A Situational Approach to Prosecutorial Strategy at the International Criminal Court' (2016) 47(2) *Georgetown Journal of International Law* 439, 493.
[173] See discussion Chapter 4 pages 202-207.
[174] Nerlich, *The Role of the Appeals Chamber*, above n 172.

appeal with all judges being equal. For example, at the ICC it has been argued that:

> … judges of the Appeals Chamber are coming from the same pool of judges as those of the Pre-Trial and Trial Chambers. There is no hierarchy in status between the judges of the Appeals Chamber on one hand and the judges of the other Chambers on the other hand ... It is arguably for that reason that the Appeals Chamber has held that the other Chambers of the Court are not 'inferior courts' vis-à-vis the Appeals Chamber … [I]t is submitted that this peculiarity has an impact generally on the role of the Appeals Chamber.[175]

It has therefore been suggested that the Appeals Chamber has taken a 'cautious approach' to the exercise of power, exercising 'judicial restraint', with judgments being described as 'generally 'minimalist' and providing only as much reasoning and explanation as is strictly necessary.'[176]

The legitimacy of international tribunals depends on a number of factors including how answerable it is to an authority, transparency in decision making, how it appoints organs of the institution and how accountable it is to its constituency.[177] It has been argued that 'lack of a legislature' linked to international tribunals means that they are 'independent of a legal system' and have been described as 'free-floating' and 'often seemingly with little accountability.'[178] While the purpose of regional human rights courts is to review the application of fair trial rights in member States, international tribunals have considered delays that have occurred within their own jurisdiction, and as discussed above, all judges appointed to international

[175] Ibid 965-966.
[176] Ibid 978-979.
[177] Antonio Cassese, 'The Legitimacy of International Criminal Tribunals' (2012) 25 *Leiden Journal of International Law* 491, 493.
[178] Larry May and Shannon Fyfe, 'The Legitimacy of International Criminal Tribunals' in Nobuo Hayashi and Cecilia Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press, 2017) 31.

tribunals are of equal experience.[179] Problems with accountability, particularly in the absence of any independent oversight mechanisms, along with the relative experience of judges at appeal level, may therefore mean that there is a reluctance to find fault in the conduct of the authorities.[180]

Although the defence is subject to particular resource limitations in international criminal law, as institutions, international tribunals generally operate in the face of limited financial resources and personnel.[181] While regional human rights courts have imposed a duty on States to organise their legal systems in a way that allows them to meet the reasonable time requirement, international tribunals have justified lengthy proceedings on the grounds of resource limitations.[182] For example, in the ICTR case of *Bizimungu*, resource limitations such as a lack of courtroom space, personnel and facilities were relied on to excuse delays in proceedings.[183] In this way, international tribunals have used resource limitations to justify and explain

[179] Nerlich, *The Role of the Appeals Chamber*, above n 172, 966.
[180] See Jamie Mayerfield, 'Who Shall be the Judge: The United States, the International Criminal Court, and the Global Enforcement of Human Rights' (2003) 25 *Human Rights Quarterly* 93, 125. Mayerfield has argued that while judges and prosecutors of the ICC are accountable to member states and may be elected and removed through the Assembly of State Parties, the ICTY and ICTR are accountable to the UN Security Council and it has been argued that this means they are accountable to 'five states whose privileged position allows them to subject others to rules not binding on themselves' which is the 'essence of unaccountable power'.
[181] *The Prosecutor v Bizimungu et. al*. (*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*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 3 November 2004).
[182] See Chapter 4 pages 203-205.
[183] *The Prosecutor v. Bizimungu* (*Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial Without Undue Delay - Article 20(4)(c) of the Statute of the Tribunal*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-99-50, 23 June 2010) [16]-[17].

delays, which is in direct opposition to the approach of the regional human rights courts where organisational failings are not tolerated.[184]

The approach of international tribunals to examining the conduct of the authorities involves some implicit recognition of resource limitations in international criminal justice. The limited resources of the ICC, which has a greater geographical mandate yet receives less funding than the ICTY and ICTR, has already been identified as a factor hindering its ability to conduct 'open-ended comprehensive investigations'.[185] These institutional restraints may mean that international tribunals are more willing than regional human rights courts to tolerate delays caused by organisational failings, as they see these factors as part of the context international criminal law operates within. This approach, however, may have a long-term impact on the fairness and legitimacy of international criminal proceedings if budgetary restraints can be used to justify infringements on due process rights.

2.2.2.3. Shifting the balance between parties in international criminal justice

The increasing emphasis on victims' rights in international criminal law coupled with the frequent rhetorical assertions that the purpose of international criminal law is to secure justice for victims has shifted the balance between parties to international criminal proceedings to the detriment of the accused.[186] Traditionally, criminal proceedings operate within either an

[184] See discussion Chapter 4 pages 198-201.
[185] Foster, above n 172, 493.
[186] Sarah Nouwen, 'Justifying Justice' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 327, 340; Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal

adversarial or inquisitorial justice system with two distinct parties: the accused and the State. In an adversarial system, the prosecutor will argue on behalf of the State with an impartial judge presiding, who has ultimate responsibility for the overall fairness of the trial and protecting the rights of the accused. On the other hand, in inquisitorial proceedings the judge takes an active role and the prosecutor and defence are more passive throughout proceedings.[187] In international criminal proceedings, elements of inquisitorial and adversarial legal systems have been fused to create a unique hybrid system. The result has seen a shift in the balance of responsibilities of the parties to proceedings so that both the prosecutor and Trial Chamber take an active role in proceedings. As Heinsch has explained:

> …one probably can say that the main difference between the two systems is a shift of responsibility. While in an adversarial system, it is of course, the responsibility of the parties to take care of the development of their case, in inquisitorial proceedings this responsibility has shifted to the judges and the parties only have the possibility to suggest a possible way in which the proceeding should be led. [188]

This shift in responsibility has also tipped the balance of power in respect of the position of parties with the Prosecutor, judiciary and victims actively participating in proceedings. Whereas the accused is generally faced with one

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Court: The Gap between Juridified and Abstract Victimhood' (2013) 76 *Law & Contemporary Problems* 235, 239; Julia Geneuss, 'Obstacles to Cross-fertilisation: The International Criminal Tribunals' "Unique Context" and the Flexibility of the European Court of Human Rights' Case Law' (2015) 84 *Nordic Journal of International Law* 404, 412; Goran Sluiter, 'Human Rights Protection in the ICC Pre-Trial Phase' in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 461; Stephen Smith Cody, 'Procedural Justice, Legitimacy, and Victim Participation in Uganda' in Nobuo Hayashi and Cecilia M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press, 2007) 377; Frederic Megret, 'In whose name? The ICC and the search for constituency' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 38. See also, discussion in Chapter 1 pages 8-11 and Chapter 2 page 71-72.

[187] See Jacqueline S. Hodgson, 'The French Prosecutor in Question' (2010) 67(4) *Washington and Lee Law Review* 1361.

[188] Heinsch, above n 151, 490.

opponent in domestic criminal proceedings where the Prosecutor represents the interests of victims, before international tribunals, victims may also ask questions of the accused.[189] In addition, the accused may also be required to respond to questions from a judge who has taken an active role in proceedings. This complicates the role of the defence who may be required to defend themselves against a range of parties and respond to questions from a variety of sources.

As examined in Chapter 2, the balance of power is further disturbed in international criminal law by the increased prominence of victims in international criminal proceedings. It has been suggested that a spotlight on victims' rights has 'permeated the discourse in international criminal law', with the Victim Participation Scheme and with the creation of the Trust Fund for Victims and the Office of Public Counsel for Victims acting as 'just some of the visible indicators of an increasing focus on the victim, not to mention the burgeoning literature on this topic.' [190] The overall effect of the shift is potentially profound:

> The integration of victims into a traditional party proceeding will normally threaten the careful balance which is usually upheld between the Prosecution and Defence, disturbing an equilibrium which has been reached over centuries of legal tradition … a stronger role of the presiding judge is inevitable in order to prevent that that the Defence is faced with actually two counterparts, and in the end is simply outnumbered. Only a proactive bench will be able to uphold the balance which is necessary for a fair trial that respects the rights of the accused and is nevertheless efficiently managed.'[191]

[189] *Rome Statute.*
[190] Kochhar and Hieramente, above n 5, 229-230.
[191] Heinsch, above n 151, 494-495.

It becomes particularly difficult to highlight breaches of the rights of those accused of gross human rights violations where the focus of international criminal proceedings is clearly and perhaps increasingly on the victims. The defence often has limited resources at best,[192] and the odds are stacked against them in terms of the number of parties they are required to respond to and the increased number of opponents they may face. Given this victim focus in international criminal law and that the accused must answer both to victims and the prosecutor, the conduct of the authorities is rarely considered a reason for finding an accused has been subjected to undue delay before international tribunals.

The shift in responsibilities of the prosecutor and judges in international criminal proceedings is particularly evident in international tribunals' approach to applying the law of undue delay. An accused must not only prove that they were subjected to delays, but also that they suffered prejudice as a result of the delay, that the actions of the prosecutor or the authorities were responsible for the delay and that these actions did not justify or explain the delay.[193] As such, the task of demonstrating why the prosecutor contributed to delays falls to the accused. This means that rather than respond to assertions made by the prosecutor about why their actions did not contribute to delays, the accused must argue this directly to judicial authorities. For example, in the ICTR case of *Bizimungu*, the Trial Chamber held that the accused had failed to demonstrate the conduct of the authorities had contributed to the delay because they had not demonstrated 'the relative significance of the judges'

[192] See above n 171.
[193] See discussion in Chapter 4 pages 202-207.

workload distribution, overlapping duties, and outside activities, or the relative significance of any related staffing issues, for the conduct of this case.'[194] In these circumstances, the accused could be regarded as having to defend themselves against both the prosecutor and the judges, which is an almost impossible burden to discharge.

A consideration of what is at stake for the applicant is at the heart of the rationale for the right to be tried without undue delay, in that it reinforces the need to make sure that the accused is not kept too long in a state of uncertainty about their fate.[195] A consideration of what is at stake for the accused was only added to the legal test after the other criteria for assessing the reasonableness of the delay had been established.[196] As stated by the IACHR:

> [T]he adverse effect of the duration of the proceedings on the judicial situation of the person must be taken into account; bearing in mind, among other elements the matter in dispute. If the passage of time has a relevant impact on the judicial situation of the individual, the proceedings should be carried out more promptly so that the case is decided as soon as possible.[197]

A consideration of what is at stake for the accused was therefore added as the fourth criterion after considering that the three criteria alone 'may not be

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[194] *Bizimungo Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [35]. For other examples where the accused was required to demonstrate actions of the judicial authorities in failing to set trial dates or deliver judgments in a timely manner, see *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No. ICTR-01-69-T, 17 November 2009) [49]; *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-97-31-A, 1 April 2011) [241].
[195] See above nn 52-53.
[196] *Jaramillo v Columbia* (Merits, Reparations and Costs) (Inter American Court on Human Rights, Valle Series C No. 192, 27 November 2008 [155] ('*Jaramillo'*).
[197] *Jaramillo* (Inter American Court on Human Rights, Valle Series C No. 192, 27 November 2008)[155]. (See also paras 8-14 of the Separate Opinion of Judge Garcia Ramirez appended to this case).

enough and to provide a convincing conclusion' about the reasonableness of the delay.[198]

While a consideration of what is at stake for the accused is given due consideration before regional human rights courts, this criterion is rarely considered before international tribunals.[199] As previously stated, the purpose of the reasonable time requirement is to ensure an accused does not remain too long in a state of uncertainty as to their fate.[200] An accused before international tribunals is often detained for long periods of time in a foreign country, has limited contact with their families and friends, and are being tried in a language they do not understand. As such, the impact of lengthy proceedings may be greater on an accused before international tribunals. Despite this, international tribunals have rarely considered this criterion and where it has been examined, they have rarely found the accused suffered prejudice as a result of the length of proceedings.[201]

An accused in international criminal proceedings is different to an accused in domestic criminal proceedings. It has been argued that the 'international criminal' differs from the 'ordinary criminal' and international tribunals have failed to sufficiently account of for these differences in addressing mass atrocity.[202] In lengthy international criminal proceedings, delay can prejudice

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[198] *Álvarez* (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006) [129] [35]-[36].
[199] Self-representation was not identified as predominant theme in the case law of international tribunals.
[200] *Stögmüller*, Merits, App No 1602/62, A/9, [1969] ECHR 2 [5]; *H v France* (1990)12 EHRR 74 [58]; *Bottazzi* [1999] ECHR 62. See discussion in Chapter 3 pages 115-116.
[201] See discussion in Chapter 5 pages 257-263.
[202] Kochhar and Hieramente, above n 5, 224.

the accused in a number of ways, most notably, the passing of time can affect the reliability of witness testimony and result in degradation of evidence.[203] However, lengthy delays in proceedings can also have a significant impact on the personal circumstances of an accused in detention. For example, in the ICC case of *Katanga*, the defence explained a number of reasons why the accused had decided to withdraw their appeal, including personal circumstances:

> And finally, well, it barely needs me to say so, the individual circumstances of the accused; 24 at the time of the crime; 37 now; 10 and a half years in prison, a very critical time. What is important here is that there is a compelling need to him, with the death of his father, his brother, the responsibilities that fall on him within an African society to get home and support his family, not just his immediate family his adopted children, but also the wider family as well. And in my submission, given his youth, relative youth at the time of the crime, his age now, the time spent in custody, it would be better if his homecoming is sooner rather than later.[204]

Given the substantial length of time Mr Katanga had already served, rather than raising the issue of delay, it was decided that strategically, it was better to wait for a review in the length of his sentence.[205] This shift away from the accused further obfuscates their rights and potentially contributes to international tribunals' tendency to focus on the rights of victims and witnesses, while downplaying delays caused by the authorities.

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[203] *Prosecutor v. Bizimungu et.al.* (*Decision On Prosper Mugiraneza's Third Motion To Dismiss Indictment For Violation Of His Right To A Trial Without Undue Delay*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No. ICTR-99-50-T, 10 February 2009) [22-23].

[204] *The Prosecutor v Germain Katanga* (*Reduction of Sentence Hearing*) (International Criminal Court, *Appeals Chamber*, Case No ICC-01/04-01/07, 6 October 2014) [12].

[205] See *The Prosecutor v Germain Katanga* (*Corrigendum to Defence Observations on Sentencing*) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 11 April 2014) [121], where the defence argued that 'the various delays in the present case, which extend from delay over joinder of the accused to the various and unforeseen delays in the trial process merit being taken into account in mitigation of sentence.'

3. Conclusion

This chapter has sought to provide an analysis of the right to a fair trial and the law of undue delay. In doing so, it has highlighted both similarities and differences in the approach of regional human rights courts and international tribunals to interpreting the right to a fair trial and the law of undue delay. The right to a fair trial and the law of undue delay is well-established in the case law of regional human rights courts and international tribunals, yet there are differences in the interpretation of these rights before international tribunals that relate to the unique context in which they operate. While the approach of regional human rights courts in interpreting and applying these rights has been consistent, the approach of international tribunals has been more nebulous. While a cumulative approach evaluating the overall fairness of proceedings is generally preferred by regional human rights courts, this has not been fully adopted by international tribunals. Although regional human rights courts and international tribunals use the same methods for determining the length of proceedings and apply the same criteria to determine if this right has been breached, international tribunals are willing to tolerate much lengthier proceedings than the regional human rights courts, commonly citing the complexity of the case and the diligent conduct of the authorities to justify seemingly excessive delays.

This chapter also considered some examples of how human rights oriented approach in applying the right to a fair trial and the right to be tried without undue delay tends to promote the interests of victims, the prosecutor and the international community over those of the accused. A number of factors

related to the unique context international criminal law operates within also tend to promote the rights and interests of parties other than the accused. In the first part of this chapter, it was demonstrated that a human rights approach in international criminal law has extended the scope of fair trial rights and demonised the accused, which has negatively impacted on the provision remedies for fair trial infringements. The second part of this chapter considered how in examining the complexity of proceedings and conduct of the authorities, the interests of victims, the prosecutor and international community prevail over those of the accused due to the unique context in which international criminal law operates. Self-representation, complex investigations and limited defence resources in international criminal trials have served to increase the overall complexity of proceedings and negatively impacted on the fair trial rights of the accused. The unique roles of victims in international criminal trials, the adversarial and inquisitorial role of the prosecutor in a hybrid system of law, and differences in institutional structures have promoted the rights of parties other than the accused. These themes will be examined further in Chapters 4 and 5 in critically analysing the interpretation and application of the law of undue delay before regional human rights courts and international tribunals. While this chapter has relied on leading cases to determine the nature and scope of these rights and identify general trends, the following chapters will provide a detailed examination of how these rights have been interpreted and applied in practice before regional human rights courts and international tribunals.

Chapter 4 – Analysis of the criteria for assessing undue delay

This chapter will examine the way in which regional human rights courts and international tribunals have applied the criteria for assessing whether an accused has been subjected to undue delay. The purpose of this chapter is to examine differences in the way that regional human rights courts and international tribunals have applied the criteria for assessing undue delay by analysing the text of judgments to identify the object and purpose of the law of undue delay. One of the main conclusions of this chapter is that both regional human rights courts and international tribunals aim to apply the law of undue delay in a manner that upholds that fundamental rights of the accused and promotes justice and fairness. Yet while regional human rights courts do in fact uphold these principles and commonly find that lengthy delays have infringed the rights of the accused, international tribunals routinely downplay delays caused by prosecutorial and judicial authorities and justify lengthy trials because of the complexity of the case.

This chapter is divided into two parts. The first part of this chapter will examine the workload of regional human rights courts and international tribunals. It will analyse the length of proceedings at international tribunals and examine the prevalence of cases that have considered the criteria for assessing undue delay. While the length of international criminal proceedings

has been examined in detail elsewhere,[1] a brief analysis of the length of completed cases at the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC) will provide a baseline for comparison with the length of proceedings in the case samples in order to consider to what extent any findings can be generalised. Finally, features of the case sample in terms of length and number of accused will be compared to the general caseload of regional human rights courts and international tribunals.

The second part of this chapter will analyse judgments that applied the criteria for assessing undue delay in the European Court on Human Rights (ECtHR), Inter American Court on Human Rights (IACHR), ICTR, ICTY and ICC. Drawing on grounded theory methodology to identify the reasoning processes used to explain findings on undue delay, the analysis will then apply teleological interpretation to identify the underlying object and purpose of the law of undue delay as defined in the case law. The discussion will focus on the application of the criteria at the ECtHR and ICTR because these two institutions had the greatest number of cases considering the law of undue delay. While there were fewer cases at the IACHR and ICTY that considered the law of undue delay, the reasoning processes in these courts and tribunals will also be examined to consider similarities and differences to the

[1]Jean Galbraith, 'The Pace of International Criminal Justice' (2009) 31 *Michigan Journal of International Law* 31; Alex Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered' (2009) 50(2) *Harvard International Law Journal* 323; Gillian Higgins, 'The impact of the size, scope and scale of the Milosevic trial and the development of Rule 73bis before the ICTY' (2009) 7(2) *Northwestern Journal of International Human Rights* 239; Stephane Bourgon, 'Procedural Problems Hindering Expeditious and Fair Justice' (2004) 2 *Journal of International Criminal Justice* 526; Krit Zeegers, *International Criminal Tribunals and Human Rights: Adherence and Contextualisation* (TMC Asser Press, 2016); Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press, 2016).

approaches of the ECtHR and ICTR. Reasoning processes that are specific to international tribunals will first be considered before examining those that are common to both regional human rights courts and international tribunals. It will be shown that while regional human rights courts and international tribunals used similar reasoning in upholding or denying an accused's right to be tried without undue delay, such as the protection of fundamental human rights and the promotion of justice and fairness, the outcome for an accused was substantially different.

This chapter will conclude by considering two main differences identified in the reasoning of international tribunals in cases that applied the criteria for assessing undue delay. While regional human rights courts commonly examined all of the criteria for assessing if an accused has been subjected to undue delay to consider the circumstances of the case in making a finding, international tribunals either rarely used the criteria or limited their application of the criteria to a balancing exercise between the complexity of the case and the actions of the authorities or the accused. The second difference related to the way in which international tribunals balanced competing rights and objectives. In considering undue delay, the focus of regional human rights courts is on balancing a range of competing fair trial rights of the accused, for example, the right to have adequate time to prepare one's defence and the right to be tried without undue delay. Given this balancing exercise is about considering fair trial rights, the emphasis before regional human rights courts has remained on protecting the rights of the accused. International tribunals on the other hand have much broader objectives than domestic criminal

proceedings and must balance a range of competing rights, interests and objectives for both the accused and other parties. The overall result has been that in considering the right to be tried without undue delay, the unique context in which international tribunals operate has tipped the balance in favour of the prosecutor, victims and witnesses at the expense of the fair trial rights of the accused. This chapter will conclude by examining possible reasons for these differences and consider how the approach of international tribunals has impacted on the right of the accused to be tried without undue delay. Through an analysis of the text of judgments, this chapter will demonstrate that while international tribunals ostensibly strive to promote and protect human rights and maintain principles of fairness and justice in applying the law of undue delay, they rarely to do in practice because they prioritise other objectives of international criminal justice.

1. Undue delay in the work of the courts and tribunals

The right to be tried within a reasonable time is the most common article considered by the ECtHR. A violation of the right to a fair trial has been found in 40% of cases, with 21% of those violations relating to the right to be tried within a reasonable time.[2] While the ECtHR has delivered approximately 1000 judgments a year on average since 2010,[3] the workload of the ICTY and ICTR is modest in comparison, with the ICTY having delivered judgments for 106 accused and the ICTR for 76 accused persons in total over approximately 20

[2] European Court of Human Rights, *Overview 1959-2016* (March 2017) <http://www.echr.coe.int/Documents/Overview_19592015_ENG.pdf>
[3] Ibid.

years.[4] The workload of the IACHR more closely resembles that of the ICTR and ICTY, having delivered a total of approximately 300 judgements in 37 years of operation.[5] The ICC to date has considered 25 cases and completed three cases that involved three accused.[6] Of these cases, there were two where the accused was found guilty and one where the accused was acquitted.[7]

ECtHR cases in the sample that considered the issue of undue delay typically involved one accused. Of the 43 cases in the sample, two cases involved two applicants, one case involved five applicants and one case involved 10 applicants.[8] Of the eight cases in the IACHR sample, two cases involved multiple applicants.[9] While there is limited research examining the prevalence of multi-accused trials in domestic criminal proceedings, a study of Federal criminal trials in the United States estimated that 24% of all proceedings

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[4] International Criminal Tribunal for the Former Yugoslavia, *Infographic: ICTY Facts & Figures < http://www.icty.org/en/content/infographic-icty-facts-figures>* accessed on 20 January 2018; International Tribunal for Rwanda, *The ICTR in Brief* <http://unictr.unmict.org/en/tribunal> accessed on 20 January 2018. For the ICTY this figure includes 87 accused were sentenced and 19 who were acquitted and excludes those cases where charges were withdrawn, proceedings terminated, or cases referred to other jurisdictions. For the ICTR this figure includes 64 sentenced and 12 acquitted accused and excludes those cases were referred, where indictments were withdrawn before trial or where the accused died before judgment.

[5] Inter-American Court of Human Rights, *Jurisprudence Bulletin of Inter-American Court of Human Rights No 6* (May-August 2016) <http://www.corteidh.or.cr/sitios/libros/todos/docs/boletin6eng.pdf >

[6] International Criminal Court, *Cases* <https://www.icc-cpi.int/Pages/cases.aspx> accessed 20 January 2018.

[7] Ibid.

[8] *Kaemena and Thonebohn v Germany* (European Court of Human Rights, Fifth Section, Application Numbers 45749/06 and 51115/06, 22 January 2009) ('*Kaemena'*); *Lupker and Others v The Netherlands* (European Commission of Human Rights, Application Number 18395/91, 7 September 1992) ('Lupker'); *Ferrantelli and Santangelo v Italy* (European Court of Human Rights, Court (Chamber), Application Number 19874/92, 7 August 1996) ('*Ferrantelli'*); *O'Reilly and Others v Ireland* (European Court of Human Rights, Court (Fifth Section), Application Number 54725/00, 29 July 2007) ('O'Reilly').

[9] *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002) ('*Hilaire'*); *Case of García Asto and Ramírez Rojas v. Peru* (*Preliminary Objection, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No. 137, 25 November 2005) ('*Asto'*).

involve multiple accused.[10] The overall proportion of trials involving multiple accused before the ICTY was comparable at approximately 30%, whereas the overall rate before the ICTR was half of that for domestic US Federal criminal proceedings (12%).[11] While the ICTY had a greater proportion of cases involving multiple accused than the ICTR, of these cases, the ICTR had a higher number of accused in each case. Almost half of the cases with multiple accused at the ICTR involved four accused persons or more, whereas this figure is only 25% at the ICTY.[12] Galbraith's 2009 study reported differences in the correlation between number of accused and the length of proceedings at the ICTY and ICTR.[13] Interestingly, the study found a negative correlation between the number of defendants in a trial and the trial time per defendant at the ICTY, with the trial time per defendant progressively declining as the number of defendants increased.[14] This pattern was not replicated at the ICTR, and while the reasons for this were unclear, it was found that multi-accused trials at the Rwandan tribunal took almost as long per defendant as single accused trials.[15] Therefore while part of the rationale for multi-accused trials is to increase trial efficiency, these trials also have the potential to increase the overall length of proceedings for individual accused. In deciding to issue joint indictments, trial efficiency must therefore be balanced with the need to protect the right of the accused to be tried without undue delay.

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[10] Andrew D. Leopold and Hossein A. Abbasi, 'The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study' (2006) 59 *Vanderbuilt Law Review* 349, 366. This study examined Federal criminal proceedings between 1999 and 2003.
[11] International Criminal Tribunal for the Former Yugoslavia, *The Cases* < http://www.icty.org/en/action/cases/4> accessed on 26 January 2018.
[12] Of the completed cases at the ICTY and ICTR, 29% comprised of two or more accused at the ICTY, compared with 15% at the ICTR.
[13] Galbraith, above n 1, 126.
[14] Ibid. Galbraith cautioned that there was limited data available which showed a correlation only, not a causal link.
[15] Ibid.

1.1. Length of proceedings at international tribunals

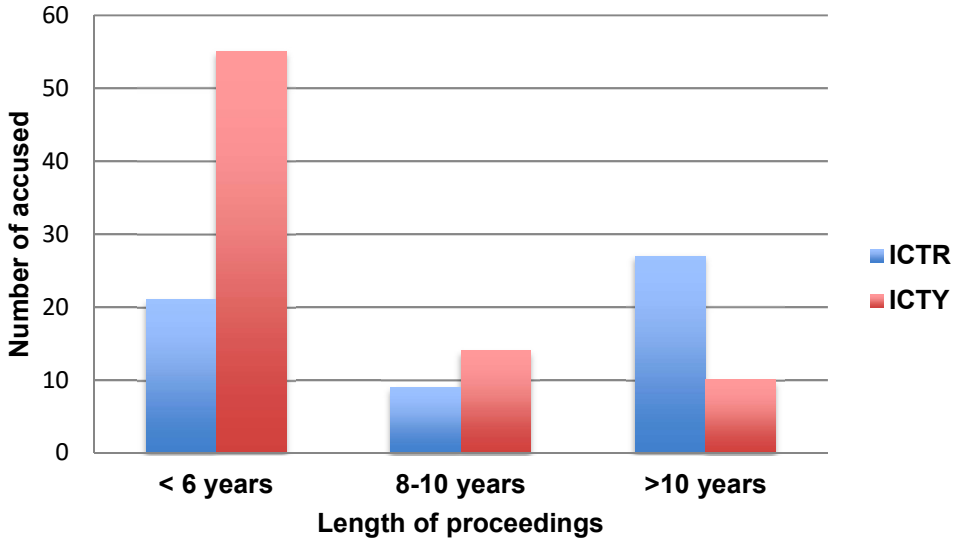
As highlighted earlier in this chapter, the length of proceedings at international tribunals has been extensively examined.[16] While this section does not seek to replicate these studies, in order to compare the length of proceedings in the case sample with the overall length of proceedings at international tribunals, baseline figures of the duration of proceedings at the ICTY, ICTR and ICC are required. All of the calculations in this section have been based on individual accused, rather than individual cases.[17] Given a significant number of cases before international tribunals involved multiple accused, considering the average length of proceedings for each individual rather than each case assists in gaining a better understanding of the scope of the problem of undue delay, and the proportion of accused before international tribunals that have been impacted by lengthy proceedings.

Trials before the ICTY have proceeded at a slightly faster pace than at the ICTR. Figure 1 groups the length of proceedings at the ICTY and ICTR into three time periods: greater than six years, eight to 10 years, and greater than 10 years. At the ICTY, proceedings have lasted under six years for just over half of the accused, whereas at the ICTR, only 28% of accused had proceedings completed in under six years, with 35% of accused involved in proceedings of over 10 years duration (27 accused). At the ICTR, proceedings were over eight years in length for 47% of all accused persons, and at the ICTY, proceedings were greater than eight years in length for

[16] Above n 1.
[17] For example, where there are six co-accused in one case, I have calculated the average figures by adding the length of proceedings for each accused together, and dividing by the total number of accused.

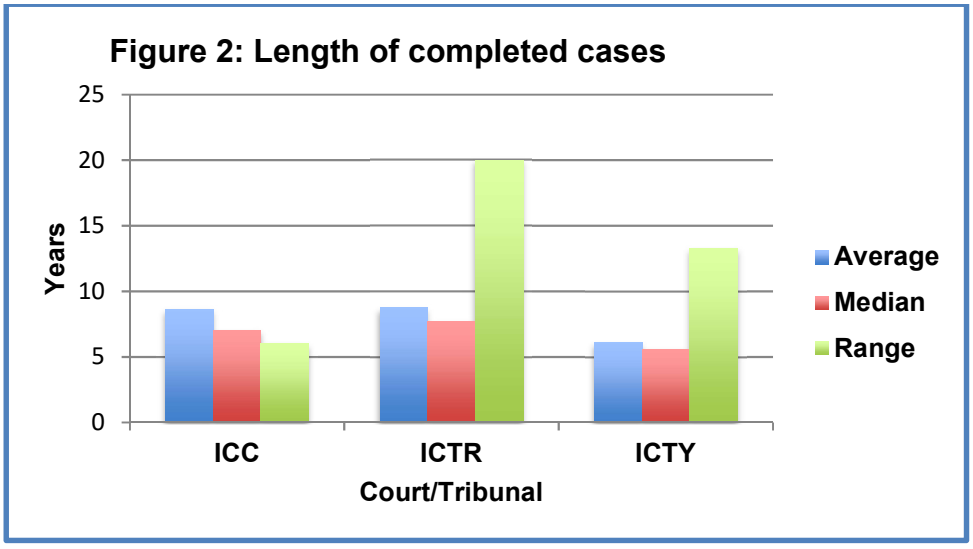
approximately 23% of accused persons. In the eight to ten year category, the majority of completed cases for both Tribunals fell within the upper range.

Figure 1: Categorising lengths of proceedings at the ICTR and ICTY



There was much greater variance in the length of cases at the ICTR compared to the ICTY. This finding is supported by Galbraith's study, which reported that there are wide ranges at every stage of proceedings at the ICTY and ICTR, and examples of cases at the upper end of the Tribunals' range 'provide fair fodder for anecdotal complaints about the length of international criminal justice.'[18] As Figure 2 shows, the range in the length of proceedings for the ICTR was much greater than for the ICTY and ICC.

[18] Galbraith, above n 1, 121.



For the three completed cases at the ICC, the accused in the *Chui* case was acquitted after seven years, and in the two cases where the accused was convicted, the *Katanga* case lasted 6.3 years and the *Lubanga* case a total of 12.4 years.[19] While the small number of completed cases is not useful for a statistical examination, conclusions can be drawn from these judgments and will be included in the analysis.

1.2. Case selection

Only those cases that applied the criteria for assessing undue delay were included in the case sample. Cases that mentioned the term 'undue delay' but did not interpret or apply the criteria were excluded from the analysis.

[19] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (International Criminal Court, Case No ICC-01/04-01/07 OA 8); *The Prosecutor v Thomas Dylio Lubanga* (International Criminal Court, Case No ICC-01/04-01/06); *The Prosecutor v Ngudjolo Chui* (International Criminal Court, Case No ICC-01/04-02/12).

1.2.1. Regional human rights courts

The aim of selecting cases for the case sample was to select judgments that examined the issue of undue delay in criminal proceedings where the accused was charged with a serious offence.[20] Cases that did not deal exclusively with criminal proceedings were eliminated, and cases were selected based on the seriousness of the offence. Cases were then manually reviewed with only criminal cases involving serious offences included in the case sample.

1.2.2. International tribunals

Results obtained from a database search for cases considering the issue of undue delay were manually reviewed to identify cases where the criteria for assessing undue delay were considered.[21] Cases on appeal have been excluded from the analysis because final determinations on the issue of undue delay have not yet been made. A summary of the length of proceedings in the case sample for international tribunals is found in Appendix 1.

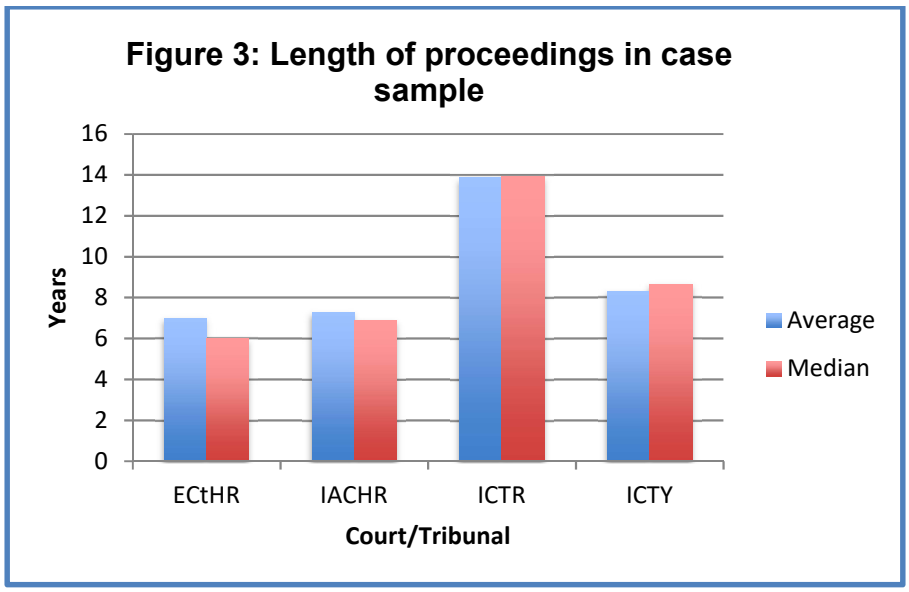
1.3. Analysis of the length of proceedings in the case sample

As shown in Figure 3, the case samples for regional human rights courts both had an average length of proceedings of approximately seven years. This is

[20] This was to ensure that cases were matched as much as possible to the seriousness of offences tried before international tribunals. Serious offences have been defined to include kidnapping, robbery and offences that involve physical violence/assaults.

[21] Each database had search limitations so a range of databases were used including Westlaw, Oxford Reports on International Law, Worldlii and the databases on the websites of the ICTR, ICTY and ICC. A number of cases were excluded where the issue of undue delay was raised, in the context of considering whether a decision or motion could potentially result in undue delay.

longer than the average length of complex domestic criminal proceedings, which is estimated at four to five years from custody to completion.[22] The case sample for the ICTY had an average length of proceedings slightly higher than regional human rights courts (8.31 years) and the ICTR averaged the longest criminal proceedings (13.75 years). The ICC cases have been excluded from this analysis given the low number of completed cases.



1.3.1. Regional human rights courts

A total of 43 cases from the ECtHR were found to meet the criteria for analysis. These cases considered a range of domestic criminal proceedings for serious offences including murder, attempted murder, manslaughter, rape and serious sex offences (for example, those involving minors), kidnapping, and robbery. While it is recognised that it is difficult to match domestic criminal cases for seriousness with cases before international tribunals that hear cases on genocide, war crimes and crimes against humanity, including only those cases that involved the most serious criminal offences before domestic

[22] Galbraith, above n 1, 102.

courts attempted to control for this factor as much as possible. In addition, while some offences before international tribunals involved mass murder, torture and sexual offences, a number of crimes before international tribunals have followed from a single murder or sexual assault and are therefore comparable to those offences tried in domestic criminal courts. Given the ECtHR case sample is small in comparison to the overall number of cases at the ECtHR, findings in this study cannot be generalised and are only representative of the selected cases.

The ECtHR found that the reasonable time requirement in Article 6(1) had not been met in 91% of cases in the sample analysed.[23] Of the four cases where the court found that the reasonable time requirement had been met, in two cases it was found that the accused had contributed significantly to the length of proceedings.[24] For example, the Court held that the accused had not been subjected to undue delay where 'belated, ill-founded or meaningless motions filed by the applicant had contributed significantly to the length of proceedings',[25] or where the accused had absconded and extradition proceedings had lengthened the criminal trial.[26] In the third case, the accused lost victim status due to the domestic court recognising and providing a remedy for the delay,[27] and in the fourth case, the length of proceedings alone

[23] The ECtHR held that the reasonable time requirement was not met in 39 of the 43 cases.
[24] *Rydz v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 13167/02, 18 December 2007) ('*Rydz*'); *Zandbergs v Latvia* (European Court of Human Rights, Application No 71092/01, 20 December 2011) ('*Zandbergs*').
[25] *Rydz* (European Court of Human Rights, Court (Fourth Section), Application Number 13167/02, 18 December 2007) [83].
[26] *Zandbergs* (European Court of Human Rights, Application No 71092/01, 20 December 2011) [85-87].
[27] *Dzelili v Germany* (European Court of Human Rights, Court (Third Section), Application Number 65745/01, 10 November 2005) ('*Dzelili*'); *Rydz* (European Court of Human Rights, Court (Fourth Section), Application Number 13167/02, 18 December 2007).

(one year and eight months) was considered insufficient to breach the reasonable time requirement.[28] The length of proceedings in the ECtHR case sample ranged from 18 months through to almost 17 years.

One reason why the average length of proceedings in the ECtHR case sample was greater than the expected length of domestic criminal proceedings may be because cases are only referred to the Court after all local remedies have been exhausted. This means that cases before the ECtHR are likely to be lengthier and perhaps also more likely to be found in breach of the reasonable time requirement. This analysis will compare the application of the law of undue delay in domestic criminal settings with that before international tribunals. Therefore, even if the cases in the case sample are at the more extreme end of the average length of domestic criminal proceedings, what is relevant for the purpose of this study is the way in which the Court applied the criteria for assessing undue delay, rather than the length of delay itself.

A total of eight cases involving 88 accused were found to meet the criteria for inclusion in the analysis for the IACHR.[29] These cases involved a range of offences including massacre, drug trafficking, murder, rape and terrorism. As with ECtHR, the IACHR found that the reasonable time requirement had been breached in the majority of cases (seven of the eight cases analysed).[30] As

[28] *Boris Popov v Russia* (European Court of Human Rights, Court (First Section), Application Number 23284/04, 28 October 2010) ('*Popov*').
[29] See *Hilaire* (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002). There were 53 accused in this case.
[30] See *Case of Caesar v. Trinidad and Tobago* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 123, 11 March 2005). There was no breach of

for the ECtHR, the high number of breaches found and length of average proceedings may also be explained by the way in which proceedings are referred to the court. The length of proceedings in the IACHR case sample ranged from four years and two months to 14 years, a slightly smaller range than for the ECtHR case sample.

1.3.2. International tribunals

A total of 13 cases involving 32 accused were considered as part of the analysis for international tribunals. The majority of these cases were from the ICTR, with a small number of cases being included from the ICTY. Given the relatively small workload of international tribunals, the proportion of cases where undue delay was considered by the ICTR is relatively high.[31] There were very few cases before the ICTY that considered the criteria for assessing undue delay, and the first case on this issue was not heard until 2007.[32] Possible reasons for the differing approach between the ICTY and ICTR will be discussed towards the end of this chapter. There have been no cases where the criteria for assessing undue delay have been considered before the ICC. The analysis of the ICTY's and ICTR's interpretation of the right to be tried without undue delay will therefore be drawn upon in Chapter 6 to determine if any recommendations can be made about the application of the criteria for assessing undue delay at the ICC.

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the reasonable time requirement found in this case because the Constitution of Trinidad and Tobago does not provide for the right to be tried within a reasonable time.

[31] The issue of undue delay was considered for 34% of all accused acquitted or convicted before the ICTR.

[32] *Prosecutor v Perišić* (*Decision on motion for sanctions for failure to bring the accused to trial without undue delay*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-81, 23 November 2007) (*'Perišić'*).

1.3.2.1. ICTR

A total of 10 cases involving 27 accused persons were found to meet the criteria for analysis for the ICTR. The criteria for assessing undue delay was considered for 35% of all accused sentenced or acquitted by the ICTR.[33] A higher proportion of accused in the case sample (26%) were acquitted when compared with the acquittal rate for all ICTR cases (16%). The tribunal found that the accused had been subjected to undue delay in only 25% of cases in the sample, compared with 91% in the ECtHR case sample. The three cases where it was held that the accused had been subjected to undue delay included both the longest and the shortest cases in the sample.[34]

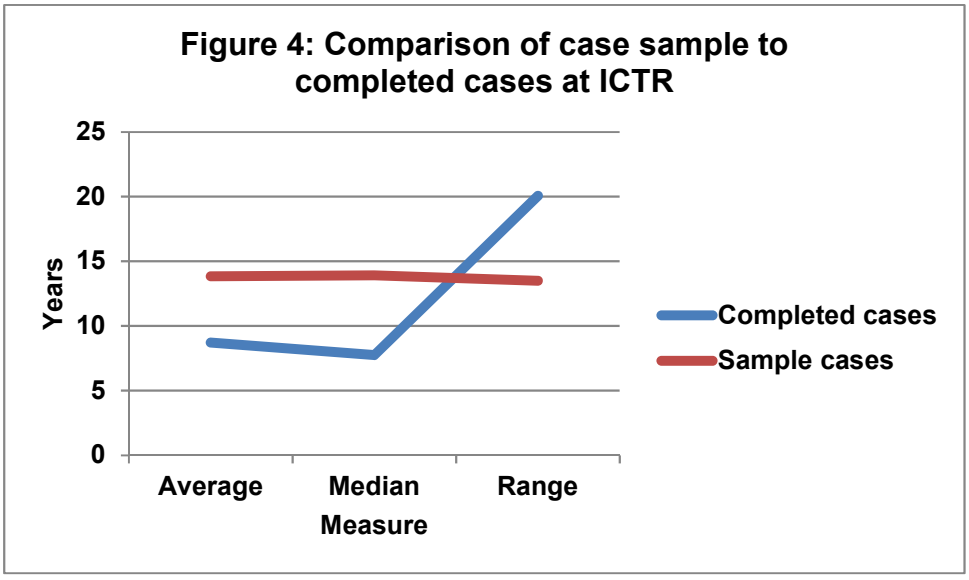


Figure 4 shows that the average length of proceedings in the case sample was higher (13.85 years) than that for all completed cases at the ICTR (9.2

[33] 27 of the 76 accused brought before the ICTR were involved in a case that considered the criteria for assessing undue delay. Of the 76 accused, 61 were sentenced and 14 were acquitted.

[34] *The Prosecutor v Nyiramasuhuko et al.* (International Criminal Tribunal for Rwanda, Case No ICTR-98-42) was the longest case before the ICTR of 240 months. *The Prosecutor v Kajeijeli* (International Criminal Tribunal for Rwanda, Case No ICTR-98-44A) was the shortest case of the sample (82 months). The *Gatete* case was of 120 months duration.

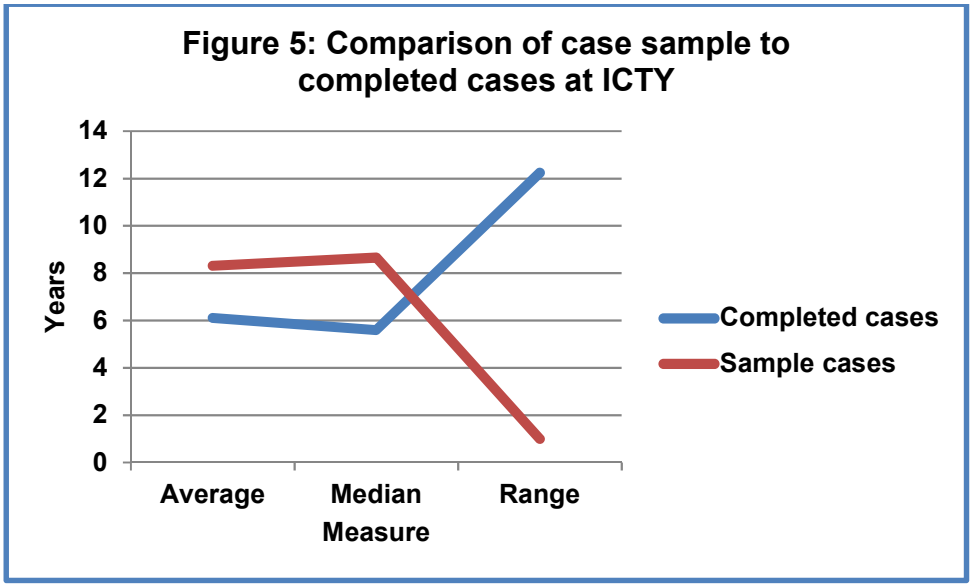
years). The length of proceedings in the sample ranged from approximately seven years through to 20 years, which was less variable than the range for all completed cases at the ICTR. These figures suggest that cases that considered the criteria for assessing undue delay were slightly longer than the average case heard by the tribunal and before the ECtHR.

1.3.2.2. ICTY

Unlike the ICTR, the criteria for determining if an accused has been subjected to undue delay were only considered for a very small number of accused before the ICTY (0.04%).[35] For the ICTY, a total of three cases involving five accused were found to meet the criteria for analysis. The Tribunal found that there had been no violation of the right to be tried without undue delay in three cases, and interestingly, four of the five accused in these cases were acquitted. Possible reasons for the low number of cases before the ICTY considering the law of undue delay will be discussed in the second part of this chapter.

Although there were only a small number of cases in the sample, it can be seen from Figure 5 that the average (8.31 years) and median (8.66 years) length of cases was higher than that of all completed cases at the ICTY, but the range in the sample was less variable than for all completed cases. The length of proceedings in the ICTY case sample was also shorter than those in the ICTR case sample.

[35] This is based on 106 accused brought before the ICTY (19 acquitted and 87 sentenced) as reported on the ICTY website. See above n 11.



2. Analysis of criteria for assessing undue delay

The case samples were analysed using aspects of grounded theory methodology outlined in Chapter 2: initial, focused and theoretical coding.[36] The section of the judgment that considered the criteria for assessing undue delay was identified for each case and then analysed and coded until no further codes could be identified and saturation was reached. Table 1 provides an example of initial, focused and theoretical coding for one section of text from an ICTR case. A complete list of theoretical coding used in this thesis is found in Appendix 2.

[36] See Chapter 2 pages 96-99.

Table 1: Example of ICTR coding

Text for analysis	Initial coding	Focused coding	Theoretical coding
There is no doubt that the proceedings are particularly complex, due inter alia to the multiplicity of counts, the number of accused, witnesses and exhibits, and the complexity of the facts and the law, and that the proceedings can be could be expected to extend over an extended period	Not doubting the complexity of the proceedings Acknowledging lengthy proceedings Explaining reasons for complexity Expecting length proceedings	Providing explanations for lengthy proceedings Acknowledging, expecting and accepting lengthy proceedings Explaining the length of proceedings based on the complexity of the case.	The process of justifying delays on the grounds of complexity

The theoretical coding for each court and tribunal was used to identify the reasoning processes used by judges in considering the criteria for assessing undue delay. This section will first consider those reasoning processes particular to international tribunals. It will then consider reasoning processes that were common to both regional human rights courts and international tribunals. While there were similar reasoning processes identified in the judgments of regional human rights courts and international tribunals, teleological interpretation will be used to examine these reasoning processes in more detail to identify the different objects and purposes of the law of undue delay as viewed by these institutions.

As explained in the introduction to this chapter, the focus of the analysis was on cases from the ECtHR and the ICTR. This was because of the small number of cases at the IACHR, the limited use of the criteria at the ICTY, and that the ICC has only completed three cases to date. This limits the generalisability of the conclusions, however, this will be addressed throughout the analysis by referring to the specific institution where trends were identified. In considering recommendations for the ICC, contextual differences will be taken into account in providing recommendations for application of the criteria for assessing undue delay in the Chapter 6.

2.1. Reasoning processes identified for international tribunals

There were two reasoning processes identified that were unique to the case samples from international tribunals. Firstly, the ICTY rarely used the criteria for assessing undue delay in cases where delay was raised as an issue, and instead used reasoning processes focused on *managing the complexity of the proceedings* as a way of addressing the issue of delay. The second reasoning process identified was that of *viewing international criminal justice and its mandate as unique and distinct* from domestic criminal justice. This reasoning permeated the ICTR's approach to applying the criteria for assessing undue delay and informed its interpretation of the common reasoning processes discussed in the next section. These reasoning processes underpin the ICTR's reliance on the complexity of the case to explain lengthy proceedings and justify findings that the accused was not subjected to undue delay.

2.1.1. Managing complexity to address the issue of undue delay

The almost non-existent use of the criteria for assessing undue delay at the ICTY was one of the most prominent themes to come out of the case analysis. The Tribunal did not apply the criteria until 2007 in the case of *Perišić,*[37] and has rarely used the criteria since.[38] This is despite the fact that proceedings at the ICTY have lasted up to 13 years with 9% of cases lasting more than 10 years.[39] Conversely, the criteria were considered for 38% of accused at the ICTR, generally as a balancing exercise between the complexity of the case and the conduct of the authorities or the accused.[40]

While the reasons for lengthy proceedings have been considered extensively in the literature,[41] there has not been much thought given to the reasons why the criteria for assessing undue delay enjoy such limited use at the ICTY in cases where the issue of undue delay was raised. One possible explanation is that the Tribunal was more efficient than the ICTR and therefore less accused have been subjected to undue delay. This could be as a result of proceedings

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[37] *Perišić* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-81, 23 November 2007).
[38] While the accused may have raised the issue of undue delay in some cases before the ICTY, the criteria for assessing undue delay were not applied. Only those cases where the criteria for assessing undue delay were applied were included in the analysis in this thesis.
[39] See above discussion pages 165-167.
[40] The criteria for assessing if an accused has been subjected to undue delay were considered in 12 of the total number of cases where an accused was convicted or acquitted.
[41] Mark Harmon, 'The Pre-Trial Process at the ICTY as a Means of Ensuring Expeditious Trials' (2007) 5 *Journal of International Criminal Justice* 377; Salvatore Zappala, 'Symposium: How to Ameliorate International Criminal Proceeedings: Some Constructive Suggestions – Forward' (2007) 5 *Journal of International Criminal Justice* 346; Carla Del Ponte, 'Reflections based on the ICTY's experience' in Roberto Bellelli (ed), *International Criminal Justice - Law and Practice from the Rome Statute to Its Review (*Ashgate, 2010) 129; Claude Jorda, 'The Major Hurdles and Accomplishments of the ICTY' (2007) *5 Journal of International Criminal Justice* 572; O-Gon Kwon, 'The Challenge of an International Trial as Seen from the Bench' (2007) 5 *Journal of International Criminal Justice* 360; Ian Bonomy, 'The Reality of Conducting a War Crimes Trial' (2007) 5 *Journal of International Criminal Justice* 348; Gideon Boas, 'A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY' in Gideon Boas and William A. Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Brill, 2003) 1, 31; Maximo Langer and Joseph Doherty, 'Managerial Judging Goes International but its Promise Remains Unfulfilled: An Empircal Assessment of ICTY Reforms' (2011) 36 *The Yale Journal of International Criminal Law*, 241; Zeegers, above n 1; McDermott, above n 1; Whiting, above n 1, 312-364.

being less protracted at the ICTY, or that they made better use of the Rules of Procedure and Evidence to ensure that proceedings were efficient and any delays were not considered 'undue'. In considering the first possibility, the average length of proceedings at the ICTY was almost four years less than at the ICTR. When examining the length of proceedings in the case sample, the average length of proceedings at ICTY was also significantly less than the ICTR, being approximately nine years shorter in duration.[42] However, as outlined in Figure 2, cases at the ICTY ranged in length from 4 months through to 13.6 years, and for 9% of accused at the ICTY, proceedings lasted over 10 years.[43] The criteria for assessing undue delay were not considered in any of the ICTY cases where proceedings lasted ten years or more. The ICTY failing to consider the criteria for undue delay in most of its cases therefore cannot be explained by the Tribunal having less prolonged proceedings than the ICTR.

Another theory to explain the limited use of the law of undue delay at the ICTY is that the Tribunal made greater use of the Rules of Procedure and Evidence to more effectively manage proceedings. For example, the ICTY had a tendency to view delays in proceedings where judges 'actively manage' proceedings as not constituting 'undue' delay.[44] The ICTY placed importance

[42] The average length of proceedings in the ICTY case sample was 4.86 years and for the ICTR it was 13.91 years.
[43] For 10 accused out of 106 accused with completed cases at the ICTY, cases lasted over 10 years.
[44] See *Perišić* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-81, 23 November 2007); *Prosecutor v Naletilić & Martinović* (*Decision on Vinko Martinovic's objection to the Amended Indictment and Mladen Natetilic's Preliminary Motion to the Amended Indictment) (*International Criminal Tribunal for the Former Yugoslavia, Case No IT-98-34-PT, 14 February 2001) (*Naletilić'*); *Prosecutor v Popović et al.* (*Decision on Further Amendment and Challenges to the Indictment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-88-PT & IT-05-88/1-PT,13

on expeditious proceedings, and the influence of the Completion Strategy[45] was evident in one of the ICTY cases analysed, where the Tribunal referred to the 'momentum of the case' in considering the issue of undue delay.[46] The ICTY argued that the 'active involvement' of the Tribunal had assisted in moving proceedings along as expeditiously as possible.[47] In the case of *Prlić*, the Trial Chamber introduced measures 'intended to prevent the Parties from raising objections that have no real grounds', reduced the number of hours the Prosecution had to present evidence, and encouraged the Prosecution to 'present its evidence in a more efficient manner'.[48] Although the *Prlić* case did not meet the criteria for inclusion in the case sample, it is worth noting that in this case, the ICTY Trial Chamber held that while there were 'numerous procedural incidents' that had occurred throughout the trial, these difficulties would not recur in the future, and introduced a range of measures aimed at 'reducing excess time dedicated to procedural incidents'.[49] This focus on procedural measures avoided a consideration of undue delay and any discussion of length of proceedings or its affect on the accused.

While the ICTY acknowledged complexity in the same manner as the ICTR, rather than addressing the problem of delay, it sought to resolve both

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July 2006) ('*Popović*'); *Prosecutor v Stanišić & Župljanin* (*Decision on Motion and Supplementary Motion for Leave to Amend the Indictment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-08-91-PT, 28 April 2009) ('*Stanišić')*.

[45] See Security Council, SC Res 1503, UN SCOR, 4817th mtg, UN Doc SC/RES/1503 (28 August 2003); Security Council, SC Res 1534, UN SCOR, 4935th mtg, UN Doc SC/RES/1534 (26 March 2004).

[46] *Perišić* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-81, 23 November 2007) [25].

[47] Ibid [25].

[48] *The Prosecutor v Prlić et al* (*Decision on adoption of new measures to bring the trial to an end within a reasonable time)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-74, 13 November 2006) [21].

[49] Ibid [18].

complexity and the resultant delay by introducing greater procedural efficiencies. This approach provided a ruling without applying the criteria for assessing undue delay and conflated the *right* to be tried without undue delay with the *interest* parties have in expeditious proceedings, which as discussed in Chapter 3, are entirely different concepts.[50] For example, in the case of *Perišić*, the Trial Chamber acknowledged that the case was amongst the most complex before the Tribunal, and referred to a letter from the Registry, which stated that the case would be ranked at the highest level of complexity for the purpose of payment during the pre-trial phase.[51] Drawing on a similar case at the ECtHR, the Trial Chamber in *Perišić* found that the Tribunal's 'active involvement' in the case has served to move proceedings forward as expeditiously as possible.[52] By introducing measures to improve the expeditiousness of proceedings and taking this active involvement approach, the ICTY Trial Chamber failed to consider the criteria for assessing whether an accused has been subjected to undue delay.

Another example of where an 'active management' approach has replaced a consideration of the criteria for assessing undue delay was the ICTY's use of the doctrine of 'unfair prejudice'. While the criteria for assessing undue delay focus on protecting the rights of the accused, the doctrine of 'unfair prejudice' centres on expediting proceedings, which may not always be in the interests

[50] See discussion in Chapter 3, pages 125-128. While the right to be tried without undue delay should apply only the accused, all parties may have an interest in expeditious proceedings. Conflating these two concepts can erode the rights of the accused where international tribunals consider other parties interests when examining the issue of undue delay.
[51] *Perišić* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-81, 23 November 2007) [22].
[52] Ibid [25].

of the accused.[53] The doctrine of 'unfair prejudice' involves a consideration by the Tribunal of whether granting a motion to amend the indictment would result in 'unfair prejudice' to the accused when viewed in light of the circumstances of the case as a whole.[54] The case of *Prosecutor v Popović et. al.* set out two elements that must be considered in determining if granting a motion to amend an indictment will result in 'unfair prejudice': 1) the amendment must not deprive the accused of an adequate opportunity to prepare an effective defence, and 2) the amendment must not adversely affect the accused's right to be tried without undue delay.[55] The possibility of delay must be weighed against the benefits that the amendment may bring to the accused and the Trial Chamber, including simplification of the proceedings, providing a more complete understanding of the Prosecution's case, or avoidance of possible challenges to the indictment or evidence produced at trial.[56] A final factor in assessing whether undue delay would be caused by granting a motion amending an indictment is a consideration of the course of the proceedings to date, including the diligence of the prosecution in advancing the case, the timeliness of the motion, and the expected effect of the amendment on the overall proceedings.[57]

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[53] See discussion in Chapter 1 pages 16-19. Some procedural reforms aimed at expediting proceedings may infringe on other fair trial rights of the accused. Expeditiousness is therefore not always in the interests of the accused whereas the purpose of the right to be tried without undue delay is to protect the rights of the accused.
[54] *Naletilić'* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-34-PT, 14 February 2001), [4]-[7].
[55] *Popović'* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-05-88-PT & IT-05-88/1-PT, 13 July 2006) [9]-[10].
[56] Ibid [8].
[57] *Stanišić* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-08-91-PT, 28 April 2009) [13].

Given the focus on the 'active involvement' of the Tribunal in ensuring expeditious proceedings, the issue of *potential* undue delay was frequently raised in the context of proposed amendments and other motions, rather than a consideration of whether the accused had been subjected to *actual* delay using the legal test for undue delay. The ICTY considered unfair prejudice more often than the ICTR, and consistently, international tribunals demonstrated a general reluctance to find that an accused has been subjected to both actual and potential undue delay.[58] While undue delay has its focus purely on the rights of the accused, unfair prejudice considerations have centred on the expeditiousness of proceedings, which as previously discussed, are not always in the interests of the accused.[59]

The small number of cases where the criteria for assessing undue delay have been applied may also be because the ICTY has limited the time period that is considered to constitute 'delay'. As discussed in Chapter 3, the length of proceedings itself may act as a threshold criterion when assessing a claim of undue delay, and if the proceedings are not sufficiently lengthy, the criteria are not applied to consider the circumstances of the case as a whole.[60] The case of *Perišić* took an inconsistent approach to considering the time period in examining the conduct of the accused.[61] Although the Trial Chamber held that the time period runs from when the accused surrendered on 7 March 2005,

[58] A database search of the case law of the Tribunals followed by a manual search using the keywords 'unfair prejudice', indicated that 45 cases at the ICTY considered unfair prejudice compared with only two cases at the ICTR. Of the cases at the ICTY, only 13% found that the proposed amendment to the indictment would result in unfair prejudice to the accused, which is a similar pattern to cases at the ICTR considering the criteria for assessing undue delay.
[59] See Chapter 1 pages 16-19.
[60] See Chapter 3 pages 115-116.
[61] *Perišić* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-81, 23 November 2007).

the ICTY noted 'that the period from the adoption of the work plan on 22 October 2006, until the case was placed in a trial ready state on 30 April 2007 was only six months' and that this was not an 'unreasonable delay'.[62] The approach in the case of *Perišić* demonstrated that even where the right to be tried without undue delay is examined specifically, the overall delay in the context of the whole proceedings is not always considered. The ICTY's approach in considering this limited time period rather than the proceedings as a whole has made it exceedingly difficult for an accused to prove they were subjected to undue delay.

While the small number of cases considering the criteria for assessing *actual* undue delay may be explained by the relatively high number of cases where the Tribunal considered the possibility of *potential* undue delay, the length of some cases before the ICTY prohibits a conclusion that the ICTY has managed proceedings more effectively than the ICTR overall.[63] While not considered by the ICTY as frequently as the ICTR, the problem of undue delay still exists at the ICTY. However, rather than addressing undue delay through the application of the criteria, the Tribunal has instead introduced a raft of procedural reforms to manage complexity and the resultant delays, and the used 'unfair prejudice' to consider *potential* delay at an early stage of the case. These actions have failed to address the problem of lengthy proceedings before the ICTY.

[62] Ibid [22].
[63] Proceedings lasted for more than 8 years for 21% of accused in completed cases before the ICTY.

Although in its early days, the ICC's approach seems consistent with the ICTY, in that rather than utilising the law of undue delay, the ICC has also relied on procedural mechanisms aimed at expediting proceedings in order to demonstrate that delays are not 'undue'. Not unlike the ICTY's application of 'unfair prejudice', the Pre-Trial Chamber of the ICC has adopted the concept of 'inexcusable delay'. Article 60(4) of the *Rome Statute* states that the Pre-Trial Chamber has to ensure that a person is not detained for an unreasonable period due to an 'inexcusable delay' by the Prosecutor.[64] Although the ICC is yet to fully consider the issue of undue delay, this is a higher threshold than the criteria for assessing undue delay which only require a consideration of the conduct of the authorities in the context of the circumstances of the case overall, and does not require the conduct to be 'inexcusable'. As discussed in Chapter 1, a number of procedural reforms have been introduced at international tribunals that have actually increased rather than decreased the length of proceedings.[65] While greater use of mechanisms aimed at expediting proceedings are seemingly for the benefit of the accused, in practice, they have been used to justify or excuse delay and subject individuals to lengthy trials.

2.1.2. Distinguishing international criminal proceedings as unique

The contention that international criminal law is special or unique, particularly in terms of its mandate, was a recurrent theme in the reasoning of ICTR

[64] See also Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), Article 17(2)(b). The ICC Statute incorporates a consideration of whether there has been an 'unjustified delay'. The concept of 'unjustified delay' relates to the admissibility of a case. The Court will determine that a State is unwilling to prosecute a case where there is an 'unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person accused to justice'.
[65] See discussion in Chapter 1 pages 16-19. See also, Langer and Doherty, above n 41.

cases considering the issue of undue delay and was utilised by international tribunals to normalise very long trials. In several ICTR cases, the unique objectives of international criminal law and the need to distinguish international tribunals from domestic courts was highlighted as part of the reasoning used to justify delays on the basis of the complexity of the case.[66] The most striking example of this was in the case of *Barayagwiza*, where it was held that 'because of the Tribunals' mandate and the inherent complexity of cases before the Tribunal, it is not unreasonable to expect that the judicial process will not be as expeditious as before domestic courts.'[67] This view that certain unique characteristics of international criminal trials justifies lengthier criminal proceedings was subsequently relied upon in several cases considering the issue of undue delay.[68] Even in the *Butare* case where the ICTR Appeals Chamber found for the accused and held that a period of 18 years constituted undue delay, the Chamber once again quoted *Barayagwiza*.[69] In doing so, the Appeals Chamber distinguished international criminal proceedings from domestic criminal proceedings on the grounds of

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[66] *Barayagwiza v Prosecutor* (*Prosecutor's Request for Review or Reconsideration*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 31 Jan 2000) ('*Barayagwiza Prosecutor's Request'*); *Karemera v The Prosecution* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) [42] ('*Karemera Appeal'*); *Nahimana et. al.v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunals for Rwanda, Appeals Chamber, Case No CTR-99-52, 28 Nov 2007) ('*Nahimana Appeal'*); *Prosecutor v Bizimungu et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [32] ('*Bizimungu Appeal'*); *The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015) [359] ('*Nyiramasuhuko Appeal'*).

[67] *Nahimana Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-52, 28 Nov 2007) [1076].

[68] *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeal Chamber, Case No ICTR-99-50-T, 4 February 2013), [32]; *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) [71]; *Nyiramasuhuko Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015) [359].

[69] *Nyiramasuhuko Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015) [359].

complexity, and cemented the idea that lengthy delays that would not be acceptable in domestic criminal proceedings may be acceptable in international criminal proceedings.[70] These issues will be examined in more detail in Chapter 5.[71]

By emphasising the exceptional nature of their work, international tribunals have further distinguished themselves from domestic criminal proceedings and standards applied in protecting the rights of the accused. International tribunals have described themselves as 'unique'[72] with a 'major role' that has been 'recogni[s]ed by the international community'.[73] The ICTR has highlighted that its mission has contributed to 'the process of reconciliation and of [the] restoration of international peace and security in Rwanda'.[74] The uniqueness of offences before international tribunals has also featured, and the 'exceptional' nature of the Tribunal in charging sexual offences as part of genocide and crimes against humanity has been described as the 'first charge of its kind in the history of international criminal law'.[75] This process of reasoning used by the ICTR distinguished international criminal law from domestic criminal law based on its mandate and unique purpose and objectives, and made it easier to depart from established standards of fair trial protections.

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[70] Ibid.
[71] See discussion in Chapter 5 pages 228-240.
[72] See, eg, *Barayagwiza Prosecutor's Request* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 31 Jan 2000).
[73] Ibid.
[74] *The Prosecutor v Rwamakuba* (*Decision on Defence Motion for Stay of Proceedings*) (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005) [42] ('*Rwamakuba Decision on Defence Motion'*).
[75] *Prosecutor v Karemera (Judgment*) (International Criminal Tribunal for Rwanda) Trial Chamber, Case No ICTR-98-44-A, 2 February 2012) [36] ('*Karemera Judgment'*).

2.2. Common reasoning processes identified

There were three reasoning processes identified from theoretical coding that were common to both regional human rights courts and international tribunals. However, in cases where the criteria for assessing undue delay were applied, regional human rights courts and international tribunals have used these reasoning processes in a way that has resulted in almost diametrically opposed outcomes. The three common reasoning processes considered below are:

- Protecting the fundamental rights of the accused;
- Promoting justice and fairness; and
- Analysing and comparing discrete variables in different cases.

The following discussion will provide an overview of the reasoning processes relied on by international tribunals in applying the criteria for assessing undue delay that will be further examined in Chapter 5.

2.2.1. Protecting the fundamental rights of the accused

Both regional human rights courts and international tribunals cited the importance of protecting the fundamental rights of the accused in considering the criteria for assessing undue delay. Yet while regional human rights courts applied this principle consistently throughout their reasoning, the ICTR stated the importance of fundamental human rights, and then applied the criteria in manner that undermined this principle. One reason that may explain this key difference is the distinct functions of these institutions. While regional human rights courts review the application of human rights law in domestic

jurisdictions, the appeal chambers of international tribunals review the application of the law within their own jurisdiction. This issue relating to a lack of oversight mechanisms was previously examined in Chapter 3.[76]

2.2.1.1. ECtHR

The ECtHR consistently applied the principle of safeguarding the rights of the accused in judgments considering the issue of undue delay. As expected for a regional human rights court, the ECtHR took a human rights law approach in the majority of cases analysed.[77] By placing importance on the rights of the accused over other considerations, for example, complexity of the case, the ECtHR viewed the object and purpose of the criteria for assessing undue delay as protecting the fundamental rights of the accused. [78] The right to be

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[76] See discussion in Chapter 3 pages 146-149.

[77] The Court referred to the fundamental rights of the accused in 21 of the 43 cases analysed. For an explanation of a human rights oriented approach that has a tendency, in practice, to prioiritse the rights of victims over the accused, see discussion see Chapter 3 pages 101, 103.

[78] *McFarlane v Ireland* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September *2010)* (*'McFarlane'); Beggs v United Kingdom* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012) (*'Beggs'*); *Mellors v United Kingdom* (European Court of Human Rights, Court (Third Section), Application Number 57836/00, 17 July 2003) (*'Mellors'*); *Henworth v United Kingdom* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004) (*'Henworth'*); *Sherstobitov v Russia* (European Court on Human Rights, Court (First Section), Application Number 16266/03, 10 June 2010) ('Sherstobitov*')*; *Sidjimov v Bulgaria* (European Court of Human Rights, Court (First Section), Application Number 55057/00, 27 January 2005) (*'Sidjimov')*; *Kobernik v Ukraine* (European Court of Human Rights, Court (Fifth Section), Application Number 45947/06, 25 July 2013) (*'Kobernik'*); *Polonskiy v Russia* (European Court of Human Rights, Court (First Section) Application Number 30033/05, 19 March 2009) (*'Polonskiy'*); *Szeloch v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 33079/96, 22 February 2001 (*'Szeloch')*; *Cankocak v Turkey* (European Court of Human Rights, Court (First Section), Application Numbers 25182/94 and 26956/95, 20 February 2001) (*'Cankocak'*); *Ramazanoglu v Turkey* (European Court of Human Rights, Court (Second Section), Application Number 39810/98, 10 June 2003) (*'Ramazanoglu'*); *Mehmet Kaya v Turkey* (European Court of Human Rights, Court (Second Section), Application Number 4451/02, 24 October 2006) (*'Mehmet'*); *Majaric v Slovenia* (European Court of Human Rights, Court (First Section), Application Number 28400/95, 8 February 2000) (*'Majaric')*; *Camasso v Croatia* (European Court of Human Rights, Court (First Section), Application Number 15733/02, 13 January 2005) (*'Camasso'*); *Ciepluch v Poland* (European Commission of Human Rights, Second Chamber, Application Number 31488/96, 3 December 1997) (*'Ciepluch'*); *MM v Italy* (European Court of Human Rights, First Chamber, Application Number 23969/94, 12 April

tried within a reasonable time was occasionally conflated by the Court with Article 5(3), which provides that an accused who is arrested or detained has the right to be brought promptly before a judge and to a trial within a reasonable time or release pending trial.[79] In three cases, the Court assessed whether there had been a breach of Article 5(3), then referred to this discussion in assessing whether there had also been a violation of Article 6(1), without providing additional reasoning.[80]

The Court considered violations of Article 6(1) in conjunction with other fair trial rights in the context of an overarching human rights framework, and required that domestic courts interpret the reasonable time requirement in a manner that 'conforms with the principles of the case law of the ECtHR'.[81] Where the reasonable time requirement conflicted with other fair trial rights, the Court balanced these competing rights in the interests of justice. This

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1996) ('*MM'*); *Panek v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 38663/97, 30 November 2000) ('*Panek'*); *Trzaska v Poland* (European Court of Human Rights, Court (First Section), Application Number 25792/94, 11 July 2000 ('*Trzaska')*; *Ferrantelli* (European Court of Human Rights, Court (Chamber), Application Number 19874/92, 7 August 1996; *Vergelskyy v Ukraine* (European Court of Human Rights, Court (Fifth Section), Application Number 19312/06, 12 March 2009) ('*Vergelskyy')*; *Subinski v Slovenia* (European Court of Human Rights, Court (Third Section), Application Number 19611/04, 18 January 2007 ('*Subinski'*); *Lisiak v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 37443/97, 5 November 2002 ('*Lisiak'*); *Portington v Greece* (European Commission of Human Rights, Commission (First Chamber), Application Number 28523/95, 16 October 1996) ('*Portington'*).

[79] *Dzelili* (European Court of Human Rights, Court (Third Section), Application Number 65745/01, 10 November 2005); *Rydz* (European Court of Human Rights, Court (Fourth Section), Application Number 13167/02, 18 December 2007); *Cevizovic v Germany* (European Court of Human Rights, Court (Third Section), Application Number 49746/99, 3 April 2003) ('*Cevizovic'*).

[80] *Dzelili* (European Court of Human Rights, Court (Third Section), Application Number 65745/01, 10 November 2005); *Rydz* (European Court of Human Rights, Court (Fourth Section), Application Number 13167/02, 18 December 2007); *Cevizovic* (European Court of Human Rights, Court (Third Section), Application Number 49746/99, 3 April 2003). The ICTY also conflated article 6(1) and Article 5(3) in the case of *Perišić* in drawing on ECtHR case law. See *Perišić* (International Criminal Tribunal for the Former Yugoslavia) (Trial Chamber, Case No IT-04-81, 23 November 2007) [25].

[81] *Kauczor v Poland* (European Court of Human Rights, Court (Third Section), Application Number 45219/06, 3 February 2009) ('*Kauczor'*).

balancing exercise was explained in the case of *Beggs v The United Kingdom*:

> The Court further considers that in giving due weight to the various aspects of a fair trial guaranteed by Article 6(1), difficult decisions have to be made by domestic courts in cases where these appear to be in conflict. In particular, the right to a trial within a reasonable time must be balanced against the need to afford the defence sufficient time to prepare its case and must not unduly restrict the right of the defence to equality of arms. Thus in assessing whether the length of the proceedings was reasonable, particularly in a case where an applicant relies upon the Court's responsibility to take steps to advance the proceedings, this Court must have regard to the reasons for the delay and the extent to which the delay resulted from an effort to secure other key rights guaranteed by Article 6.[82]

The approach of the ECtHR placed great importance on protecting the rights of the accused, and limited the balancing process to only considering competing fair trial rights of the accused. As will be discussed in the next section, this is in direct contrast to the approach of international tribunals, where judges engaged in a much wider balancing process where the fair trial rights of the accused were not only balanced against each other, but also with the rights and interests of other parties to proceedings including victims, witnesses and the prosecutor.[83] This is an important distinction in that the approach of regional human rights courts is aimed at protecting the fair trial rights of the accused, while the rights of the accused before international tribunals are considered in the context of a much broader range of competing parties, rights and interests.

The ECtHR consistently found that the complexity of the case did not justify lengthy proceedings in domestic criminal courts. The complexity of the case

[82] *Beggs* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012) [240].
[83] See discussion in Chapter 1 pages 65-68.

was the most common justification for lengthy proceedings relied upon by domestic courts, and was considered in the majority of judgments analysed in the ECtHR case sample.[84] Of the cases where the complexity of the case was raised, the Court acknowledged that the proceedings were complex in 84% of these cases but found that the complexity alone did not justify the overall length of proceedings.[85] The ECtHR cited reasons such as the number of co-defendants, witnesses and charges, the requirement for forensic analysis, investigation or examination, the nature of the charges, procedural issues such as difficulties determining jurisdiction, and the presentation of new grounds of appeal as causes of complexity in proceedings.[86] There were

[84] The ECtHR considered the complexity of the case in 56% of cases in the sample.
[85] *McFarlane* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September *2010) Beggs* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012) *Sherstobitov* (European Court on Human Rights, Court (First Section), Application Number 16266/03, 10 June 2010); *Sidjimov* (European Court of Human Rights, Court (First Section), Application Number 55057/00, 27 January 2005); *Kobernik* (European Court of Human Rights, Court (Fifth Section), Application Number 45947/06, 25 July 2013); *Polonskiy* (European Court of Human Rights, Court (First Section) Application Number 30033/05, 19 March 2009); *Szeloch* (European Court of Human Rights, Court (Fourth Section), Application Number 33079/96, 22 February 2001; *Cankocak* (European Court of Human Rights, Court (First Section), Application Numbers 25182/94 and 26956/95, 20 February 2001); *Ramazanoglu* (European Court of Human Rights, Court (Second Section), Application Number 39810/98, 10 June 2003); *Majaric* (European Court of Human Rights, Court (First Section), Application Number 28400/95, 8 February 2000); *Camasso* (European Court of Human Rights, Court (First Section), Application Number 15733/02, 13 January 2005); *MM* (European Court of Human Rights, First Chamber, Application Number 23969/94, 12 April 1996); *Panek* (European Court of Human Rights, Court (Fourth Section), Application Number 38663/97, 30 November 2000); *Trzaska* (European Court of Human Rights, Court (First Section), Application Number 25792/94, 11 July 2000; *Vergelskyy* (European Court of Human Rights, Court (Fifth Section), Application Number 19312/06, 12 March 2009); *Subinski* (European Court of Human Rights, Court (Third Section), Application Number 19611/04, 18 January 2007; *Lisiak* (European Court of Human Rights, Court (Fourth Section), Application Number 37443/97, 5 November 2002; *Portington* (European Commission of Human Rights, Commission (First Chamber), Application Number 28523/95, 16 October 1996); *Pleshkov v Ukraine* (European Court of Human Rights, Court (Fifth Section), Application Number 37789/05, 7 July 2009) ('*Pleshkov'*).
[86] *Rydz* (European Court of Human Rights, Court (Fourth Section), Application Number 13167/02, 18 December 2007); *Mellors* (European Court of Human Rights, Court (Third Section), Application Number 57836/00, 17 July 2003); *Sherstobitov* (European Court on Human Rights, Court (First Section), Application Number 16266/03, 10 June 2010); *Beggs* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012); *Portington* (European Commission on Human Rights, Commission (First Chamber, Application Number 28523/95, 16 October 1998); *Vergelskyy* (European Court of Human Rights, Court (Fifth Section), Application Number 19312/06, 12 March 2009); *Ferrantelli* (European Court of Human Rights, Court (Chamber), Application Number

only three cases where the Court failed to acknowledge that a case was complex, and found either that the case did not present any exceptional problems or difficulties,[87] or that the State had failed to show any circumstances that demonstrated the degree of complexity was greater than in other cases.[88] While these factors were commonly relied upon to justify complexity, interestingly, the ECtHR also acknowledged that the seriousness of the offence contributed to the complexity of the case. The Court stated that a case was complex because it concerned infliction of serious injuries,[89] or because of the serious nature of the charges, crimes or conviction.[90] In the case of *Henworth v the United Kingdom,* the Court noted that the domestic court had mentioned the seriousness of the charge and brutality of the killing as 'indicative of complexity', but found that while the 'gravity of the charge is a relevant factor', for a murder case the proceedings were relatively straightforward. [91]

A consideration of what is at stake for the applicant is part of the assessment of whether the reasonable time requirement has been met.[92] The ECtHR's assessment of the criteria for assessing undue delay included a consideration

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19874/92, 7 August 1996; *Pleshkov* (European Court of Human Rights, Court (Fifth Section), Application Number 37789/05, 7 July 2009).

[87] *Mellors* (European Court of Human Rights, Court (Third Section), Application Number 57836/00, 17 July 2003); *Henworth* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004).

[88] *Ciepluch* (European Commission of Human Rights, Second Chamber, Application Number 31488/96, 3 December 1997).

[89] *Polonskiy* (European Court of Human Rights, Court (First Section) Application Number 30033/05, 19 March 2009).

[90] *Portington* (European Commission on Human Rights, Commission (First Chamber, Application Number 28523/95, 16 October 1998); *Szeloch* (European Court of Human Rights, Court (Fourth Section), Application Number 33079/96, 22 February 2001; *Rydz* (European Court of Human Rights, Court (Fourth Section), Application Number 13167/02, 18 December 2007).

[91] *Henworth* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004) [26].

[92] See discussion in Chapter 3 page 119-120.

of the weight of the charges, the weight of any potential sentence, criminal liability and psychological strain.[93] However, the Court went a step further, and placed importance on the fact that the accused was detained throughout the proceedings.[94] In 18% of cases analysed, the Court held that where an accused was in detention, a special or particular diligence was required on the part of the domestic courts managing the case to 'administer justice expeditiously'.[95]

2.2.1.2. ICTR and ICTY

In direct contrast to the approach of regional human rights courts, the ICTR cited the importance of safeguarding the rights of the accused, yet applied the criteria in a way that severely limited those rights. In almost half of the cases

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[93] *McFarlane* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September 2010); *Beggs* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012); *Mellors* (European Court of Human Rights, Court (Third Section), Application Number 57836/00, 17 July 2003); *Henworth* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004); *Lisiak* (European Court of Human Rights, Court (Fourth Section), Application Number 37443/97, 5 November 2002; *Portington* (European Commission of Human Rights, Commission (First Chamber), Application Number 28523/95, 16 October 1996); *Ciepluch* (European Commission of Human Rights, Second Chamber, Application Number 31488/96, 3 December 1997); *Massey v the United Kingdom* (European Court of Human Rights, Court (Fourth Section), Application Number 14399/02, 16 December 2004) ('*Massey'*).

[94] *Sherstobitov* (European Court on Human Rights, Court (First Section), Application Number 16266/03, 10 June 2010); *Pavlik v Slovakia* (European Court of Human Rights, Court (Fourth Section), Application Number 74827/01, 30 January 2007) ('*Pavlik'*); *Czajka v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 15067/02, 13 February 2007) ('*Czajka'*); *Henworth* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004); *Kobernik* (European Court of Human Rights, Court (Fifth Section), Application Number 45947/06, 25 July 2013); *Polonskiy* (European Court of Human Rights, Court (First Section) Application Number 30033/05, 19 March 2009); *Vergelskyy* (European Court of Human Rights, Court (Fifth Section), Application Number 19312/06, 12 March 2009).; *Rokhlina v Russia* (European Court of Human Rights, Court (First Section), Application Number 54071/00, 9 September 2004) ('*Rokhlina'*).

[95] *Sherstobitov* (European Court on Human Rights, Court (First Section), Application Number 16266/03, 10 June 2010); *Czajka* (European Court of Human Rights, Court (Fourth Section), Application Number 15067/02, 13 February 2007); *Kobernik* (European Court of Human Rights, Court (Fifth Section), Application Number 45947/06, 25 July 2013); *Polonskiy* (European Court of Human Rights, Court (First Section) Application Number 30033/05, 19 March 2009); *Vergelskyy* (European Court of Human Rights, Court (Fifth Section), Application Number 19312/06, 12 March 2009).

in the sample, the ICTR referred to the primacy of the rights of the accused and the Tribunal's duty to protect those rights, describing the rights contained within Article 21(4)(c) as 'fundamental' or 'absolute'.[96] Yet in 10 of the 12 cases analysed, the Tribunal accepted that very long proceedings did not constitute undue delay using a reasoning process that involved justifying delays on the grounds of the complexity of the case.[97] While regional human rights courts held that complexity did not relieve domestic courts of their duty to conduct expeditious proceedings, the ICTR generally acknowledged that while in some cases the delay was substantial, the accused had not been subjected to undue delay where the time period could be explained by the complexity of the case.

An exception to this trend was found in the *Butare* case before the ICTR Appeals Chamber.[98] Rather than justifying lengthy delays on the grounds of complexity, the Appeals Chamber found that the Trial Chamber erred in finding that the length of proceedings was reasonable and adequately

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[96] See: *Kajejijeli v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44A-A, 23 May 2005) ('*Kajejijeli Appeal'*); *Barayagwiza v The Prosecutor* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999) [71], [106] ('*Barayagwiza Appeal')*; *Renzaho v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011) [242] ('*Renzaho Appeal'*); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [37]; *Prosecutor v Bizimungu* (*Decision on Prosper Mugiraneza's Second Motion to dismiss for deprivation of his right to trial without undue delay*) (International Criminal Tribunal for Rwanda, Trial Chamber II, ICTR-99-50-T, 29 May 2007) [20] ('*Mugiraneza's Second Motion*').

[97] *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014); *Ndindiliyimana et.al. v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014) ('*Ndindiliyimana Appeal'*); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *Bagosora and Nsengiyumva v The Prosecutor* (*Appeal judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011) ('*Bagosora Appeal'*); *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011).

[98] *Nyiramasuhuko Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015).

explained by the complexity of the case.[99] In considering the delay, the Appeals Chamber argued that 'organisational hurdles' and a lack of resources could not justify the prolongation of proceedings that have already been significantly delayed.[100] The approach of the Appeals Chamber in this case was at odds with other cases where lengthy delays were justified on the grounds of case complexity. As mentioned previously in this chapter, despite finding for the accused, the Appeals Chamber noted that it was not unreasonable to expect that international criminal proceedings would not be as expeditious as domestic criminal trials.[101] It remains to be seen whether this reasoning will be followed in subsequent cases, and also whether this case represented a shift in the approach of international tribunals or was merely a product of the excessive length of proceedings in that particular case, which ran for over 18 years. The complexity of international criminal proceedings will be examined in more detail in Chapter 5 by further analysing the reasoning processes of judges in cases where it was found the accused had not been subjected to undue delay.

2.2.2. Promoting justice and fairness

2.2.2.1. ECtHR and IACHR

While taking slightly different approaches, both the ECtHR and the IACHR have used the concept of justice to argue that the failure of domestic courts to meet the reasonable time requirement would not be tolerated. The IACHR's reasoning process was based on promoting justice and argued in 75% cases in the case sample that access to justice required access to a competent

[99] Ibid [378].
[100] Ibid [376].
[101] Ibid [359].

court, with judicial authorities that acted with diligence and care to provide timely justice.[102] In promoting justice and fairness, the ECtHR highlighted the impact of delays on the ability of domestic courts to deliver justice. For example, in the case of *McFarlane v Ireland*, the ECtHR held that domestic courts have an 'inherent jurisdiction to ensure that justice is done',[103] and in the case of *Massey v the United Kingdom*, the Court highlighted that further delays would damage the quality of available evidence.[104] The ECtHR also viewed the loss of evidence due to delays as linked to the Court's objective to promote justice and fairness.

The predominant theme in the reasoning of IACHR cases analysed was promoting access to justice, and along with promoting the rights of the accused, the Court viewed justice and fairness as the main objectives of applying the criteria to assess undue delay. The IACHR held that the reasonable time requirement had not been met because in six of the eight cases analysed, the accused was denied access to justice.[105] In almost all of these cases, the IACHR held that access to justice required access to a

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[102] *Acosta Calderón v. Ecuador* (*Merits, Reparations and Costs*) (Inter-American Court of Human Rights, Series C No. 129, 24 June 2005) ('*Acosta'*); *Case of Yvon Neptune v Haiti, Neptune v Haiti* (*Merits, reparations and costs*) (Inter-American Court of Human Rights, Series C no 180, 6th May 2008) ('*Neptune'*); *Case of López Álvarez v. Honduras* (*Merits*, *Reparations and Costs*) (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006) ('*Álvarez')*; *Hilaire* (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002); *Case of Ricardo Canese v. Paraguay* (*Merits, Reparations and Costs*) (Inter-American Court of Human Rights, Series C No. 111, 31 August 2004) ('*Canese'*); *Asto* (Inter-American Court of Human Rights, Series C No. 137, 25 November 2005).
[103] *McFarlane* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September 2010) [152].
[104] *Massey* (European Court of Human Rights, Court (Fourth Section), Application Number 14399/02, 16 December 2004) [27].
[105] *Acosta* (Inter-American Court of Human Rights, Series C No 129, 24th June 2005); *Neptune* (Inter-American Court of Human Rights, Series C no 180, 6th May 200); *Case of Álvarez* (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006); *Hilaire* (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002); *Canese* (Inter-American Court of Human Rights, Series C No. 111, 31 August 2004; *Asto* (Inter-American Court of Human Rights, Series C No. 137, 25 November 2005.

competent court, and found that authorities demonstrated a 'lack of diligence and care' in performing their duties.[106] Delays in the delivery of the final judgment, inclusion of irrelevant documents in the case file, statements that were lost or taken over two years after the incident, and failure to prove the crime were all criticised by the IACHR, and it was held that domestic authorities lacked care, diligence and promptness in performing their duties.[107] The importance of a competent court being impartial and independent was emphasised by the Court.[108]

Timely access to justice was also used by the IACHR to justify finding that the reasonable time requirement had not been met.[109] In the *Case of López Álvarez*, the IACHR found that the protection of rights of accused:

> … may be useless, inefficient, or deceptive if it is not offered on time, in the understanding that "arriving on time" means operating with maximum efficiency in the protection and minimum infringement of the individual's rights, promptness that does not mean riding roughshod, rashness, or thoughtlessness. These stipulations take into consideration the concerns that preside the aphorism "delayed justice is denied justice.[110]

The IACHR also highlighted that in considering the conduct of the authorities, there was a need to distinguish between activities carried out with 'justifiable reflection and caution' from those carried out with 'excessive calm, exasperating slowness, [and] excessive rituals.'[111] The IACHR characterised

[106] *Acosta* (Inter-American Court of Human Rights, Series C No 129, 24th June 2005; *Neptune* (Inter-American Court of Human Rights, Series C no 180, 6th May 2008); (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006); *Canese* (Inter-American Court of Human Rights, Series C No. 111, 31 August 2004).
[107] *Canese (*Inter-American Court of Human Rights, Series C No. 111, 31 August 2004); *Neptune* (Inter-American Court of Human Rights, Series C no 180, 6th May 2008).
[108] *Neptune* (Inter-American Court of Human Rights, Series C no 180, 6th May 2008).
[109] *Neptune* (Inter-American Court of Human Rights, Series C no 180, 6th May 2008); *Álvarez* (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006).
[110] *Álvarez* (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006).
[111] *Álvarez* (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006).

the failings of the judicial authorities as obstacles or obstructions to an individual's access to justice.[112] Domestic courts that imposed measures that were not required for the administration of justice were described as obstructing an individual's access to the courts,[113] and the excessive workload of domestic courts were labelled as an obstacle to access to justice.[114] In cases where the IACHR found an unacceptable delay, the burden of proof was on the State to justify the length of proceedings.[115]

While not a predominant theme in the reasoning in the ECtHR case sample, the Court also highlighted failures of the justice system as the reason the reasonable time requirement was not met. In 11% of cases analysed, the ECtHR found that the only reasonable explanation for the length of proceedings was that the State had 'failed to act with the required diligence'.[116] This failure has been considered particularly significant in cases involving a serious offence.[117] The duty of States to comply with Article 6(1) was not mitigated by the heavy workload of domestic courts[118] or serious

[112] *Neptune* (Inter-American Court of Human Rights, Series C no 180, 6th May 2008); *Álvarez* (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006).
[113] *Neptune* (Inter-American Court of Human Rights, Series C no 180, 6th May 2008).
[114] *Álvarez* (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006).
[115] *Hilaire* (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002).
[116] *Dzelili* (European Court of Human Rights, Court (Third Section), Application Number 65745/01, 10 November 2005); *Matwicjczuk v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 37641/97, 12 October 2010); *Cankocak* (European Court of Human Rights, Court (First Section), Application Numbers 25182/94 and 26956/95, 20 February 2001); *Ramazanoglu v Turkey* (European Court of Human Rights, Court (Second Section), Application Number 39810/98, 10 June 2003); *Mehmet* (European Court of Human Rights, Court (Second Section), Application Number 4451/02, 24 October 2006).
[117] *Sidjimov* (European Court of Human Rights, Court (First Section), Application Number 55057/00, 27 January 2005).
[118] *Kaemena* (European Court of Human Rights, Court (Fifth Section), Application Numbers 45749/06 and 51115/06, 22 January 2009); *Majaric* (European Court of Human Rights, Court (First Section), Application Number 28400/95, 8 February 2000).

failings in the judicial system that necessitated prolonged proceedings.[119] The ECtHR also held that there was a requirement in law or practice for individual parties to take steps to advance proceedings.[120] Consistent with this, a willingness to find a violation of Article 6(1) where the State had not offered a reasonable explanation for delays was evident in the ECtHR's reasoning in these cases. The ECtHR found that there had been a violation of Article 6(1) in 16% of cases where the State had offered no convincing explanation for protracted, inordinate or excessive delays.[121]

The ECtHR's reasoning process in promoting justice and fairness was also seen in cases where the Court protected the rights of the accused against the State. The ECtHR placed an onus on States to organise their judicial systems to meet the reasonable time requirement. Consistent with the way in which the Court downplayed the complexity of the proceedings, it placed less importance on the conduct of the accused than the conduct of the authorities, and held that only the actions of the State could justify a finding that the reasonable time requirement had not been met.[122] The State was also found to bear responsibility where the accused had contributed to the length of

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[119] *Vasilev v Bulgaria* (European Court of Human Rights, Court (Fifth Section), Application Number 48130/99, 12April 2007) ('*Vasilev'*); *Sherstobitov* (European Court on Human Rights, Court (First Section), Application Number 16266/03, 10 June 2010).
[120] *O'Reilly* (European Court of Human Rights, Court (Fifth Section), Application Number 54725/00, 29 July 2007).
[121] *McFarlane* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September 2010); *Vasilev* (European Court of Human Rights, Court (Fifth Section), Application Number 48130/99, 12April 2007); *Cankocak* (European Court of Human Rights, Court (First Section), Application Numbers 25182/94 and 26956/95, 20 February 2001); *Kamazanoglu v Turkey* (European Court of Human Rights, Court (Second Section), Application Number 39810/98, 10 June 2003); *Mattoccia v Italy* (European Court of Human Rights, Court (First Section), Application Number 23969/94, 25 July 2000) ('*Mattoccia'*); *Camasso* (European Court of Human Rights, Court (First Section), Application Number 15733/02, 13 January 2005); *Arvelakis v Greece* (European Court of Human Rights, Court (Second Section), Application Number 41354/98, 12 April 2001) ('*Arvelakis'*).
[122] *Rydz* (European Court of Human Rights, Court (Fourth Section), Application Number 13167/02, 18 December 2007).

proceedings,[123] and an accused was not held responsible where they had put forward motions on their behalf to take advantage of all 'resources afforded by national law'.[124] The ECtHR continued to uphold the rights of the accused even where the accused had not been detained or where they had failed to cooperate with the authorities.[125]

Not only did the ECtHR place greater emphasis on the conduct of the authorities in considering violations of Article 6(1), but it also imposed a positive duty on States to comply. In 20% of cases analysed, the ECtHR held that Article 6(1) imposes on States the duty to organise their legal systems to meet the right to be tried within a reasonable time.[126] In a further case, the onus was placed on the courts rather than the State to 'take steps of their own motion if necessary to advance proceedings.'[127]

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[123] *Beggs* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012); *Solovyev v Russia* (European Court of Human Rights, Court (First Section), Application Number 2708/02, 24 May 2007) ('*Solovyev'*).
[124] *Rokhlina* (European Court of Human Rights, Court (First Section), Application Number 54071/00, 9 September 2004; *Solovyev* (European Court of Human Rights, Court (First Section), Application Number 2708/02, 24 May 2007).
[125] See *Rokhlina* (European Court of Human Rights, Court (First Section), Application Number 54071/00, 9 September 2004
[126] *Kaemena* (European Court of Human Rights, Court (Fifth Section), Application Numbers 45749/06 and 51115/06, 22 January 2009); *Henworth* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004); *Majaric* (European Court of Human Rights, Court (First Section), Application Number 28400/95, 8 February 2000); *Mattoccia* (European Court of Human Rights, Court (First Section), Application Number 23969/94, 25 July 2000); *Arvelakis* (European Court of Human Rights, Court (Second Section), Application Number 41354/98, 12 April 2001; *MM* (European Court of Human Rights, First Chamber, Application Number 23969/94, 12 April 1996); *Lupker* (European Commission of Human Rights, Application Number 18395/91, 7 September 1992); *Vasilev* (European Court of Human Rights, Court (Fifth Section), Application Number 48130/99, 12April 2007); *O'Reilly* (European Court of Human Rights, Court (Fifth Section), Application Number 54725/00, 29 July 2007).
[127] *Beggs* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012).

2.2.2.2. ICTR and ICTY

The ICTR argued in several cases that the interests of justice, safeguarding fairness, and maintaining the integrity and independence of the judicial process were considerations in assessing the criteria for assessing undue delay, yet such considerations did not always benefit the accused.[128] For example, in the case of *Rwamakuba*, the ICTR Trial Chamber considered that even though a joint trial brought complexity and delays, it was still in the interests of justice and did not result in undue delay:

> As it has already been decided in other cases, while a joint trial may be in the interests of justice and not necessarily encroaching upon the right to be tried without undue delay, it might bring complexity to the case and the proceeding. In the present case, there is no doubt that the joint Indictment brought complexity to the facts, to the law and to the proceedings. … The length of time elapsed between the initial appearance [in April 1999] and the beginning of the trial in November 2003 does not appear as undue in light of the complexity of the case and of the proceedings at that time.[129]

The Trial Chamber acknowledged that the joint indictment increased the complexity of proceedings, and then relied on the complexity of the case to justify the length of proceedings. This reasoning focused on whether the decision of the prosecutor to hold a joint trial was in the interests of justice instead of focusing on the rights of the accused and whether the delay caused by this decision was in the interests of justice. In this way, the ICTR relied on arguments of justice and fairness but an analysis of the text in judgments showed that these concepts were interpreted in a way that protected the interests of the Prosecutor rather than the accused. This reasoning directly

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[128] *Rwamakuba Decision on Defence Motion* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005); *Barayagwiza Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999); *Nyiramasuhuko Appeal* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015).
[129] *Rwamakuba Decision on Defence Motion* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005) [29].

contravened the core purpose of fair trial provisions, which aim to protect the rights of the accused and redress the inherent imbalance between the accused and the State (or international bodies).

The Statutes of international tribunals provide that there is an onus on the Trial Chamber to make sure that proceedings are fair and expeditious.[130] However, in contrast to the ECtHR's approach that placed an onus on the State to meet the reasonable time requirement, even in cases where the accused has contributed to the length of proceedings, international tribunals consistently placed an onus on the defence to prove that the accused was subjected to undue delay.[131] In the case of *Bizimungu*, it was held that not only is the onus on the accused to prove undue delay, but the 'Prosecution's failure to respond to the substance of the Defence's allegations does not automatically lead to a finding in favour of the Defence.'[132] This onus has proven difficult for an accused to satisfy, with the Tribunal finding in a significant number of cases that the accused has failed to demonstrate that

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[130] SC Res 955, UN SCOR, 49th session, 3453rd meeting, UN Doc S/RES/955 (8 November 1994) annex, Article 19(1); SC Res 827, UN SCOR, 48th session, 3217th meeting, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th session, 6155th meeting, UN Doc S/RES/1877 (7 July 2009) Article 21(1).

[131] *Mugiraneza's Second Motion* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 29 May 2007) [36]; *Prosecutor v Nsengimana* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009 [53] ('*Nsengimana Judgment'*); *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011) [242]; *Bagosora and Nsengiyumva v The Prosecutor* (*Appeal Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011) [30]; *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [33-37]; *The Prosecutor v Bizimungu* (*Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial Without Undue Delay - Article 20(4)(c) of the Statute of the Tribunal*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50, 23 June 2010) [16]-[21] ('*Mugiraneza's Fourth Motion'*); *Ndindiliyimana Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014) [47]; *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) [70].

[132] *Mugiraneza's Second Motion* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 29 May 2007) [18].

they were subjected to undue delay.[133] It is unclear how this onus on the accused is in the interests of justice, and it appears inconsistent with the equality of arms principle itself, which is primarily aimed at protecting the accused against imbalances between the two parties.

The equality of arms principle is an element of the right to a fair trial and provides that each party is given a reasonable opportunity to present their case and that both parties should be equal before the courts.[134] This right is inherently linked to the right to an independent and impartial tribunal, because institutions that fail to be impartial are unlikely to ensure parties are equal. This can be an issue in international criminal law where '[f]ull equality' is 'advanced as a goal to overcome the perceived inequality resulting from "prosecution bias" with its emphasis on "ending impunity" as the cornerstone of these institutions.'[135] Equality requires the full participation of the both parties, and where the prosecution fails to provide arguments, 'a problem may arise as to the impartiality of the court as, instead of relying on the pleadings of the prosecutor, the judge will be forced to formulate the arguments her-or

[133] *Mugiraneza's Second Motion* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 29 May 2007) [36]; *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009) [53], *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011) [242]; *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011) [30]; *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [33-37]; *Mugiraneza's Fourth Motion* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50, 23 June 2010) [16]-[21]; *Ndindiliyimana Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014) [47]; *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) [70].
[134] See discussion in Chapter 3 page 140-144.
[135] Maria Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Intersentia, 2012) 4.

himself in favour of a conviction and/or sentence.'[136] As such, the impartiality of international tribunals may be brought into question where the defence must demonstrate undue delay, yet the prosecution is not required to respond to allegations that their actions contributed to that delay.

Contrary to the approach of regional human rights courts where it has been established that organisational failures resulting from prosecutorial misconduct or multi-accused trials cannot justify delays in proceedings, the ICTR was transparent in both acknowledging and accepting that delays in some cases resulted from the conduct of the prosecutorial or judicial authorities but were not considered 'undue'.[137] While regional human rights courts impose a positive duty on domestic courts to organise proceedings in a way that allows them to meet the reasonable time requirement, the Tribunal used organisational failures to justify delay. For example, the Tribunal used the complexity of the case to demonstrate that the Prosecutor did not lack diligence, and argued that findings that organisational failures caused unnecessary delays 'ignores the common challenges of trial administration of a multi-accused case with a complicated procedural history.'[138] While international tribunals have somewhat less control over organisational failings and resource limitations than States exercise over their judicial systems, it should not be an accepted justification for breaching the rights of the accused.

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[136] Stephan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005) 98.
[137] See *Prosecutor v Bizimungu* (*Judgment and Sentence*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 30 September 2011) ('*Bizimungu Judgment*'); *Nyiramasuhuko Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015); *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011).
[138] *Bizimungu Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 30 September 2011) [79].

The ICTY also used fairness in its reasoning in considering the issue of undue delay and like the ICTR, employed arguments based on justice and the equality of arms principle to find that delays were justified in the circumstances. For example, the ICTY considered arguments on equality of arms where the accused claimed to have insufficient resources to manage the complexity of the case.[139] In the case of *Brđanin*, the Trial Chamber held that it was 'not indifferent to the difficulties faced by the defence in preparing a case of this complexity', and noted that the Registry had acted on a recent request by the Defence for resources.[140] However, in the case of *Perišić*, the ICTY Trial Chamber held that 'the accused had not demonstrated any equal lack of access to the processes of the Tribunal or the opportunity to seek procedural relief'.[141] The Trial Chamber also stated that while it could not permit a miscarriage of justice to occur where it is demonstrated that the resources necessary to carry out a fair trial are not available, there would be no miscarriage of justice if 'an accused person were shown to be freely willing to go to trial without the provision of such resources'.[142] In this way, international tribunals have been able to rely upon the concept of justice to support limiting the rights of the accused, rather than using it to protect the rights of the accused against the authorities as regional human rights courts have done. While the ICTY rightly considered a lack of defence resources as

[139] *Prosecutor v Radoslav Brdanin & Momir Talic* (*Decision on Second Motion by Brdanin to Dismiss the Indictment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36, 16 May 2001) ('*Brdanin Decision'*); *Perišić* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-04-81 23 November 2007).
[140] *Brdanin Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36, Trial Chamber II, 16 May 2001) [4].
[141] *Perišić* International Criminal Tribunal for the Former Yugoslavia, Case No IT-04-81 23 November 2007) [27].
[142] *Brdanin Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36, 16 May 2001) [11].

part of the equality of arms argument, it rarely relied on this principle to protect the rights of the accused. The point of the equality of arms argument in protecting the rights of the accused against the authorities is missed entirely when it is used to protect the rights of parties other than the accused. These issues will be examined in further detail in Chapter 5.

2.2.3. Analysing and comparing discrete variables in different cases

2.2.3.1. ECtHR and IACHR

In a handful of cases, the ECtHR and the IACHR compared the length of proceedings in previous cases and the 'degree of the violation' to determine if there had been a violation of the reasonable time requirement.[143] These cases focused on the facts and circumstances of the case alone, including the length of proceedings, rather than specifically applying the criteria used to assess if the reasonable time requirement has been met. In five other cases, the ECtHR based its finding on rulings in similar cases, stating that the Court had 'found violations of Article 6(1) of the Convention in cases raising similar issues to the present case'.[144] Instead of discussing the criteria for assessing if the reasonable time requirement had been met, these cases took a

[143] *Pavlik* (European Court of Human Rights, Court (Fourth Section), Application Number 74827/01, 30 January 2007); *Kauczor* (European Court of Human Rights, Court (Third Section), Application Number 45219/06, 3 February 2009); *Czajka v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 15067/02, 13 February 2007); *C v Ireland* (European Court of Human Rights, Court (Fifth Section), Application Number 24643/08, 1 March 2012) ('*C case*'); *Camasso* (European Court of Human Rights, Court (First Section), Application Number 15733/02, 13 January 2005); *Hilaire* (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002); *Canese* (Inter-American Court of Human Rights, Series C No. 111, 31 August 2004); *Asto* (Inter-American Court of Human Rights, Series C No. 137, 25 November 2005).

[144] *Pavlik* (European Court of Human Rights, Court (Fourth Section), Application Number 74827/01, 30 January 2007); *Kauczor* (European Court of Human Rights, Court (Third Section), Application Number 45219/06, 3 February 2009); *Czajka* (European Court of Human Rights, Court (Fourth Section), Application Number 15067/02, 13 February 2007); *C case* (European Court of Human Rights, Court (Fifth Section), Application Number 24643/08, 1 March 2012); *Camasso* (European Court of Human Rights, Court (First Section), Application Number 15733/02, 13 January 2005).

comparative approach, drawing out similarities to previous cases, to find that there had been a violation of Article 6(1).

The IACHR also relied on the length of the proceedings to justify finding for the accused, and argued in three cases that prolonged delay in itself can constitute a violation of the reasonable time requirement *per se*.[145] In two cases before the ECtHR, the Court considered the cumulative effect of delays in their reasoning, and argued that a number of delays taken together demonstrated that the proceedings did not 'proceed with the necessary expedition' and failed to meet the reasonable time requirement.[146] The case of *Subinski v Slovenia* also referred solely to the length of the proceedings in finding that the reasonable time requirement had not been met. [147]

2.2.3.2. ICTR

Although the Tribunal accepted the established position that no fixed time period constitutes undue delay, in half of the cases analysed, rather than examining the circumstances of the case overall, judges undertook a limited comparison with other cases before the ICTR and focused on the complexity of the case or the length of the proceedings alone. [148] For example, in the

[145] Hilaire (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002); (Inter-American Court of Human Rights, Series C No. 111, 31 August 2004); *Asto* (Inter-American Court of Human Rights, Series C No. 137, 25 November 2005).
[146] *Henworth* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004); *Massey* (European Court of Human Rights, Court (Fourth Section), Application Number 14399/02, 16 December 2004).
[147] *Subinski* (European Court of Human Rights, Court (Third Section), Application Number 19611/04, 18 January 2007.
[148] *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014); *Ndindiliyimana Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals

case of *Bizimungu*, the Tribunal concluded that the pace of proceedings was similar to other multi-accused trials where no undue delay was found.[149] Similarly, in the case of *Karemera*, the Tribunal considered cases of comparable complexity as a 'benchmark', and held that there was no undue delay in that case because it was of greater complexity than previous cases where it was found that accused had not been subjected to undue delay.[150] This approach did not take into account the circumstances of the case overall, and it is concerning that proceedings lasting over a decade were used as 'benchmark' for what is an acceptable delay.

Not only did the ICTR set a high bar in terms of the overall length of proceedings, it also considered the degree and intensity of the violation of the rights of the accused. For example, the degree and intensity of the violation was used by the ICTR to justify its findings in *Barayagwiza's* case, with the Appeals Chamber initially arguing that what made the violation of the accused's rights so 'egregious', was the 'combination of delays'.[151] Yet when the Appeals Chamber overturned it's finding of undue delay, it held that new facts diminished the 'intensity of the violation of the rights of the Appellant.'[152] Even where the Tribunal found that the accused had been subjected to undue delay in the case of *Kajelijeli*, the Tribunal held that the rights of the accused

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Chamber, Case No ICTR-98-41-A, 14 December 2011); *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011).

[149] *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [32].

[150] *Karemera Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-A, 2 February 2012) [39].

[151] *Barayagwiza Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999) [109].

[152] *Barayagwiza Prosecutor's Request* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 31 March 2000) [71].

had been violated, but not 'egregiously so'.[153] It is concerning that delay has been quantified in this way without full reference to any of the relevant criteria or the circumstances of the case, and the approach of international tribunals was at odds with that of regional human rights courts where any violation is sufficient and need not be 'egregious'. It may be that international tribunals have quantified the degree of violation in this way because of concerns they may have to then provide a remedy, as only those violations that were so egregious they would 'prove detrimental to the court's integrity' require provision of a remedy.[154]

2.4. Differences in the approach of the international tribunals

Differences in the way international tribunals and regional human rights courts have applied the criteria for assessing undue delay also reflected their different objectives and the context in which they operate. While international tribunals aspired to the highest standards of human rights protection, justice and fairness, these principles were not always evident in decisions on undue delay. Lengthy trials have been justified on the basis of the operational, legal, factual and procedural complexity of proceedings and concepts of justice and fairness were used to excuse the actions of the prosecutorial and judicial authorities and a lack of both defence and institutional resources.

The question of whether the accused in international criminal proceedings has been provided with a lesser standard of rights protection than in domestic

[153] *Kajejijeli Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44A-A, 23 May 2005) [198].
[154] *Barayagwiza Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999) [74].

criminal courts, and whether the criteria could be adapted to the context in which international criminal proceedings operate will be discussed in Chapters 5 and 6. The following discussion will briefly examine two main differences identified in the analysis in this chapter, and consider reasons for those differences and how they impacted on the rights of the accused. The differences considered are:

- The limited use of the criteria for assessing undue delay and the importance of complexity; and
- Tensions between upholding fundamental human rights and maintaining justice and fairness in proceedings with the challenges of conducting international criminal trials.

These tensions will be analysed to highlight the main differences in the approach of regional human rights courts and international tribunals to the right to be tried without undue delay. Chapter 5 will build on the issues introduced in this section to specifically consider how the length of proceedings, the complexity of international criminal proceedings, and the way in which differences in the roles of the prosecutor and the defence in international criminal justice have affected the overall fairness of proceedings and protecting the rights of the accused.

2.4.1. The limited use of the criteria for assessing undue delay and the importance of complexity

While the criteria for assessing whether an accused has been subjected to undue delay are routinely applied in regional human rights courts and set the standard of protection for an accused in domestic criminal proceedings, out of 106 accused tried before the ICTY, the criteria were only applied in cases for

five accused. While the ICTR have used the criteria in a significant number of cases, albeit with a focus firmly on the complexity of the case, the criteria have mostly been absent from the judgments of the ICTY. The ICTY's focus on addressing procedural inefficiencies seems to have somewhat obscured the issue of delay, where past delays were considered remedied by reforms aims at expediting future delays.

One question that needs further consideration is whether 'justice delayed is justice denied'.[155] Failing to examine the obstacles international tribunals face in trying to meet domestic standards of fair trial protections, such as the complexity of the case, also fails to safeguard the overall fairness of proceedings. As examined earlier in this chapter, procedural reforms introduced before the ICTY after the issue of undue delay was raised focused on the 'active involvement' of the Tribunal in ensuring proceedings 'move forward' by putting limits on the time allowed to present evidence and limiting the number of objections.[156] This approach failed to examine the causes of complexity and placed too much importance on expediency. If a case is legally and factually complex, time may be required to adequately present all the evidence and allow for objections where the introduction of certain facts could prejudice the accused.[157] Time limits may affect the fairness of proceedings by truncating this process. Addressing complexity by speeding up matters seems counterproductive when the aim of addressing complexity in the first place is to reduce delays and improve the fairness and legitimacy of the proceedings as a whole. The distinction between undue delay and

[155] See discussion in Chapter 3 page 126-127.
[156] See discussion in Chapter 4 pages 177-185.
[157] Whiting, above n 1, 323-364.

expeditiousness must remain at the heart of any legal criteria that seek manage or assess undue delay.[158]

2.4.2. Tensions between the objectives of upholding fundamental human rights and maintaining justice and fairness in proceedings with the challenges of conducting international criminal trials

International tribunals have sought to uphold the fundamental rights of the accused with objectives that include promoting and maintaining justice and fairness. Yet because of the perceived challenges associated with conducting international criminal proceedings, international tribunals have limited the rights of the accused in cases considering the issue of undue delay without consistent or transparent reasoning on which those findings were based. As will be discussed in Chapter 5, international tribunals' approach to undue delay has resulted in international tribunals relying on justice or fairness in their reasoning processes to consider parties other than the accused and downplay the role of the prosecutorial or judicial authorities in causing delays to proceedings.[159]

The argument that international criminal justice is unique and distinctly different from domestic criminal justice may be responsible for the development of a different standard of rights protection for an accused before international tribunals. The emphasis international criminal law places on ensuring expeditious proceedings is consistent with the objectives of international criminal justice and lends support to the theory that the legitimacy of international tribunals comes from the perceived fairness of their

[158] See discussion in Chapter 3 pages 123-128.
[159] See discussion in Chapter 5 pages 240-265.

proceedings.[160] Yet there is an inconsistency in the way in which the fundamental rights of the accused and concepts of justice and fairness are invoked in theory, yet in practice are traded away on the grounds of complexity, organisational failures and a lack of resources. While international tribunals may equate expeditious proceedings with justice and fairness, viewing undue delay as something that can be remedied by procedural reforms conceals the real challenges that these courts and tribunals face in conducting fair proceedings in an international context. Adopting criteria that would seek to acknowledge both the challenges faced by international tribunals in terms of complexity and resources, while recognising the effects that delays may have on the rights of the accused, would be a way forward in acknowledging the uniqueness of international criminal justice, while continuing to uphold rights of the accused that are fundamental in domestic criminal justice settings.

3. Conclusions

The purpose of this chapter was to analyse the reasoning of judges applying the criteria for assessing if an accused has been subjected to undue delay in both regional human rights courts and international tribunals, and to identify differences in their approaches to the law of undue delay. This was done by adopting aspects of grounded theory methodology and applying a teleological interpretive approach to judgments of the ECtHR, IACHR, ICTR, ICTY and

[160] David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 569, 579; Adrian Fulford, 'The Reflections of a Trial Judge' (2011) 22 *Criminal Law Forum* 215, 216. See also, Mark Klamberg, 'What are the Objectives of International Criminal Procedure? - Reflections on the Fragmentation of a Legal Regime' (2010) 79 *Nordic Journal of International Law* 287

ICC, to identify reasoning processes in applying the criteria for assessing undue delay and to consider the object and purpose of the law of undue delay. The reasoning processes have highlighted a number of differences in the approach of these courts and tribunals to the law of undue delay and that international tribunals have departed from domestic standards of fair trial protections upheld by regional human rights courts. These differences will be further examined in Chapters 5 and 6 to consider whether a different standard should apply in protecting the right of an accused to a fair trial in international criminal law, and how the criteria for assessing undue delay could be adapted to operate in an international criminal law context.

Chapter 5 - Contextual factors international tribunals have relied on in departing from domestic standards of fair trial protections

The right to be tried by a competent, independent and impartial tribunal is a component of the right to a fair trial, and is an absolute right, not subject to any exceptions or limitations.[1] The right to a fair trial, however, is a procedural right that allows other rights to be protected, and is not in itself absolute. So while the overall fairness of a trial cannot be compromised, the procedural rights that comprise fair trial rights may be subject to limitations. This is provided that the accused is afforded a fair trial as whole, and any limitations are proportionate, or necessary to achieve a legitimate aim.[2]

International tribunals have sought to adapt the criteria for assessing undue delay in a manner that allows them to meet the challenges of conducting trials in an international context. However, international tribunals have applied the criteria in a manner that lacks consistency and transparency and that has resulted in an accused before international criminal proceedings receiving a different standard of fair trial protections than an accused before domestic criminal courts. This was highlighted by the analysis in the previous chapter, which found that there is a disparity between international tribunals' application of the criteria for assessing undue delay, and their rhetoric on the

[1] See discussion in Chapter 3 pages 107-108.
[2] *Handyside v United Kingdom* (1976) 1 EHRR 737, [48]-[50]; *Sunday Times v United Kingdom* (1979) 2 EHRR 245 [62].

importance of protecting the fundamental rights of the accused and promoting justice and fairness.

This chapter further examines the reasoning of judges in cases where it was held that the right to be tried without undue delay had not been infringed. It will consider how the criteria for assessing undue delay were applied in these cases, and further analyse the reasoning used by judges in finding that an accused was not subjected to undue delay. While the previous chapter analysed the reasoning processes of judges to identify the differences in the way in which the law of undue delay has been applied and interpreted by international tribunals and regional human rights courts, this chapter will examine how international tribunals have relied on factors related to the unique context in which they operate, and the broad objectives of international tribunals in finding an accused was not subjected to undue delay. This chapter will conclude by considering whether the factors related to the unique context international tribunals operates within and the objectives of international criminal justice are legitimate reasons for departing from domestic standards of fair trial protections.

This chapter is divided into two parts. The first part of this chapter will analyse how the legal test for assessing undue delay has been applied by international tribunals to find that an accused was not subjected to undue delay. It will focus on areas where international tribunals have departed from the approach of regional human rights courts, and analyse how these differences relate to the unique context in which international tribunals operate

and the broad objectives of international criminal justice. These differences in the approach of international tribunals can be grouped into two themes:

- The inconsistent application of the reasonableness of the time period and focus on the complexity of the case; and
- The evidential burden placed on the accused in proving undue delay (and downplaying of the actions of the prosecutorial and judicial authorities).

After examining the way in which international tribunals have inconsistently approached an examination of the reasonableness of the time period, recent literature identifying factors that contribute to complexity in criminal trials will be analysed to examine how international tribunals have assessed the complexity of the case. It will be suggested that while international criminal trials are more complex than domestic criminal trials, the factors that international tribunals have relied on to assess complexity are not always evidence-based.

In considering the burden on the accused, it will be shown that the practically insurmountable difficulties faced by an accused in meeting the evidential burden of proving undue delay have failed to balance the rights and interests of the accused with those of the prosecutor, victims and even the judicial authorities. The following issues will be examined in relation to the burden on the accused:

- The burden of proof;
- The rights and interests of the prosecutor in proving undue delay;
- Justifying the actions of the prosecutor;

- Justifying the actions of judicial and institutional authorities; and
- Establishing that an accused suffered prejudice.

The second part of this chapter will conclude by examining whether the contextual factors and objectives examined in the reasoning processes of international tribunals are legitimate reasons for international tribunals departing from domestic standards of fair trial protections upheld by regional human rights courts.

The complexity of international criminal proceedings and difficulties balancing rights and interests of the accused, prosecutor and authorities, have arisen out of the unique context international tribunals operate within, including the breadth and number of their objectives, and the legal, factual and procedural complexity of proceedings. International tribunals have responded to these challenges by applying the criteria for assessing undue delay in a way that ultimately, but unnecessarily, limits the rights of the accused.[3] This thesis will draw on the analysis in this chapter to propose a novel approach for adapting the criteria for assessing undue delay in a way that balances the challenges of conducting international criminal proceedings, with meeting established standards of human rights protection. Rather than advocating for new ways of interpreting existing criteria as has been proposed previously in the literature,[4] this thesis will suggest both a new legal test that accounts for the challenges of conducting international criminal proceedings and clarifies elements of the existing criteria. In doing so, this thesis will provide specific guidance on the

[3] See discussion in Chapter 4 pages 210-214.
[4] See Krit Zeegers, *International Criminal Tribunals and Human Rights: Adherence and Contextualisation* (TMC Asser Press, 2016); Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford, 2016).

practical application of the criteria for assessing undue delay in a way that allows international tribunals to balance the rights of the accused with factors relating to the unique context in which they operate. By undertaking a detailed analysis of the factors that international tribunals have relied on in finding that an accused was not subject to undue delay, this chapter will consider whether the uniqueness of international criminal justice provides a legitimate reason for departing from domestic standards of fair trial protections. In particular, it will highlight how the current legal test fails to account for these factors, which has led to a lack of transparency in judicial reasoning in cases considering the law of undue delay.

1. Reasons for finding an accused was not subjected to undue delay

One of the aims of this research is to draw on the experiences of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) in applying and interpreting the criteria for assessing undue delay to make recommendations for how the criteria can be adapted for future use at the International Criminal Court (ICC). The ICC is yet to consider the criteria for assessing undue delay, and therefore the analysis in this section will focus mainly on cases from the ICTR, and the small number of cases from the ICTY that have considered the criteria for assessing undue delay and found against the accused.

1.1. Inconsistent application of the criteria

The following section considers two examples of where international tribunals have inconsistently applied the criteria to find an accused was not subjected to undue delay:

- the reasonableness of the time period; and
- the complexity of the case.

While these issues were examined in Chapter 4, this chapter will provide a more detailed examination of the reasoning of judges in cases where it was found the accused was not subjected to undue delay to analyse how they relate to the unique context in which international tribunals operate and the broad objectives of international criminal justice.

1.1.1. Reasonableness of the time period

International tribunals have taken a somewhat confusing approach to considering the reasonableness of the length of proceedings. It will be recalled from Chapter 3 that before regional human rights courts, there is no set time period that constitutes undue delay and the reasonableness of the length of proceedings depends on the circumstances of the case.[5] In theory at least, international tribunals have adopted the same approach as regional human rights courts in assessing the length of the proceedings, which incorporates the time from when the accused is first notified of the alleged offence, until the court has reached a final decision.[6] In particularly prolonged proceedings, the length of the proceedings alone is sufficient to establish that

[5] See discussion in Chapter 3, page 117-119.
[6] *Eckle v Federal Republic of Germany,* (1982) 51 Eur Court HR (Ser A) 1; *Deweer v Belgium* [1980] ECHR 1.

an accused has been subjected to undue delay.[7] This is in recognition of the fact that for particularly lengthy trials, the only possible conclusion is that the delay was undue, and further consideration of the criteria is unnecessary. Equally, a time period may be so short in duration as to provide evidence that a delay was not undue.[8] However, as Chapter 4 demonstrated, international tribunals have relied on a reasoning process of 'analysing discrete variables', where lengths of proceedings are compared across cases and violations quantified in terms of seriousness.[9]

The approach of international tribunals has been to consider the length of the proceedings when it can be used to demonstrate there was no undue delay, but dismiss the length of proceedings when raised by an accused seeking to demonstrate their rights have been violated. [10] For example, the ICTR Appeals Chamber considered the reasonableness of the length of proceedings in cases where the co-accused were detained for periods between 14 and 16 years, however, concluded that '[t]he pace of the trial was not dissimilar from that of other multi-accused trials, where no undue delay has been identified'.[11] In this way, the Appeals Chamber failed to consider the

[7] See, eg, *Prosecutor v. Darko Mrdja* (*Sentencing Judgment*) (International Criminal Tribunal for the Former Yugoslavia, Case No IT-02-59, Trial Chamber I, 31 March 2004) ('*Mrdja Judgmen*t'). In this case the Trial Chamber referred to supporting case law of the European Court of Human Rights.
[8] See, eg, *Boris Popov v Russia* (European Court of Human Rights, Court (First Section), Application Number 23284/04, 28 October 2010) ('*Popov'*).
[9] See discussion in Chapter 4 pages 208-210.
[10] See, eg, *The Prosecutor v Bagosora et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) ('*Bagosora Judgment*'); *Karemera v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) ('*Karemera Appeal'*); *Prosecutor v Bizimungu et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) ('*Bizimungu Appeal*').
[11] *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *Bagosora Judgment*

criteria for undue delay by stating that lengthy time periods did not constitute undue delay, because previous cases with comparable periods of delay were also found not to be undue. This approach has normalised lengthy proceedings and made it exceedingly difficult for an accused to prove that the time period itself constitutes evidence of undue delay. The approach of international tribunals is at odds with that of regional human rights courts, where proceedings lasting over a decade would never be relied upon to support a finding that there was no undue delay.[12]

Where an accused has argued that the length of the proceedings itself constitutes evidence that it was undue, the ICTR reverted to the principle that no set time period constitutes undue delay, and adopted techniques that allowed it to avoid giving detailed consideration to the question of delay. For example, in the ICTR case of *Bizimungu,* proceedings had been ongoing for over 10 years and Mr Mugiraneza argued that the United Nations Human Rights Council (UNHRC) had 'never approved a delay approaching the length

(International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008); *Renzaho v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011) ('*Renzaho Appeal'*).

[12] In the European Court of Human Rights case sample there were seven cases lasting 10 years or more and the Court found the accused had been subjected to undue delay in all of these cases. *McFarlane v Ireland* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September 2010) ('*McFarlane'*); *Beggs v United Kingdom* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012) ('*Beggs'*); *Vasilev v Bulgaria* (European Court of Human Rights, Court (Fifth Section), Application Number 48130/99, 12April 2007); *Sidjimov v Bulgaria* (European Court of Human Rights, Court (First Section), Application Number 55057/00, 27 January 2005); *Ferrantelli and Santangelo v Italy* (European Court of Human Rights, Court (Chamber), Application Number 19874/92, 7 August 1996; *Kaemena and Thonebohn v Germany* (European Court of Human Rights, Court (Fifth Section), Application Numbers 45749/06 and 51115/06, 22 January 2009); *C v Ireland* (European Court of Human Rights, Court (Fifth Section), Application Number 24643/08, 1 March 2012.

of that in the present case'.[13] The Trial Chamber, however, responded by stating that the jurisprudence of the UNHRC was not binding upon it.[14] The following year, Mr Mugiraneza again raised the issue of undue delay, arguing that the length of his proceedings alone, which had lasted 4 018 days (11 years), was sufficient to demonstrate that he had been subjected to undue delay.[15] The ICTR Trial Chamber however disagreed with the view that the indictment ought to be dismissed on the length of his detention alone, and held that:

> The Chamber has heard all the evidence in Mugiraneza's case and is currently at the stage of deliberating and preparing its judgment. It reiterates its previously expressed view that the reasonableness of a period of delay cannot be translated into a fixed length of time and has to be assessed on a case-by-case basis taking into consideration all of the other factors articulated by the Appeals Chamber.[16]

Strikingly, the ICTR Appeals Chamber took a similar approach in the *Butare* case, where despite being the longest international criminal trial in history, it was held that the length of proceedings alone might not be sufficient to demonstrate undue delay. The Appeals Chamber in this case acknowledged that some of the co-appellants had waited over 20 years for a final judgment and it was 'indisputable that the proceedings in this case have been of an

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[13] *The Prosecutor v. Bizimungu et al*. (*Decision on prosper Mugiraneza's third motion to dismiss indictment for violation of his right to a trial without undue delay*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50, 10 February 2009) [9] ('*Mugiraneza's Third Motion'*).
[14] Ibid [10].
[15] *The Prosecutor v. Bizimungu et al.* (*Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial Without Undue Delay - Article 20(4)(c) of the Statute of the Tribunal*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50, 23 June 2010) [10] ('*Mugiraneza's Fourth Motion'*).
[16] Ibid [11].

unprecedented and considerable length.'[17] Rather alarmingly, however, the Appeals Chamber held that:

> … the length of an accused's detention does not in itself constitute undue delay, and the fact that the co-Appellants had been detained for many years at the time of the issuance of the Trial Judgement [sic] is insufficient, in itself, to show that the Trial Chamber erred in its determination that there was no undue delay in the proceedings. Because of the Tribunal's mandate and of the inherent complexity of the cases before it, it is not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts.[18]

While the Appeals Chamber went on to find that the Trial Chamber had made an error in finding that the accused had not been subjected to undue delay, it was not on the grounds of the length of delay itself, but that there had been a failure to consider all of the criteria for assessing undue delay.[19] So while the outcome for the accused in this case was ultimately favourable, the approach of the ICTR Appeals Chamber appears to have removed any hope that the length of proceedings alone will ever be sufficient to demonstrate an accused was subjected to undue delay. This approach is inconsistent with the approach of regional human rights courts where the length of the trial may be sufficient to determine the delay was undue, an approach that was endorsed by the ICTY.[20]

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[17] *The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015) [357] ('*Nyiramasuhuko Appeal')*.
[18] Ibid [359].
[19] Ibid [60].
[20] *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002) [145]. The ECtHR has found that the length of proceedings act as a threshold for determining the reasonable time requirement has been met. See *Popov* (European Court of Human Rights, Court (First Section), Application Number 23284/04, 28 October 2010); *Mrdja Judgment* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-02-59, Trial Chamber, 31 March 2004).

The underlying rationale of international tribunals' inconsistent and selective approach to considering the reasonableness of the time period has had the effect of normalising lengthy proceedings. If this was not the intention of international tribunals, it has certainly been the effect. Before international tribunals, the length of proceedings is rarely used to demonstrate the delay has been unreasonable or undue. Instead, international tribunals have engaged in comparative exercises where lengthy trials are normalised and used to justify delays in subsequent trials. For example, in the case of *Karemera*, which had been ongoing for 16 years and was described by the ICTR Appeals Chamber as being 'among the largest ever heard by the Tribunal', it was held that the delay could 'reasonably be explained by the size and complexity of the case' and the 'pace of the trial was not dissimilar from that of other multi-accused trials, where no undue delay has been identified.'[21]

Another example is provided by the case of *Bagosora*, where the Trial Chamber considered the length of proceedings, which had been ongoing for approximately 12 years, by comparing it to a similarly lengthy trial:

> In the *Nahimana et al*.case, the Appeals Chamber held that a period of seven years and eight months between the arrest of Jean-Bosco Barayagwiza and his judgement did not constitute undue delay, apart from some initial delays which violated his fundamental rights … Like the present case, the *Nahimana et al.* case involved multiple Indictments and requests for amendments and joinder. This case is also two to three times the size of the *Nahimana et al.* case. There was a need for intervals between the trial segments to allow the parties to prepare in view of the massive amounts of disclosure relevant to the case, the need to translate a number of documents, and the securing of witnesses and documents located around the world. Extensive cross-examination by four Defence teams took time … In view of the size and complexity of this trial, in particular in comparison to the

[21] *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) [71].

> *Nahimana et al.* case, the Chamber does not consider that there has been any undue delay in the proceedings.[22]

Reasoning which states that there have been some initial delays that violated the accused's 'fundamental rights' yet ultimately considers there has been no undue delay in the proceedings is confusing. Where delays of over a decade are repeatedly found to be reasonable, it normalises lengthy trials, and sets new expectations for the length of proceedings amongst the international community. As Zeegers has argued, '[i]f 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.'[23]

1.1.2. Complexity of the case

As discussed in the previous chapter, the ICTR almost exclusively relied on a consideration of the complexity of the case in finding that an accused was not subjected to undue delay.[24] Yet a finding of undue delay cannot be based on complexity alone, but must be made following a balanced consideration of all criteria, including the conduct of the parties and authorities, and what is at stake for the applicant.[25] The legal test requires a consideration of the circumstances of the case as a whole, and unless all criteria have been considered, it will not have been correctly applied.[26] The following section explores international tribunals' overreliance on the complexity of the case to

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[22] *Bagosora Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) [80-81], [84].
[23] Zeegers, above n 4, 337.
[24] See discussion in Chapter 4 pages 194-196, 211-213.
[25] See Chapter 3 page 119-120.
[26] With the exception of where a finding has been made based on the length of proceedings alone where they are excessive or fail to engage the right to be tried without undue delay. See discussion in Chapter 3 pages 116-119.

justify findings of undue delay and argues that in relying solely on the complexity of the case, international tribunals have failed to correctly apply the legal test for assessing undue delay. It will start with an examination of the concept of complexity, and discuss recent studies measuring the complexity of international criminal proceedings. It will then consider reasons for international tribunals' focus on the complexity of the case, and suggest that while the application of the legal test may be flawed, there is merit in distinguishing the complexity of international criminal proceedings from domestic criminal proceedings. This section will conclude by examining whether the legal test provides sufficient guidance on the application of the criteria.

1.1.2.1. What is complexity?

There has been relatively little research into the complexity of international criminal proceedings, and there is no agreed definition of complexity in the literature.[27] However, Ford has suggested that 'something is complex when it is composed of many interconnecting parts such that their interaction makes the whole difficult to understand or analyse.'[28] In considering complexity in international criminal proceedings, three main types of complexity have been identified: legal complexity, factual complexity, and participant complexity.[29] Legal and factual complexity may result from volume (where a legal area is highly regulated or there are large volumes of evidence), or because the law

[27] Stuart Ford, 'Complexity and Efficiency at the International Criminal Courts' (2014) 29 *Emory International Law Review* 1; Larry Heuer and Steven Penrod, 'Trial Complexity: A Field Investigation of Its Meaning and Effects' (1994) 18 *Law and Human Behaviour* 29, 30.
[28] Ford, *Complexity and Efficiency at the International Criminal Courts*, above n 27, 12.
[29] Ibid 12-13.

or facts are unclear or technical.[30] On the other hand, participant complexity results from the actions of parties, judges, juries and witnesses.[31] Studies looking at civil trials identified three similar types of complexity: dispute (number of applicants and issues), evidence (including quantity, consistency, reliability and technicality) and decision (including legal complexity and complexity of inferential chains).[32] As will be demonstrated, in determining whether a case was complex, international tribunals have relied on all three types of complexity.

1.1.2.2. Can delays in international criminal proceedings be explained by the complexity of the case?

International tribunals have selectively applied the criteria for assessing undue delay to demonstrate the complexity of the case justified or explained the length of proceedings. While this selective application of the criteria is unsound, one study has provided support for the contention that international criminal proceedings are inherently complex.[33] Ford's study measured the complexity of criminal proceedings using a variable comprised of three factors: the number of trial days, the number of witnesses and the number of exhibits.[34] This study found that the complexity of trials at the ICTY were 'the

[30] Ibid 13-14. See also, Gideon Boas, 'The Miloševic Prosecution Case: Getting Off on the Wrong Foot' in Gideon Boas '*The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge University Press, 2007) 79, 79-80. Although interestingly, Boas did not define 'complexity' throughout his research on conducting complex international criminal proceedings, the indictment was noted as being important in understanding the 'scope and the nature of complex proceedings involving senior officials in international criminal law.'
[31] Ford, *Complexity and Efficiency at the International Criminal Courts*, above n 27, 13-14.
[32] Robert J. MacCoun 'Getting inside the Black Box: Towards a Better Understanding of Civil Jury Behaviour' (1987) RAND Corporation: The Institute for Civil Justice.
[33] Stuart Ford, *Complexity and Efficiency at the International Criminal Courts*, above n 27; Stuart Ford, 'The Complexity of International Criminal Trials is Necessary' (2015-2016) 48 *George Washington International Law Review* 151.
[34] Ford, Complexity and Efficiency at the International Criminal Courts, above n 27, 20.

most complex set of related criminal cases that has ever been tried by any court' and that they 'dwarf the complexity of domestic criminal prosecutions'.[35] For example, the study compared the complexity of ICTY cases with another study by Heuer and Penrod that looked at 160 random Federal and State criminal trials in the United States.[36] Ford found that the median and average complexity scores calculated by Heuer and Penrod for domestic criminal prosecutions were lower than the least complex case before the ICTY.[37] In comparing ICTY trials with the most complicated domestic criminal trial in the dataset, the study found that the least complex ICTY trial was more complex than the average criminal trial in the United States, and 'among the most complex trials that have ever taken place.'[38] Cases at the ICTY were also found to be more complex than trials before other international tribunals.[39] Ford concluded that only the most complex criminal proceedings in the United States can compare with ICTY trials, with a trial involving organised crime that 'lasted nearly 21 months and involved 90 witnesses and 850 exhibits, with 20 defendants accused of multiple acts of selling and distributing cocaine, credit card fraud, gambling, and loansharking that took place over a nine year period' being rated as only slightly more complex than the average ICTY trial.[40] This comparison lends support to the contention that international criminal proceedings are inherently complex.

[35] Ibid 6.
[36] Heuer and Penrod, above n 27.
[37] Ford, Complexity and Efficiency at the International Criminal Courts, above n 27, 33.
[38] Ibid 1.
[39] Ibid 31-32.
[40] Ibid 34.

While international tribunals may be justified in arguing that international criminal proceedings are complex, the factors they have relied on in making this assertion may not always be reliable indicators of complexity. Certainly, international tribunals consider similar factors to domestic courts in assessing the complexity of the case, which include the 'massive amounts' of disclosure,[41] the 'vast amounts of evidence'[42] and the number of trial days, witnesses, exhibits and written decisions.[43] Other factors considered as part of the ICTR's assessment of complexity have included the number of accused;[44] the number of indictments;[45] the scope and number of crimes charged in the indictment;[46] the number of amendments to the indictment, and the number of times the amendments to the indictment altered the scope of the case;[47] joinder and severance of the case at initial stages and conduct of

[41] *Bagosora and Nsengiyumva v The Prosecutor* (*Appeal judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011) ('*Bagosora Appeal'*).
[42] Ibid.
[43] *The Prosecutor v Bagosora et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2010); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).
[44] *Prosecutor v. Nsengimana* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009) ('*Nsengimana Judgment'*); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *Nahimana, Barayagwiza and Ngeze v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No, ICTR -99-52-A, 28 November 2007); *Nyiramasuhuko Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015); *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011); *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014).
[45] *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011).
[46] *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014); *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011); *Bagosora Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008).
[47] *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011); *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014).

the Prosecutor in this context altering the scope of the case;[48] the need for translation and securing witnesses and documents around the world;[49] and the complexity of facts and law.[50] In addition, international tribunals have considered the severity of the charges, seniority of the accused and modes of liability.[51] For example, both Trial Chambers at the ICTY and ICTR found that the gravity and seriousness of the charges are a relevant consideration,[52] and the ICTR has held that the prominence and seniority of the accused is linked to the complexity of the case. [53] Factors relied upon by the ICTY to demonstrate that a case was amongst the most complex before the tribunal, include both the argument that joint criminal enterprise increases the complexity of the case, and whether the registry has ranked the case of the highest level of complexity for the purposes of payment.[54] While international tribunals have often relied on these factors to justify delays on the grounds that a case is complex, little thought has been given to whether they are reliable indicators of complexity.

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[48] *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014).
[49] *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).
[50] See, eg, *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014); *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011); *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011).
[51] *Bagosora Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).
[52] *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011); *The Prosecutor v Rwamakuba* (*Decision on Defence Motion for Stay of Proceedings*) (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005) ('*Rwamakuba Decision on Defence Motion'*).
[53] *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).
[54] *Prosecutor v Perišić* (*Decision on motion for sanctions for failure to bring the accused to trial without undue delay*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-81, 23 November 2007) [22] ('*Perišić*').

Fortunately, recent research has provided some clarity about the factors that increase the complexity of international criminal proceedings.[55] Early research identified four 'dimensions of complexity' which included complexity caused by the size and scope of the dispute; uncertainty regarding the matter or difficulties in assessing the law or facts of the dispute; human limitation; or from 'the political aspects of adjudication'.[56] Another study found that judges' perceptions of complexity were affected by case type and location and increased with the total number of defendants, trial length and the number of expert witnesses.[57] Trial lengths, large amounts of evidence, and complex legal standards have also been identified as contributing to complexity in civil proceedings.[58] Finally, in examining judges' perception of complexity in both civil and criminal proceedings it was found that complicated evidence, complicated legal issues and large quantities of information were considered to increase trial complexity.[59] It would therefore appear that judges perceive that complexity is affected by the length of proceedings, number of accused, the amount of evidence, and legal and factual complexity of the case. Given the subjective nature of these measures, however, one study suggested that further research examining criminal case complexity 'with more precision and rigor' would be helpful.[60] Drawing the above research, Ford measured the complexity of international criminal proceedings using a developed a 'proxy

[55] Ford, The Complexity of International Criminal Trials is Necessary, above n 33.
[56] Jeffrey W. Stempel, 'A More Complete Look at Complexity' (1998) 40 *Arizona Law Review* 781, 822.
[57] Michael Heise, 'Criminal Case Complexity: An Empirical Perspective' (2004) 1 *Journal of Empirical Legal Studies* 331, 360.
[58] Richard Lempert, 'Civil Juries and Complex Cases: Let's not Rush to Judgement' (1981) 80 *Michigan Law Review* 68.
[59] Heuer and Pernod, above n 27, 48.
[60] Heise, above n 57, 369.

variable' comprised of the number of trial days, trial witnesses, and trial exhibits needed to complete a trial.[61] Ford based this objective measure of complexity on previous research considering subjective measures of complexity and empirical evidence obtained in domestic civil and criminal proceedings.[62]

Applying this complexity variable, Ford's research tested a number of factors to determine their affect the on the complexity of international criminal proceedings.[63] It was found that the greatest predictors of trial complexity are the number of accused, the seniority of the accused and their position within the political hierarchy, and whether the accused is a direct perpetrator.'[64] These findings demonstrated that the ICTR might be justified in relying on the number of accused and the seniority of the accused to explain the complexity of the case. It was suggested that the seniority of the accused increases complexity because it is difficult to prove that an accused person is responsible for crimes from which they may be removed both geographically and as an organisation, and a greater amount of 'linking evidence' is required which increases the overall complexity of the trial.[65] As Ford explained:

> …proof of the individual's criminal responsibility is provided through evidence linking the accused to crimes committed by his or her subordinates or accomplices … the higher the accused's rank in a military or political hierarchy, the more organisational levels separate them from the physical commission of the crimes, which are usually carried out by those in the lowest levels of the hierarchy … as the seniority of the accused increases, more linking evidence is necessary and trial complexity increases.'[66]

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[61] Ford, *Complexity and Efficiency at the International Criminal Courts*, above n 27, 41.
[62] See Heise, above n 57, 360; Stempel, above n 56, 822.
[63] Ford, *Complexity and Efficiency at the International Criminal Courts*, above n 27, 41.
[64] Ford, *The Complexity of International Criminal Trials is Necessary*, above n 33, 172.
[65] Ibid 154.
[66] Ibid 159.

Seniority of the accused and direct perpetration were found to be responsible for the majority of trial complexity. The seniority of the accused substantially affected the complexity of the case, with every increase in a level of the accused's seniority having almost the same effect on complexity as adding an accused to the proceedings.[67] Although it was also found that the complexity increased with the number of co-accused in a trial, separating accused into individual trials was thought to 'significantly increase the total complexity of the group of trials in comparison to a single trial with multiple accused.'[68] While multi-accused trials may reduce complexity from an institutional point of view, the impact of multi-accused trials on individual accused must still be considered to ensure international tribunals do not rely on increased complexity to justify lengthy delays in these cases.

Gaining a greater understanding of the factors that affect complexity will assist international tribunals in accurately assessing the complexity of the case, and whether this factor can be relied on to legitimately explain lengthy proceedings and a finding that the accused was not subjected to undue delay. Research has shown that factors such as the number of crime sites, the use of joint criminal enterprise, superior responsibility and charging genocide did not have a statistically significant effect on the complexity of proceedings.[69] The seriousness of the charges was found to have no effect on the complexity

[67] Ibid 181-182. The seniority of the accused was also mentioned in relation to the complexity of the Miloševic trial. See Boas, *The Miloševic Prosecution Case: Getting Off on the Wrong Foot*, above n 33, 80.
[68] Ibid 179.
[69] Ibid 174. This meant that these factors had no statistically significant effect on the using that the number of trial days, trial witnesses, and trial exhibits needed to complete a trial.

of the case, with trials involving genocide held to be 'no more complex on average than trials of war crimes or crimes against humanity'.[70] These findings have significant implications for international tribunals' consideration of the complexity of the case, and indicate that cases that have justified delays on the grounds of complexity may rely on factors are not supported by evidence.

Measuring the efficiency of criminal proceedings has some relevance to the question of whether a delay is undue, and while the complexity of criminal proceedings can reasonably be measured, determining the efficiency of criminal proceedings may be more contentious. Ford's study found that trials at the ICTY are more efficient than trials of comparable gravity and complexity in domestic criminal proceedings.[71] In support of this premise, Ford argued that the ICTY's procedural rules are 'designed to control the trials and prevent the parties from presenting needless, irrelevant, or cumulative evidence' and that 'there is not a lot of time-wasting going on' at the ICTY.[72] It was therefore proposed that complexity and cost can be used to measure the efficiency of international criminal proceedings at the ICTY.[73]

Participants in the trial process, however, also contribute to complexity, and they may not always act in the most efficient way. For example, a prosecutor

[70] Ibid. See also Thomas H. Cohen and Tracey Kyckelhahn, 'Felony Defendants in Large Urban Counties 2006 (2010) *Bureau of Statistics*, U.S. Department of Justice, Table 1. These statistics note that only 0.7% of felony defendants in the United States are charged with murder and only 23% with any violent offence. See Brian A. Reeves 'Felony Defendants in Large Urban Counties, 2009 – Statistical Tables' (2013) *State Court Processing Statistics*, US Department of Justice, for more recent figures indicate this has risen slightly so that 0.7% of felony defendants are charged with murder.
[71] Ford, *Complexity and Efficiency at the International Criminal Courts*, above n 27*,* 41.
[72] Ibid.
[73] Ibid.

may collect greater amounts of evidence than required to prove their case, which must be disclosed and reviewed by the defence. This can increase the complexity of proceedings but it would be impossible to say whether the trial was efficient without first examining the relevance of this evidence and whether the case was presented in the most efficient way. Without an examination of participant complexity and analysis of the relevance of evidence and witnesses presented at these trials, it could not be said that a trial is efficient. Participant complexity would need to be examined in detail before complexity could be considered a reliable measure of the efficiency of international criminal proceedings. The factors considered relevant to measuring complexity are largely dependent on the actions of the parties involved in proceedings. For example, the number of trial days, number of witnesses and number of exhibits are driven by decisions of the prosecutor and the conduct of the accused. Prosecutorial misconduct could result in a larger volume of evidence and more witnesses being called than may be necessary, resulting in a greater number of trial days. While it would be correct to say that this type of trial is complex, we could not say that it is efficient or effective or that any delays are explained by its complexity, without knowing whether the decisions and conduct of the parties to the proceedings were absolutely necessary.[74] If those actions were necessary, the time taken to carry them out would be justified along with any resultant delays. Although helpful in assessing the complexity of international criminal proceedings, Ford's study does not alleviate concerns that all delays in international

[74] As will be discussed in the following section that considers the burden of proof on the accused, there is a great deal of avoidable procedural litigation in international criminal law to clarify matters of law. While this is spread out across a greater number of cases in domestic criminal proceedings, there are fewer cases before international tribunals and therefore a greater number of procedural issues litigated which contribute to lengthy delays.

criminal proceedings can be explained by the complexity of the case. Further research into the links between complexity, delays and efficiency are needed to ensure that international criminal tribunals are upholding the fairness of proceedings within the constraints of an international criminal justice context.

1.1.2.3. Is the complexity of the case a legitimate reason to depart from domestic standards of fair trial protections?

While research suggests that international tribunals may be justified in distinguishing the complexity of their proceedings from domestic criminal proceedings, this does not necessarily mean that it is legitimate for international criminal tribunals to depart from domestic standards of fair trial protections applied by regional human rights courts. Selectively applying the criteria to focus on the complexity of the case fails to apply the legal test for assessing undue delay in a balanced manner, and findings that do not balance all criteria cannot be justified. In finding an accused was not subjected to undue delay, international criminal tribunals have relied on arguments that delays can be explained by the complexity of proceedings. While studies are only just starting to elucidate the factors that contribute to complexity in proceedings, it is clear that a more nuanced approach to the law of undue delay is required.

Evidence-based guidance on the criteria may assist international tribunals in applying the legal test for undue delay to consider only those factors relevant to the assessment of complexity. While the of volume of evidence and number of witnesses and trial days assist in measuring the complexity of international criminal proceedings, it is questionable whether they have any

utility in measuring actual effectiveness or efficiency of international criminal proceedings without further evaluating how the actions of various parties to proceedings alter these factors. It is agreed that international criminal proceedings are more complex than domestic criminal proceedings, and that the unique context in which international criminal law operates serves to increase complexity because of the large numbers of co-accused, and the practice of charging senior officials that are not direct perpetrators. It remains to be seen, however, whether international tribunals could be more effective or efficient, and whether complexity is a reasonable justification for delay. As the research identifying measures of complexity in international criminal proceedings is further developed, judges will be better equipped to objectively determine the complexity of trials and the impact of this on the length of proceedings. Relying on the complexity of the case to explain lengthy proceedings, without an objective assessment of that complexity is not a legitimate reason for departing from domestic standards of fair trial protections.

1.2. The burden of proof on the accused

In criminal proceedings, fair trial protections have evolved to protect the interests of an accused against the State. This is in recognition of the unequal position of the accused with respect to the State. This section will examine the burden of proof that has been placed on an accused before international tribunals in proving that they were subjected to undue delay. It will consider how international tribunals have justified lengthy proceedings because the accused had ‘failed to prove’ that delays caused by the actions of the

prosecutorial or judicial authorities were *undue*. It will also argue that because of the unique context in which international criminal law operates and the focus on the rights of victims, witnesses and the prosecutor over the accused, the evidential burden placed on an accused by international tribunals has failed to strike a fair balance.

1.2.1. The burden of proof

An accused before international tribunals faces a heavy burden in proving that they were subjected to undue delay. As outlined in the previous chapter, in a significant number of cases, international tribunals justified delays because the accused had failed to prove that the delay in proceedings was undue.[75] To fully appreciate the challenges faced by an accused before international tribunals, it is useful to first consider how the burden of proof operates in criminal proceedings. The following analysis will highlight differences in relation to the burden of proof in proving elements of criminal offences and human rights infringements to consider what should be expected of international tribunals in interpreting and applying the criteria for assessing undue delay.

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[75] *Prosecutor v Bizimungu* (*Decision on Prosper Mugiraneza's Second Motion to dismiss for deprivation of his right to trial without undue delay*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 29 May 2007) [36]; *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Case No ICTR-01-69-T, Trial Chamber I, 17 November 2009) [53], *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011) [242]; *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011) [30]; *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [33-37]; *Mugiraneza's Fourth Motion* (International Criminal Tribunal for Rwanda Trial Chamber II, Case No ICTR-99-50, 23 June 2010) [16]-[21]; *Ndindiliyimana et.al. v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014) [47] ('*Ndindiliyimana Appeal')*; *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) [70].

The burden of proof determines which party is required to prove certain elements of the case. In criminal proceedings, the presumption of innocence requires that the legal burden of proof lie with the prosecution.[76] In other words, it is for the prosecution and not the accused, to prove the elements of an offence. In proving the elements of a defence or exception, an accused may bear the evidential burden of proof, however the legal burden of proof remains with the accused throughout trial proceedings.[77] Unlike a legal or persuasive burden where a party must prove certain facts, an evidential burden requires the party to provide evidence that demonstrates there is a case to answer.

The general consensus is that reversals of the burden of proof are not necessarily incompatible with the presumption of innocence.[78] In examining reverse burdens in light of the requirements of the presumption of innocence, the ECtHR has held that it 'requires States to confine them within reasonable limits which take into account the importance of what it at stake and maintains the rights of the defence.'[79] While not binding on international tribunals, some guidance on reverse burdens is provided by case law in the United Kingdom

[76] Stephan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005) 167.
[77] Juhi Gupta, 'Interpretation of Reverse Onus Clauses' (2012) 5(49) *National University of Juridical Sciences Law Review* 50.
[78] *Salabiaku v France* (European Court of Human Rights, Court (Chamber), Application Number 10519/83, 7 October 1998) ('*Salabiaku'*). See also Andrew Stumer, *The presumption of innocence: evidential and human rights perspectives* (Hart, 2010) 75; Andrew Simester, *Appraising Strict Liability* (Oxford University Press, 2010) 149; David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66(1) *Cambridge Law Journal* 142-171.
[79] *Salabiaku* (European Court of Human Rights, Court (Chamber), Application Number 10519/83, 7 October 1998).

(UK).[80] The UK Court of Appeal held that in considering reverse burdens, if only an evidential burden is placed on the accused, there will be no risk of violating the presumption of innocence, and there is 'nothing intrinsically indefensible' in a reverse burden, but it must be justified.[81] Determining whether a reverse burden is justified depends on both its terms, and whether it strikes the right balance between the interests of the State at stake, and the rights of the defendant.[82] If the burden is evidential, the easier it is for the accused to discharged and more likely to be justified.[83] The UK Appeals Court held that the ultimate question should be whether the reverse burden would prevent a fair trial.[84]

The general principle that applies in human rights cases, however, is that the party alleging a violation will bear the burden of proving the particular allegation.[85] The accused must establish there was an interference with the particular right, and the other party is then required to provide an explanation or justification as to why that interference should not be regarded as a violation.[86] In essence, the accused bears the evidential burden for demonstrating their right has been interfered with, and it is up to the authorities to demonstrate that the interference was justified. As discussed in the analysis in Chapter 4, this approach is evident in the reasoning of regional human rights courts, where an accused demonstrates that the reasonable

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[80] *Regina v Edwards, Denton and Jackson Hendley Crowley; Attorney General's Reference (No. 1 of 2004)* [2004] EWCA Crim 1025 (29 April 2004) [53].
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Mónika Ambrus, 'The European Court of Human Rights and Standards of Proof' (2013) 8 *Religion Cases, Religion and Human Rights,* 107, 109.
[86] Ibid.

time requirement has been infringed, then the authorities must demonstrate that those length of proceedings did not constitute undue delay.

Regional human rights courts have clearly established that there is a positive duty on the authorities, which includes the judges, judicial institutions and the prosecutor, to comply with the reasonable time requirement. Prosecutorial misconduct, multi-accused trials, and organisational failures resulting from a lack of resources do not justify undue delay, and prosecutors are to act with 'special diligence' when an accused is detained.[87] In considering what is at stake for the applicant, rather than an accused having to provide extensive evidence to prove they suffered prejudice as a result of the length of proceedings, before regional human rights courts, prejudice is often found to exist *per se*.[88] This means the length of time the accused has been in detention, or the psychological strain of remaining in a state of uncertainty over their criminal liability, stand alone as factors demonstrating that the accused suffered prejudice.[89]

An accused before international tribunals on the other hand, bears a heavy burden in establishing that they have been subjected to undue delay. In practice, an accused before international tribunals is required to prove a range of elements to demonstrate they were subjected to undue delay. These include that:

[87] For further discussion on this point, see discussion in Chapter 4 pages 189-194 and 196-201.
[88] See Chapter 4 pages 193-194 for further discussion on this point.
[89] See discussion in Chapter 4 pages 193-194.

- There was a delay in proceedings;[90]
- The accused suffered prejudice as a result of the delay;[91] and
- The actions of the prosecutor or the authorities were responsible for the delay and those actions did not justify the delay.[92]

While an accused is often able to show that there was a delay in proceedings, they are rarely able to demonstrate that the actions of the prosecutor or judicial authorities caused *undue* delay. As discussed in Chapter 3, these difficulties arise from the fused system of law in international criminal proceedings that incorporates elements of both adversarial and inquisitorial legal systems.[93] As such, there has been a shift in the balance of responsibilities of the parties to proceedings so that both the prosecutor and Trial Chamber take an active role in proceedings.[94] While there is also a prosecutor and judge in inquisitorial proceedings, they act almost as one entity, as the prosecutor's role is quasi-judicial and they are therefore

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[90] *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011); *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *Ndindiliyimana Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014); *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011); *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014).

[91] See *Mugiraneza's Third Motion* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50, 10 February 2009); *Mugiraneza's Fourth Motion* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50, 23 June 2010) ; *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009).

[92] See *Mugiraneza's Third Motion* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50, 10 February 2009) ; *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009); *The Rwamakuba Decision on Defence Motion* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005); *Ndindiliyimana Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011).

[93] See discussion in Chapter 3 pages 149-155.

[94] Ibid.

considered part of the judiciary.[95] It has been argued that 'continental prosecutors assume a high degree of independence in their activities and are frequently associated with the judicial function' and are 'likely to have quite different aims and motivations than their counterparts working in truly adversarial settings.'[96] Conversely, in adversarial criminal proceedings, the judge remains impartial while the prosecutor produces evidence and questions witnesses. In international criminal proceedings, which incorporate both an active judge and adversarial prosecutor, the accused is faced with two active participants with different roles and objectives. This may explain why the conduct of the authorities is rarely found to be at fault in contributing to undue delay.

Before international tribunals, the purpose of fair trial rights is no longer to merely to protect the rights of the accused, but to balance the competing interests of the accused with the prosecutor and the authorities. The following sections consider some of the justifications relied on by international tribunals in finding that an accused has failed to prove that they have been subjected to undue delay. Firstly, changes to the prosecutor's role in international criminal proceedings will be considered to determine how they have affected the burden on the accused in proving undue delay. The difficulties faced by an accused in proving that the actions of the prosecutor or the authorities caused undue delay will also be examined and it will be argued that international

[95] See Jacqueline S. Hodgson, 'The French Prosecutor in Question' (2010) 67(4) *Washington and Lee Law Review* 1361, 1366-1368; Erik Luna and Marianne Wade, 'Prosecutors as Judges' (2010) 67(4) *Washington and Lee Law Review* 1413, 1468-1469. Hodgson explained that the 'judicial status' of the French prosecutor (the 'procureur') is 'essential to the pivotal role she plays within the criminal justice system that goes far beyond the prosecution of cases. The *procureur* and judges have the same training in France.
[96] Luna and Wade, above n 95, 1468-1469.

tribunals have failed to strike the right balance between the interests and rights of the accused and other parties to proceedings.

1.2.2. The rights and interests of the Prosecutor and proving undue delay

The status of the prosecutor as a party to proceedings has increased the burden on the accused in demonstrating that they were subjected to undue delay. The prosecutor's role in international criminal proceedings is different to that in domestic criminal proceedings and this has tipped the balance against the accused in proving that the actions of the prosecutor or the judicial authorities were justified in causing delays.[97] Before international tribunals, the actions of the prosecutor may have been acknowledged as being responsible for lengthy delays, but were downplayed by the judicial authorities and rarely viewed as a breach of the right of the accused to be tried without undue delay. For example, in the case of *Rwamakuba*, the Trial Chamber dismissed concerns raised by the accused about delays caused by the prosecutor amending the indictment, arguing that:

> … although failure of the prosecutor to show its motion was brought in a timely manner might warrant dismissal in other circumstances, this factor is counterbalanced by the likelihood that proceedings under the amended indictment might actually be shorter.[98]

Similarly, in the case of *Ndindiliyimana*, the accused argued that the Prosecutor's failure to disclose exculpatory material in a timely manner had

[97] See discussion in Chapter 3 pages 149-151.
[98] *Rwamakuba Decision on Defence Motion* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005) [31], quoting *Karemera et al. v The Prosecutor* (*Decision on Prosecutor's Interlocutory Appeal against 'Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR·98-44-AR73, 19 December 2003) [13].

violated his right to be tried without undue delay.[99] However, the ICTR Appeals Chamber held that it had already dismissed the accused's allegations of 'prosecutorial misconduct', and observed that:

> … in light of these violations two additional trial days were held for further questioning of Prosecution and Defence witnesses. As explained above, the Appeals Chamber is satisfied that the remedies provided for the disclosure violations by the Trial Chamber sufficiently compensated *Ndindiliyimana* for any resulting undue delay.[100]

Disclosure violations are a separate issue to a consideration of undue delay and it is difficult to see how violations of the right to be tried without undue delay could be remedied by adding additional trial days. The approach of international tribunals in downplaying the actions of the prosecutor stands in stark contrast to the approach of regional human rights courts, where a positive duty is imposed on prosecutorial and judicial authorities to conduct proceedings in a manner that complies with the reasonable time requirement.[101]

Similarly, the ICTY has downplayed the actions of the prosecutor where they have contributed to delays. Unlike the ICTR where the actions of the prosecutor are minimised to find a delay is not undue, the ICTY has minimised the actions of the prosecutor in causing delays where it can be shown that introducing procedural reforms will increase trial efficiency and prevent future delays. While not included in the case sample, an example is provided in the case of *Prlić*, where the Trial Chamber acknowledged that a

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[99] *Ndindilyimana et al. (Military II)* (International Criminal Tribunal for Rwanda, Case No ICTR-00-56).
[100] *Ndindiliyimana Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014).
[101] *Buchholz v. the Federal Republic of Germany* (1981) 3 EHRR 97 [51]. See discussion in Chapter 3 pages 144-146 and Chapter 4 pages 198-201.

'large portion of time used to date was spent on procedural matters', but held that a number of procedural changes would be introduced to expedite proceedings, speculating that the fact that '[t]hese difficulties should not recur in the future' resolved the accused's allegations of having been subjected to undue delay.[102] In this case, the accused had argued that if they adhered to time limits imposed by the UN Security Council to increase efficiency, 'the nature of proceedings would change.'[103] To adhere to these timeframes, the Trial Chamber had proposed that where a party raised an objection, the time taken to do so would be deducted from the time allocated to present their case.[104] The Defence moved instead for a reduction in the scope of the indictment to ensure the reasonable time requirement was met, as parties needed to raise objections in order for a matter to be considered on appeal.[105] It is difficult to see how the proposed reforms would resolve the procedural inefficiencies that caused delays in the first place, and rather they served as a case specific solution to facilitate a speedy trial and prevent the issue of delay being raised by the accused in the future. This case also introduced the premise that prospective procedural reforms aimed at reducing delays can remedy retrospective delays in proceedings. Focusing on means of expediting proceedings to address *potential* delay that may arise in the future fails to address the issue of undue delay, which requires a consideration of *actual* delay that has occurred. The focus on expediting proceedings is therefore a distraction from addressing undue delay and protecting the rights of the

[102] *The Prosecutor v Prlić et. al.* (*Decision on adoption of new measures to bring the trial to an end within a reasonable time)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-74, 13 November 2006) [18-22].
[103] Ibid [12].
[104] Ibid.
[105] Ibid.

accused. As discussed in Chapter 4, it is difficult to see how remedies for potential delay can address violations of the right to be tried without undue delay that have already occurred.[106]

1.2.3. Justifying the actions of the prosecutor - conflating the issue of legality of the action with whether it justifies undue delay

Even where an accused before international tribunals can demonstrate that the prosecutor's actions caused delay, they face significant challenges in demonstrating the delay in proceedings was *undue*. These challenges arise because in considering the actions of the prosecutor, international tribunals have assessed the legality of the prosecutor's actions rather than whether these actions justified an infringement of the accused's rights. Instead of demonstrating that their actions were justified in causing delay to the proceedings, international tribunals have focused on whether the actions were justified because they were provided for in the Rules of Procedure and Evidence (RPE).[107]

In a significant number of ICTR cases, the Tribunal acknowledged that the prosecutor's actions were responsible for lengthy proceedings, but found that the delay was not 'undue' because those actions were provided for in the

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[106] For discussion about remedies for disclosure violations being found to have remedied violations of the right to be tried without undue delay, see discussion in Chapter 4 pages 177-185.

[107] *The Prosecutor v Semanza* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T 15 May 2003) ('*Semanza Judgment'*); *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009) ('*Nsengimana Judgment'*); *Rwamakuba Decision on Defence Motion* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005); *Ndindiliyimana Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011).

RPE.[108] For example, the ICTR has justified delays caused by the prosecutor amending the indictment on the basis that the prosecutor had leave to do so and it was provided for in the RPE.[109] In the case of *Semanza*, the ICTR Appeals Chamber held that:

> As evidence of the delay caused by the Prosecution, the Defence argues that the Prosecutor amended the Indictment three times and that the Prosecutor brought rebuttal witnesses. In the context of this case, the Chamber does not consider either of these arguments to be persuasive. The Rules provide for the amendment of indictments, and the Prosecutor did so in this case with the leave of the Chamber under the Rules.[110]

The ICTR Trial Chamber has also found that evidence deemed to have 'probative value' under Rule 89(c) of the RPE will not be considered to have contributed to delay even if not referred to in the prosecution's closing brief.[111] Findings that justify the prosecutor's actions simply on the basis that they were provided for in the RPE as a matter of procedure fail to engage with the critical issue of whether in executing those actions, the prosecutor violated the right of the accused to be tried without undue delay in substance.

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[108] *Semanza Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T 15 May 2003); *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009); *Rwamakuba Decision on Defence Motion* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005); *Ndindiliyimana Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011).

[109] *Semanza Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T 15 May 2003); *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009; *The Prosecutor v Bizimungu et. al.* (*Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 14 June 2007) ('*Mugenzi's Motion Alleging Undue Delay'*).

[110] *Semanza Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T 15 May 2003).

[111] *Mugiraneza's Third Motion* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50, 10 February 2009) [22].

While an accused before regional human rights courts must only prove that their right has been engaged before the burden of proof shifts to the prosecution, an accused before international tribunals must also prove that the prosecutor's actions caused undue delay. Even when an accused has shown they have been subjected to delay, it will be found that they have failed to prove the delay was undue if those actions are allowed under the RPE. For example, international tribunals have found that joinder increases the size and complexity of a case because these cases involve several accused filing a number of motions and delays, and it becomes more difficult to schedule status conferences because multiple parties and their counsel need to be in the same place at the same time.[112] The ICTR Appeals Chamber has acknowledged in cases where four or five co-accused were charged on the same indictment that the accused's individual trial 'could have started earlier',[113] and that joinder 'brought complexity to the facts, the law and proceedings'[114] or increased the 'size and complexity' of the trial.[115] Despite this, the Appeals Chamber held that the prosecutor's actions did not cause undue delay because joinder is provided for by the RPE and is 'warranted to reflect the full scope and joint nature of the co-accused's alleged criminal conduct'.[116] Even where it is acknowledged that prosecutor's decision to

[112] *Rwamakuba Decision on Defence Motion* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005) [29].
[113] *Ndindiliyimana Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014) [44]; *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011) [35].
[114] *Rwamakuba Decision on Defence Motion* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005).
[115] *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [33].
[116] *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011) [35]; referring to the trial judgment. See also *Ndindiliyimana Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case

jointly charge four senior government officials had 'caused size and complexity', it has been held that the accused had failed to demonstrate that this decision *improperly* prolonged the trial.[117] The accused is only required to demonstrate that the right to be tried without undue delay has been engaged. The burden should then shift to the prosecutor to consider whether their actions were justified in causing delay.

1.2.4. Justifying the actions of the judicial and institutional authorities

An accused before international tribunals must also prove that the actions of the judicial and institutional 'authorities' caused undue delay.[118] While it is firmly established before regional human rights courts that organisational failings or a lack of resources will not justify lengthy delays, an accused before international tribunals is expected to demonstrate how the actions of the authorities contributed to delays, and have rarely been successful in doing so.[119] The case of *Bizimungu* highlighted how the ICTR's consideration of the conduct of the authorities has been in direct opposition to the approach of regional human rights courts.[120] In 2010, the accused in this case had been in detention for over 11 years and argued that the United Nations Security Council and the General Assembly had failed to provide adequate resources

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No ICTR-00-56-A, 11 February 2014) [44], where it was held that joinder is provided for in the RPE and was not challenged by the accused on appeal.

[117] *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [33].

[118] 'The authorities' in this context refers both to the judicial authorities and international institutions responsible for funding international tribunals.

[119] See *Semanza Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T 15 May 2003) ('*Semanza Judgment'*); *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).

[120] *Prosecutor v Bizimungu et. al.* (International Criminal Tribunal for Rwanda, Case No ICTR-99-50-T).

to the Tribunal, and that delays had resulted from having to work in three different languages, 'bureaucratic infighting between the OTP and registry' and a limited amount of courtroom space.[121] The Trial Chamber rejected this argument on the basis that the accused had 'failed to provide any details to support his assertion that the Tribunal lacks the personnel and facilities to perform its functions or to show how such issues have translated into undue delay.'[122] In 2011, the accused again raised his concerns that the conduct of authorities had caused undue delay, and the Trial Chamber held that the accused's 'blanket allegation that the Tribunal's "organisational failures" caused unnecessary delays in this trial ignores the common challenges of trial administration of a multi-accused case with a complex procedural history.'[123] In 2013, after the proceedings had been ongoing for 13 years, the accused's argument that proceedings could have been streamlined by better the use of courtrooms was once again dismissed by the Appeals Chamber, where it was found that their argument failed to recognise that cases of this size are 'conducted in segments' to allow parties to prepare, provide time for translation, and secure witnesses and other evidence, and do not account for other judicial or trial management activity, for example, preparation of decisions.[124] This finding supported an earlier decision where the ICTR Trial Chamber held that the limited resources of the tribunal were a reason for finding there has been no undue delay.[125]

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[121] *Mugiraneza's Fourth Motion* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50, 23 June 2010) [15].
[122] Ibid [16].
[123] Ibid [79].
[124] *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [34].
[125] *Semanza Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T 15 May 2003) [582].

Problems with an accused being required to prove the actions of judicial authorities violated their right to be tried without undue delay are clearly evident where an accused must speculate on the complex workings of international tribunals.[126] The Appeals Chamber in the case of *Bizimungu* noted the accused's concerns that the increased workload of judges caused the 12-year delay, but found that it was 'not unusual for judges of the Tribunal to participate in multiple proceedings, impacting the pace of those respective proceedings'.[127] The Appeals Chamber continued, finding that the accused had not shown '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.'[128] It is difficult to determine how the accused would be able to demonstrate that different logistical arrangements would have affected the judges' workload. The key issue to be considered in applying the criteria for assessing undue delay was whether the delays in proceedings were caused by the judges' excessive workload. Requiring the accused to engage in a detailed analysis of the logistical requirements of the Tribunal distracted from this central issue and would be almost impossible for the accused to demonstrate.

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[126] *Mugenzi's Motion Alleging Undue Delay* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No Case No ICTR-99-50-T, 14 June 2007); *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).
[127] *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [35].
[128] Ibid.

In the case of *Renzaho*, the accused argued that a delay of seven years overall and of 18 months to deliver the trial judgment violated his right to be tried without undue delay.[129] The ICTR Appeals Chamber, however, acknowledged the length of proceedings and argued that:

> With respect to the delivery of the Trial Judgement, the Appeals Chamber notes that it was delivered one and a half years after the close of trial. In the context of this case, such a delay is concerning. The Appeals Chamber underscores that lengthy delays can give rise to serious questions regarding fairness to the accused. However, in view of the complexity of this case, including the number of charges and the volume of evidence produced by the Parties, Renzaho has not demonstrated that the delivery of the Trial Judgement was unduly delayed.[130]

The Trial Chamber's failure to set a trial date has also been dismissed by the ICTR.[131] The Appeals Chamber, while agreeing that a five year period between arrest and transfer to the tribunal was long, justified the Trial Chamber's refusal to set a trial date, outlining that the Trial Chamber 'explained that it was not in a position to set a date for trial bearing in mind the overall judicial calendar for the Tribunal.'[132]

It is significant that in the recent case of *Nyiramasuhuko*, the ICTR Appeals Chamber brought its approach to considering the conduct of judicial and prosecutorial authorities in line with that of regional human rights courts. In its 2015 judgment, the Appeals Chamber held that 'logistical considerations should not take priority over the Trial Chamber's duty to safeguard the

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[129] *Prosecutor v Renzaho* (*Notice of Appeal*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-I , 2 October 2009) [39].
[130] *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011) [241].
[131] *Mugenzi's Motion Alleging Undue Delay* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No Case No ICTR-99-50-T, 14 June 2007); *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009).
[132] *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009 [49].

fairness of proceedings.'[133] In this case, it was held that the accused had proven that the prosecution's failure to fulfil their disclosure obligations, and the practice of judges participating in simultaneous proceedings 'did not justify delays and organisational hurdles and lack of resources cannot reasonably justify the prolongation of proceedings that had already been significantly delayed.'[134] Given that this was the final case brought before the ICTR and the approach went against the weight of previous decisions, it is difficult to say what influence it will have on the ICC.

1.2.5. Establishing that an accused suffered prejudice

In contrast to the approach before regional human rights courts, the requirement that an accused must demonstrate that they suffered prejudice as a result of the delay has been described as an 'almost insurmountable obstacle' in proving undue delay before international tribunals.[135] Before regional human rights courts, a consideration of what is at stake for the accused must be considered as part of the criteria for assessing undue delay.[136] As part of this consideration, factors such as the length of detention, the loss of exculpatory evidence through fading witness memories or degradation of evidence, and the psychological effects of remaining in a state of uncertainty about one's fate are accepted as prejudice *per se* by regional human rights courts.[137] However, international tribunals have taken this

[133] *Nyiramasuhuko Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015) [376].
[134] Ibid [376].
[135] Zeegers, above n 4, 377.
[136] See Chapter 3, page 119.
[137] *McFarlane* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September 2010); *Beggs* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012); *Mellors v United Kingdom*

requirement one step further and instead of considering what is at stake for the accused, the accused must prove that they suffered prejudice as a result of the delay. As Zeegers has argued, the requirement to demonstrate prejudice itself has been 'invented' by international tribunals, and 'finds no support in IHRL [international humanitarian law] and is arguably inconsistent with the object and purpose of the very right to be tried without undue delay'.[138] This additional requirement further adds to the burden of proof faced by an accused in proving they were subjected to undue delay. The case of *Bizimungu*, which has been discussed previously, is illustrative of the difficulties with the ICTR's approach to the matter of prejudice.[139] To put this decision in context, the two co-accused, Mr Mugenzi and Mr Mugiraneza, were both arrested on 6 April 1999, and at the time of their appeal, had been detained for almost 14 years. The Appeals Chamber began its consideration of the issue of undue delay by acknowledging that the two co-accused had claimed violations of their right to be tried without undue delay throughout the proceedings.[140] Mr Mugenzi argued that he had suffered prejudice as a result of the delays because there had been a loss of evidence in the form of reliable witness testimony, and that he had endured 'oppressive incarceration,

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(European Court of Human Rights, Application Number 57836/00, 17 July 2003), *Henworth v United Kingdom* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004); *Lisiak v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 37443/97, 5 November 2002; *Portington v Greece* (European Commission of Human Rights, Commission (First Chamber), Application Number 28523/95, 16 October 1996); *Ciepluch v Poland* (European Commission of Human Rights, Second Chamber, Application Number 31488/96, 3 December 1997); *Massey v the United Kingdom* (European Court of Human Rights, Court (Fourth Section), Application Number 14399/02, 16 December 2004).

[138] Zeegers, above n 4, 328-329.

[139] *The Prosecutor v Bizimungu et. al*. (*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*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 3 November 2004).

[140] *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [19].

anxiety and concern'.[141] He also asserted that it was 'plain that he suffered prejudice because he spent 12.5 years away from his family in detention "as a man presumed innocent [...] kept uncertain as to his fate'".[142] Mr Mugiraneza also argued that he had suffered prejudice because the '12-year incarceration prior to the issuance of the Trial Judgment amounts to prejudice *per se*'.[143]

The ICTR's approach to considering whether the accused had proved prejudice in this case differed significantly to that of regional human rights courts. While both the Trial Chamber and the Appeals Chamber failed to address the issue of prejudice resulting from prolonged detention or the psychological effects on the accused, the effect of lengthy proceedings on the reliability of witness evidence was examined in some detail. This issue related to the prosecution's contention that one witnesses' testimony should be discounted because it conflicted with that of another witness' version of events. The accused argued that it had been 14 years since the events being recalled had occurred, and that 'fading memories are a problem in any trial conducted long after the event.'[144] The accused submitted that if witness testimony can be discounted because of discrepancies in the witness' memory long after the events, he had 'been prejudiced by delay in his ability

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[141] *Mugiraneza's Fourth Motion* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50, 23 June 2010) [17] quoting *Bizimungu et al.* (*Prosper Mugiraneza's Reply to Prosecutor's Response to Prosper Mugiraneza's 11th Anniversary Motion to Dismiss Indictment for Violation of Right to Trial Without Undue Delay*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-99-50-T, 15 April 2010) [9].
[142] *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [24], quoting *Mugenzi and Muriganeza v The Prosecutor* (*Justin Mugenzi's Appeal Brief*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-A, 20 February 2012) [317].
[143] Ibid [46], [47].
[144] Ibid [21] quoting *Prosecutor v Bizimungu et al*. (*Prosper Mugiraneza's Third Motion to Dismiss Indictment for Violation of his Right to a Trial Without Undue Delay*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 10 December 2008) [9].

to present his defence."[145] In 2009, the Trial Chamber concluded that there had been no prejudice because it could not be proven that the contradictions in testimony were due to fading memories.[146] In light of the Trial Chamber's discussion, it is difficult to understand the circumstances in which it could be successfully argued that fading witness memory has prejudiced the accused.

In 2010, after the proceedings had been ongoing for 11 years, the Trial Chamber once again considered the issue of prejudice. Referring to the length of proceedings in the case of *Bizimungu*, the ICTR Trial Chamber concluded that there was no prejudice, stating that the trial had advanced significantly since these issues were raised previously, and the Chamber was now at the deliberation stage and considering its judgment.[147] In 2013, the Appeals Chamber considered the issue of prejudice for the final time in this case. It acknowledged that the 12 year delay from arrest until the trial judgment 'had been lengthy'[148] but argued that there was no merit in the argument that the co-accused had been prejudiced by the delay because of reduced credibility of witnesses. The Appeals Chamber's reasoning rested on the finding of guilt and stated that the example of witness testimony provided by the accused related to an event that did not underpin the conviction.[149] The ICTY's approach has been similar, and has demonstrated an unwillingness to

[145] Ibid [9(c)(ii)].
[146] *Mugiraneza's Third Motion'* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50, 10 February 2009) [23].
[147] *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013) [18].
[148] Ibid [31].
[149] Ibid [35-36].

find that an accused suffered prejudice because delays resulted in the loss of exculpatory evidence.[150]

The ICTR's assessment of whether lengthy detention constitutes prejudice *per se* has also been inconsistent.[151] In the case of *Bagosora*, one of the co-accused alleged that they had been prejudiced by the delay, while two other co-accused made no submissions regarding the delay.[152] Despite the accused having spent over 11 years in detention, it was held that the accused had made no submissions about the prejudice they faced and the Trial Chamber had failed to identify any, 'in particular since both have received life sentences in view of the gravity of their crimes.'[153] Three years later, the accused once again raised the issue of prejudice and the Appeals Chamber held that his submission amounted to 'mere assertion without demonstrating how he was prejudiced.'[154] Not only have international tribunals failed to recognise prejudice *per se* as before regional human rights courts, but also that the accused faces a heavy burden in actively proving prejudice as a result of lengthy delays. However, as was the case in proving that the actions of the prosecutor and authorities did not justify lengthy proceedings, the final case heard by the ICTR also held that delays caused by the prosecutor and authorities and the resulting prolonged detention constituted prejudice *per*

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[150] *Perišić* (*Decision on motion for sanctions for failure to bring the accused to trial without undue delay*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-81 23 November 2007) [28].
[151] 'Prejudice *per se*' refers to finding that it can be assumed from the length of the delay that the accused suffered prejudiced.
[152] *Bagosora Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) [83].
[153] Ibid.
[154] *Bagosora Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011) [36].

se.'[155] It is therefore unclear whether this decision will impact on the jurisprudence of the ICC in future cases considering the issue of undue delay.

Another area of concern in considering the issue of prejudice to the accused as a result of delay is the way in which the gravity of the offence has been used to mitigate the length of proceedings. After concluding that the accused had not identified any error in the Trial Chamber's approach in the case of *Bizimungu*, the Appeals Chamber held that the length of the accused's pre-trial detention 'was not disproportionate in relation to the gravity of the crimes with which he was charged.'[156] This statement directly contravened the presumption of innocence by justifying pre-trial detention on the seriousness of offences that have not yet been proved.[157] It also views pre-trial detention as punitive rather than as required for the proper administration of justice, and the gravity of the offence cannot be used to justify lengthy detention.[158]

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[155] *Nyiramasuhuko Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015) [388].
[156] *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009) [49].
[157] See Shima Baradaran, 'Restoring the Presumption of Innocence' (2011) 72 *Ohio State Law Journal* 772, 776, 770. Baradaran argued that historically, judges were not allowed to consider the facts and circumstances of the crime the accused allegedly committed in order to determine whether to grant bail and the proper basis for restricting a person's liberty includes ensuring a person's attendance at trial, protecting the judicial process from interference and if detained, protecting the security of the facility. See also Rinat Kitai-Sangero, 'The Limits of Preventative Detention' (2009) 40 *McGeorge Law Review* 903, 933. Kitai-Sangero argued that there is no way to predict dangerousness and detention should only be imposed in rare cases where there is 'clear evidence regarding a person's dangerousness' due to the importance of the presumption of innocence. Cf Richard L. Lippke, 'Preventative Pre-Trial Detention Without Punishment' (2014) 20 *Res Publica* 111. Lippke argued that pre-trial detention for those accused of serious offences may warrant infringements of the presumption of innocence.
[158] *Prosecutor v Perišić* (Decision on Mr *Perišić*'s Motion for Provisional Release During the Court's Winter Recess) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-8IT, 17 December 2008) [10], quoting *Ilijkov v Bulgaria* (European Court of Human Rights, Fourth Section, Application Number 33977/96, 26 July 2001) [81].

The seriousness of the offence also entered into the consideration of whether the accused has been subjected to undue delay in the case of *Rwamakuba*, where the Trial Chamber held that this should be assessed 'in light of several criteria including the complexity of the proceedings and the case, the charges against the Accused, the conduct of the Accused, and the organs of the Tribunal.'[159] The Trial Chamber concluded by arguing that:

> Having viewed the factual history of the proceedings, this Chamber notes that from the initial appearance of the Accused until now, the proceedings have been continuously advancing taking into account the particularities and the complexity of the case. Thus, in light of the complexity of the case and the proceedings, the serious charges against the Accused, the conduct of both parties and of the Registry, the Chamber does not consider that the right of the accused to be tried without undue delay has been violated.[160]

Similarly, in the case of *Nsengimana*, the ICTR Trial Chamber concluded that the accused had not demonstrated that they had been subjected to undue delay, and commented that 'the length of Nsengimana's pre-trial detention was not disproportionate in relation to the gravity of the crimes with which he was charged.'[161] Including a consideration of the seriousness of the offence has no relevance to the question of undue delay when raised at the time of judgment.

1.2.6. In considering the burden of proof placed in the accused in proving undue delay, does the context in which international tribunals operate provide a legitimate reason for departing from domestic standards of fair trial protections?

An accused before international tribunals faces a heavy burden that extends beyond what they are required to prove before domestic criminal courts. The

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[159] *Rwamakuba Decision on Defence Motion* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005) [27].
[160] Ibid [37].
[161] *Nsengimana Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009) [49].

accused is required to establish not only that there was an interference with their right to be tried without undue delay, but also that they suffered prejudice as a result of that interference, and that the actions of the prosecutor and the authorities should be regarded as a violation of their right to be tried without undue delay. While international tribunals have readily accepted that there have been delays in proceedings, and the right to be tried without undue delay has been engaged, they have consistently found that the actions of the prosecutor and the authorities were justified and there was no violation of the right of the accused to be tried without undue delay.

The relative disparity in the position of the accused with respect to the prosecutor and international tribunals, combined with flawed decision making of international tribunals, have made it almost impossible for an accused to demonstrate that their right to be tried without undue delay has been violated. The approach of international tribunals in demonstrating undue delay is also inconsistent with that of regional human rights courts, where a positive duty is imposed on the prosecutor to act with a ‘special diligence’, and on the authorities to meet the reasonable time requirement. Overall, the way in which international tribunals have interpreted the burden on the accused to prove that they were subjected to undue delay does not strike the right balance between the interests of the prosecutor, authorities, and those of the accused. International tribunals have relied on differences in the role of the prosecutor and the lack of available resources in international criminal justice without considering the effectiveness and efficiency of the authorities in managing

resultant delays. As such, international tribunals have not provided legitimate reasons for departing from domestic standards of fair trial protections.

2. The criteria for assessing undue delay does not account for the unique context in which international tribunals operate

International tribunals' application of the legal test for undue delay has failed to protect the rights of the accused. On the one hand, international tribunals have sought to uphold the fundamental rights of the accused and promote justice and fairness. Yet on the other, international tribunals have repeatedly relied on the complexity of the case to explain lengthy delays and have downplayed the actions of the prosecutorial or judicial authorities that caused the delay, or used previous cases where lengthy delays were not found to be undue to justify similarly lengthy proceedings. While international tribunals have fallen short of meeting domestic standards of justice, no alternative standard of protection has been proposed to which they should be answerable.

The current legal test does not account for the unique context in which international criminal law operates. In applying the criteria for assessing undue delay that were developed for domestic jurisdictions, international tribunals have compromised fairness and the rights of the accused in order to meet the demands of international criminal justice, most significantly, the complexity of international criminal proceedings. This context operates to affect the length of proceedings in two ways, neither of which are adequately addressed by the current legal test. Firstly, the broad objectives of international criminal justice can increase complexity, for example, the need to

create a historical record can increase the volume of evidence in a trial. Secondly, the context in which international criminal proceedings operate can increase the complexity of proceedings, for example, through a lack of resources. Reasoning processes that downplay the role of the prosecutorial and judicial authorities in causing delays, rather than examining the actions of their actions throughout the trial, ultimately place a heavy burden on the accused to prove they were subjected to undue delay that they are rarely able to discharge. The current legal test does not provide a means of objectively assessing complexity or the actions of judicial or prosecutorial authorities to allow international tribunals to consider only those factors that legitimately impact the length of proceedings. The legal test for undue delay currently does not allow for a consideration of the objectives of international criminal justice or provide a framework for balancing these factors with the overall fairness of proceedings. In applying a legal test that is not appropriately adapted to its context, international tribunals have demonstrated reasoning processes that lack transparency and consistency and do not provide adequate protection of the right of the accused to be tried without undue delay.

This chapter has considered two ways in which international tribunals have adapted the criteria for assessing undue delay that derive from the uniqueness of international criminal law, in terms of both its status as a *sui generis* system of law, and its broad objectives and mandate. The way in which international tribunals have interpreted the criteria to meet the challenges of international criminal justice relate to the complexity of the case.

It also relates to the way in which the actions of the prosecutorial and judicial authorities are downplayed due to a human rights oriented approach in international criminal law that has broadened the scope of parties to which fair trial rights and various interests apply, and changed the role of parties of proceedings as a result of a fused system of law incorporating both adversarial and inquisitorial elements of procedure. These issues will be analysed further in Chapter 6, which will both examine the standard of protection for the right to be tried without undue delay to which international tribunals should be held to account, and outline an adapted legal test for undue delay that, unlike the way in which international tribunals have applied the criteria, meet both the objectives and challenges of conducting international criminal proceedings while ensuring the proceedings are fair overall.

Chapter 6 – Adapting the legal test for undue delay

This chapter proposes an adapted legal test for undue delay that considers the differences between domestic and international criminal proceedings. The proposed legal test aims to provide a framework that is adapted to the international criminal justice context, assists judges to consistently and objectively assess the reasonableness of the length of proceedings and the complexity of the case, and transparently balance the goals and objectives of international criminal justice with the overall fairness of proceedings. The aim of the adapted legal test is to ensure that international tribunals only depart from domestic standards of protection of the right to be tried without undue delay after the overall fairness of proceedings has been considered and where it is necessary to meet the broad objectives of international criminal justice. In considering the length of international criminal proceedings, focus has been almost solely on the complexity of the case or the interests of parties other than the accused. The adapted legal test aims to shift the focus of undue delay back to the right to a fair trial, which is afforded only to the accused.

This thesis clarifies the standard to be applied in upholding the right of the accused to be tried without undue delay. International tribunals are currently not meeting domestic standards of fair trial protections, yet there is no clarity about the standard to which they should be held. The approach to the legal test for undue delay proposed in this thesis mediates between theories that

sanction departures from domestic standards of fairness in order to uphold the goals and objectives of international criminal justice, and those that argue that international tribunals should be held to the highest standards fairness in interpreting human rights norms.[1] This chapter begins by briefly re-examining the literature on fair trial standards in international criminal justice critiqued in Chapter 1, to understand how this has informed the development of the adapted legal test.[2] It will then outline the five elements of the adapted legal test before applying it to the facts of two completed cases before the International Criminal Court (ICC). In applying the adapted legal test for undue delay to the facts of actual cases, this chapter will demonstrate how the test could be applied in an international criminal law context to better safeguard the rights of the accused and provide consistent and transparent reasoning processes.

1. Theoretical basis for the adapted legal test for undue delay

In determining the relevant standard of fairness to be applied in an international criminal justice context, two approaches have been advanced in the literature. These approaches are essentially arguments about whether the context in which international criminal law operates justifies a departure from domestic standards of fair trial protections.[3] One view is that international tribunals should adhere to the highest standards of fairness, and in some

[1] See discussion in Chapter 1 pages 29-37, referring to the following research: Krit Zeegers, *International Criminal Tribunals and Human Rights: Adherence and Contextualisation* (TMC Asser Press, 2016); Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press, 2016); Mirjan Damaska, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' (2010-2011) 36 *North Carolina Journal of International Law and Commercial Regulation* 365*;* Frederic Megret, 'Beyond "Fairness": Understanding the determinants of International Criminal Procedure' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 37.
[2] See discussion in Chapter 1 pages 28-56.
[3] See discussion in Chapter 1 pages 29-37.

cases, exceed the standards set by domestic criminal justice.[4] Studies supporting this approach have sought to address tensions between upholding the objectives of international criminal justice and the rights of the accused, by drawing on human rights principles[5] and concepts of fairness to interpret fair trial provisions. An alternative view, however, is that the demands of international criminal justice warrant international tribunals departing from domestic standards of fair trial protection.[6] Both of these approaches have identified similar problems with international tribunals' current application of the law of undue delay in terms of consistency, transparency and fairness.[7]

This following discussion will examine theories on the relevant standard of fairness for international tribunals, and explain how they have influenced the development of the adapted legal test for undue delay proposed in this thesis. It is important to first establish the theoretical basis for the adapted legal test in order to better understand the context in which each element should be interpreted and applied. While fairness is fundamental for protecting the right to be tried without undue delay, this thesis argues that international tribunals should not be required to adhere to the highest standards, and that some departure from international standards of fair trial protections applied in domestic criminal courts may be necessary in order to meet the demands of international criminal justice. The central question is whether the accused can still be afforded a fair trial in light of the complexity of the case, management

[4] McDermott, *Fairness in International Criminal Trials*, above n 1, 177.
[5] 'Human rights principles' refers to Zeegers' proposed framework for interpreting fair trial rights in international criminal law discussed in Chapter 1 pages 47-53. This approach is to be distinguished from a human rights oriented approach explained in Chapter 3 pages 101,103.
[6] Damaska, *The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals*, above n 1*;* Megret, above n 1.
[7] See discussion in Chapter 1 pages 36-53.

of proceedings by the prosecutorial and judicial authorities to prevent undue delay, and the objectives of international criminal justice. A focus on the rights of the accused is currently lacking from the international tribunals' approach to the current criteria for assessing undue delay, which instead focuses on the complexity of proceedings and the interests of parties other than the accused. The adapted legal test seeks to find a balance between requiring international tribunals to adhere to the highest standards of fairness, and justifying departures from these standards on the grounds that international criminal law is unique.

1.1. Fairness and international criminal justice

1.1.1. International tribunals should maintain the highest standards of fairness

As discussed in Chapter 1, some researchers have argued that international tribunals should be held to the highest standards of fairness, and that the unique context in which they operate does not justify their failure to provide this level of protection to the rights of the accused.[8] As demonstrated in the analysis in Chapters 4 and 5, international tribunals have interpreted and applied the right to be tried without undue delay in a way that has failed to meet international standards of fair trial protections provided by regional human rights courts and applied in domestic criminal courts. Yet rather than acknowledging that an international criminal justice context may require departure from these standards, some studies have argued that judges of

[8] See discussion in Chapter 1 pages 32-34. See also, Zeegers, above n 1; McDermott, *Fairness in International Criminal Trials*, above n 1.

international tribunals should interpret fair trial rights using human rights principles[9] or concepts of fairness to better protect the rights of the accused.[10]

International criminal law is comprised of a number of different legal fields, and employs a range of interpretive methods to balance competing goals, objectives rights and interests.[11] Chapter 2 highlighted that in the absence of a coherent framework, human rights interpretive principles have been used by international tribunals to interpret and apply the criteria for assessing undue delay in a way that has prioritised the interests of parties other than the accused.[12] In interpreting and applying the law of undue delay, international tribunals have failed to resolve tensions between human rights law, with its broad interpretive methods, and criminal law, which maximises the protection of individual accused through fair trial provisions embedded in criminal procedure.[13] As critiqued in Chapter 3, a human rights oriented approach to international criminal procedure has resulted in a tendency for victims' rights to prevail over those of the accused in balancing competing rights, interests and objectives.[14] A human rights oriented approach has resulted from the application of expansive human rights interpretive methods to international criminal law, the influence of victim-focused humanitarian law in international criminal justice, and the view that victims are the central purpose of international criminal justice.[15] While a human rights oriented approach that incorporates elements of fairness would seem aimed at protecting individual

[9] See above n 5.
[10] See discussion in Chapter 1 pages 46-47.
[11] See discussion in Chapter 2 pages 64-65 and 90-96.
[12] See discussion in Chapter 2 pages 61-83.
[13] See discussion in Chapter 2, pages 81-82.
[14] See discussion in Chapter 3 pages 121-133.
[15] See discussion in Chapter 3 pages 101,103-104.

accused, in an international criminal law context, it also necessitates a focus on the rights of victims and the interests of the international community in seeing justice done.[16]

The criteria for assessing undue delay do not assist judges in consistently and transparently balancing competing goals, objectives and interests and are not adapted to an international criminal justice context. International criminal law is different to domestic criminal proceedings and it may not always be possible for international tribunals to meet domestic standards of fair trial protections for an accused.[17] The broad objectives of international criminal justice bring complexity to proceedings that extend beyond the central purpose of domestic criminal trials in finding the guilt or innocence of an accused. While it has been established that international tribunals have indeed derogated from meeting domestic standards of fair trial protections in interpreting and applying the law of undue delay, they have done so in a way that lacks transparency and consistency.[18] This is because the current legal test does not provide for a consideration of the context in which international tribunals operate, or provide a framework for balancing these factors with the overall fairness of proceedings and the rights of the accused.

Previous research has failed to consider whether the criteria for assessing undue delay require modification to be adapted to an international criminal

[16] See discussion in Chapter 2 pages 81-82.
[17] It is acknowledged that domestic criminal proceedings have other objectives in common with international tribunals, such as deterence, however, the objectives of domestic criminal justice are not as expansive as those in international criminal justice.
[18] See Chapter 1 page 14-16. Zeegers, above n 1, 359-360; McDermott, *Fairness in International Criminal Trials*, above n 1.

justice context. As discussed in Chapter 1, previous research has recommended addressing problems with consistency and transparency in international tribunals' application of the right to be tried without undue delay by giving greater attention to the conduct of the parties and motions alleging undue delay, and ensuring that fair trial rights attach to the accused alone and are not extended to other parties to proceedings.[19] It has also been suggested that to better protect the rights of the accused, international tribunals should interpret fair trial rights using a methodological framework comprising of 'best practices' from the international tribunals' interpretation and application of human rights norms so they may be better contextualised in an international criminal justice context.[20] However, international tribunals are not human rights courts, and using frameworks that interpret fair trial rights using a human rights oriented approach will only further obfuscate the issue of undue delay.[21] As discussed above, where the influence of human rights is too great in an international criminal justice setting, the rights and interests of victims, and indeed the interests of the prosecutor will prevail over those of the accused. As has been demonstrated in previous chapters, any exercise in balancing the rights involved in a fair trial will, in practice, result in trade-offs being made which are adverse to the interests of the accused.[22]

Approaches that fail to acknowledge the ways in which international criminal law differs from domestic criminal law create tensions that the current legal test for undue delay is unable to resolve. As such, the legal test for undue

[19] McDermott, *Fairness in International Criminal Trials*, above n 1, 177.
[20] Zeegers, above n 1, 380.
[21] See discussion in Chapter 2 pages 77-83.
[22] See discussion in Chapter 3 pages 121-133.

delay has either been disregarded or applied in a limited way where the underlying reasons for departing from domestic standards of fairness are difficult to discern from judgments, which instead simply refer to the complexity of the case. As shown in Chapter 4, the criteria for assessing undue delay are not adapted to an international criminal justice context and as such, international tribunals have interpreted them in a way that is diametrically opposed to the approach of regional human rights courts, to account for factors unique to the international criminal justice context.[23] An adapted legal test for undue delay must therefore shine a light on those factors that justify limiting the rights of the accused by providing international tribunals with a framework to consistently and transparently balance the demands of fairness with the challenges of conducting criminal proceedings in an international context.

1.1.2. International tribunals are justified in departing from domestic legal standards

This thesis supports the view that international tribunals may be justified in departing from domestic standards of fair trial protections in order to meet the broad goals and objectives of international criminal justice.[24] This argument stems from both recognition of the *sui generis* nature of international criminal justice with its unique objectives and goals, and the tensions that arise between those objectives and the principles of criminal procedure, or, at least, criminal procedure as ordinarily conceived. The central argument of this approach is that domestic criminal procedure is not adapted to an

[23] See Chapter 4 page 210-214.
[24] See also: Damaska, *The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals*, above n 1*;* Megret, above n 1; Sergey Vasiliev, 'International Criminal Trials – A Normative Thesis' *PhD Thesis*, University of Amsterdam, 2014.

international criminal law environment, and where international tribunals are required to adhere to domestic standards of fair trial protections, the tensions between those standards and the objectives of international criminal justice have often led to fair trial protections being distorted or completely disregarded.[25] As demonstrated by the analysis in Chapters 4 and 5 of this thesis, international tribunals may fail to ensure due process protections where procedural rules do not account for the context or environment in which international law operates, and the demands of fairness become too great.[26]

The argument that international criminal law is unique and should be influenced, but not constrained by, rules of domestic criminal procedure has been used to challenge the idea that domestic fair trial standards should apply in an international context.[27] Vasiliev has suggested that the influence of domestic criminal procedure is merely a 'starting position', and that the 'rationale, functions, implications and, indeed, very nature' of procedural rules are changed by the environment in which they operate.[28] As stated in Chapter 1, it has therefore been argued that the influence of domestic criminal procedure on international criminal procedure is more of a 'legal translation' rather than 'legal transplantation'.[29] International justice should therefore be responsive to its environment, which may require 'abandonment, or relaxation, of some cherished domestic procedural arrangements'.'[30] These

[25] On this point, see: Mirjan Damaska, 'Reflections on Fairness in International Criminal Justice' (2012) 10 *Journal of International Criminal Justice* 611, 612.
[26] For further discussion, see Chapter 4 pages 210-214 and Chapter 5 pages 265-267.
[27] Damaska, *The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals*, above n 1*;* Megret, above n 1; Vasiliev, *International Criminal Trials – A Normative Thesis*, above n 24.
[28] Vasiliev, *International Criminal Trials – A Normative Thesis*, above n 24, 848.
[29] Ibid.
[30] Damaska, *Reflections on Fairness in International Criminal Justice*, above n 25, 612.

arguments support the position that the unique nature of international criminal justice necessitates modification of procedural rules to fit the context in which they operate.

While some departures from domestic standards of fair trial protections are permissible or even necessary given the context in which international criminal law operates, those departures must still meet the minimum standards of a fair trial. Damaska has suggested that the requirements of a fair trial are described in human rights instruments in broad terms that 'leave room for fine-grained adaptations of these ingredients to the varying circumstances in which domestic and international courts operate'.[31] The issue is not whether departures from these standards are permissible, but whether they go below the minimum requirements of a fair trial.[32] In adapting international criminal procedure and departing from domestic standards:

> … an elusive core minimum, or kernel, cannot be disregarded without compromising the hard won achievements of civilization. The reputation of international criminal justice depends on respecting this kernel and leaving it intact.'[33]

By interpreting fairness broadly to apply to a range of parties other than the accused, the 'elusive core minimum, or kernel' has been disregarded. The adapted legal test seeks to balance factors related to the unique context international tribunals operate within while bringing focus back to the central issue of whether the right of the *accused* to a fair trial has been protected. As mentioned above, there have been no previous studies that have recommended changes to the legal test for undue delay. However, one

[31] Damaska, *The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals*, above n 1, 380-381.
[32] Ibid 387.
[33] Ibid.

possible model of how this could be done successfully is provided by Davidson's study examining the legal test for granting provisional release.[34]. Davidson's study considered problems with the test for allowing provisional release and proposed modifications such as limiting the 'unbridled discretion' of the courts to detain, eliminating the 'sufficiently compelling humanitarian circumstances' requirement, and placing the burden of persuasion on the prosecution to show the defendant is a flight risk or danger.[35] The adapted legal test for undue delay outlined in the following section follows a similar approach to Davidson by seeking to adapt a transplanted legal test in a way that balances fairness and human rights with the objectives of international criminal justice.

1.1.3. Setting the relevant standard of fairness for international tribunals

This thesis argues that while the accused must be afforded a fair trial and the minimum standards of human rights protection be maintained, adapting or contextualising the legal test for undue delay to meet the demands of international criminal justice necessitates some departure from domestic standards of human rights protection.[36] In applying the law of undue delay, international tribunals have professed the importance of the fundamental rights of the accused, yet the current legal test has failed to provide an effective framework for balancing the rights of the accused with the complexity of the case, fairness considerations and the objectives of international criminal justice. The legal test for undue delay must serve as an effective tool to assist

[34] Caroline Davidson, 'No Shortcuts On Human Rights: Bail and the International Criminal Trial' (2010) 60(1) *American University Law Review* 1, 60-69.
[35] Ibid.
[36] See discussion Chapter 1 pages 53-56.

international tribunals to balance the need for fairness and human rights protection with the objectives of international criminal justice. Any such test must provide a framework allowing international tribunals to decide when departures are justified in order to meet their broader objectives.

2. The adapted legal test for undue delay

The following section outlines the adapted legal test for undue delay. It will describe each element of the test to examine how the proposed changes seek to remedy problems with the current approach of international tribunals identified in the analysis in Chapters 4 and 5. After considering the reasonableness of the time period as a threshold question, the adapted legal test will examine a number of elements to objectively assess the length of proceedings, before considering whether the accused can be afforded a fair trial overall. It will be recalled from Chapter 5 that complexity can be factual, legal, or arise from the actions of the prosecutor, judges, victims, witnesses or the accused (participant complexity).[37] The adapted legal test introduces an objective assessment of the complexity of the proceedings, that should be considered alongside an examination of whether the prosecutorial and judicial authorities acted efficiently and effectively to manage proceedings to prevent undue delay, and whether the length of proceedings was necessary to meet the objectives of international criminal justice. The adapted legal test provides a framework for balancing these factors with the overall fairness of proceedings.

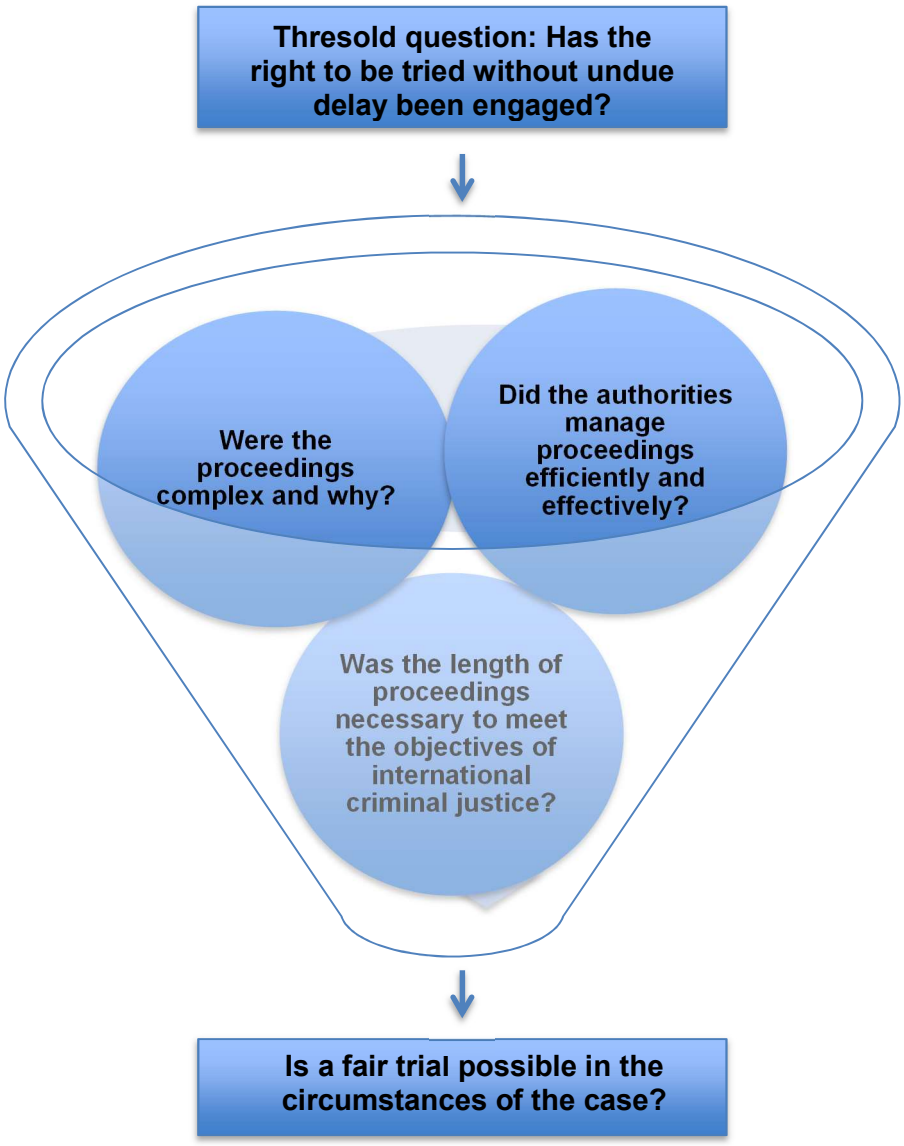
[37] Stuart Ford, 'Complexity and Efficiency at the International Criminal Courts' (2014) 29 *Emory International Law Review* 1, 12-14.

The adapted legal test recognises that some delays may be outside the control of the prosecutorial or judicial authorities where the length of proceedings were required to meet an objective of international criminal justice. For example, the large scope of the indictment may cause proceedings to be lengthy, but that scope may be required in order to prosecute and punish the perpetrators of genocide, crimes against humanity and war crimes. Similarly, a large number of witnesses or volume of evidence may be required to link a senior official to an offence in order to ensure the worst perpetrators are held accountable for their crimes. However, where the authorities did not act efficiently or effectively to prevent undue delay, for example, where a prosecutor called a large number of unnecessary witnesses or judicial authorities delayed issuing a judgment, and those actions were not related to meeting the objectives of international criminal justice, it will be found that the accused was subjected to undue delay.

The adapted legal test provides a framework to consider the context international criminal justice operates within, and balances this with the overall fairness of proceedings to ensure the reasoning processes of international tribunals in cases considering the issue of undue delay are balanced, consistent and transparent. The aim of the adapted legal test is to consider whether in light of the complexity of the case, the management of proceedings by prosecutorial and judicial authorities, and the objectives of international criminal justice, the accused can still be afforded a fair trial overall. In applying the current legal test for undue delay, international tribunals have focused on the complexity of the case and the rights and interests of parties other than

the accused. The adapted legal test will assist in returning the focus of undue delay considerations back where it belongs on the rights of the accused to ensure they receive a fair trial overall. The five elements of the adapted legal test are outlined in Figure 1. Each element in the adapted legal test is considered in turn below.

Figure 1: Elements of the adapted legal test for undue delay



2.1. Threshold question: Has the right of the accused to be tried without undue delay been engaged?

The current approach of international tribunals to assessing the reasonableness of the time period has demonstrated a lack of clarity as to the purpose of the assessment, and inconsistencies in the way the time period is itself is assessed.[38] A consideration of the reasonableness of the time period has at times been neglected by international tribunals and not considered a separate criterion in its own right. Instead, international tribunals have dismissed lengthy proceedings by stating that 'no set time period constitutes undue delay' and that the reasonableness of the length of proceedings depends on the circumstances of the case overall, then failed to consider the other three criteria of the legal test, or at best applied the criteria selectively.[39] As such, international tribunals have not engaged with elements of the criteria for assessing undue delay enforced by regional human rights courts and affirmed in the case law of international tribunals.[40]

In addition to adding new elements to the criteria for assessing undue delay that account for the context international tribunals operate within, the adapted legal test seeks to detail the crucial elements of the criteria for assessing undue delay contained in international human rights case law to ensure consistency, transparency and fairness. The adapted legal test, however, does more than simply restate the case law, but also provides a method for assessing the duration of proceedings that is linked to the purpose of the reasonable time requirement, and provides additional criteria to assist judges

[38] See discussion in Chapter 5 pages 222-228.
[39] See discussion in Chapter 4 pages 208-210 and Chapter 5 pages 222-228.
[40] See discussion in Chapter 3 page 117-119.

in determining when the duration of proceedings will be considered 'inordinate or excessive'.[41] Requiring international tribunals to first consider the duration of proceedings will ensure that trials lasting over a decade are not dismissed or normalised, and shift the focus of international tribunals back onto protecting the rights of the accused. The adapted legal test seeks to:

- Link a consideration of the time period with the purpose of the right to be tried without undue delay. This will ensure that for lengthy trials, the rights of the accused and the need to ensure that they are not left too long in a state of uncertainty about their fate are at the forefront of considerations; and
- Acknowledge that the length of proceedings *per se* engages the right to be tried without undue delay and this in turn warrants a balanced consideration of the circumstances of the case using the adapted legal test.

Regional human rights courts view the assessment of the reasonableness of the time period as a threshold for determining whether the right of the accused to be tried without undue delay has been engaged.[42] Where the time period is such that it raises the question of whether this right is being infringed, a consideration of the remaining criteria for assessing undue delay ensues. International tribunals, however, have used the opportunity to consider the reasonableness of the time period to justify lengthy delays, rather

[41] Young, Summers and Corker, above n 42, 31.
[42] David Young, Mark Summers and David Corker, *Abuse of Process in Criminal Proceedings* (Bloomsbury, 2014), 31. See also *Boris Popov v Russia* (European Court of Human Rights, Court (First Section), Application Number 23284/04, 28 October 2010). In this case the length of proceedings was considered to be too short to constitute undue delay and therefore acted as a threshold test.

than as a threshold assessment to determine whether the right of the accused to be tried without undue delay has been engaged.[43]

The case analysis in Chapters 4 and 5 identified that international tribunals have used reasoning processes that compare the length of proceedings in similar cases and quantify the degree of violation of the rights of the accused to assess the reasonableness of the time period, yet there are a number of inconsistencies in their approach.[44] International tribunals have cited the principle that no set time period constitutes undue delay, yet have justified lengthy proceedings by comparing the length of proceedings across cases.[45] Where international tribunals have held that there was no undue delay in a particularly lengthy case, they have relied on this finding in subsequent cases to justify delays of similar durations.[46] Another inconsistency in the assessment of the reasonableness of the time period is the method used by international tribunals to assess the length of proceedings. It is well established that the relevant time period starts from the time the accused first became aware of the charges,[47] however, the ICTR rarely assessed the entire length of proceedings and instead measured from the time the issue of undue delay was last raised by the accused.[48]

The revised legal test seeks to introduce a consistent approach to considering the reasonableness of the time period for the purpose of determining whether

[43] See discussion in Chapter 3 pages 117-119.
[44] See discussion in Chapter 4 pages 208-210 and Chapter 5 pages 222-228.
[45] See discussion in Chapter 5 pages 222-228.
[46] Ibid.
[47] *Kangasluoma v. Finland* [2004] ECHR 29.
[48] See discussion in Chapter 5 pages 222-228.

the right of the accused to be tried without undue delay has been engaged. The approach of judges of international tribunals has been to normalise lengthy proceedings without always acknowledging the rights of the accused. Requiring judges to first consider the length of the trial itself brings focus back to the accused and ensures that where the length of proceedings has engaged the right to be tried without undue delay, the remaining criteria of the legal test are considered. To ensure consistency between cases, international tribunals should apply the following principles in assessing the reasonableness of the time period:

- The period to be assessed should always be from the time proceedings began, which is from the time of arrest or when the accused first became notified of the alleged offence, to final judgment;[49]
- If the proceedings are ongoing, the time period should be measured up to the point of the current proceedings and not from the last time the matter of undue delay was raised. If the proceedings have been finalised, the time period is measured up until the date of final judgment. This includes any appeals;[50]
- There is no set time period that constitutes undue delay and comparisons with other cases before international tribunals is irrelevant. Each matter should be considered based on the individual

[49] UN Human Rights Committee, *Earl Pratt and Ivan Morgan v Jamaica: Views*, Communication Nos. 210/1986 and 225/1987, U.N. GAOR, 44th Sess., Supp. No. 40, U.N. Doc. A/44/40, Annex X, sect. F, at 222 (29 September 1989); *Case of López Álvarez v. Honduras* (*Merits, Reparations and Costs*) (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006) [129]; *Kangasluoma v. Finland* [2004] ECHR 29; 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) 84. See discussion in Chapter 3 pages 117-119.
[50] UN Human Rights Committee, *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, UN Doc CCPR/C/GC/32, 23 August 2007. See discussion in Chapter 3 page 117-119.

circumstances of the case and where the length of proceedings is such that the rights of the accused have been engaged, the remaining parts of the legal test should be considered;[51]

- The accused should bear the onus for proving that the length of proceedings raises the question of whether the right to be tried without undue delay has been engaged. Where the time period is shown to be 'inordinate or excessive',[52] the right will be engaged, and the rest of the test will be applied;
- To determine if a length of proceedings is 'inordinate or excessive', *the reasonableness and nature of the delay in proceedings should be examined in light of the purpose of the reasonable time requirement.* For example, a time period of two years from arrest to final judgment may not be considered 'inordinate or excessive' because it is a reasonable amount of time for an accused to be in uncertainty as to their fate. A period of eight years, however, is a long time for an accused to not know the outcome of the proceedings and this time period may be considered 'inordinate or excessive'; and
- Rather than fixing a time period for when the length of proceedings would be considered 'inordinate or excessive', the nature of the 'delay'

[51] UN Human Rights Committee, *Mario InnesTorres v Finland: Views*, Communication 291/1988, UN Doc CCPR/C/38/D/291/1988, IHRL 2432, 45th session, (2 April 1990); *Prosecutor v Bizimungu* (*Judgment and Sentence*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 30 September 2011); *Prosecutor v Kanyabashi* (*Decision on the Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-15-I, 23 May 2000); *Gatete v The Prosecutor* (*Appeal Judgement*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-61-A, 9 October 2012) [18]; *Renzaho v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Case No ICTR-97-31-A, 1 April 2011) [238] ('*Renzaho Appeal*'); *The Prosecutor v Nahimana* (*Appeals Judgement*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-52-A, 28 November 2007) [1074].

[52] Young, Summers and Corker, above n 42, 31.

> must be considered. While proceedings of four years from arrest to final judgment may be reasonable, if proceedings ended when closing arguments were heard after two years, yet the judgment was not delivered for another two years, this time period may be may be considered 'inordinate or excessive'. This is because two years is an unreasonable amount of time to wait for judgment when the proceedings themselves took two years to conclude.

It is only before international tribunals that an accused is required to demonstrate that they suffered prejudice as a result of delays. [53] Before domestic courts, a consideration of what is what is at stake for the applicant is part of the legal test for undue delay, and as discussed in Chapter 4, this is easily demonstrated in the majority of domestic criminal cases.[54] On the other hand, prejudice has been exceedingly difficult for an accused to prove in an international criminal law context.[55] The purpose of the right to be tried without undue delay is to ensure that an accused does not remain too long in a state of uncertainty as to their fate.[56] If it can be shown that the time period was such that it engaged the right to be tried without undue delay, it can be assumed that the accused has suffered prejudice because of the length of proceedings. Therefore, if an accused proves that the length of proceedings has engaged their right to be tried without undue delay, prejudice will be presumed *per se*. McDermott has also proposed modifying the way international tribunals consider the issue of prejudice, and has argued that a

[53] See discussion in Chapter 5 pages 257-263.
[54] See discussion in Chapter 4 pages 189-194.
[55] See discussion in Chapter 5 pages 257-263.
[56] *Wemhoff v. Germany* [1968] ECHR 2 [19], [110].

presumption of prejudice should exist where the accused has been detained for some time.[57] The approach proposed in this thesis builds on this concept by providing a framework to assess the reasonableness of the length of proceedings, which in turn limits situations where prejudice will be presumed. Where the right to be tried without undue delay has been engaged, international tribunals must then consider the remaining elements of the adapted legal test.

2.2. Objective assessment of the length of proceedings

Once the tribunal has determined that the right to be tried without undue delay has been engaged, the next consideration involves an objective assessment of the length of proceedings. This consists of an analysis of the complexity of the case, the whether the prosecutorial and judicial authorities were efficient and effective in managing proceedings to prevent undue delay, and a consideration of whether the length of proceedings was necessary in order to meet the objectives of international criminal justice. The analysis in Chapters 4 and 5 demonstrated that the application of the legal test for undue delay essentially consists of a balancing exercise between the complexity of the case and the conduct of the prosecutorial and judicial authorities. Regional human rights courts consistently found that the accused was subjected to undue delay where the actions of the authorities contributed to delays through a lack of diligence, even if the case was complex.[58] In international criminal proceedings, however, this balancing exercise is complicated by international tribunals' need to meet the objectives of international criminal justice. The

[57] McDermott, *Fairness in International Criminal Trials*, above n 1, 60-61.
[58] See discussion in Chapter 4 pages 189-194.

adapted legal test introduces a consideration of the objectives of international criminal justice into this balancing exercise.

The elements required to objectively assess the length of proceedings are analysed separately below, however in practice, international tribunals should consider complexity, the efficiency and effectiveness of the authorities in managing proceedings to prevent undue delay, and the objectives of international criminal justice collectively given there will be overlap in the factors considered in this assessment. For example, in identifying that the scope of the indictment contributed to the complexity of the case by increasing the volume of evidence, the prosecutorial choice in determining the scope of the indictment will be considered in light of the objectives of international criminal justice. The possible findings that can be reached following this assessment are outlined at the end of this section.

2.2.1. Were the proceedings complex and why?

The complexity of international criminal proceedings set them apart from domestic criminal trials. The most significant difference in the way in which regional human rights courts and international tribunals have applied the legal test for undue delay is the emphasis placed on the complexity of the case. As discussed in Chapter 4, judges of regional human rights courts have not used complexity to justify lengthy trials, but have instead placed a duty on the State to meet the reasonable time requirement.[59] This is in stark contrast to the approach of international tribunals, where the complexity of the case has

[59] See discussion in Chapter 4 pages 189-194.

justified lengthy proceedings in the majority of cases.[60] As the analysis in Chapter 5 demonstrated, international criminal proceedings are inherently complex.[61] This complexity is driven by factors related to the unique context international tribunals operate within, and where complexity increases, there is potential for the length of proceedings to also increase.

The reasoning processes used by international tribunals have failed to effectively address the challenges raised by complexity in international criminal proceedings. The importance of the fundamental rights of the accused were referred to by the ICTR in almost half of the cases analysed in Chapter 4, yet in the majority of these cases, the tribunal accepted that lengthy trials could be explained by the complexity of the case and therefore did not constitute undue delay.[62] International tribunals have failed to balance the objectives of international criminal justice and the complexity this brings to proceedings, with overall fairness and the rights of the accused. Instead, they have disregarded due process protections in favour of factors related to the context or environment in which international criminal law operates.[63]

This thesis argues that due process constraints must only be lifted where it can be justified according to a balanced consideration of all relevant factors. Where the case is complex, the current legal test does not provide the tools to account for, or engage in, an objective assessment of complexity, including how the unique context of international criminal justice may have contributed

[60] See discussion in Chapter 4 pages 194-196.
[61] See discussion Chapter 5 pages 228-240.
[62] Chapter 4 that found that the delays were explained by the complexity of the case in 10 of the 12 cases analysed in the sample.
[63] Damaska, *Reflections on Fairness in International Criminal Justice*, above n 25, 612.

to that complexity.[64] As such, the ICTR has relied on a 'blanket justification' that the length of proceedings can be explained by the complexity of the case.[65] This masks the underlying reasons for delays and fails to acknowledge the tensions between meeting the objectives of international criminal justice and safeguarding the rights of the accused. An objective and evidence-based assessment of complexity is proposed in this thesis as a means of addressing problems with international tribunals' current approach by limiting its use as a 'free pass' to justify lengthy delays. This includes an assessment of factual, legal and participant complexity. Along with a detailed examination of how complexity is managed in international criminal proceedings, the adapted legal test seeks to provide a framework to assist international tribunals that is lacking in the current legal test for undue delay.

Similarly, the ICTY has also failed to engage in an analysis of the determinants of complexity but has done so by circumventing the current legal test for undue delay almost entirely.[66] The ICTY has focused more on introducing greater efficiencies to streamline proceedings rather than objectively assessing how the prosecutor and the tribunal have managed that complexity.[67] This focus on introducing procedural reforms has been aimed at

[64] See discussion in Chapter 5 pages 228-240.
[65] *Karemera v The Prosecution* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014); *Ndindiliyimana et.al. v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014); *Prosecutor v Bizimungu et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *Bagosora and Nsengiyumva v The Prosecutor* (*Appeal judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011); *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011). See discussion in Chapter 4 pages 194-196 and Chapter 5 pages 228-240.
[66] See discussion in Chapter 4 pages 174, 177-185.
[67] See discussion in Chapter 4 pages 177-185.

expediting proceedings, however, this is not the same as safeguarding the right to be tried without undue delay. As my analysis of the research has shown, reforms aimed at improving efficiency alone can have the opposite effect and actually undermine due process protections.[68] Managing delay by introducing procedural reforms to expedite proceedings in future, fails to address whether previous delays were undue and the rights of the accused were infringed.

One of the aims of the adapted legal test for undue delay is to provide international tribunals with a consistent and evidence-based approach to assessing the complexity of the case. The term 'complex proceedings' has not been defined by international tribunals, which may have contributed to their nebulous approach to assessing complexity. As discussed in Chapter 5, Ford has defined complexity as having 'many interconnecting parts such that their interaction makes them difficult to understand or analyse' and incorporates legal, factual and participant complexity.[69] Complexity can therefore arise from choices made by participants to proceedings, for example, the prosecutor in deciding the scope of the indictment, or may be inherent in international criminal proceedings, such as procedural complexity. Complexity must also be considered in light of the way in which the proceedings were managed by the prosecutorial and judicial authorities. For example, a large volume of evidence may indicate complex proceedings, but if this amount of evidence was not required to prove the guilt of the accused and the authorities could have managed proceedings more efficiently and effectively

[68] See discussion Chapter 1 pages 16-19.
[69] Stuart Ford, *Complexity and Efficiency at the International Criminal Courts*, above n 37,12.

to reduce the amount of evidence, this may also alter the assessment of the complexity of proceedings. For these reasons, complexity needs to be considered along with the other elements in this objective assessment and not as the sole criterion to be considered in international tribunals' application of the legal test.

In the majority of cases before the ICTR, an examination of the complexity of the case was limited to a discussion about whether the length of proceedings could be explained by the complexity of the case.[70] Another issue with the current approach was the considerable variation between cases and institutions as to the factors considered relevant to the assessment. As discussed in Chapter 5, Ford's research found that in considering the complexity of a case, there are both measures of the complexity of proceedings and factors that explain trial complexity (drivers of complexity).[71] Measures of complexity, which correlate with subjective measures of trial complexity, were found to be the number of trial days, number of witnesses and the number of exhibits, while the factors found to best explain complexity were the number of accused, the seniority of the accused and whether the accused is a direct perpetrator of the offence.[72] It is therefore proposed that in assessing the complexity of the case, international tribunals consider both measures and drivers of complexity. Once these factors are identified as part an objective assessment of complexity, using the remaining elements in this part of the adapted legal test, it will be determined whether the length of

[70] See discussion in Chapter 4 pages 194-196.
[71] Ford, *Complexity and Efficiency at the International Criminal Courts*, above n 37; Stuart Ford, 'The Complexity of International Criminal Trials is Necessary' (2015-2016) 48 *George Washington International Law Review* 151.
[72] Ford, *The Complexity of International Criminal Trials is Necessary*, above n 71, 172.

proceedings was due to complexity that related to the objectives of international criminal justice (for example, large volumes of evidence that resulted in lengthy proceedings but was required in order to prove indirect perpetration to ensure the worst perpetrators are held accountable for their crimes), or a failure on the part of the authorities to manage proceedings efficiently and effectively to prevent delays (for example, delays in disclosing documents due to the prosecutor's failure to effectively and efficiently manage their workload which was not related to meeting the objectives of international criminal justice).

Incorporating validated measures and drivers of complexity into the legal test for undue delay will ensure that international tribunals are more consistent and accurate in their assessment of the complexity of the case. Factors found to have no statistically significant effect on the complexity of proceedings, such as the seriousness of the charges, the number of crime sites, or the use of joint criminal enterprise, superior responsibility or charging genocide, should not be included as part of the assessment.[73] It is important to note that while the adapted legal test does not mandate Ford's method of assessing the complexity of proceedings, it does require an objective and evidence-based assessment of complexity as part of the legal test. Ford's research is offered as one of the only examples in this developing area of research, however, as knowledge in this field develops, along with our understanding of factors affecting complexity in international criminal proceedings, alternative methods for carrying out objective assessments may be incorporated into the legal test.

[73] Ibid 179-182.

What the adapted test does require is that an objective and evidence-based assessment of complexity is undertaken. By assessing complexity objectively, the adapted legal test seeks to prevent the use of this measure as a 'blanket justification' for lengthy proceedings. By identifying the type of complexity, the adapted legal test will consider whether the prosecutorial or judicial authorities managed proceedings efficiently and effectively to prevent undue delay (or could have minimised factors related to the type of complexity identified, for example reducing the amount of evidence or witnesses) in light of the objectives of international criminal justice. Both the measures and drivers of complexity will be considered further in the section below which examines how the authorities have managed proceedings.

2.2.2. Could the prosecutorial or judicial authorities have managed proceedings more effectively or efficiently to prevent undue delay?

This element of the adapted legal test constitutes an assessment of the efficiency and effectiveness of proceedings. Efficiency refers to a person 'working in a well-organised and competent way',[74] whereas effectiveness is a distinct concept about the quality of an individual's performance and relates to producing a desired outcome or result.[75] This part of the legal test will therefore consider whether given the length of proceedings, were the prosecutor's actions competent, well organised, and produced the desired outcome of managing proceedings to prevent delays. The purpose of this element of the test is to identify whether the length of proceedings was due to

[74] 'efficiency', Oxford English Online, January 2018 <https://en.oxforddictionaries.com/definition/efficient>
[75] 'effectiveness', Oxford English Dictionary Online, January 2018,<https://en.oxforddictionaries.com/definition/efficient>

the prosecutorial or judicial authorities failing to manage the trial efficiently and effectively to prevent undue delay, or was necessary in order to meet the objectives of international criminal justice.

This element of the adapted legal test relates to Ford's research into the efficiency of international criminal proceedings. As argued in Chapter 5, contrary to Ford's assertions, it cannot be determined that international criminal proceedings were efficient without examining the actions of participants to those proceedings.[76] For example, while a large amount of evidence in one case may be comparable to similar cases, it cannot be said that the trial is efficient without examining whether the amount of evidence was more than required to prove the accused committed the offence in that particular case. This part of the adapted legal test seeks to ensure that these factors are objectively assessed. As discussed in Chapter 1, where international tribunals have focused on expediency, this has sometimes impacted on other due process rights of the accused.[77] As such, efficiency does not always equate to fairness, which is what the authorities must strive to achieve in performing their functions. Judicial and prosecutorial authorities will be effective if they manage proceedings fairly. By considering both efficiency (whether proceedings were expedited where possible) and effectiveness (whether the authorities managed proceedings fairly), the adapted legal test provides a framework for international tribunals to analyse how the authorities managed the proceedings to prevent undue delay.

[76] See discussion Chapter 5 page 237-238.
[77] See discussion in Chapter 1 pages 16-19.

Currently, the criteria for assessing undue delay require a consideration of whether the actions of the authorities have contributed to the length of proceedings. While this consideration carries some weight before regional human rights courts where a positive duty is imposed on States to meet the reasonable time requirement, the actions of the prosecutorial or judicial authorities are almost never held responsible for causing undue delay in an international criminal law context.[78] The reasoning processes of international tribunals have highlighted the interests of justice, safeguarding fairness and maintaining the integrity of the judicial process as paramount in considering the issue of undue delay.[79] Yet international tribunals have failed to uphold these principles because of the way in which they have adapted the current legal test for undue delay. While placing an onus on the accused to prove undue delay, international tribunals have routinely acknowledged that the actions of the prosecutorial or judicial authorities have contributed to the length of proceedings, and then relied on these organisational failings and the complexity of the case to justify lengthy delays. This result is untenable.

In the vast majority of ICTR cases analysed, the Tribunal found that the 'accused failed to demonstrate' that they had been subjected to undue delay.[80] The onus is on the accused to prove that their right to be tried without undue delay has been infringed, and the ICTR has held that there has been no undue delay where the actions of the prosecutor were provided for in the Rules of Procedure and Evidence, or where the limited resources of the tribunal or an increase in the workload of the judges has caused the length of

[78] See discussion in Chapter 4 pages 202-207 and Chapter 5 pages 256-247.
[79] See discussion in Chapter 4 pages 202-207.
[80] See discussion in Chapter 5 pages 240-265.

proceedings.[81] This conclusion is often reached without an examination of the actions of the prosecutorial or judicial or authorities, or whether they could have managed proceedings more efficiently and effectively to reduce complexity or the overall length of proceedings. There may be cases where the proceedings were lengthy but the actions of the prosecutorial and judicial authorities were required to meet an objective of international criminal justice and in managing the proceedings, they did all they could to prevent undue delay. The current criteria for assessing undue delay do not allow for a consideration of these elements in the context of international criminal justice and it is only after considering these elements together that it can be determined whether there are legitimate reasons for departing from domestic standards of fair trial protections.

Placing a duty on the prosecutor and the tribunal to manage the length of proceedings ensures fair and expeditious proceedings and that the legal test for undue delay promotes and protects the interests of justice. As discussed above, requiring prosecutorial authorities to demonstrate proceedings were managed effectively is distinct from the positive duty to expedite proceedings in the statutes of international tribunals. As previously discussed, expeditious proceedings may not always be in the interests of the accused and may impact on other aspects of fairness in proceedings.[82] Requiring prosecutorial and judicial authorities to demonstrate that their actions did not cause undue delay, however, is aimed purely at safeguarding the right of the accused to be tried without undue delay.

[81] See discussion in Chapter 5 pages 252-256.
[82] See discussion in Chapter 1 page 1 and pages 16-19.

The crucial consideration in this element of the adapted legal test is whether the length of proceedings is attributable to the authorities failing to manage proceedings to prevent undue delay, taking into account factors unique to the context international tribunals operate within. In considering the management proceedings by the prosecutorial and judicial authorities, it is important to consider their reasonableness, given any findings on complexity. For example, where the proceedings are complex because of the high volume of evidence, number of witnesses and the number of accused, it should be considered whether the prosecutor could have reduced the number of witnesses or exhibits or considered separating the trials. As will be discussed, this consideration is also related to the following element of the legal test, which examines the link between length of proceedings and the objectives of international criminal justice.

If the authorities failed to efficiently and effectively manage proceedings to prevent undue delay, subject to the other elements of the adapted legal test, it will be found the right to be tried without undue delay has been infringed. This is because the failure of prosecutorial or judicial authorities to prevent undue delay cannot be mitigated by fairness considerations. It is only where the length of proceedings is beyond the control of the authorities, despite acting efficiently and effectively to prevent undue delay, that the objectives of international criminal justice and fairness considerations can be used as mitigation. Unlike the current criteria for assessing undue delay, the adapted legal test therefore allows a consideration of the conduct of the authorities in

light of the complexity of proceedings and objectives of international criminal justice.

The current approach to assessing the conduct of the prosecutorial and judicial authorities includes an assessment of the conduct of the accused in contributing to delays. The actions of the accused are only considered to the extent that they have impacted on the prosecutor's ability to manage the proceedings. The actions of the accused outside of this context are irrelevant because they cannot result in a finding of undue delay because an accused cannot infringe their own fair trial rights.

2.2.3. Was the length of proceedings necessary to meet the objectives of international criminal justice?

This thesis has argued that the unique context international tribunals operate within justifies some departures from domestic standards of fairness. This element of the adapted legal test therefore requires a consideration of whether the length of proceedings was necessary in order to meet the objectives of international criminal justice. The way in which international tribunals have interpreted and applied the right to be tried without undue delay rarely acknowledged the objectives of international criminal justice, even though they have been responsible for increasing the overall complexity of trials and contributing to delays in proceedings. This has resulted in an overreliance on the complexity of the case to justify findings of undue delay, and reasoning that lacks transparency. As outlined throughout this part of the adapted legal test, this element should be considered concurrently with an objective assessment of the complexity of the case and whether the

authorities efficiently and effectively managed proceedings to prevent undue delay.

The current legal test does not allow international tribunals to consider the relationship between the length of international criminal proceedings and the unique context in which international criminal law operates. For example, proceedings may be lengthy and have been objectively assessed as being complex due to the large number of witnesses and volumes of evidence. In examining the complexity further, however, it is found to be the case that the accused held a senior position in government. This may mean that they were an indirect perpetrator and physically removed from the offence with which they are charged, and that the large amounts of evidence were required to link them to the offence and demonstrate criminal responsibility.[83] Introducing a separate element into the adapted legal test requires international tribunals to consider the objectives of international criminal justice and whether the prosecutor's actions in calling those witnesses and obtaining the evidence were necessary in order to create a historical record, end impunity or bring those responsible to justice. Bringing a perpetrator to justice in an international criminal law context is an objective of international criminal justice, and the complexity this brings in terms of volumes of evidence and witnesses, may constitute a contextual factor that justifies departing from the standard of protection offered in domestic criminal courts. This is provided that the prosecutor and tribunal managed proceedings effectively and efficiently in preventing undue delay in light of those objectives. Simply

[83] See discussion in Chapter 5 page 235. See also, Ford, *The Complexity of International Criminal Trials is Necessary*, above n 71, 172.

identifying an accused as a senior leader may not suffice in cases where an accused's role and status is ambiguous. In these circumstances, the prosecutor must provide evidence of the accused's role in the organisation which can further increase the complexity of their case theory and the length of proceedings overall. This is distinct from the decision to obtain evidence that is unrelated to proving your case theory or the objectives of international criminal justice.

In order to prove that the length of proceedings was necessary in order to meet the objectives of international criminal justice, the prosecutor would need to demonstrate that any actions they took that lengthened proceedings (for example, a decision on joinder or the scope of the indictment) and/or the complexity of the proceedings was necessary in order to meet the objectives of international criminal justice. By considering whether the complexity of proceedings was necessary to meet an objective of international criminal justice, this element of the test provides an additional safeguard for the accused. In cases where the case is identified as complex but the prosecutorial and judicial authorities managed proceedings efficiently and effectively to prevent undue delay, the accused has still been subjected to lengthy proceedings that met the threshold test of being 'inordinate or excessive'. Considering whether the complexity of proceedings was necessary to meet an objective of international criminal justice will add to the qualitative assessment of the length of proceedings and assist in determining whether the accused can still be afforded a fair trial in the circumstances as part of the final part of the adapted legal test. This element of the adapted

legal test will also ensure that length of proceedings is related to the objectives of international criminal justice and is not simply due to ineffective or inefficient management of proceedings by the prosecutorial or judicial authorities.

In order to prove that the length of proceedings was necessary in order to meet an objective of international criminal justice, the prosecutor would need to firstly demonstrate that the objective being considered is recognised as an objective of that international tribunal. It was acknowledged in Chapter 2 that there is some disagreement as to the objectives of international criminal justice.[84] However, this element of the adapted legal test relies on the stated objectives of international tribunals as the criteria to be applied.[85] Secondly, it would need to be demonstrated that the length of proceedings was linked to meeting that objective. In considering this question, it would need to be shown that the management of proceedings by the authorities (for example, in making decisions about the scope of the indictment) or complexity of the case increased the length of proceedings but this was necessary in order to meet the objective (i.e. the objective would not have been met without the decisions of the authorities and/or complexity of proceedings).

It is difficult to conceive of circumstances where the proceedings were not complex and were managed efficiently and effectively by the authorities, yet were lengthy and met the threshold test considering the reasonableness of the time period. This is because the complexity of the case and the

[84] See Chapter 2 pages 70-74.
[85] For example, the objectives of the ICC are detailed in the Preamble to the Rome Statute.

management of proceedings by the prosecutorial and judicial authorities are almost always the cause of lengthy proceedings in international criminal justice. However, the objectives of international criminal justice will still be considered in these circumstances given this element is examined alongside the complexity of the case and the management of proceedings by the authorities.[86] The proposed test recognises that some departure from domestic standards of fairness is necessary, but seeks to ensure that any such departure remains within the limits of the right to a fair trial, and is justified on the grounds of meeting a valid objective through an objective assessment of the length of proceedings.

2.2.4. Possible findings following an objective assessment of the length of proceedings

As discussed above, where the assessment of the reasonableness of the length of proceedings demonstrated that the time period was not inordinate or excessive it should be found the accused has not been subjected to undue delay and an objective assessment of the length of proceedings is not required. Following an objective assessment of the length of proceedings, where it is concluded that the prosecutorial or judicial authorities did not manage proceedings efficiently and effectively to prevent delay, it should be found that the accused was subjected to undue delay. This is because where the proceedings were not managed efficiently and effectively, this should not

[86] This example is included in the discussion for the sake of completeness in considering all possible outcomes. As discussed below, where the proceedings were not complex and the authorities managed proceedings efficiently and effectively, the final step of the adaped legal test will be applied This will enable international tribunals to consider all of the factors examined as part of the assessment of the length of proceedings to determine whether the accused can be afforded a fair trial overall.

be mitigated by fairness considerations. In all other circumstances, the final element of the adapted legal test should be considered.

Where the case is objectively assessed as complex and the complexity was necessary to meet an objective of international criminal justice, provided the authorities managed proceedings efficiently and effectively to prevent undue delay, the final element of the adapted legal test should be considered. However, even where it was found that the complexity of the case was not necessary to meet an objective of international criminal justice or the case was not complex, where the authorities managed proceedings efficiently and effectively to prevent undue delay, the final element of the adapted legal test should also be considered. As outlined above, in these circumstances, the accused has still been subjected to lengthy proceedings that met the threshold test. As such, the final element of the adapted legal test should be considered to determine whether in light of the length of proceedings, the accused can still be afforded a fair trial overall.

This means that the final element of the adapted legal test will be considered regardless of whether the complexity is found or whether it was necessary to meet an objective of international criminal justice. It is important to understand, however, that this does not render the objective assessment of the length of proceedings meaningless. This is because the analysis undertaken as part of the objective assessment of the length of proceedings is essential in determining whether the accused can be afforded a fair trial overall. The adapted legal test provides a framework for consistent and

transparent reasoning in considering the issue of undue delay. As such, this framework will be essential in balancing a range of factors to ensure that any determinations made in the final element regarding the overall fairness of proceedings, are based on both the objective assessment of the length of proceedings (complexity, efficiency and effectiveness and the objectives of international criminal justice) and the overall fairness of proceedings, which involves a consideration of whether other fair trial rights of the accused have been met. For example, even where the case is found not to be complex and the proceedings were managed efficiently, the analysis of factors in the objective assessment of the length of proceedings will be crucial in determining if the accused can still be afforded a fair trial overall. This objective assessment ensures that it is not simply a matter of meeting the threshold test to demonstrate proceedings were lengthy and stating the length of proceedings was necessary to meet the objectives of international criminal justice. The objective assessment of the length of proceedings requires a detailed examination of the length of proceedings, which allows for a consistent and transparent analysis of all relevant factors to justify any findings on the overall fairness of proceedings in the final element of the adapted legal test. All of these elements must therefore be applied in order to fully assess the circumstances of the case to determine the overall fairness of proceedings.

2.3. Is a fair trial possible in the circumstances of the case?

The final element to be considered as part of the adapted legal test considers whether a fair trial remains possible despite the length of proceedings. The

application of the current legal test for undue delay has focused on the complexity of proceedings and the rights and interests of parties other than the accused. This element of the adapted legal test seeks to properly refocus considerations about undue delay onto protecting the right of the accused to a fair trial. The central question of the adapted legal test is whether given the reasonableness of the time period and objective assessment of the length of proceedings, can an accused be afforded a fair trial overall.

As outlined in Chapter 3, the right to be tried without undue delay is a component of the right to a fair trial.[87] It is not an absolute right, and a fair trial may still be possible where other component rights are met and an accused can still be afforded a fair trial *overall*.[88] In considering the meaning of a fair trial, this thesis has adopted McDermott's definition of fairness that incorporates both the notion of a fair trial and elements of Franck's theory of legitimacy.[89] Fairness can therefore be defined as being comprised of a number of rights 'as enunciated in near universal human rights and domestic constitutional provisions reflected in the standards of international tribunals', and is determinate (requires reasoned decisions and clarity on the meaning of

[87] See discussion in Chapter 3 page 107-108.
[88] See discussion in Chapter 3 pages 109-111, which explains the approach of international tribunals tends to favour the 'cumulative approach', where a fair trial may be possible even if not all component rights are met. See further, Yvonne McDermott, 'General Duty to Ensure the Right to a Fair and Expeditious Trial' in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev and Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) 800.
[89] McDermott, *Fairness in International Criminal Trials*, above n 1, 29. McDermott describes Franck's theory of fairness in international law as having incorporated his theory of legitimacy, which has four elements: determinacy, symbolic validation, coherence, and adherence. See Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995) 29.

rules), coherent (requires rules to be applied in a consistent manner) and adherent (requires consistency between primary and secondary rules).[90]

In determining whether a fair trial is possible, the abuse of process doctrine should be considered in this part of the legal test. Incorporating the abuse of process doctrine into the legal test will also ensure that a remedy is considered if the outcome is that a fair trial cannot be guaranteed. The abuse of process doctrine therefore requires consideration of whether the length of proceedings has made a fair trial impossible, and whether there have been ' serious and egregious violations of the accused's rights that would in turn prove detrimental to the court's integrity.'[91] This would require a consideration of the right to be tried without undue delay in the context of the right to a fair trial. Where an accused can be afforded a fair trial overall, even though the proceedings were lengthy, they will not be entitled to a remedy. However, if the accused cannot be afforded a fair trial, they will be entitled to a remedy for breach of their right to be tried without undue delay.

2.3.1. Providing a remedy

Where an accused cannot be afforded a fair trial because they have been subjected to undue delay, a remedy should be provided under the abuse of process doctrine.[92] The Rome Statute and Rules of Procedure and Evidence are 'largely silent' on the remedies available to an accused whose fair trial

[90] Oxford University Press, 2013).
[90] McDermott, *Fairness in International Criminal Trials*, above n 1, 29.
[91] *Barayagwiza v The Prosecutor* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999) [74] ('*Barayagwiza Appeal*').
[92] See discussion in Chapter 3 pages 111-114.

rights have been violated.[93] As such, it has been argued that '[t]here is, undoubtedly, uncertainty about the appropriate kind of reparation and about the level required for violations to qualify as sufficiently "serious"'.[94] Kurth has argued, 'such ("generous") remedies should be accessible in cases of the most profound human rights violations on the side of the defendant' because of the serious nature of offences that an accused before international tribunals faces.[95] Possible remedies that could be provided include a reduction in sentence following conviction for 'less egregious breaches' and setting aside jurisdiction or dismissing the charges in more extreme cases, such as where there has been torture or serious mistreatment of the accused.[96]

The case of *Lubanga* provides an example of how the abuse of process doctrine has operated, where the ICC Trial Chamber decided to stay proceedings because a fair trial was no longer possible.[97] In this case, the prosecution refused to comply with the Court's order to disclose the identity of a witness, and the Trial Chamber held that 'it was necessary to stay proceedings as an abuse of process of the Court' and that 'the fair trial of the accused is no longer possible, and justice cannot be done'.[98] The Trial Chamber held that the stay would remain in force while these conditions

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[93] Ibid.
[94] Guido Acquaviva, 'Human Rights Violations Before International Tribunals: Reflections on the Responsibility of International Organisations' (2007) 20 *Leiden Journal of International Law* 613, 633.
[95] Kurth, above n 96, 632-633.
[96] Michael E. Kurth, 'Anonymous Witnesses before the International Criminal Court: Due Process in Dire Straits' in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill Nijhoff, 2009) 632.
[97] *The Prosecutor v Thomas Dyilo Lubanga* (*Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the VMU*) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2582, 8 July 2010) ('*Lubanga Decision on Prosecution's Urgent Request*')
[98] Ibid [31].

continued, because in order for the accused to receive a fair trial, 'it is necessary that it [the Court's] orders, decisions and ruling are respected'.[99]

Another possible remedy where there has been a violation of the right to be tried without undue delay is compensation. While the issue of compensation has been tentatively explored, there is no clear guidance on how this can be provided to an accused whose right to be tried without undue delay has been violated.[100] The provisions in the ICC Statute are 'not particularly clear', however, the Rules of Procedure and Evidence provide guidance on the procedure to be followed for compensation.[101] Article 85(1) of the Rome Statute provides compensation for an accused who was the victim of wrongful arrest or detention, where their conviction was overturned due to a miscarriage of justice, where they have been released, or in 'exceptional circumstances' where proceedings have been terminated because of a 'grave and manifest miscarriage of justice'.[102] However, there is no guidance provided on which violations should result in compensation and Article 85 'seems to exclude the possibility of immediate release of the accused subject to the most serious violations.'[103]

One example of research that has considered remedies in the context of international criminal justice is Davidson's study on provisional release

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[99] Ibid [28].
[100] See discussion in Chapter 3 pages 111-114. See also Acquaviva, above n 94; Salvatore Zappala, 'Compensation to an Arrested or Convicted Person' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary'* (Oxford University Press, 2002) 1585.
[101] Zappala, above n 100, 1585.
[102] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), Article 85 ('*Rome Statute'*).
[103] Acquaviva, above n 94, 633.

discussed earlier in this chapter.[104] This study considered problems with the test for allowing provisional release and as in this thesis, proposed changes to the legal test for considering provisional release as a solution.[105] A detailed scholarly study on the types of remedies that could be available in an international criminal law context is beyond the scope of this thesis, but is greatly needed in order to ensure a range of options, that extend beyond a simple reduction in sentence, and are available to an accused whose rights have been breached, particularly where the accused is acquitted.

3. Application of the adapted legal test for undue delay

The aim of this section is to demonstrate how the adapted legal test could be applied to cases before the ICC in order to better protect the rights of the accused in an international criminal law context, and to improve consistency and transparency in judicial reasoning.

3.1. Case Study - *The Prosecutor v Germain Katanga* – International Criminal Court – Case No. ICC-01/04-01/07

Mr Germain Katanga was arrested in October 2007. In March 2014, he was found guilty of being an accessory to one count of a crime against humanity and four counts of war crimes.[106] At the time of his conviction, Mr Katanga had spent over six years in detention. He was sentenced to 12 years imprisonment in May 2014 and his time spent in detention was deducted from his sentence.[107] The most significant matter in this case that was relevant to

[104] Davidson, above n 34, 63-65.
[105] Ibid. See discussion on page 277.
[106] *Prosecutor (on the application of Victims) v Katanga* (*Judgment*) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) (‘*Katanga Judgment’*).
[107] Ibid.

the issue of undue delay was the Trial Chamber's decision to recharacterise Mr Katanga's mode of participation. This decision will be analysed in the following section, drawing on both the judgments in the case and the dissenting opinion of Judge Van Den Wyngaert. The procedural background to this decision is outlined below.

3.1.1. Procedural background

In 2012, the ICC Trial Chamber gave participants notice under regulation 55 of the *Rome Statute* that it was considering changing Mr Katanga's mode of participation from commission of a crime as an indirect perpetrator, to complicity in the commission of a crime by a group of persons acting with a common purpose.[108] After examining the evidence, the Trial Chamber found that Mr Katanga's 'mode of participation could be considered from a different perspective from that underlying the confirmation decision.'[109] It was therefore held that the majority would decide if it was possible to apply regulation 55, having regard to the particular circumstances of the case, without infringing the rights of the accused as outlined in article 67.[110]

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[108] *Rome Statute* regulation 55(2), states that if at any time during the trial it appears to the Chamber that the legal characterisation of facts may be subject to change, 'they shall give notice to the participants and allow them to make oral and written submissions.' The change in the mode of participation being considered by the Court was from indirect perpetration under article 25(3)(a) of the *Rome Statute* to a group of persons acting with a common purpose under article 25(3)(d).

[109] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (*Decision on the Implementation of Regulation 55 of the regulations of the court and severing charges against accused persons*) (International Criminal Court, Trial Chamber II, ICC-01/04-01/07, 21 November 2012) [6] ('*Katanga Decision on Regulation 55 and Severance'*).

[110] Article 67 of the *Rome Statute* outlines the rights of the accused, including the right to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks, and the right to be tried without undue delay.

In March 2013, Mr Katanga appealed against the Trial Chamber's decision to recharacterise the charges, arguing that the decision violated his right to be tried without undue delay because at this late stage of proceedings, the decision would unnecessarily prolong the trial.[111] The Trial Chamber acknowledged that 'triggering article 55 will prolong proceedings' but held that 'it cannot be said that it would ultimately infringe the right of the accused to be tried without undue delay.'[112] It was held that the application of article 55 would be strictly regulated which 'will ensure it does not engender future unjustified or undue delay' and that if it was considered that the proceedings had 'become excessive, for reasons it had not anticipated', the Court should 'reconsider its assessment as to the rights which the accused must be afforded.'[113] The Trial Chamber concluded by giving notice of the intention to recharacterise the charges.

In considering the issue of delay, the Trial Chamber did not apply the current legal test for undue delay, however, it held that it had 'fully respected' the requirements of article 67(1)(c) which provides for the right to be tried without undue delay.[114] The judgment explained that the Trial Chamber's 'perfect regularity in the sequence of written submissions' and decisions since 2012, provided 'proof' that they were 'ever mindful of the need for expeditiousness'

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[111] *Prosecutor (on the application of Victims) v Katanga (Germain)* (*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*) (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA 13, 27 March 2013) [97] ('*Katanga Appeal Against Decision on Regulation 55 and Severing Charges*').
[112] *Katanga Decision on Regulation 55 and Severance* (International Criminal Court, Trial Chamber II, Case no ICC-01/04-01/07-3319, ICL 1556, 21 November 2012) [44].
[113] Ibid.
[114] *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1591].

and that it was 'ensured that the Defence could play its part under the fairest possible conditions.'[115] Had the current legal test for undue delay been applied, it would seem likely that they would have found that the complexity of the case justified the length of proceedings. Although the ICC is yet to consider or apply the current legal test for undue delay, it has stressed the importance of the complexity of the case in justifying lengthy proceedings. In an earlier decision in *Katanga's* case, the Trial Chamber mentioned the test for undue delay and noted that in considering this issue, 'it is common in international criminal law to refer to the complexity of the case, which might comprise factual or legal issues.'[116] International tribunals have focussed on the complexity of the case in applying the legal test for undue delay because it will always outweigh the other criteria in an international criminal justice context. As there is currently no requirement for an assessment of complexity to be objective and evidence-based, international tribunals have considered a range of irrelevant factors, such as the seriousness of the offence.[117] In addition, considerations of complexity have been unconstrained by any requirement to assess the management of proceedings by prosecutorial and judicial authorities. Thus lengthy proceedings have been normalised because there is no framework to objectively assess the reasonableness of the length of proceedings.[118] For these reasons, the current legal test is inadequate. An application of the adapted legal test for undue delay to the facts and circumstances of this case will be used to illustrate how it could be applied before the ICC to better protect the rights of the accused.

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[115] Ibid [1590].
[116] *Katanga Decision on Regulation 55 and Severance* (International Criminal Court, Trial Chamber II, Case no ICC-01/04-01/07-3319, ICL 1556, 21 November 2012) [60]-[61].
[117] See discussion in Chapter 5 pages 228-240.
[118] See discussion in Chapter 5 pages 222-228.

3.1.2. Has the right to be tried without undue delay been engaged?

To determine if the right to be tried without undue delay has been engaged, the adapted legal test first requires an assessment of the reasonableness of the time period. Applying the principles outlined in the adapted legal test, the assessment of the reasonableness of the time period in *Katanga's* case would include four considerations.

Firstly, the relevant period to assess the reasonableness of the time period began in October 2007, when the arrest warrant was unsealed. For the purposes of this case study, the issue of delay was raised in the 2014 judgment, so this will be taken as the date of current proceedings. The relevant time period to be assessed in this case would therefore be just over six years. Secondly, although the accused also raised the issue of undue delay in 2012 and 2013, it is important to note that these periods are irrelevant for the assessment of the time period in 2014, because the relevant time period should not be measured from the last time the issue was raised, but from when the accused first became notified of their alleged offence. Thirdly, there is there is no set time period that constitutes undue delay. In the 2012 decision in this case, the Trial Chamber held that 'it is common in international criminal law to refer to the complexity of the case' and cited the ICTR case of *Bagosora*, where proceedings lasting ten-months did not constitute undue delay, and stating that undue delay could be compensated for by a reduction

in sentence.[119] This approach goes against the presumption of innocence and the principle that no set time period constitutes undue delay.[120] *Bagosora* is therefore irrelevant to the consideration under the adapted legal test. Fourthly, the accused bears the onus of proving that the length of delay has engaged their right to be tried without undue delay. This occurs when the time period is 'inordinate or excessive' and requires the rest of the legal test to be applied.

To determine if the time period is 'inordinate or excessive', the reasonableness and nature of the delay in proceedings need to be considered in light of the purpose of the reasonable time requirement. The time period in this case was just over six years. In considering the nature of the delay in proceedings, while this time period from unsealing the arrest warrant to judgment may seem reasonable, closing statements were issued in May 2012 and the accused was convicted in March 2014. A period of almost two years from closing statements to conviction is a third of the length of the trial and in light of the purpose of the reasonable time requirement, could be considered to be an unreasonable amount of time for the accused to be in uncertainty as to their fate while awaiting judgment. Given these considerations, it is likely that the accused would be successful in demonstrating that their right to be tried without undue delay had been engaged. In that event, the Court would then turn to the next step in the adapted legal test.

[119] *Katanga Decision on Regulation 55 and Severance* (International Criminal Court, Trial Chamber II, Case no ICC-01/04-01/07-3319, ICL 1556, 21 November 2012) [43], [60]-[61].
[120] See discussion in Chapter 3 pages 117-119.

3.1.3. Objective assessment of the length of proceedings

As outlined above, an objective assessment of the length of the proceedings should involve a consideration of the complexity of the case, whether the prosecutorial and judicial authorities managed proceedings efficiently and effectively to prevent undue delay, and whether the length of proceedings was necessary in order to meet the objectives of international criminal justice. While in practice, the factors considered under each of these elements overlap to some extent and are best considered collectively, for the purpose of outlining what is required to be considered as part of each element, they are discussed individually below.

3.1.3.1. Were the proceedings complex and why?

An objective assessment of the complexity of the case, considering both measures and drivers of complexity, should be carried out as part of an objective assessment of the length of proceedings. While there is no generally accepted definition of complexity, the most current research in this area is Ford's work on complexity in international criminal proceedings, and has been applied for illustrative purposes in this case study.[121] The complexity co-efficient[122] is not a required part of the legal test, however, it is essential that some such objective and evidence-based factors be used in the assessment.

[121] Ford, *The Complexity of International Criminal Trials is Necessary*, above n 71.
[122] For further explanation of the complexity co-efficient, see Ford, *Complexity and Efficiency at the International Criminal Courts*, above n 37.

3.1.3.1.1. Measures of complexity

Ford's study calculated a complexity co-efficient to measure the relative complexity of a case in international criminal law using three measures of complexity: the number of trial days, number of witnesses and number of exhibits.[123] While not necessary for the purpose of this case study, it is interesting to consider how the complexity co-efficient can be utilised as a way of understanding the possibilities of objectively analysing complexity. The range for the complexity co-efficient was from 0 to 3, with higher numbers representing more complex proceedings.[124] In considering the relative complexity of proceedings at international tribunals, the *Taylor* case at the Special Court for Sierra Leone was found to have a complexity co-efficient of 1.37 and was considered equivalent to the most complex cases at the ICTY.[125] This case comprised of 420 trial days, 15 witnesses and 1522 exhibits.[126] On the other hand, the *Duch* case at the Extraordinary Chambers in the Courts of Cambodia was considered a relatively simple case with a complexity co-efficient of 0.44, comprising of 77 trial days, 55 witnesses and 1000 exhibits.[127] The *Lubanga* case, which will be discussed below, was found to have a complexity co-efficient of 0.79, with 204 trial days, 67 witnesses and 1373 exhibits.[128] This case was considered to be less complex than the average ICTY trial.[129] Ford also calculated complexity co-efficients for a range of domestic criminal trials in the United States and found that the

[123] Ibid 27.
[124] Ibid.
[125] Ibid 43.
[126] Ibid 31.
[127] Ibid.
[128] Ibid.
[129] Ibid.

average case had a complexity score of 0.043, with the most complicated domestic criminal case scoring 0.20.[130]

While Ford's dataset would be required to calculate the complexity co-efficient in this case, for the purposes of this case study, the complexity co-efficient from the range of cases discussed above can be used to consider the relative complexity of the *Katanga* case.[131] The *Katanga* case consisted of 265 trial days, 54 witnesses, and 643 exhibits. Given this, and considering other cases outlined in Ford's study, it is likely that the *Katanga* trial would fall somewhere between the *Duch* and *Lubanga* cases in terms of complexity. Therefore, in an international criminal justice context, this case would not be considered overly complex. However, if you compare this case to domestic criminal trials, it would be considered more complex than the most complicated domestic criminal case. On this basis, while the case in not particularly complex in terms of cases before international tribunals, the ICC would be justified in finding the case is complex when compared with domestic criminal trials. This is an important comparison in demonstrating the utility of these criteria because this thesis advocates some departure from domestic standards of fairness on the grounds that there are differences between domestic and international criminal proceedings.

[130] Ibid.
[131] Unlike comparisons between the length of proceedings, measures of complexity can be compared with other cases as part of an objective assessment because they have been statistically verified as being linked to the overall complexity of a case and standardised using a numerical scale.

3.1.3.1.2. Drivers of complexity

Ford's drivers of trial complexity included the number of accused, the seniority of the accused and whether the accused is a direct perpetrator of the offence.[132] At the time of his arrest, Mr Katanga was a Brigadier General in the Armed Forces of the Democratic Republic of the Congo. He was charged as an indirect perpetrator with a co-accused so there were initially two accused as part of his case. In November 2012, the charges were severed and his mode of participation was recharacterised to being part of a group of persons acting with a common purpose. While Mr Katanga held a position of seniority, at the time of judgment he was a single accused and no longer considered an indirect perpetrator under article 25(3)(a). Overall, delays in this case cannot be explained by factors identified as drivers of complexity.

In summary, an objective assessment of complexity in this case study has demonstrated that the case is not particularly complex in an international criminal justice context, although it would be considered much more complex than the most complicated domestic criminal trials. As we are considering justifications for departing from domestic standards of fairness, for the purpose of this assessment, the case would be assessed as complex. However, the objective assessment of the length of proceedings also requires that the complexity of the case is considered in light of whether the prosecutorial and judicial authorities managed proceedings efficiently and effectively to prevent undue delay, and if the length of proceedings were necessary to meet the objectives of international criminal justice.

[132] Ford, *The Complexity of International Criminal Trials is Necessary*, above n 71, 153.

3.1.3.2. Could the prosecutorial or judicial have managed proceedings more efficiently and effectively to prevent undue delay?

This element requires an examination of whether the prosecutorial or judicial authorities could have managed the proceedings more efficiently and effectively to prevent undue delay. The main issue to be considered in this part of the legal test is the decision to recharacterise the mode of participation under regulation 55, and the impact this had on the length of the proceedings. Considering the facts of this case, there are two areas where it could be argued that the authorities did not manage the proceedings efficiently and effectively to prevent undue delay:

- The authorities delayed proceedings by having recourse to regulation 55 at a late stage of the proceedings; and
- The authorities failed to provide adequate information to the accused about the charges and delayed responding to requests from the defence.

3.1.3.2.1. The authorities delayed proceedings by activating regulation 55 at a late stage of the proceedings.

The question of whether the prosecutor or Trial Chamber could have managed the length of proceedings more efficiently and effectively to prevent undue delay comes down to whether the decision to invoke regulation 55 could have been taken earlier.[133] In 2012, the Trial Chamber examined the evidence and considered that Mr Katanga's mode of participation could be

[133] The issue of whether the accused was afforded a fair trial overall is also raised by the fact that it only became apparent late in the day that the evidence would not substantiate the charges and mode of liability confirmed. This is because following re-characterisation of the mode of liability, the accused may be convicted on evidence on which they did not have the opportunity to make submissions.

considered differently.[134] The Trial Chamber stated that they were 'able to continue their examination of the evidence in greater depth' and noted that Mr Katanga had 'emphasised his contribution as a coordinator of preparations for the attack in Bogoro' along with a number of other witnesses.[135] Therefore it was only after the evidence was considered 'in greater depth' towards the end of the trial that the Trial Chamber considered the possibility of amending Mr Katanga's mode of participation. The ICCs 'Chambers Practice Manual' states that the confirmation decision 'constitutes the final, authoritative document setting out the charges, and by doing so the scope of the trial', and as such, this requires that 'the charges presented by the Prosecutor and those finally confirmed by the Pre-Trial Chamber are clear and unambiguous.'[136] The approach of the Trial Chamber in this case would therefore appear to contradict the purpose of the confirmation of charges procedure before the Pre-Trial Chamber, which is to precisely specify the case to be made out at trial. As Stahn has argued, '[t]he interplay between the confirmation of charges hearing, amendments of the charging document, and subsequent re-characterizations under Regulation 55 needs further fine-tuning by case law, and Chambers should carefully learn from the delays in *Lubanga*, *Bemba*, and most obviously in *Katanga*.'[137]

Based on the facts of the case, it may be argued that the Trial Chamber could have prevented delays because it should have been aware of this evidence at

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[134] *Katanga Decision on Regulation 55 and Severance* (International Criminal Court, Trial Chamber II, Case no ICC-01/04-01/07-3319, ICL 1556, 21 November 2012) [5].
[135] Ibid.
[136] International Criminal Court, *Chamber Practice Manual*, February 2016 <https://www.icc-cpi.int/iccdocs/other/Chambers_practice_manual--FEBRUARY_2016.pdf>
[137] Ignaz Stegmiller, 'Fairness and Expeditiousness of ICC Proceedings' in Carsten Stahn (ed), (Oxford University Press, 2015) 905.

an earlier stage of the proceedings and provided notice to the parties that the characterisation of the charges may change. In her dissenting opinion, Judge Van Den Wyngaert stated that the Majority had two and a half years of proceedings during which they could have provided notice to Mr Katanga that the charges may have been subject to change and that '[d]espite the limited precedent before this court, notice of possible recharacterisation has consistently been provided at a far earlier stage of the proceedings.'[138] In a slightly separate issue to that of undue delay, in considering the timing of the recharacterisation in relation to the right of the accused to be informed promptly of the charges, Judge Van Den Wyngaert noted that 'the timing of the Notice Decision cannot be reconciled with the duty of diligence that rests upon the Chamber.'[139] She further argued that throughout the proceedings the Defence had requested additional clarifications about the charges and challenged the mode of liability, while both the prosecutor and the Trial Chamber had not raised any matters 'relating to an alternative form of personal liability.'[140] Based on this examination, it would appear that the Trial Chamber failed in their duty to efficiently and effectively manage proceedings and prevent undue delay because they could have acted on the evidence earlier to trigger regulation 55.

[138] *Katanga Judgment* (International Criminal Court), Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [63 -64] (Judge Van Den Wyngaert).
[139] Ibid [63].
[140] Ibid.

3.1.3.2.2. The authorities failed to provide adequate information to the accused about the charges and delayed in responding to requests from the defence.

It could also be argued that the authorities failed in their duty to manage proceedings efficiently and effectively to prevent undue delay because they did not adequately respond to requests from the accused, in particular, requests to conduct further investigations (discussed below), and to provide adequate information about the charges and evidence required to secure a conviction.[141] In March 2013, the accused raised concerns about the extent of further investigations that the defence team would need to conduct, whether security problems in the region would cause further delays, whether witnesses would co-operate, and whether members of the defence team would remain available.[142] The Appeals Chamber argued that these concerns were speculative and at the stage of proceedings, and at the time, it was not clear that undue delay would be caused by their decision.[143] It was held that the Trial Chamber would need to be 'particularly vigilant' in ensuring that the accused's right to be tried without undue delay was not violated.[144]

In December 2013, the defence requested a stay of proceedings.[145] They argued that their inability to conduct investigations should not be considered 'in isolation from other factors', which included the lack of an amended document containing the charges and the lack of clarity as to what evidence

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[141] *Prosecutor v Tadić* (*Appeal Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [52].
[142] *Katanga Appeal Against Decision on Regulation 55 and Severing Charges* (International Criminal Court), Appeals Chamber, Case No ICC-01/04-01/07, 27 March 2013) [98].
[143] Ibid [97-99].
[144] Ibid.
[145] *Prosecutor (on the application of Victims) v Katanga* (*Defence Request for a Permanent Stay of Proceedings*) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 11 December 2013).

would support a conviction.'[146] The defence argued that any further extension of time 'would only further aggravate the position without a clear advantage in sight', and that the 'stress and strain on the accused has had the effect of narrowing the range of defence options by excluding any that may lead to a further delay in the conclusion of this trial.'[147] In considering these arguments, the Appeals Chamber held that the Trial Chamber had ensured the fairest possible conditions for the defence by 'responding to each of the defence's written submissions and offering guidance to the Defendant, whilst steering the re-characterisation procedure within a strict timeframe.'[148]

The dissenting opinion of Judge Van Den Wyngaert on the other hand, argued that the Defence only had a period of one month to conduct investigations because while they had requested time to conduct investigations in March 2013, the Trial Chamber did not grant permission to do so until June 2013, and security conditions prevented the defence from investigating in August 2013.[149] It was therefore argued that the defence was unable to 'conduct meaningful investigations on broad topics over an expansive geographical area' that were required in order to provide a defence to the changed mode of participation.[150] The dissenting judgment also highlighted that compared to the 'high standard' that the Trial Chamber had set in ensuring the accused was adequately informed about the nature of the initial charges, it was unclear why there was 'no serious effort to inform

[146] Ibid [56].
[147] Ibid [52].
[148] *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1590].
[149] Ibid [103].
[150] Ibid [103].

Germain Katanga of the precise nature of the revised charges against him.'[151] Judge Van Den Wyngaert also argued that 'the Majority consistently failed to address the Defence's concerns about the Majority's course of action' or respond to allegations about the overall fairness of proceedings in light of regulation 55.[152] Considering the facts outlined above, there would be a strong argument to support a finding that the authorities did not act efficiently and effectively to prevent undue delay. The judicial authorities delayed proceedings by failing to respond to defence requests to conduct investigations, and to requests to provide further information about the charges. This resulted in a delay of over 12 months.

The only alternative argument in this case would be that the authorities acted diligently in reviewing the evidence in this case, but it was so voluminous that this took much longer than it would in a less complex case. The volume of evidence was factored into the assessment of complexity in the previous element of the adapted legal test considered above. However, this complexity must also be considered in light of the other elements of the objective assessment of the length of proceedings, which in this case, requires an examination of whether the volumes of evidence could have been managed more efficiently and effectively by the prosecutorial authorities to prevent undue delay. If this argument could be made, delays would be attributable to complexity alone rather than a failure on the part of the judicial authorities to prevent undue delay. Evidence supporting such a conclusion could include actions the authorities took to review the evidence more expeditiously, such

[151] Ibid [69] (Judge Van Den Wyngaert).
[152] Ibid [109] (Judge Van Den Wyngaert).

as allocation of additional resources, or efforts by the prosecutorial authorities to reduce the amount of evidence in the trial. However, as these types of measures were not taken in this case, it likely that the authorities did not fulfil their duty to manage proceedings efficiently and effectively to prevent undue delay. Before finding that the accused was subjected to undue delay, however, an examination of whether the length of proceedings was necessary in order to meet the objectives of international criminal justice is required. This examination will consider whether complexity of the case and the decisions made by the authorities that lengthened proceedings in order to meet an objectives of international criminal justice.

3.1.3.3. Was the length of proceedings necessary to meet the objectives of international criminal justice?

Based on the analysis of the previous element in the adapted legal test, it is likely that it would be found that the authorities failed to manage proceedings to prevent undue delay. To consider whether the length of proceedings was necessary to meet an objective of international criminal justice, the complexity of the case and/or management of proceedings by the authorities will be examined to determine if they were necessary in order to meet the objectives of international criminal justice. In considering the objectives of international criminal justice, the ICC has four main aims that are taken from the Preamble to the Rome Statute.[153] These are to:

- Ensure the worst perpetrators are held accountable for their crimes;

[153] *Rome Statute*, Preamble.

- Serve as a court of last resort that can investigate, prosecute and punish the perpetrators of genocide, crimes against humanity and war crimes;
- Assist national judiciaries in the investigation and prosecution of perpetrators with the aim to allow States to be the first to investigate and prosecute; and
- Help promote peace and security by deterring potential perpetrators.

These four aims would be recognised as objectives of international criminal justice for the purpose of applying the adapted legal test.

The ICC's aim is to ensure the worst perpetrators are held accountable for their crimes means that an accused should be charged with the mode of participation on which they are most likely to be convicted.[154] An argument could be made that the Prosecutor diligently considered the evidence but it was so voluminous that the delay in invoking regulation 55 was necessary so they could properly consider it, and assign the correct mode of participation to ensure the greatest likelihood of holding the accused accountable for their alleged crimes. In these circumstances, it could be argued that the length of proceedings was necessary in order to meet an objective of international criminal justice. This would not be a strong argument in light of the circumstances of the case outlined above, given there was no effort made to reduce the volume of evidence and given the delays in responding to defence request to conduct investigations and provide more information about the charges. While it is likely a finding of undue delay could be reached at this

[154] While this argument could be made, this approach would conflict with the objective of creating a historical record by limiting the amount of evidence produced.

point because the authorities did not act efficiently and effectively to prevent undue delay, the above discussion provides a useful illustration of how this element of the adapted legal test could be applied.

3.1.4. Is a fair trial possible in the circumstances of the case?

The final part of the adapted legal test requires a consideration of the fairness of proceedings and whether the accused can still be afforded a fair trial in the circumstances. Although this part of the test is unlikely to be considered given a finding of undue delay may be reached following an objective assessment of the length of proceedings, for the purpose of this case study, we will assume that it could be shown the authorities acted efficiently and effectively and the length of proceedings was necessary in order to meet an objective of international criminal justice. It would then need to be demonstrated in this part of the test that a fair trial remains possible in the circumstances. This would involve a consideration of both the objective assessment of the length of proceedings and whether other fair trial rights of the accused were met or a sum of these violations resulting in 'serious and egregious violations of the accused's rights that would in turn prove detrimental to the court's integrity.'[155]

The Appeals Chamber held that a stay of proceedings was a 'drastic remedy to which recourse would only be countenanced where a fair trial is precluded by breaches of the fundamental rights of the accused.'[156] It was concluded that 'difficulties that beset the defendant's investigations did not entail any

[155] *Barayagwiza Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999) [74].
[156] *Katanga Appeal* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1593].

violation'.[157] Conversely, the dissenting opinion of Judge Van Den Wyngaert argued that she believed that 'a series of Germain Katanga's rights have been fundamentally violated' and that 'the manner in which the ensuing proceedings have been handled infringed upon the accused's right to a fair and impartial hearing.'[158] Judge Van Den Wyngaert identified a range of fair trial rights that were infringed in Mr Katanga's case, which included that the accused:

- did not receive prompt notice of the specific facts within the facts and circumstance of the case described in the charges which may be relied upon;
- was not given adequate time and facilities for the effective preparation of his defence; and
- was not afforded the right to examine and have witnesses examined.[159]

The dissenting judgment also argued that the accused was not informed of their right not to be compelled to testify, because testimony that the accused gave in relation to charges under article 25(3)(a) of the statute was used in relation to charges under the recharacterised mode of participation under article 25(3)(d).[160] Judge Van Den Wyngaert stated that in testifying, Mr Katanga only waived his right to remain silent in relation to 'the present case' and noted that the Trial Chamber emphasised this point by stating that questions during cross-examination should be 'strictly related to the charges' and not relate to 'facts and circumstances falling outside the scope of the

[157] Ibid [1594].
[158] Ibid [13] (Judge Van Den Wyngaert). See also, Melanie Klinkner, 'Is all Fair in Love and War Crimes Trials? Regulation 55 and the Katanga Case' (2015) 15 *International Criminal Law Review* 396.
[159] Ibid (Judge Van Den Wyngaert).
[160] Ibid (Judge Van Den Wyngaert) [51-59].

current case.'[161] Judge Van Den Wyngaert concluded that Mr Katanga had not knowingly and freely waived his right to remain silent in relation to the confirmed charges and his testimony could only be considered against him as an 'indirect perpetrator'.[162] She concluded by stating that '[a]ny one of these infringements alone would suffice to cast serious doubts on the validity of today's judgment. In view of their cumulative effect, they present a case of overwhelming strength against the legality and legitimacy of this judgment.'[163]

Even assuming that a finding of undue delay was not reached in an earlier stage of the adapted legal test, it is likely that it would be concluded that a fair trial would be impossible. This is because the cumulative effect of fair trial infringements in this case amounted to serious and egregious violations that would prove detrimental to the court's integrity. The accused would therefore and been entitled to a remedy for breach of their right to be tried without undue delay.

3.2. Case Study 2 - The Prosecutor v Thomas Dylio Lubanga – International Criminal Court – Case No ICC-01/04-01/06

Mr Thomas Dylio Lubanga was arrested in March 2006. In March 2012, he was found guilty of war crimes and in July 2012, he was sentenced to 14 years imprisonment. Mr Lubanga appealed his conviction in November 2014. At the time of his appeal, he had spent over eight years in detention.

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[161] Ibid [53] (Judge Van Den Wyngaert)
[162] Ibid [54] (Judge Van Den Wyngaert). For further discussion of these issues: See, Margaux Dastugue, 'The faults in "fair" trials: an evaluation of regulation 55 at the International Criminal Court' (2015) 48(1) *Vanderbuilt Journal of Transnational Law* 273, 293-300.
[163] Ibid [15] (Judge Van Den Wyngaert).

3.2.1. Procedural background

The main issue in this case that is relevant to the issue of undue delay is the delayed disclosure of evidence by the prosecution, and the Trial Chamber's management of resultant delays. Mr Lubanga alleged that the prosecution deliberately delayed disclosing evidence, which resulted in two stays of proceedings that taken together constituted undue delay. A stay of proceedings was granted from June to November 2008 because of the prosecution's failure to disclose evidence obtained under confidentiality agreements.[164] The prosecution argued that the evidence they obtained fell under article 54(3)(e) of the Statute.[165] This provision provides that the prosecutor will agree 'not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.'[166] The Officer of the Prosecutor argued that this provision applied to all material, as long as it was used for the 'purpose of generating new evidence' and the prosecutor argued that they depend on information providers who were 'working under very difficult conditions on the ground and who had made a deliberate decision that in order to protect staff, their information must be confidential.'[167] The context in which international criminal law operates means that 'if the court was not to accept the "realities" for the UN and NGOs on the ground, then they would not

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[164] *The Prosecutor v Thomas Dyilo Lubanga* (*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*) (International Criminal Court, Trial Chamber I, Case No ICC-01704-01/0,13 June 2008) ('*Decision on the consequences of non-disclosure*').
[165] Ibid
[166] *Rome Statute,* Article 54(3)(e).
[167] *Decision on the consequences of non-disclosure* (International Criminal Court, Trial Chamber I, Case No ICC-01704-01/0, 13 June 2008) [26].

provide evidence and “there was no other option available”’.[168] Similarly, the prosecution argued that they could not ask the UN specific issues before being provided with information and that it would not have been possible for them to start an investigation into the matter without the information the UN provided under confidentiality agreements.[169] The Trial Chamber held that this provision could only be used in ‘highly restricted circumstances’ and the prosecution can receive information on a confidential basis only for the purpose of generating new evidence.[170] This meant the prosecutor was required to obtain evidence on the basis of information in the confidential document, which would then not be subject to confidentiality agreements.

A second stay of proceedings was granted in 2010 for a period of three months after the prosecution failed to comply with disclosure requests.[171] The Appeals Chamber reversed the stay of proceedings in October 2010, after finding the Trial Chamber should have considered imposing sanctions to ensure the prosecution complied with disclosure requests, rather than immediately resorting to a stay of proceedings.[172] This decision attracted criticism for a number of reasons. The prosecution’s decision to withhold potentially exculpatory material was described as ‘alarming’ and to have

[168] Ibid.
[169] Ibid.
[170] Ibid [71].
[171] *Lubanga Decision on Prosecution’s Urgent Request* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2582, 8 July 2010).
[172] *The Prosecutor v Thomas Dyilo Lubanga* (*Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay) (*International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06-2582, 14 October 2010).

'shocked international scholars'.[173] Although the Appeals Chamber's initial decision to stay the proceedings was found to be 'reassuring' and received much support because it prioritised due process protections for the accused,[174] after a 'string of limited disclosure rulings' there were concerns about whether the ICC would allow these violations to continue.[175] Similarly, it was argued that viewing this decision as positive may be 'overly optimistic' given it ultimately lengthened proceedings for the accused and it was 'not satisfactory that in order to ensure trial safety, they must stop proceedings.'[176] As such, it has been contended that confidentiality agreements should not be used 'in a broad attempt to generate sweeping evidence against the accused at trial'[177] and that there should be 'some kind of meaningful repercussion' for prosecutors who violate the rights of the accused.[178]

Conversely, others have argued that these decisions in *Lubanga* to stay proceedings prioritised the 'goal of a fair trial at the expense of future convictions'[179] and the protection of witnesses has been 'trumped by other

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[173] Rachel Katzman, 'The Non-Disclosure of Confidential Exculpatory Evidence and the *Lubanga* Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial' (2009) 8(1) *Northwestern Journal of International Human Rights* 77, 78; Michelle Ahronovitz, 'Guilty until Proven Innocent: International Prosecutorial Failure to Disclose Exculpatory Evidence' (2017) 48 *McGeorge Law Review* 343, 368.
[174] Katzman, above n 173, 78. See also Sara Anoushirvani, 'The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas Lubanga Dyilo' (2010) 22 *Pace International Law Review* 213; Kai Ambos, 'Confidential Investigations (Article 54(3)(E) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law' (2009) 12 *New Criminal Law Review* 543; Sabine Swoboda, 'The ICC Disclosure Regime: A Defence Perspective' (2008) 19 *Criminal Law Forum* 449-472.
[175] Ahronovitz, above n 173, 368.
[176] Sophie Rigney, 'The Fractured Relationship Between Fairness, the Rights of the Accused and Disclosure at the International Criminal Court' in Jadrana Petrovic (ed), *Accountability for Violations of International Humanitarian Law: Essays in Honour of Time McCormack* (Taylor and Francis, 2015) 205.
[177] Katzman, above n 173, 99.
[178] Ahronovitz , above n 173, 369.
[179] Christodoulos Kaoutzaris, 'A Turbulent Adolescence Ahead: The ICC's Insistence on Disclosure at the Lubanga Trial' (2013) 12(2) *Washington University Global Studies Law Review* 263, 306.

concerns.'[180] It has been contended that the 'stringent consequences' imposed on the prosecutor may mean that the ability to target and prosecute perpetrators will decrease because it will be more difficult to convince witnesses to give evidence.[181] To address this, it has been suggested that alternatives to complete non-disclosure should be explored which would protect the rights of the accused while ensuring the safety of witnesses.[182] Given the protections for victims and witnesses provided for in the Rome Statue, it is unlikely that these concerns are credible.[183]

3.2.1.1. Judgment decision 2012

In the judgment decision of March 2012, the Trial Chamber acknowledged that the prosecutor's actions had prejudiced the accused, yet held that there had been no violation of the prosecutor's duty because the Chamber had taken measures to mitigate that prejudice.[184] The Trial Chamber indirectly considered the issue of undue delay by acknowledging that the prosecution's delayed disclosure had prejudiced the accused.[185] However, the Trial Chamber considered the issue of prejudice only in relation to the reliability of evidence and not the resultant delays in proceedings. It was held that the prosecutor had not failed in its statutory duty because the Trial Chamber had mitigated any prejudice the prosecutor's actions had caused the accused.[186]

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[180] Heidi L. Hansberry, 'Too Much of a Good Thing in Lubanga and Haradinaj: The Danger of Expediency in International Criminal Trials' (2011) 9 *Northwestern University Journal of International Human Rights* 357.
[181] Kaoutzaris, above n 179, 306. See also Ibid.
[182] Hansberry, above n 180.
[183] In particular, see *Rome Statute* Article 68.
[184] *Prosecutor v. Thomas Lubanga Dyilo* (*Judgment pursuant to Article 74 of the Statute, International Criminal Court*) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 4 April 2012).
[185] Ibid [119-120].
[186] Ibid [119-120].

To address prejudice caused by the prosecutor's incomplete or late disclosure, it was argued that the Trial Chamber had taken a number of measures. These included staying the proceedings when the lack of disclosure made a fair trial impossible, and allowing the defence to recall witnesses and raise issues following disclosure orders, even though the agenda for closing submissions had been set.[187] The Trial Chamber concluded that the prosecution had not failed in its statutory duties because:

> … [w]henever violations of the prosecution's statutory obligations have been demonstrated, the Chamber has evaluated whether, and to what extent, they affect the reliability of the evidence to which they relate. In each instance, any problems that have arisen have been addressed in a manner which has ensured the accused has received a fair trial. [188]

In considering the rights of the accused, the Trial Chamber only examined their actions in limiting prejudice as it related to reliability of evidence, and the issue of undue delay was never considered. This was despite the Trial Chamber acknowledging that the incomplete and delayed disclosure prejudiced the accused, and the obvious consequences of delayed disclosure to the overall length of proceedings.[189] The Trial Chamber's approach to the issue of delay failed to consider the length of proceedings overall and how delays prejudiced the accused. This is a very narrow approach and one that fails to safeguard the right of the accused to be tried without undue delay.

3.2.1.2. Sentencing decision 2012

Similarly, in the sentencing decision of July 2012, the Trial Chamber managed to reconcile the accused being subjected to 'onerous conditions' after being

[187] Ibid [121].
[188] Ibid [123].
[189] Ibid [121-123].

put ‘under considerable unwarranted pressure by the conduct of the prosecution’, with finding there had been no violation of their right to be tried without undue delay and without applying the criteria for assessing undue delay. [190] The defence argued for a reduction in sentence because the disclosure violations resulted in stays of proceedings that led to a breach of the right of the accused to be tried without undue delay.[191] The Trial Chamber held that they had already ‘considered, and rejected, an abuse of process challenge’ but stated that they had ‘reflected certain factors involving Mr Lubanga in the aftermath of the offences’ and noted that he was cooperative throughout proceedings ‘notwithstanding some particularly onerous circumstances’.[192] These ‘onerous circumstances’ included the first stay of proceedings resulting from the prosecution failing to disclose exculpatory evidence because it was collected under confidentiality agreements, and the second stay of proceedings resulting from the prosecution’s repeated failure to comply with disclosure orders.[193] In concluding, the Trial Chamber held that they had ‘borne in mind … the mitigation provided by his consistent cooperation with the Court during the course of the entirety of these proceedings, in circumstances when he was put under considerable unwarranted pressure by the conduct of the prosecution during the trial.’[194]

[190] *Prosecutor v. Thomas Lubanga Dyilo* (*Decision on Sentence pursuant to Article 76 of the Statute*) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 13 July 2012) [97] (‘*Lubanga Judgment’*).
[191] Ibid [89].
[192] Ibid [91].
[193] Ibid.
[194] Ibid [97].

3.2.1.3. Appeal Decision 2014

In December 2014, the defence appealed this decision and requested an automatic reduction in sentence for violation of Mr Lubanga's fundamental rights, including his right to be tried without undue delay.[195] Mr Lubanga raised fair trial violations, in particular the delayed disclosure violating his right to be tried without undue delay. However, the Appeals Chamber found no merit in this argument and held that these matters had already been considered during the course of the trial and found that there had been no breach of the accused's fundamental rights.[196] In stating that they had already considered and rejected the abuse of process challenge, the Appeals Chamber referred to decisions in 2011 and 2012.[197]

When the matter was raised again in 2014, the Appeals Chamber simply referred to previous decisions considering the matter without reviewing whether the circumstances had changed. The fact that an additional two years had passed and the accused had been subjected to further delay was not considered, and the criteria for assessing undue delay were not applied.
It was argued that 'given the significant delays in this case, any such request on the part of the defence would only have aggravated the prejudice which [Mr Lubanga] had already suffered owing to the violation of his right to be tried

[195] *Prosecutor v. Thomas Lubanga Dyilo (Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute*") (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 1 December 2014) [105] ('*Lubanga Appeal'*).
[196] *Ibid* [109].
[197] Ibid [209-210]*; Lubanga Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 13 July 2012) [91].

within a reasonable period of time.'[198] The Appeals Chamber rejected this argument, stating that:

> This decision as to whether unreasonable delay would have occurred however, would have to be taken by the Trial Chamber. In this context, the Appeals Chamber notes that Mr Lubanga does not indicate whether and when he sought such a decision by the Trial Chamber. It is not for the Appeals Chamber to make at this stage of the proceedings a speculative finding as to whether any delay would have rendered the length of the trial unreasonably long.[199]

Although the accused did not raise this issue at trial, rather than speculating, the Appeals Chamber could have considered the delays in proceedings that had actually taken place throughout the proceedings as a result of delayed disclosure. In considering the length of proceedings in this case, Heinsch has argued:

> A look at the chronology of the first case ever to be conducted before the ICC, the case against Thomas Lubanga Dylio reveals the biggest problem of international criminal trials. They are very lengthy.[200]

The length of proceedings in this case has been described as 'disappointing for a number of reasons', including that it involved a single accused charged with a single offence, the length of time it took to issue the judgment, and the impact of the length of proceedings had on the accused and victims.[201] In considering the duration of the trial overall, it is clear the proceedings were lengthy and at least warranted consideration of the issue of undue delay by the Appeals Chamber. This assessment would have included the periods

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[198] *Lubanga Appeal* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 1 December 2014) [157].
[199] Ibid [159].
[200] 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 Goran Sluiter (eds), *The Emerging Practice of the Interntaional Criminal Court* (2008, Brill/Nijoff) 479, 480.
[201] Susanna Sacouto and Katherine Cleary, 'The Adjudication Process and Reasoning at the International Criminal Court: The Lubanga Trial Chamber Judgment, Sentencing and Reparations' in Eva Brems and Yves Haeck (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer, 2014) 132.

when the two stays of proceedings had been granted and delays that resulted in the Trial Chamber introducing measures to mitigate prejudice to the accused.

Throughout proceedings, there was little reference to the issue of undue delay and the legal test for undue delay was not applied. The Trial Chamber considered the effect of delays on the accused and acknowledged on several occasions that the length of proceedings had prejudiced Mr Lubanga and that the conditions throughout the trial had been 'onerous'.[202] In granting the stay of proceedings in 2010, it has been argued that the accused's length of detention was one of the reasons given by the Trial Chamber to justify Mr Lubanga's release.[203] Despite this, and without a consideration of the legal test for undue delay, it was found there was no violation of the right of the accused to be tried without undue delay. The current legal test does not provide an objective means of assessing the complexity of the case, so if it had been applied, it is likely that the complexity of the case would have been the sole consideration to justify the length of proceedings. As discussed previously in this chapter, because complexity is easy to demonstrate without an objective assessment, had the current test been applied in this case, lengthy delays would have been normalised with little consideration of the actions of the authorities.[204] The decision-making processes of the Trial Chamber and Appeals Chamber are considered in more detail below.

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[202] *Lubanga Appeal* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 1 December 2014) [91].
[203] Anne-Laure Vours-Chaumette, 'Provisional Release in International Criminal Procedure: The Limits of the Influence of Human Rights Law' in Norman Weiss and Jean-Marc Thouvenin (eds), *The Influence of Human Rights on International Law* (Springer, 2015) 143.
[204] See discussion above on pages 289-295.

3.2.2. Has the right to be tried without undue delay been engaged?

As outlined in the previous case study, to determine if the right to be tried without undue delay has been engaged, the adapted legal test requires an assessment of the reasonableness of the time period. Firstly, the relevant date for the start of proceedings would be March 2006 when the arrest warrant was unsealed. For the purposes of this case study, we will consider the most recent time the issue of delay was raised which was in the appeal in November 2014. The length of proceedings is therefore over eight and a half years. Secondly, previous considerations of the issue of delay raised in 2008, 2010 and 2012 are irrelevant for the assessment of the time period because it should not be measured from the last time the issue was raised but from when the accused first became notified of their alleged offence. Thirdly, in considering the nature and reasonableness of the delays in proceedings in light of the purpose of the reasonable time requirement, given the accused was in detention for over eight and a half years, this would not be a reasonable period for the accused to be left in a state of uncertainty and therefore the right to be tried without undue delay would be engaged and the Court should apply the next step in the adapted legal test.

3.2.3. Objective assessment of the length of proceedings

As with the previous case study, while the elements should be balanced collectively in order to objectively assess the length of proceedings, they will be considered individually below to better understand the factors examined under each element.

3.2.3.1. Were the case complex and why?

As outlined in the previous case study, in considering Ford's measures of complexity, the complexity co-efficient is not required as part of the adapted legal test, but is useful in the context of these case studies. In the *Lubanga* case, there were 204 trial days, 67 witnesses and 1373 exhibits. Ford calculated the complexity coefficient for the *Lubanga* case in his study based on these measures, which was found to be 0.79. Considering the complexity of the case in an international criminal justice context, the *Lubanga* case is less complex that the average ICTY trial with a complexity co-efficient of 0.97. However, compared to the most complicated domestic criminal proceedings with a complexity co-efficient of 0.20, for the reasons outlined in the previous case study, the *Lubanga* case would be considered complex overall.

Ford's factors explaining complexity include the number of accused, the seniority of the accused and whether the accused is a direct perpetrator of the offence.[205] Mr Lubanga did not have any co-accused in his case. He did however hold a position of seniority as the President of the Union of Congolese Patriots or the Patriotic Force for the Liberation of the Congo, and Commander in Chief of the Army. As with Mr Katanga, Mr Lubanga was charged under section 25(3)(a) of the Statute and was therefore considered to be part of a group of persons acting with a common purpose, rather than an indirect perpetrator. While Mr Lubanga held a position of seniority, at the time of judgment he was convicted as a single accused and not as an indirect perpetrator under article 25(3)(a). This would mean that overall the drivers of

[205] Ford, *The Complexity of International Criminal Trials is Necessary*, above n 71, 172.

complexity would not be significant in this case. This is because it is much simpler to prove that a single perpetrator committed the offence than to meet the complexities of the doctrine of indirect co-perpetration.[206]

In summary, an objective assessment of complexity in this case study would demonstrate that in comparison to international criminal proceedings, the case is not particularly complex, but is more complex than the most complicated domestic criminal proceedings. Therefore it should be assessed objectively as being a complex case. As stated previously, this is important in justifying departures from domestic standards of fairness. The complexity will now be considered in light of the other elements of the objective assessment of the length of proceedings below.

3.2.3.2. Could the prosecutorial or judicial have managed proceedings more efficiently and effectively to prevent undue delay?

This main consideration in applying this element of the adapted legal test is to consider whether the prosecutor and Trial Chamber managed the length of proceedings efficiently and effectively to prevent undue delay. Considering the procedural background outlined above, and given the acknowledgement by both the Trial Chamber and the Appeals Chamber that the prosecutor's

[206] Indirect co-perpetration has been criticised in the literature for lacking a coherent theory of perpetration and for departing from established international jurisprudence by adopting the 'joint control over the crime approach'. See Lachezar Yanev and Tijs Kooijmans, 'Divided Minds in the Lubanga Trial Judgment: A Case Against Joint Control Theory' (2013) 13 *International Criminal Law Review* 789; Stefano Manacorda and Chantal Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law? (2011) 9 *Journal of International Criminal Justice* 159; Jens David Ohlin, 'Joint Intentions to Commit International Crimes (2011) 11 *Chicago Journal of International Law* 693. Cf Neha Jain 'The Control Theory of Perpetration in International Criminal Law (2011) 12 *Chicago Journal of International Law* 159; Maria Granik, 'Indirect Perpetration Theory: A Defence' (2015) 28 *Leiden Journal of International Law* 922-977. These researchers have instead supported the control theory of perpetration.

conduct in delaying disclosure had a prejudicial effect on the accused and subjected them to 'onerous circumstances' that put them 'under considerable unwarranted pressure', it would be difficult to argue that the prosecutor managed the proceedings efficiently and effectively to prevent undue delay.[207]

The Appeals Chamber argued in this case that the prosecutor had not failed in their statutory duty because the Trial Chamber had taken a number of steps to mitigate any prejudicial effect, in particular, by staying proceedings when a fair trial became impossible due to delayed disclosure or refusal to disclose evidence. However, in 2010 the Appeals Chamber overturned the decision to stay proceedings because of a failure to consider other measures to ensure the prosecution's compliance with disclosure requests. The issue of undue delay was never considered, and the Appeals Chamber only considered prejudice to the accused as it related to reliability of evidence. The adapted legal test requires the prosecutor to demonstrate they efficiently and effectively managed proceedings to prevent delay. For reasons discussed above, it is unlikely that the prosecution would be able to discharge this onus.

3.3.3.3. Was the length of proceedings necessary to meet the objectives of international criminal justice?

One of the objectives of international criminal justice is to serve as a court of last resort that can investigate, prosecute and punish the perpetrators of genocide, crimes against humanity and war crimes.[208] It will be recalled that the prosecution in this case argued that 'it would not have been possible for

[207] *Lubanga Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06,13 July 2012) [91].
[208] *Rome Statute,* Preamble.

them to start an investigation into the matter without the information the UN provided under confidentiality agreements' and the evidence would not have been provided in another form.[209] The prosecutor could therefore argue that their actions in obtaining evidence under confidentiality agreements was necessary in order for them to serve as a court of last resort that can investigate, prosecute and punish the perpetrators of genocide, crimes against humanity and war crimes.

This argument would allow one of the challenges of conducting international criminal proceedings, namely the difficulties associated with conducting investigations in unstable environments with limited resources, to be taken into consideration in evaluating delays in this case. On the other hand, the prosecutor in the end was able to waive the confidentiality agreements.[210] Although it is unlikely that it would have been found that the prosecutor acted efficiently and effectively in this case, considering the remaining elements of the adapted legal test has provided another example of how the context in which international criminal law operates could be balanced transparently with other factors in considering the issue of undue delay.

3.3.4. Is a fair trial possible in the circumstances of the case?

Given the analysis undertaken as part of the objective assessment of the length of proceedings, it is unlikely that the accused would still be able to receive a fair trial. The Trial Chamber in this case held that 'the disclosure of

[209] *Decision on the consequences of non-disclosure* (International Criminal Court, Trial Chamber I, Case No ICC-01704-01/0, 13 June 2008) [26].
[210] See previous discussion on pages 332-333, discussing the controversy around the use of confidentiality agreements at the ICC.

exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial' and as such, granted a stay of proceedings because 'the fundamental preconditions of a fair trial were missing' and there was 'no sufficient indication that this would be resolved during the trial process'.[211] Even though the stay of proceedings was later lifted, the Court maintained that the prosecution's actions in refusing to disclose information were inconsistent with the fair trial rights of the accused, and it is argued that this would amount to serious and egregious violations of the accused's rights that would prove detrimental to the court's integrity.[212] The overall finding in this case is therefore likely to be that the accused was subjected to undue delay and is entitled to a remedy.

In considering remedies, a stay of proceedings is considered quite extreme and only granted in limited circumstances. Given the circumstances of *Lubanga*, it has therefore been suggested that Article 71 of the Rome Statute could provide an alternative remedy.[213] Although the scope of Article 71 is 'quite narrow', it provides for the Court to sanction those who 'disobey order or disrupt proceedings'.[214] This is consistent with argument raised earlier in this chapter, that even where the accused cannot be afforded a meaningful remedy, the prosecution should be subject to a 'meaningful repercussion.[215] This is particularly the case where proceedings are ongoing, as a stay of

[211] *Decision on the consequences of non-disclosure* (International Criminal Court, Trial Chamber I, Case No ICC-01704-01/0, 13 June 2008) [91].
[212] *Barayagwiza Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999) [74].
[213] Xavier-Jean Keïta, 'Disclosure of Evidence in the Law and Practice of the ICC' (2016) 16 *International Criminal Law Review* 1018, 1045.
[214] Ibid.
[215] Ahronovitz, above n 173, 369.

proceedings can further lengthen proceedings as it did in *Lubanga*, and therefore be incompatible with the right to be tried without undue delay.[216]

3.4. Conclusions

The two cases studies considered in the final part of this chapter have demonstrated both the need for an adapted legal test for undue delay and how this test can be used consistently and transparently to consider a range of issues particular to an international criminal justice context. It is significant to note that the ICC failed to specifically consider the issue of undue delay in both of these cases, despite this issue being of relevance to the facts and circumstances of each. Even if the current legal test was applied in these cases, it is likely that the complexity of the case alone would have justified the length of proceedings and the outcome would have been a short consideration of the circumstances of this case that failed to consider the complexities raised in light of the context in which the ICC operates. The current legal test for undue delay is not an appropriate tool because it does not assist judges in balancing the rights of the accused with the considerations outlined in the case studies. Rather than circumventing the problem of undue delay, the ICC requires a legal test that can assist judges to balance competing considerations of fairness and the objectives of international criminal justice. It can be seen from the case studies provided in this chapter how the adapted legal test lends itself to transparent reasoning, and that by requiring objective assessments of both complexity and the conduct of the authorities, the discussion is much richer and allows

[216] Rigney, above n 176, 205.

international tribunals to examine and balance a range of factors relating to the context international tribunals operate within.

While it will not be the case for all proceedings before international tribunals, the two case studies have demonstrated that in the few cases where the issue of undue delay has been raised before the ICC, the prosecutorial authorities have failed to manage proceedings efficiently and expeditiously to prevent undue delay. The adapted legal test seeks to provide a framework to examine a range of factors related to the unique context in which international tribunals operate. This is because the legal test for undue delay must recognise that the environment in which international criminal law operates presents challenges for international tribunals that are not faced by domestic criminal courts. Where authorities did not manage proceedings efficiently and effectively to prevent delays in light of the complexity of the case and the objectives of international criminal justice, however, it should be found that the accused was subjected to undue delay.

The overarching consideration in cases considering undue delay should be whether the accused can be afforded a fair trial overall. While international tribunals should not be held to precisely the same standards of fair trial protections as their domestic counterparts, fair trial considerations should be incorporated into the legal test for undue delay. In considering the current criteria for undue delay, international tribunals have disproportionately focussed on the complexity of the case and the rights and interests of parties other than the accused. In examining the length of international criminal

proceedings, the adapted legal test seeks to shift the focus back to the rights of the accused and ensure that the right to be tried without undue delay is placed in its proper context within the right to a fair trial.

Chapter 7 - Conclusion

The inconsistent approach of international tribunals to addressing the problem of undue delay has often failed to protect the rights of the accused. In international criminal proceedings, it is not uncommon for an accused to be detained for over a decade pending completion of a trial.[1] Despite this, the ICTR has found that the accused was not subjected to undue delay in the majority of cases in which it applied the criteria for assessing undue delay,[2] and lengthy proceedings continue to be of concern at the ICC, which is yet to consider the criteria. By examining differences in the reasoning processes of judges considering the criteria for assessing undue delay in regional human rights courts and international tribunals, this thesis has demonstrated that the current criteria are not adapted to an international criminal justice setting. The current criteria also fail to assist judges in balancing the challenges of operating within an international criminal law context with the overall fairness of proceedings. As such, while acknowledging the importance of the fundamental rights of the accused, international tribunals have demonstrated an overreliance on the complexity of the case and downplayed the role of prosecutorial and judicial authorities in applying the criteria for assessing

[1] See discussion in Chapter 4 outlining that the average length of proceedings at the ICTR is 13.91 years. Completion of the trial includes the conclusion on any appeal proceedings.
[2] This is in contrast to the ECtHR where a breach of the reasonable time requirement was found in 91% of the case sample analysed and at the IACHR where seven of the eight cases analysed found a breach of the reasonable time requirement. The ICTY has rarely utilized the legal test for undue delay. See Chapter 4 for further discussion.

undue delay that has resulted in under-protection of the rights of the accused.[3]

International tribunals should not be required to adhere to domestic standards of fair trial protections regarding the right to be tried without undue delay and some departure from may be necessary in order to meet the demands of international criminal justice.[4] It is certainly the case that the unique context in which international tribunals operate has resulted in proceedings that are inherently complex.[5] As such, international tribunals have demonstrated an overreliance on the complexity of the case to justify lengthy trials.[6] Yet an appropriately adapted test at the international level would need to take into account a range of factors. Despite mounting evidence that proceedings at the International Criminal Court (ICC) are expected to be of a similar duration to those before international tribunals, the ICC is yet to apply the legal test for undue delay in any case before it.[7] However, it is disquieting to note that in describing the legal test for undue delay, the ICC has also limited the assessment of the reasonableness of the delay in proceedings to a consideration of the complexity of the case.[8] Unless the legal test for undue

[3] Krit Zeegers, *International Criminal Tribunals and Human Rights: Adherence and Contextualization* (TMC Asser Press, 2016) 377.
[4] See discussion Chapter 1 pages 28-32.
[5] See discussion in Chapter 5 pages 228-240.
[6] See discussion in Chapter 4 pages 194-196.
[7] The length of proceedings for completed cases before the ICC range between 6 and 12 years. See also Chapter 4 pages 165-166.
[8] For example, see *Prosecutor v Thomas Lubanga Dyilo* (*Decision on the Application for the Interim Release of Thomas Lubanga Dyilo*) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 18 October 2006) p7-8, where it was argued that 'it is particularly important to assess the complexity of the case'. See also, *Prosecutor (on the Application of Victims) v Katanga and Ndugjolo Chui* (*Decision on the Implementation of Regulation 55 of the Regulations of the Court and severing the charges against the accused person*) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/07-3319, 21 November 2012) [43] ('*Katanga Decision on Regulation 55 and Severance'*), where is was held that 'it is common in international law to refer to the complexity of the case'.

delay is adapted to meet the needs of international criminal justice more broadly, it is likely that the ICC will maintain the approach of international tribunals in addressing undue delay, and the rights of the accused will remain under-protected. The complexity of proceedings is a legitimate factor to take into account in assessing whether a trial has involved undue delay, but if it is treated as the only relevant factor, then in practice it will always outweigh the interests of the defendant. This would render the right to be tried without undue delay a nullity.

In adapting the legal test for undue delay, this thesis has argued that the overall consideration should be whether the accused has been afforded their right to a fair trial, in light of both an objective assessment of the length of proceedings and whether other fair trial rights of the accused have been met. The adapted legal test for assessing undue delay that has been proposed in this thesis seeks to address inconsistencies in the application of the legal test for undue delay by proposing an objective approach to assessing the reasonableness of the time period and the complexity of the case. It aims to redress the balance between the rights of the accused and the prosecutorial and judicial authorities, and has introduced a requirement to consider the objectives of international criminal justice and the overall fairness of proceedings. In proposing a new legal test for undue delay and applying it to recent cases before the ICC, this thesis has demonstrated how the criteria for assessing undue delay could be adapted to an international criminal justice context.

1. Research methodology and structure

1.1. Introduction, research aims and methodology (Chapters 1 and 2)

The research aims and literature review were set out in the introduction in Chapter 1. The provisional thesis of this research was that the legal test for undue delay, which has been developed in domestic criminal jurisdictions, is not adapted to the unique context in which international criminal law operates. The three research aims of this thesis where therefore to:

- Identify differences in the reasoning processes of judges applying the legal test for undue delay before regional human rights courts and international tribunals, and determine if the approach of international tribunals has failed to safeguard the right to be tried without undue delay;
- Examine the reasons international tribunals have relied on in departing from domestic standards of fairness and whether they are legitimate in light of the objectives of international criminal justice and the unique context international tribunals operate within; and
- Propose a new legal test for undue delay that is adapted to the context in which international criminal law operates.

The literature review concluded that that while there has been much research into the causes of delay in international criminal proceedings, most have focused on employing this knowledge to develop realistic timeframes for international justice, or to implement reforms to further expedite proceedings.[9] Rather than focusing on the utility of the criteria for assessing undue delay,

[9] See discussion in Chapter 1 pages 16-19, which discusses how research has moved on from focusing on expediting proceedings through the introduction of procedural reforms to accepting that international criminal trials

recent research has suggested drawing on human rights principles and concepts of fairness to interpret international human rights norms using existing legal tests in international criminal law.[10] Chapter 1 set out the importance of the right to be tried without undue delay and argued that the current legal test for undue delay is not adapted to the unique context in which international tribunals operate. It highlighted that despite a general acceptance that international criminal trials will take longer than domestic criminal proceedings and that international tribunals have failed to meet domestic standards of fairness in interpreting the right to be tried without undue delay, there has been no analysis of the utility of the criteria for assessing undue delay in an international criminal justice context.

Chapter 2 began by analysing principles that underpin the interpretation of the right to be tried without undue delay. The analysis first scrutinised the objectives and principles of international criminal justice and international criminal procedure before examining the influence of human rights law interpretive methods in international criminal law.[11] The principles highlighted in this chapter provided the foundation to identify the reasoning processes in judgments in cases considering the issue of undue delay in Chapters 4 and 5. The goals of international criminal procedure were first examined, which while providing the framework for the conduct of criminal trials, also give effect to the objectives of international criminal justice. The use of expansive human rights law interpretive methods and concepts of fairness in interpreting international criminal procedure were also critiqued. While drawing on human

[10] Zeegers, above n 3, 380-395; Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford, 2016).
[11] See discussion in Chapter 2 pages 64-83.

rights interpretive methods in international criminal procedure could appear to favour the rights of the accused, it was highlighted that this approach can also limit the rights of the accused by allowing for the consideration of the rights of other parties including victims, witnesses, the prosecutor and the international community in assessing undue delay. Chapter 2 revealed a tendency in academic and juridical writing towards the latter.

Chapter 2 analysed the research methodology that incorporated teleological interpretive methods. It was explained how teleological interpretation would be applied to the text of judgments to identify the object and purpose of the legal test for undue delay as viewed by the judges in each case. By using this interpretive method to compare the different objects and purposes as identified by judges of international tribunals and regional human rights courts, this study sought to demonstrate how judges applied this law in practice. To identify common themes in cases applying the law of undue delay, Chapter 2 concluded by establishing how coding methods from grounded theory methodology would be applied to the judgments of regional human rights courts and international tribunals. This methodology provided the framework for a detailed textual analysis of the case sample.[12]

1.2. Establishing the content of the right to a fair trial and the legal test for undue delay (Chapter 3)

Chapter 3 analysed differences in the way regional human rights courts and international tribunals have interpreted the content and scope of the right to a

[12] A detailed textual analysis was particularly important given the small number of cases that met the criteria for inclusion in the case sample.

fair trial and the legal test for undue delay. The purpose of this chapter was to analyse the content and scope of the right to a fair trial and the right to be tried without undue delay. Using key cases that set out the elements comprising these rights, the influence of international human rights law on international tribunals and the extent to which these institutions are bound by international human rights norms was examined.[13] Chapter 3 identified gaps or areas of contention in the way in which regional human rights courts and international tribunals have applied these rights to critique the way in which judges have attempted to resolve tensions between competing rights and objectives.

Chapter 3 concluded that the content and scope of the right to be tried without undue delay is well established in regional human rights courts and international tribunals. However, there are differences in the way these institutions apply the legal test is terms of how the reasonableness of the time period is assessed, the role that the complexity of the case and the conduct of the relevant authorities play in an assessment of the length of proceedings, which parties are afforded the right to a fair trial, and the approach to determining what is at stake for the applicant.[14] Unlike before international tribunals, regional human rights courts have relied on evidence of lengthy proceedings alone to find that the reasonable time requirement was not met.[15] Regional human rights courts are also less likely than international tribunals to tolerate excessive delays in complex cases, and have imposed a duty on member states to prevent lengthy proceedings and to organise their judicial

[13] See discussion in Chapter 3 pages 121-133.
[14] See discussion in Chapter 3 pages 120-155.
[15] See discussion in Chapter 3 pages 116-119.

systems in a way that allows them to meet the reasonable time requirement.[16] International tribunals on the other hand have focused more on the complexity of the case as a means of explaining lengthy delays and do not impose a duty on the prosecutorial or judicial authorities to prevent delays.[17] In considering what is at stake for the applicant, the regional human rights courts will assume that the accused has suffered prejudice where there is a significant delay in proceedings, whereas prejudice is a necessary separate element for an accused to prove before international tribunals, regardless of the length of the proceedings.

The analysis in Chapter 3 also revealed tensions between the different institutions in the way in which the right to a fair trial is assessed. While regional human rights courts have favoured a cumulative approach, where a fair trial may be provided even if all the requirements of a fair trial have not been met, the position of international tribunals remains unclear.[18] The origins of a human rights oriented approach in international criminal law was introduced and it was explained how in international criminal law, this approach tends to favour the rights interests of victims over those of the accused when balancing competing rights, interest and objectives. It was demonstrated how applying a human rights oriented approach to the right to a fair trial has extended the scope of fair trial rights and demonised the accused, which has negatively impacted on the provision of remedies for fair trial infringements. Finally, Chapter 3 considered how in examining the complexity of proceedings and conduct of the authorities, the interests of

[16] See discussion in Chapter 3 pages 144-146.
[17] Ibid.
[18] See discussion in Chapter 3 pages 109-111.

victims, the prosecutor and international community prevail over those of the accused due to the unique context in which international criminal law operates. The conclusions drawn regarding the content of the right to a fair trial and the right to be tried without undue delay, and the extent to which international tribunals are bound by international human rights law, formed a baseline for assessing whether the approach of international tribunals has resulted in under-protection of the right to be tried without undue delay in Chapters 4 and 5.

2. Main findings

2.1. Research aim 1

Identify differences in the reasoning processes of judges applying the legal test for undue delay before regional human rights courts and international tribunals, and determine if the approach of international tribunals has failed to safeguard the right to be tried without undue delay.

The analysis of the case sample in Chapter 4 found that while regional human rights courts held that the reasonable time requirement had not been met in approximately 91% of cases analysed, international tribunals found a breach of the right to be tried without undue delay in only 25% of ICTR cases and in none of the ICTY cases analysed.[19] Overall, the main consideration in finding that an accused has been subjected to undue delay before regional human rights courts has been the conduct of the prosecutorial or judicial authorities.[20] In direct contrast, the reasoning processes of the judges of the ICTR have focused almost exclusively on the complexity of the case and placed a heavy burden on the accused to demonstrate that they were subjected to undue

[19] See discussion in Chapter 4 pages 168-174. 91% of the ECtHR case sample found a breach of the reasonable time requirement and seven of the eight cases in the IACHR case sample found a breach.
[20] See discussion in Chapter 4 pages 194-196.

delay.[21] This burden has proved almost impossible to discharge because the ICTR has consistently downplayed actions of the prosecutorial or judicial authorities that have caused the delay, for which they would be held accountable before regional human rights courts.[22] As discussed in Chapter 5, the cases of *Semanza*, *Nsengimana* and *Bizimungu* are illustrative of this point, where although it was acknowledged that lengthy delays were caused by the workload of the tribunal, limited use of courtrooms, or a failure to set a trial date, it was found that the accused had failed to demonstrate that they had been subjected to undue delay.[23] The legal test for assessing undue delay has only been applied in a handful of cases at the ICTY, which instead focused on managing the complexity of proceedings as way of addressing delays.[24]

2.1.1. Reasoning processes of regional human rights courts and international tribunals in interpreting the law of undue delay

In considering the reasoning processes of judges applying the legal test for undue delay, an analysis of the text of judgments in Chapter 4 identified:

- Themes that were unique to international tribunals; and
- Common themes in the reasoning processes of regional human rights courts and international tribunals.

[21] See discussion in Chapter 4 pages 194-196 and 202-207.
[22] See discussion in Chapter 5 pages 240-265.
[23] *Prosecutor v Semanza* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-97-20-T, 15 May 2003) ('*Semanza Judgment'*); *Prosecutor v. Nsengimana* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009); *Prosecutor v Bizimungu* (*Decision on Prosper Mugiraneza's Second Motion to dismiss for deprivation of his right to trial without undue delay*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 29 May 2007).
[24] See discussion in Chapter 4 pages 177-185.

2.1.1.1. Reasoning processes unique to international tribunals

Two reasoning processes were identified that were unique to international tribunals:

- Managing complexity to address the issue of undue delay; and
- Distinguishing international criminal law from domestic criminal law.

A prominent theme identified in the analysis was that the ICTY rarely applied the criteria for assessing undue delay.[25] While the reasons for this are unclear, the ICTY's approach when the matter of undue delay was raised was to focus on managing proceedings more effectively to prevent future delays. Where undue delay was raised in a case, rather than applying the criteria, the ICTY considered the momentum of the case, whether the Tribunals had 'active involvement'[26] in progressing the case and whether the case had 'continued to go forward'.[27] Where it was found that proceedings were being managed effectively, the ICTY held that the issue of delay had been addressed.[28] This approach focussed on *potential* delays rather than actual delays that had occurred. In neglecting to apply the criteria for assessing undue delay, the ICTY failed to consider actual delays that had occurred in proceedings, or potential violations of the fair trial rights of the accused.

International tribunals highlighted the broad objectives of international criminal justice, the 'exceptional nature' of international charges and the inherent

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[25] Ibid.
[26] *Prosecutor v Perišić* (*Decision on motion for sanctions for failure to bring the accused to trial without undue delay*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-81, 23 November 2007).
[27] *Prosecutor v Seselj* (*Decision on Oral Request of the Accused for the Abuse of Process*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-03-67-T, 10 February 2010).
[28] See discussion in Chapter 4 pages 177-185.

complexity of international criminal proceedings to explain why international criminal proceedings may take longer than domestic criminal trials.[29] For example, the case of *Barayagwiza* held that 'because of the Tribunals' mandate and of the inherent complexity of cases before the Tribunal, it is not unreasonable to expect that the judicial process will not be as expeditious as before domestic courts.'[30] This case was repeatedly cited in subsequent cases.[31] While highlighting differences between international criminal proceedings and domestic criminal trials, international tribunals applying this reasoning process lacked a consistent method of both assessing the length of proceedings and the factors relevant to this assessment. Similarly, the reasoning processes of the ICTR lacked transparency in considering the issue of complexity. The majority of cases cited that the accused had not been subjected to undue delay due to the complexity of the case, without providing an analysis of the factors that were considered and relied on in reaching this conclusion.[32]

2.1.1.2. Common reasoning processes

Three common themes were identified in the reasoning processes of judges of regional human rights courts and international tribunals:

- Protecting the fundamental rights of the accused;

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[29] See discussion in Chapter 4 pages 185-187.
[30] *Barayagwiza v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-52-A, 28 November 2007) ('*Barayagwiza Appeal'*).
[31] See discussion Chapter 4 pages 208-210. See also *Prosecutor v Bizimungu et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda, Appeal Chamber, Case No ICTR-99-50-T, 4 February 2013), [32] ('*Bizimungu Appeal'*); *Karemera v The Prosecution* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) [71];, *The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015) [359].
[32] See discussion in Chapter 4 pages 194-196 and Chapter 5 pages 228-240.

- Promoting justice and fairness; and
- Analysing and comparing discrete variables.

Judges from all institutions relied on these themes as being of importance in applying the legal test for undue delay. However, while regional human rights courts applied the legal test for undue delay in a manner consistent with these themes, international tribunals interpreted these themes inconsistently. For example, both regional human rights courts and international tribunals stated the importance of protecting the fundamental rights of the accused or promoting justice and fairness in applying the legal test for undue delay.[33] While regional human rights courts applied the legal test in a manner that upheld these principles by holding prosecutorial and judicial authorities to account where their actions contributed to the delay, and finding that the complexity of the case did not justify lengthy proceedings, international tribunals applied the legal test for undue delay in a way that directly contradicted their stated objectives.[34] The contradictory and inconsistent approach of international tribunals analysed in Chapter 4 included using the complexity of the case to justify lengthy proceedings,[35] and downplaying the role of the prosecutorial and judicial authorities, even where it was

[33] See discussion Chapter 4 pages 188-189.
[34] See discussion Chapter 4 page 194-196.
[35] See the following cases discussed in Chapter 4: *Kajelijeli v The Prosecutor* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-98-44A-A, 23 May 2005); *Prosecutor v Barayagwiza* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999); *Renzaho v The Prosecutor* (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, J, 1 April 2011) ('*Renzaho Judgment*'); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *Prosecutor v. Bizimungu* (*Decision on Justin Mugenzi's Motion Alleging Undue Delay*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-99-50, 14 June 2007).

acknowledged that they were responsible for the length of proceedings.[36] International tribunals repeatedly found the accused had 'failed to prove' they were subjected to undue delay, despite acknowledging the length of the proceedings and that the actions of the prosecutorial or judicial authorities had contributed to the length of proceedings.[37] Finally, inconsistencies were evident in the lack of a coherent approach by international tribunals in assessing the complexity of the case or the reasonableness of the time period.[38] It was therefore concluded in Chapter 4 that the approach of international tribunals to the legal test for undue delay was found to have departed from the standard of protection of the right to be tried without undue delay afforded to an accused before regional human rights courts, which has resulted in limitations being placed on the right to be tried without undue delay.[39]

Protecting the fundamental rights of the accused was a common theme that was cited in the text of judgments of both regional human rights courts and international tribunals. Despite citing this as being of importance in applying the criteria for assessing undue delay, the reasoning processes of international tribunals were inconsistent with this principle, and in almost half of the cases analysed, stated the importance of this principle and then found

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[36] *Sagahutu v The Prosecutor* (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-OO-56-A, 11 February 2014); *Bagosora and Nsengiyumva v The Prosecutor* (*Appeal Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011); *The Prosecutor v Rwamakuba* (*Decision on Defence Motion for Stay of Proceedings Article 20 of the Statute*) (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-PT, 3 June 2005); *Bizimungu Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013); *Semanza Judgment* (International tribunal for Rwanda, Trial Chamber I, Case No ICTR-97-20-T, 15 May 2003).

[37] See discussion in Chapter 4 pages 189-194.

[38] See discussion in Chapter 4 pages 194-196 and 208-210.

[39] See discussion in Chapter 4 pages 213-214.

that the complexity of the case explained the length of delay and that the accused had not been subjected to undue delay.[40] The case of *Renzaho* is illustrative of this reasoning process, where after 11 years in detention, the Appeals Chamber acknowledged that 'lengthy delays can give rise to serious questions regarding fairness' and they were concerned about the 'length of proceedings as a whole', yet held that because of the complexity of this case, the accused had not demonstrated that he had been subjected to undue delay.[41]

Inconsistencies were revealed in the manner in which international tribunals strayed from promoting justice and fairness by placing an almost impossible evidential burden on the accused to demonstrate they were subjected to undue delay, and downplaying the actions of the prosecutorial and judicial authorities in contributing to that delay.[42] The challenges faced by an accused in proving they were subjected to undue delay were highlighted in the case of *Bizimungu* discussed in Chapters 4 and 5.[43] After over 14 years in detention, the Appeals Chamber acknowledged that the proceedings had been 'lengthy' and the workload of the trial judges had 'contributed to the delay in the proceedings', but found that it was 'not unusual for judges of the Tribunal to participate in multiple proceedings, impacting the pace of those respective proceedings'.[44] The Appeals Chamber demonstrated the burden of proof on the co-accused by outlining that the accused had failed to demonstrate a

[40] See Chapter 4 pages 194-196.
[41] *Renzaho Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-31-A, 1 April 2011) [241-242].
[42] See discussion Chapter 4 page 201-207 and Chapter 5 pages 256-247.
[43] *Bizimungu Appeal Judgment* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-A, 4 February 2013).
[44] Ibid [35].

number of factors outside their knowledge, including '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.'[45] The Appeals Chamber concluded by finding the accused had failed to prove they were subjected to undue delay.

Finally, Chapters 4 and 5 identified inconsistencies in the way in which international tribunals applied the law between individual cases. Both regional human rights courts and international tribunals employed analytical reasoning processes as a common theme in considering the issue of undue delay, where discrete variables such as the length of proceedings, number of accused, exhibits or witnesses and number of trial days were compared between cases in considering the issue of undue delay.[46] However, international tribunals' reasoning processes demonstrated inconsistencies in the way the reasonableness of the time period was assessed to support their finding that an accused was not subjected to undue delay, or the factors used in different cases to assess the complexity of the case.[47] In assessing the period of delay, international tribunals sometimes adopted the approach of regional human rights courts and considered the period from when the accused first became aware of the charges, but at other times only considered distinct time periods, for example, from the time of arrest until the trial commenced, or from the last time the issue of undue delay was considered.[48] In assessing the complexity of the case, international tribunals

[45] Ibid [31, 35].
[46] See discussion in Chapter 4 pages 208-210.
[47] See Chapter 4 pages 194-196, 208-210 and Chapter 5 pages 220-238.
[48] See discussion in Chapter 5 pages 222-228.

often considered factors that were not relevant to the issue of complexity, such as the seriousness of the charges.[49]

Chapter 4 concluded firstly that in trying to meet domestic standards of protection for the right to be tried without undue delay upheld by regional human rights courts, international tribunals have applied the criteria for assessing undue delay in way that lacks both consistency and transparency. The methodology used in this thesis highlighted a number of factors unique to international criminal justice that relate to the complexity of proceedings and the heavy onus placed on the accused in proving they were subjected to undue delay.

2.2. Research Aim 2

Examine the reasons international tribunals have relied on in departing from domestic standards of fairness and whether they are legitimate in light of the objectives of international criminal justice and the unique context international tribunals operate within.

Chapter 5 provided a detailed analysis of cases before international tribunals where judges held that the accused had not been subjected to undue delay. Building on the analysis in Chapter 4, this chapter analysed the reasoning processes of judges in cases where international tribunals have departed from domestic standards of fair trial protections upheld by regional human rights courts to determine if those departures were legitimate in light of the unique context international tribunals operate within and the objectives of international criminal justice. The analysis in Chapter 5 further analysed two areas where international tribunals have departed from the approach of

[49] See discussion in Chapter 5 pages 228-240.

regional human rights courts in finding an accused was not subjected to undue delay:

- Inconsistent application of the reasonableness of the time period and focus on the complexity of the case; and
- The evidential burden placed on the accused in proving undue delay, while downplaying the role of prosecutorial and judicial authorities in contributing to delays.

This thesis has argued that international tribunals have struggled to resolve tensions between upholding the fundamental rights of the accused and the challenges posed by the international context in which they operate. It has been the failure to resolve these tensions that has resulted in international tribunals adapting or distorting the way in which they interpret the criteria for assessing undue delay to justify departures from the approach of regional human rights courts in a manner that has offered little protection for the rights of the accused.

2.2.1. Inconsistent application of the reasonableness of the time period and focus on the complexity of the case

In theory, international tribunals have adopted the approach of regional human rights courts in assessing the reasonableness of the length of proceedings.[50] Chapter 5 showed, however, that in practice their approach has been inconsistent and had the effect of normalising lengthy proceedings in international criminal law.[51] Rather than acting as a threshold for determining whether the right to be tried without undue delay has been

[50] See discussion in Chapter 3 pages 119-120.
[51] See discussion in Chapter 5 pages 222-228.

engaged, international tribunals have argued that the accused was not subjected to undue delay because similar findings were made in other cases with proceedings of equal or greater duration.[52]

International tribunals have explained the length of proceedings by relying on the complexity of the case as the almost sole criterion for assessing delay.[53] Chapter 5 evaluated international tribunals' reliance on complexity by analysing research examining factors that contribute to trial complexity.[54] It was concluded that the majority of international criminal proceedings are inherently complex, and this complexity arises in part from the mandate and objectives of international criminal justice.[55] Research has demonstrated that the number of trial days, number of witnesses and number of exhibits can be used as a measure of the complexity of proceedings.[56] However, as Chapter 5 showed, these are not the only measures. In addition, the truth-telling and historical record objectives of the tribunals often require the management of vast quantities of evidence and witnesses and a large number of trial days for the judges to consider. To end impunity for those responsible for gross violations of human rights, international tribunals are required to charge accused that are senior members of the political hierarchy and are often removed both physically and geographically from the offences with which they have been charged. The seniority of the accused and whether they are an indirect perpetrator are both factors that have been found to reliably predict

[52] See discussion in Chapter 4 pages 208-210.
[53] See discussion in Chapter 4 pages 194-196.
[54] See discussion in Chapter 5 pages 228-240.
[55] See discussion in Chapter 5 pages 263-265.
[56] Stuart Ford, 'Complexity and Efficiency at the International Criminal Courts' (2014) 29 *Emory International Law Review* 1.

the complexity of proceedings, given the vast amounts of evidence required to prove an accused in these circumstances committed the offence.[57] The analysis in Chapter 5 demonstrated that in finding an accused was not subjected to undue delay, international tribunals have relied on factors that have been demonstrated to have no affect on the complexity of proceedings. This is a particularly significant finding given the complexity of the case was almost the sole criterion relied on by international tribunals in finding against the accused.

The way in which international tribunals have selectively applied the legal test for undue delay to focus solely on the complexity of the case demonstrates the difficulties they face in reconciling tensions between the objectives of international criminal justice and upholding the fundamental rights of the accused. An important finding in this thesis has been that international tribunals have justified findings that an accused was not subjected to undue delay by relying on factors to predict or measure complexity that have been found to have no effect on the complexity of the case.[58] These factors include the seriousness of the charges, the number of crime sites or whether the accused had been charged under joint criminal enterprise.[59] This finding is unique in that it is the first time that studies examining complexity of international criminal trials have been applied to considerations of undue delay. As noted above, this is significant given international tribunals' overreliance on the complexity of the case to find an accused was not

[57] Ibid.
[58] See discussion in Chapter 4 pages 194-196 and Chapter 5 pages 226-238.
[59] Stuart Ford, 'The Complexity of International Criminal Trials is Necessary' (2015-2016) 48 *George Washington International Law Review* 151. See case analysis in Chapter 5 pages 226-238.

subjected to undue delay and the inconsistent approach to assessing this criterion in reaching these findings.

2.2.2. The evidential burden placed on the accused in proving undue delay, while downplaying the role of prosecutorial and judicial authorities

International tribunals place a heavy burden on the accused in demonstrating that they were subjected to undue delay. This burden has proved almost impossible to satisfy, particularly given the way in which international tribunals have downplayed the role of the prosecutorial and judicial authorities in managing proceedings.[60] International tribunals must balance the rights and interests of a broader range of parties than in domestic criminal proceedings, including those of victims, witnesses, the prosecutor and the accused. Given the focus of international criminal law tends to be on victims and witnesses, this balance tends shift against the accused.[61]

Chapter 5 argued that the evidential burden placed on an accused by international tribunals does not strike a fair balance between the interests of the accused, the prosecutor and the authorities. The extension of fair trial rights and interests to parties other than the accused has shifted the burden for proving undue delay from the prosecutor, who is entitled to a fair trial under international criminal law, to be placed solely on the accused.[62] This shift in the burden of proof under international criminal law has also shifted the balance of competing rights and interests away from the accused and in favour of the prosecutor and authorities. The reasons for finding that an

[60] See discussion in Chapter 5 pages 240-265.
[61] See discussion in Chapter 1 pages 65-68.
[62] See discussion in Chapter 3 pages 123-128 and Chapter 5 pages 244-247.

accused was not subjected to undue delay are linked to the context international tribunals operate within and the objectives of international criminal justice, however, the way in which international tribunals have considered these factors in applying the criteria for assessing undue delay did not constitute a legitimate departure from domestic standards of fair trial protections. It was concluded that the legal test for undue delay does not provide judges with the tools to balance the objectives of international criminal justice with the overall fairness of proceedings. As such, international tribunals have departed from domestic standards of fairness upheld by regional human rights courts by adapting the criteria for assessing undue delay in a way that has failed to adequately protect the rights of the accused.

2.3. Research Aim 3

Propose a new legal test for undue delay is adapted to the context in which international criminal law operates.

This thesis concluded that the legal test for undue delay could be adapted to the unique context in which international tribunals operate. Chapter 6 argued that because the legal test for undue delay fails to take into account the international criminal justice context in which it operates, international tribunals have applied the criteria in way that departs from domestic standards of protection for the right to be tried without undue delay, and the overarching right to a fair trial.[63] Chapter 6 proposed an adapted legal test for undue delay that accounts for the differences between domestic and international criminal justice. International tribunals must balance objectives that relate to the goals of international criminal justice, while also balancing competing rights and

[63] See Chapter 6 pages 270-280 for a discussion of the theoretical basis for this position.

interests of a number of parties including victims, witnesses, the prosecutor and the accused. The adapted legal test provides judges with a tool to balance these competing goals, objectives and interests while ensuring the fairness of proceedings. Unlike other research in this area, the adapted legal test does not suggest that international tribunals must adhere to the same standard of protection provided in domestic criminal courts. The test instead requires that three components be met to provide consistency and transparency in decision-making in applying the legal test for undue delay:

- Objectively and consistently assessing the reasonableness of the time period and the complexity of the case;
- Requiring the prosecutorial and judicial authorities to demonstrate that they efficiently and effectively manage proceedings to prevent undue delay; and
- Balancing the length of proceedings with the objectives of international criminal justice and the overall fairness of proceedings.

This thesis has argued that while international tribunals may need to depart from domestic standards of fairness in order to meet the broad objectives of international criminal justice, safeguards must be put in place to ensure an accused is provided with a fair trial overall.

3. The adapted legal test for undue delay

The adapted legal test for undue delay outlined in Chapter 6 provided a framework for assessing undue delay that considers the elements.

3.1. Has the right of the accused to be tried without undue delay been engaged?

Before regional human rights courts, the reasonableness of the time period acts as a threshold consideration to determine if the right of the accused to be tried without undue delay has been engaged.[64] International tribunals, however, have been inconsistent in their approach to assessing the length of proceedings. There is no consistent method used to measure the length of proceedings. Reasoning in these cases also lacks transparency, as international tribunals have used the process of 'analysing and comparing discrete variables' to dismiss lengthy trials and find that the accused was not subjected to undue delay because similar findings were reached in equally lengthy proceedings. This fails to account for the individual circumstances of the case and has had the effect of normalising lengthy proceedings in international criminal justice.

The adapted legal test mandates a consideration of the reasonableness of the time period as a threshold test for the accused to demonstrate that their right to be tried without undue delay has been engaged. Guiding principles are proposed as part of the adapted legal test to provide a consistent approach for international tribunals to assess the length of proceedings and link this assessment with the purpose of the reasonable time requirement to ensure the focus remains on the rights of the accused.[65] The accused must demonstrate that the trial length has been 'inordinate or excessive'[66] by

[64] See discussion in Chapter 3 pages 115-119.
[65] See discussion in Chapter 6 pages 283-289 for further details on the principles to be applied in assessing the reasonableness of the length of proceedings.
[66] David Young, Mark Summers and David Corker *Abuse of Process in Criminal Proceedings* (2014) Bloomsbury, 31. See also *Popov v Russia* (European Court of Human Rights, Court

examining the reasonableness and nature of the delay in proceedings in light of the purpose of the reasonable time requirement.[67] Unlike the current legal test that requires the accused to demonstrate they were prejudiced by the length of proceedings, consistent with the approach before regional human rights courts,[68] prejudice should be presumed once the length of the proceedings is such that it has engaged the right of the accused to be tried without undue delay. The adapted legal test therefore provides judicial decision makers with an objective method of assessing the reasonableness of the length of proceedings, taking into account the individual circumstances of the case, rather than simply finding that there was no undue delay based of the length of proceedings in other cases.

3.2. Objective assessment of the length of the proceedings

In undertaking an objective assessment of the length of proceedings, the adapted legal test requires international tribunals to consider a number of elements. These elements include an objective assessment of the complexity of the case, a consideration of whether the prosecutorial and judicial authorities efficiently and effectively managed proceedings to prevent undue delay, and whether the complexity of proceedings was necessary in order to meet the objectives of international criminal justice. These elements are examined below, however, in practice, international tribunals will consider them together as part of an objective assessment of the length of proceedings.

(First Section), Application Number 23284/04, 28 October 2010). In this case the length of proceedings was considered to be too short to constitute undue delay and therefore acted as a threshold test.

[67] See discussion in Chapter 6 pages 283-289.

[68] See discussion in Chapter 5 pages 257-263.

3.2.1. Were the proceedings complex and why?

International tribunals have demonstrated inconsistent reasoning processes in considering the complexity of the case.[69] Judgments have cited the importance of justice, fairness and protecting the fundamental rights of the accused, yet have justified lengthy proceedings based on the complexity of the case using factors that have no bearing on trial complexity.[70] International tribunals have also excused failings of the prosecutorial or judicial authorities that have contributed to the length of proceedings.[71] This is evident in reasoning processes of international tribunals that cite the importance of justice and fairness, yet excuse conduct of the prosecutorial or judicial authorities that contributed to the length of proceedings, to find that the accused has failed to prove they were subjected to undue delay.[72]

Firstly, judges must consider where the case was complex by undertaking an objective assessment using reliable measurements and predictors of complexity. The introduction of these objective assessments will provide a consistent approach to balancing relevant factors to determine whether the length of proceedings constitutes undue delay. The current legal test provides no guidance for judges to assess the complexity of the case. As a result, the complexity of the case is routinely used to explain lengthy proceedings, without an understanding of which factors increase the complexity of proceedings, and there is no consistency in the assessment of

[69] See discussion in Chapter 4 pages 194-196 and Chapter 5 pages 226-238.
[70] See discussion in Chapter 5 pages 228-240.
[71] See discussion in Chapter 5 pages 240-265.
[72] See discussion in Chapter 4 pages 202-207.

trial complexity. Reliable predictors of complexity will ensure that cases are assessed consistently using factors that have been demonstrated to affect case complexity.[73]

3.2.3. Did the prosecutorial authorities manage proceedings efficiently and effectively to prevent undue delay?

International tribunals will also be required to objectively assess whether the prosecutorial and judicial authorities efficiently and effectively managed proceedings to prevent undue delay. This will require an assessment of whether proceedings were expedited where possible (efficiency), and whether the proceedings were managed fairly (effectiveness). The conduct of the accused was removed from the adapted legal test because this criterion can never be relied upon to reach a finding of undue delay, as an accused cannot be found to have breached their rights.

This element of the adapted legal test will prevent judges undertaking superficial assessments of complexity to reach findings that there was no undue delay, and require prosecutorial and judicial authorities to demonstrate that proceedings were efficiently and effectively managed to prevent undue delay. It also defers to the qualitative question so that the length of proceedings becomes less significant.

[73] See discussion Chapter 5 pages 228-236.

3.2.4. Was the length of proceedings necessary to meet the objectives of international criminal justice?

The proposed legal test requires international tribunals to consider the objectives of international criminal justice and whether the length of proceedings resulted from meeting one of those objectives. Unlike other contextual factors, for the purpose of this element, the objectives of international criminal justice are fixed which allow them to be applied consistently across different cases.[74] This element requires judges to consider recognised objectives of international criminal justice and whether the length of proceedings was necessary in order to meet that objective.[75] Providing this fixed and transparent framework will ensure that international tribunals do not stray from their objectives and find new ways to justify delays at the expense of the rights of the accused.

It will be found that the accused was not subjected to undue delay if the length of proceedings was not 'inordinate or excessive'. Also, if the authorities did not manage proceedings efficiently or effectively to prevent undue delay in light of the complexity of the case and objectives of international criminal justice, it should be found the accused was subjected to undue delay. This is because the fairness considerations cannot mitigate circumstances where the authorities have not acted efficiently and effectively. In all other circumstances, the final element of the adapted legal test will be considered.

[74] See Chapter 6, which outlines relevant factors to include stated objectives of international tribunals. For the ICC, the objectives are stated in the Rome Statute Preamble.
[75] See discussion in Chapter 6 pages 301-305.

3.3. Is a fair trial possible in the circumstances of the case?

The right to be tried without undue delay is only one of the requirements of a fair trial.[76] The overall aim in considering the issue of undue delay is to ensure that the accused has been afforded a fair trial overall. As demonstrated in this thesis, international tribunals have cited fairness and justice as objectives in their reasoning when applying the legal test for undue delay, yet as highlighted in Chapter 3, international tribunals have not demonstrated a clear approach to assessing the overall fairness of proceedings.[77] The favoured approach under international human rights law, however, is the cumulative approach, which provides that a fair trial may still be possible, even if not all the requirements of a fair trial are met.[78]

The proposed legal test incorporates a fairness requirement when considering undue delay. This consideration puts the right to be tried without undue delay within the context of the right to a fair trial using the cumulative approach, with the judge considering whether the accused has been afforded a fair trial overall given circumstances of the case. Where an accused cannot be afforded a fair trial because of delay they should be granted a remedy as provided under the abuse of process doctrine.[79] A remedy may be provided under the abuse of process doctrine where delay has made a fair trial impossible, or where proceeding with the trial would contravene the court's

[76] See discussion in Chapter 3 pages 107-108.
[77] Ibid.
[78] See discussion in Chapter 3 pages 109-111.
[79] See discussion in Chapter 3 pages 111-114.

sense of justice due to impropriety or misconduct.[80] Incorporating the abuse of process doctrine into the legal test will ensure that a remedy is provided where the right to a fair trial has been infringed.

Currently, the consideration of remedies provided to an accused whose rights have been infringed is a relatively underdeveloped area of international criminal law.[81] Remedies are generally only provided in the form of the a reduction in sentence, and while the issue of compensation has been tentatively explored by the tribunals, there is no clear guidance on how this can be provided to an accused whose right to a fair trial has been violated.[82] This section concluded by discussing options for remedies beyond a stay of proceedings in granting a remedy to an accused.[83] These include amended requirements for granting provisional release and compensation.[84]

The final part of Chapter 6 provided case studies demonstrating how the adapted legal test for undue delay could be applied in the context of the ICC. The adapted legal test for undue delay was applied to the facts and circumstances from the *Katanga* and *Lubanga* cases at the ICC.[85] In these two cases, the issue of undue delay was raised but the Court did not apply the current legal test. The analysis under each element of the adapted legal test demonstrated how it could be applied to cases before the international

[80] See discussion in Chapter 6 pages 309-312.
[81] See discussion in Chapter 3 pages 111-114.
[82] See discussion in Chapter 6 pages 309-312.
[83] Ibid.
[84] See Caroline Davidson, 'No Shortcut on Human Rights – Bail and the International Criminal Trial' (2010) 60 *American University Law Review* 1, 60-65.
[85] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (International Criminal Court, Case No ICC-01/04-01/07 OA 8); *The Prosecutor v Thomas Dylio Lubanga* (International Criminal Court, Case No, ICC-01/04-01/06).

criminal court to take into account the challenges inherent in conducting international criminal proceedings, while safeguarding the right of the accused to fair trial. The case studies demonstrated both the inadequacy of the criteria for assessing undue delay in an international criminal justice context, and how the adapted legal test provides for a consistent, transparent and comprehensive discussion of factors considered in balancing competing principles and objectives.

4. Limitations of the study and possible areas for future research

A significant limitation of this study has been the small number of cases that have interpreted and applied the criteria for assessing undue delay and the abuse of process doctrine in granting a remedy. The small case sample size analysed in this thesis has limited the ability to generalise findings across similar cases in the same tribunal, or more generally across the international criminal law institutions. However, while other studies have focused on the way in which international tribunals have managed the issue of delay more generally to broaden this discussion, this thesis has focused on the interpretation of the criteria for assessing undue delay. This was done with the aim of adapting the legal tools used by judges to better protect the rights of the accused in the context of international criminal justice. While this has limited the number of cases considered in the analysis, the underuse of the legal test for undue delay given the large number of lengthy proceedings is

argued to be evidence in itself of problems with the application of the test and that a consistent approach to the problem of undue delay is required.[86]

This research has identified a number of areas for future research that would further improve the way in which international tribunals manage the problem of undue delay. The complexity of proceedings is arguably the greatest contributing factor to delays in international criminal trials, and research that would provide a more detailed understanding of the factors that drive complexity could assist the prosecutorial and judicial authorities to develop ways to more effectively manage these cases. Unlike previous research that has unsuccessfully introduced procedural measures with the goal of expediting proceedings, the purpose of this research would be to ensure that prosecutorial and judicial authorities are competent in managing proceedings effectively. Another potential area that could be explored in future research are ways to limit the impact of lengthy delays on the accused and minimise any related infringement on their human rights. This thesis has argued that in some cases, it should be accepted that international criminal proceedings will take longer and that the main consideration should be whether the accused could be provided a fair trial in the circumstances of the case. Greater efforts to enable provisional release would be one area that could minimise the effect of delays on the accused and prevent infringements of their right to liberty. The seriousness of the offence often prevents provisional release being considered, yet some accused before international tribunals are being tried with offences that are similar to those in domestic criminal proceedings, for

[86] See figures in Chapter 4 pages 165-167.

example war crimes, where the accused is charged with torture or inhuman treatment. Reviewing the criteria for granting provisional release, which takes into account the seriousness of the offence, could be one area that would lessen the impact of lengthy proceedings under international criminal law.

Yet another area that could be further developed is clarifying remedies that are available to an accused subjected to undue delay. If remedies other than a stay of proceedings were available to international tribunals in applying the legal test for undue delay, and circumstances in which compensation could be provided to those acquitted, judges of international tribunals may be more likely to address undue delay and utilise the legal test. In considering the problem of undue delay, the overarching goal is fairness. A final proposed area for future research would be to explore the meaning of fairness for both victims and perpetrators before international tribunals to ensure that standards that have been imported from domestic courts are relevant and meaningful to all participants in the process and are appropriately adapted to the ICC context.

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Prosecutor v Thomas Dyilo Lubanga (*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*) (International Criminal Court, Trial Chamber I, Case No ICC-01704-01/0,13 June 2008).

Prosecutor v Thomas Dyilo Lubanga (*Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the VMU*) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2582, 8 July 2010).

Prosecutor v. Thomas Lubanga Dyilo (*Decision on Sentence pursuant to Article 76 of the Statute*) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 13 July 2012).

Prosecutor v Lubanga Dyilo (*Decision regarding the Timing and Manner of Disclosure and the Date of Trial*) (International Criminal Court, Trial Chamber I, 9 November 2007).

Prosecutor v Thomas Lubanga Dylio (*Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3*

October 2006) (International Criminal Court, Appeals Chamber, Case No CC-01/04-01/06-722, 14 December 2006).

Prosecutor v Thomas Dyilo Lubanga (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay) (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06-2582, 14 October 2010).

Prosecutor v. Thomas Lubanga Dyilo (*Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute"*) (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 1 December 2014).

Prosecutor v Thomas Lubanga Dyilo (*Judgment pursuant to Article 74 of the Statute, International Criminal Court*) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 4 April 2012).

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v Aleksovski (*Decision on Prosecutor's Appeal on Admissibility of Evidence*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1, 16 February 1999).

Prosecutor v Blagojević (*Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-60-AR73.4, 7 November 2003).

Prosecutor v Brdanin and Talic (*Decision on Motion by Radislav Brdanin for Provisional Release*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-99-36-PT, 25 July 2000).

Prosecutor v Brdanin (*Decision on Second Motion by Brdanin to Dismiss the Indictment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-99-36, 16 May 2001).

Prosecutor v Delalic (*Judgment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, IT-96-21-T, 16 November 1988).

Prosecutor v Martic (*Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Malin Babic*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-11–AR 73.2, 14 Sept 2006) [13].

Prosecutor v Milosevic (*Separate Opinion of Judge Shahabuddeen Appended to Appeals Chamber's Decision Dated 30 September 2003 on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written*

Statements) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-54-AR73.4, 31 October 2003).

Prosecutor v. Darko Mrdja (*Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-02-59, 31 March 2004).

Prosecutor v Dragan Nikolić (*Decision on Interlocutory appeal regarding legality of arrest*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No IT-94-2-AR73, 5 June 2003).

Prosecutor v Naletilić & Martinović (*Decision on Vinko Martinovic's objection to the Amended Indictment and Mladen Natetilic's Preliminary Motion to the Amended Indictment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-PT, 14 February 2001).

Prosecutor v Popović et. al. (*Decision on Further Amendment and Challenges to the Indictment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-88-PT & IT-05-88/1-PT,13 July 2006).

Prosecutor v Perišić (*Decision on motion for sanctions for failure to bring the accused to trial without undue delay)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-81, 23 November 2007).

Prosecutor v *Perišić* (*Decision on Mr Perišić's Motion for Provisional Release During the Court's Winter Recess*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-8IT, 17 December 2008).

The Prosecutor v Prlić et. al. (*Decision on adoption of new measures to bring the trial to an end within a reasonable time*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-74, 13 November 2006).

Prosecutor v Šešelj (*Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with His Defense*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No IT-03-67-PT21, May 9 2003).

Prosecutor v Stanišić & Župljanin (*Decision on Motion and Supplementary Motion for Leave to Amend the Indictment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-08-91-PT, 28 April 2009).

Prosecutor v Dusko Tadic (*Appeal Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*) (International Criminal Tribunal for the former Yugoslavia, Appeal Chamber, Case No IT-94-1-AR72, 10 August 1995).

Prosecutor v Tadic (*Judgment*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999).

International Criminal Tribunal for Rwanda

Bagosora and Nsengiyumva v The Prosecutor (*Appeal judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011).

Barayagwiza v The Prosecutor (*Prosecutor's Request for Review or Reconsideration*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No CTR-97-19-AR72, 31 Jan 2000).

Barayagwiza v The Prosecutor (*Prosecutor's Request for Review or Reconsideration*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 31 March 2000).

Prosecutor v Barayagwiza (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999).

Prosecutor v Bizimungu et. al. (*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*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 3 November 2004).

Prosecutor v Bizimungu et. al. (*Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 14 June 2007).

Prosecutor v Bizimungu et. al. (*Decision on Prosper Mugiraneza's Second Motion to dismiss for deprivation of his right to trial without undue delay*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 29 May 2007).

Prosecutor v. *Bizimungu et. al.* (*Decision On Prosper Mugiraneza's Third Motion To Dismiss Indictment For Violation Of His Right To A Trial Without Undue Delay*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No. ICTR-99-50-T, 10 February 2009).

Prosecutor v Bizimungu et. al. (*Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial Without Undue Delay - Article 20(4)(c) of the Statute of the Tribunal*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-99-50, 23 June 2010).

Prosecutor v Bizimungu et. al. (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).

Prosecutor v Bizimungu et. al. (*Judgment and Sentence*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 30 September 2011).

Gatete v The Prosecutor (*Appeal Judgement*) (International Criminal Tribunal for Rwanda, Case No. ICTR-00-61-A, 9 October 2012).

Prosecutor v Kajelijeli (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-98-44A-A, 23 May 2005).

Kajelijeli v The Prosecutor (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44A-A, 23 May 2005).

Prosecutor v Kanyabashi (*Decision on the Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings*) (International Criminal Tribunal for Rwanda, Case No ICTR-96-15-I, Trial Chamber, 23 May 2000);

Karemera et. al. v The Prosecutor (*Decision on Prosecutor's Interlocutory Appeal against 'Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR·98-44-AR73, 19 December 2003).

Karemera et. al. v The Prosecution (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014).

Prosecutor v Karemera et. al. (*Judgment*) (International Criminal Tribunal for Rwanda), Trial Chamber, Case No ICTR-98-44-A, 2 February 2012).

Nahimana et. al. v. The Prosecutor (*Judgment*) (International Criminal Tribunals for Rwanda, Appeals Chamber, Case No. ICTR-99-52-A, 28 November 2007).

Ndindiliyimana et.al. The Prosecutor (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014)

Prosecutor v. Nsengimana (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009).

The Prosecutor v Nyiramasuhuko (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015).

The Prosecutor v Semanza (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T 15 May 2003).

The Prosecutor v Šainović et. al. (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No IT-05-87, 23 January 2014).

Renzaho v The Prosecutor (*Appeals Judgement*) (International Criminal Tribunal for Rwanda, Case No ICTR-97-31-A, 1 April 2011).

Prosecutor v Rwamakuba (*Decision on Defence Motion for Stay of Proceedings Article 20 of the Statute*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-98-44C-PT, 3 June 2005).

Prosecutor v Zigiranyirazo (*Decision on the Prosecution Joint Motion for Re-opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza Via Video-Link*) (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No Case No: ICTR-2001-73-T, 16 November 2006).

United Kingdom

Handyside v United Kingdom (1976) 1 EHRR 737.

Regina v Edwards, Denton and Jackson Hendley Crowley; Attorney General's Reference (No. 1 of 2004) [2004] EWCA Crim 1025 (29 April 2004).

Sunday Times v United Kingdom (1979) 2 EHRR 245.

Appendix 1: Length of international tribunal cases in sample

Tribunal	Case	Number of accused	Name of accused	Length (months)
ICTR	Military I case	4	Bagosora	193
			Kabiligi	177
			Nisengiyumva	193
			Ntabakuze	177
ICTR	Government II	4	Bizimungu, C	167
			Bikamumpaka	165
			Mugenzi	165
			Mugiraneza	165
ICTR	Gatete	1	Gatete	120
ICTR	Kajelijeli	1	Kajelijeli	83
ICTR	Military II	4	Bizimungu, A	124
			Ndindiliyimana	168
			Nzuwonemeye	167
			Sagahutu	167
ICTR	Media case	3	Nahimana	140
			Barayagwiza	140
			Ngeze	124
ICTR	Nsengimana	1	Nsengimana	90
ICTR	Renzaho	1	Renzaho	102
ICTR	Butare	6	Ndayambaje	245
			Nsabimana	220
			Ntahobali	220
			Nteziryayo	211
			Nyiramasuhuko	220
			Kanyabashi	245
ICTR	Karemera	2	Karemera	195
			Ngirumpatse	195
ICTY	Haradinaj	3	Haradinaj	104
ICTY			Balaj	104
ICTY			Brahimaj	104
ICTY	Brdanin	1	Brdanin	93
ICTY	Perisic	1	Perisic	95

Appendix 2: Coding themes and theoretical coding

ICTY coding

Coding theme	Theoretical coding	Information/text from case	Case
Analysing and comparing discrete variables.	The process of considering the time period in considering the issue of undue delay	… considered period from arrest/surrender, not when accused first became aware of charges.	*Prosecutor v Perišić* (Decision on motion for sanctions for failure to bring the accused to trial without undue delay) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-81, 23 November 2007).
Promoting justice and fairness.	The process of safeguarding the interests of justice and fairness	Article 21(4) of the Statute expressly identifies the rights of the accused. The Statute of course does not address rights of the Prosecution in express terms .... This does not, however, mean that the Prosecution is without rights. By virtue of the burden placed on the Prosecution to prove the guilt of the accused person beyond reasonable doubt, the position of the Prosecution is in many ways different from the position of the accused person. Thus, the Prosecution has duties, which the Defence does not have, and the Defence has rights, which the Prosecution does not have. Properly analysed, the relationship between the Prosecution and Defence is not symmetrical; it is, because of the aforementioned burden, asymmetrical. The duty of the Trial Chamber under this Article to ensure a fair and expeditious trial is general in that it relates both to the Prosecution and the Defence. It is as a consequence of this duty that the Prosecution's interests are to be protected by	*Prosecutor v Haradinaj* (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-04-84-A, 19 July 2010).

Coding theme	Theoretical coding	Information/text from case	Case
		a Trial Chamber, with the result that the Prosecution has a similar righto the right of the Accused in Article 21(4)(e) of the Statute to obtain the attendance and examination of witnesses. But, this right is qualified in Article 20(1) of the Statute. It is a right that is to be enjoyed “with full respect for the rights of the accused”. The meaning is quite clear: the Prosecution cannot be given a level of assistance by the Trial Chamber in securing the attendance of its witnesses that would result in a right of the accused not being fully respected. If, for example, the level of assistance given is such that it will unduly interfere with the right of the accused under Article 21(4)(c) of the Statute to be tried without undue delay, then the Trial Chamber would be in breach of its statutory duty.	
Promoting justice and fairness.	The process of safeguarding the interests of justice and fairness	... accused said they would renounce their right to an expeditious trial provided the proceedings were of a 'reasonable duration' - Chamber does not consider this a real renunciation because the Accused explicitly requested to be tried within a reasonable time - 'Furthermore, the Chamber holds that the Accused are not the only ones to have the right to an expeditious trial and consequently cannot renounce it.	*Prosecutor v Prlić* (Decision on adoption of new measures to bring the trial to an end within a reasonable time) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-74, 13 November 2006).
Promoting justice and fairness.	The process of safeguarding the interests of justice and fairness.	As it has already confirmed, the Chamber considers that it is its highest duty to examine each aspect of the proceedings with all due attention. Furthermore, it finds, in accordance with its Decision of II February 2009 that, "its duty to preserve the integrity and fairness of the proceedings must prevail over time considerations in light of the exceptional circumstances of this case". The Chamber insists, moreover, on the fact that each interruption in this	*Prosecutor v Seselj* (Decision on Oral Request of the Accused for the Abuse of Process) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-03-67-T, 10 February 2010).

Coding theme	Theoretical coding	Information/text from case	Case
		trial was justified by a higher interest aimed at preserving the fairness of the proceedings.	
Protecting the fundamental rights of the accused.	The process of justifying the length of proceedings on the grounds of complexity	In the light of the extreme complexity of this case, the large number of witnesses heard and exhibits tendered before the Chamber, the behaviour of all the parties involved, as well as the seriousness of the charges against the Accused, the Chamber is not of the opinion that the Accused's right to be tried without undue delay has been violated.	*Prosecutor v Seselj* (Decision on Oral Request of the Accused for the Abuse of Process) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-03-67-T, 10 February 2010).
Protecting the fundamental rights of the accused.	The process of acknowledging the fundamental rights of the accused	The Chamber acknowledges the lengthy period of time the Accused has spent in detention and constantly has in mind the fundamental right accorded to him by Article 21(4)(c) of the Statute. This consideration notably constituted one of the principal foundations of the Chamber's decision of 23 November 2009 which ended the adjournment of the Accused's trial.	*Prosecutor v Seselj* (Decision on Oral Request of the Accused for the Abuse of Process) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-03-67-T, 10 February 2010).
Protecting the fundamental rights of the accused.	The process of acknowledging the fundamental rights of the accused	It is fundamental to any criminal justice system that no-one should be convicted of a crime otherwise than after a fair trial according to law. Articles 20.1 and 22.2 of the Tribunal's Statute expressly provide that an accused before the Tribunal is entitled to a fair trial. Article 20.1 makes it an essential function of the Trial Chambers to ensure that the accused receives such a fair trial.	*Prosecutor v Radoslav Brdanin & Momir Talic* (Decision on Second Motion by Brdanin to Dismiss the Indictment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36, 16 May 2001).
Managing complexity to address the issue of delay	The process of finding no undue delay where the length of proceedings was actively managed	Measures introduced to respect time limits imposed in a previous decision. Recalled Milosevic, 20 May 2003 - 'The Trial Chamber is aware of the necessity to ensure that a trial is expeditious and does not consume, unduly, too much in the way of international time and resources'. Then went on	*Prosecutor v Prlić* (Decision on adoption of new measures to bring the trial to an end within a reasonable time) (International Criminal Tribunal for the Former Yugoslavia, Trial

Coding theme	Theoretical coding	Information/text from case	Case
		to say that 'It stresses however that the considerations of economy should never violate the right of the parties to a fair trial'	Chamber III, Case No IT-04-74, 13 November 2006).
Managing complexity to address the issue of delay	The process of finding no undue delay where the length of proceedings was actively managed	Finally, it should be pointed out that even when the hearings were suspended, the proceedings continued to go forward in that the Chamber regularly met with the Accused during the administrative hearings and dealt with the requests he submitted. The Chamber ensures compliance with the rights of the defence and in particular those recognised by Article 21 (4) (c) of the Statute. Nevertheless, international and European jurisprudence clearly establish that there is no predetermined threshold with regard to the time period beyond which a trial may be considered unfair on account of undue delay.	*Prosecutor v Seselj* (Decision on Oral Request of the Accused for the Abuse of Process) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-03-67-T, 10 February 2010).
Managing complexity to address the issue of delay	The process of finding no undue delay where the length of proceedings was actively managed	... found that the 'active involvement' in the present case has served to move proceedings forward as expeditiously as possible (referred to similar finding in ECtHR case where it considered the 'intensive and continuous review' of the accused's pre-trial detention in concluding there had been no violation of *Article 5(3)*	*Prosecutor v Perišić* (Decision on motion for sanctions for failure to bring the accused to trial without undue delay) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-81, 23 November 2007).
Managing complexity to address the issue of delay	The process of finding no undue delay where the length of proceedings was actively managed.	Chamber adopted several measures to respect the time limits in 'Decision Adopting Guidelines' (earlier decision) - 'Numerous procedural incidents have occurred since the beginning of the trail were linked to the fact that, this is the first time that the Tribunal has had to conduct a 'mega trial'. These difficulties should not recur in the future. Furthermore, the Registrar, the Parties and the Chamber have had to familiarise themselves with the e-court information system,, which also slowed	*Prosecutor v Prlić* (Decision on adoption of new measures to bring the trial to an end within a reasonable time) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-74, 13 November 2006).

Coding theme	Theoretical coding	Information/text from case	Case
		down the course of proceedings ... Nevertheless, the Chamber is aware that this reduction of expected time will not be sufficient to significantly reduce the excess time dedicated to procedural indicants. In order to guarantee better employment of the sitting time, Chamber takes measures 'intended to prevent the Parties from raising objections that have no real grounds' ... Chamber reduces the number of hours by 107 allocated to the Prosecution for presentation of evidence. Chamber also encourages the Prosecution to present its evidence in a more efficient manner by calling witnesses only absolutely necessary and only evidence crucial to prove the crimes.	
Analysing and comparing discrete variables.	The process of considering the time period in considering the issue of undue delay	Nevertheless, international and European jurisprudence clearly establish that there is no predetermined threshold with regard to the time period beyond which a trial may be considered unfair on account of undue delay.	*Prosecutor v Seselj* (Decision on Oral Request of the Accused for the Abuse of Process) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-03-67-T, 10 February 2010).
Protecting the fundamental rights of the accused.	The process of justifying the length of proceedings on the grounds of complexity	The accused Radoslav Brdanin ("Brdanin") has filed a motion in which he seeks the dismissal of the indictment He complains that the Tribunal has not provided him, and is not prepared to provide him, with sufficient resources properly and legally to prepare his defence, and that it has caused unnecessary delay by failing to provide sufficient translation services to the Office of the Prosecutor. He says that either the Tribunal has the necessary resources to provide equality between the prosecution and the defence or it has failed and refused to request the Security Counsel or the General Assembly of the United Nations for additional funding. The delays caused by these failures	*Prosecutor v Radoslav Brdanin & Momir Talic* (Decision on Second Motion by Brdanin to Dismiss the Indictment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36, 16 May 2001).

Coding theme	Theoretical coding	Information/text from case	Case
		are in violation of his right to be tried without undue delay. He asserts that he is at a significant disadvantage in preparing for trial compared to the prosecution because the prosecution has access to greater resources. He submits that the indictment should be dismissed as the only reasonable remedy for the failure of the Tribunal to "honour the principle of equality of arms and provide sufficient resources to the defence in this case".4 Alternatively, he requests an order to the Registrar to provide resources to the defence "commensurate with those devoted by the Prosecutor" to the case, and he submits that, if there be a default by the Registrar to do so within a reasonable time, the indictment should be dismissed. … However, the Trial Chamber is not indifferent to the difficulties faced by the defence in preparing a case of this complexity.	
Promoting justice and fairness.	The process of safeguarding the interests of justice and fairness	If it is demonstrated that the resources necessary to ensure a fair trial are not available, a Trial Chamber cannot permit a miscarriage of justice to occur. There would be no miscarriage of justice if an accused person were shown to be freely willing to go to trial without the provision of such resources. Even where a trial would amount to a miscarriage of justice, it would only be in exceptional circumstances that the dismissal of the indictment would be appropriate. However, if the Trial Chamber is satisfied that the absence of such resources will result in a miscarriage of justice, it has the inherent power and the obligation to stay the proceedings until the necessary resources are provided, in order to prevent the abuse of process involved in such a trial.11 The consequences of such a stay	*Prosecutor v Perišić* (Decision on motion for sanctions for failure to bring the accused to trial without undue delay) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-81, 23 November 2007).

Coding theme	Theoretical coding	Information/text from case	Case
		upon the continued detention of the accused would depend upon the circumstances of the particular case ... Considered equality of arms argument as Defence raised lack of adequate funding as an issue - referred to previous finding that accused had not demonstrated any equal lack of access to the processes of the Tribunal or the opportunity to seek procedural relief.	
Protecting the fundamental rights of the accused.	The process of justifying the length of proceedings on the grounds of complexity	... defence conceded complexity - referred to a letter to the Defence from the Registry in reasoning that the case would be ranked at the highest level of complexity for the purpose of payment during the pre-trial phase. Accepted that the case is amongst the most complex before the Tribunal for the purpose of determining this motion	*Prosecutor v Perišić* (Decision on motion for sanctions for failure to bring the accused to trial without undue delay) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-81, 23 November 2007).
Protecting the fundamental rights of the accused.	The process of conflating Article 5(3) with the right to be tried without undue delay	…considered ICTR case and ECtHR cases - conflation with Article 5(3) issues in ECtHR case	*Prosecutor v Perišić* (Decision on motion for sanctions for failure to bring the accused to trial without undue delay) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-81, 23 November 2007).
Managing complexity to address the issue of delay	The process of finding no undue delay where the length of proceedings was actively managed	... found that the 'active involvement' in the present case has served to move proceedings forward as expeditiously as possible (referred to similar finding in ECtHR case where it considered the 'intensive and continuous review' of the accused's pre-trial detention in concluding there had been no violation of *Article 5(3).*	*Prosecutor v Perišić* (Decision on motion for sanctions for failure to bring the accused to trial without undue delay) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-81, 23 November 2007).

Coding theme	Theoretical coding	Information/text from case	Case
Protecting the fundamental rights of the accused.	The process of justifying the length of proceedings on the grounds of complexity	With respect to the period between 21 March 2012, the date of the last decision validating the length of the proceedings, and 28 August 2013, the date of the disqualification of Judge Harhoff, the Chamber deems that this is a reasonable period for deliberations, considering the complexity of the proceedings, especially the number of counts, the amount of evidence and the complexity of events and applicable law. Since the requests of the Accused on the alleged violation of his right to be tried without undue delay prior to the Decision of 21 March 2012 have already been ruled on, the questions relating to this alleged violation raised in the Accused's Submission are moot. Moreover, the Chamber finds that the time that elapsed between the Decision of 21 March 2012 and the Decision of 28 August 2013 is reasonable and did not lead to a violation of the above right.	*Prosecutor v Šešelj* (Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with His Defense) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No IT-03-67-PT21, May 9 2003).

ICTR coding

Coding theme	Theoretical coding	Information/text from case	Case
Analysing and comparing discrete variables	The process of quantifying the degree of violation to justify a finding that there was no undue delay	… the accused's rights have been violated by not egregiously so ...	*Kajelijeli v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44A-A, 23 May 2005).
		The new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant … this is still a substantial delay and that the Appellant's rights have still been violated – the period during which these violations took place is less extensive	*Barayagwiza v The Prosecutor* (*Prosecutor's Request for Review or Reconsideration*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No CTR-97-19-AR72, 31 Jan 2000).
Protecting the fundamental rights of the accused	The process of promoting the fundamental rights of the accused	… the appellant's right to an expeditious trial before this tribunal that fully respects the rights as an accused is absolute …	*Kajelijeli v The Prosecutor* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44A-A, 23 May 2005).
		… violation of his fundamental rights as expressed by Articles 19 and 20.	*Prosecutor v Barayagwiza* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999).
		… compels us to reaffirm that it is for the Trial Chamber to adjudicate on the guilt of an accused, in accordance with the fundamental principle of the presumption of innocence.	*Prosecutor v Barayagwiza* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999).
		The Appeals Chamber is mindful that the right enshrined in Article 20(4)(c) of the Statute is fundamental.	*Renzaho v The Prosecutor* (*Appeals Judgement*) (International Criminal Tribunal for Rwanda, Case No ICTR-97-31-A, 1 April 2011).

Coding theme	Theoretical coding	Information/text from case	Case
		… Appeals Chamber is mindful that the right enshrined in Article 20(4)(c) is fundamental.	Prosecutor v Bizimungu et. al. (Judgment) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).
		… notes the fundamental guarantees …derived directly from the tribunal's statutory instruments.	*Prosecutor v Bizimungu et. al.* (*Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial Without Undue Delay - Article 20(4)(c) of the Statute of the Tribunal*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-99-50, 23 June 2010).
		In this respect, the Chamber notes that the fundamental guarantees afforded to the Accused are derived firstly from the Tribunal's statutory instruments – in particular Articles 19 and 20 of the Statute.	*Prosecutor v Bizimungu et. al.* (*Decision on Prosper Mugiraneza's Second Motion to dismiss for deprivation of his right to trial without undue delay*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 29 May 2007).
		As held repeatedly, the conduct of the parties and of the relevant authorities are relevant factors to take into account in determining whether an accused's fundamental right to a trial without undue delay has been infringed.	*The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015).

Coding theme	Theoretical coding	Information/text from case	Case
Promoting justice and fairness	The process of safeguarding the interests of justice and fairness	… the Chamber must ensure the fairness and expeditiousness of the trial and protect the right of the accused to be tried without undue delay …to ensure a fair and expeditious trial for the accused in the interests of justice.	*Prosecutor v Rwamakuba* (*Decision on Defence Motion for Stay of Proceedings Article 20 of the Statute*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-98-44C-PT, 3 June 2005).
		Some of the co-Appellants will have waited more than 20 years for a final determination of their case. It is therefore indisputable that the proceedings in this case have been an unprecedented and considerable length. Considering the extraordinary length of these proceedings, the Trials Chamber's determination in the Trial Judgement that none of the co-Accused's right to a trial without undue delay had been violated, and the interests of justice, the Appeals Chamber will consider Nteziyayo's arguments on undue delay and, if necessary, will proprio motu consider the impact of its findings on Nsabimana's rights regardless of the fact that he did not raise allegations in this regard on appeal.	*The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015).
		The Appeals Chamber recalls that the logistical considerations should not take priority over the trial chamber's duty to safeguard the fairness of proceedings.	*The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015).
		The Tribunal, an institution whose primary purpose is to ensure that justice is done – must not place its imprimatur on such violations.	*Prosecutor v Barayagwiza* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999).

Coding theme	Theoretical coding	Information/text from case	Case
Protecting the fundamental rights of the accused	The process of promoting the fundamental rights of the accused	Following the jurisprudence of the Tribunal which reflects the jurisprudence of international bodies on human rights …	*Prosecutor v Rwamakuba* (*Decision on Defence Motion for Stay of Proceedings Article 20 of the Statute*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-98-44C-PT, 3 June 2005).
		… to be a violation of his fundamental rights … as expressed by… internationally recognized human rights standards.	*Prosecutor v Barayagwiza* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999).
		The International Tribunal is a unique institution, governed by its own Statute and by the provisions of customary international law, where these can be discerned.	*Barayagwiza v The Prosecutor* (*Prosecutor's Request for Review or Reconsideration*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No CTR-97-19-AR72, 31 Jan 2000).
		… the Chamber's decision will focus on the jurisprudence binding upon it, rather than that of the Human Rights Committee, in determining whether the delay in this case – if any – is undue.	Bizimungu 10 Feb 2009
		The Chamber fully accepted the binding nature of 'generally accepted norms of human rights' on the Tribunal. Secondly, however, whilst the jurisprudence of the ECHR and HRO may be persuasive in nature to the Tribunal, the Chamber considers that it should only have recourse to such authorities to the extent that the Tribunal's statutory instruments and jurisprudence are deficient. In this respect, the Chamber notes that the fundamental guarantees afforded to the Accused are derived firstly from the Tribunal's statutory instruments … the Chamber's decision will focus on the	*Prosecutor v Bizimungu et. al.* (*Decision on Prosper Mugiraneza's Second Motion to dismiss for deprivation of his right to trial without undue delay*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 29 May 2007).

Coding theme	Theoretical coding	Information/text from case	Case
		jurisprudence which is binding upon it in making a determination as to whether the delay in this case – if any – is undue.	
Viewing international criminal justice and its mandate as unique and distinct from international criminal justice	The process of distinguishing international tribunals' mandate as unique	The Tribunal was established to contribute to the process of reconciliation and of restoration of international peace and security in Rwanda. Its major role has been recognized by the international community. Ensuring a fair trial to the accused with a more concise indictment will contribute to the tribunal's mission and guarantee for the accused and the victims that justice is done.	*Prosecutor v Rwamakuba* (*Decision on Defence Motion for Stay of Proceedings Article 20 of the Statute*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-98-44C-PT, 3 June 2005).
Promoting justice and fairness	The process of balancing the interests of justice with the complexity of the case	While a joint trial may be in the interests of justice and not necessarily encroaching upon the right to be tried without undue delay, it might bring complexity to the case and proceedings.	*Prosecutor v Rwamakuba* (*Decision on Defence Motion for Stay of Proceedings Article 20 of the Statute*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-98-44C-PT, 3 June 2005).
Protecting the fundamental rights of the accused	The process of justifying the length of proceedings on the grounds of the complexity of the case.	... there is no doubt that the proceedings are particularly complex, due inter alia to the multiplicity of counts, the number of accused, witnesses and exhibits, and the complexity of the facts and the law, and that the proceedings can be could be expected to extend over an extended period.	*Barayagwiza v The Prosecutor* (*Prosecutor's Request for Review or Reconsideration*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 31 March 2000).
		... while the proceedings have been lengthy, the Appeals Chamber notes that the case against Renzaho was complex … although the Appeals Chamber accepts that preparing such a case for trial can require a lengthy period of time, it emphasizes that every effort should be made to bring cases to trial as expeditiously as possible .. In the context of this case, such a delay is concerning. The Appeals Chamber underscores that lengthy delays can give rise to serious questions regarding fairness to the accused. However, in view of the complexity	*Renzaho v The Prosecutor* (*Appeals Judgement*) (International Criminal Tribunal for Rwanda, Case No ICTR-97-31-A, 1 April 2011).

Coding theme	Theoretical coding	Information/text from case	Case
		of this case, including the number of charges and volume of evidence produced by the parties, Renzaho has not demonstrated that the delivery of the trial judgement was unduly delayed.	
		… it is common ground that the proceedings have been lengthy. This can be explained by the complexity of the case.	*The Prosecutor v Bagosora et. al.* (Judgment) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008).
		In the circumstances of this case, which is one of the largest ever heard by the Tribunal, the significant period of time which elapsed during these proceedings can be reasonably explained by its size and complexity.	*Prosecutor v Bizimungu et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).
		While the Appeals Chamber is concerned by the duration of proceedings as a whole, given the size and complexity of the case it is not convinced …	*Prosecutor v Bizimungu et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).
		While this period is substantial, the Appeals Chamber also notes that Ndindiliyimana was one of five co-accused charged in the same indictment … Furthermore, the record reveals that this case was subject to extensive and complex pre-trial litigation … The Appeals Chamber notes that the accused before the Tribunal are free to raise procedural and substantive challenges and highlights this litigation only to underscore the complexity of Ndindiliyimana's pre-trial proceedings.	*Sagahutu v The Prosecutor* (Judgment) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-OO-56-A, 11 February 2014)

Coding theme	Theoretical coding	Information/text from case	Case
		In the circumstances of this case, which is amongst the largest ever heard by the Tribunal, the period of time which elapsed during these proceedings can reasonably be explained by the size and complexity of the case. The pace of the trial was not dissimilar from that of other multi-accused trials, where no undue delay has been identified.	*Karemera et. al. v The Prosecution* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014).
		It is common ground that the proceedings have been lengthy. This can be explained by the particular complexity of the case.	*Prosecutor v Karemera et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda), Trial Chamber, Case No ICTR-98-44-A, 2 February 2012).
		The crucial question before the Appeals Chamber us whether the Trial Chamber erred in finding that the length of proceedings could be explained by the complexity of the case along. In this respect, the Appeals Chamber recalls that, in addition to he length and the complexity of the proceedings, a number of other factors are relevant to the assessment of an allegation of undue delay …	*The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015).
		The Appeals Chamber accepts that preparing such a case for trial can reasonably require a lengthy period of time but emphasizes that every effort should be made to bring cases to trial as expeditiously as possible.	*The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015).
		… in light of the particular circumstances of the case and its complexity, including the complexity of investigations, this Chamber does not consider that the Prosecution lacked diligence.	*Prosecutor v Rwamakuba* (*Decision on Defence Motion for Stay of Proceedings Article 20 of the Statute*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-98-44C-PT, 3 June 2005).

Coding theme	Theoretical coding	Information/text from case	Case
		The proceedings in this case have been lengthy. The Chamber recognises concerns that the conduct of the Tribunal , and the increased workload of the presiding judges more specifically, has contributed to this delay. The Chamber notes, however, that a delay of 12 years from arrest to judgement does not, per se, constitute undue delay for the purposes of the Statute, but that delay must be evaluated according to the totality of those matters outlined by the Appeals Chamber.	*Prosecutor v Bizimungu et. al.* (*Judgment and Sentence*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 30 September 2011).
		Mugenzi defence team's blanket allegation that the Tribunal's 'organisational failures' caused unnecessary delays in this trial ignores the common challenges of trial administration of a multi-accused case with a complicated procedural history. In view of the size and complexity of this trial, the Chamber …does not consider that there has been undue delay in these proceedings.	*Prosecutor v Bizimungu et. al.* (*Judgment and Sentence*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 30 September 2011).
		The Appeals Chamber observes that it was practice for judges of the Tribunal to participate simultaneously in multiple proceedings given the workload of the Tribunal during the relevant period. It also notes that significant efforts were made by the authorities of the Tribunal to obtain the necessary resources to complete its mandate while ensuring the utmost respect for the rights of the accused. However, in the particular circumstances of this case where the co-Accused had already been in detention for nearly 4 to 6 years at the start of the trial and which had already suffered from significant delays resulting from the judges' simultaneous participation to other proceedings caused undue delay. The Appeals Chamber recalls that the logistical considerations should not take priority over the trial chamber's duty to safeguard the fairness of proceedings. In the same vein, the Appeals Chamber is of the view that the organizational hurdles and lack of resources cannot reasonably justify the prolongation	*The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015).

Coding theme	Theoretical coding	Information/text from case	Case
		of proceedings that had already been significantly delayed ... …delays in the start of the trial due to the Prosecution's conduct and delays resulting from the Trial Chamber judges' simultaneous assignment to multiple cases cannot be reasonably explained or justified. As a result, the Appeals Chamber find that the Trial Chamber erred when it found that the length of the proceedings was reasonable and adequately explained by the complexity of the case.	
Analysing and comparing discrete variables	The process of assessing the complexity of the case using the seriousness of the charges	In light of the complexity of the case and the proceedings, the serious charges against the accused, the conduct of both parties and the Registry, the TC does not consider the right of the accused to be tried without undue delay has been violated	Rwamakuba 03/06/2003
		The crimes for which the Appellant is charged are very serious. However, in this case, the fundamental rights of the appellant were repeatedly violated.	*Prosecutor v Barayagwiza* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999).
		… the length of Nsengimana's pre-trial detention was not disproportionate in relation to the gravity of the crimes with which he was charged.	*Prosecutor v. Nsengimana* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009).
		… the length of the trial proceedings is largely due to the scope and gravity of the crimes charged against the accused.	*The Prosecutor v Bagosora et. al.* (Judgment) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008).

Coding theme	Theoretical coding	Information/text from case	Case
		Having considered the gravity of the crimes for which Gatete's convictions have been upheld and taking into account the violation of his rights, the Appeals Chamber sets aside Gatete's sentence of life imprisonment and concludes that his sentence should be reduced to a term of 40 years imprisonment.	*Gatete v The Prosecutor* (*Appeal Judgement*) (International Criminal Tribunal for Rwanda, Case No. ICTR-00-61-A, 9 October 2012).
Analysing and comparing discrete variables	The process of considering the cumulative nature of violations of the right to be tried without undue delay	The crimes for which the Appellant is charged are very serious. However, in this case, the fundamental rights of the appellant were repeatedly violated … We find this conduct to be egregious and, in light of the numerous violations …conclude that the only remedy is to dismiss the charges ... Moreover, we find it the only effective remedy for the cumulative breaches of the accused's rights ... We reiterate that what makes this case so egregious is the combination of delays that seem to occur at virtually every stage of the Appellant's case.	*Prosecutor v Barayagwiza* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999).
		The cumulative effect of these violations thus being reduced, the reparation being ordered by the Appeals Chamber now appears disproportionate in relation to the events.	*Barayagwiza v The Prosecutor* (*Prosecutor's Request for Review or Reconsideration*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No CTR-97-19-AR72, 31 Jan 2000).
Promoting justice and fairness	The process of promoting the interests of justice and fairness	… to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process	*Prosecutor v Barayagwiza* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999).
		To allow the Appellant to be tried on charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals – including those charged with unthinkable crimes – would be amongst the most serious	*Prosecutor v Barayagwiza* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999).

Coding theme	Theoretical coding	Information/text from case	Case
		consequences of allowing the Appellant to stand trial in the face of such violations of his rights.	
		… it is the proper role of an independent judiciary to halt this prosecution so that no further injustice results.	*Prosecutor v Barayagwiza* (*Decision*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 3 November 1999).
		… the Tribunal is an independent body, whose decisions are based solely on justice and law.	*Barayagwiza v The Prosecutor* (*Prosecutor's Request for Review or Reconsideration*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No CTR-97-19-AR72, 31 Jan 2000).
Viewing international criminal justice and its mandate as unique and distinct from international criminal justice	The process of distinguishing international tribunals' mandate as unique	The International Tribunal is a unique institution … the Prosecution asserts that the Accused are individually criminally responsible for all rapes and sexual assaults that occurred in Rwanda from early to mid April 1994 to June 1994 as genocide, or, alternatively, complicity in genocide. It also charges the rapes and sexual assaults as genocide and crimes against humanity under the theory of extended joint criminal enterprise – the first charge of its kind in the history of international criminal law.	*Barayagwiza v The Prosecutor* (*Prosecutor's Request for Review or Reconsideration*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No CTR-97-19-AR72, 31 Jan 2000).
		… because of the Tribunal's mandate and of the inherent complexity of cases before the Tribunal, it is not unreasonable to expect that the judicial process will not be as expeditious as before domestic courts.	*Nahimana, Barayagwiza and Ngeze v The Prosecutor* (Appeals Judgment) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No, ICTR -99-52-A, 28 November 2007).

Coding theme	Theoretical coding	Information/text from case	Case
		The Appeals Chamber recalls that "because of the Tribunal's mandate and of the inherent complexity of cases before the Tribunal, it is not unreasonable to expect that the judicial process will not be as expeditious as before domestic courts"	*Prosecutor v Bizimungu et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).
		The Appeals Chamber recalls that "because of the Tribunal's mandate and of the inherent complexity of cases before the Tribunal, it is not unreasonable to expect that the judicial process will not be as expeditious as before domestic courts".	Karemera 29/09/2014
		Because of the Tribunal's mandate and of the inherent complexity of the cases before it, it is not unreasonable to expect that he judicial process will not always be as expeditious as before domestic courts.	*The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015).
Promoting justice and fairness	The process of placing an onus on the accused to prove they were subjected to undue delay	Does not provide any detail in this respect … does not explain how delay in assignment of counsel on appeal is attributable to the Registrar … failed to show that his right to undue delay has been violated.	*Nahimana, Barayagwiza and Ngeze v The Prosecutor* (Appeals Judgment) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No, ICTR -99-52-A, 28 November 2007);
		... defence has not identified any specific error in the reason for the delay … not convinced that the Defence has demonstrated that the length of proceedings amounted to undue delay nor has it shown that the delay amounted to any unjustified prejudice to the accused.	*Prosecutor v. Nsengimana* (*Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-69-T, 17 November 2009).
		Renzaho has not demonstrated that the delivery of the trial judgement was unduly delayed … While the Appeals Chamber is concerned about the length of proceedings as a whole, in the particular circumstances of the case, the Appeals Chamber finds that Renzaho has failed to demonstrate that his right to be tried without undue delay has been violated.	*Renzaho v The Prosecutor* (*Appeals Judgement*) (International Criminal Tribunal for Rwanda, Case No ICTR-97-31-A, 1 April 2011).

Coding theme	Theoretical coding	Information/text from case	Case
		The Appeals Chamber recognises that that the substantial length of the proceedings in this case resulted in a long period of pre-judgment detention … however, it finds that Nsengiyumva failed to demonstrate that the Trial Chamber erred in finding that the proceedings had not been *unduly* delayed.	*Bagosora and Nsengiyumva v The Prosecutor* (*Appeal judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-41-A, 14 December 2011).
		Notwithstanding Gatete's failure to demonstrate that his ability to prepare or present his defence case was prejudiced by the delay, the Appeals Chamber finds that the pre-trial delay of more than seven years was undue given the case against Gatete was not particularly complex.	*Gatete v The Prosecutor* (*Appeal Judgement*) (International Criminal Tribunal for Rwanda, Case No. ICTR-00-61-A, 9 October 2012).
		'fails to demonstrate' 'have not shown' … it is not convinced… that Mugenzi and Muriganeza have demonstrated any error in the Trial Chamber's finding that the length of the proceedings did not amount to undue delay.	*Prosecutor v Bizimungu et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).
		… failed to show that he has been denied.	*Prosecutor v Bizimungu et. al.* (*Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial Without Undue Delay - Article 20(4)(c) of the Statute of the Tribunal*) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-99-50, 23 June 2010).
		... as a matter of law, the onus is on the Defence as the moving party to make out the circumstances which it says amount to undue delay … The question for the Chamber is not whether the Prosecution has satisfied a reverse onus, but rather, whether the Defence has made out of the undue delay alleged … The Prosecution's failure to respond to the substance of the Defence's	*Prosecutor v Bizimungu et. al.* (*Decision on Prosper Mugiraneza's Second Motion to dismiss for deprivation of his right to trial without undue delay*) (International Criminal Tribunal for

Coding theme	Theoretical coding	Information/text from case	Case
		allegations does not automatically lead to a finding in favour of the Defence.	Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 29 May 2007).
		In light of the foregoing, the Appeals Chamber finds that Ndindiliyimana has failed to demonstrate undue delay.	*Sagahutu v The Prosecutor* (Judgment) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-OO-56-A, 11 February 2014)
		Except for a general allegation that his case is not complex, Ngirumpatse merely claims that the Trial Chamber erred in dismissing his challenges to the length of the proceedings but has failed to discuss any of these factors, or to challenge their assessment by the Trial Chamber.	*Karemera et. al. v The Prosecution* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014).
Analysing and comparing discrete variables	The process of comparing the length of cases to justify a finding of no undue delay	… reference to another case is helpful only if strong similarities are shown.	*Prosecutor v Bizimungu et. al*. (*Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 14 June 2007).
		... in view of the size and complexity of this trial, in particular in comparison to the Nahimana et al case, the Chamber does not consider that there has been any undue delay in proceedings … The delays found here are not like Rwamakuba or Kajeijeli where financial compensation or a reduction of the sentence are warranted. These cases involved excessive delays before the initial appearance and were coupled with other serious fair trial rights violations including the right to counsel for extended periods.	*The Prosecutor v Bagosora et. al*. (Judgment) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008).

Coding theme	Theoretical coding	Information/text from case	Case
		Whether a case is sufficiently complex to justify lengthy pre-trial detention is, in the view of the Appeals Chamber, a matter to be determined on a case by case basis … the Trial Chamber correctly observed that the case against Gatete could not be compared to multi-accused trials, which run for years and involve hundred of trial days, hundreds of witnesses and over a thousand exhibits.	*Gatete v The Prosecutor* (*Appeal Judgement*) (International Criminal Tribunal for Rwanda, Case No. ICTR-00-61-A, 9 October 2012).
		The pace of the trial was not dissimilar from that of other multi-accused trials, where no undue delay has been identified. As a result, the fact that some multi-accused cases may have proceeded at a more accelerated pace does not, in and of itself, demonstrate that the duration of proceedings in this case amounted to undue delay.	Prosecutor v Bizimungu et. al. (Judgment) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-50-T, 4 February 2013).
		Compared Nahimana, Bagosora and Nyiramashuko delays …	*Prosecutor v Bizimungu et. al.* (*Judgment and Sentence*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 30 September 2011).
		Footnotes compare with other ICTR cases where UD was not found.	*Sagahutu v The Prosecutor* (Judgment) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-OO-56-A, 11 February 2014)

Coding theme	Theoretical coding	Information/text from case	Case
		In Nahimana et. al., the Appeals Chamber considered that a period of seven years and eight months between the arrest of Jean Bosco Barawagwiza and his judgement did not constitute undue delay, apart from some initial delays which violated his fundamental rights. In particular, the Appeals Chamber reasoned that Barayagwiza's case was especially complex due to the multiplicity of counts, the number of accused, witnesses and exhibits as well as the complexity of the facts and law. It further noted that comparisons with time frames in domestic criminal courts were not particularly persuasive because of the inherent complexity of international proceedings. Using this precedent as a benchmark, the Trial Chamber in Bagosora et.al. considered that a period of eleven years for its proceedings did no constitute undue delay given that its case comprised of 408 trial days, 242 witnesses, nearly 1600 exhibits, and around 300 written decisions ... Like the Nahimana et. al. case, the present case involved multiple indictments and requests for amendments and joinder. This case is nearly two times the size of the Nahimana et.al. case, nearly equals the Bagosora et al case in terms of trial days and exhibits, and triples the latter in the number of written decisions issued. When considered alongside the setback occasioned by the rehearing and the dilatory effects of Ngigumpatse's illness and Nziraera's death, these factors provide a reasonable explanation for the length of the proceedings ... In view of the size and complexity of this trial, in particular in comparison to the Nahimana et.al. and Bagosora et. al. cases, the Chamber does not consider that there has been any undue delay in the proceedings.	*Prosecutor v Karemera et. al.* (*Judgment*) (International Criminal Tribunal for Rwanda), Trial Chamber, Case No ICTR-98-44-A, 2 February 2012).

Coding theme	Theoretical coding	Information/text from case	Case
		With respect to the trial phase, the Appeals Chamber observes that, as highlighted by Ntahobali and Kanyabashi, the trial phase lasted over eight years and was thus proportionally longer than in other multi-accused cases at the Tribunal. The Appeals Chamber, however, stressed that a more accelerated pace in other multi-accused cases does not, in an of itself, demonstrate undue delay.	*The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015).
Promoting justice and fairness	The process of considering the conduct of the authorities	… the conduct of the Prosecution and the relevant authorities resulted in instances of pre-trial delay that could not be explained or justified.	*Gatete v The Prosecutor* (*Appeal Judgement*) (International Criminal Tribunal for Rwanda, Case No. ICTR-00-61-A, 9 October 2012).
		In the circumstances of this case, the Appeals Chamber considers that this protracted delay and the resulting prolonged pre-trial detention constitutes prejudice per se.	*Gatete v The Prosecutor* (*Appeal Judgement*) (International Criminal Tribunal for Rwanda, Case No. ICTR-00-61-A, 9 October 2012).
Analysing and comparing discrete variables	The process of considering the stage of proceedings in determining if the accused was subjected to undue delay	Having considered the submissions of the Parties, in light of the totality of the criteria established by the Appeals Chamber, and taking into account the current stage of proceedings in the case …	*Barayagwiza v The Prosecutor* (*Prosecutor's Request for Review or Reconsideration*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No CTR-97-19-AR72, 31 Jan 2000).
		…and taking into account the stage which the trial has now reached.	*Prosecutor v Bizimungu et. al.* (*Decision on Prosper Mugiraneza's Second Motion to dismiss for deprivation of his right to trial without undue delay*) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-50-T, 29 May 2007).

Coding theme	Theoretical coding	Information/text from case	Case
Analysing and comparing discrete variables	The process of comparing the length of cases to justify a finding of no undue delay	… Chamber notes that Mr Muriganeza is in his tenth year of incarceration. When analysing undue delay, however, this Chamber has made clear that the reasonableness of a period of delay cannot be translated into a fixed period of time.	Prosecutor v. Bizimungu et. al. (Decision On Prosper Mugiraneza's Third Motion To Dismiss Indictment For Violation Of His Right To A Trial Without Undue Delay) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No. ICTR-99-50-T, 10 February 2009).
		… notes that Mr Mugenzi is in his ninth year of incarceration – Chamber has made it clear that the reasonableness of the delay cannot be translated into a fixed period of time …	Prosecutor v. Bizimungu et. al. (Decision On Prosper Mugiraneza's Third Motion To Dismiss Indictment For Violation Of His Right To A Trial Without Undue Delay) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No. ICTR-99-50-T, 10 February 2009).
		The Appeals Chamber recalls that, as previously held, the length of an accused's detention does not in itself constitute undue delay, and the fact that the co-Appellants had been detained for many years at the time of the issuance of the Trial Judgement is insufficient, it itself, to show that the Trial Chamber erred in its determination that there was no undue delay in the proceedings.	*The Prosecutor v Nyiramasuhuko* (*Appeals Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015).

ECtHR coding

Coding theme	Theoretical coding	Text	Case
Protecting the fundamental rights of the accused	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	While the criminal investigation would have been sensitive and somewhat complex, the court does not consider that this explains the overall length of proceedings	*McFarlane v Ireland* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September 2010).
	The process of acknowledging the complexity of proceedings but finding it did not justify the .	The complexity of the case, while an important factor in assessing the reasonableness of the length of the appeal proceedings, cannot of itself justify appeal proceedings that lasted over 10 years. Of particular relevance in the present case is therefore the conduct of the parties.	*Beggs v United Kingdom* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012).
	The process of acknowledging the complexity of proceedings but finding it did not justify the .	As regards the complexity of the proceedings, these involved forensic investigation prior to the trial and on appeal, complications arose when the applicant's representatives raised new grounds of appeal … it cannot be considered however that the proceedings presented any exceptional problems or difficulties.	*Mellors v United Kingdom* (European Court of Human Rights, Court (Third Section), Application Number 57836/00, 17 July 2003).
	The process of acknowledging the complexity of proceedings but finding it did not justify the .	The Court concedes that the case was rather complex. It concerned the sexual assault of a child with a learning disability and required comprehensive forensic analysis and examination. However, in the Court's view, the complexity of the case alone does not suffice to account for the length of the proceedings in the instant case.	*Sherstobitov v Russia* (European Court on Human Rights, Court (First Section), Application Number 16266/03, 10 June 2010).
	The process of acknowledging the complexity of proceedings but finding it did not justify the .	The Court considers that the alleged complexity of the case cannot explain the complete failure of the authorities to proceed with its examination. That failure is particularly serious in view of the fact that the case concerns rape charges in the context of alleged repeated rapes of a minor, abducted and forced to prostitute.	*Sidjimov v Bulgaria* (European Court of Human Rights, Court (First Section), Application Number 55057/00, 27 January 2005).

Coding theme	Theoretical coding	Text	Case
	The process of finding that the length of proceedings was not justified by the complexity of the case.	As regards the complexity of the proceedings, whilst the Government have pointed to the number of witnesses, the seriousness of the charge and the brutality of the killing as indicative of complexity, it is not apparent that the case presented any special difficulty. Whilst, as the applicant has acknowledged, the gravity of the charge was a relevant factor, for a murder case the proceedings were relatively straightforward.	*Henworth v United Kingdom* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004).
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	The Court therefore accepts that the applicant's case was certainly of more than average complexity. That, however, cannot justify the total, significant length of the trial.	*Lisiak v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 37443/97, 5 November 2002).
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	The Court appreciates that the criminal proceedings at issue which concerned charges of criminal activities against fifteen defendants, were of particular complexity … On the other hand, the Court considers that these circumstances are not sufficient to justify the entire period of more than seven years and ten months for the determination of the applicant's case.	*Kobernik v Ukraine* (European Court of Human Rights, Court (Fifth Section), Application Number 45947/06, 25 July 2013).
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	The Court shares the Commission's view hat the case was undoubtedly complex having regard to the nature of the charges and to the problems in determining jurisdiction for offences committed by minors acting in concert with adults … If the case is examined as whole however, the only possible conclusion is that the reasonable time requirement was not complied with because, and this is the decisive consideration, the applicants were not convicted with final effect until sixteen years after the events, which had occurred when they were	*Ferrantelli and Santangelo v Italy* (European Court of Human Rights, Court (Chamber), Application Number 19874/92, 7 August 1996).

Coding theme	Theoretical coding	Text	Case
		still minors.	
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	The Court acknowledges that the case was complex as it concerned several counts of robbery, infliction of serious injuries and murder allegedly committed by six members of an armed criminal gang. However, in the Court's view, the complexity of the case does not suffice, in itself, to account for the length of the proceedings.	*Polonskiy v Russia* (European Court of Human Rights, Court (First Section) Application Number 30033/05, 19 March 2009).
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	The Court accepts that, given a considerable number of victims and several co-defendants involved, the case was of a certain complexity. At the same time, it notes that the investigation and the trial, which had lasted for three years and two months in total, were recognized by the domestic authorities as seriously flawed. …	*Pleshkov v Ukraine* (European Court of Human Rights, Court (Fifth Section), Application Number 37789/05, 7 July 2009).
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	The Court appreciates that the criminal proceedings, at issue, which concerned a person's disappearance, were of a certain complexity. It also notes the exemplary efforts of the trial court to expedite proceedings … On the other hand, the court notes that the delays in resolution of the matter have been primarily due to the numerous remittals of the case for reinvestigations and the rectification of procedural omissions. Moreover on several occasions, the pre-trial investigation was suspended for no reason or on account of the applicant's alleged ill health in the absence of appropriate medical documentation …the Court considers that the Government have not providing a plausible explanation for the delay.	*Vergelskyy v Ukraine* (European Court of Human Rights, Court (Fifth Section), Application Number 19312/06, 12 March 2009).

Coding theme	Theoretical coding	Text	Case
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	The Court accepts that the authorities in the domestic proceedings were faced with some difficulties in obtaining evidence due to the status of the alleged victims. It, however, cannot disregard the fact that the first set of proceedings was pending for more than four years and seven months at the first level of jurisdiction. The Court attaches important to two periods of inactivity for which the State was essentially responsible.	*Subinski v Slovenia* (European Court of Human Rights, Court (Third Section), Application Number 19611/04, 18 January 2007).
	The process of holding the State responsible for the length of proceedings that were not explained by the complexity of the case.	…even though the case was of a certain complexity, having regard to the serious nature of the conviction and the applicant's grounds of appeal, it cannot be said that this in itself justified the length of proceedings … The Court concludes that the complexity of the case and the applicant's conduct are not in themselves sufficient to justify the length of the appeal proceedings. Although it is true that the applicant may be responsible for some delay in the proceedings resulting from his requests for adjournments, the overall delay was essentially due to the way in which the authorities handled the case.	*Portington v Greece* (European Commission of Human Rights, Commission (First Chamber), Application Number 28523/95, 16 October 1996).
	The process of holding the State responsible for the length of proceedings that were not explained by the complexity of the case.	The Court first considers that the case should be considered as complex, regard being had to the serious nature of the charges … The Court therefore considers that it was essentially the substantial delay in the preparation of the expert opinions which was the principal reason for prolonging the proceedings .. the Court sees no cause in the circumstances of the present case from departing from the usual principles that primary responsibility for delays resulting from the provision of expert opinions rests ultimately with the State …did not in itself discharge the Court from its obligation to deal with the case	*Szeloch v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 33079/96, 22 February 2001).

Coding theme	Theoretical coding	Text	Case
		speedily.	
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	… the Court can accept that the case mounted against the applicant and the large number of other defendants was complex. That being said, it cannot but note that the proceedings lasted almost fifteen years and eight months of which seven years and six months are within the scope of the Court's consideration. This is an excessively long period which cannot be justified with reference to considerations of complexity.	*Cankocak v Turkey* (European Court of Human Rights, Court (First Section), Application Numbers 25182/94 and 26956/95, 20 February 2001).
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	It can accept that the case mounted against the applicant and the large number of other defendants was complex. That being said, it cannot but note that the proceedings have already lasted more than twenty one and a half years of which jus over sixteen years are within the scope of the Court's consideration. This is an excessively long period that cannot be justified with reference to considerations of complexity.	*Ramazanoglu v Turkey* (European Court of Human Rights, Court (Second Section), Application Number 39810/98, 10 June 2003).

Coding theme	Theoretical coding	Text	Case
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	It can accept that the case mounted against the applicant and the large number of other defendants was complex. That being said, it cannot but note that the proceedings have lasted twenty five years of which over eighteen fall within the Court's jurisdiction. The length of this period is excessive and cannot be justified with reference to complexity alone.	*Mehmet Kaya v Turkey* (European Court of Human Rights, Court (Second Section), Application Number 4451/02, 24 October 2006).
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	The Court considers that the case was of some complexity due to the fact that additional charges had bee brought against the applicant in the court of the proceedings in the first instance. However, this can not, as such, justify the length of the proceedings.	*Majaric v Slovenia* (European Court of Human Rights, Court (First Section), Application Number 28400/95, 8 February 2000).
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	The Court accepts that the case involved a certain degree of complexity in respect of the legal issues. However, the length of the proceedings cannot be explained by this fact alone.	*Camasso v Croatia* (European Court of Human Rights, Court (First Section), Application Number 15733/02, 13 January 2005).
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	The Court considers that the case involved a certain degree of complexity. However, the overall length of the proceedings cannot be explained by their complexity.	*Panek v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 38663/97, 30 November 2000).
	The process of finding that the length of proceedings was not justified by the complexity of the case.	… the Government, when maintaining that the case was particularly complex because of the question of the applicant's criminal responsibility, failed to adduce any circumstances showing that the degree of this complexity was in fact higher than in other similar cases.	*Ciepluch v Poland* (European Commission of Human Rights, Second Chamber, Application Number 31488/96, 3 December 1997)
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	The Court acknowledges that the case disclosed a certain complexity, as shown by the voluminous character of the case-file referred to the Government. However, in the Court's opinion there are no grounds on which to hold that the case has been particularly	*Trzaska v Poland* (European Court of Human Rights, Court (First Section), Application Number 25792/94, 11 July 2000).

Coding theme	Theoretical coding	Text	Case
		complex.	
	The process of finding that the length of proceedings was not justified by the complexity of the case.	As regards the complexity of the proceedings, whilst the Government have pointed to the number of witnesses, the seriousness of the charge and the brutality of the killing as indicative of complexity, it is not apparent that the case presented any special difficulty. Whilst, as the applicant has acknowledged, the gravity of the charge was a relevant factor, for a murder case the proceedings were relatively straightforward.	*Henworth v United Kingdom* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004).
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	As regards the nature of the case, the Court observes that having regard to the seriousness of the crimes and their sexual character, as well as the mental state of some of the victims and the number of witnesses and accused, it was of considerable complexity.	*Rydz v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 13167/02, 18 December 2007).
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	… even though the case was of a certain complexity, having regard to the serious nature of the conviction and the applicant's grounds of appeal, it cannot be said that this in itself justified the length of proceedings	*Portington v Greece* (European Commission of Human Rights, Commission (First Chamber), Application Number 28523/95, 16 October 1996).
	The process of acknowledging the complexity of proceedings but finding it did not justify the length of proceedings.	… despite a certain complexity of the case, the delays in the proceedings have not been convincingly explained by the Government.	*MM v Italy* (European Court of Human Rights, First Chamber, Application Number 23969/94, 12 April 1996).
Promoting justice and fairness	The process of ensuring that justice is done.	… domestic courts have an inherent jurisdiction to ensure that justice is done	*McFarlane v Ireland* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September 2010).

Coding theme	Theoretical coding	Text	Case
	The process of finding that the State has not provided justification for the length of proceedings.	The Court notes that the government have not provided any or any convincing explanations for the above described delays	*McFarlane v Ireland* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September 2010).
	The process of finding that the State has not provided justification for the length of proceedings.	In the absence of a convincing explanation by the respondant Government, it is difficult to accept that remedying such a procedural deficiency justified setting at naught the entire trial that took place … The Government have not provided such an explanation.	*Vasilev v Bulgaria* (European Court of Human Rights, Court (Fifth Section), Application Number 48130/99, 12April 2007).
	The process of finding that the State has not provided justification for the length of proceedings.	No convincing justification for this inordinate delay has been offered by the respondent Government.	*Cankocak v Turkey* (European Court of Human Rights, Court (First Section), Application Numbers 25182/94 and 26956/95, 20 February 2001).
	The process of finding that the State has not provided justification for the length of proceedings.	No convincing justification for these excessive delays has been offered by the respondent Government.	Kamazanoglu v Turkey (European Court of Human Rights, Court (Second Section), Application Number 39810/98, 10 June 2003).
	The process of finding that the State has not provided justification for the length of proceedings.	The Court finds no justification – nor has any been put forward by the Government – for such delays, which cover more than half of the overall length of the proceedings and are attributable to the national authorities.	*Mattoccia v Italy* (European Court of Human Rights, Court (First Section), Application Number 23969/94, 25 July 2000).
	The process of finding that the State has not provided justification for the length of proceedings.	The Court considers that the Government's explanation that the Supreme Court gave priority to files concerning defendants in detention, which was not the applicant's case at the material time, cannot justify the protracted character of the appellate proceedings.	*Camasso v Croatia* (European Court of Human Rights, Court (First Section), Application Number 15733/02, 13 January 2005).

Coding theme	Theoretical coding	Text	Case
	The process of finding that the State has not provided justification for the length of proceedings.	No convincing explanation for these delays has been given by the respondent Government.	Arvelakis v Greece (European Court of Human Rights, Court (Second Section), Application Number 41354/98, 12 April 2001)
Protecting the fundamental rights of the accused	The process of acknowledging what is at stake for the applicant.	As to what was at stake for the applicant, it is noted that the charges against him were serious and that he bore the weight of such charges and of the potential sentences…	*McFarlane v Ireland* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September 2010).
	The process of acknowledging what is at stake for the applicant.	The importance of what was at stake for the applicant, namely a conviction for a serious criminal offence and sentence of life imprisonment with a substantial tariff, is not in doubt.	*Beggs v United Kingdom* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012).
	The process of acknowledging what is at stake for the applicant.	The importance of what is at stake for the applicant, a serious criminal conviction and a sentence of imprisonment is not in doubt.	*Mellors v United Kingdom* (European Court of Human Rights, Court (Third Section), Application Number 57836/00, 17 July 2003).
	The process of acknowledging the impact of the length of detention of the accused.	The Court notes that the fact that the applicant was held in custody during the first and second trials required particular diligence on the part of the authorities dealing with the case to administer justice expeditiously.	*Sherstobitov v Russia* (European Court on Human Rights, Court (First Section), Application Number 16266/03, 10 June 2010).
	The process of acknowledging what is at stake for the applicant.	The importance of what is at stake for the applicant, a serious criminal conviction and a sentence of imprisonment is not in doubt.	*Henworth v United Kingdom* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004).

Coding theme	Theoretical coding	Text	Case
	The process of acknowledging what is at stake for the applicant.	However, that lack of progress in the trial resulted in a delay of about two years and ten months. The Court does not find a sufficient justification for that delay, especially having regard to the importance of what – in terms of both criminal liability and psychological strain involved – was and still is, at stake for the applicant in the proceedings.	*Lisiak v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 37443/97, 5 November 2002).
	The process of acknowledging what is at stake for the applicant.	There is no doubt of the importance of what was at stake for the applicant – a serious prison sentence.	*Massey v the United Kingdom* (European Court of Human Rights, Court (Fourth Section), Application Number 14399/02, 16 December 2004).
	The process of acknowledging what is at stake for the applicant.	Regard being had to the importance of what was at stake for the applicant, who was sentenced to the death penalty by the trial court, a total lapse of time in hearing his appeal of approximately eight years cannot be regarded as reasonable.	*Portington v Greece* (European Commission of Human Rights, Commission (First Chamber), Application Number 28523/95, 16 October 1996).
	The process of acknowledging what is at stake for the applicant.	… noting that the applicant was sentenced to five years imprisonment, the Commission considers that much was (and still is) at stake for him in the proceedings. Accordingly, having regard to the delays in the proceedings for which the authorities were responsible and to the importance of what was, and is, at stake for the applicant, the Commission finds that the length of the proceedings in issue has exceeded a reasonable time.	*Ciepluch v Poland* (European Commission of Human Rights, Second Chamber, Application Number 31488/96, 3 December 1997).
Promoting justice and fairness	The process of placing an onus on the State to meet the reasonable time requirement.	… the Court considers that the existence of any possibility or right on the part of the applicant to take steps to expedite did not dispense the State from ensuring that the proceedings progressed relatively quickly	*McFarlane v Ireland* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September 2010).

Coding theme	Theoretical coding	Text	Case
	The process of placing an onus on the State to meet the reasonable time requirement.	Although the Court is not in a position to analyse the legal quality of the domestic courts' decisions, it considers that, since the remittal of cases for re-examination is frequently ordered as a result of errors committed by lower courts, the repetition of such orders within one set of proceedings may disclose a serious deficiency in the judicial system. The fact that the domestic courts heard the case several times did not absolve them of having to comply with the reasonable time requirement of Article 6(1).	*Sherstobitov v Russia* (European Court on Human Rights, Court (First Section), Application Number 16266/03, 10 June 2010).
	The process of placing an onus on the State to meet the reasonable time requirement.	The Court has already noted in previous cases against Bulgaria the inordinate delays in criminal proceedings were brought about by the unjustified remittal of cases to the investigation stage of the proceedings.	*Vasilev v Bulgaria* (European Court of Human Rights, Court (Fifth Section), Application Number 48130/99, 12April 2007).
	The process of placing an onus on the State to meet the reasonable time requirement.	While it is regrettable that the applicant's appeal proceedings took over ten years to be concluded, it is clear that a substantial proportion of the delay is attributable to the applicant's own conduct … However, given the periods of inactivity identified above and the failure of the judicial authorities during these periods to take steps to progress matters of their own motion, the Court concludes that there has been a violation of Article 6(1) in the present case.	*Beggs v United Kingdom* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012).

Coding theme	Theoretical coding	Text	Case
	The process of placing an onus on the State to meet the reasonable time requirement.	It has been the Court's constant approach that an applicant cannot be blamed for taking full advantage of the resources afforded by national law in the defence of his interests … As regards the conduct of the authorities, the Court considers that the overall period, less the period attributed to the applicant, leaves the authorities accountable for a period of approximately 5 years. The Court is aware of substantial periods of inactivity for which the Government have not submitted any satisfactory explanation and which are attributable to the domestic authorities.	*Solovyev v Russia (European Court of Human Rights, Court (First Section), Application Number 2708/02, 24 May 2007)*
	The process of placing an onus on the State to meet the reasonable time requirement.	With regard to the conduct of the authorities and of the applicant, the court reiterates that only delays attributable to the State may justify a finding of a failure to comply with the reasonable time requirement.	*Rydz v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 13167/02, 18 December 2007).
	The process of placing an onus on the State to meet the reasonable time requirement.	… the Court reiterates that Article 6 does not require a person charged with a criminal offence to co-operate actively with the judicial authorities. In particular, applicants cannot be blamed for taking full advantage of the resources afforded by the national law in their defence. The Court finds, on the other hand, that many delays in the proceedings have been occasioned by the acts of the domestic authorities or rather their failures to act …Although the applicant was not in custody, the Court finds that the trial court should have fixed a tighter hearing schedule in order to speed up the proceedings.	*Rokhlina v Russia* (European Court of Human Rights, Court (First Section), Application Number 54071/00, 9 September 2004).

Coding theme	Theoretical coding	Text	Case
	The process of ensuring that justice is done.	…. domestic courts have an inherent jurisdiction to ensure that justice is done and have a constitutional duty to protect constitutional rights	*McFarlane v Ireland* (European Court of Human Rights, Grand Chamber, Application Number 31333/06, 10 September 2010).
	The process of placing an onus on the State to meet the reasonable time requirement.	The Court accepts that the Federal Constitutional Court, as guardian of the Constitution, plays a special role in the domestic legal system and faced a heavy workload at the relevant time. Nevertheless, Article 6(1) imposes on contracting States the duty to organize their judicial systems in such a way that the courts can meet each of their requirements, including the obligation to hear cases within a reasonable time	*Kaemena and Thonebohn v Germany* (European Court of Human Rights, Fifth Section, Application Numbers 45749/06 and 51115/06, 22 January 2009).
	The process of placing an onus on the State to meet the reasonable time requirement.	… courts have a responsibility to take steps of their own motion if necessary in order to advance the proceedings	*Beggs v United Kingdom* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012).
	The process of placing an onus on the State to meet the reasonable time requirement.	The Government have also relied on the procedural context … They have not substantiated this assertion however, nor could is absolve them from the State's responsibility to organize its judicial system in such a way as to assure compliance with the Convention…	*Henworth v United Kingdom* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004).
	The process of placing an onus on the State to meet the reasonable time requirement.	… the resulting delay cannot be explained soley by 'objective' factors, as argued by the Government. It is the fruit of the authorities' inability to take the measures necessary to organize the conduct of the criminal proceedings with due regard to Article 6(1) …	*Vasilev v Bulgaria* (European Court of Human Rights, Court (Fifth Section), Application Number 48130/99, 12April 2007).

Coding theme	Theoretical coding	Text	Case
	The process of placing an onus on the State to meet the reasonable time requirement.	As to the reference by the Government to the heavy workload of the domestic courts resulting from the economic and legislative reforms in Slovenia, it is recalled that Article 6(1) imposes on contracting states to organize their judicial system in such a way that their courts can meet each of their requirements. The Court has before it no information which would indicate that the difficulties encountered in Slovenia during the relevant period were such as to deprive the applicant of his entitlement to a judicial determination in a 'reasonable time'.	*Majaric v Slovenia* (European Court of Human Rights, Court (First Section), Application Number 28400/95, 8 February 2000).
	The process of placing an onus on the State to meet the reasonable time requirement.	The Court observes in this connection that Article 6(1) of the Convention imposes on the Contracting State the duty to organize their legal systems in such a way that their courts can meet each of the requirements of that provision, including the obligation to decide cases within a reasonable time.	*Mattoccia v Italy* (European Court of Human Rights, Court (First Section), Application Number 23969/94, 25 July 2000).
	The process of placing an onus on the State to meet the reasonable time requirement.	The Court observes in this connection that Article 6(1) of the Convention imposes on the Contracting States a duty to organize their legal system in such a way that the courts can meet each of the requirements of that provision, including the obligation to decide cases within a reasonable time.	*Arvelakis v Greece* (European Court of Human Rights, Court (Second Section), Application Number 41354/98, 12 April 2001).
	The process of placing an onus on the State to meet the reasonable time requirement.	The Commission reiterates that Contracting States are under a duty to organize their legal systems so as to enable the courts to guarantee everyone the right to a definitive determination of any criminal charge against him within a reasonable time.	*MM v Italy* (European Court of Human Rights, First Chamber, Application Number 23969/94, 12 April 1996).
	The process of placing an onus on the State to meet the reasonable time requirement.	The Commission recalls that Article 6 para 1 (Art 6-1) of the Convention imposes on the Contracting States the duty to organize their legal system in such a way that the Court can meet each of its requirements.	*Lupker and Others v The Netherlands* (European Commission of Human Rights, Application Number 18395/91, 7 September

Coding theme	Theoretical coding	Text	Case
			1992).
	The process of placing an onus on the State to meet the reasonable time requirement.	The Court considers that the alleged complexity of the case cannot explain the complete failure of the authorities to proceed with its examination. That failure is particularly serious in view of the fact that the case concerns rape charges in the context of alleged repeated rapes of a minor, abducted and forced to prostitute.	Sidjimov v Bulgaria (European Court of Human Rights, Court (First Section), Application Number 55057/00, 27 January 2005).
	The process of placing an onus on the State to meet the reasonable time requirement.	… the Court recalls that States are obliged to organize their legal systems so as to allow the Courts to comply with the reasonable time requirement of Article 6 so that even a principle of domestic law or practice requiring the parties to take initiatives to advance the proceedings does not dispense the State from this obligation.	*O'Reilly and Others v Ireland* (European Court of Human Rights, Court (Fifth Section), Application Number 54725/00, 29 July 2007).
Protecting the fundamental rights of the accused	The process of balancing competing rights of the accused.	The Court further considers that in giving due weight to the various aspects of a fair trial guaranteed by Article 6(1), difficult decisions have to be made by domestic courts in cases where these appear to be in conflict. In particular, the right to a trial within a reasonable time must be balanced against the need to afford the defence sufficient time to prepare its case and must not unduly restrict the right of the defence to equality of arms. Thus in assessing whether the length of the proceedings was reasonable, particularly in a case where an applicant relies upon the Court's responsibility to take steps to advance the proceedings, this Court must have regard to the reasons for the delay and the extent to which the delay resulted from	*Beggs v United Kingdom* (European Court of Human Rights, Court (Fourth Section), Application Number 25133/06, 6 November 2012).

Coding theme	Theoretical coding	Text	Case
		an effort to secure other key rights guaranteed by Article 6.	
	The process of conflating Article 5(3) with Article 6(1).	As regards the reasonableness of the length of the proceedings … the Court refers to is above findings with regard to Article 5(3) of the Convention.	*Dzelili v Germany* (European Court of Human Rights, Court (Third Section), Application Number 65745/01, 10 November 2005).
	The process of conflating Article 5(3) with Article 6(1).	The Court also refers to its above findings in respect of the complaint under Article 5(3).	*Rydz v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 13167/02, 18 December 2007).
	The process of conflating Article 5(3) with Article 6(1).	The Court refers to its finding with regard to Article 5(3) of the Convention that the competent national court failed to act with the necessary special diligence in conducting the applicant's proceedings, rendering the length of the applicant's detention as excessive. The finding is likewise valid in respect of the length of criminal proceedings as such.	*Cevizovic v Germany* (European Court of Human Rights, Court (Third Section), Application Number 49746/99, 3 April 2003)

Coding theme	Theoretical coding	Text	Case
	The process of conflating Article 5(3) with Article 6(1).	The competent national court failed to act with the necessary special diligence in conducting the applicant's proceedings, rendering the length of the applicant's detention, as well as the length of the proceedings excessive.	*Dzelili v Germany* (European Court of Human Rights, Court (Third Section), Application Number 65745/01, 10 November 2005).
	The process of conflating Article 5(3) with Article 6(1).	The Court recalls its finding that domestic authorities did not display 'special diligence' in the conduct of criminal proceedings against the applicant. In this connection, it notes that although the overall length of the proceedings may not seem excessive, the period of eighteen months without a hearing in a criminal case shows the lack of diligence required in such cases.	*Matwicjczuk v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 37641/97, 12 October 2010.
	The process of conflating Article 5(3) with Article 6(1).	In the Court's opinion the length of proceedings can only be explained by the failure of the domestic courts to deal with the case diligently.	*Cankocak v Turkey* (European Court of Human Rights, Court (First Section), Application Numbers 25182/94 and 26956/95, 20 February 2001).
	The process of conflating Article 5(3) with Article 6(1).	In the Court's opinion the length of proceedings can only be explained by the failure of the domestic courts to deal with the case diligently.	*Ramazanoglu v Turkey* (European Court of Human Rights, Court (Second Section), Application Number 39810/98, 10 June 2003).
	The process of conflating Article 5(3) with Article 6(1).	In the Court's opinion the length of proceedings can only be explained by the failure of the domestic courts to deal with the case diligently.	*Mehmet Kaya v Turkey* (European Court of Human Rights, Court (Second Section), Application Number 4451/02, 24 October 2006).
	The process of conflating Article 5(3) with Article 6(1).	The Court notes that the fact that the applicant was geld in custody during the first and second trials required particular diligence on the part of the authorities dealing with the case to administer justice expeditiously.	*Sherstobitov v Russia* (European Court on Human Rights, Court (First Section), Application Number 16266/03, 10 June 2010).

Coding theme	Theoretical coding	Text	Case
	The process of conflating Article 5(3) with Article 6(1).	… whether a person is kept in detention on remand, the fact of his detention is a factor to be considered in assessing whether the requirement of a decision on the merits within a reasonable time has been met.	Pavlik v Slovakia (European Court of Human Rights, Court (Fourth Section), Application Number 74827/01, 30 January 2007).
	The process of conflating Article 5(3) with Article 6(1).	It reiterates that a special diligence is required in the examination of a case where an accused is deprived of his liberty.	*Czajka v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 15067/02, 13 February 2007).
	The process of conflating Article 5(3) with Article 6(1).	… the Court considers that the State was, by this time under a responsibility to proceed with a particular diligence. Not only was the applicant in custody, but the Crown had elected to retry him for a second time and in these circumstances it was incumbent on the authorities to ensure that any delay was kept to an absolute minimum.	*Henworth v United Kingdom* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004).
	The process of conflating Article 5(3) with Article 6(1).	… for the remaining period of the criminal proceedings the applicant was held in detention – a fact that required particular diligence on the part of the authorities dealing with the case to administer justice expeditiously	*Kobernik v Ukraine* (European Court of Human Rights, Court (Fifth Section), Application Number 45947/06, 25 July 2013).
	The process of conflating Article 5(3) with Article 6(1).	Moreover, the fact that the applicant was being held in custody required particular diligence on he part of the authorities dealing with the case to administer justice expeditiously … The Court notes that in almost five years since the applicant's committal for trial, the court has not yet delivered a judgment. It also notes that the applicant spent all these years in custody.	*Polonskiy v Russia* (European Court of Human Rights, Court (First Section) Application Number 30033/05, 19 March 2009).
	The process of conflating Article 5(3) with Article 6(1).	The Court further recalls that for the period of nine months the applicant in the present case was held in custody – a fact which required particular diligence on the part of the authorities dealing with the case to administer justice	*Vergelskyy v Ukraine* (European Court of Human Rights, Court (Fifth Section), Application Number 19312/06,

Coding theme	Theoretical coding	Text	Case
		expeditiously.	12 March 2009).
	The process of conflating Article 5(3) with Article 6(1).	In this connection it recalls that for a year and a half , the applicant was kept in custody -	*Rokhlina v Russia* (European Court of Human Rights, Court (First Section), Application Number 54071/00, 9 September 2004).
Analysing and comparing discrete variables	The process of comparing with similar cases to find the reasonable time requirement was not met.	… the Court has frequently found violations of Article 6(1) of the Convention in cases raising similar issues to the present case	*Pavlik v Slovakia* (European Court of Human Rights, Court (Fourth Section), Application Number 74827/01, 30 January 2007).
	The process of comparing with similar cases to find the reasonable time requirement was not met.	… the Court has frequently found violations of Article 6(1) of the Convention in cases raising similar issues to the present case	*Kauczor v Poland* (European Court of Human Rights, Court (Third Section), Application Number 45219/06, 3 February 2009)
	The process of comparing with similar cases to find the reasonable time requirement was not met.	…the Court has frequently found violations of Article 6(1) of the Convention in cases raising similar issues to the present case	*Czajka v Poland* (European Court of Human Rights, Court (Fourth Section), Application Number 15067/02, 13 February 2007).
	The process of comparing with similar cases to find the reasonable time requirement was not met.	… the Court has frequently found violations of Article 6(1) of the Convention in cases raising similar issues to the present one	*C v Ireland* (European Court of Human Rights, Court (Fifth Section), Application Number 24643/08, 1 March 2012).
	The process of comparing with similar cases to find the reasonable time requirement was not met.	The Court recalls that it has previously found violations of Article 6(1) of the Convention in similar cases.	*Camasso v Croatia* (European Court of Human Rights, Court (First Section), Application Number 15733/02, 13 January 2005).

Coding theme	Theoretical coding	Text	Case
	The process of considering the cumulative effect of delays.	Overall, the court concludes that, whilst there are no unusually long and unexplained periods of inactivity, there are a number of delays which taken together … disclose that the proceedings did not proceed with the necessary expedition …	*Henworth v United Kingdom* (European Court of Human Rights, Court (Third Section), Application Number 515/02, 2 November 2004).
	The process of considering the cumulative effect of delays.	The Court would observe that in a case where there has already been some delay (unavoidable or otherwise) in bringing the matter on for trial the need for progressing the appeal reasonably expeditiously takes on more urgency … in conclusion, there are several periods of delay which, taken together, and in the light of the date of events under examination, disclose that the proceedings did not proceed with the necessary expedition and failed to satisfy the reasonable time requirement.	*Massey v the United Kingdom* (European Court of Human Rights, Court (Fourth Section), Application Number 14399/02, 16 December 2004).
Protecting the fundamental rights of the accused	The process of acknowledging the impact of the length of detention of the accused.	An added consideration if the fact that the trial concerned matters some years in the past and a further lapse of time could only damage the quality of evidence available.	*Massey v the United Kingdom* (European Court of Human Rights, Court (Fourth Section), Application Number 14399/02, 16 December 2004).

IACHR coding

Coding theme	Theoretical coding	Text	Case
Promoting justice and fairness	The process of finding the authorities lacked care and were responsible for the length of proceedings.	From the evidence in this case we can conclude that the delay of more than five years in the processing of the case was due to the judicial authority's behaviour. The case file included documents that had no relationship whatsoever with the process, which demonstrates a lack of care. It seems that Mr. Acosta Calderón's statement, if there ever was one, was lost and was taken two years after the court order for the investigation of the alleged crime on November 15, 1989. What is even more serious is that the procedure of proving if the substance that led to the arrest and processing of Mr. Acosta Calderón was or wasn't a controlled substance, essential to constitute the crime, was never carried out, even though it was first ordered by the Judge on November 29, 1989, because the substance was not found by the corresponding authority It is also important to point out that a criminal process, pursuant to that established in the Code of Criminal Procedures of 1983, which was applicable to the alleged victim, should not exceed one hundred days. However, in the case of Mr. Acosta Calderón, it lasted more than five years without any justification for such a delay.	*Acosta Calderón v. Ecuador* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 129, 24 June 2005).
	The process of finding the authorities were not independent or competent and were responsible for the length of proceedings.	In this case, it should be emphasized that this norm implies that the judge or court responsible for hearing a case must, above all, be competent, in addition to independent and impartial. Article 8 of the Convention, which refers to the right to a fair trial, establishes the guidelines of the so-called "due process," which consist inter alia in the right of every person to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial judge or court, previously established by law, in the substantiation of any accusation of a criminal nature made against him	*Case of Yvon Neptune v Haiti, Neptune v Haiti* (Merits, reparations and costs) (Inter-American Court of Human Rights, Series C no 180, 6th May 2008).

		In the instant case, the Court finds it unreasonable that the organs of administration of justice of a State Party to the American Convention subject a person to criminal proceedings and deprive him of liberty for more than two years without having determined, with certainty, their own competence as regards the relevant procedure established by domestic law	
	The process of finding the authorities were not competent and were responsible for the length of proceedings.	Mr. Neptune's lack of access to a competent court has unduly prolonged this situation of uncertainty – normally resulting from criminal proceedings – and he has not been allowed to obtain a final ruling of a competent judge on the charges of which he is accused.	*Case of Yvon Neptune v Haiti, Neptune v Haiti* (Merits, reparations and costs) (Inter-American Court of Human Rights, Series C no 180, 6th May 2008).
	The process of finding the authorities lacked care and diligence and were responsible for the length of proceedings.	… any domestic law or measure that imposes costs or in any other way obstructs an individual's access to the courts, and that is not warranted by what is reasonably needed for the administration of justice, should be considered contrary to Article 8(1) of the Convention. Closely related to the above, the right of access to justice recognizes that, from the outset, any person who is committed to trial must have the effective possibility of obtaining a final ruling, without undue delays resulting from the lack of diligence and care that the courts of justice must guarantee, as observed in the instant case.	*Case of Yvon Neptune v Haiti, Neptune v Haiti* (Merits, reparations and costs) (Inter-American Court of Human Rights, Series C no 180, 6th May 2008).
	The process of finding the authorities lacked care and diligence and were responsible for the length of proceedings.	Closely related to the above, the right of access to justice recognizes that, from the outset, any person who is committed to trial must have the effective possibility of obtaining a final ruling, without undue delays resulting from the lack of diligence and care that the courts of justice must guarantee, as observed in the instant case.	*Case of Yvon Neptune v Haiti, Neptune v Haiti* (Merits, reparations and costs) (Inter-American Court of Human Rights, Series C no 180, 6th May 2008).
	The process of placing an onus on the State to	It is for the State to explain and prove why it has required more time than would be reasonable, in	*Case of Hilaire, Constantine and Benjamin et al.*

	explain the length of proceedings was reasonable.	principle, to deliver final judgment in a specific case, in accordance with these criteria.	*v. Trinidad and Tobago* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002).
	The process of finding the authorities were responsible for the length of proceedings.	In the criminal proceedings filed against Mr. Canese, the judicial authorities did not act with due diligence and promptness; this is reflected, for example, by: a) the proceedings lasted eight years and six months until the judgment of second instance was final; b) the time that elapsed between the filing of the appeal against the judgment of first instance and the delivery of the judgment of second instance was three years and seven months; and c) the time that elapsed between the filing of the remedy of appeal against the judgment of second instance filed by the complainants' lawyer and the final decision was approximately three years and five months.	*Case of Ricardo Canese v. Paraguay* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 111, 31 August 2004).
	The process of considering the actions of the authorities as responsible for the length of proceedings.	Regarding the behaviour of the court –but it would be better to talk, generically, about the behaviour of the authorities, because not only the first operate on behalf of the State--, it is necessary to separate the activity carried out with justifiable reflection and caution, and that performed with excessive calm, exasperating slowness, excessive rituals.	*Case of López Álvarez v. Honduras* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006).
	The process of finding the authorities did not provide effective judicial recourse and were responsible for the length of proceedings.	Article 25(1) of the Convention establishes the obligation of the States to offer all people submitted to its jurisdiction an effective judicial recourse against acts that violate their fundamental rights. It is not enough for the recourses to exist formally; it is necessary that the be effective, that is, the person must be given a real opportunity to present a simple and prompt recourse that allows them to obtain, in their case, the judicial protection required. The existence of this guarantee "represents one of the basic mainstays, not only of the American Convention, but also of	*Case of López Álvarez v. Honduras* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006).

		the Rule of Law in a democratic society in the sense set forth in the Convention." In this regard, this Court has reiterated that said obligation does not end with the legal existence of a remedy; it is necessary that it be suitable to fight the violation, and its application by the competent authority must be effective.	
	The process of finding the authorities did not provide effective judicial recourse and were responsible for the length of proceedings.	Therefore, the Court considers that the State violated Article 25 of the American Convention, in detriment of Mr. Alfredo López Álvarez, since it did not guarantee his access to effective judicial recourses that could protect him against the violations to his rights.	*Case of López Álvarez v. Honduras* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006).
	The process of finding the authorities were responsible for the length of proceedings.	It is necessary to know this part of the reality, but none of these should damage the individual's rights and be used against him. The excess workload can not justify the non observance of the reasonable time, which is not a national equation between the amount of lawsuits and the number of courts, but instead an individual reference for the specific case. All those shortages translate into obstacles, from severe to impossible to overcome, for the access to justice. Should the impossibility to access justice because the courts are saturated with cases or because the judicial system has too many days off be considered a violation of rights?	*Case of López Álvarez v. Honduras* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006).
	The process of finding the authorities lacked competence and were responsible for the length of proceedings.	To that respect, the Court recognizes the difficult circumstances undergone by Peru. However, the conditions of a country, without considering how hard they might be, do not generally release a State Party to the American Convention from the legal obligations set forth in that treaty, except in the cases therein established. In light of the foregoing, the Court considers that despite the proven complexity of the new criminal proceedings instituted against Urcesino Ramírez-Rojas in the instant case,	*Case of García Asto and Ramírez Rojas v. Peru* (Preliminary Objection, Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 137, 25 November 2005).

		the actions of the competent State authorities have not been compatible with the principle of reasonable time. The Court considers that the State must take into account the time Urcesino Ramírez-Rojas has remained in custody so as to conduct the new proceedings in an efficient way.	
Protecting the fundamental rights of the accused	The process of considering the purpose of the Convention in protecting the rights of the accused.	Despite the diversity of the situations contemplated in each case, diversity that I am not going to discuss at this time, the three stipulations of the Convention obey to a same project for the defense of the individual's rights: opportunity for protection …	*Case of López Álvarez v. Honduras* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 141, 1 February 2006).
	The process of promoting due process and the rights of the accused	The Court ruled in its Advisory Opinion OC-16/99 that "for 'the due process of law' a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality without her defendants." In this context, the Court has said that in order to ensure a veritable guarantee of the right to a fair trial, the proceedings must adhere to all the requirements that "are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof," or rather, "the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination.	*Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002).
	The process of acknowledging the effect of the length of proceedings on the accused	More than fourteen years have passed since the detention of Urcesino Ramírez- Rojas on July 27, 1991. The Court recognizes that during that term Urcesino Ramírez-Rojas has remained deprived of freedom in several roles: as detainee, as defendant, and as convict.	*Case of García Asto and Ramírez Rojas v. Peru* (Preliminary Objection, Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 137, 25 November 2005).
Analysing and comparing	The process of finding the length	On the basis of the above considerations, after	*Case of Hilaire, Constantine and*

discrete variables	of proceedings alone can constitute a violation of the reasonable time requirement	comprehensive analysis of the proceeding against Mr. Suárez-Rosero in the domestic courts, the Court observes that that proceeding lasted more than 50 months. In the Court's view, this period far exceeds the reasonable time contemplated in the American Convention. Likewise, the Court considers that the fact that an Ecuadorian tribunal has found Mr. Suárez-Rosero guilty of complicity in a crime does not justify his being deprived of his liberty for more than three years and ten months, when two years is the maximum in Ecuadorian law for that offense. In view of the foregoing, the Court finds that the State of Ecuador violated, to the detriment of Mr. Rafael Iván Suárez-Rosero, the right to be tried within a reasonable time or be released, as established in Articles 7(5) and 8(1) of the American Convention.	*Benjamin et al. v. Trinidad and Tobago* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002).
	The process of finding the length of proceedings alone can constitute a violation of the reasonable time requirement	As stated above, the Court considers that a long delay may per se constitute a violation of the principle of due process.	*Case of García Asto and Ramírez Rojas v. Peru* (Preliminary Objection, Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 137, 25 November 2005).
	The process of finding the length of proceedings alone can constitute a violation of the reasonable time requirement	The Court considers that, in certain cases, a prolonged delay may, in itself, constitute a violation of judicial guarantees.	*Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002).
	The process of finding the length of proceedings	It is the view of this Court that in certain cases a prolonged delay in itself can constitute a violation of	*Case of Hilaire, Constantine and Benjamin et al.*

	alone can constitute a violation of the reasonable time requirement	the right to fair trial.	*v. Trinidad and Tobago* (Merits, Reparations and Costs) (Inter-American Court of Human Rights, Series C No. 94, 21 June 2002).