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Complexity and Efficiency at International Criminal Courts, 29 Emory Int'l L. Rev. 1 (2014)

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COMPLEXITY AND EFFICIENCY AT INTERNATIONAL CRIMINAL COURTS

Stuart Ford*

ABSTRACT

One of the most persistent criticisms of international criminal tribunals has been that they cost too much and take too long. In response, this Article presents a new approach that utilizes two concepts: complexity and efficiency. The first half of this Article proposes a method for measuring the complexity of criminal trials and then uses that method to measure the complexity of the trials conducted at the International Criminal Tribunal for the former Yugoslavia (ICTY). The results are striking. Even the least complex ICTY trial is more complex than the average criminal trial in the United States, and the most complex ICTY trials are among the most complex trials that have ever taken place. This highlights why it is misleading to compare the cost and length of the ICTY's trials to other trials, both domestic and international, without first accounting for their complexity.

The second half of the Article explores the efficiency of international criminal trials. Efficiency is defined as the complexity of a trial divided by its cost, and the Article calculates the overall efficiency of the ICTY and then compares that to the efficiency of the Special Court for Sierra Leone (SCSL) and a sample of criminal trials in the United States. The results show that the ICTY is more efficient than the SCSL and approximately as efficient as complex murder trials in the United States. The ICTY is less efficient than a typical domestic murder trial, but this appears to be because efficiency decreases as complexity increases, making such cases poor comparators. Although the data is sparse, the ICTY appears to be much more efficient than its closest domestic comparator—mass atrocity trials. Ultimately, the ICTY has been more efficient than cases of comparable gravity and complexity tried in domestic courts or at the SCSL.

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INTRODUCTION	3
I. ABOUT COMPLEXITY	6
A. <i>The Utility of Complexity</i>	7
B. <i>Defining Complexity</i>	10
C. <i>Are ICTY Trials Complex?</i>	15
D. <i>Measuring Complexity</i>	19
II. THE COMPLEXITY OF THE ICTY'S TRIALS	24
A. <i>The Cases</i>	24
B. <i>Computing Complexity Scores</i>	27
C. <i>Conclusion</i>	28
III. COMPARATIVE COMPLEXITY	29
A. <i>Complexity of Trials at Other International Courts</i>	31
B. <i>Complexity of Domestic Criminal Trials</i>	32
C. <i>Conclusion</i>	35
IV. EFFICIENCY	36
A. <i>Is the ICTY Efficient?</i>	38
B. <i>Comparison to the SCSL</i>	42
C. <i>Comparison to Domestic Criminal Trials</i>	45
1. <i>Breaking Down the ICTY Budget by Functions</i>	46
2. <i>Domestic Criminal Trials</i>	50
a. <i>Prosecuting Timothy McVeigh</i>	50
b. <i>Defending Jeffrey Skilling</i>	52
c. <i>Prosecuting O.J. Simpson</i>	52
d. <i>Prosecuting Scott Peterson</i>	53
e. <i>Murder Trials in North Carolina</i>	53
f. <i>Murder Trials in Maryland</i>	54
g. <i>Murder Trials in Kansas</i>	55
h. <i>Conclusion</i>	55
CONCLUSION	62
APPENDIX	68

INTRODUCTION

International criminal courts are established primarily to conduct trials,¹ despite being given additional goals.² Thus the trials at the International Criminal Tribunal for the former Yugoslavia (ICTY) ought to be one of its signature accomplishments. Yet, the trials have been one of its most criticized features. The ICTY will eventually cost more than \$2.7 billion³ and take more than twenty years to finish.⁴ As a result, many writers have argued that the ICTY has been too slow, too inefficient and has cost too much.⁵ For example, there are seventy-five law review articles that use the word “slow” in the same sentence as “ICTY.”⁶ Similarly, eighty-five law review articles use either

¹ Shahram Dana, *Turning Point for International Justice?*, in XI ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 962, 972 (Andre Klip & Goran Sluiter eds., 2007) (“The primary function of the international criminal tribunal is to determine the criminal responsibility and punishment of those individuals found guilty of the crimes under its jurisdiction.”); Adrian Fulford, *The Reflections of a Trial Judge*, 22 CRIMINAL L.F. 215, 216 (2011) (“We are first, foremost and last a criminal court: our core business is to process criminal trials. All the rest, and I hasten to add some of the rest is very important indeed (such as our deterrent potential, reparations to victims and outreach), is secondary to the Court’s obligation to investigate, arrest and try alleged criminals.”); O-Gon Kwon, *The Challenge of An International Criminal Trial as Seen from the Bench*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 360, 373 (2007) (“The task of determining guilt or innocence must take precedence over other, not strictly judicial, considerations”); U.N. Secretary-General, 20, U.N. Doc. A/C.5/52/4 (Oct. 21, 1997) (“[Chambers] performs the fundamental core activity of the Tribunal, that is, the trial and determination of guilt or innocence of persons responsible for serious violations of international humanitarian law within the territory of the former Yugoslavia”).

² See S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993). The ICTY was given the additional goals of putting an end to the commission of crimes in the former Yugoslavia and restoring peace in the Balkans. *Id.* See also Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT’L L. 405, 472 (2012) (noting that the goals of international criminal courts include establishing the historical record and fostering post-conflict reconciliation).

³ See Stuart Ford, *How Leadership in International Criminal Law Is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 ST. LOUIS U. L.J. 953, 971 (2011) (estimating the cost as \$2.3 billion). The estimate of \$2.3 billion was based on the assumption that the ICTY would shut down in 2014. *Id.* Now that it is clear the ICTY will continue to operate into at least 2017, see *infra* note 4, it will certainly cost more than that. My current estimate is that it will ultimately cost \$2.7 billion. See *infra* note 178.

⁴ The ICTY was established in 1993. See S.C. Res. 808, U.N. Doc. S/RES/808/ (Feb. 22, 1993). According to its most recent report on its Completion Strategy, the ICTY will not finish its last trials and appeals until early 2017. See President of the International Criminal Tribunal for the Former Yugoslavia, *Assessment and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) and covering the period from 24 May to 18 November 2013, transmitted by letter to President of the Security Council*, U.N. Doc. S/2013/678, at 39 (Nov. 18, 2013) (by Judge Theodor Meron).

⁵ See Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT’L L.J. 323, 324 & n.1 (2009).

⁶ This data comes from a Westlaw search of the Law Reviews & Journals database using the search “ICTY /25 slow.” The search was conducted on June 24, 2014. The vast majority of the results are articles that

“expensive” or “costly” in the same sentence as “ICTY,”⁷ and sixteen use the word “inefficient” in the same sentence as “ICTY.”⁸ Professor Whiting describes this belief that the ICTY has been too slow and cost too much as the “consensus” position among academics.⁹ Some have even argued that the slow pace of the trials “call[s] into question the efficacy of international criminal justice.”¹⁰

Nor are academics the only ones to criticize the ICTY’s pace and cost. States and policymakers have also been deeply critical. For example, Ralph Zacklin, who was the Assistant Secretary-General for Legal Affairs at the United Nations, described a sense of “dissatisfaction which has become pervasive among the Member States” that he called “donor fatigue.”¹¹ According to him, most states eventually decided that the cost of the ICTY was not justified and that the ICTY “exemplif[ied] an approach that is no longer politically or financially viable.”¹² Others have also diagnosed donor fatigue among states.¹³

One response to this criticism has been that critics are judging the cost and length of ICTY trials by comparing them to trials in domestic court systems and that this comparison is unfair.¹⁴ Thus, a supporter of the ICTY might say: Of course its trials took longer and cost more than the average domestic trial,

either accuse the ICTY of being slow or note that the ICTY has been accused of being slow. Running the same search in the News database found 80 responsive newspaper articles.

⁷ This data comes from a Westlaw search of the Law Reviews & Journals database using the search “ICTY /25 (expensive costly).” The search was conducted on June 24, 2014. The vast majority of the results are articles that either accuse the ICTY of being expensive or note that it has been accused of being expensive. Running the same search in the News database found 17 responsive newspaper articles.

⁸ This data comes from a Westlaw search of the Law Reviews & Journals database using the search “ICTY /25 inefficient.” The search was conducted on June 24, 2014. The vast majority of the results are articles that either accuse the ICTY of being inefficient or note that it has been accused of being inefficient. Running the same search in the News database found 10 responsive newspaper articles.

⁹ Whiting, *supra* note 5, at 323–24.

¹⁰ Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT’L & COMP. L. 347, 347 (2006).

¹¹ Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT’L CRIM. JUST. 541, 543 (2004).

¹² *Id.* at 545.

¹³ See Steven D. Roper & Lilian A. Barria, *Gatekeeping Versus Allocating in Foreign Assistance: Donor Motivations and Contributions to War Crimes Tribunals*, 51 J. CONFLICT RESOL. 285, 287 (2007); Higonnet, *supra* note 10, at 434; Elizabeth Nielsen, *Hybrid International Criminal Tribunals: Political Interference and Judicial Independence*, 15 UCLA J. INT’L L. & FOREIGN AFF. 289, 295 (2010); Jonathan O’Donohue, *Financing the International Criminal Court*, 13 INT’L CRIM. L. REV. 269, 273–74 (2013); Nancy Kaymar Stafford, *A Model War Crimes Court: Sierra Leone*, 10 ILSA J. INT’L & COMP. L. 117, 139 (2003).

¹⁴ See, e.g., David Wippman, *The Cost of International Justice*, 100 AM. J. INT’L L. 861, 861–62 (2006).

they are vastly more complex than the average domestic trial, and we generally expect that more complex trials will take longer and cost more.¹⁵ But, while it is widely acknowledged that the cases that come before the ICTY are more complex than the typical criminal case in a domestic jurisdiction,¹⁶ and some articles have cataloged the complexity of individual trials,¹⁷ the complexity of international criminal trials has not been studied quantitatively before. Thus, it has been impossible to directly compare the complexity of international and domestic trials.

As a result, studying the complexity of trials at the ICTY has a big payoff. By measuring and controlling for complexity, we can more fairly compare domestic and international criminal trials. Moreover, once we measure complexity, it is only a short step to measuring the efficiency of different courts. Efficiency can be thought of as the complexity of a court's trials divided by their cost. Thus, with a complexity measure and cost data we can calculate the relative efficiency of different courts. In short, studying complexity tells us whether the ICTY's trials have been too slow and expensive compared to other international courts or to domestic trials, *given their complexity*. This study sheds new light on one of the most persistent criticisms of the ICTY—that it has taken too long and cost too much.

Assessing complexity and efficiency quantitatively could also yield significant benefits for the International Criminal Court (ICC). Every year, the members of the Assembly of States Parties must decide on the budget of the ICC. In recent years, this has become a contentious process, with heated debates about how much money the ICC really needs.¹⁸ One of the arguments made by those states that wish to rein in ICC spending is that the court is inefficient and that it could do more with the money it has if it became more efficient. The court disputes that it is inefficient and maintains that additional funding is necessary for it to comply with its mandate. Much of the debate

¹⁵ See *id.* at 873 (“In general, however, complex cases take longer to try and generate higher overall costs.”).

¹⁶ See *id.* (“By contrast, almost all ICTY trials, because of the nature of the prosecution undertaken, entail lengthy and expensive court proceedings and pretrial investigations.”); Patricia M. Wald, *ICTY Judicial Proceedings—An Appraisal from Within*, 2 J. INT’L CRIM. JUST. 466, 468 (2004).

¹⁷ See, e.g., Gillian Higgins, *The Impact of the Size, Scope and Scale of the Milošević Trial and the Development of Rule 73bis before the ICTY*, 7 NW. J. INT’L HUM. RTS. 239, 246 (2009) (“The procedural and substantive demands of the [Milošević] trial upon all parties were excessive.”).

¹⁸ See generally Stuart Ford, *How Much Money Does the ICC Need in The LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT: A CRITICAL ACCOUNT OF CHALLENGES AND ACHIEVEMENT* (Carsten Stahn ed., forthcoming 2014). See also Jonathan O’Donohue, *Financing the International Criminal Court*, 13 INT’L CRIM. L. REV. 269, 279–81 (2013).

about the ICC's funding depends on an assessment of its efficiency, but current assessments are subjective and potentially unreliable. Thus, developing a quantitative measure of the complexity and efficiency of the court's work could significantly improve the budgeting process at the ICC.

Of course, to assess complexity quantitatively, one needs to be able to measure it, and this Article proposes a measure of complexity that permits complexity to be measured and compared across international and domestic court systems. So, how complex are the ICTY's trials? As far as I can tell, they are the most complex set of related criminal cases that has ever been tried by any court anywhere. They dwarf the complexity of domestic criminal prosecutions, and not even the prosecution of the senior Nazi leaders by the International Military Tribunal (IMT) can compare with the most complex ICTY cases. Collectively, the forty-one full trials completed by the ICTY so far are more than seventeen times as complex as the entire IMT.

This Article's most important conclusion is that the ICTY's trials have been efficient given their complexity. The ICTY has been more efficient than the Special Court for Sierra Leone (SCSL), despite the fact that the SCSL was specifically designed to be more efficient than the ICTY. It is less efficient than run of the mill domestic murder trials, but there are good reasons to believe that ordinary domestic murder trials are not a fair comparator. It has, however, been roughly as efficient as complex murder trials, like those of O.J. Simpson and Scott Peterson. Most importantly, the ICTY has been more efficient than comparable domestic mass atrocity trials, like the trial of Timothy McVeigh for the bombing of the federal building in Oklahoma City. The conventional wisdom—that the ICTY costs too much and takes too long—is simply not accurate. This Article shows that the ICTY has been more efficient than domestic courts would be, if faced with cases of comparable complexity and gravity.

I. ABOUT COMPLEXITY

The concept of complexity is central to this Article and requires some explanation. This Part discusses a number of questions about complexity, including why to use it, how to define it, and the limitations of a complexity-based approach. These theoretical discussions lay the groundwork for the rest of the Article.

A. *The Utility of Complexity*

It is common to allege that the ICTY is slow, expensive and inefficient.¹⁹ But the obvious question is: Slow compared to what? Expensive compared to what? For critics, the answer appears to be slow and expensive compared to most domestic criminal trials. And while this is certainly true, a number of people have noted that comparison is unfair because the kinds of cases that come before domestic and international courts are very different. Trials at international criminal tribunals are much more complex than the average domestic criminal prosecution.

If we can measure and account for the differences in complexity between the two systems, we can make a much fairer comparison. The right comparison is not between the average domestic criminal trial and the average ICTY trial, but between trials of the same complexity in both systems. If the ICTY trial is still much slower and more expensive than a domestic trial of the same complexity, then it may be that the ICTY is too slow, too expensive and inefficient. At the least, it suggests that it would be cheaper and quicker to prosecute violations of international criminal law in domestic courts. On the other hand, if the ICTY trial costs less than a domestic trial of the same complexity, then the numbers suggests that the ICTY is not too slow, expensive or inefficient. Rather, the ICTY is doing better than a domestic court would do if it were faced with such a case. In effect, by measuring and controlling for complexity, we may be able to draw conclusions about the efficiency of the ICTY, with efficiency measured by the cost of trying a case of a given complexity.

This is not a perfect comparison because domestic criminal trials and international criminal trials serve slightly different purposes even though they engage in similar activities. Retribution is a key purpose of both kinds of trials, but international criminal trials have many purposes (post-conflict reconciliation, ending impunity, setting the historical record, ending conflict, etc.) that have no real analog in most domestic criminal trials. These additional purposes presumably have value and this suggests that we might be willing to pay more for international criminal trials, even after adjusting for complexity, than we would for domestic trials. So, even a complexity-adjusted comparison of domestic and international trials is not a perfect comparison. It is, nevertheless, a useful comparison.

¹⁹ See *supra* text accompanying notes 5–13.

Measuring complexity is not, of course, the solution to all of the difficult questions in international criminal law. It cannot, for example, tell us whether the level of complexity in a given trial is necessary or desirable. It is undisputed that the ICTY's trials are exceedingly complex. Two trials have been more complex than the trials of the Nazi leaders at the IMT.²⁰ But is this level of complexity required? The methodology described in this Article cannot answer that question. I will, however, return to it later, as it is an important question.²¹

Another thing we cannot do with complexity is decide whether we ought to prosecute violations of international criminal law at all. This is an important point as not all criticisms of the ICTY have focused on the question of its efficiency. Some have argued against the creation of international criminal courts for purely political reasons.²² Others have questioned whether international criminal courts can achieve their purposes,²³ which implicitly raises doubts about whether funding them is worthwhile, irrespective of the efficiency with which they carry out trials. Showing that the trials at international courts are no more expensive or time consuming than domestic trials given their complexity does not directly respond to these questions.

But the reality is that the international community is deeply committed to international criminal justice. This can be seen most visibly at the International Criminal Court (ICC), which currently has 122 members. Membership in the ICC represents a commitment to a permanent venue for the prosecution of serious violations of international criminal law, and the majority of states in the world have undertaken that commitment. In that sense, the question of whether we ought to prosecute violations is less relevant to most states than the questions of how long it will take and how much it will cost. Indeed, questions about the pace and cost of international criminal justice have taken center stage at the ICC, where recent meetings of the Assembly of States Parties have been

²⁰ See *infra* notes 159–60.

²¹ See *infra* Conclusion.

²² See, e.g., Michael P. Scharf, *The Politics Behind U.S. Opposition to the International Criminal Court*, 6 BROWN J. WORLD AFF. 97, 98 (1999) (describing opposition to the creation of the International Criminal Court in the United States based on a fear that it would investigate or prosecute American citizens).

²³ See Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 331–40 (2008) (questioning whether international courts can achieve their goals); David Wippman, *Atrocities, Deterrence and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 475 (1999) (questioning whether international courts can achieve deterrence). But see Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001) (arguing that prosecution of serious violations of international criminal law can have positive effects).

dominated by debates about the ICC's budget.²⁴ A better understanding of complexity can help states understand how much funding the ICC needs to complete its trials and how long those trials can be expected to last. This may not directly answer the question of whether international criminal justice is worthwhile, but it is valuable information.

The ideal way to justify spending on international criminal courts would be to directly measure and assign a value to the outcomes of international criminal justice and compare that to the cost of international criminal justice. Such an undertaking would resemble a cost-benefit analysis.²⁵ This analysis would allow us to directly measure the value of the ICTY rather than just comparing its cost to criminal trials in domestic systems, which we assume have roughly equivalent value. Professor Shany recently advocated a similar approach to measuring the effectiveness of international courts.²⁶ He stressed that courts should be evaluated by their ability to accomplish their goals,²⁷ and that their cost-effectiveness should also be measured by considering the resources expended in pursuit of those goals.²⁸ He uses the language of sociology, but the result would be quite similar to a cost-benefit analysis.

A cost-benefit analysis of international criminal justice would be exceedingly difficult, although probably not impossible in the long run. First, we would have to identify the purposes or goals of international criminal justice. Luckily, there is extensive literature on this subject.²⁹ The next step, however, is much harder. We would need to measure whether and how much courts' outputs contribute to achieving their purposes. It may be that with careful thought and data collection it would be possible to measure the real world impact of international criminal courts, but it would be extremely difficult and time-consuming.³⁰ Without a way to directly measure a court's ability to achieve its goals, there is no way to determine the absolute value of

²⁴ See *supra* note 18.

²⁵ See Ford, *supra* note 3, at 954–55.

²⁶ See Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 230 (2012).

²⁷ *Id.* at 230–31.

²⁸ *Id.* at 237–38.

²⁹ See Damaska, *supra* note 23, at 331; Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT'L CRIM. JUST. 427, 428 (2004); Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 537–43 (2008).

³⁰ Shany, *supra* note 26, at 239 (“The goals of public organizations, such as courts, tend to be ambiguous, and the public goods they generate, such as justice, peace, and legal certainty, are hard to quantify”). See also *id.* at 248–49 (“The key to assessing the effectiveness of international courts according to the rational-system or goal-based approach involves evaluation of judicial outcomes”).

its work. Thus, studying complexity may not be the ideal way to assess the value of international criminal justice because it provides only a relative measure of value, but it is the best way that is currently possible.

B. Defining Complexity

Complexity in the law has been addressed extensively by Professors Tidmarsh,³¹ Stempel,³² and others.³³ Much of the existing literature, however, has to do with civil trials³⁴ in the United States³⁵ and may not be appropriate for a study of international criminal trials. Moreover, agreement on a definition of complexity specific to the law has been elusive.³⁶ Professor Stempel explicitly declines to provide a definition of the term, choosing to focus instead

³¹ Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1684 (1992).

³² Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781 (1998).

³³ There are numerous scholarly articles that deal in some manner with the concept of complexity in the law. Some examples include Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463 (1987); Michael Heise, *Criminal Case Complexity: An Empirical Perspective*, 1 J. EMPIRICAL LEGAL STUD. 331 (2004); Ronit Dinovitzer & Jeffrey S. Leon, *When Long Becomes too Long: Legal Culture and Litigators' Views on Long Trials*, 19 WINDSOR Y.B. ACCESS JUST. 106 (2001); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1982); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Effects*, 18 LAW & HUM. BEHAV. 29 (1994); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences and Cures*, 42 DUKE L.J. 1 (1992); Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, & Nicole L. Waters, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171 (2005); Matthew A. Reiber & Jill D. Weinberg, *The Complexity of Complexity: An Empirical Study of Juror Competence in Civil Cases*, 78 U. CIN. L. REV. 929 (2010).

³⁴ Some studies have covered both civil and criminal trials. See Heuer & Penrod, *supra* note 33. Very few have exclusively studied exclusively criminal trials. The exception is Heise, *supra* note 33. Most of the literature cited below relates largely or exclusively to civil trials.

³⁵ One of the exceptions to the focus on the United States is the study by Dinovitzer and Leon, which examined civil trials in Canada. See Dinovitzer & Leon, *supra* note 33.

³⁶ Burbank, *supra* note 33, at 1463 ("Not even those charged with responsibility to devise procedures for complex cases in the federal courts have essayed a definition worth of the name."); Heise, *supra* note 33, at 366–67 (noting that there is no accepted definition of complexity and that different groups may define it differently); Eisenberg et al., *supra* note 33, at 190 (noting that different people probably view complexity differently); Dinovitzer & Leon, *supra* note 33, at 117 (noting that courts have difficulty determining when to categorize cases as complex); Heuer & Penrod, *supra* note 33, at 30–31 (noting that there have been many proposed definitions of complexity but little agreement); Schuck, *supra* note 33, at 2–3 (noting that "legal complexity is hard to define" and that different people might conceive of it and define it in different ways); Stempel, *supra* note 32, at 785–86; Reiber & Weinberg, *supra* note 33, at 945 n.41 (noting that there have been attempts to create an all-encompassing definition of complexity, but that such attempts have not generally been successful). Professor Tidmarsh's article highlights the difficulty of trying to reach an agreement on a definition of complexity through its extensive catalog of definitions that have been previously suggested, which covers more than 40 pages. See Tidmarsh, *supra* note 31, at 1692–1734.

on the factors that cause complexity.³⁷ Professor Tidmarsh, on the other hand, argues that it is impossible to properly assess whether any given case is complex without a definition of complexity,³⁸ and criticizes those who have tried to explain complexity without offering a definition.³⁹

Professor Tidmarsh's attempt to define complexity is the most comprehensive, but it is a definition of complex litigation in civil trials in the United States and it is inextricably connected to assumptions about civil trials in the U.S.⁴⁰ As such, it is not directly transferable to the context of the ICTY. Moreover, Professor Tidmarsh tried to distinguish between "routine" civil cases that could proceed under normal rules and "complex litigation" that would need special procedural rules,⁴¹ and his definition was tailored to that purpose. This Article does not treat complexity as a threshold between the routine and the complex.⁴² For these reasons, this Article will not adopt Professor Tidmarsh's definition.

In contrast to the search for a definition of complexity among legal academics, participants in empirical studies of complexity are usually asked to measure it without being offered a definition. For example, in the Heise study, participants were simply asked to rate the complexity of a trial on a scale that ranged from "not at all complex" to "very complex."⁴³ In the Heuer and Penrod study, judges were asked to rate how complex a particular trial was compared to the average trial they heard.⁴⁴ The assumption in the empirical literature is that people can adequately identify and measure complexity without a definition even as that literature acknowledges that different people might define and therefore report complexity differently.⁴⁵ This suggests that we could proceed without a definition. It seems useful, however, to have a working definition of complexity.

³⁷ See Stempel, *supra* note 32, at 785–86 (noting that "a single definition of complexity is both unnecessary and perhaps misleading").

³⁸ See Tidmarsh, *supra* note 31, at 1690 ("a correct understanding of complex litigation might prevent well-intentioned reform from paving the path to a procedural hell").

³⁹ *Id.* at 1694–98.

⁴⁰ *Id.* at 1743–50 (basing his definition of complexity on seven assumptions about the nature of civil procedure in the United States).

⁴¹ *Id.* at 1689–90.

⁴² See *infra* notes 104–108.

⁴³ Heise, *supra* note 33, at 346.

⁴⁴ Heuer & Penrod, *supra* note 33, at 35.

⁴⁵ Heise, *supra* note 33, at 344–45, 350; Eisenberg et al., *supra* note 33, at 190.

A plain language definition will be used because it will help us to understand what most people mean when they say that a trial is “complex.” Complexity is usually defined by dictionaries as “[t]he quality or condition of being complex.”⁴⁶ If we look at definitions of “complex,” there are two distinct ideas that appear in most definitions. One idea is that multiple parts of a whole are related to one another in such a way that they can interact. Thus one dictionary defines complex as “consisting of or comprehending various parts united or connected together.”⁴⁷ Other dictionaries offer similar definitions.⁴⁸ A second strand of the definition has to do with the difficulty of analyzing or understanding something complex. Thus one dictionary defines complex as being “not easily analysed or disentangled.”⁴⁹ Other definitions also pick up on this aspect of the word.⁵⁰ Combining these two strands, something is complex when it is composed of many interconnected parts such that their interaction makes the whole difficult to understand or analyze. Complexity then becomes the state or condition of having these attributes. Thus, for purposes of this Article, complexity occurs when multiple parts of a system interconnect and interact in such a way that the whole system becomes hard to understand or analyze.

Despite having rejected the definitions of complexity in the existing academic literature, there is much of value in that literature. For example, most legal scholars agree that there are different types of commonly occurring complexity.⁵¹ The main types identified in the literature are: (1) legal

⁴⁶ THE OXFORD ENGLISH DICTIONARY 613 (J.A. Simpson & E.S.C. Weiner eds., Oxford University Press 2d ed. 1989). Other dictionaries define it similarly. See NEW OXFORD AMERICAN DICTIONARY (Angus Stevenson & Christine A. Lindberg eds., Oxford University Press 3d ed. 2010) (“the state or quality of being intricate or complicated”); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 377–78 (Houghton Mifflin Co. 4th ed. 2000) (“the quality or condition of being complex”); RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 271 (2d ed. 1999) (“the state or quality of being complex”).

⁴⁷ THE OXFORD ENGLISH DICTIONARY, *supra* note 46, at 613.

⁴⁸ See NEW OXFORD AMERICAN DICTIONARY, *supra* note 46 (“consisting of many different and connected parts”); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 46 (“consisting of interconnected or interwoven parts”); RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY, *supra* note 46 (“composed of many interconnected parts; compound; composite”).

⁴⁹ THE OXFORD ENGLISH DICTIONARY, *supra* note 46, at 613.

⁵⁰ See NEW OXFORD AMERICAN DICTIONARY, *supra* note 46, at 271 (“not easy to analyze or understand; complicated or intricate”); RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY, *supra* note 46 (“so complicated or intricate as to be hard to understand or deal with”).

⁵¹ See Heise, *supra* note 33, at 358 (noting that judges in the study were asked to rate evidentiary and legal complexity separately and that the separate scores were then combined into an overall measure of trial complexity); Heuer & Penrod, *supra* note 33, at 35 (noting that judges in the study were asked to rate both evidentiary complexity and legal complexity); Tidmarsh, *supra* note 31, at 1702–12 (describing various types

complexity; (2) factual complexity; and (3) participant complexity. Some scholars identify other kinds of complexity,⁵² but the three types listed above feature in the majority of complexity scholarship and are most applicable to a discussion of the ICTY.

Legal complexity arises from the law itself. Obviously, to reach a legal decision, a court must first identify the content of the law and then apply it to the facts of the case.⁵³ This process is sometimes complex, as the law in a particular field may be dense (i.e., the field is heavily regulated and there are many different overlapping legal rules to consider), difficult to ascertain (e.g., there are many different sources of the appropriate law, which makes it more difficult to decide which sources apply), extremely technical (i.e., they require technical expertise or sophistication to understand and apply), or uncertain (e.g., the law is standards rather than rules based, depends on multi-factor tests or balancing tests, is heavily fact dependent, or there are a multitude of conflicting prior precedents to analyze).⁵⁴

Factual complexity arises from the facts or information needed to reach a legal decision. Legal decisions require not just an understanding of the law, but an understanding of the facts and how the law should be applied to the facts to reach a legal decision. As a result, complexity can arise from the nature of the facts necessary to reach a decision.⁵⁵ This can result in complexity if there is a need for a large numbers of facts, the facts are very technical, the facts are difficult to determine, or the facts are simply indeterminate.⁵⁶ There is some

of complexity, including legal complexity, factual complexity, remedy complexity, and party complexity); Stempel, *supra* note 32, at 789–96 (discussing legal and factual complexity).

⁵² For example, Reiber and Weinberg treat “procedural complexity” as a separate form of complexity, although it looks most like what this Article calls legal complexity. Reiber and Weinberg, *supra* note 33, at 947. Tidmarsh identifies “remedy complexity” and “party complexity” as additional forms of complexity in civil trials. Tidmarsh, *supra* note 31, at 1707–12. These forms of complexity have less relevance in the context of criminal proceedings.

⁵³ *Cf. id.* at 1736 (arguing that legal adjudication requires “reasoned judgment, which is based on the consideration of the disputants’ circumstances, the relevant evidence, and the nature of the claimed obligation”).

⁵⁴ Schuck, *supra* note 33, at 3–4; Stempel, *supra* note 32, at 789–92 (noting that legal complexity may stem from the technical nature of the law, the difficulty in ascertaining the law, or the indeterminacy of the law).

⁵⁵ Heuer & Penrod, *supra* note 33, at 35–36 (noting that both the quantity of the evidence and the difficulty of the evidence caused perceived trial complexity to increase); Heise, *supra* note 33, at 352–54 (noting that the difficulty of the evidence increased perceived complexity of the trial).

⁵⁶ See Reiber & Weinberg, *supra* note 33, at 950–51 (testing a model in which factual complexity was represented by the need to reconcile the evidence of multiple witnesses who gave conflicting testimony and

evidence that this form of complexity is the most important for determining overall complexity.⁵⁷

The third kind of complexity is participant complexity. Legal decisions are made by people, not machines. Thus, the people who participate in the legal process, including the parties, judges, juries, lawyers, and witnesses, have an effect on that process, including its complexity.⁵⁸ The lawyers for the parties may play a deliberate role that affects the overall complexity of the decision-making process. For example, some studies of criminal cases suggest that skilled prosecutors decrease perceived complexity, while skilled defense counsel increase perceived complexity.⁵⁹ But even when individuals are not deliberately assuming roles that affect complexity, they may still have an effect on it. For example, an unskilled or overwhelmed participant might make a trial more complex because of their inability to fulfill their role in the process.⁶⁰ Indeed, there is some evidence that self-represented accused increase trial complexity, perhaps because they are unable or unwilling to fulfill their role.⁶¹ Another concern is that humans' inherent cognitive limitations⁶² may increase perceived complexity by making legal decision-making more difficult.⁶³

Another insight from the legal literature is that the different forms of complexity arise from different causes and therefore can change independently of one another. Legal complexity can make decision-making difficult even in

draw inferences from circumstantial evidence); Stempel, *supra* note 32, at 794–95; Tidmarsh, *supra* note 31, at 1766.

⁵⁷ See Heuer & Penrod, *supra* note 33, at 36 tbl.2 (reporting that the quantity of evidence and the complexity of the evidence had more impact on the reported complexity of the cases than the complexity of the law). *But see* Reiber & Weinberg, *supra* note 33, at 952–54 (suggesting that legal complexity makes juror decision-making more difficult than factual complexity). Of course, the ICTY does not use juries, so the Reiber and Weinberg finding may not be applicable at the ICTY.

⁵⁸ See Tidmarsh, *supra* note 31, at 1755–80; Dinovitzer & Leon, *supra* note 33, at 112–14 (noting studies that have indicated that the local legal culture of judges and lawyers affects the length of time it takes to decide a case); *id.* at 138 (noting that the vast majority of lawyers in the study believed that lawyer skill, knowledge and preparation would affect trial length).

⁵⁹ See Heise, *supra* note 33, at 355–56; *cf.* Heuer & Penrod, *supra* note 33, at 41–42.

⁶⁰ See Stempel, *supra* note 32, at 796; Tidmarsh, *supra* note 31, at 1757–59.

⁶¹ See Higgins, *supra* note 17, at 245, 248, 250; U.N. Secretary-General, Budget for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, for the biennium 2012–2013, 55, U.N. Doc. A/66/386 (Sept. 29, 2011).

⁶² Despite our beliefs otherwise, we are not fundamentally rational decision makers. Our decision-making is affected by both motivated reasoning and cognitive biases. See Ford, *supra* note 2, at 419–39.

⁶³ Schuck, *supra* note 33, at 25 (noting research in social psychology that shows that people have difficulty with truly complex decisions and tend to radically simplify their decision-making through the use of heuristics when confronted with complexity); Stempel, *supra* note 32, at 795–96.

situations where the facts are straightforward and vice versa.⁶⁴ Participant complexity can move independently of factual or legal complexity depending on the role, abilities, and motivations of the participants.⁶⁵ Thus, the different forms of complexity may not all move in lockstep. At the same time, in practice, the different forms of complexity will often be correlated.⁶⁶ Moreover, the most complex cases tend to be those that exhibit high legal, factual, and participant complexity.⁶⁷

Finally, a number of writers have noted that one form of complexity can sometimes cause or exacerbate other forms of complexity. For example, when both the law and the facts are complex, the total complexity of the resulting decision may be greater than the complexity of the individual components. In other words, legal complexity and factual complexity may interact in ways that generate additional complexity.⁶⁸ High legal or factual complexity may also cause participant complexity when it overwhelms the abilities of the participants to perform their roles.⁶⁹ As a result, total complexity will sometimes be greater than the sum of the individual types of complexity, particularly in cases that exhibit high levels of factual and legal complexity.

C. *Are ICTY Trials Complex?*

Using the definition of complexity described above,⁷⁰ it is obvious that trials at international criminal courts exhibit a high degree of complexity. First, they are marked by many interconnected parts that together form the whole. Criminal trials are ultimately formed out of, *inter alia*, the interaction of the charges, the substantive law, the procedural rules, the evidence put before the court, and the personalities, motivations, and skills of the participants, including the prosecutors, defense lawyers, witnesses, judges, and the accused. Each of these parts interacts with the other parts to produce the whole that we call a trial, and there are many moving parts. While this is true at some level of

⁶⁴ Cf. Tidmarsh, *supra* note 31, at 1703 (noting that cases with relatively simple facts can generate “wonderfully difficult legal issues”).

⁶⁵ See *supra* notes 59–63.

⁶⁶ Heise, *supra* note 33, at 359 tbl.8 (noting that evidentiary and legal complexity were often related and cannot be assumed to be independent); Reiber & Weinberg, *supra* note 33, at 947 n.48 (noting that procedural and factual complexity may overlap with one another).

⁶⁷ Tidmarsh, *supra* note 31 at 1702–03 (suggesting that cases are not truly complex unless they involve both factual and legal complexity).

⁶⁸ Cf. *id.* at 1702–03 (suggesting that the most complex cases arise when there is a combination of factual and legal complexity).

⁶⁹ Stempel, *supra* note 32, at 796; Tidmarsh, *supra* note 31, at 1757–59.

⁷⁰ See *supra* text accompanying notes 46–50.

all criminal trials, trials at international criminal courts tend to have many more moving parts than trials in most domestic criminal systems. For example, they include a larger number of charges, more individual crime sites, and a larger number of alleged victims.⁷¹ They also have larger numbers of witnesses and exhibits.⁷² The larger number of moving parts suggests a higher level of complexity than is present in most domestic trials.

Second, the parts interact with each other in ways that have made trials at international criminal courts extremely difficult to analyze. This is exemplified by the difficulty that courts have had predicting how long the trials will take and how much they will cost. For example, the ICTY initially predicted that all work, including appeals, could be completed by 2008.⁷³ By 2004, the court was predicting that it would complete all of the first trials during 2008.⁷⁴ Two years later, it was predicting that first trials would continue into 2009.⁷⁵ Fast forward another two years, and the court was predicting that first trials would be finished in 2010.⁷⁶ By 2010, the court was predicting that trials would finish in 2013.⁷⁷ In 2013, the ICTY acknowledged that three trials would stretch into 2014 or beyond.⁷⁸ Now it seems likely that the court will be hearing appeals until 2017.⁷⁹

⁷¹ See Stuart Ford, *Fairness and Politics at the ICTY: Evidence from the Indictments*, 39 N.C. J. INT'L L. & COM. REG. 45, 75–77, 84–85, 87 (2013).

⁷² See *infra* Table 3.

⁷³ See Rep. of the ICTY, 57th Sess., Sept. 4, 2002, 6, U.N. Doc. A/57/379-S/2002/985 (Aug. 14, 2002).

⁷⁴ See President of the International Tribunal for the Former Yugoslavia, *Assessments and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004)*, transmitted by letter to President of the Security Council, 3, 47–52, U.N. Doc. S/2004/420 (May 21, 2004) (by Judge Theodor Meron).

⁷⁵ See President of the International Tribunal for the Former Yugoslavia, *Assessment and report of Judge Fausto Pocar, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004)*, 30, U.N. Doc. S/2006/898 (Nov. 16, 2006) (by Judge Fausto Pocar).

⁷⁶ See President of the International Tribunal for the Former Yugoslavia, *Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004)*, 42, U.N. Doc. S/2008/729 (Nov. 24, 2008) (by Judge Patrick Robinson).

⁷⁷ See President of the International Tribunal for the Former Yugoslavia, *Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), covering the period from 15 May 2010 to 15 November 2010*, 4, U.N. Doc. S/2010/588 (Nov. 19, 2010) (by Judge Patrick Robinson).

⁷⁸ See President of the International Tribunal for the Former Yugoslavia, *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 16 November 2012 to 23 May 2013*, 3, U.N. Doc. S/2013/308 (May 23, 2013).

⁷⁹ See S.C. Res. 808, *supra* note 4; Letter from the President of the ICTY, *supra* note 4.

The court has even admitted that it cannot make accurate predictions: “[t]he estimation of the length of trial proceedings is more an art than a science, and the assessments that are always made prior to the commencement of a trial are by their very nature approximations.”⁸⁰ Unsurprisingly, it attributes the difficulty of predicting the length of the trials to their complexity.⁸¹ Thus, trials at the ICTY exhibit not just a large number of moving parts, but interactions among these parts that make predicting or analyzing them difficult. In short, they are complex.

Trials at the ICTY also exhibit a relatively high degree of each form of complexity. Trials at the ICTY tend to be legally complex.⁸² For one thing, international criminal law is a specialized and technical area of the law, and those who practice it tend to be specialists. This stems in part from the fact that it has multiple sources, including treaties,⁸³ customary international law,⁸⁴ and the judicial decisions of a number of different courts.⁸⁵ Moreover, these rules often overlap and the same act can be more than one crime, depending on how it is analyzed. For example, the distinction between murder as a crime against humanity and willful killing as a war crime depends on a careful evaluation of the contextual elements rather than any difference in the act of killing.⁸⁶

The rules themselves are rarely bright-line rules, and they often incorporate something akin to a reasonableness standard.⁸⁷ They are also highly fact

⁸⁰ See President of the International Tribunal for the Former Yugoslavia, *Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), covering the period from 15 May 2010 to 15 November 2010*, 6, U.N. Doc. S/2010/588 (Nov. 15, 2010) (by Judge Patrick Robinson).

⁸¹ *Id.* (“This is the nature of trials, particularly trials of the complexity that are heard at the Tribunal.”).

⁸² See Kwon, *supra* note 1, at 364 (concluding that the elements of the crimes and modes of liability are “far more complex” in international criminal law than in domestic criminal law).

⁸³ ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 9–12 (2d ed. 2010) (discussing the sources of international criminal law).

⁸⁴ Crimes against humanity are largely rooted in customary international law. See Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125, 129–80 (2007) (chronicling the development of crimes against humanity over time).

⁸⁵ CRYER ET AL., *supra* note 83, at 109–80 (describing the various international courts).

⁸⁶ *Id.* at 246.

⁸⁷ See Stuart Ford, *Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility to Protect and Individual Responsibility in the Aftermath of Cyclone Nargis*, 38 DENVER J. INT’L POL’Y 227, 242, 245–46 (2010) (discussing the intent requirement in international criminal law).

dependent, and circumstantial evidence plays a large role.⁸⁸ Moreover, the state of the law is often indeterminate. This is particularly true where the law is derived from international custom, as there will be no definitive writing that embodies the rule. Even when the overarching rule is treaty-based and thus presumably easier to determine, there is still often a large number of potentially inconsistent precedents to consider.⁸⁹ In short, international criminal trials demonstrate significant legal complexity.

International criminal trials also tend to be factually complex, at least compared to most domestic criminal cases.⁹⁰ The crimes themselves are often undertaken by hierarchical groups working together, rather than individuals, and proof of them usually requires detailed proof of the actions of individuals other than the accused.⁹¹ This increases the factual complexity of all but the simplest ICTY cases compared to the majority of criminal cases in domestic jurisdictions, which usually involve individuals acting alone.⁹² They often also take place across multiple locations and sometimes cover multiple countries or long periods of time.⁹³ Some of the facts are also highly technical, particularly those relating to mass grave exhumations and the conduct of organized militaries, and require the use of expert witnesses to help the decision maker understand them. Finally, the facts themselves are often indeterminate.⁹⁴

There is also evidence of participant complexity at the ICTY. For one thing, the ICTY has had a large number of multi-accused trials.⁹⁵ Cases that include more than one defendant have more participants⁹⁶ than single accused

⁸⁸ Robert Petit et al., *Exploring Critical Issues in Religious Genocide: Case Studies of Violence in Tibet, Iraq and Gujarat*, 40 CASE W. RES. J. INT'L L. 163, 203–09 (2008) (discussing the use of circumstantial evidence to prove genocide).

⁸⁹ *Id.* at 190–94 (discussing the various inconsistent and contradictory sources relating to the meaning of the word “destroy” in the crime of genocide).

⁹⁰ See Wippman, *supra* note 14, at 875 (“Relative to most national criminal court trials, ICTY trials are inherently complex.”); Kwon, *supra* note 1, at 364.

⁹¹ See Ford, *supra* note 71, at 67–68.

⁹² *Id.*

⁹³ See *id.* at 85–87. For example, the trial of Slobodan Milošević covered acts that took place in three different countries at more than 400 crime sites. *Id.* at 87. See also Damaska, *supra* note 23, at 340–41 (describing the complexity of the Milošević case further).

⁹⁴ See generally NANCY A. COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010) (documenting difficulties in fact-finding in international trials).

⁹⁵ See *infra* Figure 1.

⁹⁶ The additional participants include not just the extra accused, but the additional lawyers that represent those accused.

trials, which are the norm in domestic criminal justice systems.⁹⁷ It seems likely that participant complexity increases as the number of participants increases. In addition, it appears that cases are more complex than they would otherwise be when accused proceed without legal counsel,⁹⁸ and several ICTY cases have included self-represented accused who appeared to go out of their way to increase the trial's complexity.⁹⁹ The high legal and factual complexity of the cases may also breed additional participant complexity as the participants reach their cognitive limitations.¹⁰⁰

D. Measuring Complexity

There are two approaches one can take to measure the complexity of trials. The approach taken by most empirical pieces is to measure complexity subjectively.¹⁰¹ Usually this is done by asking the participants or observers to rank the complexity of a trial on a scale.¹⁰² This makes sense as complexity is a subjective factor. Unlike physical attributes like mass, circumference, or height, complexity cannot be directly measured. It exists in the mind of the individual watching or participating in a trial and occurs when the interactions among the parts of the system make it hard for the individual to understand the proceedings.

The subjective method is not available here. So far, the Trial Chambers have sat for more than 7200 days. This results in more than 20 years' worth of trial transcripts. It would be too expensive and time consuming to have a group of people read the trial transcripts and rate the complexity of the trials. Instead, this Article depends on the availability of an objective measure that can act as a proxy¹⁰³ for complexity and that can be assessed from information that is publicly available. Moreover, I will try to use factors that are common to a broad range of legal systems, so that complexity can be measured and compared across different systems.

⁹⁷ See *infra* note 133.

⁹⁸ See *supra* note 61.

⁹⁹ The most famous of these cases involved Slobodan Milošević and Vojislav Šešelj. Milošević and Šešelj both used their trials as a platform to attack the court, obstruct the proceedings, and try to influence public opinion in Serbia. See Turner, *supra* note 29, at 573–74.

¹⁰⁰ See *supra* notes 62–63.

¹⁰¹ See Eisenberg et al., *supra* note 33, at 175; Heise, *supra* note 33, at 343; Heuer & Penrod, *supra* note 34, at 34.

¹⁰² See *supra* notes 43–45.

¹⁰³ A proxy variable is “[a] measurable variable that is used in place of a variable that cannot be measured.” GRAHAM UPTON & IAN COOK, A DICTIONARY OF STATISTICS 315 (2d ed. 2008).

Another consideration is whether to treat complexity as a dichotomous or continuous variable.¹⁰⁴ Much of the literature about complexity in civil cases in the United States is concerned with whether any given case should be described as either complex or routine. This distinction matters in U.S. federal courts because cases that are labeled as complex can be subject to different rules than routine cases.¹⁰⁵ However, it is obvious from Professors Stempel's and Tidmarsh's arguments that complexity is not a binary matter.¹⁰⁶ Rather, complexity is a continuum.¹⁰⁷ Some cases will be more complex, some will be less complex. While all cases at the ICTY are more complex than the average case in the United States, there is still a great deal of variation between the most complex and the least complex ICTY trials.¹⁰⁸ Therefore, complexity will be treated as a continuous variable.

With these considerations in mind, this Article measures trial complexity using a proxy variable that is a composite of: (1) the number of trial days the case takes to be heard; (2) the number of witnesses that testify; and (3) the number of exhibits that are entered into the record. There are a number of reasons for focusing on these three variables to create a proxy for trial complexity. First, in my personal experience,¹⁰⁹ these are the best outward indicators of the complexity of a trial. Second, experts on international criminal trials tend to describe trial complexity using these metrics. For example, attorneys who write about complex ICTY cases tend to describe them in terms of the number of trial days, witnesses and documents that are necessary to reach a decision.¹¹⁰ The Registry uses similar factors to determine the expected complexity of a case.¹¹¹ Moreover, when international judges

¹⁰⁴ A dichotomous variable is a categorical variable with only two categories. *Id.* at 114. A continuous variable is one whose set of possible values is a continuous interval of real numbers. *Id.* at 88.

¹⁰⁵ See FED. R. CIV. P. 16(c)(2)(L) (noting that cases that are identified as "complex" may be subject to "special procedures"). See also MANUAL FOR COMPLEX LITIGATION (4th ed. 2004) (providing guidance to federal judges facing "complex" cases).

¹⁰⁶ See generally Stempel, *supra* note 32 (assessing criteria used to measure complexity); Tidmarsh, *supra* note 31 (developing a more formal and inclusive definition of complexity).

¹⁰⁷ See Heuer & Penrod, *supra* note 33, at 33; Schuck, *supra* note 33, at 5.

¹⁰⁸ See *infra* Part II.C.

¹⁰⁹ The author spent three years working in the Office of the Co-Prosecutors at the ECCC as an Assistant Prosecutor. He assisted in investigating and drafting the indictments and served on the trial team in the case of Kaing Guek Eav alias Duch. Prior to working at the ECCC, he spent more than five years litigating complex commercial matters before federal district courts in the United States.

¹¹⁰ See Damaska, *supra* note 23, at 341; Higgins, *supra* note 17, at 246 (describing the complexity of the Milošević trial in terms of hearing days, witnesses, and trial exhibits).

¹¹¹ See *Defence Counsel-Pre-Trial Legal Aid Policy*, U.N. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, 22 (May 1, 2006), available at http://www.icty.org/x/file/About/Defence/pretrial_payment_

describe the cases they have decided, they often provide statistics about the number of trial days, trial witnesses, and trial exhibits, suggesting that they view these as indicators of complexity.¹¹² Sometimes the judges even make this connection explicitly.¹¹³

Finally, the use of these variables is supported by the empirical evidence. For example, Professors Heuer and Penrod found that the length of the trial, the number of exhibits, and the number of witnesses were all good indicators of perceived complexity in their study.¹¹⁴ Similarly, Professor Heise's study found that trial length¹¹⁵ and number of witnesses¹¹⁶ correlated significantly with perceptions of trial complexity. Professor Heise did not have data on the number of exhibits and so could not draw any conclusions about the influence of exhibits on perceived complexity. In short, these three factors generally correlate with subjective evaluations of trial complexity. Therefore, they can act as a proxy for trial complexity.¹¹⁷ Thus, these three variables were chosen to create a measure of the complexity of ICTY trials (hereafter called a Complexity Score).

There are potential criticisms of this approach. One is that two of the variables, the number of witnesses and exhibits, primarily measure factual

2006_en.doc (last visited Oct. 9, 2012) (using the number and type of witnesses and documents that are expected to be used at trial to determine the expected complexity of the case).

¹¹² See e.g., *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, 4 (Aug. 2, 2001) (“In all, the Trial Chamber heard more than 110 witnesses over 98 days of trial and viewed in the vicinity of 1,000 exhibits.”). See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Judgment, Annex II, 1, 15–16, 19–26 (June 10, 2010); *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 11 (Mar. 14, 2012); *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-1-T, Judgment Summary, 8, (April 26, 2012); Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Introduction, (Sept. 30, 1946); *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgment and Sentence 1 n.1 (Dec. 18, 2008).

¹¹³ See e.g., *Prosecutor v. Jadranko Prlić*, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Čorić and Berislav Pušić, Judgment Summary, May 29, 2013, available at http://icty.org/x/cases/prlic/tjug/en/130529_summary_en.pdf (“During the trial, which closed on 2 March 2011, the Chamber admitted close to 10,000 exhibits into evidence and heard 145 Prosecution witnesses, six of whom were expert witnesses, as well as 61 Defence witnesses, seven of whom were expert witnesses. The Judgment is a 2,629-page-long document divided into six volumes, including four annexes and partially dissenting or separate opinions by Judge Trechsel and myself, all of which illustrates the complexity of this case.”).

¹¹⁴ See Heuer & Penrod, *supra* note 33, at 36 tbl.2.

¹¹⁵ See Heise, *supra* note 33, at 352–53, 355–56, 359, 361–62.

¹¹⁶ *Id.* at tbl.7 & tbl.8 (finding that the number of expert witnesses affected attorney and judicial perceptions of trial complexity).

¹¹⁷ *Cf. id.* at 362 (noting that “[a]lthough it is possible to conclude that trial length itself may make a trial more complicated, a more likely explanation is that complicated criminal trials take longer to litigate”); Heuer & Penrod, *supra* note 33, at 36 tbl.2 (finding that the quantity of information presented at trial was the best predictor of subjective measures of trial complexity).

complexity, and that as a result the Complexity Score does not do a good job of capturing legal or participant complexity. There are a number of reasons why I believe this criticism is misplaced. First, the three factors used in the Complexity Score are the factors that are most often identified as measures of complexity by those who deal with this issue regularly,¹¹⁸ and there is often value in a “wisdom of the crowd” approach.¹¹⁹ Anyone who thinks that these are not the appropriate variables to measure complexity would have to explain why professionals who deal with these trials think they are appropriate. Second, our subjective assessment of trial complexity is driven largely by factual complexity.¹²⁰ If factual complexity is the largest component of overall trial complexity, then it makes sense that a measure that tries to duplicate subjective measures of trial complexity would use variables that are associated with factual complexity.

Third, it is simply not true that the components of the Complexity Score only measure factual complexity. For one thing, empirical studies of complexity have shown that, particularly in complex cases, the various forms of complexity are often inter-related, and factual complexity cannot be neatly separated from the other forms of complexity.¹²¹ For example, complex legal questions like whether an individual had the requisite specific intent for genocide or whether a widespread or systematic attack against a civilian population has occurred tend to require large numbers of witnesses and exhibits to prove. In other words, the number of witnesses and exhibits used in the ICTY’s trials is driven, in part, by their legal complexity. Thus, measuring the number of witnesses and exhibits does capture information about the legal complexity of the case.

The Complexity Score is also clearly affected by participant complexity. In multi-accused cases, each accused typically calls his or her own witnesses and offers his or her own exhibits.¹²² As a result, the number of exhibits, witnesses,

¹¹⁸ See *supra* notes 109–112.

¹¹⁹ See Jan Lorenz et al., *How Social Influence Can Undermine the Wisdom of the Crowd Effect*, 108 PROC. NAT’L ACAD. SCI. 9020, 9020 (2011) (describing the “wisdom of the crowd” effect, where the “aggregate of many people’s estimates tends to be closer to the true value than all of the separate individual or even expert guesses.”).

¹²⁰ See Heuer & Penrod, *supra* note 33 (noting studies that show factual complexity is the largest driver of subjective evaluations of overall complexity).

¹²¹ See Heise, *supra* note 33.

¹²² See Commc’n Serv. of the Int’l Criminal Tribunal for the former Yugoslavia, *Case Information Sheet for Prlić et al.*, ICTY, available at http://icty.org/x/cases/prlic/cis/en/cis_prlic_al_en.pdf (last visited Sept. 27, 2013), at 4 (noting the number of witnesses called and exhibits offered by each individual defendant); Case

and trial days in multi-accused trials is a function of participant complexity in addition to legal and factual complexity. But the Complexity Score also picks up other aspects of participant complexity. For example, to the extent that self-represented accused deliberately try to obstruct the court or draw out the hearings for political purposes,¹²³ this will show up as additional witnesses, exhibits, and trial days. In short, there is good reason to believe that the components of the Complexity Score do capture legal, participant, and factual complexity.

A different criticism might be that other variables should be added to the composite Complexity Score. For example, one might expect that increased factual and legal complexity would result in longer trial judgments as the judges wrestle with complex facts and difficult legal decisions.¹²⁴ Indeed, there is a strong correlation between the Complexity Scores in this Article and the length of the trial judgments, suggesting that it too has some validity as a proxy for trial complexity.¹²⁵ One could probably identify other variables that could be measured and would correlate with complexity. However, it is not clear that adding more factors would improve the measure.

Adding additional components has costs. For the Complexity Score to be useful as a means of comparing across courts it has to be based on components that can be readily measured across courts. Detailed statistical information about courts is hard to come by, so a simpler measure is better because it makes it easier to create Complexity Scores for other institutions. For this reason, the Complexity Score is composed only of the three components that the majority of experts usually cite as measures of complexity, even though one can find other measureable criteria that also correlate with trial complexity.

Indeed, for some purposes, it might be necessary to have an even simpler measure of complexity because not all courts report all three components. For example, it is extremely difficult to find data on all three components of the Complexity Score for domestic criminal trials. If complexity has to be measured using a single variable, the number of trial days is the best choice as

Information Sheet for Popović et al., ICTY, *available at* http://icty.org/x/cases/popovic/cis/en/cis_popovic_al_en.pdf (last visited Sept. 27, 2013), at 5 (same).

¹²³ See Turner, *supra* note 29, at 530.

¹²⁴ The Judgment Summary in *Prlić* explicitly claims that the length of the judgment is an indicator of the complexity of the case. See *Prosecutor v. Jadranko Prlić*, *supra* note 113.

¹²⁵ The correlation coefficient for the Complexity Scores and trial judgment length (measured in pages) was $r = .72$. This result was highly significant, with $p \leq .001$.

it is the most commonly reported information, and at least one study has found it to have the strongest correlation with perceived trial complexity.¹²⁶ Moreover, measuring trial complexity with just the number of trial days should produce results quite similar to the Complexity Scores because of the high degree of correlation among the components of the Complexity Score.¹²⁷ Nevertheless, this Article will use all three factors to create a Complexity Score where possible because most observers of international trials agree that trial complexity is best measured using all three components.

II. THE COMPLEXITY OF THE ICTY'S TRIALS

This Section measures the complexity of the ICTY's trials. Unless otherwise indicated, data comes from a database about the ICTY created by the Author. More information about the database and how it was created can be found in an earlier work about the ICTY's indictments.¹²⁸ For this Article, the database was updated to include data through June 17, 2013.

A. *The Cases*

The ICTY indicted 161 accused, and these were divided into 79 cases. However, 17 cases ended without a trial.¹²⁹ In 59 cases, first trials have now been completed. The trials of Ratko Mladić, Radovan Karadžić, and Goran Hadžić are still underway. These three trials represent the last cases the ICTY will try before it shuts down. As a result, the ICTY will eventually make a determination of guilt or innocence in 62 cases, involving 112 accused. This makes the ICTY the largest international criminal tribunal ever, at least by total number of accused.¹³⁰

Summary statistics about the ICTY's cases are presented below in Table 1. The median ICTY case involved nine counts against the accused, including four war crimes charges, five charges of crimes against humanity (CAH), and

¹²⁶ See Heise, *supra* note 33.

¹²⁷ See *infra* Table 3.

¹²⁸ See Ford, *supra* note 71, Section VII (describing the creation of the database). A copy of the data is available upon request from the author.

¹²⁹ Three cases were withdrawn by the prosecutor because the accused were not of sufficient importance, seven cases were transferred to domestic courts, and seven cases ended with the death of the accused prior to entry of a judgment.

¹³⁰ Its closest competitor, the International Criminal Tribunal for Rwanda ("ICTR"), has tried only 74 accused. See *Status of Cases*, INT'L CRIM. TRIB. FOR RWANDA, <http://www.unictr.org/Cases/tabid/204/Default.aspx> (last visited June 17, 2013).

zero genocide charges.¹³¹ The number of counts, the kinds of counts, and the use of different modes of liability are consistent with what one would expect from an international criminal court that was principally interested in determining the guilt or innocence of the accused through fair trials.¹³²

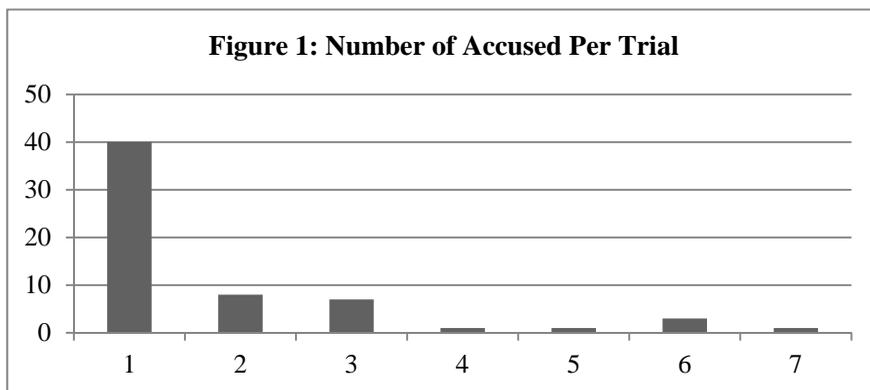
	Mean	Median	S.D.	Min.	Max.
Total Counts	13.3	9	11.9	1	66
War Crimes Counts	7.7	4	8.9	0	49
CAH Counts	5.2	5	4.7	0	24
Genocide Counts	.4	0	.78	0	2
JCE*	.4	-	.5	-	-
Superior Responsibility*	.7	-	.4	-	-
Planning*	.6	-	.5	-	-
Ordering*	.7	-	.5	-	-
Instigating*	.6	-	.5	-	-
Aiding and Abetting*	.7	-	.5	-	-
Direct Perpetration*	.4	-	.5	-	-

* represents a dummy variable

Forty of the ICTY's trials were single-accused trials; the remaining 22 were multi-accused trials, but these multi-accused trials involved 71 accused. Thus while the majority of the trials have been single accused trials, the majority of the accused (63%) will be tried in multi-accused trials. Indeed, large multi-accused trials have been a hallmark of the ICTY's practice. See Figure 1 below.

¹³¹ Given that the averages for most of these figures are skewed by a few outliers, the median values are more representative of the cases that came before the ICTY.

¹³² See generally Ford, *supra* note 71 (finding that charging and sentencing practices in the ICTY are generally comparable to the range of practices considered fair in domestic criminal justice systems).



One thing this data shows is that the cases that have come before the ICTY are not like the cases that come before domestic criminal courts in the United States. For one thing, there are significantly more multi-accused trials at the ICTY. In the U.S., most accused are tried alone.¹³³ The number of counts in the average ICTY case (13.3) is also significantly higher than in the United States. According to one study, nearly half of all felony defendants in the U.S. are charged with just a single crime.¹³⁴

The cases heard by international criminal courts also involve much more serious allegations of criminality than the vast majority of cases heard by domestic criminal courts. For example, the average case at the ICTY involves allegations of the unlawful killing of more than 100 individuals, often in conjunction with the forced transfer or unlawful imprisonment of thousands of people.¹³⁵ By contrast, only 0.6% of felony defendants in U.S. courts are charged with even a single murder, and only 23% of felony defendants are charged with any sort of violent offense.¹³⁶ Only the most serious mass atrocity trials that take place in domestic systems can compare with the seriousness of even the average ICTY case.¹³⁷

¹³³ For example, in federal district courts in the United States, the average number of accused per criminal case is only 1.3. THOMAS F. HOGAN, ADMIN. OFFICE OF THE UNITED STATES CTS., ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at tbl.D (2012). If one compares the number of criminal cases opened in 2011 (78,440) with the number of new criminal defendants in that same period (102,931), one can surmise that there were approximately 1.3 defendants per case. *Id.* at 192, 195.

¹³⁴ See THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at App. tbl.1 (2010) (noting that 48% of felony defendants had no other charges pending against them).

¹³⁵ See Ford, *supra* note 71, at 104.

¹³⁶ See COHEN & KYCKELHAHN *supra* note 134, at tbl.1.

¹³⁷ See Ford, *supra* note 71, at 104.

B. Computing Complexity Scores

Summary statistics for the number of trial days, trial witnesses, and trial exhibits needed for the ICTY's trials are shown below in Table 2. These figures are based on the 41 cases that have had full trials so far. It excludes those cases that were dropped prior to trial,¹³⁸ the 18 trials that were resolved with guilty pleas,¹³⁹ and the three trials that are still underway.

	Mean	Median	S.D.	Min.	Max.
Trial Days	176	150	102	10	465
Trial Witnesses	121	104	63	14	315
Trial Exhibits	2,022	1351	2015	37	9,876

To construct a Complexity Score for each trial, the value of each of the three complexity components in that trial was converted to a ratio of that value to the highest value of that variable in any case that had a full trial. The three ratios were then added together to produce a Complexity Score. The scores have a theoretical range of 0 to 3, but the actual scores range from .07 to 2.63.¹⁴⁰ The three components of the Complexity Score are highly correlated, as indicated below in Table 3.

	Trial Days	Trial Witnesses	Trial Exhibits
Trial Days	1		
Trial Witnesses	.7877***	1	
Trial Exhibits	.8819***	.6553***	1

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

¹³⁸ See *supra* note 129.

¹³⁹ In cases where the accused pled guilty, either no evidence was presented or only limited evidence was presented.

¹⁴⁰ See *infra* Appendix.

C. Conclusion

The Complexity Scores allow us to make comparisons between ICTY cases. A list of the ICTY's completed trials, ordered from least to most complex, is attached as an Appendix at the end of this Article. This list shows that there has been significant variability in complexity across the ICTY's trials. *Furundžija*, the simplest ICTY trial, involved only 14 witnesses and 37 exhibits and lasted only 10 trial days. It had a Complexity Score of 0.07. The most complex full trial, *Prlić et al.*, involved 199 witnesses, 9876 exhibits, and took 465 trial days to complete. It had a Complexity Score of 2.63. Thus, the *Prlić et al.* case was nearly 40 times more complex than the *Furundžija* case.

The average ICTY trial took 176 trial days, and involved 121 witnesses and 2022 exhibits. It would produce a Complexity Score of 0.97. By comparison, the median ICTY trial took 150 days, and involved 104 witnesses, and 1,351 exhibits. It would produce a Complexity Score of only 0.77. The median score is lower because outliers (like *Prlić et al.* and *Popović et al.*) push up the average values.

Collectively, in these 41 cases, more than 4900 witnesses have testified and more than 80,000 exhibits have been entered into the record over the course of more than 7200 trial days. The trial judgments, if added together, cover nearly 18,000 pages, while the appeal judgments cover more than 6000 pages. In addition to the judgments, there have been more than 15,000 other judicial decisions, and 22,000 filings by the parties, covering a dizzying array of topics.¹⁴¹ There are also more than 20,000 official documents of various other sorts in the ICTY Court Records database.¹⁴² Along the way, the prosecution

¹⁴¹ This information was obtained by searching in the ICTY Court Records database located at www.ICR.ICTY.org. Under "Select Name of Accused," the option for "All Accused" was chosen. The results were then narrowed down to only those in English to avoid picking up duplicates of the same document in multiple languages. Judicial decisions are those documents that appear under the category of "Decisions and Orders." Filings by the parties are a combination of the results that appear under the categories of "Briefs," "Responses," and "Motions." The searches were conducted on July 7, 2013. The searches were then repeated in French and Bosnian/Serbian/Croatian. The results were substantially lower for both other languages, suggesting that significant numbers of documents are available only in English.

¹⁴² This figure combines the English language documents that were found under the categories of "Notices," "Transcripts," "Witness-Related Materials," "Correspondence," "Warrants and Subpoenas," and "Other" on the ICTY Court Records Database. More than 10,000 of these documents are transcripts of court proceedings. The search was conducted on July 7, 2013.

has cataloged, analyzed and disclosed millions of pages of documents to the defense teams.¹⁴³

III. COMPARATIVE COMPLEXITY

This section compares the ICTY to both other international criminal courts and to domestic criminal courts. While each of the modern international criminal courts (ICTY, ICTR, SCSL, ECCC, and ICC) is unique in certain ways, they are all also quite similar. They have jurisdiction over very similar substantive crimes, have similar structures, and often have similar procedural rules. Accordingly, it is quite common to make comparisons between international tribunals,¹⁴⁴ and most writers seem to accept that the courts are similar enough for such comparisons to be useful.

But, can the ICTY be compared to domestic courts? There are greater differences between the ICTY and domestic courts than between the ICTY and other international criminal courts. For example, international criminal law is substantively different from the vast majority of domestic criminal law;¹⁴⁵ trials at international criminal tribunals generally deal with crimes that are much graver than the average domestic trial;¹⁴⁶ the purposes of international criminal trials differ from those of domestic criminal trials;¹⁴⁷ and international criminal tribunals have their own procedural and evidentiary rules,¹⁴⁸ although these may be quite similar to the rules that govern trials in the United States.¹⁴⁹

There are differences, but the differences are not so dramatic that domestic and international trials are fundamentally different undertakings. Indeed, trials

¹⁴³ See Higgins, *supra* note 17, at 246 (noting that the prosecution disclosed more than 1.2 million pages of documents to the defense just during the trial of Slobodan Milošević).

¹⁴⁴ See generally Catherine Cisse, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 103 (1997) (comparing the ICTY and ICTR); Gideon Boas, *Comparing the ICTY and the ICC: Some Procedural and Substantive Issues*, 47 *NETHERLANDS INT'L L. REV.* 267 (2000) (comparing the ICTY and ICC); Donna E. Arzt, *Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 *ANNALS AM. ACAD. POL. & SOC. SCI.* 226 (2006) (comparing the ICTY and SCSL).

¹⁴⁵ While there are similarities between domestic and international criminal law, the key international crimes (war crimes, crimes against humanity, and genocide) were created by international law and have no direct analogs in most domestic legal systems. See CRYER ET AL., *supra* note 83, at 8–12.

¹⁴⁶ See *supra* notes 135–137 and accompanying text.

¹⁴⁷ See *supra* Part I.A.

¹⁴⁸ See, e.g., ICTY, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.49, (May 22, 2013), http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf [hereinafter ICTY Rules].

¹⁴⁹ See *infra* Part IV.A.

proceed quite similarly before international tribunals and domestic courts in the United States. The prosecution has to prove the accused's guilt beyond a reasonable doubt, and this is done by presenting evidence in the form of witness testimony and exhibits to the trier of fact.¹⁵⁰ The accused, in turn, has the right to examine the evidence presented against him and to present his own evidence.¹⁵¹ On the whole, domestic criminal trials and international criminal trials are more similar than different.

This similarity is unsurprising given that fair trial guarantees are a key component of international human rights law.¹⁵² Thus trials in both domestic and international courts must comply with the same minimum standards. There is still room for differences across legal systems, but the fundamentals should be quite similar. Indeed, the fundamentals are similar enough that, once the trials have been adjusted for their relative complexity, a comparison between the two systems tells us something useful about international criminal justice.¹⁵³

Having said that, the trials at the ICTY look most like trials in common law countries like the United States, Canada, Britain, or Australia.¹⁵⁴ It may be that the differences between the ICTY's trials and trials in jurisdictions that do not use a common law system would stretch the comparison too far. For example, it is not clear how one should account for the work done during the investigation phase in countries that use an investigating judge.¹⁵⁵ Thus, this Article will focus primarily on a comparison between the ICTY's trials and trials that take place at other international tribunals or in courts in the United States.

¹⁵⁰ ICTY Rules, *supra* note 148, at R. 87(A). The trier of fact is often different, however. At the ICTY, the trier of fact is a Trial Chamber, composed of three judges. In many criminal trials in the United States the trier of fact is a jury. *See* Kwon, *supra* note 1, at 363.

¹⁵¹ ICTY Rules, *supra* note 148, at R. 85. The overwhelming majority of accused at international criminal courts are male.

¹⁵² *See, e.g.*, International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, 999 U.N.T.S. 14668.

¹⁵³ *Cf.* Shany, *supra* note 26, at 249 (suggesting that it is appropriate to compare international and national courts that share "comparable functions"); Wippman, *supra* note 14, at 862.

¹⁵⁴ While the overall ICTY system is a blend of common and civil law features, the common law features are more prominent, particularly at the trial phase. *See* Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and Its Progeny, Due Process Deficit*, 4 INT'L CRIM. L. REV. 243 (2004); Kwon, *supra* note 1, at 363.

¹⁵⁵ The work of the investigative judge may well shorten the resulting trials by establishing much of the evidence that the parties would otherwise be required to present to the court, but would not show up in the variables used to compute the Complexity Score. *Cf.* Fairlie, *supra* note 154, at 248–51 (comparing the pre-trial phases in the common law and civil law systems).

A. *Complexity of Trials at Other International Courts*

This Part uses the methodology described above to compute Complexity Scores for a selection of trials at other international tribunals. For example, the ICTR's first case, the trial of Jean-Paul Akayesu, took place over 60 trial days and involved the use of 41 witnesses and 155 exhibits.¹⁵⁶ This results in a Complexity Score of only 0.27. Thus, the *Akayesu* trial would rank somewhere between the simplest and the second simplest trial the ICTY undertook. The case against Kaing Guek Eav alias Duch at the Extraordinary Chambers in the Courts of Cambodia (ECCC) involved 55 witnesses, approximately 1000 exhibits, and took 77 trial days.¹⁵⁷ This results in a Complexity Score of 0.44. If the *Duch* trial had taken place at the ICTY, it would have been one of the simpler cases, falling somewhere between the case against Pavle Strugar and the case against Milorad Krnojelac. It would have been significantly less complex than the median ICTY case.

The *Lubanga* trial at the International Criminal Court (ICC) involved 204 trial days, 67 witnesses, and 1373 exhibits.¹⁵⁸ This implies a Complexity Score of 0.79. This is almost exactly the same as the complexity of the median ICTY trial. In contrast, the trial of Charles Taylor, the former head of state of Liberia, at the Special Court for Sierra Leone (SCSL) took 420 trial days and resulted in the calling of 115 witnesses, and the entry into the record of 1522 exhibits.¹⁵⁹ This equates to a Complexity Score of 1.37, which would place the *Taylor* trial in the top quarter of ICTY trials in terms of its complexity.

Not even the trial of the Nazi leaders, however, can compare to the most complicated ICTY trials. The trial of the major German war criminals by the IMT was a massive undertaking.¹⁶⁰ There were 403 "sessions" of the Tribunal.

¹⁵⁶ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, 24, 28 (Sept. 2, 1998), <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

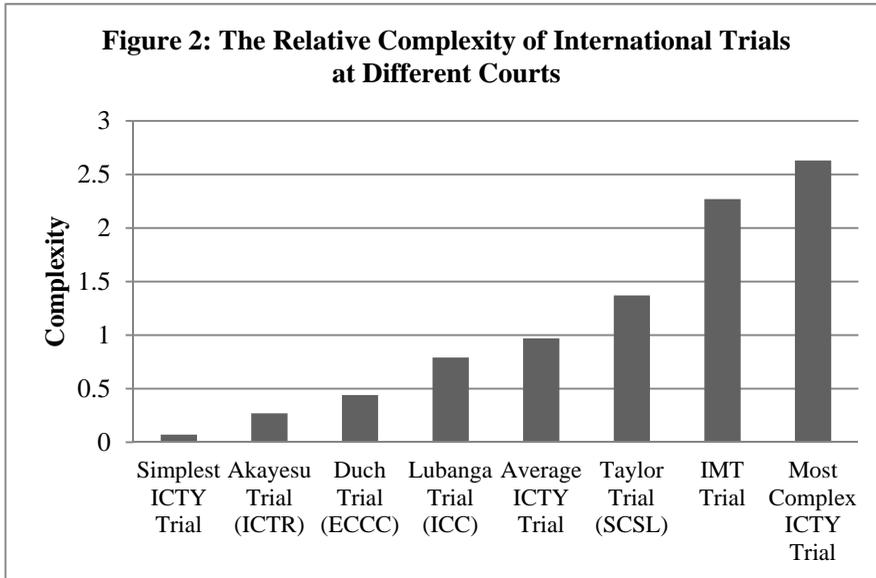
¹⁵⁷ *Kaing Guek Eav*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC), <http://www.eccc.gov.kh/en/indicted-person/kaing-guek-eav> (last visited Oct. 10, 2012) (identifying the number of trial days and witnesses); Prosecutor v. *Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, para 56 (2010), available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf (identifying the number of trial exhibits).

¹⁵⁸ See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 11 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

¹⁵⁹ See Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-1-T, Judgment Summary, 8 (Apr. 26, 2011), http://www.worldcourts.com/scsl/eng/decisions/2012.12.17_Prosecutor_v_Taylor.pdf.

¹⁶⁰ See International Military Tribunal, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 Nov. 1945–1 Oct. 1946 (1947). The introduction to the judgment contains a description of the trial, from which the figures necessary for calculating its complexity have been drawn.

259 witnesses gave evidence, including 143 who gave evidence in written form. Finally, approximately 5800 exhibits were entered into the record.¹⁶¹ This indicates a Complexity Score for the IMT trial of 2.27. Yet, had the ICTY heard the case against the major German war criminals, it would have been only the third most complex case the ICTY has heard. If the complexity scores for all the ICTY cases to date are added up, the ICTY's trials have been more than 17 times as complex as the case tried at the IMT. And this multiple will only get higher as the remaining ICTY cases are completed. Figure 2 shows the relative complexity of trials at a number of international criminal courts.



B. Complexity of Domestic Criminal Trials

This Article's methodology also allows for a comparison of the complexity of international trials and domestic trials in the United States. According to the Administrative Office of the United States Courts, there were 8453 criminal cases completed in the US federal district courts during the period September

¹⁶¹ While the Judgment of the IMT is somewhat vague about the number of exhibits (it refers only to "several thousands of exhibits"), other sources give more exact figures. See LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT 12 (2001) (noting that there were approximately 4000 documents and 1800 photographs that were entered into the record as exhibits).

2010 to September 2011.¹⁶² Of these trials, 5779 (68%) lasted one day or less. Only 37—less than half of one percent—lasted more than 20 days.¹⁶³ No data was available on the average number of witnesses or exhibits introduced during those trials, making it impossible to calculate Complexity Scores for them. Nevertheless, it is clear that the average federal trial is nowhere near as complex as the cases that come before the ICTY.

A dataset does exist that contains data on all three components of the Complexity Score for a sample of domestic criminal prosecutions. It was compiled by Professors Larry Heuer and Steven Penrod in the early 1990s and consists of information on 160 random criminal trials conducted at both the federal and state level in 33 states.¹⁶⁴ Among the information they collected was the number of witnesses who testified, the trial length,¹⁶⁵ and the number of exhibits entered into evidence.¹⁶⁶ Complexity Scores were calculated for the cases in their dataset.

The least complex case in Heuer and Penrod's dataset has a Complexity Score of 0.007, making it ten times less complicated than the least complicated ICTY case. The median trial in their dataset had a Complexity Score of 0.028, while the average case had a Complexity Score of 0.043. Both of these scores are lower than the least complex ICTY case. Only the most complicated case in their dataset had a Complexity Score higher than the least complex ICTY case, with a score of 0.20. However, this case was still significantly less complex than even the second least complicated ICTY case, and nearly five times less complex than the average ICTY trial. Other datasets on domestic criminal trials yield similar results.¹⁶⁷ As can be seen from Figure 3 below, the

¹⁶² See HOGAN, *supra* note 133, at tbl. T-2.

¹⁶³ *Id.*

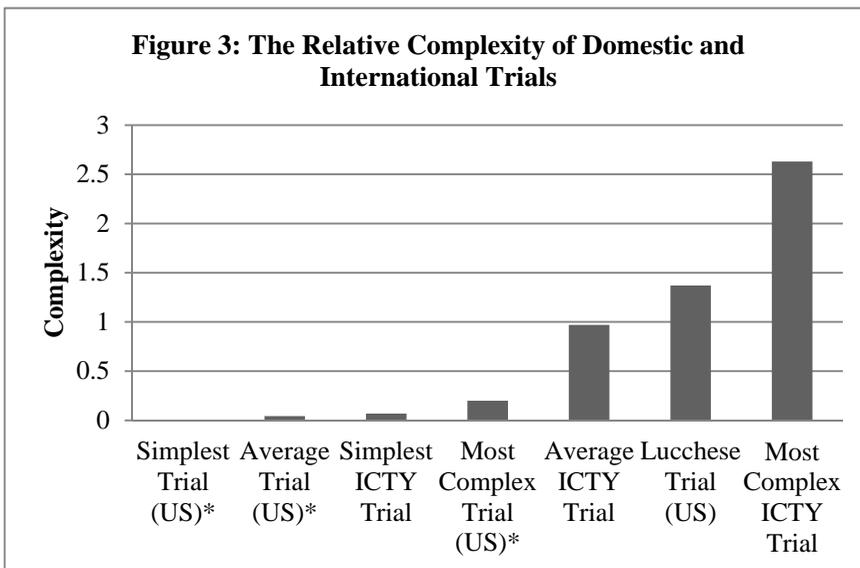
¹⁶⁴ Heuer & Penrod, *supra* note 33, at 34–35.

¹⁶⁵ They collected the information on trial length in days and hours and then converted them to trial hours at the rate of four hours per day for criminal trials. Since trial days were used rather than trial hours in this study, trial hours were converted back to days using the same conversion rate. *Id.* at tbl. 1 (explanatory note). This may not be an entirely accurate comparison as the ICTY defaults to five courtroom hours per day and, in practice, often exceeds this. See U.N. Secretary-General, *Budget for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, for the biennium 2012–2013*, 31, U.N. Doc. A/66/386 (Sept. 29, 2011) [hereinafter *Budget for the International Tribunal*].

¹⁶⁶ Heuer & Penrod, *supra* note 33, at tbl.1.

¹⁶⁷ According to one study, the average non-capital murder trial in North Carolina in the early 1990s took 3.8 days. See PHILIP J. COOK & DONNA SLAWSON, *THE COST OF PROCESSING MURDER CASES IN NORTH CAROLINA* tbl. 6 (1993). The study did not contain data on the number of exhibits or witnesses, but when comparing the average length of a murder trial in that study to the average length of an ICTY trial, the ICTY case takes 45 times longer to present than the murder trial. See also *infra* Part IV.C.2.e–g.

average trial in the Heuer and Penrod dataset barely even registers when placed on the same chart as the ICTY's cases.¹⁶⁸



Only the most complex U.S. criminal trials can compare to ICTY cases. For example, one of the longest and most complex criminal trials in U.S. history was the 1988 trial of the Lucchese crime family.¹⁶⁹ It lasted nearly 21 months and involved 90 witnesses and 850 exhibits; the 20 defendants were accused of multiple acts of selling and distributing cocaine, credit card fraud, gambling, and loansharking that took place over a nine year period.¹⁷⁰ It rates a complexity score of 1.09, which makes it slightly more complex than the average ICTY trial, but there have been 15 cases at the ICTY that were more complex, including 2 that were more than twice as complex. While it is axiomatic that international criminal trials are long and complex, this is true in a way that virtually nobody who has not actually tried one understands.

¹⁶⁸ The categories with an asterisk in Figure 3 are based on the data from the Heuer and Penrod dataset. See Heuer & Penrod, *supra* note 33.

¹⁶⁹ Jesus Rangel, *All 20 Acquitted in Jersey Mob Case*, N.Y. TIMES, Aug. 27, 1988, at A111, 20. The article describes the Lucchese crime family trial as “[o]ne of the longest criminal trials in the United States.” *Id.* See also Paul Richter, *Longest Mob Trial Ends in Acquittals*, L.A. TIMES, Aug. 27, 1988, at 1, 20 (describing the trial as “the longest federal criminal trial in the nation’s history”).

¹⁷⁰ See Rangel, *supra* note 169.

C. Conclusion

The complexity of the cases that have come before the ICTY is mind boggling. The ICTY has completed 41 full trials so far, and will complete another three. The completed cases have a combined Complexity Score of more than 39, and this will only go up as the remaining trials are completed. Moreover, there are a number of reasons to believe that this measure undercounts the real complexity of the ICTY's work substantially.

For example, the measure does not include the complexity of cases where the accused died prior to a judgment. That includes the case of Slobodan Milošević, who died just months before the close of his case. Mr. Milošević's trial was arguably the most complex case the ICTY undertook and would have added significantly to its overall complexity, if it were included.¹⁷¹ At the time of his death, the judges had heard 295 witnesses, received about 5000 exhibits, and sat for 466 trial days, and the trial was not over yet.¹⁷² This corresponds to a Complexity Score of 2.44, which is only slightly less complex than *Prlić et al.* and *Popović et al.*, the ICTY's two most complex trials. If the Milošević trial is included in the calculation, the total complexity of the ICTY's cases rises to slightly more than 42.

Nor does it include the complexity of those cases that resulted in guilty pleas or cases where the accused were transferred back to domestic courts in the former Yugoslavia for trial. Eighteen cases have been resolved by guilty pleas, and some of them involved serious allegations against high-ranking officials.¹⁷³ In addition, seven cases were transferred back to domestic courts in the former Yugoslavia after an investigation and issuance of an indictment by the ICTY. While none of those cases resulted in a full trial at the ICTY and thus did not contribute to the court's overall Complexity Score, investigating the alleged crimes, preparing the indictments, and getting the cases ready for trial involved significant work.

The calculation also excludes the contempt cases the ICTY has litigated. It appears that, on average, they have been significantly less complex than the cases involving allegations of violations of international criminal law, but there

¹⁷¹ See Higgins, *supra* note 17, at 241–49 (describing the complexity of the trial).

¹⁷² Damaska, *supra* note 16, at 340–41.

¹⁷³ The most significant guilty pleas came from Biljana Plavšić, who had been the co-President of the Bosnian Serb Republic (later the Republika Srpska), and Milan Babić, the President of the Republic of Serbian Krajina.

have been a number of them.¹⁷⁴ In addition, 17 investigative dossiers, involving 43 individuals, were compiled and transferred to national courts. These dossiers contained the results of investigations by the Office of the Prosecutor (OTP) that produced evidence of crimes but for which an ICTY indictment was never confirmed.¹⁷⁵ It took investigative resources to compile these dossiers, but that expenditure of resources is not captured in the court's overall Complexity Score.

As a result of excluding these factors from the calculation, the estimate of the ICTY's overall complexity used in this Article is inherently conservative and there are good reasons to believe that the true complexity of the ICTY's work is significantly higher. Even just based on the cases that resulted in full trials, however, the complexity of the ICTY's work is enormous. It will ultimately try the equivalent of more than 17 IMTs. To put it another way, the 41 trials the ICTY has already completed are roughly equivalent to 1400 of the median cases described in Heuer and Penrod's dataset.¹⁷⁶ As far as I am aware, the trials completed by the ICTY thus far are the most complex set of related criminal cases that have ever been tried by any court anywhere.¹⁷⁷

IV. EFFICIENCY

It is undeniable that the ICTY's trials have been enormously complex, but the ICTY has also been very expensive. The tribunal will cost more than \$2.7 billion over its lifetime.¹⁷⁸ Once adjusted for inflation, that means the international community will ultimately pay the equivalent of \$3.08 billion in

¹⁷⁴ See, e.g., U.N. Secretary-General, *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 15 November 2011 to 22 May 2012*, 30–34, U.N. Doc. No. S/2012/354 (May 23, 2012) (by Judge Theodor Meron).

¹⁷⁵ Budget for the International Tribunal, *supra* note 165, at 14.

¹⁷⁶ See *supra* notes 164–168 and accompanying text.

¹⁷⁷ While I have not measured the complexity of all the cases at the ICTR, the ICTR has indicted fewer accused and they appear to have been, in general, less complex indictments and trials. The ICC may eventually overtake the ICTY in terms of the total complexity of the cases it tries. However, this prospect would require the equivalent of another 45 trials of the same complexity as the *Lubanga* trial. I am unaware of any domestic courts that have tried a comparatively complex set of related criminal cases.

¹⁷⁸ This was calculated using the methodology described in Ford, *supra* note 3, at 989–90. The figure reported in my earlier article was updated to include data from the 2010, 2011 and 2012 United Nations General Assembly resolutions authorizing appropriations for the ICTY's budget. See G.A. Res. 65/253, 3, U.N. Doc. 65/253 (Dec. 24, 2010); G.A. Res. 66/239, 10, U.N. Doc. A/66/239 (Dec. 24, 2011); G.A. Res. 67/243, 10, U.N. Doc. A/RES/67/243 (Dec. 24, 2012). The calculation was also updated to reflect an estimated termination of the ICTY's operations in 2017 rather than 2014. This reflects the fact that the timeline for the ICTY's completion has slipped once again. See *supra* note 4.

2012 U.S. dollars.¹⁷⁹ The question then becomes: did we receive a good return on our investment?

One way to answer that question is to compare the relative efficiency of different courts.¹⁸⁰ Efficiency is often defined as the ratio of work performed to energy supplied.¹⁸¹ The principal work performed by international tribunals is to try those accused of having committed serious violations of international criminal law.¹⁸² The energy supplied to them is the funding that makes those trials possible. Accordingly, one way to define the efficiency of courts is as the ratio of trial complexity to cost. Of course, this is not the only way one could think about the efficiency of international criminal courts,¹⁸³ but it is a relevant measure of their efficiency, given that trials are supposed to be their principal output.

Using this model, the overall efficiency of the ICTY is 1.37×10^{-8} units of trial complexity per 2012 U.S. dollar. This ratio is based on the total complexity of the ICTY's trials¹⁸⁴ divided by the inflation adjusted total cost of the ICTY. Another way to think of this is that each point of trial complexity cost approximately \$73 million to produce. If we can calculate a similar value for domestic criminal cases or for another international criminal court, we could compare their relative efficiency and draw some conclusions about which was more efficient.

¹⁷⁹ Past inflation was accounted for using the Consumer Price Index produced by the U.S. Department of Labor, Bureau of Labor Statistics. Future inflation was assumed to be 2% per year.

¹⁸⁰ See Shany, *supra* note 26, at 237 (suggesting the study of the relative efficiency of international courts); Wippman, *supra* note 14, at 862 (noting that one way to determine whether the ICTY provides “value for money” is to compare the cost of criminal trials in national legal systems with those at the ICTY).

¹⁸¹ See OXFORD ENGLISH DICTIONARY, *supra* note 46, at 84 (“[t]he ratio of useful work performed to the total energy expended”); RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY, *supra* note 46, at 419 (“the ratio of the work done by a machine to the energy supplied to it”); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 46, at 570 (“[t]he ratio of the effective or useful output to the total input in any system”).

¹⁸² See *supra* note 1.

¹⁸³ For example, one might also calculate efficiency as the total gravity of the crimes adjudicated divided by the cost of those trials. This would be a different but also valid way of thinking about efficiency.

¹⁸⁴ For this purpose, the complexity of the 41 full trials that have been completed plus the partial trial of Slobodan Milošević were included. This yields a total complexity of 42.13. That score does not include any estimation of the complexity of the three trials that are currently underway or any estimation of the complexity associated with guilty pleas, cases transferred to domestic systems, or the contempt proceedings. See *supra* notes 172–175.

A. *Is the ICTY Efficient?*

Before we begin comparing the ICTY to other courts, however, we must address a legitimate concern—that trial complexity at the ICTY is driven not by complex law and facts, but rather by loose procedural rules and judges that are unwilling to rein in the excesses of the parties. For example, the measures used to calculate complexity in the Article could be artificially inflated if the parties were permitted to introduce large amounts of irrelevant evidence. If this were the case, the complexity scores of ICTY trials would represent not the complexity of the underlying cases, but rather the inefficiency of the ICTY's procedures and the propensity for the parties to waste time and judicial resources. This would, if true, undermine attempts to measure the court's efficiency. After all, it makes no sense to think of a court's efficiency as the complexity of its trials divided by their cost if you conclude that the trials could be completed in half the time and with fewer witnesses and exhibits but for time wasting by the parties.

ICTY complexity does not, however, appear to be driven by loose procedure or lax judges. First, the ICTY uses procedural and evidentiary rules to limit unnecessary evidence that are quite similar to those used in the United States. The Federal Rules of Evidence govern the admission of evidence before federal courts,¹⁸⁵ and the vast majority of U.S. states follow very similar rules.¹⁸⁶ As a result, the Federal Rules of Evidence can be thought of as the basic rules that govern the admission of evidence before the majority of courts in the United States. Therefore, one way to evaluate the ICTY's procedures is to compare them to the analogous provisions of the Federal Rules of Evidence.

The ICTY may only admit relevant evidence that it deems to have probative value,¹⁸⁷ and the court may exclude otherwise relevant evidence if its probative value is substantially outweighed by the need to ensure a fair trial.¹⁸⁸ These rules are functionally quite similar to Rules 401, 402, and 403 of the Federal Rules of Evidence. Moreover, the ICTY's judges are admonished to “exercise control over the mode and order of interrogating witnesses and presenting evidence so as to . . . avoid needless consumption of time.”¹⁸⁹ This

¹⁸⁵ See Fed. R. Evid. 101(a).

¹⁸⁶ See GEORGE FISHER, EVIDENCE 2-3 (3d ed. 2013) (noting that 44 states “have adopted the Federal Rules [of Evidence] in whole or great part . . .”).

¹⁸⁷ ICTY Rules, *supra* note 148, at R. 89(C).

¹⁸⁸ *Id.* at R. 89(D).

¹⁸⁹ *Id.* at R. 90(F).

language is very similar to Federal Rule of Evidence 611.¹⁹⁰ Cross-examination at the ICTY is “limited to the subject matter of the evidence-in-chief and matters affecting the credibility of the witness,”¹⁹¹ which is very similar to Rule 611(b).¹⁹² Moreover, ICTY judges have the authority to limit the time given for the prosecution’s case in chief and “the number of witnesses the Prosecutor may call.”¹⁹³ Judges in the United States have similar authority.¹⁹⁴ In short, the ICTY has rules designed to control the trials and prevent the parties from presenting needless, irrelevant, or cumulative evidence that are very similar to those used in the United States.

Despite these tools, the ICTY has come under enormous and continuing pressure to reduce the time and cost of the trials.¹⁹⁵ This pressure has forced the court to adopt some procedures that go considerably farther than simply overseeing the trial to ensure the parties do not waste time with needless or duplicative evidence.¹⁹⁶ For example, pursuant to Rule 73 *bis*, judges at the ICTY may, “in the interest of a fair and expeditious trial, invite the Prosecutor to reduce the number of counts charged in the indictment.”¹⁹⁷ If that does not work, the Court may simply tell the Prosecutor to limit the number of counts.¹⁹⁸ In addition, the Trial Chamber can fix the number of crime sites or incidents about which the Prosecution may introduce evidence.¹⁹⁹ The aim of these rules is to expedite pre-trial and trial proceedings.²⁰⁰ Judges do use Rule 73 *bis* to limit the scope of the prosecution’s case, a fact the Prosecutor has

¹⁹⁰ Fed. R. Evid. 611(a). The last three clauses of Rule 403 may serve a similar purpose. *See* Fed. R. Evid. 403 (giving the court discretion to exclude relevant evidence if it would result in “undue delay, wasting time, or needlessly presenting cumulative evidence.”)

¹⁹¹ ICTY Rules, *supra* note 148, at R. 90(G) & 90(H).

¹⁹² Fed. R. Evid. 611(b).

¹⁹³ ICTY Rules, *supra* note 148, at R. 73 *bis* (C).

¹⁹⁴ *Who Does What, Witnesses: Qs & As*, FEDERAL JUDICIAL CENTER (Aug. 23, 2013), available at <http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu5a&page=/federal/courts.nsf/page/311?opendocument> (last visited Aug. 23, 2013) (“[T]he judge often sets limits on the number of witnesses and the amount of time for testimony in a particular case. . . . The goal in setting limits is to ensure that each party has sufficient time to make his or her case, but without redundancy.”).

¹⁹⁵ *See* Kwon, *supra* note 1, at 361 (“[T]he judges of the Tribunal have found themselves faced with the daunting task of determining how to change the existing procedures to be able to dispose of increasingly complex cases in a shorter period of time, while still respecting to the highest degree the rights of the accused to a fair trial.”).

¹⁹⁶ *See* Maximo Langer & Joseph W. Doherty, *Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms*, 36 YALE J. INT’L L. 241, 245–51 (2011) (describing changes made to the Rules of Procedure and Evidence).

¹⁹⁷ ICTY Rules, *supra* note 148, at R. 73 *bis* (D).

¹⁹⁸ *See id.* at R. 73 *bis* (E).

¹⁹⁹ *Id.* at R. 73 *bis* (D).

²⁰⁰ *See* Higgins, *supra* note 17, at 240.

vehemently protested as an intrusion on her authority to decide which crimes and acts to charge.²⁰¹ In at least one case, the Prosecutor argued that the court's use of Rule 73 *bis* denied the Prosecution a fair trial by forcing her to present a case that was not "reasonably representative" of the accused's criminality.²⁰²

The ICTY has also adopted a system, contained in Rules 92 *bis* and 92 *ter*, where written witness statements can be admitted in lieu of live testimony. These rules provide for the use of witness statements rather than live testimony when the evidence goes to "proof of a matter other than the acts and conduct of the accused as charged in the indictment," and when "other witnesses will give or have given oral testimony of similar facts."²⁰³ This rule was adopted to reduce the length of the trials, but it has been the subject of considerable criticism. Patricia Wald, who was Chief Judge of the United States Court of Appeal for the District of Columbia Circuit before becoming a judge at the ICTY, considered this practice to be the "most troublesome" aspect of the ICTY's proceedings.²⁰⁴ "To permit critical material to be admitted without the ability to directly view and question the witness goes to the heart of the process and threatens to squander the ICTY's most precious asset—its reputation for fairness and truth seeking."²⁰⁵ Defense counsel at the ICTY share Judge Wald's concern that the reliance on witness statements over live witnesses and cross-examination sacrifices fairness for expediency.²⁰⁶ Not everyone agrees with these criticisms, of course.²⁰⁷

Over time, the ICTY has adopted rules that permit judges to limit the size and scope of the prosecution's case and permit the use of witness statements instead of live witnesses in certain circumstances. These rules were designed to reduce the length and cost of the trials, but they are in tension with the court's duty to ensure that its trials are both "fair and expeditious."²⁰⁸ Indeed, at

²⁰¹ See *id.* at 251–57.

²⁰² *Id.* at 254. But see Kwon, *supra* note 1, at 372–75 (arguing that Rule 73 *bis* gives the Trial Chamber much needed authority to "compel the prosecution to focus the evidence presented on the most important counts and charges in the indictment").

²⁰³ ICTY Rules, *supra* note 148, at R. 92 *bis*.

²⁰⁴ Wald, *supra* note 16, at 473.

²⁰⁵ *Id.*

²⁰⁶ See Turner, *supra* note 29, at 558–60.

²⁰⁷ See Kwon, *supra* note 1, at 365 (arguing that the procedures on the use of witness statements "enhanced" the ability of the judges to manage the trials while simultaneously being "fully consistent with principles of justice and fair trial rights").

²⁰⁸ *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, Updated

different times and on different issues, prosecutors, judges and defense counsel have all argued that in changing the rules in ways that promote expediency the ICTY has risked making the trials less fair.²⁰⁹ Academics have also argued that, after years of pressure to speed up the trials, the ICTY now places too much emphasis on expediency at the expense of fairness.²¹⁰

In short, the ICTY has been under immense pressure to reduce its trial times. It has tried to achieve that goal by making various changes to the rules that favor expediency over other goals, including fairness. These far-reaching changes, however, have not reduced the length of the trials,²¹¹ and it may not be possible to favor expediency much further and still have fair trials. Yet, the trials remain immensely complicated. The most reasonable way to interpret this evidence is that there is not a lot of time-wasting going on, and that there is little additional complexity that can be wrung out of the trials through procedural changes without profoundly undermining their fairness. In effect, dividing the total complexity of the ICTY's trials by their cost does tell us something meaningful about their efficiency.

Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 20(1), (Sept. 2009), *available at* www.icty.org/sections/legallibrary/statuteofthetribunal.

²⁰⁹ See *supra* notes 202 & 205. There is significant disagreement about this, however. See generally Kwon, *supra* note 1 (rejecting arguments that there are due process concerns arising out of the changes made to the Rules of Procedure and Evidence).

²¹⁰ See Heidi L. Hansberry, *Too Much of a Good Thing in Lubanga and Haradinaj: The Danger of Expediency in International Criminal Trials*, 9 ATROCITY CRIMES LITIGATION YEAR-IN-REVIEW 357, 357 (2011) (arguing that “judges tend to consider any reason for delay as unjustified and to be avoided at all costs in order to promote trial expediency” and that this has undermined the protection of witnesses at the ICTY and ICC); Michele Caianiello, *Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, 36 N.C. J. INT'L L. & COM. REG. 287, 316–17 (2011) (expressing concern that the evidentiary rules at the ICTY were amended solely for purposes of expediency and not because of any legal deficiency in the previous rules); Charles Chernor Jalloh, *Does Living by the Sword Mean Dying by the Sword?*, 117 PENN. ST. L. REV. 707, 751–52 (2013) (arguing that over its lifetime the ICTY's decision-making with respect to assignment of defense counsel shifted from an emphasis on the rights of defendants to an emphasis on expediency); Anna Petrig & Fausto Pocar, *Case Referral to National Jurisdictions: A Key Component of the ICTY Completion Strategy*, 45 CRIM. L. BULL. 1, 1, 12 (2009) (worrying that referral decisions were driven largely by concerns of expediency in ways that undermined the legitimacy of those decisions); Daniel Tillay, *The Non-Rules of Evidence in the Ad Hoc Tribunals*, 45 INT'L LAWYER 695, 715–16 (2011) (worrying that rules about the presentation of evidence were changed largely for reasons of expediency without due regard for their effect on fairness).

²¹¹ See Langer & Doherty, *supra* note 196 (concluding that the procedural changes made at the ICTY failed to meaningfully effect the length of the trials).

B. Comparison to the SCSL

Comparing the efficiency of the ICTY to the efficiency of other international criminal courts is possible because international criminal courts tend to be structured similarly, have similar purposes, and conduct similar trials.²¹² In addition, the total cost of an international criminal court is pretty close to the total cost of the justice they produce because their budgets cover the investigation phase, pre-trial phase (including costs of pre-trial detention), trial phase (including costs of prosecution and defense), and appeals.²¹³ The only thing missing from their budgets is the cost of enforcing their sentences.²¹⁴ Thus, comparing the overall efficiency of one international criminal court to the overall efficiency of another international criminal court comes quite close to an apples-to-apples comparison.

This Article focuses on the SCSL as a comparator because the SCSL has had a small number of trials that have all been completed. Thus, most of the data necessary to calculate its efficiency is available and relatively easy to collect. Complexity Scores for the SCSL's four trials are presented below in Table 4. The SCSL's trials have had a total complexity of 4.27. Not surprisingly, the trial of Charles Taylor was the most complex trial, although the RUF trial was not far behind. Both of these trials were more complex than the average ICTY trial. The CDF and AFRC trials were roughly on par with the median ICTY trial. Unlike the ICTY, the SCSL did not have any relatively simple trials, probably because the SCSL focused on prosecuting leaders who bore the greatest responsibility for the conflict.²¹⁵

²¹² See *supra* note 144 and accompanying text.

²¹³ See generally Wippman, *supra* note 14.

²¹⁴ All of the international criminal courts rely on states to enforce the sentences in their own criminal justice systems. See, e.g., *Member States Cooperation*, U.N. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://icty.org/sections/LegalLibrary/MemberStatesCooperation> (indicating that 16 countries have entered into agreements for the enforcement of ICTY sentences).

²¹⁵ See Statute of the Special Court for Sierra Leone art. 1(1), Jan. 16, 2002, 2178 U.N.T.S. 145, available at <http://www.rscsl.org/Documents/scsl-statute.pdf> (limiting the personal jurisdiction of the SCSL to those "who bear the greatest responsibility for serious violations of international humanitarian law" including "those leaders who, in committing such crimes, have threatened the establishment and implementation of the peace process in Sierra Leone"). In contrast, the ICTY initially charged a fairly large number of low-ranking perpetrators. See Ford, *supra* note 71, at 71–72.

	Trial Days	Trial Witnesses	Trial Exhibits	Complexity Score
CDF Trial ²¹⁶	162	119	147	0.74
RUF Trial ²¹⁷	308	171	395	1.25
AFRC Trial ²¹⁸	176	147	119	0.86
Taylor Trial ²¹⁹	420	115	1522	1.42
			Total	4.27

The total cost of the SCSL over its lifetime is estimated to be \$314 million.²²⁰ Once adjusted for inflation, that works out to \$352 million in 2012 U.S. dollars.²²¹ This gives the SCSL an overall efficiency of 1.21×10^{-8} units of complexity per 2012 U.S. dollar, which means that it cost about \$82.5 million to produce each point of trial complexity at the SCSL. In contrast, it costs only \$73 million to produce each point of complexity at the ICTY, indicating that the SCSL has been 12% less efficient than the ICTY so far. Moreover, the ICTY's efficiency is likely to increase over time.

All of the SCSL's trials have been completed and are included in its overall efficiency rating, which is based on an estimate of its total lifetime cost. The ICTY's efficiency rating is also based on an estimate of its total lifetime cost, but it excludes the complexity of the three trials that have not yet been

²¹⁶ See *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, Annex F at 21, (Spec. Ct. for Sierra Leone, Trial Chambers I, Oct. 9, 2007), available at <http://www.refworld.org/docid/484417252.html>. The CDF trial judgment does not contain a direct statement of the number of exhibits entered into the record during the trial. However, a review of the evidence used to support the judgment indicates that the case was heavily skewed towards witness testimony. Exhibits are rarely mentioned. The highest numbered exhibit mentioned in the judgment is Exhibit 147. *See id.* 98.

²¹⁷ See *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Judgment Summary, Annex B at 32–36 (Mar. 2, 2009), available at <http://www.refworld.org/docid/4ae9b31c2.html>.

²¹⁸ See *Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-T, Sentencing Judgment, Annex A at 58–63, (Spec. Ct. for Sierra Leone, Trial Chambers II, June 20, 2007), available at <http://www.refworld.org/docid/467fba742>.

²¹⁹ See *supra* note 159.

²²⁰ This cost was calculated by updating the methodology from Ford, *supra* note 3, at 993–95. It now appears that the SCSL will complete its operations at the end of 2013 with the issuance of the Appeal Judgment in the case against Charles Taylor. See Press Release, Special Court for Sierra Leone, Outreach and Public Affairs Office, Oral Hearings Conclude in Taylor Appeal, Judges Will Now Retire to Deliberate and Consider Judgment, (Jan. 23, 2013), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=pTTabQ5Bm2U%3d&tabid=53>.

²²¹ Past inflation was accounted for using the Consumer Price Index produced by the U.S. Department of Labor, Bureau of Labor Statistics. Future inflation was assumed to be 2% per year.

completed. In other words, the SCSL's efficiency rating is not likely to change between now and when the SCSL is formally shut down. The ICTY's efficiency rating is likely to increase as the last three trials are completed. Ultimately, the ICTY will probably be more efficient than the current figures suggest.

In addition, the SCSL's efficiency rating is a rating for all of the court's work. In contrast, the ICTY's efficiency rating excludes a significant part of the court's work. For example, it does not include the significant resources expended in investigating and preparing for trial those cases that ended in a guilty plea. Nor does it include the trial complexity of the contempt cases or the investigative complexity of those cases and dossiers that were transferred to domestic courts in the former Yugoslavia. If there were a way to measure and account for this work, the ICTY's efficiency rating would be even better.

The SCSL has been much cheaper than the ICTY, but that is because the Special Court has tried far fewer cases, not because it has been more efficient at trying cases. Ultimately, the SCSL has not lived up to the hopes of some of those who championed hybrid tribunals as an efficient alternative to the ad hoc tribunals.²²² Of course, efficiency was not the only supposed benefit of hybrid tribunals like the SCSL,²²³ but it was certainly one of their key selling points.²²⁴

²²² See Higonnet, *supra* note 10, at 348 (arguing that hybrid courts would be a "cost-efficient, high impact" alternative to the ICTY and ICTR); *id.* at 385–86 (arguing that the SCSL was "more efficient" than the ICTY); Mathias Holvoet & Paul de Hert, *International Criminal Law as Global Law: An Assessment of the Hybrid Tribunals*, 17 TILBURG L. REV. 228, 232 (2012) (describing the SCSL as "effective" and "relatively cheap"); David M. Crane, *Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecution Strategy for an International Tribunal after Third World Armed Conflicts*, 37 CASE. W. RES. J. INT'L L. 1, 2 (2005) (arguing that the SCSL was "efficiently and effectively" delivering international criminal justice); Kelli Mundell, *Capturing Women's Experiences of Conflict: Transitional Justice in Sierra Leone*, 15 MICH. ST. J. INT'L L. 85, 94 (2007) (noting that the SCSL was supposed to be more cost effective and efficient than the ICTY); see generally J. Peter Pham, *A Viable Model for International Criminal Justice: The Special Court for Sierra Leone*, 19 N.Y. INT'L L. REV. 37, 89–90 (2006).

²²³ See, e.g., Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 306–08 (2003) (noting that hybrid tribunals may also enhance perceived legitimacy, perceived independence of the judiciary, accountability, and the creation of regional human rights norms, among other things).

²²⁴ See Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L L. 395, 446–51 (2011); *id.* at 446 ("The SCSL was specifically designed to improve on the trial efficiency of the ICTR and ICTY.").

C. Comparison to Domestic Criminal Trials

Two issues make comparing the ICTY to domestic criminal justice systems more difficult than comparing the ICTY to the SCSL. First, very little systematic information is available on the cost and length of domestic criminal trials, either in the United States or elsewhere.²²⁵ There are numerous newspaper reports, policy papers, and scholarly articles that contain information on the cost of individual parts of particular complex cases, particularly in the context of the death penalty,²²⁶ but the information in these sources is often incomplete. There have been few systematic studies of the cost and length of trials, and those that do exist tend to have small sample sizes. As a result, the information that is available is far from comprehensive.

The second problem stems from the fact that what cost data on domestic systems is available is usually not data on the total cost of the process from start to finish. Whereas the budgets of the international criminal courts contain data on all costs of a case except for enforcement of the sentences, data on domestic systems is often related to just one part of the total cost of the cases. The information most commonly reported relates to investigation costs,

²²⁵ See Wippman, *supra* note 14, at 863 (stating that neither federal nor state agencies routinely calculate the per trial cost and length of criminal trials).

²²⁶ See COOK & SLAWSON, *supra* note 167, at 54 (reporting figures for the cost of murder trials in North Carolina in 1991 and 1992); *The Cost of Justice*, L.A. TIMES, Sept. 13, 1998, at 2 (containing cost figures for a number of famous trials in the Los Angeles area); Russell Gold, *Counties Struggle with High Cost of Prosecuting Death-Penalty Cases* WALL ST. J., Jan. 9, 2002, at B1 (describing cost of death-penalty cases); ELI BRAUN, OHIO JUST. & POL'Y CTR., \$42,000 FOR A COURTHOUSE HOUR: THE COST OF PROCESSING ADULT CRIMINAL CASES IN HAMILTON COUNTY, OHIO, (2010), available at <http://www.ohiojpc.org/text/publications/court%20cost.pdf>; NATASHA MINSKER, ACLU OF N. CAL., THE HIDDEN DEATH TAX: THE SECRET COSTS OF SEEKING EXECUTION IN CALIFORNIA (Claire Cooper & Elise Barducci eds., 2008), available at https://www.deathpenalty.org/downloads/The_Hidden_Death_Tax.pdf; JOHN ROMAN, ET AL., URB. INST. JUST. POL'Y CENTER, THE COST OF THE DEATH PENALTY IN MARYLAND, (2008), available at: http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf; JOHN G. MORGAN, COMPTROLLER OF THE TREASURY (TENN), TENNESSEE'S DEATH PENALTY: COSTS AND CONSEQUENCES (2004); Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End The California Legislature's Multi-Billion Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S72-75 (2011); Terance D. Miethe, *Estimates of Time Spent in Capital and Non-Capital Murder Cases: A Statistical Analysis of Survey Data from Clark County Defense Attorneys* (Feb. 21, 2012) available at <http://www.deathpenaltyinfo.org/documents/ClarkNVCostReport.pdf>; STATE OF KANSAS, LEGISLATIVE DIVISION OF POST AUDIT, COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS (2003), available at <http://www.kslpa.org/docs/reports/04pa03a.pdf>; Aliza B. Kaplan, *Oregon's Death Penalty: The Practical Reality*, 17 LEWIS & CLARK L. REV. 1, 32-49 (2013); JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES—JUDICIAL CONFERENCE OF THE UNITED STATES—UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES (2010), available at <http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/FDPC2010.pdf>; Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985).

prosecution costs, defense costs and direct trial costs, but even then, it is relatively rare to find data on all four of these components for the same trial.

Moreover, the ICTY has paid for a number of services for which most domestic criminal courts do not pay. For example, a substantial portion of the ICTY's budget was spent on translation and interpretation services.²²⁷ While domestic courts do sometimes need such services, it is extremely unlikely that they make up as large a component of costs in domestic systems as they did at the ICTY. Similarly, the ICTY has spent a lot of money bringing witnesses from the former Yugoslavia to testify in The Hague and on housing them during their stay in the Netherlands.²²⁸ It has also in some cases paid to have witnesses and their families relocated to different countries.²²⁹ Most domestic courts do not have to pay such high costs to obtain the testimony of witnesses. In addition, the ICTY has funded legacy costs, startup costs, and the costs of mentoring domestic criminal justice systems in the former Yugoslavia out of its budget.²³⁰ None of these costs have any obvious analog in most domestic court systems.

In effect, to achieve a fair comparison between the ICTY and domestic systems, any figures would have to include the same components for both systems (i.e., either both the domestic and the ICTY figures include costs of investigations or neither does, etc.). This means that we need to be able to calculate the cost of the various components of the ICTY's trials.

1. Breaking Down the ICTY Budget by Functions

The ICTY's budgets do not directly list the amount or percentage of the budget spent on particular functions.²³¹ Rather, the budgets indicate how much has been spent on different organs within the court (e.g., the Registry or the Office of the Prosecutor) and on different activities (e.g., travel costs of witnesses, rent on premises, and cost of expert witnesses).²³² To solve this

²²⁷ See *Translation and Interpretation*, About the ICTY, <http://www.icty.org/sid/165> (last visited Sept. 23, 2014).

²²⁸ See VICTIMS AND WITNESSES SECTION, INFORMATION BOOKLET FOR ICTY WITNESSES (2007) at 14, available at http://www.icty.org/x/file/About/Registry/Witnesses/witnesses_booklet_en.pdf.

²²⁹ *Id.* at 22.

²³⁰ Richard Dickner & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, in HUMAN RIGHTS WATCH WORLD REPORT 2004, available at <http://www.hrw.org/news/2004/01/26/beyond-hague-challenges-international-justice> & <http://www.hrw.org/legacy/wr2k4/download/10.pdf>.

²³¹ *The Cost of Justice*, About the ICTY, <http://www.icty.org/sid/325> (last visited Sept. 23, 2014).

²³² U.N. Secretary-General, *Second Performance Report on the Budget of the International Tribunal for the Former Yugoslavia for the Biennium 2012–2013*, 2–3 tbls. 1 & 2, U.N. Doc. A/68/582 (Nov. 11, 2013).

problem, the Author reviewed the ICTY’s budget documents. For each year’s budget, each item in the budget was assigned to a particular function. Funding for the various organs was apportioned according to the number of personnel in that organ working on different functions.²³³ In that fashion, it was possible to approximate the cost of each of the ICTY’s functions over time.²³⁴ The result appears below as Table 5.

	Cost in 2012 dollars	Percentage
OTP Investigations	\$ 350,268,000	11.37%
OTP Prosecutions	\$203,761,000	6.62%
OTP Appeals	\$146,206,000	4.75%
OTP Other	\$81,186,000	2.64%
Direct Trial Costs	\$359,698,000	11.68%
Direct Appeal Costs	\$126,589,000	4.11%
Witness & Victim Costs	\$100,205,000	3.25%
Interpretation & Translation	\$339,603,000	11.03%
Legal Aid – Trials	\$253,883,000	8.24%
Legal Aid – Appeals	\$82,419,000	2.68%
Detention	\$143,613,000	4.66%
Security	\$212,305,000	6.89%
Registry Support Functions	\$616,355,000	20.01%
Startup Costs	\$42,501,000	1.38%
Legacy	\$15,597,000	0.51%
Excluded	\$5,537,000	0.18%

The largest component of the ICTY’s cost is for functions that support the judicial activities of the court. These are labeled “Registry Support Functions”

²³³ For example, the cost of the OTP was apportioned to investigation, prosecutions, appeals, and other tasks, depending on the number of personnel assigned to the Prosecution Division, Investigation Division, Appeals Division, or Immediate Office of the Prosecutor. The cost of the Registry was similarly apportioned between support tasks and tasks directly associated with trials and appeals depending on the number of personnel assigned to the various divisions within the Registry.

²³⁴ This process was relatively easy for the ICTY budgets covering the years 1994 to 2005, as the publicly available budget documents for those years were very thorough. It was more difficult for the years 2006 to 2013 as the ICTY’s budgets have become less detailed over time. Nevertheless, it was possible to calculate the cost of the various functions of the ICTY with reasonable certainty, even for the latter years. Estimates for the years 2014–2017 are the result of educated guesses about the ways in which ICTY spending will change as the trials are completed and the focus shifts to appeals. The data that form the basis for Table 5 are available from the Author upon request.

in the Table. This category covers any non-judicial cost that is not covered by any other category. It includes the cost of support personnel within the Registry (e.g., personnel working on procurement, travel, human resources, finance, building maintenance, information technology, etc.). It also covers the cost of operating the court buildings, including the rent on the premises, as well as utilities, equipment, furniture and supplies. Startup costs, including construction work necessary to convert the main building into a court, equipment purchased to get the court off the ground, and some personnel costs in the court's first year of existence, were calculated separately.

The security category includes the cost of the guards that ensure the safety of the court buildings, the staff, and the public. It does not include the cost of the detention center, which is calculated separately. The ICTY operates its own detention facility to house accused that are in pre-trial detention. The detention category includes the cost of rent and guards for the detention center, as well as medical care for the detainees.

In its early years, the ICTY Prosecutor also acted as the Prosecutor for the ICTR. As a result, some personnel within the ICTY's OTP were working on ICTR cases. This cost has been separated and labeled "Excluded" in the table above. In its later years, the court also dedicated some resources to preparing its records and archives for the closure of the court, so that the information would not be lost when the court ceased to function. That cost has been labeled "Legacy." All told, these functions, which are not directly related to judicial activities, account for about 34% of the court's total budget over the years 1993-2017.

The remaining 66% of the court's budget was spent on things that were directly related to the judicial process. The largest component of this is direct trial costs. This category includes the cost of the judges and their clerks, plus the cost of the personnel that staff the courtroom when it is in session (ushers, court reporters, etc.). This category also includes the majority of the judicial costs of pre-trial practice.²³⁵ The direct appeals category includes the cost of the judges of the Appeals Chamber plus their clerks.²³⁶

²³⁵ There was no way to extract the pre-trial costs from the trial costs based on the information in the ICTY's budgets.

²³⁶ Costs were apportioned between direct trial costs and direct appeal costs by taking total judicial costs (essentially the sum of the cost of the Chambers, the Judicial Support Division of the Registry plus any items related to judicial costs) and then prorating those costs based upon the number of judges who were assigned to trials versus appeals in any given year.

The witnesses and victims category includes the cost of arranging for the witnesses to appear before the tribunal. The court is located in The Hague, but most of the witnesses live in the former Yugoslavia. Thus, the ICTY bore considerable costs associated with bringing the witnesses before the court.²³⁷ The largest portion of this cost was travel costs, although it also included compensation for lost wages, medical costs, the cost of relocating some witnesses and their families, and the cost of the Victim and Witness Support Section within the Registry.

Interpretation and translation was a mammoth task at the ICTY.²³⁸ The court worked in two official languages, English and French.²³⁹ In addition, the majority of the witnesses and most of the documents were in a mix of languages spoken in the former Yugoslavia, including Bosnian, Serbian, Croat and Albanian.²⁴⁰ The result was that interpreters and translators were crucial at all stages of the court's work from the investigation stage, when translators produced English translations of documents for the investigators, to the courtroom, where interpreters provided English and French language interpretation of the testimony of the witnesses. Those costs are collected together in the interpretation and translation category.

The various costs of the Office of the Prosecutor ("OTP") were put in one of four categories. The largest of these categories is the cost of investigations. This category includes the cost of the personnel involved in the investigations, their travel costs and various special costs associated with the investigations, like the cost of exhumations of mass graves. The OTP prosecutions cost includes pre-trial costs and the cost of the trials. It is largely the sum of the costs of the personnel in the Prosecution Division of the OTP plus miscellaneous costs associated with the trials, including travel costs, expert witness costs, and costs for temporary assistance provided during peak trial times. The OTP appeals cost represents the cost of those personnel assigned to the Appeals Division of the OTP. The "other" category includes a number of OTP functions that were not directly related to the investigations and trials, including personnel assigned to manage the OTP, train and mentor personnel in domestic criminal systems in the former Yugoslavia, and provide political analysis of events in the former Yugoslavia.

²³⁷ See Wippman, *supra* note 14, at 877–78.

²³⁸ *Id.* at 877.

²³⁹ *Id.*

²⁴⁰ *Id.*

The last two categories relate to legal aid. They capture the cost of providing defense to indigent and partially indigent accused throughout the lifecycle of the court. In theory, accused are expected to pay for their own defense. In practice, the vast majority of accused have depended on legal aid, and a defense team costs approximately \$360,000 per year per accused.²⁴¹ Legal aid includes payments to the defense counsel as well as the cost of Office of Legal Aid within the Registry. The costs were divided between those associated with pre-trial and trial functions, and those associated with appeals.²⁴²

2. *Domestic Criminal Trials*

With this information, it is now possible to make comparisons between the cost of the ICTY and the cost of criminal trials in the United States. Given the scarcity of data, comparisons will be made to both the small number of systematic studies that exist as well as a number of individual cases for which cost data is available. The latter category tends to feature high-profile cases because these are the type of cases for which there is sufficient public interest for journalists to investigate and report on trial costs.

a. *Prosecuting Timothy McVeigh*

On April 19, 1995, Timothy McVeigh and his accomplice, Terry Lynn Nichols, set off a bomb outside the Murrah Building in Oklahoma City, Oklahoma, that killed 168 people and injured numerous more.²⁴³ The cost of investigating and prosecuting Timothy McVeigh for the Oklahoma City bombing was \$82.5 million between 1995 and 1998.²⁴⁴ After adjusting for inflation, the investigation and prosecution cost \$124.3 million in 2012 U.S. dollars.²⁴⁵ Defense costs for McVeigh were more than \$15 million.²⁴⁶ This

²⁴¹ See U.N. Secretary-General, *Comprehensive Report on the Progress made by the International Criminal Tribunal for the Former Yugoslavia in Reforming its Legal Aid System*, 31, U.N. Doc. A/58/288 (Aug. 12, 2003).

²⁴² *Id.* 31, Annex I. As with direct trial and appeal costs, the total amount of legal aid was apportioned between trials and appeals based on the number of judges assigned to each of those functions in any given year.

²⁴³ See *United States v. McVeigh*, 153 F.3d 1166, 1176 (10th Cir. 1998).

²⁴⁴ See Wippman, *supra* note 14, at 862; Howard Pankratz, *Bomb Trials Costs \$82.5 Million*, denverpost.com, Nov. 3, 1998, available at <http://extras.denverpost.com/bomb/bomb1103.htm> [hereinafter *Bomb Trials*].

²⁴⁵ See *Bomb Trials*, *supra* note 244 (noting that the FBI had 2,592 agents investigating the case in 1995 and that this number decreased rapidly over time). The 2012 cost was assumed to accrue in 1995 because it is clear that the vast majority of resources were expended during that year. (Author's Calculation).

translates into \$21.5 million in 2012 U.S. dollars.²⁴⁷ McVeigh's trial took 23 days for the presentation of evidence during the guilt phase.²⁴⁸ The penalty phase took another 7 days.²⁴⁹ As a result, the entire trial took 30 trial days to present.

Using this information, we can calculate what the equivalent portion of an ICTY trial of the same length would cost.²⁵⁰ The investigation and prosecution portion of a 30-day trial at the ICTY would cost \$2.2 million in 2012 U.S. dollars.²⁵¹ The legal aid portion of a 30-day trial at the ICTY would cost \$990,000 in 2012 U.S. dollars. Investigation and prosecution costs were more than fifty times higher for the McVeigh trial than an equivalent ICTY case. Defense costs were more than twenty times higher. No matter how one slices it, the cost of the McVeigh trial appears to have outweighed the cost of a similar trial at the ICTY by more than an order of magnitude.²⁵²

The U.S. government was keenly aware of the high cost of the McVeigh trial. The Department of Justice acknowledged that it was the largest amount it had ever spent on an investigation and prosecution, but defended the expenditure on the grounds that bombing was "the largest terrorist act in the history of the United States" up until then.²⁵³ The spokesperson for the Department of Justice stated that "[w]e believe the cost is justified and that the taxpayers got their money's worth."²⁵⁴

²⁴⁶ *Bomb Trials*, *supra* note 244.

²⁴⁷ Defense costs were assumed to accrue in 1997, the year of the trial. (Author's Calculation).

²⁴⁸ *McVeigh*, 153 F.3d at 1177.

²⁴⁹ *Id.* at 1179. The presentation of evidence for the penalty phase began on June 4, 1997, and ended on June 12, 1997. *Id.* Assuming that the court did not hear evidence over the weekend, this means that the penalty phase took seven days.

²⁵⁰ This calculation is based solely on trial days, rather than all of the components of the Complexity Score, because information is not readily available about the number of witnesses and exhibits presented during the McVeigh trial. If a complexity calculation is to be based on just one of the components, the number of trial days is the best component to use. *See Heise*, *supra* note 33, at 360.

²⁵¹ This was calculated as follows: equivalent cost = (number of trial days in McVeigh trial)÷(total number of trial days in all ICTY trials)×(total cost of ICTY)×(percentage of cost attributable to prosecutions + percentage of cost attributable to investigations). With the actual figures it becomes: (30)÷(7691)×(3079726477)×(0.0662+0.1137). Subsequent calculations of the equivalent cost of an ICTY trial use an analogous methodology.

²⁵² Professor Wippman suggests that the McVeigh trial was unusually short given its complexity due to tactical decisions made by the prosecution and defense to call a smaller number of witnesses and use fewer exhibits than either side had initially intended. *See Wippman*, *supra* note 14, at 873. Even if the prosecution and defense had chosen differently and thus doubled the length of the trial, the basic conclusion about the trial's efficiency would remain the same.

²⁵³ *Bomb Trials*, *supra* note 244.

²⁵⁴ *Id.*

b. Defending Jeffrey Skilling

In May 2006, former Enron CEO Jeffrey K. Skilling was convicted of conspiracy, securities fraud, making false representations to auditors, and insider trading in connection with the 2001 collapse of Enron Corporation.²⁵⁵ Total defense costs for Mr. Skilling were estimated at more than \$65 million.²⁵⁶ This included the costs of his five trial attorneys, a team of associates and paralegals who helped prepare the defense, jury consultants, graphics specialists, and expert witnesses.²⁵⁷ Adjusted for inflation, that means the defense spent \$74 million in 2012 U.S. dollars. The trial took 60 trial days to complete²⁵⁸ and involved “some of the most sophisticated business deals ever to make their way into a courtroom.”²⁵⁹ In comparison, the defense costs of a 60-day trial at the ICTY would be approximately \$1.98 million in 2012 U.S. dollars. Again, the ICTY costs are much smaller. In this case, they are more than thirty times smaller.

c. Prosecuting O.J. Simpson

On October 3, 1995, O.J. Simpson was acquitted of the murders of his ex-wife Nicole Brown Simpson and Ronald Lyle Goldman.²⁶⁰ There is sufficient information to calculate a Complexity Score for the trial.²⁶¹ The O.J. Simpson trial has a Complexity Score of 0.79. This means the Simpson trial was about as complex as the median ICTY trial. The trial reportedly cost Los Angeles County about \$9 million for the direct trial costs and the prosecution costs.²⁶² This would be the equivalent of \$13.6 million in 2012 U.S. dollars. By comparison, the direct trial costs and prosecution costs of a case with a Complexity Score of 0.79 would cost \$10.6 million in 2012 U.S. dollars at the ICTY. Once again, it appears the ICTY trial would be cheaper, but the margin is much smaller.

²⁵⁵ See *United States v. Jeffrey K. Skilling*, 638 F.3d 480, 481 (5th Cir. 2011).

²⁵⁶ See Carrie Johnson, *After the Enron Trial, Defense Firm is Stuck With the Tab* WASH. POST, June 16, 2006, at D1.

²⁵⁷ *Id.* at D3.

²⁵⁸ See Brief for the United States as Appellee at 5, *United States v. Jeffrey K. Skilling*, 554 F.3d 529 (5th Cir. Nov. 13, 2007) (No. 06-20885), 2007 WL 4207556.

²⁵⁹ See Johnson, *supra* note 248, at D1.

²⁶⁰ See James Sterngold, *Not Guilty: The Man; Simpson Walks Out of the Courtroom a Free Man and Into the Lucrative Free Market*, N.Y. TIMES, Oct. 4, 1995, at A10.

²⁶¹ According to USA Today, the trial lasted 141 trial days (including opening and closing statements), 126 witnesses testified, and 857 exhibits were entered into evidence. See *The O.J. Simpson trial, by the numbers*, USA TODAY (Oct. 18, 1996), <http://usatoday30.usatoday.com/news/index/nns062.htm>.

²⁶² See *id.*

d. Prosecuting Scott Peterson

In 2004, Scott Peterson was tried and eventually sentenced to death for the murder of his wife, Laci Peterson, and their unborn son; opening statements in the guilt phase began on June 1, 2004, and the state rested its case on October 5, 2004.²⁶³ The defense began its case on October 18, 2004 and finished on October 26, 2004.²⁶⁴ The penalty phase began on November 30, 2004, and ended on December 9, 2004.²⁶⁵ The court sat in session four days a week during that time.²⁶⁶ All told, the Peterson trial took 81 trial days. According to one study, based on records kept by the State of California, the cost to prosecute the Peterson case was \$1.4 million (\$1.7 million in 2012 dollars).²⁶⁷ The equivalent cost to prosecute a case of the same length at the ICTY would be \$2.1 million in 2012 dollars. Here, the ICTY costs are higher than the domestic costs, but not by a huge margin.

e. Murder Trials in North Carolina

In 1993, a group of researchers attempted to ascertain the cost of capital and non-capital murder trials in the state of North Carolina.²⁶⁸ They calculated the average cost of murder cases including the cost of defense, prosecution and courtroom time.²⁶⁹ Their calculation excludes investigative costs, as well as judicial costs not directly related to courtroom time (e.g., deliberating, researching, and writing opinions).²⁷⁰ They estimated trial length and costs of: (1) 3.8 trial days and \$16,697 (\$27,323 in 2012 dollars) for non-capital murder trials; (2) 10.6 days and \$57,290 (\$93,752 in 2012 dollars) for capital trials that

²⁶³ See *The State's Case: Jun 1–Oct 15, 2004*, PWC CONSULTING, <http://pwc-sii.com/Timeline/State.htm> (last visited Sept. 19, 2014) [hereinafter *The State's Case*]. Note that this website is not an impartial source; it is devoted to the idea that Scott Peterson is innocent. Nevertheless, it appears to be reliable for the purpose of identifying the number of trial days.

²⁶⁴ See *The Defendant's Case, Jury Deliberations, & Verdict: Oct 6–Nov 12, 2004*, PWC CONSULTING, <http://pwc-sii.com/Timeline/Defense.htm> (last visited Sept. 19, 2014).

²⁶⁵ See *Penalty Phase, Motions, & Sentencing: Nov 13, 2004–Mar 17, 2005*, PWC CONSULTING, <http://pwc-sii.com/Timeline/Penalty.htm> (last visited Sept. 19, 2014).

²⁶⁶ *The State's Case*, *supra* note 263. They indicate that the court heard testimony Mondays through Thursdays but was not in session on Fridays. *Id.* There were also some additional days when the court was not in session. These days included July 1st, July 5th, July 8th, August 9th, August 19th, and September 6th. *Id.*

²⁶⁷ See MINSKER, *supra* note 226, at 21.

²⁶⁸ See COOK & SLAWSON, *supra* note 167, at 47 (reporting figures for the cost of murder trials in North Carolina in 1991 and 1992).

²⁶⁹ *Id.* at 45.

²⁷⁰ *Cf. id.* In this way, their calculation does not include the total judicial cost of the trial, which the ICTY figures do, but there is no way to account for this discrepancy.

ended after the guilt phase; and (3) 14.6 days and \$84,099 (\$137,623 in 2012 dollars) for a bifurcated capital trial.²⁷¹

Their calculations are not exactly comparable to the ICTY figures. First of all, their calculation of judicial costs excludes judicial time outside of the courtroom. Second, they included time spent on pre-trial motions as trial time,²⁷² whereas the ICTY figures do not count pre-trial hearings as trial time. These factors are likely to improve their estimated efficiency as compared to the ICTY. Nevertheless, comparable ICTY figures for the cost of prosecution, defense and direct trial costs are: (1) \$403,000 for a 3.8 day trial; (2) \$1,113,000 for a 10.6 day trial; and (3) \$1,552,000 for a 14.6 day trial. The ICTY trials are an order of magnitude more expensive than the average murder trial in North Carolina in the early 1990s. Even given the differences in the way the numbers are calculated, it seems clear that ICTY trials are significantly less efficient.

f. Murder Trials in Maryland

A similar study was carried out in 2008 on the cost of death eligible murder trials in Maryland.²⁷³ In that study, the researchers concluded that the cost and trial length of an average murder trial was: (1) 3.1 days and \$158,000 (\$175,000 in 2012 dollars) for a non-capital murder trial; (2) 10.2 days and \$672,000 (\$743,000 in 2012 dollars) for a case where a death notice was filed; and (3) 13.2 days and \$1,038,000 (\$1,150,000 in 2012 dollars) for a case that resulted in a death sentence.²⁷⁴ This calculation includes the cost of prosecution, defense and direct trial costs.²⁷⁵

Equivalent costs at the ICTY would be: (1) \$329,000 for a 3.1 day trial; (2) \$1,047,000 for a 10.2 day trial; and (3) \$1,355,000 for a 13.2 day trial. Here, the ICTY costs are higher than the equivalent costs in Maryland, but not by nearly as much as in the North Carolina study. Moreover, the difference is smaller for the cases where the prosecuting attorney gave notice that the death penalty would be sought (41%) than for cases where it was not sought (88%). Finally, the difference is smallest (31%) when comparing the ICTY cases to cases that resulted in a death penalty. To put it another way, the efficiency of

²⁷¹ *Id.* at tbls 6.2 & 6.3.

²⁷² *Id.* at 96.

²⁷³ See ROMAN, ET AL., *supra* note 226.

²⁷⁴ *Id.* at tbls. 5 & 6.

²⁷⁵ *Id.* at app. B (describing how the cost data was calculated).

the Maryland cases decreased as their complexity increased. This suggests that cost does not scale linearly with complexity.

g. Murder Trials in Kansas

In 2003 the Kansas state auditors estimated the cost of death penalty trials in Kansas.²⁷⁶ Their report contains sufficient information to compare costs in Kansas to the ICTY. They estimated that the average cost and length of murder trials was: (1) \$110,000 (\$137,000 in 2012 dollars) and 7.4 trial days for a murder trial; (2) \$291,000 (\$363,000 in 2012 dollars) and 19 trial days for a case where the death penalty was requested but not imposed; and (3) \$744,000 (\$928,000 in 2012 dollars) and 22 trial days for cases in which the death penalty was imposed.²⁷⁷ These figures include the direct trial costs, the defense costs, the prosecution costs, and investigation costs.

Equivalent costs for the ICTY would be: (1) \$1,233,000 for a 7.4 day trial; (2) \$2.9 million for a trial lasting 19 days; and (3) \$3.3 million for a trial lasting 22 days. The ICTY is an order of magnitude more expensive than Kansas courts in prosecuting average murder trials. But, like the results for Maryland, as the cases get more complex, the differential gets smaller. When considering cases where the death penalty was imposed, the ICTY is only 3.5 times more expensive than the Kansas courts. Again, it seems that cost does not scale linearly with complexity.

h. Conclusion

One thing that is clear from the domestic data is that even after adjusting for complexity, there is no such thing as a general efficiency rating for domestic courts. Rather, there is great variability in the efficiency of courts in the United States.²⁷⁸ Even if one considers just average murder trials, there are huge differences in cost and efficiency. North Carolina reported an average cost of \$27,000, while Maryland reported an average cost of \$175,000 (both figures in 2012 dollars). There are at least two factors that could partially explain the difference in cost: (1) time, and (2) location. In general, the cheapest figures are for the oldest studies. In this regard, the North Carolina

²⁷⁶ KAN. LEGIS. DIVISION OF POST AUDIT, COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS (2003), available at <http://www.kslpa.org/docs/reports/04pa03a.pdf>.

²⁷⁷ Data used to calculate these figures was taken from *id.* at Chart I-2 and Appendix E.

²⁷⁸ See COOK & SLAWSON, *supra* note 167, at 6; ROMAN ET AL., *supra* note 226, at tbl.1.

study (1993) reports the lowest costs, the Kansas study (2003) reports higher costs, and the Maryland study (2008) reports the highest costs, even after adjusting for inflation. This may suggest that trial costs have been increasing faster than inflation. In addition, there are probably differences depending on where the trial takes place. Part of the reason that trial costs in Maryland are more expensive than in North Carolina is because the cost of living is higher in Maryland.²⁷⁹

Complexity does not explain the differences in cost, as the average length of a murder trial in North Carolina (3.8 days) was very similar to the average length of a murder trial in Maryland (3.1 days). In the end, neither time, location or complexity seems capable of explaining the more than sixfold difference between the cost of a murder trial in North Carolina and Maryland. This suggests that efficiency is the explanation and that there are real differences in efficiency across different jurisdictions within the United States, even for average cases.

If we switch from looking at efficiency across states to looking at intra-state efficiency, the three studies that compare the costs of average murder trials to death penalty trials in the same location at the same time indicate that cost does not increase linearly with complexity. This can be seen in Table 6, where after compensating for trial complexity, death penalty cases are less efficient in Kansas, North Carolina, and Maryland than ordinary murder trials, sometimes by a large amount. The efficiency ratings for the high profile murder trials of O.J. Simpson and Scott Peterson are consistent with this finding. Both were significantly more complex than the average death penalty case in North Carolina, Kansas, or Maryland. Once adjusted for their complexity, the efficiency of these high-profile murder trials was fairly close to that of the ICTY, and generally less than that of the average death penalty case. Taken together, this data suggests that it is a general rule that efficiency will decrease as complexity increases.

²⁷⁹ For example, the cost of supporting a family consisting of two adults and two children in North Carolina is roughly \$39,000 in North Carolina and \$47,000 in Maryland. Amy K. Glasmeier, *Living Wage Calculator*, M.I.T., <http://livingwage.mit.edu/> (last updated Mar. 24, 2014).

	Relative Efficiency
Murder Trial in North Carolina	14.9
Guilt Phase Death Penalty Trial in NC	12
Bifurcated Death Penalty Trial in NC	11.3
Murder Trial in Kansas	9
Death Penalty Sought in Kansas	7.99
Death Penalty Imposed in Kansas	3.56
Murder Trial in Maryland	1.88
Death Penalty Sought in Maryland	1.41
Scott Peterson Prosecution	1.24
Death Penalty Imposed in Maryland	1.18
ICTY	1
SCSL	0.89
O.J. Simpson Trial	0.78
Timothy McVeigh Defense	0.05
Jeffrey Skilling Defense	0.03
Timothy McVeigh Prosecution	0.02

Table 6 shows the relative efficiency of the various courts and trials discussed above. All results are comparisons to the ICTY's efficiency, which was set at 1. Higher numbers mean greater efficiency, lower numbers mean less efficiency. Table 6 demonstrates the massive differences in efficiency across trials in the United States. The most efficient trials considered in this Article, murder trials in North Carolina, are 745 times more efficient than the Timothy McVeigh prosecution, even once you adjust for their relative complexity. The ICTY is in the bottom half of the list, but it is not last. Indeed, it is more efficient than trials at the SCSL, as well as high profile domestic trials like those of O.J. Simpson, Jeffrey Skilling, and Timothy McVeigh. It is also worth pointing out again that the efficiency rating for the ICTY underestimates its true efficiency for a number of reasons, including that it does not incorporate the complexity of the three remaining cases or the complexity associated with the guilty pleas obtained at the ICTY.²⁸⁰

The question then becomes not whether the ICTY is more efficient than domestic criminal trials, but rather which domestic criminal trials should the ICTY be compared to? If we compare the ICTY's trials to the average murder

²⁸⁰ See *supra* Part III.C.

trial, the ICTY will look grossly inefficient. If we compare it to the average death penalty trial, the ICTY will be slightly less efficient. If we compare it to high profile murder trials, the ICTY has roughly the same efficiency. On the other hand, if we compare the ICTY to extremely complex white collar crime cases like that of Jeffrey Skilling or to mass atrocity crimes like those of Timothy McVeigh, the ICTY appears to be a model of efficiency.

The ICTY's trials should not be compared to average murder trials for a number of reasons. To begin with, ordinary murder trials usually involve a single perpetrator,²⁸¹ a relatively small number of counts, and are concerned with acts that take place in a relatively small period of time and at a small number of locations. Accused at the ICTY are much more likely to be tried in multi-accused trials, they are likely to be charged with many more counts than domestic accused,²⁸² and the alleged crimes are likely to have taken place at many more locations and over longer periods of time.²⁸³ Moreover, such crimes are usually undertaken by hierarchical groups working together and proving them often requires proof of the criminal acts of individuals other than the accused.²⁸⁴ In short, the trials at the ICTY look very little like the average murder trial before a domestic court.

In addition, cost seems to increase faster than complexity. One result is that efficiency decreases as complexity increases. This suggests that comparing the efficiency of cases that have vastly different complexities is not a fair comparison. The less complex cases will appear to be more efficient. A fair comparison requires the cases to be of roughly equivalent complexity. Thus, the average murder trial is not a fair comparator for the ICTY's caseload because they are much less complex than ICTY cases. The average murder trial took 7.4 days in Kansas, 3.8 days in North Carolina, and 3.1 days in Maryland.²⁸⁵ Even the average death penalty case is not a fair comparator. The data from Kansas, North Carolina, and Maryland suggest that the average trial that resulted in a death penalty took between 13 and 22 trial days to complete.²⁸⁶ The average ICTY case takes 176 trial days to resolve.

²⁸¹ See Ford, *supra* note 71, at 68 n.92.

²⁸² See *supra* Part II.A.

²⁸³ See *supra* Part I.D.

²⁸⁴ *Id.*

²⁸⁵ See COOK & SLAWSON, *supra* note 167, at 49; ROMAN, ET AL., *supra* note 226, at 24; KAN. LEGIS. DIVISION OF POST AUDIT, *supra* note 276, at 18.

²⁸⁶ See COOK & SLAWSON, *supra* note 167; ROMAN, ET AL., *supra* note 233; KAN. LEGIS. DIVISION OF POST AUDIT, *supra* note 276.

Finally, the gravity of the crimes charged in ICTY cases is far greater than in the average murder trial. The average murder trial in a domestic system involves a single victim. The typical ICTY case involved allegations of the unlawful killing of more than 100 people, often combined with other unlawful acts like the torture, mistreatment, imprisonment, or forcible transfer of large numbers of people.²⁸⁷ Only the most serious mass atrocity crimes tried in domestic criminal justice systems approach the complexity and gravity of the average ICTY trial.²⁸⁸ This suggests that the most appropriate comparison is between the ICTY's cases and domestic mass atrocity trials. And by this comparison, the ICTY appears to be vastly more efficient.

My sample includes cost data on only a single U.S. mass atrocity trial that is similar in gravity to the average ICTY case—the trial of Timothy McVeigh for the Oklahoma City bombing—but I suspect that other mass atrocity crimes investigated and prosecuted in the United States have equally large costs. For example, there is no data yet on the cost of the investigation of the bombing of the USS Cole in Yemen in 2000, although the government may eventually be required to disclose that information.²⁸⁹ Nevertheless, the investigation is described as a decade-long affair that involved personnel from the FBI, Naval Criminal Intelligence Service, CIA, and prosecutors from New York, the Justice Department, and the Pentagon.²⁹⁰ There is also little concrete information on the cost of the government's response to the bombing of U.S. embassies in East Africa in 1998, but what little information exists suggests a similarly massive investigation.²⁹¹ Finally, although the U.S. response to the terrorist bombings on September 11, 2001, was not principally legal in nature, it can certainly be said that the cost of the response was not an overriding concern.²⁹² This evidence is not definitive, but it suggests that when the victims of mass atrocities are Americans, we are willing to spend far more than the ICTY did to investigate and prosecute them.

²⁸⁷ See Ford, *supra* note 71, at 76, 104.

²⁸⁸ See COHEN & KYCKELHAHN *supra* note 134; *id.* at 91.

²⁸⁹ See Carol Rosenberg, *Lawyers Spar Over Funding in Guantanamo Court*, MIAMI HERALD, Apr. 12, 2012, <http://www.miamiherald.com/760/index.html>.

²⁹⁰ *Id.*

²⁹¹ The initial investigation was described as involving more than 1,000 FBI employees who were sent to East Africa, including more than 500 FBI agents. See Wippman, *supra* note 14, at n.80.

²⁹² See, e.g., JOSEPH E. STIGLITZ & LINDA J. BILMES, *THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT 7–8* (2008) (“The tone of the administration was cavalier, as if the sums involved were minimal.”).

Nor are we alone in this approach to mass atrocities. While cost data on trials in other countries' domestic systems is also difficult to find, some data is available on the trial of Anders Breivik, who was accused of killing 77 people and wounding 42 more in Norway in July 2011.²⁹³ In addition, some information is available on the trial of the individuals accused of carrying out the bombing of trains in Madrid in 2004 that killed 192 and injured an additional 1,400.²⁹⁴

The investigation of Anders Breivik's crimes took more than one year and the crimes were investigated by a specially created police force comprised of more than 100 investigators with specialties in evidence, victims, witnesses and international cooperation.²⁹⁵ The investigation was described as "the biggest in Norway's history."²⁹⁶ The trial began on April 16, 2012, and concluded on June 22, 2012.²⁹⁷ Thus it lasted 50 days. It was described as the "most serious criminal trial" in Norway's history by the chief justice of the court.²⁹⁸ According to one source, the total cost of the legal proceedings against Breivik at the completion of the trial was 165 million Norwegian Kroners.²⁹⁹ This is the equivalent of approximately \$27 million.³⁰⁰ It appears that this figure includes the cost of the prosecutors, defense counsel, victim and witness participation, security, detention, and direct trial costs.³⁰¹ The cost of an equivalent trial at the ICTY including these components would be \$8.3 million. Thus, the Breivik trial ended up being more than three times as expensive as an equivalent trial at the ICTY.

²⁹³ See Walter Gibbs & Elinor Schang, *Norway Police To Track Killer's Funds in Year-Long Probe*, REUTERS NORWAY (Aug. 3, 2011), <http://in.reuters.com/article/2011/08/03/idINIndia-58607220110803>.

²⁹⁴ See Ford, *supra* note 71, at 79, 100.

²⁹⁵ See Gibbs & Schang, *supra* note 284.

²⁹⁶ *Id.*

²⁹⁷ See *Timeline: Anders Breivik*, ALJAZEERA, <http://www.aljazeera.com/news/europe/2012/08/201282314116683446.html> (last modified Aug. 24, 2012).

²⁹⁸ See Alastair Reed, Kristin Myers & Josiane Kremer, *Breivik Claims Self-Defense as Oslo Terror Trial Starts*, BLOOMBERG (Apr. 16, 2013), <http://www.bloomberg.com/news/2012-04-16/breivik-defends-massacre-as-norway-s-saddest-trial-starts.html>.

²⁹⁹ See *Breivik's Attacks Cost Billions*, NEWSINENGLISH.NO (Aug. 24, 2012), <http://www.newsinenglish.no/2012/08/24/breiviks-attacks-cost-billions/>.

³⁰⁰ This was calculated using an exchange rate of .1689 Kroner to the Dollar. See Historical Exchange Rates, <http://www.oanda.com/currency/historical-rates/> (last visited Sept. 26, 2013).

³⁰¹ See *Breivik's Attacks Cost Billions*, *supra* note 299. Various other articles contain some cost data, but none seem as comprehensive. See Reed, Myers & Kremer, *supra* note 298 (noting that the court estimated before the trial began that the cost of court administration during the proceeding would be 76 million kroner).

The trial of the Madrid train bombers took approximately four months and was described at the time as “Europe’s biggest terrorism court case.”³⁰² A four-month trial equates to about 80 trial days. An 80-day trial at the ICTY would cost about \$2.1 million to prosecute with another \$3.7 million in direct trial costs. No data was available on the cost of the investigation, but the Spanish Ministry of Justice did release a partial accounting of the costs of the trial. Unfortunately, the figures do not include some very important costs, like the salaries of the judges or prosecutors. Nevertheless, the Spanish government reported that even these partial costs of the trial equated to €3.1 million with one month left to go in the trial.³⁰³ This is the equivalent of \$4.7 million in 2012 dollars.³⁰⁴ In short, with one month of the trial still to complete, the partial cost of the Madrid trial reported by the Spanish government excluding salaries (\$4.7 million) was almost the same as the total cost of a similar trial at the ICTY including salaries (\$5.8 million). Given this, it seems almost certain that the total cost of the Madrid trial exceeded the cost of an equivalent trial at the ICTY.

When the ICTY is compared to those domestic trials that most resemble its caseload—mass atrocity trials—the ICTY looks fairly efficient. In fact, the constant questions about the cost and efficiency of the ICTY seem to represent a subtle form of discrimination between “us” and “them.” The data on mass atrocity crimes in the United States suggests that had the atrocities in the former Yugoslavia been perpetrated against Americans, we would gladly have spent much more than \$3 billion to investigate and prosecute them. In this regard, the Department of Justice was adamant that the money spent on the McVeigh trial was well spent because of the nature and gravity of his crime, despite the fact that it was approximately fifty times less efficient than trials at the ICTY.³⁰⁵ The disparate expenditures on atrocity crimes when the victims are Americans versus non-Americans suggests that we believe the lives of others are worth less of an investment in justice. This is consistent with research showing that we generally tend to value foreign lives less than

³⁰² *Madrid Train Bombings Trial Wraps Up*, L.A. TIMES, July 3, 2007, at 8, available at <http://articles.latimes.com/2007/jul/03/world/fg-briefs3.2>.

³⁰³ See Paloma Díaz Sotero, *Desglose Económico del Ministerio: ¿Cuánto Cuesta el Macrojuicio del 11-M?*, EL MUNDO, <http://www.elmundo.es/elmundo/2007/06/01/espana/1180718228.html> (last updated June 2, 2007).

³⁰⁴ The exchange rate for July 2007 was 1.3704 Euros to the Dollar. See Historical Exchange Rates, *supra* note 300. Inflation data came from the Bureau of Labor Statistics. See Consumer Price Index – All Urban Consumers, available at <http://www.bls.gov/cpi/cpid07av.pdf>.

³⁰⁵ See *Bomb Trials*, *supra* note 244.

domestic lives.³⁰⁶ While this Article focused on a comparison with domestic criminal trials in the United States, it seems likely that a similar dynamic would apply in other countries.³⁰⁷

Thus one may reverse the initial question and ask not why we spend so much on the ICTY, but rather why we spend so little on it compared to what we would spend if atrocities on a similar scale occurred here. The answer may be that humans have a tendency to distinguish between “us” and “them” and treat victims of our own group better than victims of other groups.³⁰⁸ On the other hand, some argue that we have little or no obligation to those outside of our own borders.³⁰⁹

CONCLUSION

It is common to claim that the ICTY has cost too much and taken too long,³¹⁰ but those who have made this claim have often not made a serious attempt to understand the complexity of the cases the ICTY tries. As this Article shows, trials at the ICTY are orders of magnitude more complex than most domestic criminal trials. Moreover, the gravity of the crimes alleged in even the average ICTY case would make them among the most serious crimes ever prosecuted in the United States.³¹¹ Finally, whereas almost all criminal prosecutions in the US are resolved through a plea deal, more than 80% of the accused at the ICTY receive a full trial. The result is a system of unparalleled complexity. In fact, the ICTY appears to have prosecuted the most complex set of related criminal cases ever attempted. Thus, it is hardly surprising that it takes a long time and costs a lot of money to try these cases.

Moreover, there is little evidence that the ICTY is inefficient. For one thing, the ICTY has been more efficient than the SCSL, even though the SCSL was partially designed to be a response to the alleged inefficiencies of the ICTY. The SCSL was certainly cheaper than the ICTY, but only because the

³⁰⁶ See, e.g., Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. (2014) 499, 539 (describing how U.S. law consistently assigns lower values to foreign lives than domestic lives).

³⁰⁷ See *supra* notes 295–304 and accompanying text.

³⁰⁸ See Naomi Ellemers & S. Alexander Haslam, *Social Identity Theory*, in 2 HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY 379, 380 (Paul A.M. Van Lange et al. eds., 2012). See also Rowell & Wexler, *supra* note 306, at Section II(B)(4).

³⁰⁹ See Rowell & Wexler, *supra* note 306, at 519 (discussing differing philosophical views of whether states owe obligations to individuals outside their borders).

³¹⁰ See *supra* notes 5–10.

³¹¹ See Ford, *supra* note 71, at 104 (noting that the average ICTY indictment contains allegations roughly equivalent to the bombing of the Alfred P. Murrah Federal Building in Oklahoma City).

court has tried fewer cases, not because it was more efficient. This has implications for a long-running debate about whether hybrid tribunals are a better model than the ad hoc tribunals. One of the principal arguments in favor of the hybrid tribunals has been that they will be more efficient than the ad hocs.³¹² This turns out not to be true for the SCSL. The arguments in favor of hybrid tribunals have never been solely about efficiency. Nevertheless, in light of my findings, it is harder to argue that the hybrid model is superior to the ad hoc model.

Comparing the efficiency of the ICTY to domestic criminal trials highlights the need to identify which kind of domestic trials to compare it to. The ICTY has been less efficient than the average murder trial, but the average murder trial is not a good basis for evaluating the efficiency of the ICTY because the average murder trial looks nothing like the average ICTY prosecution. Even complex, high-profile murder cases are not comparable to the ICTY's cases, although they are closer. The only domestic cases that are comparable are those involving the prosecution of mass atrocities. Such trials are rare and published cost data is even rarer, which makes any conclusions somewhat tentative. Nevertheless, the ICTY appears to be much more efficient than the prosecution of comparable mass atrocity cases in the United States. It also appears to be more efficient than mass atrocity trials in Europe. Thus the conventional wisdom—that the ICTY's trials have been too slow and cost too much—turns out not to be true.

We are still left, however, with the fact that states and policymakers view the ICTY (and international criminal justice more generally) as too expensive.³¹³ My findings suggest that we are unlikely to significantly reduce the cost of international criminal trials by improving their efficiency because there is little evidence that they are inherently inefficient. Our alternatives are limited.

We could simply decide not to try serious violations of international criminal law before international courts, which would save several hundred million dollars a year.³¹⁴ However, the international community has repeatedly committed itself to prosecuting these crimes, creating a host of situation-specific tribunals like the ICTY, ICTR, SCSL and ECCC. Moreover, it has created a permanent International Criminal Court and declared that “the most

³¹² See *supra* notes 222–224 and accompanying text.

³¹³ See *supra* notes 5–13.

³¹⁴ See Ford, *supra* note 3, at fig.2 (charting spending on international criminal tribunals over time).

serious crimes of concern to the international community as a whole must not go unpunished and [] their effective prosecution must be ensured.”³¹⁵ In light of that commitment, it seems unlikely that we will stop prosecuting violations of international criminal law anytime soon.

A second alternative might be to further streamline the trials, but it is doubtful whether this would be successful. Previous attempts to modify the procedural rules to improve efficiency have raised questions about whether the court is favoring expediency at the expense of fairness while simultaneously failing to significantly shorten the trials.³¹⁶ Additional changes probably would not save a huge amount of money, but may well jeopardize the fairness of the proceedings. Judge Wald has argued that the fairness of the ICTY’s trials was one of its greatest achievements,³¹⁷ and it seems unwise to sacrifice this to save a small amount of money. Fairness may also be central to the court’s legitimacy and its ability to persuade others to comply with its norms.³¹⁸ If this is true, then making the process less fair to save a relatively small amount of money would be counterproductive because it would undermine the long term goals of international criminal justice.

A third alternative might be to prosecute violations of international criminal law but have much simpler charges and trials by trying individuals only for one or two “symbolic” crimes. This would be a radical departure from the practice of the ICTY (and most other international courts), which has been to use representative charging. Of course, charging in international criminal courts is almost always incomplete. It is usually impossible to present evidence about every single criminal act that the prosecution believes an accused could be convicted of. Rather, the goal is to charge the accused with a representative selection of crimes that accurately conveys the scope of the accused’s criminality.³¹⁹ My goal as a prosecutor at the ECCC was to craft an indictment

³¹⁵ See United Nations Diplomatic Conference on the Establishment of an International Criminal Court, Rome, July 17, 1998, *Rome Statute of the International Criminal Court*, Preamble, U.N. Doc. A/CONF.183/9, available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/RomeStatutEng.pdf>.

³¹⁶ See *supra* Part IV.A.

³¹⁷ See Wald, *supra* note 16, at 466.

³¹⁸ See Tom Tyler, *Legitimacy and Compliance: The Virtues of Self-Regulation*, in LEGITIMACY AND COMPLIANCE IN CRIMINAL JUSTICE 8, 11 (Adam Crawford & Anthea Hucklesbury eds., 2013); Tom R. Tyler, *Legitimacy and Rule Adherence: A Psychological Perspective on the Antecedents and Consequences of Legitimacy*, in 11 THE PSYCHOLOGY OF JUSTICE AND LEGITIMACY 251 (D. Ramona Bobocel et al. eds., 2010).

³¹⁹ See *supra* note 202. See also ICTY Rules, *supra* note 148, at R. 73bis(D) (suggesting that charges are “reasonably representative” if they take into account “all the relevant circumstances” including the classification and nature of the charges, the location of the alleged crimes, the scale of the crimes, and the victims of the crimes); Daryl A. Mundis, Book Review, 102 AM. J. INT’L L. 691, 693 (2008) (arguing that

that was representative of the geographic scope of the crimes, the types of crimes that were committed, the temporal scope of the crimes, and the types of victims. This form of charging, called representative charging, is dramatically different from symbolic charging where only one or two of the most prominent or easily proved episodes are chosen.

Symbolic charging might make prosecutions cheaper and faster by dramatically reducing the number of counts and crime sites included in the indictment, which would presumably reduce trial complexity. But it is likely that even these streamlined cases would be very complex compared to average domestic prosecutions. Moreover, symbolic charging might cause more problems than it solves. Courts that have tried this approach, for example in the trials of Saddam Hussein and Thomas Lubanga, have been criticized for failing to accurately capture the accused's criminality.³²⁰ At least in the Lubanga case, it did not seem to shorten the trial either.³²¹ Moreover, my own research indicates that establishing the historical record should be one of the principal goals of international trials.³²² This would be much harder to achieve with symbolic charging.

A fourth alternative might be to charge only a very limited number of the most senior leaders. This is the strategy taken by the SCSL, ECCC, and ICC. It is a cheaper approach because it reduces the number of trials that take place, but there is no reason to believe that it decreases the length or cost of individual trials; it may even reduce overall efficiency.³²³ Moreover, a focus on the most senior leaders may cause problems. There is no obvious correlation between seniority and number of counts the indictees were charged with or the length of the sentence they received.³²⁴ Indeed, the most serious and shocking crimes that came before the ICTY were committed largely by mid-level

prosecutors are "duty bound to draft indictments that reflect the scale and scope of [the accused's] criminality").

³²⁰ See Robert Cryer, *Prosecuting the Leaders: Promises, Politics and Practicalities*, 1 GÖTTINGEN J INT'L L. 45, 72–74 (2009); Suzan M. Pritchett, *Entrenched Hegemony, Efficient Procedure or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 265, 288 (2008); Mundis, *supra* note 319, at 693 ("Can anyone today claim that the trial of Saddam Hussein before the Iraqi Special Tribunal and his execution *solely* for the crimes in Dujail held him accountable for the totality of his criminal record?").

³²¹ See *supra* note 158 (noting that the Lubanga case took 204 trial days to hear).

³²² See Ford, *supra* note 2, at Section IV.

³²³ It seems likely that there are "economies of scale" at international criminal tribunals and that tribunals that try more cases will be more efficient than tribunals that try fewer cases. This may be one reason the SCSL's efficiency was lower than the ICTY's efficiency.

³²⁴ See Ford, *supra* note 71, at 73–74, 97.

accused.³²⁵ If, as the Preamble to the Rome Statute says, our goal is to prosecute the most serious crimes, then we have to be able to prosecute more than just one or two of the most senior leaders.³²⁶

Finally, there is no guarantee that a court that tries many fewer cases would be more effective than the ICTY (as opposed to more efficient).³²⁷ The question of how many trials are necessary for a court to achieve its purposes is beyond the scope of this Article, although it is certainly an important question. To answer it, however, you would need data on the effect of individual trials on the goals of international criminal justice. At the moment there is no way to measure how individual trials contribute to a court's purposes. As a result, it is impossible to know the optimal number of trials necessary to maximize the court's contributions to its purposes. A small number of trials could be better than a large number of trials, but it could be worse. The optimal number might vary depending on a host of factors specific to the particular situation. We simply do not know.

In short, the length, complexity, and cost of international criminal trials may well be largely unavoidable. Indeed, a number of judges who have worked at the ICTY eventually came to this conclusion.³²⁸ As the comparison of the complexity and efficiency of international and domestic trials shows, the cost and length of the ICTY's trials are a function of the extraordinary seriousness and complexity of the crimes that the court has been tasked with adjudicating, rather than any inherent inefficiency arising from the international nature of the court.

While it may seem that this Article's focus on the ICTY makes it largely retrospective in nature, adopting a quantitative approach to complexity and efficiency has prospective value as well. The ICTY will be shutting down soon, but these issues will not go away. Indeed, they have already become hotly contested questions at the ICC, where negotiations over the court's budget have been marked by disputes about the court's efficiency.³²⁹ Although

³²⁵ See *id.* at 97.

³²⁶ See *supra* note 315.

³²⁷ See Shany, *supra* note 26, at 230, 237 (contrasting effectiveness, the ability of an organization to accomplish its purposes, with efficiency, the relationship between an organization's inputs and outputs).

³²⁸ See Kwon, *supra* note 1, at 362 (concluding that the complexity of cases is driven by factual and legal complexity, as well as due process concerns); Wald, *supra* note 16, at 468 (concluding that international trials are fundamentally different from most trials in the United States and that they will inevitably be more complex).

³²⁹ See *supra* note 18 and accompanying text.

it is too soon to draw any conclusions about the ICC's efficiency using the methodology in this Article because the court has only completed one trial, the ICC's efficiency can eventually be measured quantitatively. This would have substantial value as it would provide members of the Assembly of States Parties with objective information that they could use in deciding how much funding the ICC needs to carry out its mandate. This would be a decided improvement over the current debates about the ICC's efficiency, which seem driven more by the desires of certain members to minimize their contributions than by an objective analysis of the court's efficiency.

Appendix: Complexity of Completed ICTY Trials		
Case Name	Case Number	Complexity Score
Furundžija	IT-95-17/1	0.07
Aleksovski	IT-95-14/1	0.32
Vasiljević	IT-98-32	0.34
Halilović	IT-01-48	0.35
Kunarac et al.	IT-96-23 & IT-96-23/1	0.35
Limaj et al.	IT-03-66	0.37
Strugar	IT-01-42	0.42
Krnojelac	IT-97-25	0.46
Lukić & Lukić	IT-98-32/1	0.51
Tadić	IT-94-1	0.62
Haradinaj et al.	IT-04-84	0.62
Martić	IT-95-11	0.62
Delić	IT-04-83	0.63
Mucić et al.	IT-96-21	0.69
Krstić	IT-98-33	0.69
Kvočka et al.	IT-98-30/1	0.73
Stakić	IT-97-24	0.75
Boškoski & Tarčulovski	IT-04-82	0.76
Blagojević & Jokić	IT-02-60	0.77
Mrkšić et al.	IT-95-13/1	0.77
Milosević, Dragomir	IT-98-29/1	0.77
Šešelj	IT-03-67	0.78
Kupreškić et al.	IT-95-16	0.81
Naletilić & Martinović	IT-98-34	0.82
Orić	IT-03-68	0.85
Simić et al.	IT-95-9	1.00
Dorđević	IT-05-87/1	1.11

Galić	IT-98-29	1.15
Perišić	IT-04-81	1.15
Blaškić	IT-95-14	1.17
Stanišić & Simatović	IT-03-69	1.28
Hadžihasanović & Kubura	IT-01-47	1.32
Tolimir	IT-05-88/2	1.47
Krajišnik	IT-00-39	1.51
Gotovina & Markač	IT-06-90	1.60
Brđanin	IT-99-36	1.63
Kordić & Čerkez	IT-95-14/2	1.72
Šainović et al.	IT-05-87	1.79
Stanišić & Župljanin	IT-08-91	1.84
Popović et al.	IT-05-88	2.46
Prlić et al.	IT-04-74	2.63