

UCLA

UCLA Law & Economics Series

Title

Managerial Judging Goes International But Its Promise Remains Unfulfilled: An Empirical Assessment of the Reforms to Expedite the Procedure of the International Criminal Tribunal for the Former Yugoslavia

Permalink

<https://escholarship.org/uc/item/82n3b1t1>

Authors

Langer, Maximo
Doherty, Joseph W

Publication Date

2010-09-01

Peer reviewed

MANAGERIAL JUDGING GOES INTERNATIONAL BUT ITS PROMISE REMAINS UNFULFILLED: AN EMPIRICAL ASSESSMENT OF THE REFORMS TO EXPEDITE THE PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

By Máximo Langer and Joseph W. Doherty*

This article analyzes whether managerial judging reforms introduced to expedite procedure at the International Criminal Tribunal for the former Yugoslavia (ICTY) achieved their goal. Using survival analysis, the paper tests the hypothesis that the higher the number of reforms a case was subjected to, the shorter the pretrial and trial phase of that case should be. Our six models for pretrial and trial reveal that in all pretrial and trial models the number of reforms is significantly correlated with longer pretrial and trial. The article explains that reforms made process longer rather than shorter because ICTY judges did not use their managerial powers or used them deficiently, and prosecution and defense managed to neutralize the implementation of the reforms. To explain judges' behavior, the paper articulates an unnoticed challenge for managerial judging—the court is likely to have limited information about the case that may lead judges to restrict use of their managerial powers to avoid making inefficient or unfair decisions. In addition, ICTY did not have an implementation plan to encourage judges to change their behavior. The paper also explains the incentives that prosecution and defense had to neutralize the reforms.

* Máximo Langer is Professor of Law at UCLA, and Louis D. Brandeis Visiting Professor of Law at Harvard Law School (spring 2010). Joseph W. Doherty is Director of the Empirical Research Group, UCLA School of Law. We would like to thank Rachel Barkow, Mirjan Damaška, Mark Grady, D. James Greiner, Hugo Hopenhayn, David Kaye, Muna Ndulo, Jeffrey J. Rachlinski, Michael H. Schill, Stephen Schulhofer, Stephen C. Yeazell; and participants—at the 2009 Symposium of the UCLA Journal of International Law and Foreign Affairs on “Trends and Tensions in International Criminal Procedure,” February 2009; the University of Texas School of Law Faculty Workshop, February, 2009; the 2008 Annual Meeting of the American Society of Comparative Law held at Hastings College of Law in October 2008; the Third Conference on Empirical Legal Studies held at Cornell Law School in September 2008; the UCLA School of Law Works-in-Progress Summer Workshop, July 2008; the Workshop of the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the former Yugoslavia (ICTY), June 2008; the Workshop of the Office of the Prosecutor of the International Criminal Court, June 2008; and at presentations we made before a group of Senior Legal Officers and a group of Judges of ICTY in June 2008—for their feedback on earlier versions of this article. We would like to express our gratitude to Judges Carmel Agius and Theodore Meron for organizing the meeting in which we presented our preliminary results to a group of Judges of ICTY; to Gavin Ruxton for arranging the interviews with Legal Officers of the OTP of ICTY, and our presentation at the workshop of the OTP; to Gabrielle McIntyre and Christian Rohde for organizing the meeting in which we presented our preliminary results to Senior Legal Officers of ICTY, and to Christian Rohde for helping us gain access to the Judicial Database of ICTY; and to ICTY Association of Defence Counsel, for arranging a number of interviews with defense attorneys at ICTY. We would also like to thank Garrett Grolemond, Dennis Ni, and Brittany Salter for their research assistance on this project; and to Scott Dewey and Cheryl Kelly Fischer for editing the piece. As usual, the UCLA School of Law Library and Linda O'Connor provided wonderful support. We would also like to express our gratitude to Dean Michael H. Schill for his support of this project, and to all our anonymous interviewees who were willing to share with us their time, knowledge and experiences at ICTY.

When Slobodan Milošević passed away on March 11, 2006—more than four years after the trial against him had started before the International Criminal Tribunal for the former Yugoslavia (ICTY or the Tribunal)—many complained about the length of the proceedings. Such criticism of ICTY’s proceedings was nothing new. It began only a few years after the creation of the Tribunal, and increased over time.¹

ICTY judges tried to address this criticism by introducing reforms to the Tribunal’s procedure. ICTY initially had adopted a predominantly adversarial process in which the parties had full control of their pretrial investigations and trial cases, and in which judges were conceived of as passive umpires who did not know about the case before the trial started. This initial procedure had also included strict limitations against the introduction of written witness statements at trial and allowed liberal use of interlocutory appeals.

In order to address the criticism regarding proceedings’ duration, ICTY judges introduced reforms that changed these original procedural features. Judges gave themselves power to manage the parties’ pretrial and trial phases, to allow the introduction of more written witness statements at trial, and to limit interlocutory appeals.² These reforms defined the new role of the judge: an expediting manager of cases who can act by his own motion over the parties’ cases within a procedural structure in which the parties remain primarily in charge of running their pretrial investigations and trials. In the terminology of U.S. civil procedure literature, these reforms can be characterized as managerial judging.³ The basic idea behind managerial judging is that by acquiring information about the case from the parties before trial, the court can expedite process by setting a work plan toward trial, answering any parties’ questions about the case, encouraging the parties to agree on factual and legal issues, and limiting the amount of evidence and the number of issues that the parties may discuss at trial.

The two major empirical studies on managerial judging reforms introduced in U.S. civil procedure—Maurice Rosenberg’s study on pretrial conference in New Jersey, and RAND’s study on the Civil Justice Reform Act of 1990—revealed disappointing results.

¹ See Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. LAW. 835 (2006) [hereinafter *Managerial Judging*].

² *Id.*

³ There is an extensive literature on managerial judging in U.S. civil procedure. See, e.g., Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986); Paul R. J. Connolly, *Why We Do Need Managerial Judges*, 23 JUDGES’ J. 37 (1984); Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91 (2002); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982)[hereinafter, Resnik, *Managerial Judges*]; Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 779 (1981); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Judith Resnik, *Managerial Judging: the Potential Costs*, 45 PUB. ADMIN. REV. 686 (1985); Judith Resnik, *Managerial Judges and Court Delay: the Unproven Assumptions*, 23 JUDGES’ J. 8 (1984); Judith Resnik, *The Assumptions Remain. (Critique of Paul R.J. Connolly’s; Why We Do Need Managerial Judges)*, 23 JUDGES’ J. 37 (1984); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001). We conceive of managerial judging somewhat more broadly than the U.S. civil procedure literature, because we also include within it the lesser reliance on live testimony at trial and restrictions on interlocutory appeals. For an explanation of how and why one can conceptualize managerial judging this way as an abstract procedural model, see Langer, *Managerial Judging*, *supra* note 1.

Rosenberg's results indicated that the use of pretrial conferences did not encourage more settlements and did not reduce trial time. In fact, the use of these conferences lengthened procedure. RAND's study concluded that the Civil Justice Reform Act of 1990 pilot program had little effect on time to disposition.

Until now, aside from impressionistic evidence, there has been no clear indication whether ICTY reforms succeeded in shortening pretrial and trial duration. As a primary goal, this article aims to fill this gap in knowledge. Based on a statistical study of the work of the Tribunal—supplemented by nineteen interviews with ICTY judges, prosecutors, defense attorneys and staff, and three presentations of our study's preliminary results at ICTY—this article will show that the procedural reforms that aimed to shorten procedure had the opposite effect: lengthening both pretrial and trial.

In Section I, this article describes the eleven managerial judging reforms that ICTY judges introduced from July 1997 to August 2003. The assumption by ICTY judges was that each of these reforms would individually contribute to expedite ICTY procedure. Thus, in Section II, using survival analysis—more specifically, Weibull regression—we test the hypothesis by ICTY judges that the higher the number of reforms a case was subjected to, the shorter the pretrial and trial phase of that case should be. Our six models for pretrial and trial control for, among other variables, case characteristics, court capacity, litigation levels, judges' characteristics, and whether the defendant pled guilty; and reveal that in all pretrial and trial models the number of reforms are significantly correlated with longer pretrial and trial.

We also repeat our main pretrial and trial regression model eleven times, substituting each individual reform for the aggregate reform measure, in order to test whether these findings are sensitive to any particular reform or if the cumulative measure is masking contrary effects. These tests reveal that most of the reforms are significantly correlated with longer pretrial and trial duration, that a few reforms are not significantly correlated with pretrial or trial duration, and that no reform is significantly correlated with shorter pretrial or trial duration.

A second goal of this article is to explain why the reforms made process longer rather than shorter. In essence, our explanation is that the reforms added new procedural steps, requirements and work—lengthening the pretrial and trial phases—without delivering promised results, such as lower numbers of incidents under discussion at trial, live witnesses testifying at trial, and interlocutory appeals entertained by the appeals chamber.

Section III of the article tests the relationships between ICTY managerial judging reforms and the number of incidents under discussion at trial, the number of live witnesses testifying at trial, and the number and ratio of interlocutory appeals entertained by the appeals chamber. The results of these regressions reveal that the managerial judging reforms did not deliver any of their promised outcomes. Section III also explains that these quantitative findings are corroborated by qualitative data since several of our interviewees indicated that ICTY judges did not use their managerial powers or used them deficiently, and that the parties managed to neutralize the implementation of the

reforms—which would explain why the reforms have not delivered their promised outcomes.

In Section IV, the article discusses reasons why ICTY judges made a limited and deficient use of their managerial powers, and why parties had incentives to neutralize the reforms. As for the judges' limited and deficient use of their managerial powers, we first analyze why we think that a public choice model on judging does not have substantial explanatory power in this context. Then, we suggest two explanations for their behavior. First, we will articulate an unnoticed and unanalyzed challenge for managerial judging—the court is likely to have limited information about the case that may lead judges to restrict use of their managerial powers to avoid making inefficient or unfair decisions—i.e., decisions that may accelerate proceedings but may impose higher costs on other goals of the legal process such as accuracy and fairness. In addition, the Tribunal did not have an implementation plan and did not take measures—such as training judges', adopting monitoring and assessment systems, and a system of incentives for judges—that could have enabled and encouraged judges to make a larger and better use of their managerial powers.

Limited information by the court about the case will also help us to explain why the parties were able to neutralize the potential expediting effect of the reforms. Given the court's limited information, the parties could find ways to avoid revealing relevant information to the court, could anticipate and neutralize judges' managerial requests, and could count on the court to not sanction them for not meeting their duties under the reforms.

Section IV will also explain why the parties had incentives to resist the reforms. Prosecutors resisted the reforms because the reforms threatened to take away from prosecutors' substantial control over their pretrial and trial cases; prosecutors were more risk-averse to acquittals than judges; and there was disagreement between prosecutors and judges about the goals of this international criminal tribunal. Defendants and defense attorneys resisted the reforms because they did not want to lose control over their pretrial and trial cases, and they had little to gain but things to lose from faster proceedings.

The third goal of this article will be to explain the implications of our analysis on the promise of managerial judging. Managerial judging assumes that the court's intervention by its own motion in the parties' pretrial and trial cases can help to expedite process without substantially compromising other goals of the legal process. Powerful critiques to managerial judging have been based on its potential negative effects upon judges' impartiality, upon the transparency and accountability of the administration of justice, and upon the role that adjudication plays in society.⁴

In Section V, we will instead take managerial judging on its own terms and explain why the obstacles that managerial judging reforms have to surmount to expedite process are larger and somewhat more structural than what has been recognized so far. This is

⁴ See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Resnik, *Managerial Judges*, *supra* note 3; Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101 (2006).

because, first, the court's intervention adds new requirements, procedural steps and work that take process time. Thus, any managerial judging time gains have to offset the extra time that the additional managerial judging requirements, steps and work take. In addition, for reasons that we will explain, the managerial court is likely to have limited information about the case. This may prevent the court from using its managerial powers to avoid making inefficient or unfair decisions, and may facilitate parties' attempts to neutralize the court's managerial powers. Finally, in those cases in which the parties would agree with the court about how much time they need for pretrial and trial, the court's intervention adds steps, requirements, and work, without bringing any time gains. While in those cases in which the parties do not agree with the court about how much time they need, the parties have an incentive to try to neutralize the managerial powers of the court.

Our study shows that these overlooked explanations may help explain not only our results, but also Rosenberg's and RAND's. In addition, given these problems and that the results of our study are consistent with the results of these two major empirical studies on managerial judging reforms, there are elements to suggest that managerial judging's promise to expedite proceedings without compromising the other goals of the legal process is, at best, very difficult to achieve, and, at worst, a chimera.

I. MANAGERIAL JUDGING REFORMS AT ICTY

The U.N. Security Council created ICTY in 1993 to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.⁵ The Tribunal has jurisdiction over grave breaches of the Geneva Conventions of 1949, other violations of the laws and customs of war, crimes against humanity, and genocide. Since 1994, the Tribunal has indicted 161 individuals and concluded proceedings against 123 of the accused.⁶

When ICTY judges adopted ICTY's Rules of Procedure and Evidence in 1994, the judges gave them a strong adversarial orientation.⁷ Prosecution and defense were in charge of running their own pretrial investigations and trials. Judges were supposed to be passive umpires who had limited knowledge about the case before trial and decided only the controversies that the parties presented to them. ICTY procedure strongly favored live testimony at trial and liberally allowed interlocutory appeals.⁸

⁵ S.C. Re. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993).

⁶ See <http://www.icty.org/sections/TheCases/KeyFigures> (visited on June 6, 2010).

⁷ On the original strong adversarial orientation of ICTY procedure, see, e.g., Gideon Boas, *Creating Laws of Evidence for International Criminal Law: ICTY and the Principle of Flexibility*, 12 CRIM. L.F. 41 (2001); Daryl A. Mundis, *From 'Common Law' Toward 'Civil Law': The Evolution of ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT'L L. 367 (2001); Vladimir Tochilovsky, *Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the Ad Hoc Tribunals*, 46 NETH. INT'L L. REV. 343 (1999); SALVATORE ZAPPALÀ, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS (2003).

⁸ Within the adversarial-inquisitorial framework, a liberal system of interlocutory appeals is arguably an inquisitorial feature given that it is a way to review decisions of lower judicial officials within a

I.A. Making Judges Case Managers to Expedite Cases

After a few years of the Tribunal's work, a number of U.N. experts and ICTY judges argued that these original procedural features were delaying ICTY's processing of cases and proposed and introduced procedural reforms to address these delays.⁹ U.N. experts and ICTY judges charged that prosecutors at the Tribunal undertook especially lengthy investigations, produced an excess of evidence at trial, and spent a great deal of time in the interrogation of witnesses and expert witnesses.¹⁰ U.N. experts and ICTY judges also claimed that the adversarial system was leading the defense to use dilatory tactics.¹¹

In order to prevent pretrial and trial delays by prosecution or defense, judges introduced reforms that would allow judges to have more information about the parties' cases. The reforms would also provide new powers to judges to set deadlines and a work plan for the parties toward trial, to encourage the parties to exchange information and reach agreements on factual and legal issues, and to limit—even by the judges' own motion—the number of witnesses and incidents under discussion at trial. Judges argued that deadlines, a work plan toward trial, and limiting witnesses and issues would reduce the length of pretrial and trial.¹²

Judges incorporated these ideas in ICTY's Rules of Procedure and Evidence. Rule 65 *ter* created the position of pretrial judge to coordinate communication between the parties, ensure that no party unduly delays the proceedings, and take any measure necessary to prepare the case for a fair and expeditious trial.¹³ According to this Rule, the pretrial judge establishes a work plan for the parties “indicating the obligations that the parties are required to meet . . . and the dates by which these obligations must be fulfilled,” and ordering the parties to meet to discuss issues related to the preparation of the case.¹⁴ Rule 65 *ter* also created duties for the prosecution and the defense to provide more information about their cases to the Court before trial.¹⁵

hierarchical apparatus of criminal justice. See MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986) (describing the hierarchical model that corresponds roughly to the inquisitorial system).

⁹ As the first President of the Tribunal, Antonio Cassese, said: “[I]t became clear fairly soon that, to expedite proceedings which, being grounded on the adversarial model, were rather lengthy, it was necessary to depart from the system whereby the court acts as a referee and has no knowledge of the case before commencement of trial.” See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 385 (2003).

¹⁰ See, e.g., Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. GAOR, 54th Sess., at para. 65, U.N. Doc. A/54/634 (1999) [hereinafter Expert Report].

¹¹ See, e.g., *id.* at para. 67.

¹² See, e.g., Expert Report, *supra* note 10, at para. 77-78; Sixth Annual Report of ICTY, August 25, 1999, para. 14 (“The judges have taken a number of steps to reduce the length of trials. These include adopting amendments to the Rules in July 1998, which provide for active pre-trial management of pending cases and strengthening the ability of the Trial Chamber to control trial proceedings.”).

¹³ See Rule 65 *ter*.

¹⁴ See Rule 65 *ter*.

¹⁵ Rule 65 *ter*. Before trial, the prosecutor must submit a pre-trial brief which discloses substantial parts of her trial case and strategy and shows her good faith about settling as many issues as possible. The prosecutor demonstrates this good faith by providing, among other things, a summary of the evidence

In order to further incorporate the reform ideas into the Rules of Procedure and Evidence, ICTY judges twice amended Rule 65 *ter*, first, making pretrial judges mandatory and ordering them to submit information about the case to the Trial Chamber,¹⁶ and later allowing ICTY senior legal officers to assist pretrial judges in their work.¹⁷

Another reform by ICTY judges was Rule 65 *bis*, which introduced status conferences to give the Trial Chamber information about the case and allow it “to organize exchanges between the parties so as to ensure expeditious preparation for trial.”¹⁸ The judges later amended Rule 65 *bis* twice, first to make status conferences mandatory, then to allow the use of teleconferencing at these conferences.¹⁹

The judges also introduced Rules 73 *bis* and *ter* mandating pretrial conferences at which the Trial Chamber (1) may call upon the prosecution and defense to shorten the estimated length of the examination-in-chief of witnesses, (2) must determine the number of witnesses that each of the parties may call, and (3) must set the time available to the prosecution and the defense to present evidence at trial.²⁰ Rule 73 *bis* was later amended to establish that the Trial Chamber may select a number of crime sites or incidents as representative of the crimes charged in the indictment, and may restrict the prosecution’s presentation of evidence to those sites or incidents.²¹

ICTY judges also introduced Rule 62 *ter*, which explicitly authorizes plea bargaining before the Tribunal.²² Finally, in January 2001 and August 2003, the Tribunal changed its fee system to ensure that defense counsel did not engage in dilatory tactics.²³

which the prosecutor intends to bring at trial, any admissions by the parties, a statement of matters which are not in dispute, and a statement of contested matters of fact and law. Rule 65 *ter* also establishes that the prosecutor has to submit, before the pretrial conference, the list of witnesses she intends to call at trial, a summary of the facts on which each witness will testify, the number of witnesses who will testify against each accused on each count, the estimated length of time required for each witness, and the total time estimated for presentation of the prosecutor’s case, as well as the list of exhibits she intends to offer. The defense also has to submit a pretrial brief which must indicate the nature of the accused’s defense and any matters in the prosecutor’s pretrial brief the defense takes issue with and why. The defense must also submit lists of trial witnesses and exhibits it intends to offer at trial.

¹⁶ This amendment made pretrial judges mandatory, substantially increased and detailed the power of pretrial judges and the parties’ duties toward them, and ordered the Pretrial Judge to submit to the Trial Chamber files consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings held.

¹⁷ Although there were other amendments of Rule 65 *ter* in the period under study in this paper, we only considered the two amendments mentioned in the text because all other amendments were very minor. We have not evaluated the amendment of Rule 65 *ter* from September 2006 because it took place after the period studied in this paper. For the same reason, we have not evaluated all other amendments and rules introduced after July 2006.

¹⁸ Rule 65 *bis* was initially adopted in July 1997, allowing for the use of status conferences.

¹⁹ Judges introduced these amendments respectively in December 1998 and December 2002.

²⁰ See Rules 73 *bis* and *ter*.

²¹ See Rule 73 *bis* (as amended in July 2003).

²² Rule 62 *ter* was adopted in December 2001. But the Tribunal considered the practice of plea bargaining to be legal before that date. The first case in which the Tribunal agreed with this practice was Prosecutor v. Erdemović, ICTY Trial Chamber, Case No. IT-96-22-T, Sentencing Judgment, para. 18 and 19 (Mar. 5, 1998).

I.B. Allowing More Written Witness Statements at Trial

The second problem with ICTY procedure diagnosed by U.N. experts and ICTY judges was that the heavy reliance on live testimony by ICTY's adversarial system was delaying trials, given the large number of witnesses that these complex trials usually include.²⁴ To address this issue, the judges allowed the introduction at trial of more written statements, arguing that this would reduce trial length by hearing fewer live witnesses at trial.

Rule 89(F) replaced the original version of Rule 90(A), which had established that "(w)itnesses shall, in principle, be heard directly by the Chambers."²⁵ Rule 89(F) now states that a "Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form."²⁶

Furthermore, ICTY Judges adopted Rule 92 *bis*.²⁷ Rule 92 *bis* (A) establishes that a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused.²⁸ In a similar vein, Rule 92 *bis* (D) establishes that a Chamber may admit a transcript of evidence that a witness gave in another proceeding

²³ Appointed counsel has handled the majority of the cases before the Tribunal. As the Tribunal explains: "In January 2001, the Registry introduced its first major reform of the legal aid system. The reforms were motivated by the need . . . to create incentives for counsel to work efficiently While payment was previously made for hours billed by defence regardless of the duration of the proceedings, this modified system is based on the allocation by Registry of a maximum number of hours, paid out in monthly disbursements for pre-trial and appeal stages based on invoiced hours At the same time, changes were also made to the remuneration applicable during the trial phase of the proceedings. A maximum monthly allotment . . . was set in respect of the lead counsel and co-counsel. That ceiling did not apply to hearing hours, which were remunerated based on the actual hours spent by counsel in court." See *Comprehensive report on the progress made by the International Criminal Tribunal for the Former Yugoslavia in reforming its legal aid system*, at para. 16 and 22, U.N. Doc. A/58/150 (2003). In its 2002 plenary, the Tribunal decided to endorse the introduction of a pure lump sum system for trial. See *id.* at para 23. This system was effectively introduced in August 2003. See United Nations. Office of Internal Oversight Services. Internal Audit Division II, *Audit of ICTY Legal Aid Program*, at 3 (March 8, 2006), available at <<http://wikileaks.org/leak/un-oiios/OIOS-20060308-01.pdf>> (visited on March 6, 2009). There was a third reform to the fee system of the Tribunal that established a lump sum for pretrial. But it was effectively introduced in December 2004, late within the period that we are studying (April 1995 to July 2006), and only affected a handful of pretrial phases, none of which had finished by July 2006. This is why we did not include this third reform in our study.

²⁴ See, e.g., Sixth Annual Report of ICTY, August 25, 1999, at para. 13. Disentangling what makes a trial complex is beyond the scope of this article. For a study on what the determinants of case complexity are for key actors of the criminal justice system, see Michael Heise, *Case Complexity: An Empirical Perspective*, 1 J. EMPIRICAL LEGAL STUD. 331 (2004).

²⁵ See Rule 90(A)(1994).

²⁶ Rule 89 (F) was introduced by an amendment to the Rules of Procedure and Evidence on December 13, 2000.

²⁷ Rule 92 *bis* was amended in September 2006. Because, as we will explain in the next section, our study covers the work of the Tribunal in the period April 1995-July 2006, we describe in the text the version of Rule 92 *bis* prior to that amendment. For the same reason, we do not analyze the introduction of Rules 92 *ter* and *quarter* in September 2006, and 92 *quinquies* in December 2009.

²⁸ Rule 92 *bis* (A).

before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.²⁹

Finally, ICTY judges adopted Rule 94 *bis*, which regulates the testimony of expert witnesses and establishes that if the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.³⁰

I.C. Giving Judges Power to Limit Interlocutory Appeals

Finally, U.N. experts and ICTY judges argued that the interlocutory appeals available for prosecution and defense were too broad, creating excessive delays during the pretrial phase and even during trial.³¹ Judges decided to give more power to the trial court to limit the number of interlocutory appeals, on the theory that fewer interlocutory appeals would mean shorter pretrial and trial proceedings.

Thus, the judges amended Rules 72 and 73. These Rules now establish that decisions on all motions except preliminary motions challenging jurisdiction are without interlocutory appeal unless such an appeal is certified by the Trial Chamber. Such certification may be granted if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.³²

I.D. Chronological Summary of the Managerial Judging Reforms

The following table provides a chronological summary of the reforms that ICTY judges introduced to shorten pretrial and trial duration.

²⁹ Rule 92 *bis* (D).

³⁰ Rule 94 *bis* (C). For the reasons already mentioned *supra* notes 17 and 27, we disregard the amendment to this Rule introduced in September 2006.

³¹ See, e.g., Expert Report, *supra* note 10, at para. 102-04.

³² Rules 72 and 73.

| Table 1. Summary of Reforms in the International Criminal Tribunal for the Former Yugoslavia | | |
|---|--|---|
| Reform Date | Reform | Details of Reform |
| July 1997 | Adoption of Rule 65 <i>bis</i> | Created status conferences |
| July 1998 | Adoption of Rules 65 <i>ter</i> , 73 <i>bis</i> , 73 <i>ter</i> and 94 <i>bis</i> | Created pretrial judges (Rule 65 <i>ter</i>); mandated pretrial conferences (Rules 73 <i>bis</i> and 73 <i>ter</i>); allowed statements of expert witnesses (Rule 94 <i>bis</i>) |
| December 1998 | Amendment of Rule 65 <i>bis</i> | Made status conferences mandatory |
| November 1999 | Amendment of Rule 65 <i>ter</i> | Made pretrial judge mandatory; ordered pretrial judges to submit information about the case to the Trial Chamber |
| December 2000 | Amendment of Rule 89(F) and adoption of Rule 92 <i>bis</i> | Allowed introduction of more written witness statements at trial |
| January 2001 | Changes in fee system for defense attorneys appointed by the Tribunal | Introduction of ceiling payment system |
| April 2001 | Amendment of Rule 65 <i>ter</i> | Allowed senior legal officers to assist pretrial judges |
| December 2001 | Adoption of Rule 62 <i>ter</i> | Explicitly allowed plea bargaining |
| December 2002 | Amendment of Rule 65 <i>bis</i> | Allowed teleconferencing at status conference |
| April 2003 | Amendment of Rules 72 and 73 | Allowed trial chamber to decide if an interlocutory appeal can be made |
| July/August 2003 | Amendment of Rules 73 <i>bis</i> and 73 <i>ter</i> and changes in fee system for defense attorneys appointed by the Tribunal | Allowed trial chamber to limit the number of sites and incidents under discussion at trial; introduction of lump sum payment system for trial |

II. EVALUATING WHETHER THE REFORMS SHORTENED ICTY PRETRIAL AND TRIAL PROCEEDINGS

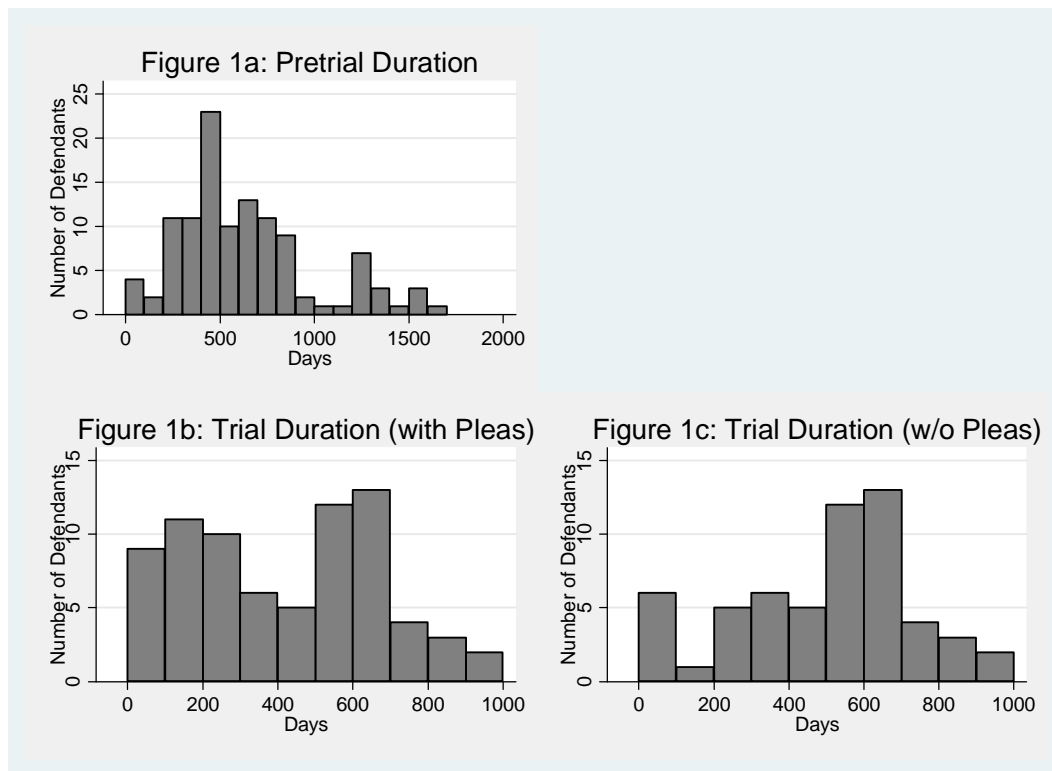
II.A. Data and Methodology

In order to test the hypothesis that the reforms adopted by ICTY judges reduced the duration of each phase of the proceedings, we collected data for this study during the summer of 2006, and the summer and fall of 2008, from the website of ICTY (www.un.org/icty). This website includes documents filed in each of the cases before the Tribunal as well as the annual reports of the Tribunal. With ICTY Registry's authorization, we also collected data from the Tribunal's Judicial Database in The Hague, the Netherlands, in October and November 2008. The earliest case in the dataset began on April 26, 1995. Our study covers the period from that date through July 1, 2006, after which we made our initial coding in the summer of 2006. Our unit of analysis is the individual defendant unless otherwise noted.

II.A.1. Duration as Dependent Variable and the Number of Reforms as Key Independent Variable.

The dependent variable for our study is the length of each procedural stage. The pretrial phase is measured as the number of calendar days between the defendant's initial appearance at the tribunal and either (a) the first day of trial, (b) the date a plea is entered, or (c) the date that some other conclusion of the pretrial period is reached. The initial appearance marks the moment in which the defendant appears for the first time before the Tribunal voluntarily or after his arrest. Since there are no trials in absentia before ICTY, it is only at that moment that the Tribunal can try to move the defendant's case toward trial. The trial phase is also measured in calendar days from the date the trial begins or a plea is entered until the sentencing judgment.³³

The median length of the pretrial phase is about 18 months (551 days). The trial phase with guilty pleas included has a median length of about 14 months (433 days), while the trial phase without guilty pleas has a median length of about 17 months (515 days). Figures 1a to 1c show the distribution of cases by duration.

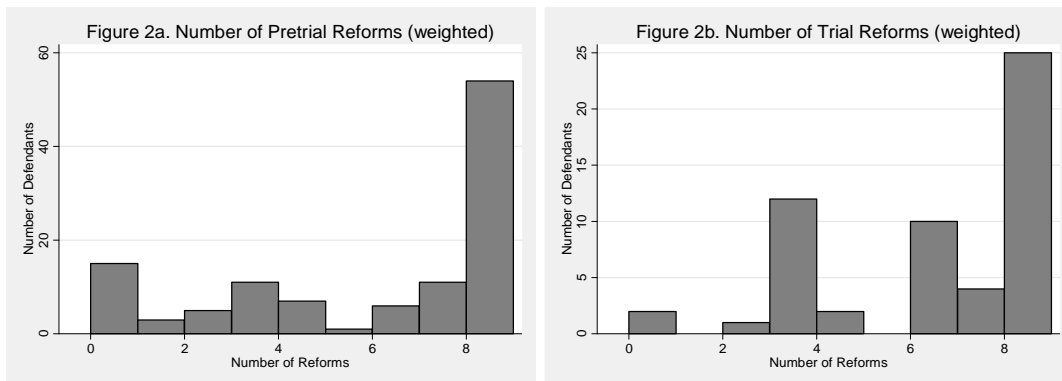


³³ We also measured trial duration by the number of actual days the trial court heard the case. This did not change the results regarding the effect of the reforms on duration.

The key independent variable for this study is the number of reforms that are in effect during the pretrial or trial phase of the defendant. The hypothesis by ICTY reformers that we are testing is that the higher the number of reforms a case is subjected to, the shorter the pretrial and trial phase of that case should be. We included in the analysis the eleven reforms described in the previous section, and we measured and weighted them in two ways: by their overall importance to the process and by their potential individual influence in any particular case.

First, we weighed each reform subjectively according to its importance. Minor reforms are weighted .50, major reforms are given a weight of 2, and those in the middle are weighted 1 (see Table A1 in the appendix). We asked our interviewees and attendees to our presentations in The Hague whether they agreed with our weighing of the relative importance of the reforms. The overwhelming majority of them agreed with it; and the only two people that did not fully agree had only minor disagreements with it. We also repeated our main regression models for pretrial and trial, substituting a non weighed reform measure for the weighed reform measure, and this did not change the results regarding the effect of the reforms on duration. As we will explain in detail in Subsections II.C and II.D, we also repeated our main regression models for pretrial and trial, substituting each individual reform for the aggregate reform measure to test whether our findings are sensitive to any particular reform.

The second weight concerns the proportion of a case that is affected by the reform, as measured by when the reform was adopted in relation to the defendant’s case. For example, if a reform is in place before a defendant’s initial appearance the reform is weighted 1, but if 75% of the duration is completed by the time the reform is adopted, then that reform is given a weight of .25. The maximum possible value in the reforms variable is 9; this value was assigned to one-third of the defendants. The median reform value for the pretrial and trial phases were 7.8 and 7.5, respectively.



As control variables we collected data on case characteristics, court capacity, litigation levels, judges’ characteristics, changes during pretrial in the number of incidents charged, total number of defendants before the Tribunal, and whether the defendant pled guilty. Some of these variables we coded in the summer of 2006; others we coded in the summer

and fall of 2008, responding to suggestions by our interviewees and to feedback we got when we presented a preliminary version of the paper in The Hague in June 2008.

II.A.2. Case Characteristics as Control Variables.

On the characteristics of each case, data were collected regarding the number of incidents, the types of charges, the defendant's physical proximity to the offense (i.e., whether the defendant had physically participated in the commission of the offense, was an immediate or close superior of those who committed it, or a superior of the immediate or close superior of those who committed the offense), whether the defendant was charged with joint criminal enterprise, whether the defendant was charged with command responsibility, the number of defendants in each proceeding, and the number of live witnesses presented at trial.

We computed these variables separately for each phase of the proceedings—i.e., pretrial and trial—gathering the data from the initial indictment for the pretrial phase, and from the final indictment for the trial phase. In the case of joint criminal enterprise, we also checked the judgments by the Trial Chamber and the Appeals Chamber on each defendant. The number of witnesses was collected from the procedural history section of the judgment of each case, and from the case sheet on each case available at the website of the Tribunal.

We counted the number of incidents, defendants, and live witnesses presented at trial. We created dummy variables for the types of charges, joint criminal enterprise, and command responsibility. We created proximity to the offense as an ordinal variable—with 1 being the closest to and 3 the furthest from the offense.

We expected that the number of incidents, defendants and witnesses at trial would be positively correlated with the length of the trial—i.e., they would decrease the risk that the trial would end on any given day. We also controlled for the types of charges, the defendant's physical proximity to the offense, joint criminal enterprise and command responsibility because they could also affect the length of the case. But we did not have one theory on whether these variables would affect duration in either direction—or would affect duration at all.

II.A.3. Court Capacity as Control Variable.

Data about the number of judges, employees, and courtrooms at the Tribunal were collected from ICTY annual reports. We devised a measure of court capacity. We expected court capacity to influence phase duration because increasing the number of judges, courtrooms and staff should, up to a certain point, increase the ability of the court to collect evidence, hear testimony and process motions. We measured these aspects of capacity, and a preliminary analysis revealed a high degree of multicollinearity among them. Rather than select one variable as an exemplar of court capacity, we included all of the variables in a confirmatory principal components analysis and generated a factor

score. This score represents the shared variance of all of these measures, and is hypothesized to represent a latent variable, “Court Capacity.” We calculated it separately for both the pretrial (Table 2a) and trial (Table 2b) phases.

| Table 2a. Court Capacity in Pretrial principal components analysis | |
|--|-----------------|
| | Promax rotation |
| Number of trial judges at time of initial appearance | .899 |
| Number of <i>ad litem</i> judges at time of initial appearance | .896 |
| Number of appeals judges at time of initial appearance | .900 |
| Number of courtrooms at time of initial appearance | .879 |
| Number of employees at time of initial appearance | .972 |
| N=115, Eigenvalue = 4.139, Proportion explained = .828 | |

| Table 2b. Court Capacity in Trial principal components analysis | |
|---|-----------------|
| | Promax rotation |
| Number of trial judges at time trial begins | .856 |
| Number of <i>ad litem</i> judges at time trial begins | .886 |
| Number of appeals judges at time trial begins | .838 |
| Number of courtrooms at time trial begins | .745 |
| Number of employees at time trial begins | .962 |
| N=77, Eigenvalue = 3.699, Proportion explained = .740 | |

II.A.4. Other Control Variables.

Data on the number of pretrial and trial written motions and interlocutory appeals were also collected from the Judicial Database of the Tribunal. We consider these variables to be a proxy for litigation levels in each case. We expected that these variables would be positively correlated with the length of the case—they decrease the risk that the case would end on any given day; especially in the pretrial phase where written motions should have more weight than at trial.

We also collected data on whether pretrial judges, trial judges, and the president of the trial court came from common or civil law jurisdictions. These data were collected from the website of the Tribunal and from the internet. We did not have one theory on whether

this variable would affect time one way or the other, or whether it would affect time at all. But we controlled for it because it was suggested as one of the factors that might affect time by some of our interviewees and by attendees at our presentations at ICTY, on the theory that the legal background of the judges could affect the judges' attitude toward the reforms.

Data on the number of times the initial indictment was factually amended during the pretrial phase were collected from the website of the Tribunal. We designed the variable as a proxy for the quality and thoroughness of the investigation before the defendant had his initial appearance at the Tribunal. Our reasoning here was that the lesser the quality or thoroughness of the early investigation, the more factual amendments prosecutors would need to introduce to indictments before they take the case to trial. Thus, we expected that the number of factual amendments to the indictments would be positively correlated with the length of the pretrial phase—i.e., they would decrease the risk that the pretrial phase would end on any given day.

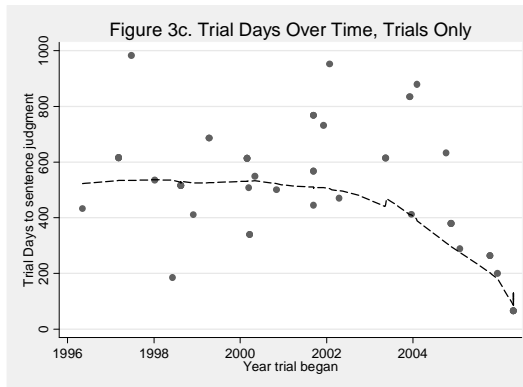
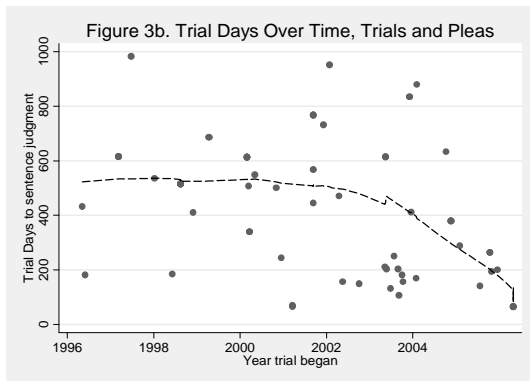
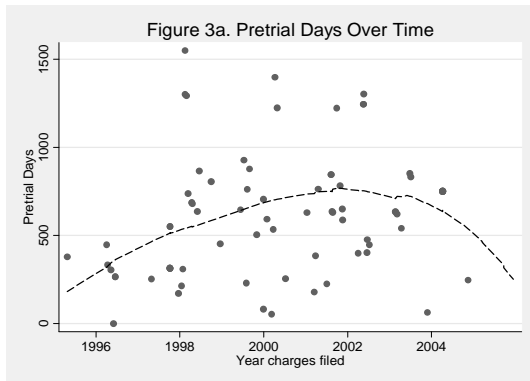
We also collected data on the number of defendants before the Tribunal at the time each defendant had his initial appearance and his trial started. We expected that the more defendants the Tribunal had, the longer the pretrial phase would be, because the more defendants, the less resources and court capacity the Tribunal would have per case. We did not expect that this variable would affect trial because once a trial starts, the trial chamber usually concentrates on it until it finishes it.

Data on whether the defendant entered a guilty plea were collected from the website of the Tribunal. We expected this to shorten length by allowing the case to move swiftly to sentencing.

Finally, we coded a variable for each defendant that represents the week in which his pretrial or trial begins. In the parlance of survival analysis, this represents the point in time that the subject was enrolled in the experiment. We theorize that this variable is a measure of two different things. First, it is a measure of institutional memory—of how well the judges, lawyers and administrators have learned to do their jobs. We expected that the passage of time would have a negative effect on the duration of pretrial and trial periods, as judges, lawyers and administrators learned how to work more efficiently. This variable also controls for the time-dependent nature of the reform process, as each additional reform is a function of both the move toward managerial judging and the calendar.

II. B. Exploratory Analysis

The duration measures of pretrial and trial periods over the course of this study did not covary. Pretrial duration increased over time, from 1996 to 2002, and then began to decline. Trial duration (with and without guilty pleas) stayed relatively steady until 2002, and then declined until July 2006 (Figures 3a to 3c).



These results could be due to a number of factors. We think the explanation is likely one of court capacity, combined with a cluster of guilty pleas that were entered between 2002 and the beginning of 2004—that can be observed by comparing Figures 3b and 3c—and a downwards trend in the number of defendants per trial after 1999.

The pretrial period increased because cases were held longer before progressing to trial because the trial chambers did not have a courtroom available or were not ready to receive them. As the court capacity increased, the Tribunal was able to hold more trials simultaneously which helped to decrease the length of the pretrial phase. The cluster of guilty pleas between 2002 and the beginning of 2004 also helps explain the decline in pretrial duration after 2002, since these guilty pleas swiftly ended these defendants' pretrial phases.

The increase in court capacity and the mentioned cluster of guilty pleas between 2002 and the beginning of 2004 would also help explain the decline in the duration of trials after 2002. The downward trend in the number of defendants per trial in the period covered by our study would also help explain the decline in the duration of trials since, normally, fewer defendants at trial leads to fewer witnesses testifying at trial, and results in shorter trials.

Our latent variable estimate of court capacity is highly correlated with time. The Tribunal steadily increased the number of judges, courtrooms and employees during the first six years under study (1996-2002), at which point it leveled off (Figures 4a and 4b). The point at which it ceased to grow coincides with the point at which pretrial duration peaked, and pretrial and trial duration started to decline, suggesting that the capacity of the court reached an equilibrium state with regard to the volume of its cases.

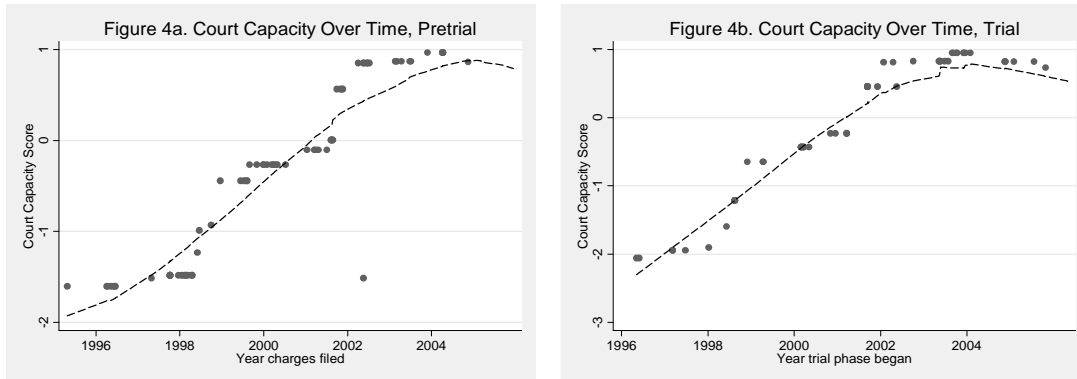
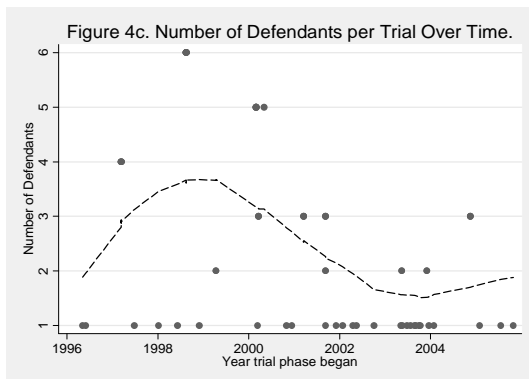


Figure 4c shows the downwards trend in the number of defendants per trial after 1999.



II.C. Survival Analysis of Pretrial Phase

We analyzed the data in Stata using Weibull regression. Weibull regression is a parametric survival analysis in which the baseline hazard function is presumed to change monotonically over time—such as in the likelihood of miscarriage during pregnancy or the likelihood of dying of cancer in the United States. In the first case the risk of miscarriage is greater at the beginning of pregnancy than at the end. In the second case the likelihood of dying of cancer at birth is smaller than at age 65.

In this analysis of procedure duration in an international criminal tribunal, the likelihood that a pretrial phase will end is assumed to increase over time. For instance, the probability that the pretrial phase will survive the 10th day is much higher than the

probability that it will survive the 700th day. In order to explain this assumption, it is necessary to notice first that there is no “trial paradox” in the context at ICTY.³⁴ The prosecutor and most defendants do not pay for the economic costs of the criminal process at ICTY. In addition, the prosecution has incentives to go to trial instead of bargaining given that the goals of international criminal tribunals include setting a complete historical record of the atrocities and giving voice to the victims—something that trials are much more able to provide than guilty pleas. The defense also has incentives to delay proceedings because the prosecution has the burden of proof and its evidence may weaken over time, the chances of acquittal are not insignificant (which creates incentives to fully litigate the case at trial), and the longer the proceedings take the more defendants may question the legitimacy of the Tribunal. Finally, plea bargaining was initially not authorized at the ICTY, and once it was introduced, a group of ICTY judges set sentences above the sentence plea-bargained by prosecution and defense—thus, discouraging plea agreements altogether.

In addition, defendants are not arrested (nor do they voluntarily surrender to the Tribunal) when the prosecution and the court are ready for trial, but rather when the Tribunal manages to get a hold on the defendant. This means that the more time that passes since the initial appearance, the more likely it is that the prosecution and the court are ready to adjudicate the case in the form of a guilty plea or a trial. Similarly, since most defense attorneys are appointed by the Tribunal and tend to work on one case at a time, the more time that passes since the defendant’s initial appearance, the more likely it is that the defense attorneys are ready for dealing with the adjudication phase in the form of a guilty plea or a trial.

For the reasons just articulated we think that Weibull regression is the best model for our study. To validate our decision we re-analyzed our data using Cox regression, a semi-parametric model that is free of assumptions about the distribution of the data. We found that the coefficients in the Cox regressions did not differ meaningfully from those in the Weibull regressions, that the Weibull regressions exhibited better model fit, and that the primary assumption of the Weibull model—that the hazard rate changes over time—is borne out by the statistics. We did not report the Cox regressions, but they are available from the authors.³⁵

³⁴ The “trial paradox” has been the starting point for a substantial part of the law and economics literature on litigation. For reviews of this literature, see, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and their Resolution*, 27 JOURNAL OF ECONOMIC LITERATURE 1067 (1989); Kathryn E. Spier, *Economics of Litigation*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (Steven N. Durlauf & Lawrence E. Blume eds., 2nd ed. 2008).

³⁵ For a similar approach, see Paul Fenn & Neil Rickman, *Asymmetric Information and the Settlement of Insurance Claims*, 68 THE JOURNAL OF RISK AND INSURANCE 615 (2001).

| Table 3. Determinants of the Duration of Pretrial Proceedings in ICTY. The dependent variable is calendar days from initial appearance to beginning of trial or plea date. Cell entries are Weibull regression coefficients (clustered standard errors in parentheses) | | | | | | |
|--|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| | I | II | III | IV | V | VI |
| Number of Reforms | -1.164** (0.238) | -1.205** (0.253) | -1.643** (0.339) | -1.626** (0.341) | -1.493** (0.339) | -1.329** (0.292) |
| Week of initial appearance (0=4/26/1995) | 0.019** (0.005) | 0.020** (0.005) | 0.019** (0.007) | 0.021** (0.007) | 0.184** (0.007) | 0.022** (0.007) |
| Number of Incidents alleged in initial indictment (log) | | 0.036 (0.128) | 0.002 (0.143) | 0.091 (0.159) | 0.009 (0.153) | 0.256 (0.178) |
| Individual Responsibility | | -0.378 (0.369) | -0.611 (0.359) | -0.864* (0.380) | -0.613 (0.440) | -0.895* (0.394) |
| Individual and Command Responsibility | | -0.225 (0.350) | -0.850* (0.419) | -1.110* (0.449) | -0.865 (0.492) | -1.091* (0.540) |
| Court Capacity (see text for explanation) | | | 2.017** (0.666) | 2.050** (0.638) | 1.783* (0.708) | 1.276 (0.684) |
| Number of Defendants Before Tribunal | | | -0.031 (0.050) | -0.051 (0.049) | -0.344 (0.049) | -0.055 (0.036) |
| Number of Defendants in This Case | | | -0.037 (0.089) | | | |
| Guilty Plea entered before or at trial | | | | 0.861* (0.371) | 0.599 (0.390) | 0.851* (0.347) |
| Number of Times Indictment was Amended | | | | | -0.180 (0.108) | -0.109 (0.105) |
| Number of Pretrial Motions -- Prosecution | | | | | | -0.741** (0.276) |
| Number of Pretrial Motions -- Defense | | | | | | -0.698** (0.161) |
| Constant | -18.132** (2.578) | -18.222** (2.649) | -15.596** (2.906) | -15.845** (2.701) | -16.381** (2.864) | -19.025** (3.339) |
| Ln(p) | 1.05** | 1.07** | 1.18** | 1.19** | 1.20** | 1.357** |
| N Subjects / N Completions | 112/76 | 110/75 | 110/75 | 110/75 | 108/75 | 108/75 |
| Time at risk | 71761 | 70559 | 70559 | 70559 | 68639 | 68639 |
| LR Chi-square(DF) | 37.95(2) | 35.29(5) | 59.26(8) | 58.87(8) | 59.98(9) | 104.27(11) |
| Prob(Chi-square) | .000 | .000 | .000 | .000 | .000 | .000 |
| *p<.05, **p<.01 | | | | | | |

The six models in Table 3 are designed to test whether the number of reforms in place during an individual defendant's pretrial proceedings is a significant determinant of the length of those proceedings. The model in Column I tests this hypothesis while

controlling for the tenure of ICTY, as measured by the weeks since the first appearance of the initial defendant—the first appearance of the first defendant is treated as week 0 of the experiment.

Column II introduces control variables that account for characteristics of the case against the defendant—i.e., the number of incidents alleged in the initial indictment and whether the defendant is charged with having command responsibility. Column III includes these variables and adds three more: a principal component score of court’s capacity, the total number of defendants before the Tribunal when the defendant had his initial appearance, and the number of defendants in his particular case.

In Column IV we replaced the number-of-defendants-in-the-case variable with a dummy that indicates whether the defendant entered a plea of guilty during the pretrial phase, since pretrial proceedings will be swiftly concluded if the defendant pleads guilty. In Column V we added a variable about the number of times the indictment was factually amended during pretrial. In Column VI we added the number of pretrial motions that prosecution and defense presented, as a proxy for level of litigation in the case.³⁶

We also ran the final regression with each of all the remaining variables we coded—i.e., the types of charges; the defendant’s physical proximity to the offense; whether the defendant was charged with joint criminal enterprise; the number of interlocutory appeals that prosecution and defense presented; and whether the pretrial judges, trial judges and the president of the trial chamber came from common or civil law jurisdictions. But these variables were not statistically significant, did not change the results regarding the effect of the reforms on pretrial length, and did not improve the fit (chi-square) of the model. This is why we did not include them in the pretrial models.³⁷

The baseline hazard for the model is estimated by the parameter $\ln(p)$. In Model I, $\ln(p)$ is 1.05 and significantly greater than 0, which indicates that with every day the pretrial phase goes on, the likelihood that it will end increases at an increasing rate. For example, the probability that the pretrial phase will end after 20 days is less than the probability that it will end after 100 days.

The number of reforms adopted at the time proceedings were initiated against each defendant is significantly and negatively correlated with the probability that the pretrial phase will end. (The coefficients should be interpreted as follows: a negative value indicates that the risk of failure—i.e., the pretrial or trial phase coming to an end—is

³⁶ The contribution of each set of variables is evident from the change in chi-square of the model. The primary robustness check on the final regression model consisted of an examination of the deviance residuals. Two cases had relatively high deviance ($dev > 3$), and their influence was tested by removing them from the dataset and re-running the regression. This made little difference to the output; all signs, coefficients and p-values were comfortably similar to their previous values.

³⁷ We performed one more specification check by expanding the data from case-level to month-level. This enabled us to assign more granular values to the time-dependent variables (reforms, court capacity, etc.). The monthly analysis did not lead us to conclusions different from those we reached using case-level data.

decreased, while a positive value indicates that the risk of failure is increased.³⁸) This is true in all of the pretrial models (I, II, III, IV, V and VI of Table 3). It suggests that the reforms caused the pretrial phase to be longer.

However, it is not possible to tell from these models whether the causal arrow points only one way—i.e., whether the longer pretrial proceedings caused the adoption of more reforms or whether the reforms themselves led to longer pretrial proceedings. But given that in the next section we will show that, contrary to what the reforms promised, the procedural reforms are not correlated with a lower number of witnesses, incidents or interlocutory appeals entertained by the appeals chamber, we have strong elements to say that the reforms lengthened pretrial duration.

It is not possible to enter each of the reforms into the models as individual variables, as there are problems of multicollinearity between them and too few degrees of freedom. To address this last point we repeated the regression model in column VI eleven times (not reported), substituting each individual reform for the aggregate reform measure, in order to test whether these findings are sensitive to any particular reform or if the cumulative measure is masking contrary effects. These tests revealed that nine of the eleven reforms are significantly correlated with duration—seven of them at $p < .05$; two of them at $p < .10$ —and that the coefficients for each of the eleven reforms indicates that they are all associated with longer durations in the pretrial phase. The only reforms not significantly correlated with pretrial duration were those allowing the use of status conferences in July 1997, and making the status conferences mandatory in December 1998.³⁹

As for the controlling variables, the week the defendant had his initial appearance is statistically significant: the later the week, the shorter the pretrial phase. This suggests that prosecutors, judges, lawyers and administrators have learned to deal faster with complex international criminal cases over time in the pretrial phase. The number of incidents alleged in the initial indictment did not affect the duration of the pretrial phase.⁴⁰

Command responsibility is also statistically significant. We created three command-responsibility categories: defendants charged only with individual responsibility, with both individual and command responsibility, and with only command responsibility—which is the intercept of the two other categories and does not appear in the model. Model VI suggests that the pretrial phase against those defendants charged with only individual responsibility and with both individual responsibility and command responsibility is longer than the pretrial phase against those defendants charged with only command responsibility.

³⁸ To put this in a different context, the coefficient for a cancer-fighting drug would be negative if the drug prolongs the life of the patient.

³⁹ On these reforms, see Section I.

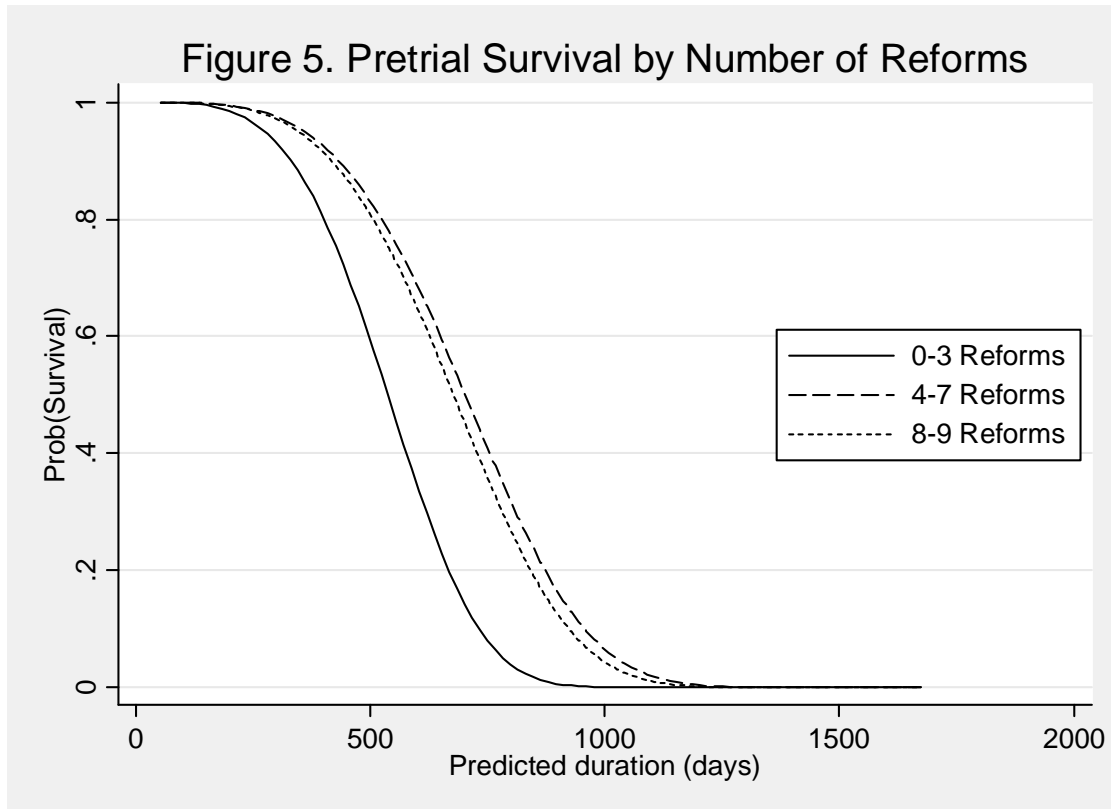
⁴⁰ Since the introduction of the reforms could have affected the number of incidents the prosecutor charged, we re-ran the analyses of Table 3 with incidents removed in order to check whether there was an endogeneity problem between the number of reforms and the number of incidents. The removal of the number of incidents did not affect the coefficient for the number of reforms.

This is probably a consequence of the mixed category requiring the prosecution to prove not only that the crime was committed and that the defendant participated in its commission, but also that the defendant was a commander of some of those committing the crime. The fact that individual responsibility cases took more time than exclusively command responsibility cases suggests that it takes more time for prosecutors to link the defendant to the specific incidents as a participant in the crime than as a commander of those who committed the crime.

The capacity of the court to handle more cases is significantly correlated with shortening pretrial proceedings—in Model VI at $p < .10$. The addition of judges, employees and courtrooms to ICTY probably reduced the duration of the pretrial phase. However, this should be interpreted only in the context of the other variables in the model; in a bivariate analysis court capacity and pretrial duration are positively correlated ($r = .17$, $p = .08$). The number of other defendants before the Tribunal at the time of the initial appearance is not significantly correlated with duration—though its coefficient goes in the direction that we expected; the more defendants, the longer the duration.

As predicted, the guilty plea variable is statistically significant: pled cases have shorter pretrial phases than cases that are not pled. The number of factual amendments to the initial indictment is not correlated with time. The number of pretrial motions by the prosecution and the defense is statistically significant—the more motions, the longer the pretrial phase. The substantial contribution of these two variables is evident from the change in the chi-square of Model VI.

The influence of the number of reforms on the duration of the pretrial phase is illustrated in Figure 5, which is derived from Column VI of Table 3.

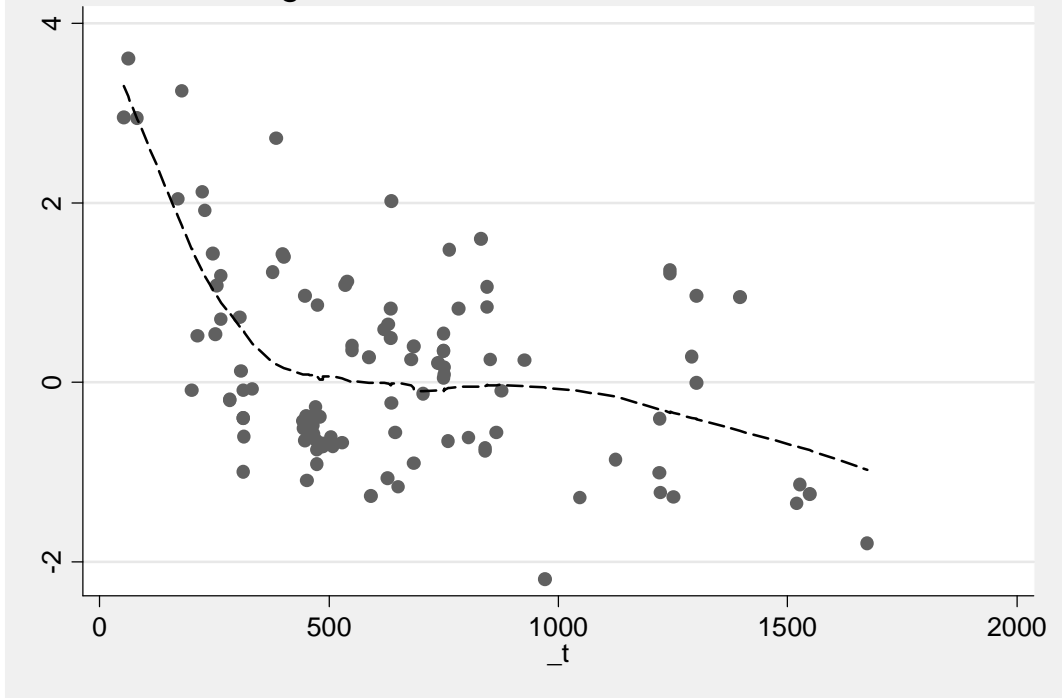


Each curve represents the predicted probability of survival for a case during its pretrial period as a function of the number of reforms, with the week of initial appearance and the court capacity variable held constant at their local means.⁴¹ Comparing the lines for 0-3 Reforms and 8-9 Reforms where each of them intersects the point where $\text{Prob}(\text{Survival}) = .2$, it is evident that the larger number of reforms lengthens the time a case spends in pretrial from approximately 700 days to about 900 days. Drawing a different comparison, at 700 days the $\text{Prob}(\text{Survival})$ of a 0-3 Reform case is .20, and the $\text{Prob}(\text{Survival})$ of an 8-9 Reform case is $> .60$.

The preceding analysis implies that the managerial reforms to ICTY, which were meant to reduce the duration of proceedings, actually increased the length of the pretrial phase, and that the systematic reductions in duration are due to increased court capacity and to the practice of plea bargaining at ICTY. The likelihood of a lurking variable is apparent from an examination of the residuals, which are evidently correlated with time (Figure 6). However, we have been unable to find any additional measures that explain more of the variance in pretrial phase duration—despite our coding of additional variables in response to comments by our interviewees, and by attendees to our presentations of our preliminary results in The Hague.

⁴¹ The local means are calculated as the average value of the other variables for cases that are within the range of the reforms. For example, the local mean of the variable Week of Initial Appearance equals 113 for cases when the number of reforms is between 0 and 3, and it equals 236 for cases when the number of reforms is between 4 and 7.

Figure 6. Residuals of Table 3, Col VI



| Table 4. Determinants of the Duration of Trial Proceedings in ICTY. The dependent variable is calendar days from trial beginning to sentencing judgment. Cell entries are Weibull regression coefficients (clustered standard errors in parentheses) Columns I-IV and VI are trials only. Column V includes trials and guilty pleas. | | | | | | |
|--|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| | I | II | III | IV | V | VI |
| Number of Reforms | -0.806** (0.298) | -0.911** (0.348) | -1.350* (0.541) | -1.888** (0.565) | -0.867* (0.375) | -1.917** (0.589) |
| Week of initial appearance (0=4/26/1995) | 0.014* (0.006) | 0.019* (0.007) | 0.016* (0.008) | 0.011 (0.009) | 0.008 (0.005) | 0.012 (0.009) |
| Number of Incidents alleged in final indictment (log) | | -0.585** (0.141) | -0.622** (0.141) | -0.779** (0.213) | -0.203 (0.144) | -0.626** (0.183) |
| Individual Responsibility | | 1.335 (0.782) | 1.219 (0.819) | -0.529 (0.994) | 1.060 (0.776) | -1.021 (0.987) |
| Individual and Command Responsibility | | 1.429 (0.768) | 1.679* (0.833) | 0.597 (0.908) | 1.104 (0.666) | 0.417 (0.992) |
| Court Capacity (see text for explanation) | | | 1.458 (1.242) | 2.771** (1.083) | 1.203 (0.822) | 2.800** (1.032) |
| Number of Witnesses | | | | -2.932** (0.416) | | -3.736** (0.794) |
| Number of Defendants in This Case | | | | | 0.092 (0.146) | 0.309 (0.173) |
| Guilty Plea entered before or at trial | | | | | 5.038** (0.928) | |
| | | | | | | |
| Constant | -25.417** (3.809) | -36.004** (6.138) | -34.304** (6.177) | -30.929** (7.599) | -26.208** (5.093) | -32.419** (8.782) |
| Ln(p) | 1.43** | 1.75** | 1.81** | 2.16** | 1.51** | 2.24** |
| N Subjects / N Completions | 57/45 | 57/45 | 57/45 | 57/45 | 75/63 | 57/45 |
| Time at risk | 28168 | 28168 | 28168 | 28168 | 31056 | 28168 |
| LR Chi-square(DF) | 9.93(2) | 33.68(5) | 30.69(6) | 68.06(7) | 51.58(8) | 59.95(8) |
| Prob(Chi-square) | .007 | .000 | .000 | .000 | .000 | .000 |
| *p<.05, **p<.01 | | | | | | |

II.D. Survival Analysis of Trial Phase

The six models in Table 4 are designed to test whether the number of reforms in place during an individual defendant's trial is a significant determinant of the length of it. Models I, II, III, IV and VI, include only trials—without pleas—started before July 1,

2006. Model V includes both trials and cases in which the defendant pled guilty before July 1, 2006.

The variables in the trial models are essentially the same variables we included in the pretrial models—though computed regarding trial, not pretrial, as explained in subsection II.A—with the following differences.

First, we excluded the number of times the initial indictment was factually amended, the number of other defendants before the Tribunal at the time of the beginning of the trial, and the number of written motions that the prosecution and defense presented during trial, because they are not statistically significant, they do not affect the relationship between the number of reforms and trial duration, and they do not improve the fit (chi-square) of the model. Given that the number of observations is relatively low—57 for trials without guilty pleas out of which only 45 were completed—there are good technical reasons to try to keep to a minimum the number of variables in the final regression.

Second, we added to the trial models the number of live witnesses presented at trial, because we predicted that this variable would lengthen the trial duration.

We also ran the final regression with the remaining variables we coded—i.e., the types of charges; the defendant’s physical proximity to the offense; whether the defendant was charged with joint criminal enterprise; the number of interlocutory appeals that prosecution and defense presented; and whether the pretrial judges, trial judges and the president of the trial chamber came from common or civil law jurisdictions. But these variables were not statistically significant, did not change the results regarding the relationships between the number of reforms and trial duration, and did not improve the fit (chi-square) of the model. This is why we did not report them in the trial models.

As with the pretrial phase, managerial reforms at the trial stage are significantly correlated with longer trial duration (Table 4). This relationship is strong in all the models. Like in the case of the pretrial models, it is not possible to tell from these trial models whether the causal arrow points solely one way. But given that in the next section we will show that the reforms did not deliver any of the measurable outputs that they promised, there are strong reasons to think that the reforms made the trial longer.

As with the pretrial models, it is not possible to enter each of the reforms as individual variables into the equation, as there is both a problem of multicollinearity and too few degrees of freedom. To address this last point we repeated the regression model in column VI eleven times (not reported), substituting each individual reform for the aggregate reform measure, in order to test whether these findings are sensitive to any particular reform or if the cumulative measure is masking contrary effects. These tests revealed that seven out of the eleven reforms are significantly correlated with longer trial duration. The other four reforms are not statistically significant with duration. These four include: making status conferences mandatory in December 1998; making pretrial judges mandatory and ordering pretrial judges to submit to the trial chamber substantial information about the case in November 1999; adopting Rule 92 *bis* in December 2000;

and allowing trial chamber to limit the number of sites and incidents under discussion at trial, and the introduction of a lump sum payment system for trial, in July/August 2003.⁴²

As for the controlling variables, the week the defendant's trial started is not statistically significant in Models IV, V and VI. This may suggest that prosecutors, defense attorneys and judges have not learned to deal faster with complex international criminal trials over time. Alternatively, this could be the result of an interaction effect. It could be that all of these actors have learned to deal better with complex international criminal trials over time, but they have opposing goals regarding trial length. For instance, it could be that the more defense attorneys learn about how to deal with these cases, the more tools they have to make trials longer.⁴³

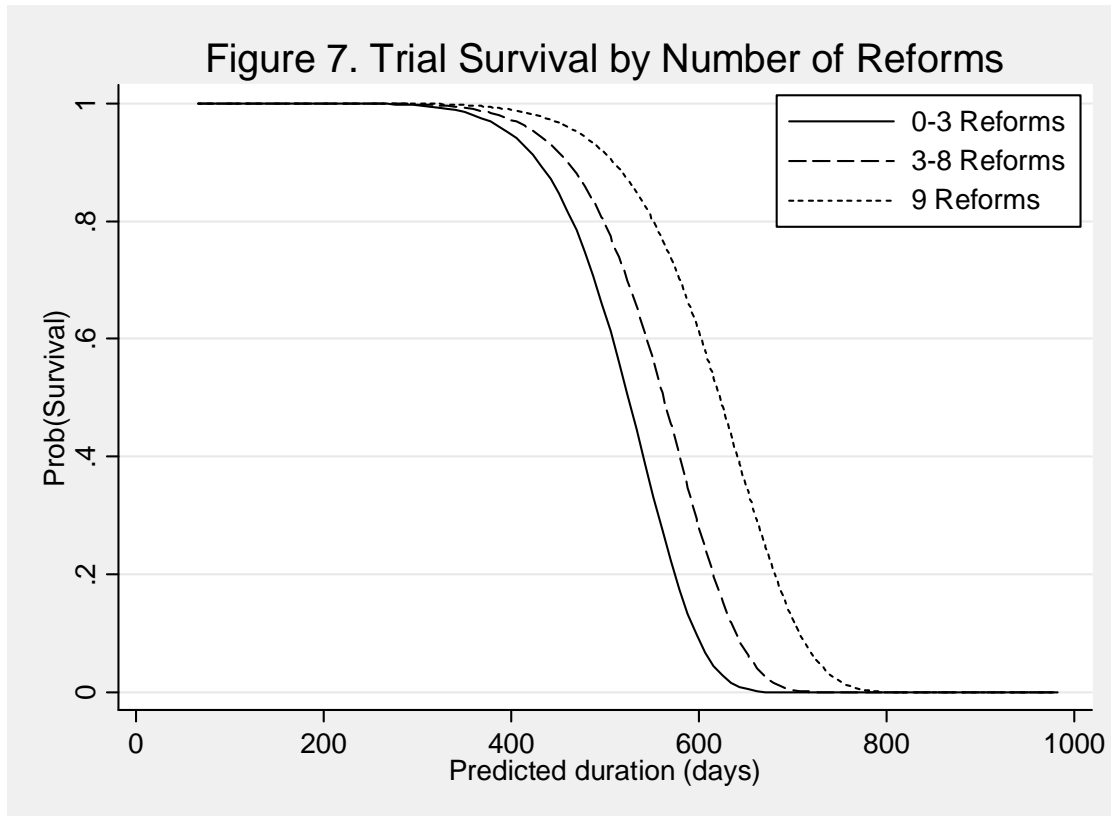
Command responsibility is not statistically significant. But court capacity and guilty pleas—the latter in Model V—are significantly correlated with shorter trial lengths, as we expected. The number of incidents, witnesses and defendants—the latter at $p < .10$ —are significantly correlated with longer trials, also as we expected.⁴⁴

The predicted effect of reforms on the duration of trials is illustrated in Figure 7. As with Figure 5, these curves are calculated by holding the week the trial begins and the court capacity at their local means.

⁴² On these reforms, see *supra* Section I.

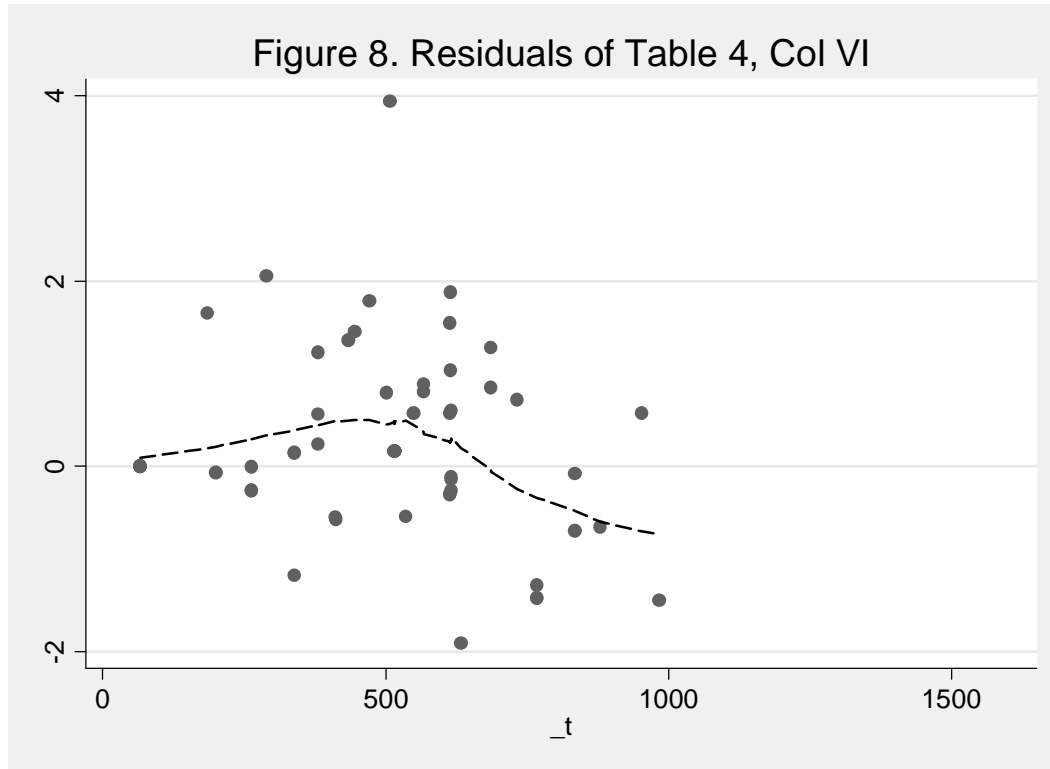
⁴³ See Interview No. 6 (civil law defense attorneys having learned more about how to work within a common law system may help explain trial results).

⁴⁴ Since the introduction of the reforms could have affected the number of incidents the prosecutor charged and the number of witnesses testifying at trial, we re-ran the analyses of Columns IV and VI of Table 4 three times with incidents and witnesses removed sequentially and simultaneously in order to check whether there was an endogeneity problem between the number of reforms and these two other independent variables. The coefficient for the number of the reforms is still negative and statistically significant after the sequential and simultaneous removal of incidents and witnesses.



The effect of the reforms at the trial stage is not as stark as it is at pretrial. The difference between 0-3 reforms and 9 reforms where each of them intersects the point where $\text{Prob}(\text{Survival}) = .2$ reveals that a larger number of reforms lengthens the time a case spends in trial from less than 600 days to about 700 days (Figure 7). Though it is a smaller difference, it is still a significant difference and not the outcome reformers promised from managerial reforms designed to render trials shorter.

Analysis of the residuals suggests that the trial data do not suffer from the lurking variable problem evident in the pretrial data. There does not appear to be any systematic variation relative to time, and no significant outliers that would skew the analysis (Figure 8). While this does not eliminate the possibility that an unknown factor is driving our results, it does provide us with another layer of validation.



II.E. Interviews and Presentation of Preliminary Results in The Hague

In order to identify any definitional or measurement problems in our variables or possible omitted variables in our study, and to obtain qualitative data about the reforms, we conducted nineteen in-depth interviews with ICTY current or former prosecutors, defense attorneys, judges, and staff. Seventeen of these interviews were conducted in person in The Hague, the Netherlands, in June 2008. Two interviews were conducted by phone in early July 2008, and in late March 2009. Twelve of these interviews were one-on-one. Four of these interviews were one-on-two—i.e., two meetings with two interviewees in each of them. One of these interviews was one-on-three—i.e., three interviewees were interviewed together. We interviewed one person twice. We count this interview as a single one and list the two dates on which the prolonged interview took place. The interviews lasted between half-an-hour and three hours.

We promised anonymity to our interviewees. In order to protect the identity of our interviewees, we indicate only their position at the time of the interview. In cases where revealing the position of the interviewee would reveal her identity, we use a more generic term to refer to her position. In the case of attorneys working at the OTP, we use the generic term “legal officer” to refer to all of them. Table 5 numbers the interviews, and lists interview dates and interviewee positions:

| Interview # | Position of the Interviewee | Date of the Interview |
|--------------------|---|------------------------------|
| 1 | Legal Officer, OTP | 6/23/08 |
| 2 | Legal Officer, OTP | 6/23/08; 6/24/08 |
| 3 | Legal Officer, OTP | 6/23/08 |
| 4 | Legal Officer, OTP | 6/23/08 |
| 5 | Staff, OTP | 6/23/08 |
| 6 | Defense attorney, also worked in Registry | 6/23/08 |
| 7 | Former investigations analyst, OTP | 6/24/08 |
| 8 | Defense attorney, former legal officer of the OTP | 6/24/08 |
| 9 | Legal Officer, OTP | 6/24/08 |
| 10 | Legal Officer, OTP | 6/24/08 |
| 11 | Legal Officer, OTP | 6/24/08 |
| 12 | Legal Officer, OTP | 6/24/08 |
| 13 | Defense Attorney | 6/24/08 |
| 14 | Judge | 6/25/08 |
| 15 | Judge | 6/26/08 |
| 16 | Defense Attorney | 6/26/08 |
| 17 | Defense Attorney, former legal officer of the OTP | 6/27/08 |
| 18 | Defense Attorney | 7/3/08 |
| 19 | Former Judge | 3/24/09 |

Though we could not do a random sampling of our interviewees, we reached them through multiple sources that do not know or do not coordinate their work with each other. OTP facilitated the interviews with its legal officers. The ICTY Association of Defence Counsel put us in contact with four of the defense attorneys interviewed. A different defense attorney put us in touch with the fifth defense attorney interviewed. We got in contact with the sixth defense attorney we interviewed by sending e-mails to a randomly selected list of all the defense attorneys who are members of the Association of Defence Counsel. We got in contact with the two judges and the former judge through a former *ad litem* judge of the Tribunal, and a former U.S. diplomat. An American law professor put us in contact with the staff member of the OTP—interview #5; and a former OTP legal officer put us in contact with the former ICTY investigations analyst.

In the interviews, we presented the preliminary results of our study—including the correlation between the reforms and longer pretrials and trials—to our interviewees, as well as three hypotheses that would explain these results: 1) lack of or inefficient implementation of the reforms; 2) resistance by the parties to the reforms; and 3) increasing levels of litigation brought on by the reforms.⁴⁵ We then asked our

⁴⁵ After we ran our interviews, we obtained data from the Judicial Database of the Tribunal about the number of pretrial motions and interlocutory appeals presented by prosecution and defense to test this

interviewees: 1) whether we were omitting any relevant variables, 2) whether we were measuring anything incorrectly, 3) whether they were surprised by the preliminary results of our study, 4) what they thought about our hypotheses regarding why the reforms had made proceedings longer, and 5) whether they had any other comments or questions.

We also presented the preliminary results of our study in June, 2008, to a group of ten ICTY judges—more than a third of the judges sitting before the Tribunal; to a group of about ten senior legal officers and other employees of the Tribunal; at the colloquium of the OTP before more than forty of its employees; and at the colloquium of the Office of the Prosecutor of the International Criminal Court.

None of our interviewees found the results about the pretrial phase surprising, generally finding our explanations for the pretrial results plausible. Seven of our interviewees were surprised regarding the trial results, mainly because they expected that Rule 92 *bis* would have the effect of shortening trial duration by reducing the number of live witnesses at trial.⁴⁶ Two judges had a similar reaction to the trial results when we presented our preliminary results to the group of ten judges described above.

In response to comments by our interviewees and by people that attended our presentations, we coded the following additional variables: common or civil law background of judges, defendant's physical proximity to the offense, number of times the initial indictment was factually amended, number of interlocutory appeals certified, and whether joint criminal enterprise was charged. We also recoded command responsibility by dividing it in three categories—defendants charged only with individual responsibility, only with command responsibility, or with both.

II.F. A Short Note on Plea Bargaining

This Section has shown that the managerial judging reforms that aimed at shortening pretrial and trial at ICTY have had the opposite effect: making them both longer. The Section also indicates that guilty pleas have had the effect of shortening pretrial and trial. Since these guilty pleas have been the product of plea agreements, one can fairly ask why we have not considered these guilty pleas as a product of the managerial judging reforms. In fact, the encouragement of settlement has been one of the main features of managerial judging as characterized by U.S. civil procedure scholars;⁴⁷ and if we conceive of managerial judging as an abstract procedural model, it makes sense to include settlement and plea bargaining within it.⁴⁸

There are four reasons why we have not considered these guilty pleas as a product of the managerial judging reforms under study. First, the practice of plea bargaining was

hypothesis about increasing levels of litigations brought by the reforms. Our results about this hypothesis were inconclusive, and this is why we abandoned it as a potential explanation of the results of the reforms.

⁴⁶ See Interview Nos. 3, 6, 9, 10, 11, 12, and 19.

⁴⁷ See, e.g., Fiss, *supra* note 4; Resnik, *Managerial Judges*, *supra* note 3.

⁴⁸ See, e.g., Langer, *Managerial Judging*, *supra* note 1, at 874-85.

introduced by ICTY prosecutors, not its judges.⁴⁹ Second, in most plea agreements, judges have remained alien to the negotiations that have taken place between prosecution and defense.⁵⁰ Third, even if the judges generally consider the practice of plea bargaining at ICTY to be legal, a group of judges strongly discouraged the practice by setting sentences above the sentence recommended by the prosecution as part of the plea agreement.⁵¹ Finally, the focus of the reforms that the judges introduced was not to encourage plea agreements, but to shorten pretrial and trial by using the other techniques described in Section I.

The reader should also note that even if someone disagrees with our decision not to consider plea agreements as a product of the reforms, this disagreement does not invalidate the rest of our analysis and results. It is easy to see that the managerial judging technique of encouraging settlement (plea agreement) is conceptually different from the other managerial judging techniques described in Section I—a pretrial judge, a work plan toward trial, pretrial conferences, asking the parties to exchange and provide information about their cases, encouraging them to reach partial agreements on factual and legal issues, reducing the number of live witnesses, and so on—that aim to shorten pretrial and trial rather than avoid trial altogether. Our study shows that this second set of managerial judging techniques have not achieved their goal at ICTY.

III. EXPLAINING WHY THE REFORMS LENGTHENED PRETRIAL AND TRIAL DURATION

The previous section has shown that the managerial reforms introduced to reduce pretrial and trial duration are correlated with longer pretrial and trial phases. Relying on quantitative and qualitative data, the next two sections will explain why the reforms have made the two phases longer. Our basic explanation is that the reforms added new procedural steps, requirements and work—which lengthened the pretrial and trial phases—but did not deliver any of the outcomes that would reduce pretrial and trial duration because judges either did not use their managerial powers or used them ineffectively, and because prosecution and defense resisted the reforms.

The new procedural steps and requirements that the reforms brought included holding status, Rule 65 *ter*, and pretrial conferences; requiring that the pretrial judge establish a work plan for the parties toward trial, and that the parties present pretrial briefs at the pretrial conferences; requirements that Rule 92 *bis* statements have to meet in order to be presented at trial; and all the other steps and requirements described in Section I of this

⁴⁹ See, e.g., Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1 (2002). It was only after prosecutors informally introduced the practice of plea bargaining that the judges amended the Rules of Procedure and Evidence.

⁵⁰ See, e.g., Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 VAND. L. REV. 69 (2006) [hereinafter Combs, *Procuring Guilty Pleas*]; Langer, *Managerial Judging*, *supra* note 1, at note 316.

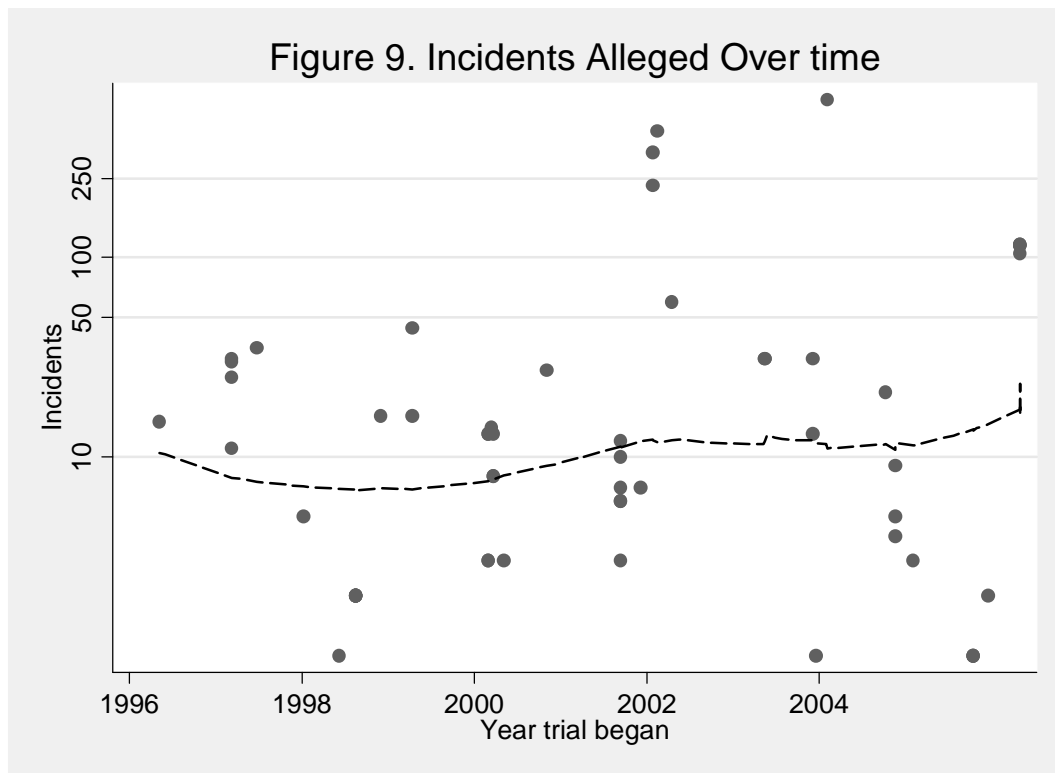
⁵¹ See, e.g., Combs, *Procuring Guilty Pleas*, *supra* note 50; Langer, *Managerial Judging*, *supra* note 1, at 903.

paper.⁵² In the following subsections, we analyze whether the reforms delivered any of their promised results that would reduce the duration of proceedings.

III.A. First Outcome Not Delivered: No Reduction in the Number of Incidents

One of the central ideas of the reforms was that they would help reduce the number of issues under discussion at trial. The reforms would achieve this goal through the work of pretrial judges—who would get early and thorough information about the case and would encourage the parties to agree on factual and legal issues; and through the work of the Trial Chamber—which would also encourage the parties to agree on factual and legal issues and would have the power to limit the number of sites and incidents under discussion at trial.

Had the reforms been successful in delivering this outcome, one would expect that the number of incidents under discussion at trial would have gone down over time. Figure 9 shows that this has not been the case.



⁵² A number of our interviewees have mentioned that the reforms have brought more work for the parties, and take extra time. See Interview Nos. 2 (the reforms brought more work for prosecutors); 9 (Rule 92 *bis* takes a lot of time of pretrial phase); and 13 (the amendment of Rules 72 and 73 have created work; for certification requests, one must file a mini-appeal). We tried to obtain quantitative data on this issue by requesting the ICTY Registry to provide us information on how many hours the prosecution, the defense and the court spent on each case. The Registry only gave us access to the Judicial Database of the Tribunal, which did not have this information.

However, it could be that these raw numbers hide the actual effect of the reforms. This would be the case if, for instance, the total number of incidents did not substantially go down but the complexity of the cases grew higher over time.

In order to test this hypothesis, we ran three regressions with the number of incidents as the dependent variable. As the crucial independent variable, we respectively included in each of these regressions the number of reforms; the adoption of Rule 65 *ter*, which created the figure of the pretrial judge and pretrial conferences; and the amendment of Rules 73 *bis* and 73 *ter*—allowing the trial chamber to limit the number of sites and incidents under discussion at trial.

As controlling independent variables we included the week in which the trial was started—in order to control for the time-dependent nature of the reforms; and the proximity of the defendant to the offense—under the theory that the further the physical proximity of the defendant to the offense, the higher his hierarchical position, and the larger the number of incidents that would be charged against him.

| Table 6. Determinants of the number of incidents charged at trial. OLS coefficients (Standard errors in parentheses). | | | |
|---|--------------------|--------------------|--------------------|
| | I | II | III |
| Level of Responsibility | 0.946** (0.189) | 0.908** (0.191) | 0.946** (0.189) |
| Initial Week | 0.004* (0.001) | 0.002 (0.001) | 0.004* (0.001) |
| Number of Reforms | -0.174 (0.128) | | |
| Adoption of Rule 65 <i>ter</i> | | -0.135 (0.520) | |
| Amendments of Rules 73 <i>bis</i> and 73 <i>ter</i> | | | -0.792 (0.452) |
| Constant | 1.272** (0.313) | 1.429** (0.450) | 1.077** (0.343) |
| Adjusted R-squared | .24 | .23 | .25 |
| N | 113 | 113 | 113 |
| *p<.05, **p<.01 | | | |

The three regressions present the same results regarding the two main variables. Neither the total number of reforms, nor the introduction of Rule 65 *ter*, nor the amendment of Rules 73 *bis* and 73 *ter*, are statistically significantly correlated with the number of

incidents (Table 6). This indicates that the reforms have not had any effect on the number of incidents.

In two of the models, the week in which the trial was started is statistically significant regarding the number of incidents, but the effect is small. This indicates that, controlling for the other variables, the number of incidents has gone up slightly over time. As expected, the physical proximity of the defendant to the offenses is statistically significant regarding the number of incidents in the three models: the physically further the defendant is to the offenses, the larger the number of incidents charged against him—and vice versa.

These regressions also indicate that the reforms did not deliver the promised outcome of reducing the number of incidents at trial as a way to reduce trial duration. These quantitative findings are corroborated by qualitative data. Several of our interviewees indicated that judges did not use their managerial powers or used them deficiently, and that the parties managed to neutralize the implementation of the reforms—which would explain why the reforms have not reduced the number of incidents.

Regarding the lack of or deficient use of judges' managerial powers, a number of our interviewees have indicated that the judges' managerial powers were insufficiently or unevenly used in the pretrial phase,⁵³ and were used at trial only after July 2006—after the end of the period covered by our study.⁵⁴ Many judges did not use the agreement on disputed issues of fact;⁵⁵ did not use status conferences to get substantial information about the case;⁵⁶ did not use 65 *ter* pretrial conferences to narrow down or solve issues in pretrial phase;⁵⁷ put senior legal officers—who lack sufficient authority to induce the parties to reach agreements—in charge of Rule 65 *ter* pretrial conferences;⁵⁸ let pretrial motions accumulate without a decision for months—especially when judges were not,

⁵³ See Interview Nos. 2 (reforms not implemented in pretrial phase); 8 (reforms have made things longer because judges are not enforcing the reforms as they should, because the system is still too unevenly applied, and there is too much influence of common and civil law); 9 (with the exception of Judge Orie, the judges do not manage cases in the pretrial); 11 (they have not reformed the pretrial phase very much); 13 (rules are not applied in the same manner because there are judges who have never sat on the bench before; judges come from different systems; and judges themselves do not know how the rules should be applied); and 14 (“let’s try to prepare trial in pretrial phase” did not work well).

⁵⁴ See Interview Nos. 8; 13 (until 2006, one had a pretty comfortable time in the courtroom; some judges were reluctant to apply pressure); 14 (not surprised about trial results because interviewee would expect judges only have had a real grip on cases in the last two years); and 15 (not surprised about trial results because judges have not used their powers).

⁵⁵ See Interview Nos. 9 and 13.

⁵⁶ See Interview No. 16. See also Mark B. Harmon, *The Pre-trial Process at the ICTY as a Means of Ensuring Expeditious Trials*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE, 377 (2007) [hereinafter *Pre-trial Process*].

⁵⁷ See Interview No. 16.

⁵⁸ See Interview Nos. 6 (65 *ter* conferences with senior legal officers serve only to expose the problems); 8 (the reform regarding senior legal officers did not make a difference; they do not have enough knowledge or authority; perhaps there is a difference now); 9 (senior legal officers are only conduits of information); and 13 (senior legal officers have no power to do anything—there is a conversation, but nothing gets resolved). See also Harmon, *Pre-trial Process* at 387.

and did not know if they would be, members of the Trial Chamber;⁵⁹ and allowed the prosecutor to amend his case and lists after the deadline set by the work plan.⁶⁰ Furthermore, judges did not use their power to sanction the parties when they did not meet their duties under the pretrial judge's work plan or under the reforms more generally.⁶¹

A number of our interviewees have also indicated that the prosecution and defense do not agree very often on facts,⁶² and have resisted reducing the number of incidents under discussion,⁶³ for reasons that we are going to discuss in detail later in Section IV.

III.B. Second Outcome Not Delivered: No Reduction in the Number of Trial Witnesses

A second announced goal of the reforms was reducing the number of live witnesses at trial. The reforms would achieve this goal by allowing the introduction of written statements that would replace live testimony. The adoption of Rule 92 *bis* in December 2000 was the central reform in this respect.⁶⁴ As already mentioned, a fair number of our interviewees and a couple of judges to whom we presented our preliminary results thought that this reform had shortened trial length.⁶⁵ In this subsection we analyze the evolution of the number of live witnesses at trial over time.

⁵⁹ See Interview Nos. 3 and 4 (Trial Chamber should be appointed earlier); 4 (many pending pretrial motions were deferred to the trial judge); 9 (mentioning 150 motions pending, and that pretrial judge sometimes is not part of the Trial Chamber); 13 (unresolved issues still go to trial, so one still has to prepare those issues; motions may linger); 14 (judges are reluctant to adjudicate matters when they are not serving in the Trial Chamber); 16; and 18 (a week before trial was going to start, there were six motions that had been pending for several months about the use of 92 *bis*, *ter* and *quarter* statements).

⁶⁰ See Interview Nos. 8 (judges almost systematically allow the prosecutor to amend his case and lists, making process longer than if there were no Rules 65 *ter* and 73 *bis*.); 16; and 18 (a week before trial was going to start, trial chamber had not decided on whether a new amendment to the indictment could be introduced; the deadline of the work plan had passed, but there was pressure on the chamber because there were sexual crimes at issue).

⁶¹ See Interview Nos. 9 (Rule 65 *ter* (N) was never implemented) and 18 (work plan by pretrial judge is strict but prosecutions and co-defendant do not meet deadlines and there are no sanctions).

⁶² See Interview No. 6.

⁶³ See Interview Nos. 15 (not surprised about trial results because prosecutors did not reduce incidents *motu proprio* or did not do it well); 16 (prosecutors did not reduce their cases and evidence *motu proprio*); 17 (no advantage for the accused to enter into any kind of agreement); and 18 (mentioning a case in which the prosecutor resisted reduction of facts).

⁶⁴ As already pointed out, we do not analyze the introduction of Rules 92 *ter* and *quarter* because it took place after July, 2006.

⁶⁵ See *supra* note 46, and accompanying text.

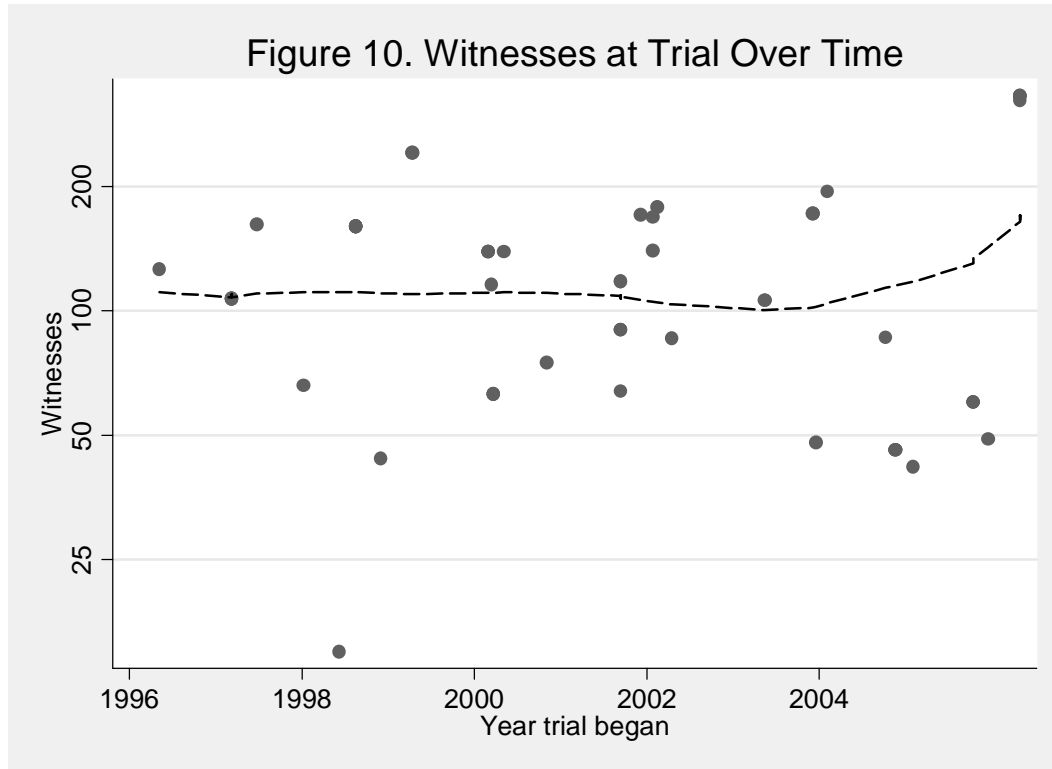
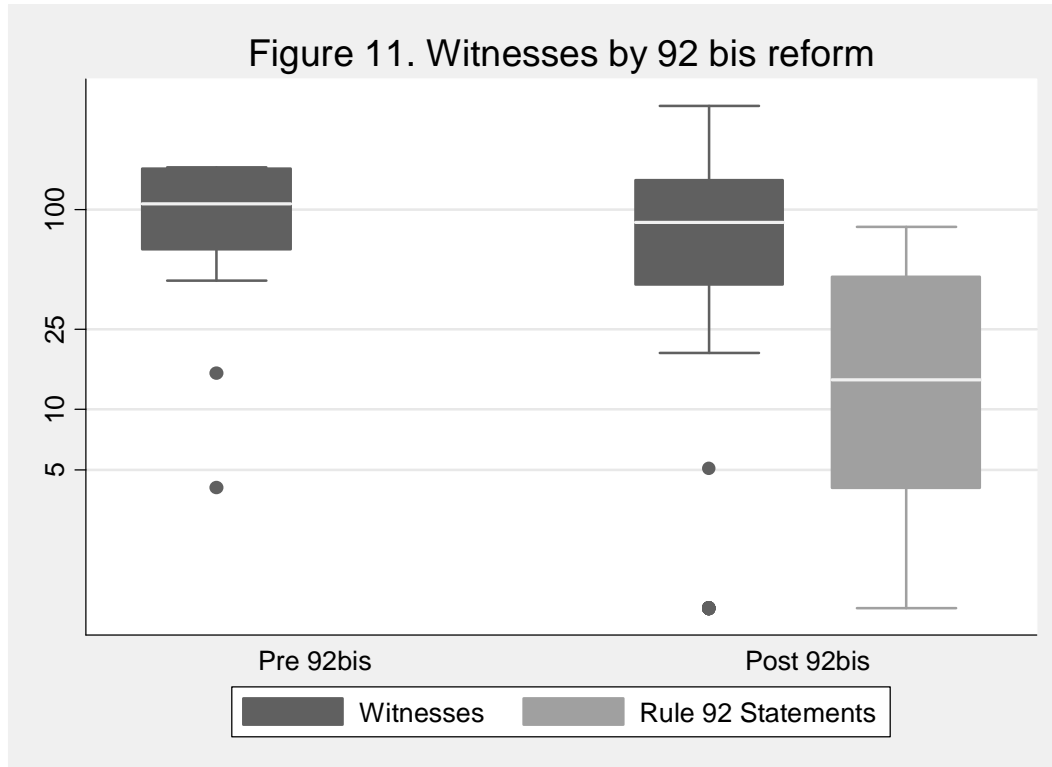


Figure 10 indicates that the number of live witnesses remained relatively steady. This suggests that the introduction of Rule 92 *bis* did not reduce the number of live witnesses at trial. In order to test whether other factors could be masking the effects of the reforms or the introduction of Rule 92 *bis*, we ran two linear regressions in which the number of witnesses is the dependent variable, and the reforms as a whole, and Rule 92 *bis*, are the crucial independent variables. As controlling variables we included the number of incidents and defendants in the same trial, and the physical proximity of the defendant to the offense—under the assumption that these variables could affect the number of trial witnesses.

| Table 7. Determinants of the number of witnesses at trial. OLS coefficients (clustered standard errors in parentheses). | | |
|--|--------------------|--------------------|
| | I | II |
| Number of Incidents | 0.225** (0.080) | 0.227** (0.074) |
| Number of Defendants | 0.205** (0.063) | 0.216** (0.058) |
| Level of Responsibility | 0.242 (0.179) | 0.163 (0.163) |
| Number of Reforms | -0.012 (0.047) | |
| Rule 92 <i>bis</i> | | 0.135 (0.223) |
| Constant | 3.455** (0.434) | 3.309** (0.337) |
| R-squared | .41 | .42 |
| N | 45 | 45 |
| *p<.05, **p<.01 | | |

As these regressions indicate, neither the reforms nor Rule 92 *bis* are significantly correlated with the number of witnesses (Table 7). These regressions then also indicate that the reforms did not have any effect on the number of live witnesses. The number of witnesses is only correlated with the number of incidents and defendants. In other words, as one would expect, the more incidents under discussion at trial and the more defendants tried at the same trials, the more live witnesses the trial presents.

As another confirmation of the reforms' lack of impact on the number of live witnesses, the box plot in Figure 11 suggests that Rule 92 *bis* statements have been introduced mainly on top of, and not instead of, live witnesses. The box plot also shows that the median number of live witnesses per trial went down only slightly after the adoption of Rule 92 *bis*.



As with the non-reduction in the number of incidents, the main reasons for the non-reduction in the number of live witnesses seem to have been the judges' lack of implementation of the reforms, and the parties' resistance toward the reforms. First, according to one of our interviewees, judges have unevenly used their power to reduce the number of witnesses.⁶⁶ In addition, several interviewees indicated that many trial judges have tended to use their powers to reduce the number of witnesses by asking the parties to reduce their list of live witnesses by one third regardless of the characteristics of the case.⁶⁷ Judges probably used their powers this way due to the limited information they had about the case.⁶⁸ This imperfect information prevented them from a more fine-tuned use of these powers.

One of the problems with this way of implementing these reforms is that the parties can easily neutralize them. If the parties know that the judges are going to ask for a one-third witness reduction in every case, any party that wants to prevent the witness reduction can simply anticipate the judges' request and inflate the number of witnesses accordingly. A number of our interviewees said that this type of strategic behavior by the parties has actually taken place at the Tribunal.⁶⁹ In addition, according to one of our interviewees,

⁶⁶ See Interview No. 6 (indicating that common law judges do not like to use these powers).

⁶⁷ See Interview Nos. 1, 9, and 13.

⁶⁸ On limited information by judges, see the interviews cited *infra* notes 96 and 104.

⁶⁹ See Interview Nos. 6 (defense calls more witnesses than necessary; prosecutors do the same thing); 13 (on the defense side, there are lawyers that game the system because they think that they can bargain); and 17 (gaming the system happens because there is no trust).

prosecutors do not like Rule 92 *bis* very much: if, as the rule allows, the witness whose written statement is introduced at trial only testifies under cross-examination, there is a risk that s/he will not make a good impression on the trial chamber.⁷⁰ The defense has also found other ways to neutralize these reforms such as providing limited information to the court about the subject of each witness's anticipated testimony.⁷¹

The other deficiency in judges' implementation of these reforms is that even though judges have asked for reductions in the number of witnesses that the parties proposed before trial, many judges have also accepted requests for additional witnesses during trial.⁷²

III. C. Third Outcome Not Delivered: No Reduction in the Number of Interlocutory Appeals Entertained by the Appeals Chamber

A third promise of the reforms was a reduction in the number of interlocutory appeals entertained by the appeals chamber. Interlocutory appeals delay process—especially in the pretrial phase—and the promise was that their reduction would shorten process duration. In order to reduce the number of interlocutory appeals entertained by the appeals chamber, ICTY judges amended Rules 72 and 73, and established that most motions are without interlocutory appeals unless certified by the Trial Chamber.

The following two regressions show a mixed picture regarding the results of this specific reform. The regressions indicate that the amendments of Rules 72 and 73 are correlated with a lower number of interlocutory appeals granted to the prosecution (at $p < .10$) and with a higher number of interlocutory appeals granted to the defense—controlling for the distance of the defendant from the offense (Table 8).

⁷⁰ See Interview No. 6.

⁷¹ See Interview Nos. 9 and 16 (65 *ter* says that the defense should describe the facts about which the witnesses will testify, but defense attorneys give the topics, not the facts).

⁷² See Interview No. 8.

| Table 8. Determinants of the number of granted interlocutory appeals. Poisson regression coefficients (bootstrapped standard errors in parentheses, 100 replications) | | |
|---|---------------------|--------------------|
| | Prosecution | Defense |
| Rules 72 and 73 amended | -1.617 (0.859) | 1.295** (0.509) |
| Initial Week | 0.004 (0.003) | -0.000 (0.001) |
| Level of Responsibility | 1.964** (0.413) | 0.813** (0.150) |
| Constant | -3.692** (0.698) | -1.986 (0.429) |
| Pseudo R-squared | .32 | .42 |
| N | 115 | 45 |
| *p<.05, **p<.01 | | |

The following four regressions take as their dependent variable the ratio of interlocutory appeals granted over those presented by the parties. The crucial independent variables are the amendment of Rules 72 and 73 and the total number of reforms. As controlling variables, we included the week in which the defendant had his initial appearance, the number of incidents charged against the defendant, and the number of times the indictment was amended during the pretrial phase.

| Table 9. Determinants of the rate at which interlocutory appeals are granted. OLS regression coefficients (Bootstrapped standard errors in parentheses with 100 replications). | | | | |
|--|-------------------|-------------------|---------------------|---------------------|
| | Prosecution | | Defense | |
| | I | II | III | IV |
| Initial Week | -0.000 (0.001) | -0.002 (0.001) | -0.000 (0.001) | -0.001 (0.001) |
| Number of Incidents | 0.028 (0.059) | 0.019 (0.056) | 0.056* (0.029) | 0.059* (0.026) |
| Number of Amendments to Initial Indictment | 0.059 (0.039) | 0.027 (0.043) | -0.061** (0.023) | -0.075** (0.022) |
| Rules 72 and 73 amended | 0.181 (0.264) | | 0.239* (0.119) | |
| Number of Reforms | | 0.110 (0.079) | | 0.071* (0.029) |
| Constant | 0.173 (0.251) | 0.217 (0.247) | 0.237* (0.126) | 0.195 (0.113) |
| Adjusted R-squared | -.02 | 0.03 | .21 | .22 |
| N | 41 | 41 | 82 | 82 |
| *p<.05, **p<.01 | | | | |

The regressions show that the ratio of interlocutory appeals granted to the prosecution is not correlated with the amendment of Rules 72 and 73 or the number of reforms (Table 9); and that the ratio of interlocutory appeals granted to the defense is positively correlated with the amendment of Rules 72 and 73 and with the number of reforms—i.e., the ratio of interlocutory appeals granted to the defense went up, instead of down, after the reforms.

Though the picture coming from our interlocutory appeals data is less clear than that regarding the two previously discussed reform results—i.e., incidents and live testimony at trial—it is fair to say that the reforms do not seem to have delivered a lower number or ratio of interlocutory appeals entertained by the appeals chamber.⁷³ As with the two previous outcomes, judges seem not to have substantially implemented these reforms.⁷⁴

⁷³ Our interviewees did not agree among themselves about the effect of the amendment to Rules 72 and 73. See Interviews Nos. 6 (number of motions and number of appeals granted have not gone down); 8 (judges deny more appeals than before, but reforms have led to many more motions and appeals, so overall, they take more time than before); and 13 (72 and 73 have reduced interlocutory appeals, but still have created work; for certification requests, one has to file a mini-appeal).

⁷⁴ It is worth mentioning that even though we analyze the interlocutory appeal reform because it was part of the reform package that judges introduced, this is the reform that is the least central for our overall argument about the structural problems in the very idea of managerial judging. The core idea of managerial judging is that the court may shorten the length of the pretrial and trial phases by acting by its own motion upon the parties' cases. The limitations to interlocutory appeals introduced by ICTY judges only relate tangentially to this core idea since the parties still have to present an interlocutory appeal before the court denies it—and, in this sense, the court is not acting by its own motion. Despite these differences between the interlocutory appeal reform and the other reforms we are studying, a number of explanations

IV. WHY JUDGES MADE A LIMITED AND DEFICIENT USE OF THEIR MANAGERIAL POWERS, AND WHY THE PARTIES RESISTED THE REFORMS

The last Section argued that the managerial judging reforms introduced to ICTY procedure actually lengthened pretrial and trial because they added additional procedural steps and requirements, while they did not deliver their promised outcomes. In this Section IV, we will analyze why judges made a limited and deficient use of their managerial powers, and why the parties resisted the reforms.

IV. A. Judges' Limited or Deficient Use of their Managerial Powers

As the previous Section explained, quantitative and qualitative data indicate that ICTY judges either did not sufficiently use their managerial powers or used them deficiently. This might seem puzzling, given that judges at ICTY are in charge of adopting and amending the Rules of Procedure and Evidence.⁷⁵ Why would the judges introduce reforms but not implement them? This subsection will explore three potential answers to this question, and will explain why two of these answers have the most explanatory power regarding ICTY judges' deficient or limited use of their managerial powers.

IV. A.1. ICTY Judges' Material and Reputational Incentives

The public choice literature on domestic judges has flourished in the last fifteen years.⁷⁶ But there have been fewer studies from this perspective regarding international judges.⁷⁷ This literature would predict that ICTY judges would not implement the managerial

we will explore in Section IV to account for the results of our study still apply to interlocutory appeals. For instance, the trial court's limited knowledge of the case may make it difficult for the court to evaluate whether not granting an interlocutory appeal would affect the fairness or outcome of the trial. Similarly, the lack of an implementation strategy should also apply as an explanation for the results of the interlocutory appeal reform. And the parties still may have found ways to neutralize this reform.

⁷⁵ Statute of the International Criminal Tribunal for the former Yugoslavia, art. 15.

⁷⁶ See, e.g., Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647 (1994); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AMERICAN JOURNAL OF POLITICAL SCIENCE 247 (2004); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994); Richard A. Posner, *What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993)[hereinafter Posner, *What do Judges and Justices Maximize?*]; Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, U. CIN. L. REV. 615 (2000); Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169 (2009); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006); Albert Yoon, *Pensions, Politics and Judicial Tenure: An Empirical Study of Federal Judges, 1869-2002*, 8 AM. L. & ECON. REV. 143 (2006).

⁷⁷ See, e.g., Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005) (testing whether judges of the International Court of Justice favor the interests of their own states); Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L L. 387 (2009) (summarizing the existing literature).

judging reforms if reform adoption without implementation maximized their material or reputational preferences.

There are a number of potential gains for judges that we should explore in ICTY's context. First, someone could argue that ICTY judges as a group had things to gain from formally adopting the reforms, without implementing them. The U.N. Security Council and other actors in the international community were pressuring the judges to expedite the Tribunal's work.⁷⁸ By introducing managerial judging reforms, judges could signal that they were responding to this pressure. This formal responsiveness would help judges renew their legitimacy before these constituencies and maintain funding for the Tribunal. In addition, individual judges who played a crucial role in the formal introduction of the reforms could also obtain reputational gains as leaders and reformers. These individual judges then could use this reputation in order to advance their own professional careers—e.g., by obtaining other positions in other international tribunals.⁷⁹ Meanwhile, under the group or individual incentives just mentioned, non-implementation or deficient implementation of the reforms, or disappointing results from those reforms, would not be apparent to outsiders or might take many years to discover.

Judges would also have other incentives to lengthen proceedings. In order to see how these incentives would work, it is necessary to explain that ICTY presents two types of judges: permanent and *ad litem*.⁸⁰ "Permanent" and *ad litem* judges are elected for a term of four years and are eligible for re-election.⁸¹ But *ad litem* judges serve in the Trial Chambers for only one or more trials, for a maximum cumulative period of three years,⁸² and they only receive their salaries and other benefits while they are actually serving at the Tribunal.⁸³ This arrangement for *ad litem* judges would thus generate material incentives for them to lengthen proceedings because they receive their salaries and benefits for only as long as they are serving in the individual cases they are assigned to. In other words, the longer an *ad litem* judge's case lasts, the longer he or she receives a salary and other benefits.

In addition, one could argue that even permanent judges have some similar material incentives to lengthen proceedings, because the Tribunal is a temporary institution and permanent judges will lose their positions once the Tribunal closes.⁸⁴

⁷⁸ See Interview No. 6 (the reason for the reforms was the pressure of the Security Council, and the willingness of the President of ICTY to satisfy the Security Council).

⁷⁹ On this phenomenon in the context of the recent wave of Latin American criminal procedure reforms, see Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617 (2007).

⁸⁰ The U.N. Security Council created the position of *ad litem* judge by U.N. Security Council Resolution 1329 in November 2000.

⁸¹ ICTY Statute, Article 13 *bis* and Article 13 *ter*.

⁸² ICTY Statute, Article 13 *ter*.

⁸³ See, e.g., Report of the Secretary-General, *Conditions of service and compensation for officials other than Secretariat officials*, A/C.5/59/2, 10 September 2004, para. 72.

⁸⁴ On the Tribunal's "completion strategy", see *infra* note 119.

Given that the opportunity costs of losing their position at the Tribunal would be substantial for some judges, there would then be material incentives for them to avoid implementation of reforms that would expedite process.⁸⁵

Though it is possible that these incentives have played a role in explaining the deficient or insufficient use of their managerial powers by a few individual judges,⁸⁶ for the following reasons we think that these incentives have not been a substantial factor in explaining most judges' behavior.

First, even if judges have some incentives to delay proceedings, they also have important incentives not to do it. The first of these incentives comes from the Tribunal being a closely watched institution. The expenses of ICTY are mainly borne by the regular budget of the United Nations in accordance with Article 17 of the U.N. Charter.⁸⁷ This means that the U.N. General Assembly reviews the Tribunal's budget, performance and results year-by-year. These annual revisions would then discourage ICTY judges as a group or individually from passing only formal reforms given that they need to show progress in their processing of cases. Governments, legal practitioners, atrocity victims, scholars, and civil society, also closely follow the work of the Tribunal. Being so closely watched would discourage cosmetic reforms.

The second set of incentives for ICTY permanent and *ad litem* judges not to delay proceedings come from the possibility of being re-elected.⁸⁸ States nominate candidates for the position of permanent or *ad litem* judge or for reelection to such positions, after which the U.N. Security Council establishes a list of candidates that it submits to the U.N. General Assembly. The U.N. General Assembly then elects or re-elects judges from the Security Council's list.⁸⁹

Though most of the existing ICTY judges that are nominated are re-elected, re-election is not a foregone conclusion. Over the years, the U.N. General Assembly has not re-elected seven judges proposed by their governments. Out of these seven judges, at least three were not re-elected due to their alleged lethargy and inefficiency in handling a trial.⁹⁰ This has thus created material incentives for judges not to be perceived as inefficient.

⁸⁵ On the opportunity costs for judges of the European Court of Human Rights, see Erik Voeten, *What Motivates International Judges? Evidence from the European Court of Human Rights*, at 22-23, 2007 AM. POL. SCI. ASSN. ANN. MEETINGS 12, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=705363 (pointing to evidence indicating that opportunity costs for ECtHR judges coming from lower-income-per-capita countries are higher than for judges coming from wealthier countries)[hereinafter Voeten, *What Motivates International Judges?*].

⁸⁶ See Interview Nos. 13 (until 2006, one had a pretty comfortable time in the courtroom; some judges were reluctant to apply pressures—they have incentives not to go back to their own countries) and 17 (*ad litem* judges and some non *ad litem* judges have nowhere to go when the case is finished).

⁸⁷ ICTY Statute, Article 32.

⁸⁸ Initially, *ad litem* judges could not be reelected. But the U.N. Security Council authorized *ad-litem*-judge reelection by amending Art. 13 *ter* of the ICTY Statute by U.N. Security Council Resolution 1597 in April 2005.

⁸⁹ See ICTY Statute, Articles 13 *bis* and 13 *ter*.

⁹⁰ See Allison Danner & Erik Voeten, *Who is Running the International Criminal Justice System?*, in WHO GOVERNS THE GLOBE? (Deborah D. Avant et al. eds., forthcoming 2010) (on file with the author); Voeter,

A third set of incentives not to delay proceedings comes from the fact that, as we just explained, the judges with less material incentives to delay proceedings—the permanent judges—have been a majority and are the ones who have the most important role in running the Tribunal.⁹¹ It is the President of the Tribunal—who is also a permanent judge—who requests the U.N. Secretary-General to appoint particular *ad litem* judges for one or more trials.⁹² If *ad litem* judges want to be appointed for more than one trial, they thus have incentive to work efficiently or risk not being requested for a second trial by the President of the Tribunal.

In addition, even if some individual judges have had reputational incentives to gain from a formal passing of reforms without needing to implement them—as they could be perceived as leaders and reformers and get positions before the deficient implementation of the reforms become apparent—a good number of ICTY judges are lawyers of very high prestige in academia, government, and the courts.⁹³ Lawyers with such high professional prestige have little to win—and a lot to lose—from not doing a good job as ICTY judges and from having overly protracted procedures.

Finally, a public choice hypothesis to explain deficient implementation of the reforms also runs against the fact that a good number of ICTY judges have had a long-life commitment to civil and human rights, and international humanitarian law; or have become international criminal judges to be part of international criminal law history.⁹⁴ It is reasonable to assume, then, that they have been trying to do the best job they can, and put in practice whatever policy ideals they embraced in this area, rather than advancing their material or reputational self-interest.⁹⁵

What Motivates International Judges?, *supra* note 85, at 6, 11-12. On the incentives generated by renewable short-term appointments for international judges and the possible remedies against negative incentives on judicial independence, see Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 361-63 (2005).

⁹¹ Initially, the Tribunal had only eleven permanent judges, whose number was increased to fourteen in 1998 by U.N. Security Council Resolution 1166 (1998); and then to sixteen by U.N. Security Council Resolution 1329 (2000)—two of whom are permanent judges of the ICTR and sit in the Appeals Chamber common to the two Tribunals. Security Council Resolution 1329 (2000) also created the position of *ad litem* judge, and established that the Tribunal Chambers shall be composed by a maximum at any one time of nine of these judges. In February 2006, U.N. Security Resolution 1660 increased the maximum number of *ad litem* judges at any one time to twelve. *Ad litem* judges are not eligible for election as, or to vote in the election of, the President of the Tribunal or the Presiding Judge of a Trial Chamber. See ICTY, Article 13 *quarter*.

⁹² ICTY Statute, Art. 13 *ter*.

⁹³ On the background of ICTY judges, see Danner & Voeter, *supra* note 90 (showing that ICTY judges' position at time of election have included, among others, appellate, trial and international judges; professors; and international and diplomat lawyers; with appellate judges being by far the larger group).

⁹⁴ This would thus make ICTY judges more prone than domestic judges to have as an incentive for their work what Judge Posner calls the “power trip” aspect of judging or the “visionary or crusading bent” of judging. See Posner, *What do Judges and Justices Maximize?*, *supra* note 76, at 3, 14, and 17-18.

⁹⁵ For a critical analysis of the ability of the public choice model to explain the behavior of domestic judges on procedural matters, see Alexander, *supra* note 76, at 660-61.

IV. A.2. *Limited Information by the Court about the Case, and the Risk of Making Inefficient or Unfair Decisions*

A number of our interviewees indicated that limited information about the case was a problem that prevented ICTY judges from using their managerial powers.⁹⁶ In this subsection, we will argue that this imperfect information is partly explained by a challenge faced by managerial judging that has been unnoticed and unanalyzed in the literature.⁹⁷

The basic idea that we would like to defend in this subsection includes two points: 1) in a managerial judging system it is likely that the court has very limited information about the case; and 2) given the limited information judges may have about the case, judges may not use their managerial judging powers more widely in order to avoid making inefficient or unfair decisions.

As for the first point, like in a pure adversarial system, the parties in a managerial judging system are in charge of running their own pretrial investigations and trial cases. Given their fact-finding role, the parties necessarily have more information about the case than the court. In a pure adversarial system—i.e., a system in which the court decides only those issues presented to her by the parties—this limited information by the court is narrowed or disappears at the moment of adjudicating issues for three different reasons.⁹⁸

First, given that the adversarial system is a zero-sum match regarding adjudicatory decisions—i.e., in every decision, one party loses and the other wins—each piece of relevant information and evidence is beneficial for one of the two parties.⁹⁹ This creates

⁹⁶ See, e.g., Interview Nos. 1 (judges making these decisions at trial are not informed); and 9 (judges do not have enough information).

⁹⁷ There is an important literature about the role that asymmetric information between the parties may play in explaining parties' behavior in the legal process. See, e.g., Lucian Ayre Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 THE RAND JOURNAL OF ECONOMICS 404 (1984); Amy Farmer & Paul Pecorino, *Civil Litigation with Mandatory Discovery and Voluntary Transmission of Private Information*, 34 J. LEGAL STUD. 137 (2005); Bruce L. Hay, *Effort, Information, Settlement, Trial*, 24 J. LEGAL STUD. 29 (1994); Steven Shavell, *Sharing of Information Prior to Settlement or Litigation*, 20 THE RAND JOURNAL OF ECONOMICS 183 (1989); and Warren F. Schwartz & Abraham L. Wickelgren, *Credible Discovery, Settlement, and Negative Expected Suits*, paper 130, AMERICAN LAW & ECONOMICS ASSOCIATION ANNUAL MEETINGS, 2008 (on file with the authors). Insights from this literature have been applied to managerial judging. See, e.g., Joel L. Schrag, *Managerial judges: an economic analysis of the judicial management of legal discovery*, 30 THE RAND JOURNAL OF ECONOMICS 305 (1999). There is also literature on the role that asymmetric information between the parties and the court plays in the adversarial system. See *infra* notes 98 and 100. But as far as we can tell, the issue of limited information by the court about the case, and the problems it rises for the court to apply case-management techniques by its own motion, have been completely overlooked in the literature.

⁹⁸ For a summary of the law & economics literature on the relative efficiency of adversarial and inquisitorial systems, see Bruno Deffains & Dominique Demougin, *The Inquisitorial and the Adversarial Procedure in a Criminal Court Setting*, 164 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 31 (2008).

⁹⁹ There may be situations in which none of the parties want to introduce a piece of relevant evidence—such as when the prosecution does not want to introduce a witness because his testimony questions the prosecution's case, while the defense does not want to introduce him because the witness can be impeached with damaging information for the defense's case. On this point, see MIRJAN DAMAŠKA, EVIDENCE LAW

incentives for the parties to reveal to the court all the relevant information when an issue is under discussion.¹⁰⁰ Second, the parties circumscribe the issues under discussion with their requests to the court. Thus, the court does not need to know every piece of information about a case, but only that information which is necessary to decide the issues that the parties consider controversial. Third, the most important decision about the case—the decision about guilt or innocence of the defendant—comes at the end of the trial, after the parties have presented substantial evidence to the court about the case.

Unlike the adversarial system—which can be considered a pure ideal type—the managerial judging system is a hybrid.¹⁰¹ In this hybrid, the court has the same adjudicatory role than the court in a pure adversarial system—i.e., the court has to decide on guilt or innocence after the parties present their cases at trial. But on top of that role, the managerial judging court is also in charge of intervening by its own motion in the parties' cases from early on in the process in order to ensure that the parties do not delay proceedings unnecessarily.

Before making these expediting decisions, it is harder than in a pure adversarial system for the managerial judging court to obtain sufficient information about the case to make efficient and fair decisions for three different reasons. First, the managerial judging system is not necessarily a zero-sum match for the parties in the sense that the two parties may prefer to have more time to prepare and present their cases than the time that the court would give them if the court had sufficient or perfect information about the case.¹⁰² As it will be explained in subsection IV.B, ICTY cases present examples of this phenomenon because the two parties involved had different incentives to resist the court's intervention in their cases. Second, certain managerial judging decisions—such as articulating a work-plan toward trial, putting pressure on the parties to reach factual or legal agreements, or deciding how much time and evidence the parties need to present their cases at trial—may require information about all aspects of the case to be efficient and fair. Third, the court has to make these expediting decisions before trial, and in some instances very early in the process—i.e. before it has a fuller picture about the case.

These reasons would explain why the court would have very limited information in many cases before making managerial judging decisions; and why it may be risky or unwise for

ADRIFT (1997). But we can assume that this type of situation is marginal and that, as a general rule, all relevant information should be beneficial for one of the parties in an adversarial system.

¹⁰⁰ See Paul Milgrom & John Roberts, *Relying on the information of interested parties*, 17 RAND JOURNAL OF ECONOMICS 18 (1986). Of course, the parties do not have incentives to reveal to the court relevant information in their possession that goes against their interests. This is not a problem if the two parties have perfect information. But given that this is an unrealistic assumption in most cases, discovery rules try to address this issue in adversarial systems.

¹⁰¹ See Langer, *Managerial Judging*, *supra* note 1.

¹⁰² This does not mean that the parties' preferences would be the most beneficial for a domestic society or the international community. On the potential misalignment between the level of litigation that the parties want and the level of litigation that is socially desirable, see Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997). On the role that the law of evidence can play in aligning the amount of search conducted by the parties with the amount that is socially optimal, see Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999)[hereinafter Posner, *An Economic Approach to the Law of Evidence*].

the court to make a large use of its managerial powers. With limited information, the court would risk making inefficient or unfair decisions—i.e., decisions that may expedite process but generate higher costs in terms of accuracy, fairness or any of the other goals of the legal process; or decisions that give more time than the parties actually need in order for the legal process to achieve its goals.¹⁰³

This limited information by the court about the case would help explain why judges are hesitant to fully implement managerial judging ideas in many cases. Aware that they may not have all the relevant information to make an efficient and fair decision, judges may refrain from using their managerial powers over the parties. One of the ICTY judges we interviewed captured this idea when he told us that one of the explanations for the reform results is insufficient information; and that given that the managerial judging reforms could be considered foreign to an adversarial system, pretrial judges did not have enough of a feeling for the case and did not have a real grip on cases.¹⁰⁴

IV. A.3. Lack of Implementation Strategy

The lack of an implementation plan and strategy by the Tribunal would also explain why the judges did not have enough information about the cases and did not use their managerial powers more widely. The originally predominant adversarial system that ICTY adopted did not require judges to have an early and active involvement in the case, and did not put substantial managerial tasks on judges. The managerial judging reforms redefined the role of the judges as active managers of cases, and created a number of new tools that judges are supposed to use as part of their redefined role. The reforms thus implied a major restructuring of the way ICTY as an organization had been working, and a conception of the judge that was different from the predominant conception of the judge in most civil and common law countries.¹⁰⁵

A number of organizational theorists would predict that for such a major organizational change to have a real opportunity to succeed in its own terms, reformers would have to do more than formally passing the procedural reforms.¹⁰⁶ In other words, in order for the ICTY judges to internalize the ideas behind the procedural reforms, learn how to use the new tools in a consistent way, and persist with the reform ideas and tools when facing resistance by the parties, it was necessary to have an implementation strategy to achieve the desired judges' behavioral changes.

¹⁰³ A number of our interviewees have mentioned these types of risks. *See* Interview Nos. 1 (judges making these decisions are not informed); 2 (implementation of the reforms at trial is draconian and inefficient); 6 (interviewee asked for disqualification of a judge for putting too much pressure on defense to agree to disclose; also said that a judge in the adversarial procedure cannot impose on the parties how many witnesses to present); 9 (judges do not have enough information; they do it arbitrarily); and 17 (the more the judge becomes active, the more the judge shows his position).

¹⁰⁴ *See* Interview No. 14. *See* also Interview No. 17 (the bench can never have enough information)

¹⁰⁵ *See* Langer, *Managerial Judging*, *supra* note 1.

¹⁰⁶ *See, e.g.*, W. WARNER BURKE ET AL., ORGANIZATION CHANGE. A COMPREHENSIVE READER (2009).

Such an implementation strategy could include measures such as training the judges in the use of the new tools and techniques, monitoring whether and how individual judges or chambers were using their managerial powers, creating incentives for individual judges or chambers to use their managerial powers, and assessing whether the reforms were reducing pretrial and trial duration and producing their promised results.¹⁰⁷ None of these measures were adopted at ICTY. In fact, there was no implementation plan or strategy to ensure that the reforms be applied.¹⁰⁸

IV. B. Parties' Incentives to Resist the Reforms

Section III explained different ways in which the parties neutralized the reforms. Given the limited information by the court about the case we just explained, the parties have powerful ways to neutralize managerial judging reform efforts. This subsection will analyze what incentives the parties had to resist ICTY reforms.¹⁰⁹

IV. B.1 Prosecutors' Resistance to the Reforms

As already mentioned, a number of our interviewees indicated that prosecutors resisted the reforms.¹¹⁰ Prosecutors' resistance to the reforms should come as no surprise for three different reasons. First, every procedure distributes power between the main actors and institutions of the administration of justice. In the case of ICTY, its initial adversarial system gave much of this power to the prosecution to handle pretrial and trial. By introducing managerial judging reforms, judges threatened to take substantial portions of this power away from prosecutors. Thus, one would expect that a number of prosecutors would resist this attempt to diminish their control over their own cases—including their control about how much time they would need to handle them.¹¹¹

Second, under ICTY's procedural system, prosecutors have the institutional responsibility to try to get convictions. As such, one would expect them to be more risk-

¹⁰⁷ *See id.*

¹⁰⁸ *See, e.g.*, Interview Nos. 13 (rules are not applied in the same manner because judges among themselves do not know how the rules should be applied); and 19 (there was no implementation plan of the reforms, no control or supervision or assessment of how each rule was applied by individual judges or trial chambers, and no monitoring—the judges did not even think about it).

¹⁰⁹ The concept “resistance to change” has been recently criticized, among other reasons because “the label of resistance can be used to dismiss potentially valid employee concerns about proposed changes.” *See* Sandy Kristin Piderit, *Rethinking Resistance and Recognizing Ambivalence: A Multidimensional View of Attitudes Toward an Organization Change*, 25 ACADEMY OF MANAGEMENT REVIEW 783, 784 (2000) (reviewing the different criticisms against the concept). Our use of the term “resistance by the parties to the reforms” does not assume that such resistance is based on illegitimate reasons. As it will become clear in our analysis, at least some of the reasons that the parties have had to resist the reforms are arguably legitimate.

¹¹⁰ *See supra* notes 62, 63, 69 and 70. On the role of the scope of the prosecution case and the prosecution's refusal to adjust its case strategy in the non completed trial of Slobodan Milošević, see GIDEON BOAS, *THE MILOŠEVIĆ TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS* (2007).

¹¹¹ On this phenomenon, see Langer, *Managerial Judging*, *supra* note 1, at 904.

averse than judges about trial acquittals. In addition, since judges are the adjudicators, prosecutors have less information than judges about how much evidence is necessary to obtain a conviction at trial. These two factors help explain why prosecutors would resist the reduction in the number of incidents and witnesses at trial—because they would fear that the fewer the incidents and live witnesses, the higher the chances of an acquittal.¹¹²

Third, the OTP under Carla Del Ponte—who was ICTY Prosecutor from August 1999, to December 2007—thought that ICTY owed justice to as many victims of the Balkan wars as possible, and should compile a complete historical record of the mass atrocities committed. This conception of the role of the Tribunal also generated incentives for prosecutors to resist a reduction in the number of incidents and live witnesses at trial.¹¹³

IV. B.2 Defendants' and Defense Attorneys' Resistance to the Reforms

Defendants also had incentives to resist the reforms. First, as with the prosecutors, the initial adversarial procedure of ICTY gave defendants and defense attorneys substantial leeway to manage their own pretrial investigations and trial cases—including deciding how much time they needed for them. As the managerial judging reforms aimed to give part of this power away to judges, one would expect that defense attorneys and defendants would try to resist them.¹¹⁴

Second, defendants and defense attorneys would have nothing to gain by being required to present fewer live witnesses at trial—it weakens their trial cases without obtaining any benefit in exchange. And unlike the case of plea agreements, defendants had little to gain from giving information away to prosecutors, or from reaching partial agreements about specific incidents or about other factual and legal issues.¹¹⁵ In addition, most defendants do not bear the economic costs of their defenses or bear only limited costs.¹¹⁶

¹¹² See Interview Nos. 8 (prosecutors are not ready because they are looking for the perfect case instead of the good); and 13 (some prosecutors want to present every piece of evidence they have, and they need to be restricted; they are insecure because they have the burden of proof). See also Langer, *Managerial Judging*, *supra* note 1, at 872.

¹¹³ See Interview Nos. 13 (prosecution is pressured by victims' groups to prosecute for everything) and 14 (Del Ponte was inappropriate because of her excessive sense of duty toward the victim). See also O-Gon Kwon, *The Challenge of an International Criminal Trial as Seen from the Bench*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 360, 373 (2007) [hereinafter *The Challenge*].

¹¹⁴ See Langer, *Managerial Judging*, *supra* note 1, at 904.

¹¹⁵ See Interview Nos. 9 (interviewee saw only one defense brief that met the requirements of Rule 65 *ter* (F); it is trial tactics and they can get away with it; judges do not care, and there is no time to fix the situation because the trial is too close); and 17 (no advantage for the accused to enter into any kind of agreement; prosecutors say the more information they get, the shorter the trial will be, but they are being disingenuous—they get more information about the defense case).

¹¹⁶ “In determining whether an accused does not have enough money to pay for his defence, the Registry takes into account his assets, including direct income, bank accounts, real or personal property, stocks and bonds. The Registry also takes into account his spouse's means, as well as those of the people with whom he habitually resides. From the accused's disposable means, the Registry deducts reasonable expenses of his household during the period he will require representation before the Tribunal. The balance remaining, if any, is the contribution the accused is required to make to the cost of his defence.... If the Registry finds that the accused is able to pay part of his defence costs, it will indicate which costs should be covered by

Third, the defense benefits from slow proceedings, given that (1) ICTY prosecutors have the burden of proof beyond a reasonable doubt—and witnesses’ memories fade over time;¹¹⁷ (2) the acquittal rates at ICTY are not insignificant—which creates incentives for defendants to fully litigate their cases at trial;¹¹⁸ (3) ICTY is a temporary institution that operates under a completion strategy to finish all its work;¹¹⁹ and (4) a number of defendants have questioned the fairness and legitimacy of the Tribunal—which is easier to do if proceedings are (unduly) prolonged.¹²⁰

As explained in Section I, the Tribunal tried to create incentives for defense attorneys not to delay proceedings by changing its fee system for appointed counsel. These reforms do not seem to have succeeded, either. Though the Tribunal did not give us access to specific quantitative data to assess whether and why these particular reforms did not work,¹²¹ most of the defense attorneys we interviewed thought that these reforms had not changed attorneys’ behavior.¹²² In addition, as we already explained in Subsections II.B and II.C, we ran our main pretrial and trial regression models substituting the two individual fee reforms for the aggregate reform measure; and these tests revealed that the ceiling-payment-system reform is significantly correlated with longer pretrial and trial; and the lump-sum-payment-system-for-trial reform is significantly correlated with longer pretrial, and is not statistically significant with trial duration.

the accused and which ones by the Tribunal. The Registry ensures that the accused's defence does not exhaust his household's financial means, and result in his dependants losing support. Since December 2000 and as of end 2007, the Registry has found that 35 of the Tribunal's accused were able to contribute to their defence costs.” See <http://www.icty.org/sid/163> (visited on June 3, 2009).

¹¹⁷ See Interview No. 6 (many lawyers think that the more time that passes, the better it is for the defense (e.g., regarding the sentence)).

¹¹⁸ For a list of the defendants that were acquitted of all charges at the ICTY, see <http://www.icty.org/sid/9984> (visited on June 8, 2010). In the period under study in this article, the Tribunal acquitted of all charges five defendants out of sixty three defendants whose cases were adjudicated through guilty pleas or trials. This is an acquittal rate of 8%. After July 1, 2006, six more defendants were acquitted. ICTY acquittal rates are not low in comparison with domestic jurisdictions. On this point and on the belief by most ICTY defense attorneys that the chances of getting acquittals at ICTY trials are real, see Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT’L L. 529 (2008).

¹¹⁹ See Interview No. 2 (the closer they get to the completion strategy, the more incentives the defense has to stall things). The completion strategy included three goals: the completion of all investigations, of all trials, and of all appeals. All the investigations were completed by December 31, 2004. The second target date was the completion of all trials by the end of 2008. Estimates as of the end of 2009 suggest that all trials are expected to be completed by mid-2011, with the exception of that of Radovan Karadžić, which is expected to finish in late 2012. With the exception of the Karadžić case, all appellate work is scheduled to be completed by mid-2013. See <http://www.icty.org/sid/10016> (visited on June 8, 2010).

¹²⁰ On ICTY defense attorneys’ perspectives on to what extent ICTY trials are closer to the legal or the political model of international criminal trial, see Iontcheva Turner, *Defense Perspectives*, *supra* note 118.

¹²¹ As already explained *supra* note 52, we requested the ICTY Registry to provide us information on how many hours each defense team spent on each case. The Registry only gave us access to the Judicial Database of the Tribunal, which did not have this information.

¹²² See Interview Nos. 6 (it has not changed lawyers’ behavior); 16 (changes in the fee system did not change anything); and 17 (lump sum fee system does not make any difference to the speed of the trial). But see Interview No.8 (system adopted in January 2001 probably made proceedings shorter).

There are three potential hypotheses that future research could test as to why changes in the fee system did not shorten process. The first hypothesis is that defense attorneys' role identity and sense of professionalism led them to resist the reforms and protect what they thought was their clients' best interest, despite the contrary incentives from changes in the Tribunal's fee system.¹²³ The second hypothesis is that the reforms in the fee system did not change defense attorneys' behavior because there were problems in the reforms' design or implementation. This would happen if, for instance, attorneys would get roughly the same fees under the old and the new system.¹²⁴ The third hypothesis is that improving the quality of defense attorneys—not the way and amount they are paid—may be the most effective way to reduce the amount of time defense attorneys spend on cases.¹²⁵

V. IS MANAGERIAL JUDGING'S PROMISE OF SHORTER PROCEEDINGS CHIMERICAL?

The three previous Sections demonstrated, and offered explanations for why, the managerial judging reforms that promised to shorten pretrial and trial at ICTY actually brought the opposite results. This Section will analyze the implications of our study on the promise of managerial judging.

A first point that is important to make is that our results are consistent with the two previous major empirical assessments of earlier managerial judging reforms in U.S. civil procedure.¹²⁶ The first of these studies is Rosenberg's on pretrial conferences in New Jersey. U.S. civil procedure has a long history of experimenting with pretrial conferences. The 1938 Federal Rules of Civil Procedure included mandatory pretrial conferences in Rule 16. This innovation spread to state jurisdictions, and New Jersey adopted mandatory pretrial conferences in 1948.¹²⁷ Between 1960 and 1962, Maurice Rosenberg—Professor of Law at Columbia University—conducted a detailed empirical study of pretrial conferences in that state.¹²⁸

¹²³ See Interview No. 6 (lawyers do not think like economists because you have a client who is a human being).

¹²⁴ See Interview No. 6 (it is the same thing if we compare the old and the new system—it is the same money).

¹²⁵ See Interview No. 17 (entry requirements for defense counsel are too lax; better lawyers make process more efficient; for instance, motions have more merit, and better attorneys make the same point in half the time). On the problem of incompetence of defense counsel in international criminal jurisdictions, see, e.g., Sonja B. Starr, *Ensuring Defense Counsel Competence at International Criminal Tribunals*, 14 UCLA J. INT'L L. & FOREIGN AFF. 169 (2010).

¹²⁶ The empirical studies on the “vanishing trial”, though related to the managerial judging literature, have not spoken directly to the relationship between the specific reforms introduced at the ICTY and time to disposition. This is why we do not address them here. The same applies to studies of litigation delay such as Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813 (2000) [hereinafter *Justice Delayed?*]. On the literature on the “vanishing trial”, see, e.g., the special symposia in 1 J. EMPIRICAL LEGAL STUD. 459-984 (2004); and 57 STAN. L. REV. (April 2005). For a recent summary and review of empirical studies of litigation, see Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919 (2009).

¹²⁷ ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* 8 (1964).

¹²⁸ The Supreme Court of New Jersey supported the study and created the conditions for a controlled experiment: every odd case number in the seven counties where the experiment was conducted would have

Rosenberg's results indicated that the use of pretrial conferences did not encourage more settlements and did not reduce trial time. In fact, according to Rosenberg, the use of these conferences lengthened procedure.¹²⁹ This was because pretrial conferences did not encourage settlement, bring earlier settlement, or reduce trial duration, while it took judges' time to conduct the conferences.¹³⁰

Rosenberg did not identify the specific reasons and mechanisms that explained why pretrial conferences did not encourage settlement or reduce trial duration. But in analyzing judges' performance in pretrial conferences, he emphasized that there was wide variation in the objectives judges assigned to these conferences, in how different judges conducted the conferences, and even in how the same judge handled conferences from one case to the next.¹³¹

The second study is RAND's evaluation of the U.S. Civil Justice Reform Act (CJRA) of 1990. The CJRA created a pilot program that required ten federal district courts to incorporate certain case management principles and consider incorporating certain case management techniques.¹³² Ten comparison districts were also selected as a control group. The pilot districts were required to implement their case management policies by January 1992, while the comparison districts could implement case management policies and principles any time before December 1993.¹³³ Having no mandated policies, comparison districts made fewer changes than pilot districts.¹³⁴

The six case management principles that the pilot districts had to adopt included: (1) differential case management; (2) early judicial management; (3) monitoring and control

a mandatory pretrial conference, while every even case number would have an optional pretrial conference. This created three group of cases: A) cases with mandatory pretrial conferences; B) cases in which pretrial conferences were not used—about a fourth of the cases; and C) cases in which counsel opted to have pretrial conferences. The experiment focused on personal injury cases. *Id.* at 17-19.

¹²⁹ *Id.* at 28-29, 45-57. WAYNE A. KERSTETTER & ANNE M. HEINZ, PRETRIAL SETTLEMENT CONFERENCE: AN EVALUATION (1979) found that pretrial conferences used in a pilot program in criminal felony cases in Dade County, Florida, in the 1970s, reduced the length of time that cases were in the system. But unlike ICTY's and New Jersey's pretrial conferences, the ones in Florida were voluntary in the sense that the defense attorney could opt out from scheduled conferences, and scheduled conferences were cancelled if a critical party did not attend. Thus, in the pretrial conferences studied by Kerstetter and Heinz, the court did not try to impose special proceedings and its own view on the parties. Rather, the parties controlled what cases were subjected to a pretrial conference and could thus subject to the conference those cases that they considered ready for an earlier disposition. Kerstetter and Heinz also claimed that for two out of the three judges of their test study, the mere scheduling of the conference saved time. But their results in this respect were more mixed and harder to interpret because for two out of the three judges, there was no statistically significant difference in time to disposition between cases in which conferences were scheduled but not held and control cases (see *id.* at 79, Table 7-8.C). Finally, a problem with Kerstetter and Heinz's study is that, as they recognized, the three judges of their test cases were not randomly selected, but rather agreed to be part of the study. They thus could not be considered representative of the universe of judges.

¹³⁰ ROSENBERG, THE PRETRIAL CONFERENCE, *supra* note 127, at 45-57.

¹³¹ *Id.* at 93-105.

¹³² James S. Kakalik et al., *Just, Speedy, and Inexpensive ? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, at 3, RAND MR-800-ICJ (1996).

¹³³ *Id.* at 3.

¹³⁴ *Id.* at 10.

of complex cases; (4) encouraging cost-effective discovery through voluntary exchanges and cooperative discovery devices; (5) good-faith efforts to resolve discovery disputes before filing motions; and (6) referral of appropriate cases to alternative dispute resolution programs.¹³⁵

In addition, the CJRA also directed each district to consider incorporating the six following case management techniques: (1) a joint discovery/case management plan; (2) party representation at each pretrial conference by an attorney with authority to bind that party regarding all matters previously identified by the court for discussion at the conference; (3) requiring signatures of attorney and party on all requests for discovery extensions or trial postponements; (4) early neutral evaluation; (5) requiring party representatives with binding authority to be present or available by telephone at settlement conferences; and (6) other features that the court considered appropriate.¹³⁶

The Judicial Conference and the Administrative Office of the U.S. Courts asked RAND's Institute for Civil Justice to evaluate the implementation and effects of the CJRA in these districts. RAND based its evaluation on extensive and detailed case-level data from January 1991 through December 1995.¹³⁷ RAND's study concluded that the CJRA pilot program had little effect on time to disposition, litigation costs, and attorneys' satisfaction and perceptions of the fairness of case management.¹³⁸ According to RAND's study, there were four reasons that explained the results.

First, some pilot districts' plans, as implemented, did not result in any major change in case management. Second, some pilot districts' plans that resulted in major change in management at the case level did not apply that change to a large percentage of cases within the district. Third, some changes that were more widely implemented (such as early mandatory disclosure of information) did not significantly affect time, cost, satisfaction, or perceptions of fairness. Finally, some case management practices identified as significant predictors of effects were implemented not at the district level, but at the case level, and there was much variation in case management among judges in both the pilot and comparison districts.¹³⁹

Though it is obvious that there are important differences between criminal procedure at ICTY and civil procedure in state and federal jurisdictions in the United States—and between the specific reforms adopted in each of these three jurisdictions—¹⁴⁰ the three case studies have one important feature in common: all of these jurisdictions grafted

¹³⁵ *Id.* at 3.

¹³⁶ *Id.* at 4.

¹³⁷ *Id.* at 5.

¹³⁸ *Id.* at 1.

¹³⁹ *Id.* at 22-23.

¹⁴⁰ The differences between these jurisdictions include that while ICTY is an international, temporary court system without its own enforcement apparatus, state and federal courts in the U.S. are domestic, permanent, established parts of the entire U.S. justice system, which includes enforcement apparatus. While ICTY uses criminal procedure, in which one of the parties is necessarily the prosecutor, and thus a public actor, civil procedure in the U.S. usually include two private parties. While all cases at ICTY are complex, U.S. civil procedure cases present varying degrees of complexity.

managerial judging techniques that redefined judges as active, expediting case managers onto adversarial systems in which judges had been defined mainly as passive umpires. It is also important to mention that this similarity is not coincidental. U.S. federal civil procedure was the direct inspiration for the reforms not only in New Jersey,¹⁴¹ but also for a good number of reforms at the ICTY.¹⁴²

Somewhat surprisingly, ICTY judges did not know about Rosenberg's and RAND's studies;¹⁴³ and RAND's study did not engage or even mention Rosenberg's.¹⁴⁴ Besides being the first study of its kind on an international tribunal and bringing together these three studies, our study has suggested two explanations for these results not explored by Rosenberg's and RAND's: limited information by the court about the case which leads judges to be cautious in the application of their managerial judging powers and enable the parties to neutralize reform efforts,¹⁴⁵ and the parties' incentives to resist reform efforts.¹⁴⁶ For two different reasons, these two explanations are important for discussing the potential of managerial judging to reduce time to disposition.

The first reason is that these two explanations may help explain not only our results, but also Rosenberg's and RAND's. For instance, Rosenberg's study found puzzling that certain judges varied in how they handled pretrial conferences from one case to the next. But if judges have different degrees of information in different cases, it would not be puzzling that they use their managerial judging powers differently in different cases.

¹⁴¹ See *supra* note 127 and accompanying text.

¹⁴² For an analysis of the completely overlooked and substantial parallels between managerial judging reforms in U.S. civil procedure and ICTY, see Langer, *Managerial Judging*, *supra* note 1. One of our interviewees confirmed that U.S. federal civil procedure was the main source or inspiration for some of the most important reforms at ICTY such as the introduction of status and pretrial conferences and of a pretrial judge. See Interview No. 19.

¹⁴³ See Interview No. 19. One should not be surprised by this lack of knowledge by ICTY judges about these two empirical studies given the mixed interest of policy-makers about empirical scholarship. On this point, see, e.g., Michael Heise, *The Future of Civil Justice Reform and Empirical Legal Scholarship*, 51 CASE W. RES. L. REV. 251 (2001).

¹⁴⁴ See Kakalik et al., *Just, Speedy, and Inexpensive?*, *supra* note 132; James S. Kakalik et al., *Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts*, RAND MR-801-ICJ (1996)[hereinafter Kakalik et al., *Implementation*]; James S. Kakalik et al., *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, RAND MR-802-ICJ (1996)[hereinafter Kakalik et al., *Evaluation*]; James S. Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act*, RAND MR-803-ICJ (1996).

¹⁴⁵ Neither Rosenberg's nor RAND's study explored judges' material and reputation incentives either—though, as we already mentioned, we do not think that these incentives played a substantial role in explaining the deficient judges' implementation at ICTY; and we do not have reason to think that they played a role in New Jersey or the U.S. federal system.

¹⁴⁶ RAND's study mentioned as one of the implementation problems of the CJRA of 1990 that some lawyers believed that these reforms unduly emphasized speed and efficiency at the possible expense of justice—and thus they thought they had good reasons for resisting change. See Kakalik et al., *An Evaluation*, *supra* note 144, at xxxiv and 34. Our explanation includes this type of situation but it is broader because it refers not only to justice concerns, but also to policy disagreements and self-interest in explaining why parties and their attorneys may resist managerial judging reforms.

Similarly, the incentives and ability of the parties to neutralize managerial reforms may help explain RAND's results.¹⁴⁷ For instance, in analyzing specific managerial judging techniques—instead of the reforms as a whole—RAND's study found that many of these techniques—such as having pretrial conferences, a joint discovery/case management plan or status report as part of early management, mandatory early disclosure, good-faith efforts before filing discovery motions, and increased use of magistrate judges to conduct pretrial case processing—did not have any effect on time to disposition.¹⁴⁸ It is easy to think of ways in which the parties may neutralize the expediting effect of these techniques.

But according to RAND's study two specific techniques that did reduce time to disposition were setting a firm trial schedule as part of early management, and shortening time to discovery cutoff.¹⁴⁹ Though these results have to be taken with caution because there was a selection bias problem in RAND's dataset,¹⁵⁰ one plausible explanation for the time reduction effect of these techniques is precisely that they cannot be circumvented by the parties, as long as the judge holds his ground on the firmness of the deadlines.¹⁵¹

¹⁴⁷ On the incentives that parties have to reduce costs in civil cases in the U.S., see Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073 (2002).

¹⁴⁸ Kakalik et al., *Just, Speedy, and Inexpensive ?*, *supra* note 132, at 27.

¹⁴⁹ According to RAND's study, the other two techniques that reduce time to disposition were early judicial management and having litigants at or available for settlement conferences. *Id.* at 14, 15 and 26. One problem with the first technique, early judicial management, is that besides setting a firm date for trial and early discovery cutoff, the study could not identify any other aspect of early judicial management that had a consistent effect on time. *Id.* at 14. Given this lack of specificity about what other aspects of early judicial management would reduce time to disposition and given the selection bias problem that we will immediately analyze, it is hard to draw strong conclusions from this finding. For instance, it could be that early judicial management shortened time to disposition in these cases because judges had sufficient information to act in these cases, or because individual judges prioritized shortening time to disposition over the other goals of the legal process. The other technique—having litigants at or available for settlement conferences—may point to agency problems between lawyers and their clients (plaintiffs or defendants). Given that in criminal cases one of the parties is the prosecutor who does not have a physical client easily identifiable, it is hard to transpose the finding about this fourth technique to criminal procedure.

¹⁵⁰ There was a selection bias problem in RAND's analysis of the effects of these individual case management procedures because the use of these procedures was not randomly assigned to judges, but the individual judges themselves decided to apply them in individual cases. It may be that certain characteristics of these individual judges—such as a greater concern with disposition time than other judges, or certain interpersonal skills—could explain these results, instead of the use of the managerial case procedures. It could also be that these judges applied the managerial techniques to these cases because they had sufficient information about these specific cases. This leaves open the question, then, of whether it was the managerial judging techniques themselves, or the judges who decided to use them, or the type of cases to which the techniques were applied, that made time to disposition shorter in these cases. RAND's study recognized this selection bias problem, and acknowledged that as a result, the study's estimates of how much disposition-time reduction these techniques could achieve should only be taken as an upper bound rather than as a precise estimate. Kakalik et al., *An Evaluation*, *supra* note 144, at xix, xxi, xxxiii-xxxiv, 8, 21-22, and 164-65. On other limitations of the RAND study, see Heise, *Justice Delayed?*, *supra* note 126.

¹⁵¹ Interestingly, these two reforms were not adopted at ICTY. See, e.g., Interview #13 (trial date that one can shoot for never happens here. There is no set date. You know when the trial is going to start two or three months in advance). Given that there are only three courtrooms at the ICTY and a limited number of cases, it could be difficult for the court to make a credible setting of the trial date relatively close in time to

The second reason that our two explanations are important for discussing the potential of managerial judging is that they suggest that the problems of managerial judging to expedite procedure without compromising the other goals of the legal process may be more structural than previous studies have considered. First, we have explained why in managerial judging systems limited information by the court about the case is likely to exist in a good number of cases. Given this limited information, the court may thus have good reasons not to use managerial judging tools in order to avoid compromising accuracy, fairness or any of the other goals of the legal process. Conversely, when the court uses managerial judging tools very widely without having sufficient information about the case, there is reason for concern given that the court may be compromising the other goals of the legal process.

Noticing the parties' capacity to resist or neutralize most managerial judging techniques also suggests another structural problem with managerial judging. In those cases in which the two parties would agree with the court that they need a certain amount of time for pretrial or trial, the court's intervention by its own motion may be inefficient in the sense that it may add unnecessary costs to the legal process—such as additional procedural steps and requirements. While in those cases in which one or both parties would not agree with the court about how much time they need for pretrial and trial, the court's intervention is likely to be resisted.

Our point is not that the court's participation by its own motion in case management is always a bad idea. There are cases in which the parties may want more time for pretrial and trial than is socially optimal, and in which the court may have enough information to address these negative externalities. Our points are, first, that—contrary to what the managerial judging system assumes—the court's intervention *sua sponte* is not necessary in every case; and that in those cases in which the court's intervention is not necessary, the intervention is inefficient since it adds procedural steps and requirements to the legal process, without bringing any time gains. In addition, even when the court's intervention is necessary, the court may not have enough information to make a socially optimal decision, and the parties may be able to neutralize the court's attempt to intervene in their cases. These structural problems would thus help explain the results of the three studies we are analyzing in this section, and why managerial judging reforms have not been able to deliver their promise to expedite process in these three jurisdictions.

It is not possible to weigh the specific impact that these structural limitations had—*vis-à-vis* implementation strategy deficiencies—in explaining the inability of the managerial judging reforms to deliver their promise to expedite process in New Jersey, the U.S. federal system, and ICTY. Future studies should try to determine the relative weight of each of these factors in explaining the results of managerial judging reforms. But the

the initial appearance. In addition, given the complexity of cases at the ICTY and the amount of evidence that they involve, shortening time to discovery cutoff might not have the same effect than in the average U.S. civil case. This is because after getting all the elements of proof about a case, the parties may need substantial amounts of time to go through them given the limited human resources the parties have at the ICTY—especially most defense teams.

comparison of these three studies suggests that these structural limitations played a role in hindering these reform efforts for two different reasons.

First, even if there are persuasive arguments that the lack of an implementation strategy played a role in explaining ICTY judges' limited and deficient use of their managerial powers, ICTY had fewer implementation challenges to surmount than the CJRA of 1990, and the New Jersey pretrial conference experiment. ICTY had fewer implementation challenges because, first, unlike the CJRA of 1990, the reforms were not externally imposed upon the judges—i.e., they were adopted by the judges themselves.¹⁵² In addition, given that the Tribunal has a total of only twenty eight judges,¹⁵³ it was easier than in the cases of the CJRA of 1990 and the New Jersey pretrial conference experiment for those involved in the change effort to understand and agree on what the change vision was,¹⁵⁴ and to disseminate needed information and communicate emerging knowledge during reform implementation.¹⁵⁵ Furthermore, given that ICTY is a sui generis multicultural international court system, one may expect that judges would be more ready to put aside their domestic preconceptions about the proper role of the judge, and to adapt more easily to the changes that managerial judging required.¹⁵⁶ But despite these fewer implementation challenges, ICTY managerial judging reforms still did not deliver their promised outcomes. This suggests that there were other reasons besides a deficient implementation plan that explain these results—such as limited information by the court about the case, and parties' incentives and ability to neutralize reform efforts.

¹⁵² According to RAND's study, one of the implementation factors that may have contributed to the pilot program's having little effect was the fact that some judges viewed the procedural innovations imposed by Congress as curtailing judicial independence. See Kakalik et al., *An Evaluation*, *supra* note 144, at xxxiv. RAND's study also suggested that gaining commitment—in this case from the judges—is often achieved by having members closest to the “work” of the system participate in determining how best to improve it. *Id.* at 42. In part in order to try to gain judges' acceptance, the CJRA of 1990 created advisory groups appointed by the chief justice of each district. The role of the advisory groups was to aid each federal district court to conduct a self-study and to develop a plan that incorporated the six principles of pretrial case management and consider incorporating the six case management techniques already described *supra* notes 135 and 136, and accompanying text. See Kakalik et al., *Implementation*, *supra* note 144, at 4. But there was wide variation among districts in the role of judges on the advisory group. *Id.* at 25. In New Jersey, the Supreme Court of the state supported the experiment on pretrial conferences. See ROSENBERG, *THE PRETRIAL CONFERENCE*, *supra* note 127, at 17. The idea that organization members who are allowed to participate in organization changes are less resistant to these changes has been one of the basic insights of organizational change theory. A classic reference is LESTER COCH AND JOHN R.P. FRENCH JR, *BASIC STUDIES IN SOCIAL PSYCHOLOGY* (1965).

¹⁵³ On the evolution of the number of judges at ICTY, see *supra* note 91.

¹⁵⁴ See Interview #19 (the message was clear of why the reforms were adopted). On this problem about the change vision in the implementation of the CJRA of 1990, see Kakalik et al., *An Evaluation*, *supra* note 144, at 40.

¹⁵⁵ *Id.* at 43. In New Jersey, 52 judges processed the test cases. See ROSENBERG, *THE PRETRIAL CONFERENCE*, *supra* note 127, at 21.

¹⁵⁶ ICTY is also a young organization. Because of this, one could think that it might be more adaptable to change. But the evidence on the relationship between an organization's age and change is mixed. For a summary of part of this evidence and the debate within organizational theory on whether inertia increases with an organization's age, see Jitendra V. Singh & Charles J. Lumsden, *Theory and Research in Organizational Ecology*, 16 *ANNUAL REVIEW OF SOCIOLOGY* 161, 180-82 (1990).

Second, one would expect that in a managerial judging system, everything else being equal, the more complex a case, the more difficult it would be for the court to obtain sufficient information about the case to make an efficient decision—and thus, act upon the case without compromising the other goals of the legal process; and the more opportunities the parties would have to neutralize the managerial judging powers of the court. One then would expect that the higher the case complexity median of a jurisdiction, the more challenges managerial judging reforms would face to expedite process. This may help explain why the reform results at ICTY—a jurisdiction in which all or almost all cases are complex—have been more disappointing than the results of the CJRA of 1990.¹⁵⁷

Similarly, everything else being equal, one would expect that ICTY would have a harder time speeding up proceedings than the reformers of U.S. civil procedure because it is structurally easier for judges in civil than in criminal procedure to become effective managers and disciplinarians. In the civil process judges can (with relative ease) strictly enforce deadlines, or refuse to admit evidence submitted late. Discovery is also much easier to manage in civil than in criminal procedure—as evidenced in the United States by the wide gap between civil and criminal discovery. In criminal cases more is at stake, so that sanctioning the parties (even the prosecutor) with preclusion becomes harder. And there is the right of the defendant to keep his evidence close to the vest. Inevitably, then, party-driven criminal process is less predictable and harder to manage than a party-driven civil process. These structural differences between criminal and civil procedure may also help explain why the reform results at ICTY have been more disappointing than the results of the CJRA of 1990.

VI. CONCLUSION

This paper has shown how and why the managerial judging reforms that ICTY judges introduced to expedite ICTY's criminal process instead lengthened both pretrial and trial. The managerial judging reforms produced these results because they added new procedural steps, requirements and work—which lengthened the pretrial and trial phases—but did not deliver any of their promised outcomes, such as limiting the number of incidents under discussion at trial, of live witnesses testifying at trial, or of interlocutory appeals entertained by the appeals chamber. The reforms did not deliver these outcomes because judges made a limited and deficient use of their managerial judging powers, and the parties neutralized the reforms.

Our comparison of the results of our study with those of Rosenberg's and RAND's also suggests that, at the very least, managerial judging reforms face substantial

¹⁵⁷ In contrast to ICTY, the CJRA applied to all civil cases. ICTY's results are more disappointing in the sense that the reforms brought a relatively substantial increase in pretrial and trial duration, while the CJRA of 1990 did not reduce time to disposition but did not increase it either. New Jersey's experiment applied to all personal injury cases. Rosenberg pointed out that New Jersey's pretrial conference lengthened procedure, but did not indicate how much. See ROSENBERG, THE PRETRIAL CONFERENCE, *supra* note 127, at 93-105.

implementation challenges that are not easy to overcome. But our study has also explained why the problems that managerial judging reforms face may be more structural than previously acknowledged.

The basic idea behind managerial judging is that the court's intervention in the parties' pretrial and trial case can help reduce time to disposition without imposing higher costs on the other goals of the legal process, such as accuracy and fairness. Our study has identified three problems present in this very idea. First, the court's intervention adds new requirements, procedural steps and work that take time. Reformers should thus notice that any time gains that may come from the court's intervention have to offset the additional time that these managerial judging requirements, steps and work take.

The second problem is that the managerial court needs sufficient information to make an efficient and fair decision—i.e., a decision that expedites process without creating higher costs for the other goals of the legal process. But given that the parties may want more time than the court may be willing to give them, that the court has to make managerial decisions before trial and very early in the process, and that certain managerial judging decisions require having information about the whole case, it is likely that the court will have limited information about the case. This imperfect information may thus prevent conscientious courts from using their managerial judging powers widely, in order to avoid compromising accuracy, fairness and the other goals of the legal process.

The third problem with the managerial judging idea is that in those cases in which the parties would agree with the court about how much time they need for pretrial and trial, the court's intervention adds steps, requirements, and work, without bringing any time gains. While in those cases in which the parties do not agree with the court about how much time they need, the parties have an incentive to try to neutralize the managerial judging powers of the court.

Our study does not mean to suggest that managerial judging is always a bad idea. There are situations in which the parties may want more time for pretrial and trial than is socially optimal; and the court's intervention, even by its own motion, may be the only way to address the situation. In addition, there may be reasons other than expediency for the court to acquire information about the case before trial to gain a better grasp of the issues under discussion, and to use this information to improve the quality of the legal process.

But our analysis indicates that it seems unrealistic to expect that most managerial judging techniques will bring substantial time gains; and that we have to be wary when specific techniques bring substantial time gains because they may be comprising accuracy, fairness and the other goals of the legal process.

Given these potential tensions between managerial judging and the other goals of procedure, would it actually be good news if managerial judging reforms successfully expedited process at ICTY or elsewhere? ICTY may already provide a case study to probe this issue in the future. A number of our interviewees mentioned that since July

2006—the end of our study period—judges have been implementing managerial judging powers much more aggressively at trial, though not during pretrial, where the situation remains basically the same as described in this article.¹⁵⁸ In addition, judges have introduced new reforms to allow for the introduction of even more written witness statements at trial.¹⁵⁹

Future studies should determine whether the new reforms and ICTY judges' more aggressive use of managerial judging techniques after July 2006 actually expedited process. But assuming for a moment that this has happened—that after July 2006 judges have reduced trial length without getting more information about the case during pretrial—it is hard to see how this could be good for the other—and arguably more important—goals of the Tribunal's criminal procedure. For judges to shorten parties' cases without enough information about the case does not seem to be a good recipe for accurate and fair trials.¹⁶⁰ And accurate and fair trials are necessary conditions to achieve any of the broader goals that we as an international community may assign to international criminal justice, such as fighting impunity, creating a historical record of atrocities, giving voice to the victims, and deterring future mass atrocities.¹⁶¹

¹⁵⁸ See *supra* note 54, and accompanying text.

¹⁵⁹ See Rules 92 *bis* (amended in September 2006), 92 *ter* and *quarter* (adopted in September 2006), and 92 *quinqüies* (adopted in December 2009).

¹⁶⁰ On comments by a number of our interviewees about these risks, see *supra* note 103.

¹⁶¹ On the different goals of international criminal tribunals and the potential tensions among them, see Mirjan Damaška, *L'Incerta Identità delle Corti Penali Internazionali*, CRIMINALIA, ANNUARIO DI SCIENZE PENALISTICHE 9-55 (2006). On the relationship between accuracy and deterrence, see Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, XXIII J. LEGAL STUD. 307 (1994); Posner, *An Economic Approach to the Law of Evidence*, *supra* note 102.

APPENDIX

| Table A1. Individual reforms included in the analysis and subjective weights, according to importance, used to create cumulative reform variables. | | |
|---|---------------|--|
| Reform | Weight | Details of reform |
| 62ter adopted | .5 | Defines plea agreement procedure |
| 65bis adopted | .5 | Allows pre-trial status conferences |
| Reforms of July 1998 | 2 | Allows pre-trial judges (65ter), mandates pretrial conference (73bis), allows pre-defense conference (73ter), allows written testimony by expert witnesses (94bis), allows sentencing evidence during trial (85.a.6) |
| 65bis amended 12/4/98 | .5 | Makes status conference mandatory |
| 65bis amended 12/12/02 | .5 | Allows teleconferencing at status conference |
| 65ter amended 11/17/99 | .5 | Makes pre-trial judges mandatory |
| Reforms of April 2001 | .5 | Authorizes that the Pretrial Judge be assisted by a Senior Legal Officer |
| 73bis and ter amended 7/17/03 and second reform to fee system in 08/01/03 | 1 | Trial chamber can fix number of crime sites and incidents |
| 72 and 73 amended 4/23/2003 | 1 | Allows trial chamber to decide if an interlocutory appeal can be made |
| Rule 89 amended and 92bis adopted | 1 | Allows less use of live testimony at trial |
| Reform of 1/2001 | 1 | Changes in fee system to discourage dilatory behavior by counsel |