

# Article

## Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms

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## I. INTRODUCTION

When Slobodan Milošević passed away on March 11, 2006—more than four years after the trial against him began in the International Criminal Tribunal for the Former Yugoslavia (ICTY)—many complained about the length of the proceedings at the ICTY. This criticism of the ICTY's proceedings was nothing new; it began only a few years after the creation of the Tribunal, and increased over time.<sup>1</sup> ICTY judges tried to address this criticism by introducing reforms to the Tribunal's procedures. These reforms defined a new role for the judge as an expediting manager of cases who can act by his own motion, while 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 encouraging managerial judging.<sup>2</sup>

1. See Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 869-70 (2005).

2. 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*

Until now, aside from impressionistic evidence, there has been no clear indication as to whether the reforms succeeded in shortening the duration of pretrial and trial. 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 the ICTY—this Article shows that the procedural reforms that aimed to shorten proceedings had the opposite effect: they lengthened both the pretrial and trial phases.

The reforms made proceedings longer rather than shorter because they added new procedural steps, requirements, and work without delivering promised results, such as a lower numbers of incidents under discussion at trial, fewer live witnesses testifying at trial, or fewer interlocutory appeals entertained by the appeals chamber. The reforms did not deliver these promised results because ICTY judges either did not use their managerial powers or used them deficiently, enabling the parties to neutralize the implementation of the reforms.

This study has implications for managerial judging that go beyond the ICTY context. The results of our study on the ICTY are not surprising given that the obstacles that managerial judging reforms have to surmount to expedite the process are larger and more structural than has been recognized so far. This is because any time gains reforms provide have to offset the extra time that the reform requirements take to implement and execute. Obtaining these time gains is difficult given that, in a managerial judging system of procedure, the managerial court is likely to have less information about the case than the parties. This limited information may lead the court to refrain from using its managerial powers in order to avoid making inefficient, or unfair decisions. The court's limited information also facilitates parties' attempts to neutralize the court's managerial powers.

This Article thus argues that the managerial court walks a tightrope. On one side, the court risks being inefficiently superfluous; 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. On the other side, in those cases in which the court's intervention may be necessary because the parties want more time than is socially optimal, the court may not have sufficient information about the

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*Judges*, JUDGES' J., Fall 1984, at 34; Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion To Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91 (2002); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981); Judith Resnik, *The Assumptions Remain*, JUDGES' J., Fall 1984, at 37 (critiquing Connolly, *supra*); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Judith Resnik, *Managerial Judges and Court Delay: The Unproven Assumptions*, JUDGES' J., Winter 1984, at 8; Judith Resnik, *Managerial Judges: The Potential Costs*, 45 PUB. ADMIN. REV. 686 (1985); 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, *supra* note 1, at 874-85, especially at 882-83.

case to make the right decisions, while the parties will have an incentive—and may have the ability—to neutralize the managerial powers of the court by relying on their superior information about the case.

We thus claim that reformers should be cautious about the promise of managerial judging to expedite proceedings without compromising the other goals of the legal process, such as accuracy and fairness. Powerful critiques of managerial judging thus far have been based on its potential negative effects on judges' impartiality, as well as on the negative externalities it imposes on society by compromising the transparency and accountability of the administration of justice and the role that adjudication plays in advancing public policy.<sup>3</sup> But we instead argue that even if managerial judges succeed in remaining unbiased toward the parties, and even disregarding the potential negative externalities for society at large, there are structural challenges in the very idea of managerial judging taken on its own terms.

This Article is organized as follows. In Part II, we describe the eleven managerial judging reforms that ICTY judges introduced between July 1997 and August 2003. The assumption by ICTY judges was that each of these reforms would contribute to expediting ICTY procedure. Thus, in Part III, using multivariate survival analysis, we test 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 four models for pretrial and trial control for, among other variables, case characteristics, court capacity, litigation levels, judges' characteristics, and whether the defendant pled guilty. In all pretrial and trial models, the number of reforms is significantly correlated with longer pretrial and trial.

Part IV of the Article tests the relationships between ICTY managerial judging reforms on the one hand 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 on the other. The results of these regressions reveal that the managerial judging reforms did not deliver any of their promised outcomes. Part IV also presents results from interviews to show that our quantitative findings are corroborated by qualitative data. Several of our interviewees indicated that ICTY judges either did not use their managerial powers or used them deficiently, and that the parties managed to neutralize the implementation of the reforms.

In Part V, the Article discusses reasons why ICTY judges made limited and deficient use of their managerial powers, and why parties had incentives to neutralize the reforms. Part V also articulates the structural challenges that managerial judging faces to expedite proceedings. In Part VI, we show that these overlooked explanations may help account not only for our results, but also for the results of the two major empirical studies on managerial judging reforms introduced in U.S. civil procedure—Maurice Rosenberg's study of

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3. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Resnik, *Managerial Judges*, *supra* note 2; Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101 (2006).

pretrial conferences in New Jersey<sup>4</sup> and RAND's study of the Civil Justice Reform Act of 1990.<sup>5</sup>

## II. MANAGERIAL JUDGING REFORMS AT THE ICTY

The U.N. Security Council created the ICTY in 1993 to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia after 1991.<sup>6</sup> 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.<sup>7</sup> Since 1994, the Tribunal has indicted 161 individuals and concluded proceedings against 128 of the accused.<sup>8</sup>

When ICTY judges adopted the Rules of Procedure and Evidence in 1994, they gave them a strong adversarial orientation.<sup>9</sup> The 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 also strongly favored live testimony at trial and liberally allowed interlocutory appeals.<sup>10</sup>

A few years later, however, the speed of the proceedings started to raise

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

5. JAMES S. KAKALIK ET AL., *INST. FOR CIVIL JUSTICE, RAND, MR-800-ICJ, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 3* (1996) [hereinafter KAKALIK, JUST, SPEEDY, AND INEXPENSIVE?]; see also JAMES S. KAKALIK ET AL., *INST. FOR CIVIL JUSTICE, RAND, MR-802-ICJ, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT* (1996) [hereinafter KAKALIK ET AL., AN EVALUATION]; JAMES S. KAKALIK ET AL., *INST. FOR CIVIL JUSTICE, RAND, MR-803-ICJ, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT* (1996) [hereinafter KAKALIK ET AL., MEDIATION]; JAMES S. KAKALIK ET AL., *INST. FOR CIVIL JUSTICE, RAND, MR-803-ICJ, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICT* (1996) [hereinafter KAKALIK ET AL., IMPLEMENTATION].

6. S.C. Res. 827, U.N. SCOR, 48th Year, U.N. Doc. S/RES/827, at 1 (May 25, 1993).

7. U.N. Secretary-General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council*, arts. 1-5, U.N. Doc. S/25704 (May 3, 1993) (proposing the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991), *adopted by S.C. Res. 827*, U.N. SCOR, 49th Year, U.N. Doc. S/Res/827, at 1 (May 25, 1993) [hereinafter ICTY Statute].

8. *The Cases: Key Figures*, INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/sections/TheCases/KeyFigures> (last visited Mar. 25, 2011); Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011) (concluding proceedings against three additional defendants).

9. On the original strong adversarial orientation of ICTY procedure, see, for example, SALVATORE ZAPPALÀ, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS* (2003); Gideon Boas, *Creating Laws of Evidence for International Criminal Law: The 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); and 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).

10. Within the adversarial-inquisitorial framework, a liberal system of interlocutory appeals is arguably an inquisitorial feature because it is a way to review decisions of lower judicial officials within a hierarchical apparatus of criminal justice. See MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 69 (1986) (describing the hierarchical model that corresponds roughly to the inquisitorial system).

important concerns for ICTY judges, who wondered whether the ICTY's predominantly adversarial system adequately addressed this issue.<sup>11</sup> By July 1998, more than five years after its creation, the Tribunal had issued only two judgments.<sup>12</sup> The rapid growth of the ICTY's caseload also fed these concerns—the number of accused persons in its custody more than tripled within two years, growing from eight individuals in June 1996 to twenty-nine in June 1998.<sup>13</sup>

Not only the judges, but also the media and several members of the international community expressed concern regarding the slowness of the Tribunal.<sup>14</sup> At the end of 1998, the General Assembly of the United Nations requested that the Secretary-General conduct a review of the functioning of the ICTY and the International Criminal Tribunal for Rwanda (ICTR), which was facing similar problems, "with the objective of ensuring the efficient use of the resources of Tribunals."<sup>15</sup> The Secretary-General appointed an Expert Group to conduct this review.<sup>16</sup> In a report issued in November 1999,<sup>17</sup> the Expert Group put the question very candidly:

Major concerns have been voiced not only by United Nations officials,

11. See, e.g., Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, ¶ 13, U.N. Doc. A/54/187 (Aug. 25, 1999) [hereinafter Sixth Annual Report of the ICTY] ("The Tribunal's judges are concerned about the length of time many of the trials and other proceedings are taking to complete."); Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, ¶¶ 4, 7, U.N. Doc. A/55/273 (Aug. 7, 2000) [hereinafter Seventh Annual Report of the ICTY] (pointing out that one of the two major problems that the Tribunal had to overcome was trying all the accused within a reasonable timeframe). 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 . . ." ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 385 (2003).

12. The cases were *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996), which had been disposed of through a guilty plea and a plea bargain, and *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), whose appeal was still pending. Of course, the tasks of the Tribunal had not been limited to these two cases alone but also extended to others where investigations had been done, indictments issued, and trials held.

13. See Mundis, *supra* note 9, at 371 n.22.

14. See, e.g., Charles M. Madigan & Colin McMahon, *A Slow, Painful Quest for Justice*, CHI. TRIB., Sept. 7, 1999, at 1; Elizabeth Neuffer, *War Criminal Tribunal Faces Trial of Its Own*, BOS. GLOBE, May 9, 1997, at A2; Elizabeth Neuffer, *A Worldwide Tribunal on Crime Eyed*, BOS. GLOBE, June 15, 1998, at A1; Tracy Wilkinson, *Problems Outweigh Progress of U.N. Tribunal*, L.A. TIMES, May 4, 1997, at A12; Carol J. Williams, *Crisis in Yugoslavia*, L.A. TIMES, May 28, 1999, at A20.

15. See 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, ¶ 2, U.N. Doc. A/54/634 (Nov. 22, 1999) [hereinafter Expert Report]; see also Seventh Annual Report of the ICTY, *supra* note 11, ¶ 330.

16. The Group was composed of Jerome Ackerman (Chairman, United States), Pedro David (Argentina), Hassan Jallow (Gambia), Jayachandra Reddy (India), and Patricio Rueda (Spain). Press Release, Int'l Criminal Tribunal for Rwanda, Report of the Expert Review Group (Jan. 31, 2000), available at <http://69.94.11.53/ENGLISH/pressbrief/2000/brief20000131.htm>.

17. The report of the Expert Group—which included criticisms of the adversarial system of the ICTY—was very influential at the Tribunal. See, e.g., Seventh Annual Report of the ICTY, *supra* note 11, ¶ 325 ("Nearly all the recommendations contained in the Expert Group report were applied or are about to be implemented.").

Member States and others, but also by all the organs of the Tribunals with regard to the slowness of the pace of proceedings. . . . [T]he question is why, after almost seven years and expenditures totaling \$400 million, only 15 ICTY and ICTR trials have been completed . . . .<sup>18</sup>

Many judges and the members of the Expert Group thought that one of the main causes of these problems was the ICTY's adversarial system.<sup>19</sup> They decided to introduce reforms to redefine the role of the judges and give them new information and tools to reduce the length of proceedings. These reforms can be characterized as moving the ICTY's procedure toward managerial judging. Like in the adversarial system, in a managerial judging system, the parties run their pretrial and trial cases, and the court decides on guilt or innocence at the end of the trial. On top of that role, however, the managerial judge is also in charge of intervening in the parties' cases by his own motion from early on in the process in order to ensure that the parties do not delay proceedings unnecessarily. We now proceed to describe these reforms.

#### A. Making Judges Case Managers To Expedite Cases

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 lay and expert witnesses.<sup>20</sup> U.N. experts and ICTY judges also claimed that the adversarial system was leading the defense to use dilatory tactics.<sup>21</sup>

In order to prevent pretrial and trial delays by the prosecution or defense, the judges introduced reforms that would allow judges to have more information about the parties' cases. The reforms would also give new powers to the judges to set deadlines and work plans for moving the parties toward trial, to encourage the parties to exchange information and reach agreements on factual and legal issues, and to limit the number of witnesses and incidents under discussion at trial, all by the judges' own motion. Judges argued that deadlines, work plans, and limiting witnesses and issues would reduce the length of both pretrial and trial.<sup>22</sup>

Judges incorporated these ideas into the ICTY's Rules of Procedure and Evidence. Rule 65 *ter* created the position of pretrial judge to "coordinate communication between the parties," "ensure that the proceedings are not unduly delayed[,] and . . . take any measure necessary to prepare the case for a fair and expeditious trial."<sup>23</sup> According to this Rule, the pretrial judge

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18. Expert Report, *supra* note 15, ¶ 35. For a complete assessment of the work of the ICTY as of August 31, 1999, see *id.* ¶¶ 26-29.

19. See CASSESE, *supra* note 11, at 385. For a description of the Expert Report and the response of the Tribunal to its findings, see Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM. J. INT'L L. 759 (2000).

20. See, e.g., Expert Report, *supra* note 15, ¶ 65.

21. See, e.g., *id.* ¶ 67.

22. See, e.g., *id.* ¶¶ 77-78; Sixth Annual Report of the ICTY, *supra* note 11, ¶ 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 pretrial management of pending cases and strengthening the ability of the trial chamber to control trial proceedings.")

23. ICTY Rules of Procedure and Evidence, *as amended*, Rule 65 *ter*, Doc. IT/32/Rev.45

establishes a work plan for the parties, “indicating, in general terms, 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.”<sup>24</sup> Rule 65 *ter* also created duties for the prosecution and the defense to provide more information about their cases to the court before trial.<sup>25</sup>

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,<sup>26</sup> and later allowing ICTY senior legal officers to assist pretrial judges in their work.<sup>27</sup>

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.”<sup>28</sup> The judges later amended Rule 65 *bis* twice, first to make status conferences mandatory, then to allow the use of teleconferencing at these conferences.<sup>29</sup>

The judges also introduced Rules 73 *bis* and *ter* mandating pretrial conferences, at which the trial chamber may (1) call upon the prosecution and defense to shorten the estimated length of the examination-in-chief of witnesses; (2) determine the number of witnesses that each party may call; and (3) set the time available to the prosecution and the defense to present evidence

(2010).

24. *Id.*

25. *Id.* Before trial, the prosecutor must submit a pretrial brief that 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 that the prosecutor intends to bring at trial, any admissions by the parties, a statement of matters that are not in dispute, and a statement of contested matters of fact and law. Rule 65 *ter* also establishes that before the pretrial conference, the prosecutor must submit a 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, the total time estimated for presentation of the prosecutor’s case, and the list of exhibits she intends to offer. The defense also has to submit a pretrial brief that indicates the nature of the accused’s defense and any matters in the prosecutor’s pretrial brief with which the defense takes issue and why. The defense must also submit lists of trial witnesses and exhibits it intends to offer at trial.

26. ICTY Rules of Procedure and Evidence, *as amended*, Rule 65 *ter* (A), Doc. IT/32/Rev.17 (1999). 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.

27. ICTY Rules of Procedure and Evidence, *as amended*, Rule 65 *ter* (D), Doc. IT/32/Rev.28 (2001). Although there were other amendments of Rule 65 *ter* in the period under study in this Article, 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 Article. See ICTY Rules of Procedure and Evidence, *as amended*, Rule 65 *ter*, Doc. IT/32/Rev.39 (2006). For the same reason, we have not evaluated all other amendments and rules introduced after July 2006.

28. Rule 65 *bis* was initially adopted in July 1997, allowing for the use of status conferences. ICTY Rules of Procedure and Evidence, *as amended*, Rule 65 *bis*, Doc. IT/32/Rev.11 (1997).

29. Judges introduced these amendments in December 1998 and December 2002, respectively. ICTY Rules of Procedure and Evidence, *as amended*, Rule 65 *bis*, Doc. IT/32/Rev.14 (1998); ICTY Rules of Procedure and Evidence, *as amended*, Rule 65 *bis*, Doc. IT/32/Rev.26 (2002).



at trial.<sup>30</sup> 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 at trial to those sites or incidents.<sup>31</sup>

ICTY judges also introduced Rule 62 *ter*, which explicitly authorizes plea bargaining before the Tribunal.<sup>32</sup> Finally, in January 2001 and August 2003, the Tribunal changed its fee system to ensure that defense counsel did not engage in dilatory tactics.<sup>33</sup>

### B. *Allowing More Written Witness Statements at Trial*

The second problem with ICTY procedure diagnosed by the U.N. experts and ICTY judges was the heavy reliance on live testimony by the ICTY's adversarial system. Live testimony was delaying trials due to the large number of witnesses that these complex cases usually include.<sup>34</sup> To address this issue, the judges allowed the introduction of more written statements at trial, arguing that this would reduce trial length by hearing fewer live witnesses.

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

30. ICTY Rules of Procedure and Evidence, *as amended*, Rules 73 *bis*, 73 *ter*, Doc. IT/32/Rev.13 (1998).

31. ICTY Rules of Procedure and Evidence, *as amended*, Rule 73 *bis*, Doc. IT/32/Rev.28 (2003).

32. Rule 62 *ter* was adopted in December 2001. ICTY Rules of Procedure and Evidence, *as amended*, Rule 62 *ter*, Doc. IT/32/Rev.28 (2001). Although this Rule established the legality of plea bargaining, the Tribunal considered the practice to be legal before the Rule's adoption. The first case in which the Tribunal accepted this practice was *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, ¶¶ 18-19 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996).

33. 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.

U.N. Secretary-General, *Comprehensive Report on the Progress Made by the International Criminal Tribunal for the Former Yugoslavia in Reforming Its Legal Aid System: Rep. of the Secretary-General*, ¶¶ 16, 22, U.N. Doc. A/58/150 (July 18, 2003). In its 2002 plenary report, the Tribunal decided to endorse the introduction of a pure lump sum payment system for trial. *See id.* ¶ 23. This system was implemented in August 2003. *See* U.N. Office of Internal Oversight Servs., Internal Audit Div. II, Audit of the ICTY Legal Aid Program, at 3, U.N. Doc. AA 2005/270/05 (Mar. 8, 2006) (on file with authors). Although there was a third reform to the fee system of the Tribunal that established a lump sum payment system for pretrial, 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.

34. *See, e.g.*, Sixth Annual Report of the ICTY, *supra* note 11, ¶ 13. Disentangling what makes a trial complex is beyond the scope of this Article. For a study on the determinants of case complexity for key actors of the criminal justice system, see Michael Heise, *Criminal Case Complexity: An Empirical Perspective*, 1 J. EMPIRICAL LEGAL STUD. 331 (2004).

Chambers.”<sup>35</sup> 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.”<sup>36</sup>

Furthermore, ICTY judges adopted Rule 92 *bis*.<sup>37</sup> 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 that goes to proof of a matter other than the acts and conduct of the accused.”<sup>38</sup> 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 before the Tribunal if it “goes to proof of a matter other than the acts and conduct of the accused.”<sup>39</sup>

ICTY judges also 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.”<sup>40</sup>

### C. Giving Judges Power To Limit Interlocutory Appeals

Finally, U.N. experts and ICTY judges argued that the interlocutory appeals available for the prosecution and defense were too broad.<sup>41</sup> 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, which now establish that decisions on all motions except preliminary motions challenging jurisdiction are without interlocutory appeal unless an appeal is certified by the trial chamber. Such certification may be granted only 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.<sup>42</sup>

35. See ICTY Rules of Procedure and Evidence, Rule 90(A), Doc. IT/32 (1994).

36. Rule 89(F) was introduced by an amendment to the Rules of Procedure and Evidence on December 13, 2000. ICTY Rules of Procedure and Evidence, *as amended*, Rule 89(F), Doc. IT/32/Rev.19 (2001).

37. Rule 92 *bis* was amended in September 2006. Because, as we explain in Section III.A, our study covered the work of the Tribunal in the period from April 1995 to 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 *quater* in September 2006, and Rule 92 *quinquies* in December 2009. We therefore rely on the June 13, 2006 version of the ICTY Rules and Procedures, which preceded the September 2006 amendments. See ICTY Rules of Procedure and Evidence, *as amended*, Rule 92 *bis*, Doc. IT/32/Rev.38 (2006).

38. *Id.* Rule 92 *bis* (A).

39. *Id.* Rule 92 *bis* (D).

40. *Id.* Rule 94 *bis* (C). For the reasons already mentioned *supra* note 37, we disregard the amendment to this Rule introduced in September 2006.

41. See, e.g., Expert Report, *supra* note 15, ¶¶ 102-04.

42. ICTY Rules of Procedure and Evidence, *supra* note 23, Rules 72, 73.

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.

<b>Reform Date</b>	<b>Reform</b>	<b>Details of Reform</b>
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	Introduced 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
April 2002	Amendment of Rules 72 and 73	Allowed trial chamber to decide if an interlocutory appeal may be made
December 2002	Amendment of Rule 65 <i>bis</i>	Allowed teleconferencing at status conference
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

### III. EVALUATING WHETHER THE REFORMS SHORTENED ICTY PRETRIAL AND TRIAL PROCEEDINGS

Having described the procedural reforms the ICTY instituted, this Part proceeds to describe our methodology and the results of our tests. It begins with a description of our data and the variables we think are central to the question at hand, and then moves on to test whether the reforms influenced the duration of the proceedings. We selected a broad range of variables for our study, based upon a review of the literature and interviews with key informants who are directly involved in the Tribunal. The variables include the duration of the pretrial and trial phases, the effective number of reforms in each pretrial and trial, case characteristics, court capacity, and other factors that are believed to affect the length of proceedings.

After exploring how these variables interact, we found that the durations of the pretrial and trial proceedings changed over the period of our study. We found that the median pretrial and trial durations are eighteen and fourteen months, respectively, and that the length of each phase was not consistent across time. Similarly, the number of effective reforms varied significantly over time, with some defendants being processed before any reforms were adopted, and many if not most brought before the Tribunal when between seven and nine reforms were in place. We used multivariate survival analysis<sup>43</sup> to test whether the reforms influenced the length of proceedings. We found that for both the pretrial and trial phases of the ICTY, the effective number of reforms significantly lengthened the proceedings. Comparing defendants in the zero reform context to those in the eight-to-nine reform context, pretrial proceedings were as much as two hundred days longer, and trial proceedings were one hundred days longer.

#### A. *Data and Methodology*

We collected data for this study during the summer of 2006 and during the summer and fall of 2008 from the website of the ICTY.<sup>44</sup> This website includes documents filed in each of the cases before the Tribunal, as well as the annual reports of the Tribunal. With the ICTY Registry's authorization, in October and November of 2008 we also collected data from the Tribunal's Judicial Database in The Hague, Netherlands. The earliest case in the dataset began on April 26, 1995, and our study covers the period from that date through July 1, 2006, after which we made our initial coding in the summer of

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43. Multivariate survival analysis is a family of statistical techniques that uses multiple variables (hence, multivariate) to estimate when a device will fail, a life will end, or some other process or duration measure that is by nature terminal will conclude. This technique is used in industrial applications to predict how long parts are expected to last, and in medical environments to predict the effectiveness of treatment alternatives. The results of survival analysis are typically expressed as the probability that someone or something will survive a given number of days, years, cycles, or whatever metric for time is appropriate for a given situation (for example, a fifty percent probability of surviving five years after a transplant).

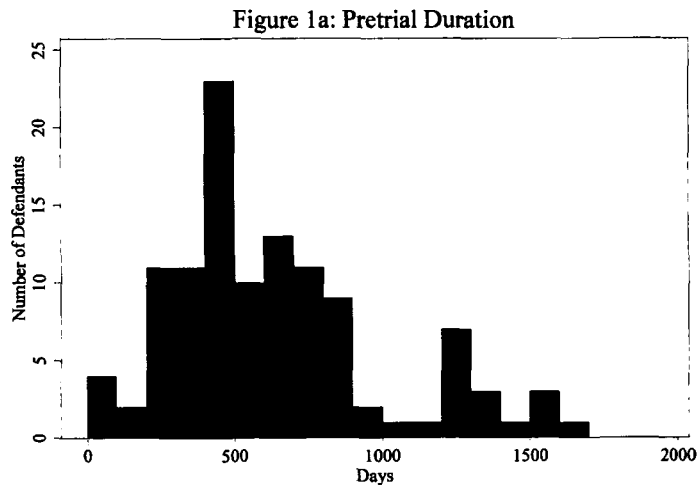
44. INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org> (last visited Apr. 18, 2011).

2006. Our unit of analysis is the individual defendant unless otherwise noted.

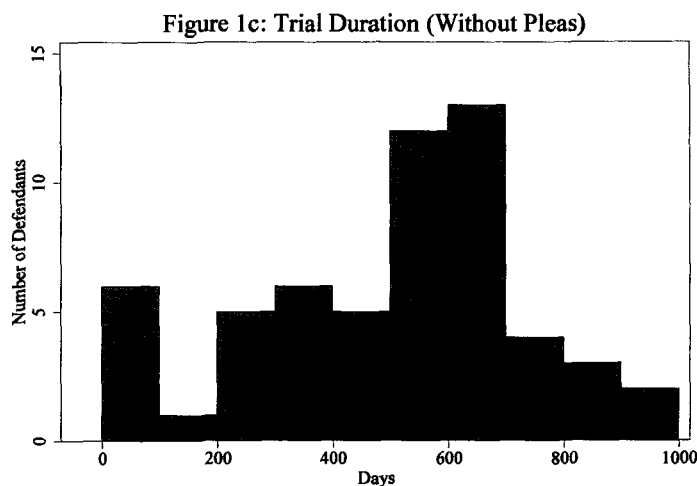
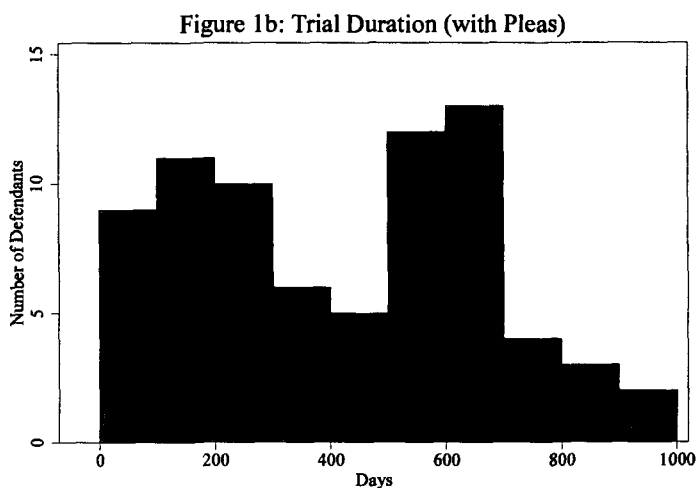
1. *Duration as the Dependent Variable and the Number of Reforms as the Key Independent Variable.*

The dependent variable for our study was the length of each procedural stage. The pretrial phase was measured as the number of calendar days between the defendant's initial appearance at the tribunal and either (1) the first day of trial, (2) the date a plea was entered, or (3) the date that some other conclusion of the pretrial period was reached. The initial appearance marks the moment at which the defendant appeared for the first time before the Tribunal voluntarily or after his arrest. Since there are no trials in absentia before the ICTY, it is only at that moment that the Tribunal can begin to move the defendant's case toward trial. The trial phase was also measured in calendar days from the date the trial began or a plea was entered until the sentencing judgment.<sup>45</sup>

The median length of the pretrial phase was about eighteen months (551 days). The trial phase with guilty pleas included had a median length of about fourteen months (433 days), while the trial phase without guilty pleas had a median length of about seventeen months (515 days). Figures 1a to 1c show the distribution of cases by duration.



45. 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 was the number of reforms that were in effect during the pretrial or trial phase of the defendant's case. The hypothesis by ICTY reformers that we were testing was that the higher the number of reforms a case was subjected to, the shorter the pretrial and trial phase of that case should be. We included in the analysis the eleven reforms described in Part II, measuring and weighting them in two ways: by their overall importance to the process, and by their potential individual influence in any particular case.<sup>46</sup>

46. See the Appendix, *infra*, for details on our weighting scheme.

Figure 2a. Pretrial Reforms

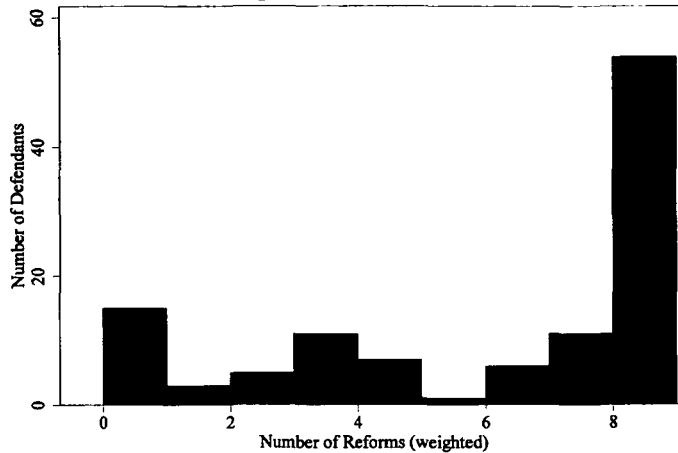
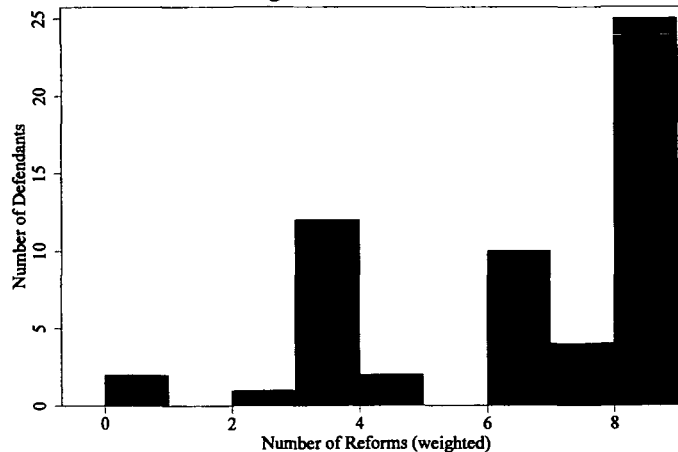


Figure 2b. Trial Reforms



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, using these as our control variables. 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 received when we presented a preliminary version of this Article in The Hague in June 2008.

## 2. *Case Characteristics as Control Variables*

On the characteristics of each case, data were collected regarding the number of incidents, the types of charges, and 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 the individual who committed it, or a superior of the immediate or close superior of the individual who committed the offense. We also collected data on 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.<sup>47</sup>

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 a particular direction—or would affect duration at all.

### 3. *Court Capacity as a Control Variable*

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<sup>48</sup> 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."<sup>49</sup>

### 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 considered these variables to be a proxy for litigation levels in each case. We also collected data on whether pretrial judges, trial judges, and the president of the trial court came from common or civil law jurisdictions. Some of our interviewees and attendees at our presentations at the ICTY suggested this variable as one of the factors that might affect phase duration, on the theory that a judge's legal background could affect her attitude toward the reforms.

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47. See *infra* Appendix for more information about how these variables were computed and from where we gathered data about them.

48. Confirmatory principal components analysis is a statistical technique that quantifies the shared variation among a set of variables. In this context, we used it to create a single index that incorporates the common correlations among the variables that constitute "court capacity." The important assumption behind this technique is that the part of each variable that is not correlated with the others is considered "noise" and left out of the index. Thus we can claim that our measure is a "clean" estimate of actual court capacity.

49. Details on our calculations are available *infra* Tables A2 and A3 in the Appendix.



The number of times the initial indictment was factually amended during the pretrial phase was designed 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 more defendants mean fewer resources and less court capacity per case. We did not expect that this variable would affect the trial phase, because once a trial starts, the trial chamber usually concentrates on it until it finishes.

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.

We also coded a variable that represents the week in which each defendant's pretrial or trial begins. In the parlance of survival analysis, this represents the point in time when the subject was enrolled in the experiment. We theorized that this variable was a measure of two different things. First, it was a measure of institutional memory—of how well the judges, lawyers, and administrators had 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.

### B. *Exploratory Analysis*

The duration measures of pretrial and trial periods over the course of this study did not rise and fall together. 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).

Figure 3a. Pretrial Days over Time

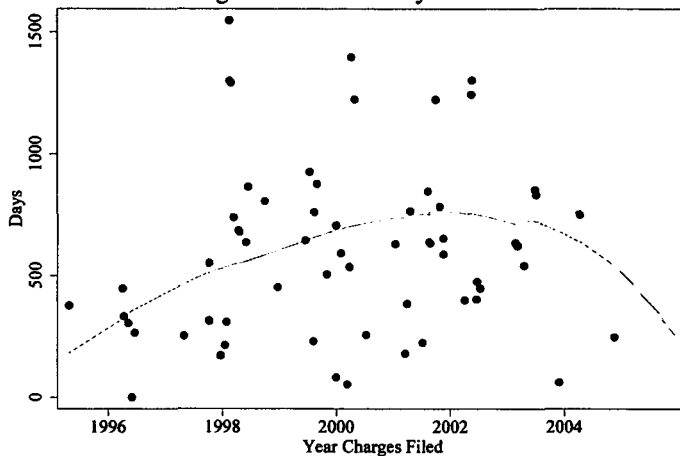


Figure 3b. Trial Days over Time, Trials and Pleas

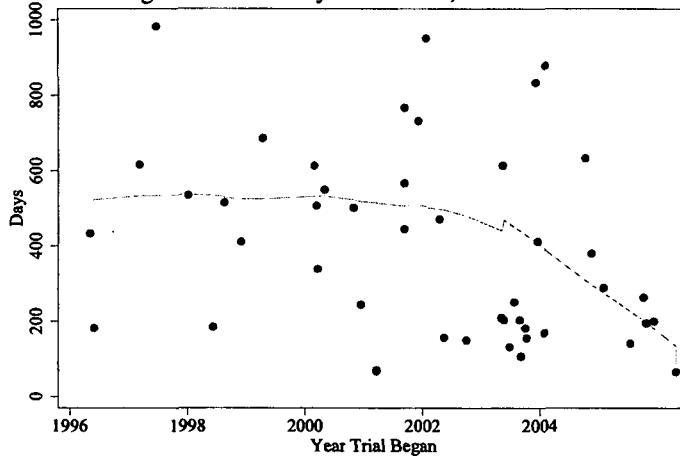
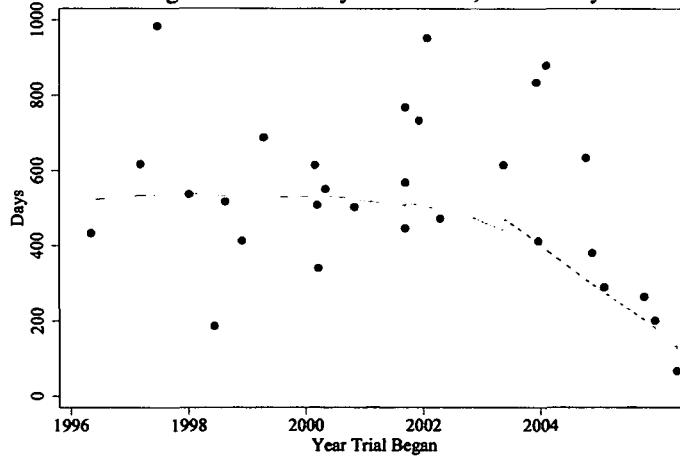


Figure 3c. Trial Days over Time, Trials Only

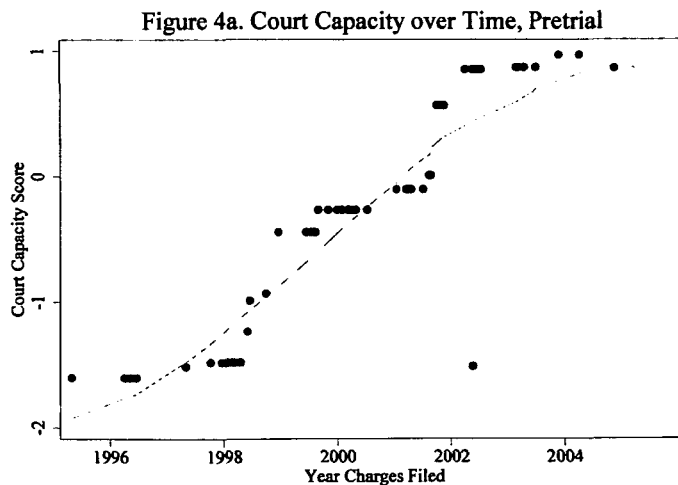


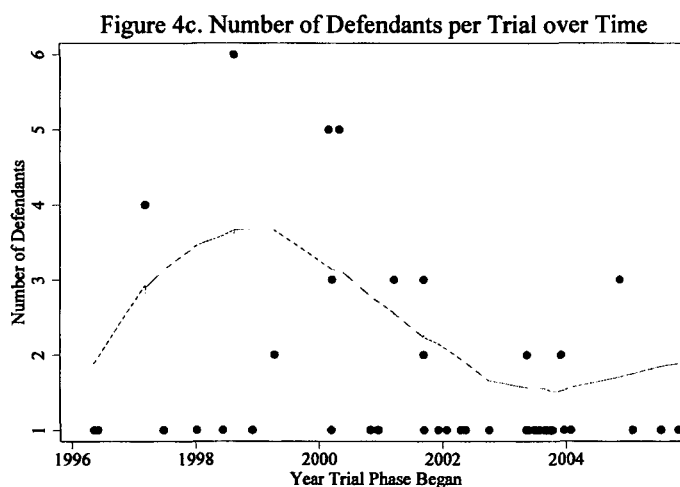
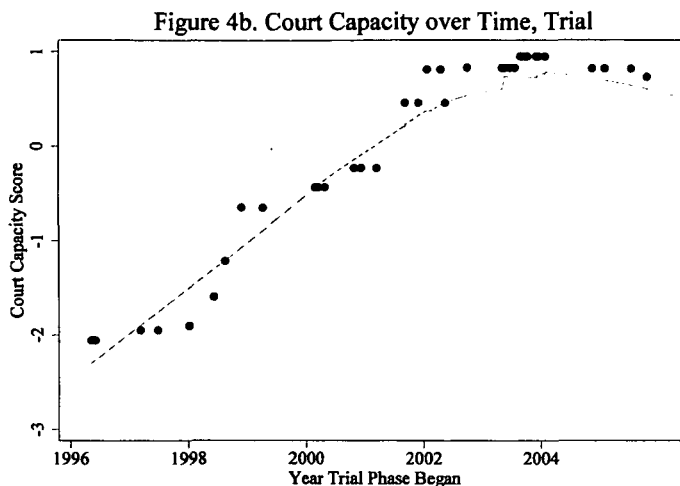
These results could be due to a number of factors. We think the likely explanation is one of court capacity, combined with a cluster of guilty pleas that were entered between 2002 and the beginning of 2004—which can be observed by comparing Figures 3b and 3c—and a downward trend in the number of defendants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

The pretrial period initially increased over time because the trial chambers did not have a courtroom available or were not ready to receive new defendants. 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 aforementioned cluster of guilty pleas between 2002 and the beginning of 2004 would help explain the decline in the duration of trials after 2002 as well. 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, which 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 the amounts leveled off (Figures 4a and 4b). The point at which these amounts 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.





### C. *Survival Analysis of Pretrial Phase*

In this Section, we test the effect of reforms on the duration of pretrial proceedings. We find that managerial reforms increased the length of proceedings, even when controlling for other factors that also affected the length of proceedings (court capacity, guilty plea, number of pretrial motions, etc.). The effect was substantively and statistically significant. During the period before reforms or after only a few reforms were in place (zero to three reforms), there was an eighty percent probability that the pretrial phase would have ended before the seven hundredth day. After all or nearly all the reforms were in place (eight to nine reforms), there was only a forty percent probability that the pretrial phase would have ended by the seven hundredth day.

We analyzed the data in Stata using Weibull regression. Weibull

regression is a parametric survival analysis in which the baseline hazard function is assumed to change monotonically over time. To put it in less technical terms, there is an explicit assumption in survival analysis that the probability an event will occur changes over time. Weibull regression adds an additional assumption that the change in probabilities is the result of a constant function (hence, monotonic). In our context, we assume that the likelihood that a pretrial phase will continue another day changes over time—specifically, that this likelihood decreases as the days increase. For example, we assume that the probability that the pretrial phase will survive the tenth day is much higher than the probability that it will survive the seven hundredth day. Weibull regression is appropriate in this study because there are few sudden changes in the probability a pretrial or trial will end (controlling for plea bargains). The normal procedures, incentives, and norms of the Tribunal do not lend themselves to such disruptive events.<sup>50</sup>

In order to further justify these assumptions, it is necessary to note first that there is no “trial paradox” in the context of the ICTY.<sup>51</sup> The prosecutor and most defendants do not pay for the economic costs of the criminal process at the ICTY. In addition, the prosecution has incentives to go to trial instead of bargaining because 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 has incentives to delay proceedings because the prosecution has the burden of proof and its evidence may weaken over time, because the chances of acquittal are not insignificant (which creates incentives to fully litigate the case at trial), and because 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 agreed to by the 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 hold of the defendant. This means that the more time that passes after the initial appearance, the more likely it is that the prosecution and the court will be ready to adjudicate the case in the form of a guilty plea or a trial. Similarly, most defense attorneys are appointed by the

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50. To validate our decision to use Weibull regression, 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 monotonically over time—is borne out by the statistics. We did not report the Cox regressions, but they are available from the authors. For a similar approach, see Paul Fenn & Neil Rickman, *Asymmetric Information and the Settlement of Insurance Claims*, 68 J. RISK & INS. 615 (2001).

51. 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 Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989); and Kathryn E. Spier, *Economics of Litigation*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 162, 167-70 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

Tribunal and tend to work on one case at a time. Thus, the more time that passes after the defendant's initial appearance, the more likely it is that the defense attorneys will be ready to deal with the adjudication phase in the form of a guilty plea or a trial.

<b>Table 2. Determinants of the Duration of Pretrial Proceedings at the ICTY</b>				
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
Number of reforms	-1.164** (0.238)	-1.205** (0.253)	-1.643** (0.339)	-1.329** (0.292)
Week of initial appearance (0 = Apr. 26, 1995)	0.019** (0.005)	0.020** (0.005)	0.019** (0.007)	0.022** (0.007)
Number of incidents alleged in initial indictment (log)		0.036 (0.128)	0.002 (0.143)	0.256 (0.178)
Individual responsibility		-0.378 (0.369)	-0.611 (0.359)	-0.895* (0.394)
Individual and command responsibility		-0.225 (0.350)	-0.850* (0.419)	-1.091* (0.540)
Court capacity (see text for explanation)			2.017** (0.666)	1.276 (0.684)
Number of defendants before tribunal			-0.031 (0.050)	-0.055 (0.036)
Number of defendants in this case			-0.037 (0.089)	
Guilty plea entered before or at trial				0.851* (0.347)
Number of times indictment was amended				-0.109 (0.105)
Number of pretrial motions by the prosecution				-0.741** (0.276)
Number of pretrial motions by the defense				-0.698** (0.161)

Constant	-18.13** (2.58)	-18.22** (2.65)	-15.59** (2.91)	-19.02** (3.34)
Ln(p)	1.05**	1.07**	1.18**	1.36**
N subjects / N completions	112/76	110/75	110/75	108/75
Time at risk	71761	70559	70559	68639
LR chi-square(DF)	37.95(2)	35.29(5)	59.26(8)	104.27(11)
Prob(chi-square)	.000	.000	.000	.000
*p < .05, **p < .01				

The four models in Table 2 were designed to test whether the number of reforms in place during an individual defendant's pretrial proceedings was a significant determinant of the length of those proceedings. The model in Column I tested this hypothesis while controlling for the tenure of the 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 Zero of the experiment.

The model in Column II introduced 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. The model in Column III included these variables and added three more: court 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. We also added a variable for the number of times the indictment was factually amended during pretrial plus the number of pretrial motions that the prosecution and defense presented as a proxy for level of litigation in the case.<sup>52</sup>

We also ran the final regression with all the remaining variables we coded.<sup>53</sup> But these variables were not statistically significant, did not change the results regarding the effect of the reforms on pretrial length, and did not

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52. 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 we tested their influence by removing them from the dataset and rerunning the regression. This made little difference to the output; all signs, coefficients, and p-values were comfortably similar to their previous values.

53. These variables include: 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.

improve the fit (chi-square) of the model. For this reason, we do not report them.<sup>54</sup>

The number of reforms adopted at the time proceedings were initiated against each defendant was significantly and negatively correlated with the probability that the pretrial phase would 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 decreased, while a positive value indicates that the risk of failure is increased.)<sup>55</sup> This was true in all of the pretrial models (I, II, III, and IV of Table 2). It suggests that the reforms caused the pretrial phase to be longer.

It is not possible to tell from these models whether the causal arrow points in only one direction—i.e., whether the longer pretrial proceedings caused the adoption of more reforms or whether the reforms themselves led to longer pretrial proceedings. We used a one-year lag regression model to test whether the reforms were a response to longer proceedings, but the results were generally inconclusive. We think we are on firmer ground with our initial conclusion that the reforms led to longer proceedings, because, as we show in Part IV, the procedural reforms are not correlated with a lower number of witnesses, incidents, or interlocutory appeals entertained by the appeals chamber, contrary to what the reforms promised.<sup>56</sup>

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 learned to deal with complex international criminal cases faster over time in the pretrial phase. The number of incidents alleged in the initial indictment did not affect the duration of the pretrial phase.<sup>57</sup>

Command responsibility was also statistically significant. Model IV suggests that the pretrial phase against those defendants charged with only individual responsibility and with both individual responsibility and command responsibility was longer than the pretrial phase against those defendants

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54. 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.

55. To put these values into a different context, the coefficient for a cancer-fighting drug would be negative if the drug prolonged the life of the patient.

56. It is not possible to enter each of the reforms into the models as individual variables, as there are problems of multicollinearity and too few degrees of freedom. To address this last point we repeated the regression model in Column IV 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  $p < .05$  and two of them at  $p < .10$ —and that the coefficients for each of the eleven reforms indicate 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. On these reforms, see *supra* Part II.

57. Since the introduction of the reforms could have affected the number of incidents the prosecutor charged, we reran the analyses of Table 2 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.



charged with only command responsibility. This is probably a consequence of the mixed category, which requires 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 IV at  $p < .10$ . The addition of judges, employees, and courtrooms to the 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 expected, the guilty plea variable is statistically significant: pled cases have shorter pretrial phases than cases that are not pled.<sup>58</sup> The number of factual amendments to the initial indictment is not correlated with phase duration. The number of pretrial motions by the prosecution and the defense is statistically significant—the more motions, the longer the pretrial phase.

We used the coefficients from Model IV to predict the probability that a proceeding will continue for another day, based upon the effective number of reforms. The differences between cases with few reforms (zero to three) and all or nearly all the reforms (eight to nine) are substantively significant. A case with few reforms has a twenty percent chance of exceeding seven hundred days, compared to nine hundred days for a case with many reforms. Put another way, a case with many reforms has a sixty percent chance of exceeding seven hundred days.<sup>59</sup>

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58. See the Appendix for an explanation of why we have not considered these guilty pleas as a product of the managerial judging reforms under study.

59. The likelihood of a lurking variable is apparent from an examination of the residuals, which are evidently correlated with time. However, we have been unable to find any additional measures that explain more of the variance in pretrial phase duration.

<b>Table 3. Determinants of the Duration of Trial Proceedings at the ICTY</b>				
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-III are trials only. Column IV includes trials and guilty pleas.				
	<b>I</b>	<b>II</b>	<b>III</b>	<b>IV</b>
Number of reforms	-0.806** (0.298)	-0.911** (0.348)	-1.917** (0.589)	-0.867* (0.375)
Week of initial appearance (0 = Apr. 26, 1995)	0.014* (0.006)	0.019* (0.007)	0.012 (0.009)	0.008 (0.005)
Number of incidents alleged in final indictment (log)		-0.585** (0.141)	-0.626** (0.183)	-0.203 (0.144)
Individual responsibility		1.335 (0.782)	-1.021 (0.987)	1.060 (0.776)
Individual and command responsibility		1.429 (0.768)	0.417 (0.992)	1.104 (0.666)
Court capacity (see text for explanation)			2.800** (1.032)	1.203 (0.822)
Number of witnesses			-3.736** (0.794)	
Number of defendants in this case			0.309 (0.173)	0.092 (0.146)
Guilty plea entered before or at trial				5.038** (0.928)
Constant	-25.42** (3.81)	-36.00** (6.14)	-32.42** (8.78)	-26.21** (5.09)
Ln(p)	1.43**	1.75**	2.24**	1.51**
N subjects / N completions	57/45	57/45	57/45	75/63
Time at risk	28168	28168	28168	31056
LR chi-square(DF)	9.93(2)	33.68(5)	59.95(8)	51.58(8)
Prob(chi-square)	.007	.000	.000	.000
*p < .05, **p < .01				

#### D. *Survival Analysis of Trial Phase*

In this Section, we test the effect of reforms on the duration of trial proceedings, finding that managerial reforms increase the length of proceedings, even when we control for other factors that also affect the length of proceedings (court capacity, number of witnesses, number of incidents, guilty plea). The effect is substantively and statistically significant, although it is smaller than on pretrial proceedings. During the period before reforms or after only a few reforms were in place (zero to three reforms), there was an eighty percent probability that the pretrial period would end before the six hundredth day. After all the reforms were in place (nine reforms), there was an eighty percent probability that the pretrial period would end by the seven hundredth day.

The four models in Table 3 test whether the number of reforms in place during an individual defendant's trial is a significant determinant of its length. The variables in the trial models are essentially the same variables we included in the pretrial models—though computed regarding trial, not pretrial—with a few differences described in the Appendix. Models I, II, and III include only trials—without pleas—started before July 1, 2006. Model IV includes both trials and cases in which the defendant pled guilty before July 1, 2006.

As with the pretrial phase, managerial reforms at the trial stage are significantly correlated with longer trial duration (Table 3). This relationship is strong in all the models. As with 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 Part IV we 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.<sup>60</sup>

As for the controlling variables, the week the defendant's trial started is not statistically significant in Models III and IV. This suggests that prosecutors, defense attorneys, and judges did not learn to deal faster with complex international criminal trials over the period studied. Alternatively, this could be the result of an interaction effect. Perhaps all of these actors have learned to deal better with complex international criminal trials over time, but they have

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60. 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 III eleven times (not reported), substituting each individual reform for the aggregate reform measure. *See supra* note 56. We did this 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 the December 1998 reform that made status conferences mandatory, ICTY Rules of Procedure and Evidence, *as amended*, Rule 65 *bis*, Doc. IT/32/Rev.14 (1998), and the November 1999 reforms that made pretrial judges mandatory and ordered pretrial judges to submit to the trial chamber substantial information about the case, ICTY Rules of Procedure and Evidence, *as amended*, Rules 65 *ter* (A), Rule 65 *ter* (K), Doc. IT/32/Rev.17 (1999). They also include the December 2000 reform that adopted Rule 92 *bis*, ICTY Rules of Procedure and Evidence, *as amended*, Rule 92 *bis*, Doc. IT/32/Rev.19 (2000), the combined reforms of July/August 2003 that allowed the trial chamber to limit the number of sites and incidents under discussion at trial, ICTY Rules of Procedure and Evidence, *as amended*, Rule 73 *bis* (E), Doc. IT/32/Rev.28 (2003), and implemented a lump sum payment system for trial, as described *supra* note 32 and Table 1.

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.<sup>61</sup>

Command responsibility is not statistically significant in any model. In the trial data (Model III), court capacity is significantly correlated with shorter trials, and the number of incidents and the number of witnesses are significantly correlated with longer trials.<sup>62</sup> Controlling for those factors, the number of defendants is correlated with shorter trials, at  $p < .10$ . When we expand the dataset to include guilty pleas—in Model IV—pleas are significantly correlated with shorter trial lengths, but apart from the number of reforms the other variables are no longer significant.<sup>63</sup>

The effect of the reforms at the trial stage is not as stark as it is at pretrial. The difference between zero-to-three reforms and nine reforms reveals that a larger number of reforms lengthens the time a case spends in trial from fewer than six hundred days to about seven hundred days. Though it is a smaller difference, it is still a significant difference and not the outcome reformers promised from managerial reforms designed to make trials shorter.<sup>64</sup>

#### 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 current and former ICTY prosecutors, defense attorneys, judges, and staff.<sup>65</sup> 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 on the Tribunal), to a group of about ten senior legal officers and other employees of the Tribunal, at the colloquium of the Office of the Prosecutor of the ICTY 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, and they generally found our explanations for the pretrial results plausible. Seven of our interviewees were surprised about the trial results,

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61. See Interview with Anonymous, Def. Att'y 1, ICTY, in The Hague, Neth. (June 23, 2008) (noting that civil law defense attorneys have learned more about how to work within a common law system which may help explain trial results).

62. 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 Column III of Table 3 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.

63. See *infra* Appendix for an explanation of why we have not considered these guilty pleas as a product of the managerial judging reforms under study.

64. 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. While this does not eliminate the possibility that an unknown factor is driving our results, it does provide us with another layer of validation.

65. See *infra* Appendix for a detailed description of how we proceeded with the interviews.

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.<sup>66</sup> Two judges had a similar reaction to the trial results when we presented our preliminary results to the group of ten judges described above.

#### IV. EXPLAINING WHY THE REFORMS LENGTHENED PRETRIAL AND TRIAL DURATION

The previous Part 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 Parts 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. This was so because judges either did not use their managerial powers or used them ineffectively, and because the prosecution and defense resisted the reforms.<sup>67</sup>

The new procedural steps, requirements, and work that the reforms brought included holding status conferences, Rule 65 *ter* conferences, and pretrial conferences; requirements that pretrial judges establish work plans for the parties toward trial; and requiring that the parties present pretrial briefs at the pretrial conferences. They also included the requirements that Rule 92 *bis* statements must meet in order to be presented at trial, as well as all the other steps and requirements described in Part II.

In the following Sections, we analyze whether the reforms delivered any of the promised results that would reduce the duration of proceedings. The first Section tests whether reforms designed to reduce the number of issues under discussion had the desired effect. Using the number of incidents alleged as a proxy for the number of issues under discussion, we find no evidence of an effect. The second Section addresses the effectiveness of the reforms in reducing the number of live witnesses at trial. As above, we find no evidence of an effect. Finally, we test whether reforms reduced the number of interlocutory appeals entertained by the appeals chamber. Controlling for other

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66. See Interview with Anonymous, Former Judge, ICTY, in The Hague, Neth. (Mar. 24, 2009); Interview with Anonymous, OTP Legal Officer 5, ICTY, in The Hague, Neth. (June 24, 2008); Interview with Anonymous, OTP Legal Officer 6, ICTY, in The Hague, Neth. (June 24, 2008); Interview with Anonymous, OTP Legal Officer 7, ICTY, in The Hague, Neth. (June 24, 2008); Interview with Anonymous, OTP Legal Officer 8, ICTY, in The Hague, Neth. (June 24, 2008); Interview with Anonymous, OTP Legal Officer 3, ICTY, in The Hague, Neth. (June 23, 2008); Interview with Def. Att’y 1, *supra* note 61.

67. A number of our interviewees mentioned that the reforms brought more work for the parties and have taken extra time. See Interview with OTP Legal Officer 5, *supra* note 66 (noting that Rule 92 *bis* takes a lot of time in the pretrial phase); Interview with Anonymous, Def. Att’y 3, ICTY, in The Hague, Neth. (June 24, 2008) (observing that the amendment of Rules 72 and 73 has created work, since one must file a mini-appeal for certification requests); Interview with Anonymous, OTP Legal Officer 2, ICTY, in The Hague, Neth. (June 23-24, 2008) (stating that the reforms created more work for prosecutors). 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.

factors, we find that these reforms appear to have reduced the number of prosecutorial interlocutory appeals and increased the number of defense interlocutory appeals.

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 and the trial chamber. The former would get early and thorough information about the case and would encourage the parties to agree on factual and legal issues. The latter would also encourage the parties to agree on factual and legal issues and would also 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 decreased over time. But the raw data indicate no such change, as depicted in Figure A1 of the Appendix. 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 decrease but the complexity of the cases increased 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, first, the week in which the trial was started in order to control for the time-dependent nature of the reforms. We also included the proximity of the defendant to the offense as a proxy for the complexity of the case, under the theory that the further the physical proximity of the defendant to the offense, the higher his hierarchical position in the command structure, and the larger the number of incidents that would be charged against him.

<b>Table 4. Determinants of the Number of Incidents Charged at Trial</b> OLS coefficients (standard errors in parentheses)			
	<b>I</b>	<b>II</b>	<b>III</b>
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 4). This indicates that the reforms did not have 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 increased 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 further the defendant physically was from the offenses, the larger the number of incidents charged against him—and vice versa.

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. These phenomena could 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,<sup>68</sup> and were used at trial only after July 2006—after the end of the period covered by our study.<sup>69</sup> Many judges did not use agreements on disputed issues of fact,<sup>70</sup> did not use status conferences to get substantial information about the case,<sup>71</sup> did not use 65 *ter* pretrial conferences to narrow down or solve issues in the pretrial phase,<sup>72</sup> and put senior legal officers—who lack sufficient authority to induce the parties to reach agreements—in charge of Rule 65 *ter* pretrial conferences.<sup>73</sup> In addition, judges let pretrial motions accumulate without a decision for months—especially when judges were not, and did not know if they would be, members of the trial chamber<sup>74</sup>—and allowed prosecutors to amend their case and lists after the deadlines set by the work plan.<sup>75</sup> Finally,

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68. See Interview with OTP Legal Officer 2, *supra* note 67 (noting that the reforms were not implemented in the pretrial phase); Interview with Anonymous, Def. Att’y 2, ICTY, in The Hague, Neth. (June 24, 2008) (stating that the reforms have made proceedings longer because judges are not enforcing the reforms as they should, and because the system is still applied unevenly); Interview with OTP Legal Officer 5, *supra* note 66 (observing that with the exception of Judge Orić, judges do not manage cases in the pretrial phase); Interview with OTP Legal Officer 7, *supra* note 66 (noting that judges have not reformed the pretrial phase very much); Interview with Def. Att’y 3, *supra* note 67 (stating that the rules are not applied consistently because there are judges who have never sat on the bench before, because judges come from different systems, and because judges themselves do not know how the rules should be applied); Interview with Anonymous, Judge 1, ICTY, in The Hague, Neth. (June 25, 2008) (observing that using the pretrial phase to prepare for trial did not work well).

69. See Interview with Anonymous, Judge 2, ICTY, in The Hague, Neth. (June 26, 2008) (stating that the trial results were not surprising because judges have not used their powers); Interview with Judge 1, *supra* note 68 (noting that the trial results were not surprising because the interviewee would expect judges to have had a real grip on cases only in the last two years); Interview with Def. Att’y 2, *supra* note 68; Interview with Def. Att’y 3, *supra* note 67 (observing that until 2006, lawyers had a pretty comfortable time in the courtroom and that some judges were reluctant to apply pressure).

70. See Interview with OTP Legal Officer 5, *supra* note 66; Interview with Def. Att’y 3, *supra* note 67.

71. See Interview with Anonymous, Def. Att’y 4, ICTY, in The Hague, Neth. (June 26, 2008); see also Mark B. Harmon, *The Pre-trial Process at the ICTY as a Means of Ensuring Expedient Trials*, 5 J. INT’L CRIM. JUST. 377 (2007).

72. See Interview with Def. Att’y 4, *supra* note 71.

73. See Interview with Def. Att’y 2, *supra* note 68 (stating that the reform regarding senior legal officers did not make a difference because they did not have sufficient knowledge or authority, although perhaps that has changed now); Interview with OTP Legal Officer 5, *supra* note 66; (noting that senior legal officers are only conduits of information); Interview with Def. Att’y 3, *supra* note 67 (observing that senior legal officers do not have the power to get things done); Interview with Def. Att’y 1, *supra* note 61 (indicating that 65 *ter* conferences with senior legal officers expose problems but do not resolve them); see also Harmon, *supra* note 71, at 387.

74. See Interview with Anonymous, Def. Att’y 6, ICTY, in The Hague, Neth. (July 3, 2008) (noting that, in one case, a week before a 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); Interview with Def. Att’y 4, *supra* note 71; Interview with Judge 1, *supra* note 68 (stating that judges are reluctant to adjudicate matters when they are not serving in the trial chamber); Interview with OTP Legal Officer 5, *supra* note 66 (mentioning the existence of 150 pending motions, as well as the fact that the pretrial judge sometimes is not part of the trial chamber); Interview with Def. Att’y 3, *supra* note 67 (stating that motions may linger and that unresolved issues still go to trial, requiring counsel to prepare those issues); Interview with OTP Legal Officer 3, *supra* note 66 (arguing that the trial chamber should be appointed earlier); Interview with Anonymous, OTP Legal Officer 4, ICTY, in The Hague, Neth. (June 23, 2008) (stating that the trial chamber should be appointed earlier and that many pending pretrial motions were deferred to the trial judge).

75. See Interview with Def. Att’y 6, *supra* note 74 (stating that, in one case, a week before a trial was going to start, the trial chamber had not decided whether a new amendment to the indictment could be introduced, and noting that, although the deadline of the work plan had passed, there was pressure on the chamber to try the sexual crimes at issue); Interview with Def. Att’y 2, *supra* note 68 (noting that judges consistently allow the prosecutor to amend his case and lists late, making the process



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.<sup>76</sup>

A number of our interviewees have also indicated that the prosecution and defense do not agree on facts very often<sup>77</sup> and have resisted reducing the number of incidents under discussion,<sup>78</sup> for reasons that we discuss in detail in Part V.

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

A second announced goal of the reforms was reducing the amount of live testimony at trial. The reforms aimed to 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.<sup>79</sup> 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.<sup>80</sup> In this Section we analyze the evolution of the amount of live testimony at trial over time.

The raw data indicates that the number of live witnesses remained relatively steady (Figure A2). 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 was the dependent variable, and the two crucial independent variables were the reforms as a whole and Rule 92 *bis*. 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.

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longer than if there were no Rule 65 *ter* or 73 *bis*); Interview with Def. Att'y 4, *supra* note 71.

76. See Interview with Def. Att'y 6, *supra* note 74 (stating that although the pretrial judge develops a strict work plan, the prosecution and defense do not meet the set deadlines, and judges do not sanction this behavior); Interview with OTP Legal Officer 5, *supra* note 66 (stating that Rule 65 *ter* (N) was never implemented).

77. See Interview with Def. Att'y 1, *supra* note 61.

78. See Interview with Def. Att'y 6, *supra* note 74 (mentioning a case in which the prosecutor resisted reduction of facts); Interview with Anonymous, Def. Att'y 5, ICTY, in The Hague, Neth. (June 27, 2008) (stating that there was no advantage for the accused to enter into any kind of agreement); Interview with Judge 2, *supra* note 69 (noting that the trial results were not surprising because prosecutors did not reduce incidents *motu proprio* or did so poorly); Interview with Def. Att'y 4, *supra* note 71 (noting that prosecutors did not reduce their cases and evidence *motu proprio*).

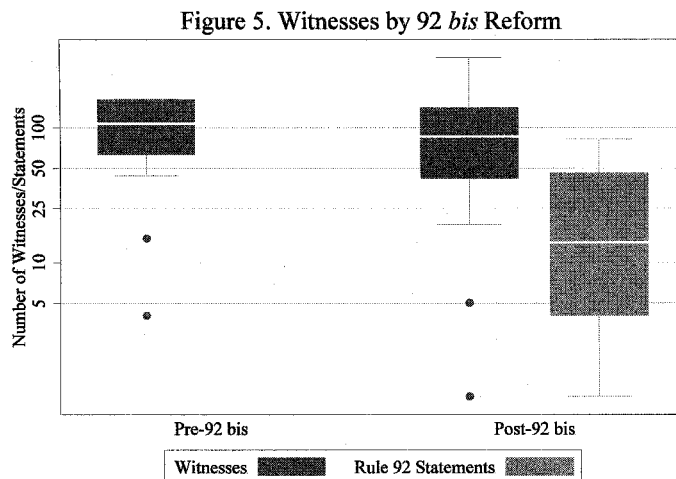
79. As already discussed, *supra* note 37, we do not analyze the introduction of Rules 92 *ter* and *quarter* because they were enacted after July 2006.

80. See *supra* note 66 and accompanying text.

<b>Table 5. Determinants of the Number of Witnesses at Trial</b> OLS coefficients (clustered standard errors in parentheses)		
	<b>I</b>	<b>II</b>
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 5). 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 testimony produced at trial.

As another confirmation of the reforms' lack of impact on the number of live witnesses, the box plot in Figure 5 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 lack of reduction of the number of incidents, the main reasons for the non-reduction in the number of live witnesses seem to have been the judges' failure to implement the reforms and the parties' resistance toward the reforms. First, according to one of our interviewees, judges used their power to reduce the number of witnesses unevenly.<sup>81</sup> 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.<sup>82</sup> Judges probably used their powers this way due to the limited information they had about the case.<sup>83</sup> This imperfect information prevented them from a more fine-tuned use of these powers.

One of the problems with implementing these reforms this way 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.<sup>84</sup> In addition, according to one of our interviewees, prosecutors do

81. See Interview with Def. Att'y 1, *supra* note 61 (indicating that common law judges do not like to use these powers).

82. See Interview with Anonymous, OTP Legal Officer 1, ICTY, in The Hague, Neth. (June 23, 2008); Interview with OTP Legal Officer 5, *supra* note 66; Interview with Def. Att'y 3, *supra* note 67.

83. On the limited information available to judges, see the interviews cited *infra* notes 111, 119; Interview with Legal Officer 1, *supra* note 82 ("Judges making these decisions at trial are not informed."); and Interview with OTP Legal Officer 5, *supra* note 66 ("Judges do not have enough information.")

84. See Interview with Def. Att'y 1, *supra* note 61 (noting that both the prosecution and defense call more witnesses than necessary); Interview with Def. Att'y 3, *supra* note 67 (observing that some defense attorneys inflate the number of witnesses on their initial lists in order to bargain over the final number); Interview with Def. Att'y 5, *supra* note 78 (arguing that gaming the system happens because there is no trust between the bench and the bar).

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 he or she will not make a good impression on the trial chamber.<sup>85</sup> The defense has also found other ways to neutralize these reforms, such as by providing limited information to the court about the subject of each witness's anticipated testimony.<sup>86</sup>

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.<sup>87</sup>

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. In order to achieve this promise, ICTY judges amended Rules 72 and 73 and established that most motions are without interlocutory appeals unless certified by the trial chamber.

We discovered 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 6).

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85. See Interview with Def. Att'y 1, *supra* note 61.

86. See Interview with OTP Legal Officer 5, *supra* note 66; Interview with Def. Att'y 4, *supra* note 71 (observing that Rule 65 *ter* provides that the defense should describe the facts about which the witnesses will testify, but that defense attorneys describe the topics of testimony, not the facts).

87. See Interview with Def. Att'y 2, *supra* note 68.

<b>Table 6. Determinants of the Number of Granted Interlocutory Appeals</b> Poisson regression coefficients (bootstrapped standard errors in parentheses, one hundred replications)		
	<b>Prosecution</b>	<b>Defense</b>
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		

We next looked at the ratio of interlocutory appeals granted to the number 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.

<b>Table 7. Determinants of the Rate at Which Interlocutory Appeals Were Granted</b>				
OLS regression coefficients (bootstrapped standard errors in parentheses with one hundred 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 indicate 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 7). These regressions also indicate 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 the results from the two previously discussed reform results, 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.<sup>88</sup> As with the two previous outcomes, judges appear not to have substantially implemented these

88. Our interviewees did not agree about the effect of the amendment to Rules 72 and 73. See Interview with Def. Att'y 1, *supra* note 61 (observing that the number of motions and number of appeals granted have not decreased); Interview with Def. Att'y 2, *supra* note 68 (noting that judges deny more appeals than before, but that the reforms have led to many more motions and appeals, such that overall, they take more time than before); Interview with Def. Att'y 3, *supra* note 67 (observing that Rules 72 and 73 have reduced interlocutory appeals, but still have created work because for certification requests, one must now file a mini-appeal).

reforms.<sup>89</sup>

## V. WHY JUDGES MADE LIMITED OR DEFICIENT USE OF THEIR MANAGERIAL POWERS AND WHY THE PARTIES RESISTED THE REFORMS

### A. *Judges' Limited or Deficient Use of Their Managerial Powers*

As the previous Part 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 the ICTY are in charge of adopting and amending the Rules of Procedure and Evidence.<sup>90</sup> Why would the judges introduce reforms but not implement them? This Section explores three potential answers to this question, and explains why two of these answers provide the best explanation for ICTY judges' deficient or limited use of their managerial powers.

#### 1. *ICTY Judges' Material and Reputational Incentives*

The public choice literature on domestic judges has flourished in the last fifteen years.<sup>91</sup> But there have been fewer studies from this perspective regarding international judges.<sup>92</sup> This literature would predict that ICTY judges would not implement the managerial judging reforms if reform adoption

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89. It is worth mentioning that even though we analyze the interlocutory appeal reform because it was part of the reform package that judges introduced, it is the least central for our overall argument about the structural obstacles to managerial judging. The core idea of managerial judging is that the court may shorten the pretrial and trial phases by acting by its own motion in the parties' cases. The limitations on interlocutory appeals introduced only tangentially relate to this core idea, since the parties still have to present an interlocutory appeal before the court may deny it; in this sense, the court is not acting on its own motion. Despite these differences between the interlocutory appeal reform and the other reforms we are studying, a number of explanations we explore in Part V 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. The parties also may have found ways to neutralize this reform.

90. ICTY Statute, *supra* note 7, art. 15. Article 15 has not been amended in any of the subsequent revisions of the Statute. See *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA (Sept. 2009), [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf).

91. 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 AM. J. POL. SCI. 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); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 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).

92. 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).

without implementation maximized their material or reputational preferences. This Subsection argues that this explanation does not account for ICTY judges' limited or deficient use of their managerial judging powers.

There are a number of potential gains for judges to explore in the context of the ICTY. First, one could argue that ICTY judges as a group stood 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.<sup>93</sup> By introducing managerial judging reforms, judges could signal that they were responding to this pressure. This formal responsiveness would help judges maintain 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 judges could then use this reputation to advance their own professional careers—for example, by obtaining other positions in other international tribunals.<sup>94</sup> Meanwhile, under the group or individual incentives just mentioned, failed 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 could also have other incentives to lengthen proceedings. In order to see how these incentives would work, it is necessary to explain that the ICTY contains two types of judges: permanent and *ad litem* judges.<sup>95</sup> Permanent and *ad litem* judges are both elected for a term of four years and are eligible for reelection.<sup>96</sup> But *ad litem* judges serve in the trial chambers for only one or more trials, for a maximum cumulative period of three years,<sup>97</sup> and they receive their salaries and other benefits only while they are actually serving at the Tribunal.<sup>98</sup> This arrangement could thus generate material incentives for *ad litem* judges to lengthen proceedings, because they receive their salaries and benefits 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 similar material incentives to lengthen proceedings, because the Tribunal is a temporary institution and permanent judges will lose their positions once the

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93. See Interview with Def. Att'y 1, *supra* note 61 (arguing that the reason for the reforms was pressure by the Security Council and the willingness of the president of the ICTY to satisfy the Security Council).

94. For a discussion of 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, 660-61 (2007).

95. The U.N. Security Council created the position of *ad litem* judge in November 2000. S.C. Res. 1329, ¶ 1, U.N. Doc. S/Res/1329 (Dec. 5, 2000).

96. ICTY Statute, *supra* note 7, arts. 13 *bis*, 13 *ter*, amended by S.C. Res. 1597, ¶ 1 & Annex ¶¶ 1-2, U.N. Doc. S/Res/1597 (Apr. 20, 2005).

97. ICTY Statute, *supra* note 7, art. 13 *ter*, amended by S.C. Res. 1597, ¶ 1 & Annex ¶¶ 1-2, U.N. Doc. S/Res/1597 (Apr. 20, 2005).

98. See, e.g., U.N. Secretary-General, *Conditions of Service and Compensation for Officials Other than Secretariat Officials: Rep. of the Secretary-General*, ¶ 72, U.N. Doc. A/C.5/59/2 (Sept. 10, 2004).



Tribunal closes.<sup>99</sup> Given that the opportunity costs of losing their position at the Tribunal would be substantial for some judges, there would be material incentives for them to avoid implementation of reforms that would expedite proceedings.<sup>100</sup>

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,<sup>101</sup> 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 so. The first of these incentives comes from the Tribunal being a closely watched institution. The expenses of the ICTY are borne mainly by the regular budget of the United Nations in accordance with Article 17 of the U.N. Charter.<sup>102</sup> 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 the 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 comes from the possibility of reelection.<sup>103</sup> 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 reelects judges from the Security Council's list.<sup>104</sup> Though most of the existing ICTY judges that are nominated are reelected, reelection is not a foregone conclusion. Over the years, the U.N. General Assembly has failed to reelect 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.<sup>105</sup> The possibility

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99. On the Tribunal's "completion strategy," see *infra* note 135.

100. On the opportunity costs for judges of the European Court of Human Rights, see Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 423 (2008) (pointing to evidence indicating that opportunity costs for European Court of Human Rights judges coming from lower-income-per-capita countries are higher than for judges coming from wealthier countries).

101. See Interview with Def. Att'y 3, *supra* note 67 ("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."); Interview with Def. Att'y 5, *supra* note 78 ("*Ad litem* judges and some non-*ad litem* judges have nowhere to go when the case is finished.")

102. ICTY Statute, *supra* note 7, art. 32.

103. Initially, *ad litem* judges could not be reelected. The U.N. Security Council authorized reelection of *ad litem* judges by amending Article 13 *ter* of the ICTY Statute in April 2005. S.C. Res. 1597, ¶ 1 & Annex ¶¶ 1-2, U.N. Doc. S/Res/1597 (Apr. 20, 2005).

104. See ICTY Statute, *supra* note 7, arts. 13 *bis*, 13 *ter*, amended by S.C. Res. 1597, ¶ 1 & Annex ¶¶ 1-2, U.N. Doc. S/Res/1597 (Apr. 20, 2005).

105. See Allison Danner & Erik Voeten, *Who Is Running the International Criminal Justice System?*, in WHO GOVERNS THE GLOBE? (Deborah D. Avant et al. eds., 2010); Voeten, *supra* note 100, at 420. On the incentives generated by renewable short-term appointments for international judges and the possible remedies against negative incentives for judicial independence, see Theodor Meron,

of reelection has thus created material incentives for judges to avoid being perceived as inefficient.

A third reason not to delay proceedings comes from the fact that, as we just explained, the judges with fewer material incentives to delay proceedings—the permanent judges—have been a majority and are the ones with the most important role in running the Tribunal.<sup>106</sup> The president of the Tribunal—who is also a permanent judge—requests the U.N. Secretary-General to appoint particular *ad litem* judges for one or more trials.<sup>107</sup> If *ad litem* judges want to be appointed for more than one trial, they thus have an 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 had reputational incentives to gain from a formal passing of reforms without needing to implement them, a substantial number of ICTY judges are lawyers of very high prestige in academia, government, and the courts.<sup>108</sup> Lawyers with such high professional prestige have little to gain—and a great deal 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 shown a lifelong commitment to civil and human rights and international humanitarian law, or have become international criminal judges to be part of international criminal law history.<sup>109</sup> It is reasonable to assume, then, that these judges have been trying to do the best job they can, and put into practice whatever policy ideals they embraced in this area, rather than advancing their material or reputational self-interest.<sup>110</sup>

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*Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 361-63 (2005).

106. Initially, the Tribunal had only eleven permanent judges, whose number the U.N. Security Council increased to fourteen in 1998, S.C. Res. 1166, U.N. Doc. S/Res/1166 (May 13, 1998), and then to sixteen in 2000, two of whom are permanent judges of the International Criminal Tribunal for Rwanda (ICTR) and sit in the appeals chamber common to the two tribunals, S.C. Res. 1329, U.N. Doc. S/Res/1329 (Dec. 5, 2000). Security Council Resolution 1329 also created the position of *ad litem* judge and established that the Tribunal Chambers shall be composed by a maximum of nine of these judges at any one time. *Id.* In February 2006, the U.N. Security Council increased the maximum number of *ad litem* judges at any one time to twelve. S.C. Res. 1660, U.N. Doc. S/Res/1660 (Feb. 28, 2006). *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 Statute, *supra* note 7, art. 13 *quarter*.

107. ICTY Statute, *supra* note 7, art. 13 *ter*, amended by S.C. Res. 1597, ¶ 1 & Annex ¶¶ 1-2, U.N. Doc. S/Res/1597 (Apr. 20, 2005).

108. On the background of ICTY judges, see Danner & Voeten, *supra* note 105 (showing that ICTY judges' positions at time of election have included, among others, appellate, trial, and international judges; international and diplomatic lawyers; and professors; with appellate judges being by far the largest group).

109. This would make ICTY judges more prone than domestic judges to being influenced by what Judge Posner calls the "power trip" aspect of judging or the "visionary or crusading bent" of judging. See Posner, *supra* note 91, at 3, 14, 17-18.

110. 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 91, at 660-65.

2. *Limited Information Available to 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.<sup>111</sup> In this Subsection, we argue that this imperfect information is partly explained by a challenge faced by managerial judging that has gone unnoticed and unanalyzed in the literature.<sup>112</sup>

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 substantially less information about the case than the parties; and (2) given the limited information judges may have about the case, judges may not use their managerial judging powers very 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. The parties' fact-finding role means that they 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 it by the parties—the limited information available to the court is narrowed or disappears at the moment that the issues are adjudicated for three different reasons.<sup>113</sup>

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.<sup>114</sup> This creates incentives for the parties to reveal all the

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111. See, e.g., Interview with Legal Officer 1, *supra* note 82 (“Judges making these decisions at trial are not informed.”); Interview with OTP Legal Officer 5, *supra* note 66 (“Judges do not have enough information.”).

112. 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 Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 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 (1995); Warren F. Schwartz & Abraham L. Wickelgren, *Credible Discovery, Settlement, and Negative Expected Value Suits*, 40 RAND J. ECON. 636 (2009); Steven Shavell, *Sharing of Information Prior to Settlement or Litigation*, 20 RAND J. ECON. 183 (1989). 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 RAND J. ECON. 305 (1999). But as far as we can tell, this literature has overlooked the issue of limited information available to the court about the case, as well as the obstacles it raises for a court in applying case-management techniques by its own motion.

113. For a summary of the law and 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 J. INSTITUTIONAL & THEORETICAL ECON. 31 (2008).

114. 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 information that damages the defense's case. On this point, see MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 99-100 (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

relevant information to the court when an issue is under discussion.<sup>115</sup> 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 the information that 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.<sup>116</sup> In this hybrid, the court has the same adjudicatory role as the court in a pure adversarial system—i.e., to decide on guilt or innocence after the parties present their cases at trial. But besides having this adjudicatory role, the managerial court also intervenes *motu proprio* from early on in the parties' cases in order to expedite the process.

Before making expediting decisions, it is harder than in a pure adversarial system for the managerial judge to obtain sufficient information about the case to make efficient and fair decisions for three different reasons. First, managerial decisions are not necessarily a zero-sum match for the parties. Both 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.<sup>117</sup> Second, certain managerial decisions may require information about all aspects of the case in order to be efficient and fair. Decisions of this kind would include, among others, articulating a work plan toward trial, putting pressure on the parties to reach factual or legal agreements, and deciding how much time and evidence the parties need to present their cases at trial. 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 full picture of the case.

These reasons explain why the court would have very limited information in many cases before making managerial decisions, and why it may be unwise for the court to fully use its managerial powers. With limited information, the court risks making unfair or inefficient decisions—in other words, it risks making decisions that may expedite the process but generate higher costs in terms of accuracy, fairness, or any of the other goals of the legal process, such

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in an adversarial system.

115. See Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 RAND J. ECON. 18 (1986). Of course, the parties do not have incentives to reveal relevant information to the court if it 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.

116. See Langer, *supra* note 1, at 885.

117. 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 evidence 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).

as setting a historical record of the tried event or giving voice to victims. The court also risks making decisions that give more time than the parties actually need in order for the legal process to achieve these goals.<sup>118</sup>

The court's limited information about the case would help explain why judges are hesitant to employ managerial tools fully 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.<sup>119</sup>

### 3. *Lack of an Implementation Strategy*

The Tribunal's lack of an implementation plan or strategy would also explain why the judges did not have enough information about their cases and did not use their managerial powers more widely. Initially, the predominantly adversarial system that the ICTY adopted did not require judges to be actively involved in cases early on, and did not require judges to complete many managerial tasks. The managerial reforms redefined the judges' role as active managers of cases and created a number of new tools that judges were supposed to use in their redefined role. The reforms thus constituted a major restructuring of the ICTY as an organization, importing a conception of the judge that was different from the predominant conception in most civil and common law countries.<sup>120</sup>

A number of organizational theorists would predict that for such a major organizational reform to have a real opportunity to succeed, reformers would have to do more than just formally pass the procedural reforms.<sup>121</sup> In other words, an implementation strategy would be necessary to ensure that ICTY judges internalized the ideas behind the procedural reforms, learned how to use the new tools in a consistent way, and persisted with the reform ideas and tools in the face of resistance by the parties.<sup>122</sup>

Such an implementation strategy could include measures such as training

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118. A number of our interviewees have mentioned these types of risks. See Interview with Def. Att'y 5, *supra* note 78 ("The more the judge becomes active, the more the judge shows his position."); Interview with OTP Legal Officer 5, *supra* note 66 ("Judges do not have enough information; they do it arbitrarily."); Interview with OTP Legal Officer 2, *supra* note 67 ("Implementation of the reforms at trial is draconian and inefficient."); Interview with Def. Att'y 1, *supra* note 61 (relating that interviewee asked for disqualification of a judge for putting too much pressure on the defense to agree to disclose information, and stating that a judge in the adversarial procedure should not be allowed to limit how many witnesses the parties present); Interview with OTP Legal Officer 1, *supra* note 82 ("Judges making these decisions are not informed.").

119. See Interview with Judge 1, *supra* note 68 (mentioning as explanations for the reform results that pretrial judges do not have enough of a feeling for or a real grip on cases); see also Interview with Def. Att'y 5, *supra* note 78 (noting that the bench can never have enough information).

120. See Langer, *supra* note 1, at 875.

121. See, e.g., W. WARNER BURKE ET AL., ORGANIZATION CHANGE: A COMPREHENSIVE READER 65-254 (2009).

122. This discussion also suggests that the effect of the reforms might lag behind their adoption, with or without an implementation strategy. While this may be true, we were unable to detect an effect in our regression models using lags of two and three years. Rather than consider this to be evidence that the lagged reforms had no effect, we think that the intervening time between the reforms and the proceedings is probably too noisome to allow us to make reliable estimates.

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.<sup>123</sup> None of these measures were adopted at the ICTY; in fact, there was no implementation plan or strategy whatsoever.<sup>124</sup>

### B. *Parties' Incentives To Resist the Reforms*

Part IV explained different ways in which the parties neutralized the reforms. Given the limited information available to the court about the case, the parties, who had much more information, had great power to neutralize managerial judging reform efforts. This Section analyzes what incentives the parties had to resist ICTY reforms.<sup>125</sup>

#### 1. *Prosecutors' Resistance to the Reforms*

As already mentioned, a number of our interviewees indicated that prosecutors resisted the reforms.<sup>126</sup> This should come as no surprise for three different reasons. First, every procedure distributes power among the main actors and institutions of the administration of justice. In the case of the ICTY, its initial adversarial system gave much of this power to the prosecution to handle pretrial and trial. By introducing managerial reforms, judges threatened to take substantial portions of this power away from prosecutors. Thus, one would expect that prosecutors would generally resist this attempt to diminish their control over their own cases—including their control about how much time they would need to handle them.<sup>127</sup>

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

123. See, e.g., BURKE, *supra* note 121, at 533-732.

124. See, e.g., Interview with Former Judge, *supra* note 66 ("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."); Interview with Def. Att'y 3, *supra* note 67 ("Rules are not applied in the same manner because judges among themselves do not know how the rules should be applied.")

125. The concept of "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." Sandy Kristin Piderit, *Rethinking Resistance and Recognizing Ambivalence: A Multidimensional View of Attitudes Toward an Organizational Change*, 25 ACAD. MGMT. REV. 783, 784 (2000) (reviewing the different criticisms of the concept). Our use of the term "resistance to the reforms by the parties" does not assume that such resistance is based on illegitimate reasons. As is evident in our analysis, at least some of the reasons that the parties have had to resist the reforms are arguably legitimate.

126. See *supra* note 78 and accompanying text; Interview with Def. Att'y 1, *supra* note 60; Interview with Def. Att'y 4, *supra* note 69; Interview with Def. Att'y 6, *supra* note 72; and Interview with Judge 2, *supra* note 67. On the role of the scope of the prosecution case and the prosecution's refusal to adjust its case strategy in the uncompleted trial of Slobodan Milošević, see GIDEON BOAS, *THE MILOŠEVIĆ TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS* 133-42 (2007).

127. On this phenomenon, see Langer, *supra* note 1, at 904.

them to be more risk-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 reducing the number of incidents and witnesses at trial: prosecutors would fear that fewer incidents and live witnesses would result in a higher likelihood of acquittal.<sup>128</sup>

Third, the Office of the Prosecutor (OTP) under Carla Del Ponte—who was ICTY Prosecutor from August 1999 until December 2007—thought that the 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.<sup>129</sup>

## 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 the 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. Since 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.<sup>130</sup>

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.<sup>131</sup> In addition, most defendants do not bear the economic costs of their defenses or bear only limited costs.<sup>132</sup>

128. Interview with Def. Att'y 2, *supra* note 68 (“Prosecutors are not ready because they are looking for the perfect case instead of the good.”); Interview with Def. Att'y 3, *supra* note 67 (“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, *supra* note 1, at 872.

129. *See* Interview with Judge 1, *supra* note 68 (“Del Ponte was inappropriate because of her excessive sense of duty toward the victim.”); Interview with Def. Att'y 3, *supra* note 67 (“Prosecution is pressured by victims' groups to prosecute for everything.”); *see also* O-Gon Kwon, *The Challenge of an International Criminal Trial as Seen from the Bench*, 5 J. INT'L CRIM. JUST. 360, 373 (2007).

130. *See* Langer, *supra* note 1, at 904.

131. *See* Interview with Def. Att'y 5, *supra* note 78 (“[There is] 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.”); Interview with OTP Legal Officer 5, *supra* note 66 (“I 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.”).

132. The ICTY determines the contribution of the accused to his or her own defense based on a number of factors:

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

Third, the defense benefits from slow proceedings, given (1) that ICTY prosecutors have the burden of proof beyond a reasonable doubt and that witnesses' memories fade over time;<sup>133</sup> (2) that the acquittal rates at the ICTY are not insignificant, which creates incentives for defendants to fully litigate their cases at trial;<sup>134</sup> (3) that the ICTY is a temporary institution that operates under a completion strategy to finish all its work;<sup>135</sup> and (4) that a number of defendants have questioned the fairness and legitimacy of the Tribunal, which is easier to do if proceedings are (unduly) prolonged.<sup>136</sup>

As explained in Part 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. Though the Tribunal did not give us access to specific quantitative data to assess whether and why these particular reforms did not work,<sup>137</sup> most of the defense attorneys we interviewed thought that these reforms had not changed attorneys' behavior.<sup>138</sup>

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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 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.

*Legal Aid*, INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/sid/163> (last visited Mar. 26, 2011).

133. See Interview with Def. Att'y 1, *supra* note 61 ("Many lawyers think that the more time that passes, the better it is for the defense (e.g., regarding the sentence).").

134. For a list of the defendants acquitted of all charges at the ICTY prior to 2011, see *Acquittals*, INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/sid/9984> (last visited Apr. 17, 2011); and *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011) (acquitting Ivan Cermak). In the period under study in this Article, the Tribunal acquitted five defendants of all charges out of sixty-three defendants whose cases were adjudicated through guilty pleas or trials. This is an acquittal rate of eight percent. After July 1, 2006, eight more defendants were acquitted. ICTY acquittal rates are not low in comparison with domestic jurisdictions. On this point and on the belief held 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).

135. Interview with OTP Legal Officer 2, *supra* note 67 ("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, trials, and appeals. All the investigations were completed by December 31, 2004. The second target date was the end of 2008 for the completion of all trials. 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 *Completion Strategy*, INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/sid/10016> (last visited Mar. 26, 2011).

136. On ICTY defense attorneys' perspectives on to what extent ICTY trials are closer to the legal or the political model of international criminal trials, see Turner, *supra* note 134.

137. See *supra* note 67. 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.

138. See Interview with Def. Att'y 5, *supra* note 78 ("[The] lump sum fee system does not make any difference to the speed of the trial."); Interview with Def. Att'y 4, *supra* note 71 ("Changes in the fee system did not change anything."); Interview with Def. Att'y 1, *supra* note 61 ("It has not changed lawyers' behavior."). But see Interview with Def. Att'y 2, *supra* note 68 ("[The] system



In addition, as we already explained in Sections 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. These tests revealed that the ceiling-payment-system reform is significantly correlated with longer pretrial and trial, and that the lump-sum-payment-system-for-trial reform is significantly correlated with longer pretrial and is not significantly correlated with trial duration.<sup>139</sup>

There are two 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.<sup>140</sup> The second hypothesis is that there were problems in the reforms' design or implementation—for instance, attorneys' behavior would not change if they got roughly the same fees under the old and the new system.<sup>141</sup> Relatedly, one of our interviewees argued 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.<sup>142</sup>

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

The three previous Parts demonstrated and offered explanations for why the managerial judging reforms that promised to shorten pretrial and trial at the ICTY actually brought the opposite result. This Part analyzes the broader implications of our study for the promise of managerial judging. The Part shows that the structural obstacles in the idea of managerial judging that this Article has identified may help explain not only our results, but also those of other empirical studies on managerial judging reforms.

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.<sup>143</sup> The first of these studies is that of

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adopted in January 2001 probably made proceedings shorter.”).

139. See *supra* note 33 and accompanying text.

140. See Interview with Def. Att’y 1, *supra* note 61 (“Lawyers do not think like economists because you have a client who is a human being.”).

141. See *id.* (“It is the same thing if we compare the old and the new system—it is the same money.”).

142. See Interview with Def. Att’y 5, *supra* note 78 (“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, for example, Sonja B. Starr, *Ensuring Defense Counsel Competence at International Criminal Tribunals*, 14 *UCLA J. INT’L L. & FOREIGN AFF.* 169 (2010).

143. The empirical studies on the “vanishing trial,” though related to the managerial judging literature, have not directly addressed the relationship between the specific reforms introduced at the ICTY and time to disposition, which 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). On the literature on the “vanishing trial,” see, for example, the special symposia in 1 *J. EMPIRICAL LEGAL STUD.* 459-984 (2004) and 57 *STAN. L.*

Maurice Rosenberg 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 established in Rule 16 that the court may in its discretion direct the attorneys for the parties to appear before it for a pretrial conference.<sup>144</sup> This innovation spread to state jurisdictions, and New Jersey adopted mandatory—instead of discretionary—pretrial conferences in 1948.<sup>145</sup> Between 1960 and 1962, Rosenberg, Professor of Law at Columbia University, conducted a detailed empirical study of pretrial conferences in that state.<sup>146</sup>

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.<sup>147</sup> This was because pretrial conferences did not encourage settlement, bring earlier settlement, or reduce trial duration, while it took the judges time to conduct the conferences.<sup>148</sup>

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.<sup>149</sup>

The second study is RAND's evaluation of the 1990 U.S. Civil Justice Reform Act (CJRA). The CJRA created a pilot program that required ten federal district courts to incorporate certain case management principles and to

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REV. 1255-1676 (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).

144. Fed. R. Civ. P. 16 (1938) (repealed).

145. ROSENBERG, *supra* note 4, at 6.

146. 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 a mandatory pretrial conference, while every even case number would have an optional pretrial conference. This created three groups of cases: (1) cases with mandatory pretrial conferences; (2) cases in which pretrial conferences were not used—about a quarter of the cases; and (3) cases in which counsel opted to have pretrial conferences. The experiment focused on personal injury cases. *Id.* at 17-19.

147. *Id.* at 28-29, 45-57. Wayne Kerstetter and Anne Heinz 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. WAYNE A. KERSTETTER & ANNE M. HEINZ, NAT'L INST. LAW ENFORCEMENT & CRIMINAL JUSTICE, PRETRIAL SETTLEMENT CONFERENCE: AN EVALUATION, at xiii (1979). But unlike the pretrial conferences at the ICTY and in New Jersey, those in Florida were voluntary, in the sense that the defense attorney could opt out of 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 on the parties. Rather, the parties controlled which cases were subjected to a pretrial conference, and could thus limit conferences to the cases that they considered ready for an earlier disposition. Kerstetter and Heinz also claimed that, for two out of the three judges in 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 tbl. 7-8.C. Finally, as Kerstetter and Heinz recognized, the three judges in 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. *See id.* at 19.

148. ROSENBERG, *supra* note 4, at 45-57.

149. *Id.* at 93-105.

consider incorporating certain case management techniques.<sup>150</sup> 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.<sup>151</sup> Having no mandated policies, comparison districts made fewer changes than pilot districts.<sup>152</sup>

The six case management principles that the pilot districts were required to adopt included: (1) differential case management; (2) early judicial management; (3) monitoring and control 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.<sup>153</sup>

In addition, the CJRA also directed each district to consider incorporating the following six 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.<sup>154</sup>

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.<sup>155</sup> RAND's study concluded that the CJRA pilot program had little effect on time to disposition, litigation costs, or attorneys' satisfaction and perceptions of the fairness of case management.<sup>156</sup> According to RAND's study, there were four explanations for 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. Fourth, 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

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150. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE?, *supra* note 5, at 3.

151. *Id.*

152. *Id.* at 10.

153. *Id.* at 3.

154. *Id.* at 4.

155. *Id.* at 5.

156. *Id.* at 1.

the pilot and comparison districts.<sup>157</sup>

Though it is obvious that there are important differences between criminal procedure at the 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<sup>158</sup>—the three case studies have one important feature in common: all of these jurisdictions grafted managerial judging techniques that redefined judges as active, expediting case managers onto adversarial systems in which judges had been defined mainly as passive umpires. This similarity is not coincidental: U.S. federal civil procedure was the direct inspiration for the reforms not only in New Jersey,<sup>159</sup> but also for a good number of reforms at the ICTY.<sup>160</sup>

Somewhat surprisingly, ICTY judges did not know about the Rosenberg and RAND studies, and RAND's study did not engage or even mention Rosenberg's.<sup>161</sup> Besides being the first study of its kind on an international tribunal and bringing together these three studies, our study suggests explanations for these results not explored by Rosenberg or RAND. These explanations include, first, that the court has more limited information about the case than the parties, which leads judges to be cautious in the application of their managerial judging powers;<sup>162</sup> and second, that the parties have incentives and the ability to resist reform efforts.<sup>163</sup>

These 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 the same judges use their managerial judging

157. *Id.* at 22-23.

158. There are important differences between these jurisdictions. For example, the ICTY is an international, temporary court system without its own enforcement apparatus, while state and federal courts in the United States are domestic, permanent, established parts of the U.S. justice system, which includes an enforcement apparatus. In addition, the ICTY uses criminal procedure, in which one of the parties is necessarily the prosecutor and thus a public actor, while civil procedure in the United States usually includes two private parties. Finally, while all cases at the ICTY are complex, American civil cases present varying degrees of complexity.

159. See *supra* note 143 and accompanying text.

160. For an analysis of the completely overlooked and substantial parallels between managerial judging reforms in U.S. civil procedure and the ICTY, see Langer, *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 the ICTY such as the introduction of status and pretrial conferences and of a pretrial judge. See Interview with Former Judge, *supra* note 66.

161. See KAKALIK ET AL., AN EVALUATION, *supra* note 5; KAKALIK ET AL., MEDIATION, *supra* note 5; KAKALIK ET AL., IMPLEMENTATION, *supra* note 5; KAKALIK, JUST, SPEEDY, AND INEXPENSIVE?, *supra* note 5.

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

163. RAND's study mentioned as one of the implementation problems of the CJRA that some lawyers believed that these reforms "unduly emphasis[ed] speed and efficiency at the possible expense of justice," and furthermore that this gave them good reason to resist change. KAKALIK ET AL., AN EVALUATION, *supra* note 5, at xxxiv; see also *id.* at 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.

powers differently in different cases.

Similarly, the incentives and ability of the parties to neutralize managerial reforms may help explain RAND's results.<sup>164</sup> For instance, in analyzing specific managerial judging techniques—instead of the reforms as a whole—RAND's study found that many of these techniques did not have any effect on time to disposition.<sup>165</sup> These techniques included 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. It is easy to think of ways in which the parties could neutralize the expediting effect of these techniques.

In addition, 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 the time to discovery cutoff.<sup>166</sup> Although these results have to be taken with caution because of a selection bias in RAND's dataset,<sup>167</sup> 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 or her ground on the firmness of the deadlines.<sup>168</sup>

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164. On the incentives that parties have to reduce costs in civil cases in the United States, see Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2082-86 (2002).

165. KAKALIK, JUST, SPEEDY, AND INEXPENSIVE?, *supra* note 5, at 27.

166. According to RAND's study, the other two techniques that reduced time to disposition were early judicial management and having litigants at or available for settlement conferences. *Id.* at 14, 15, 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 to disposition. *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 analyze *infra* note 167, 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, potentially for both plaintiffs and defendants. Given that in criminal cases one of the parties is the prosecutor, who does not have an easily identifiable physical client, it is hard to transpose the finding about this fourth technique to criminal procedure.

167. 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—rather, the 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 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 5, at xix, xxi, xxxiii-xxxiv, 8, 21-22, 164-65. On other limitations of the RAND study, see Heise, *supra* note 143, at 819-22.

168. Interestingly, these two reforms were not adopted at the ICTY. *See, e.g.*, Interview with Def. Att'y 3, *supra* note 67 ("A 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 set a credible trial date when the accused makes his initial appearance. In addition, given the complexity of cases at the ICTY and the amount of evidence that they involve, shortening time for discovery might

Our explanations suggest that the obstacles of managerial judging to expedite procedure may be more structural than previous studies have considered. This is because any managerial judging time gains have to offset the extra time that the additional managerial requirements, steps, and work require. But obtaining these time gains is difficult because the managerial court is likely to have less information about the case than the parties. This limited information 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.

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. But in a managerial judging system the parties have more information about the case than the court. Thus, even when the court's intervention is necessary, it 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 obstacles thus may help explain the results of the three studies we are analyzing in this Part, 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 the 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 comparison of these three studies suggests that these structural limitations played a role in hindering these reform efforts for the following 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, the ICTY had fewer implementation challenges to surmount than the CJRA and the New Jersey pretrial conference experiment. The ICTY had fewer implementation challenges because, unlike the CJRA, the reforms were not externally imposed upon the judges but adopted by the judges themselves.<sup>169</sup> Second, the Tribunal has a total of only

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not have the same effect as 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.

169. 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 believed that the procedural innovations imposed by Congress curtailed judicial independence. See KAKALIK ET AL., AN EVALUATION, *supra* note 5, at xxxiv. RAND's study also suggested that gaining the commitment of key players—in this case, 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 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 153-154 and accompanying text. See KAKALIK ET AL., IMPLEMENTATION, *supra* note 5, at 4-5. But there was "wide variation among districts in the role

twenty-eight judges.<sup>170</sup> It was thus easier than in the cases of the CJRA and the New Jersey pretrial conference experiment for those involved in the change effort to understand and agree on what the change vision was<sup>171</sup> and to disseminate needed information and communicate emerging knowledge during reform implementation.<sup>172</sup> Third, given that the 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.<sup>173</sup> But despite these diminished implementation challenges, the 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 available to the court about the case, and parties' incentives and ability to neutralize reform efforts.

Furthermore, 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 a fair or efficient decision. Also, the more complex a case, the more opportunities the parties would have to neutralize the managerial judging powers of the court. One then would expect that the greater the case complexity median of a jurisdiction, the more challenges managerial judging reforms would face in attempting to expedite proceedings. This may help explain why the reform results at the ICTY—a jurisdiction in which all or almost all cases are complex—have been more disappointing than the results of the CJRA.<sup>174</sup>

Similarly, everything else being equal, one would expect that the ICTY would have a harder time speeding up proceedings than the reformers of U.S. civil procedure because it is easier for judges in civil rather than in criminal

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of judges on the advisory group." *Id.* at 25. The Supreme Court of New Jersey supported the experiment on pretrial conferences. See ROSENBERG, *supra* note 4, 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 & John R.P. French, Jr., *Overcoming Resistance to Change*, in BASIC STUDIES IN SOCIAL PSYCHOLOGY 444 (Harold Proshansky & Bernard Seidenberg eds., 1965).

170. On the evolution of the number of judges at the ICTY, see *supra* note 104.

171. See Interview with Former Judge, *supra* note 66 (stating that the message of why the reforms were adopted was clear). On this problem about the change vision in the implementation of the CJRA, see KAKALIK ET AL., AN EVALUATION, *supra* note 5, at 40.

172. KAKALIK ET AL., AN EVALUATION, *supra* note 5, at 43. In New Jersey, fifty-two judges processed the test cases. See ROSENBERG, *supra* note 4, at 21.

173. The ICTY is also a young organization. Because of this, one might think that it would be more adaptable to change. There is only mixed evidence on the relationship between an organization's age and its adaptability to change, however. For a summary of some of this evidence and the debate in 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 ANN. REV. SOC. 161, 180-82 (1990).

174. In contrast to the ICTY, the CJRA applied to all civil cases. The 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 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, *supra* note 4, at 93-105.

procedure to deal with the structural obstacles identified in this Article and 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 procedure—as evidenced in the United States by the wide gap between civil and criminal discovery.<sup>175</sup> In criminal cases more is at stake, so sanctioning the parties (even the prosecutor) with preclusion becomes more difficult. There also is the right of the defendant to keep his evidence close to the vest. Inevitably, then, a party-driven criminal process is less predictable and harder to manage than a party-driven civil process. These differences between criminal and civil procedure may thus also help explain why the reform results at the ICTY have been more disappointing than the results of the CJRA.

## VII. CONCLUSION

This Article shows how and why the managerial judging reforms that ICTY judges introduced to expedite the 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, live witnesses testifying at trial, or interlocutory appeals entertained by the appeals chamber. The reforms did not deliver these outcomes because judges made limited or 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 implementation challenges that are not easy to overcome. Our study has also explained why the obstacles 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 cases 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 several obstacles present in this very idea. Any managerial judging time gains have to offset the extra time that the additional managerial judging requirements, steps, and work take. But obtaining these time gains without sacrificing the other goals of the legal process is difficult given that the managerial court is likely to have more limited information about the case than the parties. This limited information may prevent the court from using its managerial powers to avoid making decisions that impose excise costs on the other goals of the legal process, and may facilitate parties' attempts to neutralize the court's managerial powers.

Our study does not suggest that managerial judging is always a bad idea. There are situations in which the parties may want more time for pretrial and

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175. Compare FED. R. CRIM. P. 16, with FED. R. CIV. P. 26.



trial than is socially optimal. In these cases, the court's intervention by its own motion may be the only way to try 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 should be wary when specific techniques bring substantial time gains, because they may also compromise 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 the ICTY or elsewhere? The 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.<sup>176</sup> In addition, judges have introduced new reforms to allow for the introduction of even more written witness statements at trial.<sup>177</sup>

Future studies should determine whether the new reforms and ICTY judges' more aggressive use of managerial judging techniques after July 2006 actually expedited proceedings. But assuming for a moment 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 development could be good for the other—and arguably more important—goals of the Tribunal's criminal procedure. For judges to shorten parties' cases without sufficient information about the case does not seem to be a good recipe for accurate and fair trials.<sup>178</sup> And accurate and fair trials are necessary conditions to achieve any of the broader goals that may be assigned to international criminal justice, such as fighting impunity, creating a historical record of atrocities, giving voice to the victims, and deterring future mass atrocities.<sup>179</sup>

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176. See *supra* note 69 and accompanying text.

177. See ICTY Rules of Procedure and Evidence, *as amended*, Rule 92 *bis*, 92 *ter*, 92 *quater*, Doc. IT/32/Rev.39 (2006) (amending Rule 92 *bis* and adopting 92 *ter* and *quater*); ICTY Rules of Procedure and Evidence, *as amended*, Rule 92 *quinquies*, Doc. IT/32/Rev.44 (2009) (adopting 92 *quinquies*).

178. On comments by our interviewees about these risks, see *supra* note 118.

179. On the different goals of international criminal tribunals and the potential tensions among them, see Mirjan Damaška, *L'Incerta Identità delle Corti Penali Internazionali* [*The Uncertain Identity of the International Criminal Court*], in CRIMINALIA, ANNUARIO DI SCIENZE PENALISTICHE [CRIMINALIA, YEARBOOK OF PENAL SCIENCE] 9-55 (2006). On the relationship between accuracy and deterrence, see Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 320 (1994); and Posner, *supra* note 117, at 1483.

## APPENDIX

A. *How the Reforms Are Weighted*

We weighted the reforms using expert opinion and the proportion of a case that was affected by the reforms. First, we weighed each reform subjectively according to its importance. Minor reforms are given a weight of .50, major reforms are given a weight of 2, and those in the middle are given a weight of 1 (Table A1). We asked our interviewees and attendees at our presentations in The Hague whether they agreed with our weighting scheme of the relative importance of the reforms. The overwhelming majority of them agreed with it; the only two people who did not fully agree had only minor disagreements with it. We also repeated our main regression models for pretrial and trial, substituting an unweighted reform measure for the weighted reform measure; this did not change the results regarding the effect of the reforms on duration. As we explain in detail in footnotes 56 and 60, 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 seventy-five percent 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.

<b>Table A1. Individual Reforms Included in the Analysis and Subjective Weights, According to Importance, Used To Create Cumulative Reform Variables</b>		
<b>Reform</b>	<b>Weight</b>	<b>Details of Reform</b>
Reforms of July 1998	2	Allowed pretrial judges (65 <i>ter</i> ), mandated pretrial conference (73 <i>bis</i> ), allowed pre-defense conference (73 <i>ter</i> ), allowed written testimony by expert witnesses (94 <i>bis</i> ), allowed sentencing evidence during trial (85(a)(6))
Rule 89 amended and 92 <i>bis</i> adopted	1	Allowed less use of live testimony at trial
Reform of January 2001	1	Changed fee system to discourage dilatory behavior by counsel
Rules 72 and 73 amended on April 23, 2002	1	Allowed the trial chamber to decide if an interlocutory appeal can be made
Rules 73 <i>bis</i> and <i>ter</i> amended July 17, 2003 and second reform to fee system on August 1, 2003	1	Allowed the trial chamber to fix number of crime sites and incidents
Rule 65 <i>bis</i> adopted	.5	Allowed pretrial status conferences
Rule 65 <i>bis</i> amended on December 4, 1998	.5	Made status conference mandatory
Rule 65 <i>bis</i> amended on December 12, 2002	.5	Allowed teleconferencing at status conference
Rule 65 <i>ter</i> amended on November 17, 1999	.5	Made pretrial judges mandatory
Reforms of April 2001	.5	Authorized the pretrial judge to be assisted by a Senior Legal Officer
Rule 62 <i>ter</i> adopted	.5	Defined plea agreement procedure

#### B. Case Characteristics as Control Variables

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 testimony 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.

### C. *Court Capacity as a Control Variable*

Data about the number of judges, employees, and courtrooms at the Tribunal were collected from ICTY annual reports. We measured these aspects of capacity, and a preliminary analysis revealed a high degree of multicollinearity. 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 this variable separately for both the pretrial (Table A2) and trial (Table A3) phases.

<b>Table A2. Court Capacity in Pretrial</b>	
Principal components analysis	
	<b>Promax Rotation</b>
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	

<b>Table A3. Court Capacity in Trial</b>	
Principal components analysis	
	<b>Promax Rotation</b>
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	

### D. *Variables in the Trial Models*

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 Section 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 these variables are not statistically significant, because they do not affect the relationship between the number of reforms and trial duration, and because they do not improve the fit

(chi-square) of the model. Given that the number of observations is relatively low—fifty-seven for trials without guilty pleas, out of which only forty-five were completed—there are good technical reasons to try to keep the number of variables in the final regression to a minimum.

Second, we added to the trial models the number of live witnesses testifying 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. These variables included 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 the 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, which is why we did not report them in the trial models.

#### E. *Interviews*

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 and former prosecutors, defense attorneys, judges, and staff. Seventeen of these interviews were conducted in person in The Hague, Netherlands, in June 2008. Two interviews were conducted by phone—in early July 2008 and in late March 2009. Twelve of the interviews were one-on-one. Four interviews were one-on-two—i.e., two meetings with two interviewees in each of them. One interview 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 positions at the time of the interviews. 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 A4 numbers the interviews and lists interview dates and interviewee positions:

<b>Interview Number</b>	<b>Position of the Interviewee</b>	<b>Date of the Interview</b>
1	Legal Officer 1, OTP	June 23, 2008
2	Legal Officer 2, OTP	June 23-24, 2008
3	Legal Officer 3, OTP	June 23, 2008
4	Legal Officer 4, OTP	June 23, 2008
5	Staff, OTP	June 23, 2008
6	Defense Attorney 1, also worked in Registry	June 23, 2008
7	Former investigations analyst, OTP	June 23, 2008
8	Defense Attorney 2, former legal officer of the OTP	June 24, 2008
9	Legal Officer 5, OTP	June 24, 2008
10	Legal Officer 6, OTP	June 24, 2008
11	Legal Officer 7, OTP	June 24, 2008
12	Legal Officer 8, OTP	June 24, 2008
13	Defense Attorney 3	June 24, 2008
14	Judge 1	June 25, 2008
15	Judge 2	June 26, 2008
16	Defense Attorney 4	June 26, 2008
17	Defense Attorney 5, former legal officer of the OTP	June 27, 2008
18	Defense Attorney 6 (phone interview)	July 3, 2008
19	Former Judge (phone interview)	March 24, 2009

For practical reasons, we could not use a random sampling to select our interviewees. We therefore reached them through multiple sources that do not know and do not coordinate their work with each other. The 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; all the other attorneys contacted this way did not reply to our e-mail. 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 number 5), and a former OTP legal officer put us in contact with the former ICTY investigations analyst.

In the interviews, we presented our interviewees with the preliminary results of our study—including the correlation between the reforms and longer pretrial periods and trials—as well as three hypotheses that would explain these results: (1) the lack of or inefficient implementation of the reforms; (2) resistance to the reforms by the parties; and (3) increasing levels of litigation

brought on by the reforms.<sup>180</sup> We then asked our 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.

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

#### F. *A Short Note on Plea Bargaining*

This Article has shown that the managerial judging reforms that aimed at shortening the pretrial process and trial at the ICTY have had the opposite effect: making them both longer. Part II of the Article 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.<sup>181</sup> In addition, if we conceive of managerial judging as an abstract procedural model, it makes sense to include settlement and plea bargaining within it.<sup>182</sup>

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 introduced by ICTY prosecutors, not its judges.<sup>183</sup> Moreover, in most plea agreements, judges have remained alien to the negotiations that have taken place between the prosecution and defense.<sup>184</sup> Furthermore, even if the judges generally consider the practice of plea

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180. 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. We used this data to test the hypothesis that reforms increased levels of litigations. Our results about this hypothesis were inconclusive, which is why we abandoned it as a potential explanation for the results of the reforms.

181. See, e.g., Fiss, *supra* note 3; Resnik, *Managerial Judges*, *supra* note 2.

182. See, e.g., Langer, *supra* note 1, at 874-85.

183. See, e.g., Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 109-14 (2002). It was only after prosecutors informally introduced the practice of plea bargaining that the judges amended the Rules of Procedure and Evidence.

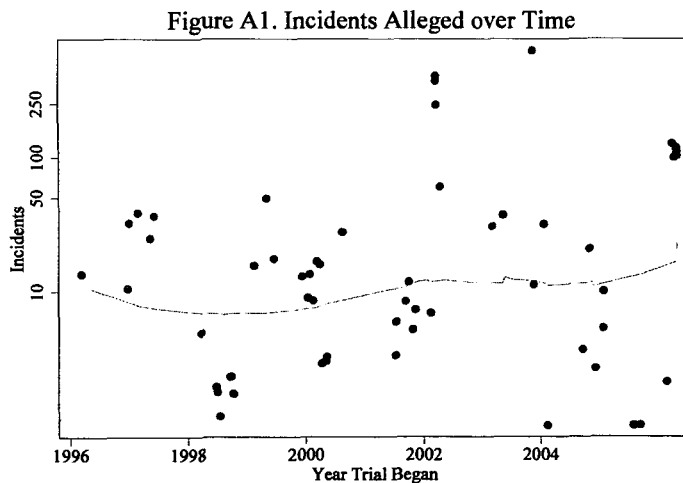
184. See, e.g., Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 VAND. L. REV. 69, 83-100 (2006); Langer, *supra* note 1, at 895 n.316.

bargaining at the 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.<sup>185</sup> 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 Part II.

The reader should also note that even if one 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 Part II, which aim to shorten pretrial and trial rather than avoid trial altogether. These other managerial judging techniques include introducing a pretrial judge, work plans toward trial, and pretrial conferences; asking the parties to exchange and provide information about their cases; encouraging the parties to reach partial agreements on factual and legal issues; reducing the number of live witnesses; and so on. Our study shows that this second set of managerial judging techniques have not achieved their goal at the ICTY.

#### G. *Outcomes Not Delivered*

As described in Section IV.A, one of the central goals of the reforms was to reduce the number of issues under discussion at trial. Had the reforms been successful, the number of incidents at trial should have decreased. However, as Figure A1 shows, the number of incidents remained relatively constant over the period in which the reforms were implemented.



Similarly, as described in Section IV.B, the reforms aimed to reduce the number of live witnesses at trial by allowing the introduction of written statements that would replace live testimony. However, Figure A2 suggests

185. See, e.g., Combs, *supra* note 184, at 90; Langer, *supra* note 1, at 903.



that the introduction of Rule 92 *bis* did not reduce the number of live witnesses at trial.

Figure A2. Witnesses at Trial over Time

