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In the interest of conserving tribunal resources, what concrete limits can a trial chamber put on the parties to reduce the length of their cases, limit cross-examination, and impose a date certain for completion of trial?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ISSUE:

IN THE INTEREST OF CONSERVING TRIBUNAL RESOURCES, WHAT CONCRETE LIMITS CAN A TRIAL CHAMBER PUT ON THE PARTIES TO REDUCE THE LENGTH OF THEIR CASES, LIMIT CROSS-EXAMINATION, AND IMPOSE A DATE CERTAIN FOR COMPLETION OF TRIAL?

Prepared by Michelle Oliver
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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue*

In the interest of conserving the resources of the United Nations and its tribunals, and in view of tribunal completion strategies, the ICTR can impose limits on the parties to reduce the length of their cases, limit cross-examination, and impose a date certain for the completion of trial. This paper examines international precedent and provides a comparative analysis of how certain domestic courts tackle the conservation issue. This paper will also briefly touch on some of the components of the ICTY and ICTR completion strategies, and explore some of the ways in which Tribunals may speed up the process of completion.

B. Summary of Conclusions

1. **The transferal of Tribunal cases to competent national courts via Rule 11 *bis* is an integral part of both the ICTY and ICTR completion strategies and presents a feasible approach toward fulfilling the mandates of the Tribunals.**

By transferring ICTR cases to other jurisdictions, the Tribunal may be able to clear most of its docket by 2010, in accordance with the UN mandate. Consequently, there are many complicating factors that make the option of transfer via Rule 11 *bis* a less favorable one than the other strategies discussed hereinafter.

2. **Two feasible strategies for speeding up the overall trial process are to impose various limitations on the parties' preliminary motions, and to develop various mechanisms to expedite the pre-trial phase.**

3. **Imposing limitations on both the length and style of cross-examination during trial can speed up the overall trial proceedings while maintaining fairness to all parties.**

In Article 19 of the ICTR Statute the standard for Commencement and conduct of trial proceedings is stated: "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses." The section in this memo regarding cross-examination will discuss how this mandate can be fulfilled while still reducing the length of cross examination to ensure that no party is lingering too long on one particular issue at the expense of moving the trial along at a reasonable pace.

4. Plea Bargaining can be a way to facilitate a speedy trial by giving the defendant the option of a sentence or charge bargain.

Trials at the ICTR tend to be lengthy because of their complexity in criminal counts and the high number of witnesses often involved. Plea bargaining presents an opportunity to streamline cases and speed up the trial process without sacrificing justice.[1] The prosecution is given some discretion as to what a feasible sentence for the defendant would look like, and then the chambers has the ability to adjust the sentence accordingly.

5. Judicial Notice is a way for Trial Chambers to reduce the length of their cases.

Taking judicial notice of something means that the matter is taken by the court as established beyond any dispute and not requiring any proof. If the chambers takes judicial notice of a key fact or evidentiary finding, the trial process will be hastened enormously because that fact will no longer have to be proven during trial.

[1] Nancy Amoury Combs, "Copping a Plea to Genocide: The Plea Bargaining of International Crimes," 151 Penn. L. Rev. 1, at 107 (2002) [reproduced in accompanying notebook at Tab 31].

6. Factual Stipulations are another tool that could shorten the length of trials by getting as much evidence on to the table as soon as possible.

In order to avoid prolonged testimony of multiple witnesses that usually slows down the trial proceedings, the parties could enter into factual stipulations resolving certain issues that are the subject of litigation. Factual stipulations are useful because they serve to quickly dismiss potential disputes that might arise in proving certain facts where evidence is either so overwhelming that no one could deny the truth, or so sparse that both parties will have to concede on a particular fact anyway.

7. The "Rocket Docket" delay reduction strategies of civil courts in the United States provide applicable strategies toward expediting the trial process at International Tribunals, and increasing judicial authority.

Rocket dockets can be particularly effective in reducing the length of the pre-trial phase.[2] By limiting preparation time, and imposing early trial dates, attorneys are, in a sense, forced to prioritize their litigation efforts. Thus, Rocket Dockets provide counsel with incentive to develop more efficient litigation strategies.[3]

II. FACTUAL BACKGROUND

Since the inception of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") (together, "Tribunals"), efforts have been taken to significantly improve the tribunals'

[2] Carrie E. Johnson, "Rocket Dockets: Reducing Delay in Federal Civil Litigation," 85 Calif. L. Rev. 225, 243 (1997). [reproduced in accompanying notebook at Tab 42].

[3] *Id.*

overall efficiency and legitimacy.[4] The adoption of detailed and frequently-amended completion strategies by the Tribunals was seen as a necessary step toward the eventual conclusion of their mandates. The plan to fulfill the mandate of the ICTY was articulated in 2002 by then-President of the ICTY, Claude Jorda.[5] This plan had two main foci. The first was to conduct trials involving "the highest-ranking political, military, paramilitary and civilian leaders," and the second main objective was to refer certain cases to competent national courts, to lighten the Tribunal's load.[6] This innovation eventually led to the development of a plan by the ICTY (in June of 2002) followed by the ICTR to complete their mandates by 2010.[7] Since that time, each presiding President of the ICTY and ICTR have given yearly reports to the UN Security Council regarding each Tribunals' progress and new ideas for and amendments to their respective completion strategies.

Subsequent to the presentation of the tribunals' initial completion strategies, the UN Security Council adopted Resolutions 1503 and 1534. Security Council Resolution 1503 particularly emphasized the duty of States in the Balkans and Eastern region of

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* In the interest of conserving Tribunal resources (and in view of Tribunal completion strategies), what concrete limits can a Trial Chamber put on the parties to reduce the length of their cases, limit cross examination, and impose a date certain for completion of trial—keeping in mind that these are complex cases with witnesses from around the globe?

[4] Daryl A. Mundis, "The Judicial Effects of the 'Completion Strategies' on the Ad Hoc International Criminal Tribunals," 99 A.J.I.L. 142, at 142 (January, 2005) [reproduced in accompanying notebook at Tab 10].

[5] Judge Claude Jorda, "Address to the United Nations Security Council," ICTY Press Release JDH/PIS/690-e, at 1 (July 23, 2002) [reproduced in accompanying notebook at Tab 11].

[6] *Id.*

[7] President Claude Jorda, "Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts," UN Doc. S/2002/678 (Oct. 2002) [reproduced in accompanying notebook at Tab 12].

Africa to aid the Tribunals in their completion strategies by improving cooperation and apprehending at-large persons indicted by the ICTY and ICTR.[8] The UN Security Council also urged the ICTR to formulate a detailed plan (similar to that of the ICTY) for the transfer of cases to competent national courts, including those of Rwanda.[9] Resolution 1534, adopted in March of 2004 set forth several new requirements both for the Tribunal presidents and other leadership, and sharpened the goals of Resolution 1503. The resolution urged prosecutors to review their respective caseloads to determine which cases should be kept on the Tribunal docket and which should be transferred to competent national jurisdictions.[10]

Despite these positive steps toward efficiency in the trial proceedings of the tribunals and progress toward ultimate completion, still there have been many complications. First and foremost, the total cost of operating both tribunals since their inception has reached more than $ 1 billion. From the establishment of the ICTY through the budget for 2005, the ICTY alone cost $629,777,722 to operate.[11] Both Tribunals have received criticism internationally for the slowness of trial proceedings, and the seemingly endless docket of cases and indicted people at large that have yet to be found and tried.

III. LEGAL DISCUSSION

[8] UN Security Council Resolution 1503 (2003) [reproduced in accompanying notebook at Tab 1].

[9] "The Judicial Effects of the 'Completion Strategies' on the Ad Hoc International Criminal Tribunals," at 144, *Supra*, note 1 [reproduced in accompanying notebook at Tab 10].

[10] UN Security Council Resolution 1534, note 7, para. 4 (2004) [reproduced in accompanying notebook at Tab 2].

[11] "The Judicial Effects of the 'Completion Strategies' on the Ad Hoc International Criminal Tribunals," at 144, *Supra*, note 1 [reproduced in accompanying notebook at Tab 10].

In lieu of the struggle of the ICTR to implement its completion strategy and move the numerous case dockets along, this memo will explore some ways in which these goals can be accomplished.

A. Transferal of Tribunal Cases to National Courts via Rule 11 *Bis*

Two amendments to the ICTR Rules of Procedure and Evidence ["Rules"] were made in 2002 and 2004 permitting the Chambers to order that cases be referred to the authorities of another competent national jurisdiction should the need arise.[12] Rule 11 *bis* reads, in pertinent part, as follows:

> (A) If an indictment has been confirmed, irrespective of whether or not the accused is in the custody of the tribunal, the President may appoint a Trial Chamber for the purpose of referring a case to the authorities of a State:
> (i) in whose territory the crime was committed; or
> (ii) in which the accused was arrested; or
> (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.
>
> (B) The Trial Chamber may order such referral *proprio motu,* or at the request of the Prosecutor, after having given to the Prosecutor, and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.
>
> (C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused.
> . . . .
>
> (F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Trial Chamber may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral.

[12] *See* ICTR Press Briefing, ICTR/INFO-9-13-22 (July 8, 2002) [reproduced in accompanying notebook at Tab 13].

Additionally, Rule 11 *bis* does not indicate whether or not the accused may make an application for referral of his or her case to national courts. The deliberations of the judges at *plenary sessions* (where rules are adopted or amended in accordance with Article 15 of the ICTY Statute) are not available to the public, thus there is no "legislative history" of the Rules that would help the interpretation.[13]

Concerning the transfer of ICTY cases, the State Court of Bosnia-Herzegovina is authorized to apply the law of Bosnia-Herzegovina, and has jurisdiction over three categories of war crimes cases: (1) those referred from the ICTY pursuant to Rule 11 bis; (2) investigations dossiers deferred by the ICTY Prosecutor for which no indictment has been issued; and (3) "Rules of the Road" cases pending before domestic courts but which, due to their sensitivity, should be tried at the State Court level.[14] It is of utmost importance that the national courts to which the ICTY and ICTR seek to transfer cases have the requisite resources to undertake these important trials, which will be discussed further along in this memo.

Any trial chamber appointed under Rule 11 *bis* will have to address two major questions: (1) whether the case meets the seniority criterion of UN Security Council Resolution 1534, and (2) whether any states are eligible to receive the case, including whether or not there is a suitable national court to try the case in the domestic

[13] *Id.*

[14] Daryl A. Mundis, "Completing the Mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?" 28 Fordham Int'l L.J. 591, at 595 (2005) [reproduced in accompanying notebook at Tab 14].

jurisdiction.[15] What is of particular concern in referring a case for trial outside the nearest regions is that by forgoing the holding of trials in the territory where the crimes were committed, the local population probably most directly affected is not engaged in the trial process. Some scholars have argued that if the local populations do not experience or observe the international justice that is being done for the atrocities that occurred in their own localities, it will negate the legitimacy of the tribunals.[16]

One of the first examples of the ICTY deciding a Rule 11 *bis* referral was the case of *Prosecutor v. Gojoko Jankovic* which was referred to the government of Bosnia and Herzegovina to be tried there. In considering the Defense's subsequent appeal to the decision, the Referral Bench examined the three part standard of Rule 11 *bis,* UN Security Resolution 1534, the gravity of the crimes with which the Appellant is charged, and the level of his responsibility as charged in the Indictment.[17] The Referral Bench was satisfied that based "on the information presently available," the Appellant would receive a fair trial and that the death penalty would not be imposed or carried out, thus in accordance with international standards. The Referral Bench held that the referral was appropriate and concluded that referral of the case to the authorities of Bosnia and Herzegovina should be ordered.[18]

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[15] Larry D. Johnson, "Closing an International Criminal Tribunal while Maintaining International Human Rights Standards and Excluding Impunity," 99 A.J.I.L.158, at 169 (2005) [reproduced in the accompanying notebook at Tab 15].

[16] *Id.* at 170.

[17] The Prosecutor v. Gojoko Jankovic, Case No. IT-96-23, "Decision on Rule 11 *bis* Referral" (15 November 2005) [reproduced in accompanying notebook at Tab 16] .

[18] *Id*. at para. 77.

As of June, 2006, six ICTY accused have been referred to the Special War Crimes Chamber and two accused have been referred to Croatia for trial before its domestic courts.[19] If all of the pending motions are successfully referred under Rule 11*bis*, 10 cases involving 16 accused will have been removed from the tribunal's docket in 2006. However, no other cases are "earmarked" for referral as they do not involve intermediate or lower level accused persons.[20]

The first attempt by the ICTR's Office of the Prosecutor in 2006 to transfer an accused to a the national jurisdiction of Norway via Rule 11*bis* failed.[21] It was the decision of a court of first instance, confirmed by the Appeals Chamber of the ICTR, to deny the transfer of Michel Bagaragaza to Norway for trial, because Norway's criminal code did not specifically foresee the crime of genocide, for which Bagaragaza was charged.[22] The *Bagaragaza* case was most likely not one of the "low priority" cases that should have been considered for transfer, primarily because Bagaragaza was a very high profile politician at the time of the genocide, as Director-General of the government office that controlled the largest industry in Rwanda at the time – the tea industry.[23] On the other hand, during the presentation of his report last June before the Security Council,

[19] President Judge Fausto Pocar, "Statement to the Security Council," The Hague, (June 2006). [reproduced in accompanying notebook at Tab 17].

[20] *Id.*

[21] Alhagi Marong, "The ICTR Appeals Chamber Dismisses the Prosecutor's Appeal to Transfer Michel Bagaragaza for Trial to Norway," The American Society of International Law, Vol. 10, Issue 25, p.2 (October 2006) [reproduced in accompanying notebook at Tab 18].

[22] Hirondell News Agency, "TPIR/Norway – Former Head of the Tea Trade Will not be Judged by Norway, the ICTR Appeals Chamber has Confirmed," www.hirondell.org (August, 2006) [reproduced in accompanying notebook at Tab 19].

[23] Alhagi Marong, "The ICTR Appeals Chamber Dismisses the Prosecutor's Appeal to Transfer Michel Bagaragaza for Trial to Norway," at 3 (October 2006) [reproduced in accompanying notebook at Tab 18].

the Gambian head prosecutor of the ICTR - Hassan Bubacar Jallow – criticized the *Bagaragaza* decision, arguing that the dismissal of the Rule11 *bis* request was likely to discourage other countries until then agreeing to receive ICTR cases.[24]

The difficulties presented in the transference of cases from the tribunals to national courts are serious, as the strategy of Rule 11 *bis* transferals is among the tribunals' top strategies toward completion. However, despite the *Bagaragaza* decision, the Norwegian Court of Justice may be able to accept "lower" priority transfers from the ICTR, especially persons accused of lesser crimes than genocide, such as complicity in homicide. The Norwegian Court would be able to accept these transfers because the code of criminal law foresees these crimes, and could proscribe an appropriate sentence. The Court would be able to sentence someone accused of complicity in homicide for up to 21 years in prison, which is the maximum sentence possible in Norway.[25]

It appears that if an accused from the ICTR were transferred to a court in Norway, the accused might have broader "rights" by some standards than those being tried by the ICTR, however, overall the rights appear to be analogous. First, according to the Norwegian Criminal Procedures Act the accused must be given the chance to refute the grounds on which the charge brought against him is based.[26] In addition, in Norway, the accused has the right to bring appeals against court verdicts, both questions of fact and questions of law. For example, appeals to the Supreme Court can only take place if

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[24] Hirondelle News Agency, "Rwanda: ICTR Confronted with the Difficulty of Transfers," www.AllAfrica.com (October 2006) [reproduced in accompanying notebook at Tab 20].

[25] Norweigan Penal Code: The World Fact book of Criminal Justice Systems: Norway, Section 15 (Revised July 22, 1997) http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjnor.txt [reproduced in accompanying notebook at Tab 3].

[26] *Id.*

approved by the Court's Appeals Selection Committee, the *Kjoerem Lsutvalget*, and such appeals can only be based on alleged errors of law, so the Supreme Court is "unable to try questions of evidence related to the issue of guilt."[27] Another difference is that in Norway, the accused might have a right to have his case tried by a jury. Cases involving appeals from verdicts reached by the court of first instance concerning felonies punishable by more than 6 years imprisonment (which most of the cases coming from the ICTR would be), are triable by a jury.[28]

Indeed, Rule 11 *bis* transfers of defendants from the ICTR to the jurisdiction of Norway are possible, if the defendant has been indicted for "lesser" charges than genocide. Courts in Norway would be able to facilitate the trying of ICTR defendants accused of crimes adequately punishable by a sentence of 21 years or less. However, besides Norway, there are jurisdictions with Criminal Codes that have incorporated genocide provisions. Canada is one such jurisdiction.

The Criminal Code of Canada has two relevant provisions, Section 318: Advocating Genocide, and Section 319(1): Public Incitement of Hatred.

First, the Code defines *genocide* as:

> Any acts committed with intent to destroy an identifiable group —such as killing members of the group, or deliberately inflicting conditions of life calculated to bring about the group's physical destruction.[29]

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[27] *Id.*

[28] *Id;* Should Norway deny the transfer of an ICTR accused to its court on grounds of national security interests, the Criminal Procedures Act provides for the accused to be entirely excluded from the proceedings, in order to protect national security interests. However, this provision could obviously be grounds for an appeal due to the fact of the right of ICTR accused to confront their accusers.

[29] Media Awareness Network, "Criminal Code of Canada: Hate Provisions," (2006) www.media-awareness.ca [reproduced in accompanying notebook at Tab 21].

Additionally, Section 318 of the Criminal Code of Canada defines the crime for "Advocating Genocide" as:

> The criminal act of "advocating genocide" is defined as supporting or arguing for the killing of members of an "identifiable group" — persons distinguished by their colour, race, religion or ethnic origin. The intention or motivation would be the destruction of members of the targeted group. Any person who promotes genocide is guilty of an indictable offence, and liable to imprisonment for a term not exceeding five years. [30]

Likewise, Section 319(1) of the Code defines "Public Incitement of Hatred" as having four main elements. All four of these elements must be proven before an accused will be found guilty of public incitement of hatred: (1) communicating statements either by telephone, broadcasting, or other audible and visual means; (2) in a public place; (3) to incite hatred against an identifiable group; (4) in such a way that there will likely be a breach of the peace.[31] The similarity in the Criminal Code of Canada and the ICTR Statutes' genocide provisions cures the deficiency found by the ICTR in *Bagaragaza*. The provisions of 318 and 319 of the Canadian Criminal Code are one example of a

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[30] Similarly, the ICTR Statute, Article 2 defines *genocide* as:

> Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> a) Killing members of the group;
> b) Causing serious bodily or mental harm to members of the group;
> c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> d) Imposing measures intended to prevent births within the group;
> e) Forcibly transferring children of the group to another group.

Statute of the ICTR ([reproduced in accompanying notebook at Tab 4].

[31] Under section 319 of the Criminal Code of Canada (*see* Note 26 *supra*), "communicating" includes communicating by telephone, broadcasting or other audible or visible means; a "public place" is one to which the public has access by right or invitation, express or implied; and "statements" means words (spoken, written or recorded), gestures, and signs or other visible representations. [Criminal Code reproduces in accompanying notebook at Tab 21].

jurisdiction that would have the capacity in its laws and/or statutes to accept the transferal of tribunal cases.

1. Potential Problems and Pitfalls with the Transferal of Cases Via Rule 11 *bis.*

It is important to note that while the transferal of ICTY and ICTR cases to national jurisdictions via Rule 11 *bis* may speed up the completion process of the tribunals, there are potential problems that may arise with this strategy. Both Canada and Norway, discussed above as potential options for transferal of cases, (whether or not they would actually agree is beyond the scope of this work) have at least ratified the International Covenant on Civil and Political Rights, as well as the Second Optional, Protocol, and thus could give assurance that the death penalty would not be imposed.[32] However, there is the possibility that inconsistencies that could arise in case law.

Though Canada's Criminal Code contains provisions for trying genocide, the way in which Canadian courts would go about this tedious trial procedure could produce different precedent than those cases that are tried at the ICTY or ICTR, thus creating the potential for inconsistencies in international criminal law. However, it is arguable that the potential for small, procedural inconsistencies in case law is a meager price to pay, when compared to the prospect of transferring ICTR cases to other jurisdictions to lighten the tribunal's load.

B. The *Musema* Trial – an Example of Efficiency

To meet the challenges presented by the completion strategies, tribunal judges must take measures to improve their trial procedures and speed up cases without

[32] Mundis, 99 A.J.I.L. 142, 150. [reproduced in accompanying notebook at Tab 10].

sacrificing the rights of the parties to a fair trial. One example of an abnormally speedy trial was the case of Alfred Musema, which began in January of 1999. The *Musema* case is the first case to benefit from an application of the changes to the tribunal's procedures adopted during the Fifty-Fourth General Assembly session, and designed to accelerate the pace of trials at the tribunal.[33]

The *Musema* trial lasted for only six months, with judgment delivered by the Trial Chamber within a year of commencement of trial.[34] Musema was alleged to have planned and participated in the killings of Tutsi men, women and children and, in concert with others, raped and killed women in the area of Bisesero in Gisovu and Gishyita Communes, Kibuye Prefecture. He was arrested in Switzerland and on 6 May 1999 pleaded not guilty to three new charges of rape included in the amended indictment he had initially been served with.[35]

Judges at the ICTR have stated that the main reason for trial delays can be procedural, that the ICTR trials could never go as fast as criminal proceedings would in a national jurisdiction.[36] This is because in national jurisdictions, the judges have complete control over procedures whereas at the ICTR, because procedures are based on common law, they are lengthier, and parties tend to drag their feet more in terms of deadlines. However, in the *Musema* case, it appears that the parties were quick to bring forth the various components of their cases, as the trial commenced in January of 1999 and the

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[33] *Id.*

[34] Kingsley Chiedu Moghalu, United Nations Press Briefing (November 2001) [reproduced in accompanying notebook at Tab 22].

[35] The Prosecutor v. Alfred Musema, Case No.: ICTR-96-13-I, "Amended Indictment," [reproduced in accompanying notebook at Tab 5].

[36] Hirondelle, "Ten Years After the Genocide, Detainees Make Negative Assessment of the ICTR," (April 2004) [reproduced in accompanying notebook at Tab 20].

parties made their closing arguments in June.[37] Though the minutes of the *Musema* trial are not published, from the Summary it is known that both parties presented extensive evidence including 30 witnesses and 182 documents. Still, the trial proceedings were substantially quicker than other cases.

One recommendation that could be made considering the *Musema* trial is that parties can bring a substantially lesser number of witnesses and still effectively prove their case. Musema was indicted on nine different counts including:

Count 1 - Genocide & Count 2 - Complicity in Genocide

Count 3 - Conspiracy to Commit Genocide

Count 4 - Crime against Humanity (murder)

Count 5 - Crime against Humanity (extermination)

Count 6 - Crime against Humanity (other inhumane acts)

Count 7 - Crime against Humanity (rape)

Counts 8 and 9 -Violation of Common Article 3 and Additional Protocol II 274.[38]

Despite all of these counts, the Prosecution was still effective in proving their case with a minimal amount of witnesses and trial time. Judge Kama, one of the judges presiding over the *Musema* case stated in a report that "judges . . . should be firmer and put more emphasis on speeding things up."[39] Judge Kama offered insight into why the trial process can drag along slowly at times, saying that certain lawyers submit too many

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[37] "Summary of the Judgement in the Alfred Musema Case", ICTR-96-13-T, paras. 10-11, (27 January 2000) [reproduced in accompanying notebook at Tab 21].

[38] *Id.*

[39] Kingsley Chiedu Moghalu, United Nations Press Briefing (November 2001) [reproduced in accompanying notebook at Tab 22].

motions and appeals that sometimes slow things down unnecessarily. In particular, Judge Kama reproached the Office of the Prosecutor for, at times, asking to amend certain indictments at the last moment, and for not respecting time limits on disclosure of evidence to the Defense.[40]

Finally, the President of the ICTY, Judge Fausto Pocar made a similar recommendation in his statement to the UN Security Council on June of 2006.[41] He assured the Security Council that the Trial Chambers are increasing efficiency of the trial proceedings, first by shortening the Prosecution's case by determining the number of witnesses the Prosecution may call.[42] Pocar also stated that the Trial Chambers were seeking to limit the time available for the presentation of evidence.[43] These are principles that appear to have been utilized by the Prosecution in the ICTR *Musema* case to speed up the trial process.

C. Limiting Preliminary Motions and Speeding up the Pre-Trial Phase

Another way to speed up the trial process would be to limit preliminary-type motions, such as motions to regulate the sequence or location in which depositions are taken. Another option would be to institute an overall page limit to restrict the aggregate length of motions and oppositions to motions that could be filed in a case. Defense counsel personnel are continuously accused of slowing down the court by continued

[40] *Id.*

[41] *Id.*

[42] *Id*.

[43] *Id*.

excessive use of motions.[44] The expert group assigned by the Security council to analyze this matter concluded that judges should come up with a rule requiring the parties to discuss any motion prior to its being filed, with a view to resolving the matter between them.[45] This is known as the "omnibus hearing" process for the effective management of motions prior to trial. Before the omnibus hearing, the parties would discuss contentious issues and attempt to resolve as many as possible without judicial intervention.[46] At the hearing, each side would have a "checklist motion" presenting their various grounds for relief. Other grounds that should have been raised but were not raised at the Omnibus would be waived. The trial chamber would then determine which motions require evidentiary hearings and would schedule such hearings as soon as possible.

The ICTY Statute states in Article 19 the standard for Commencement and conduct of trial proceedings: “The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”

Pocar, in his June 2006 statement to the Security Council spoke about increasing the efficiency of the pre-trial process. First, a policy has been put into place whereby all pre-trial cases are transferred to the Trial Chamber that will hear the trial at the earliest

[44] Eric Husketh, “Pole Pole: Hastening Justice at UNICTR,” 3 NW. U. J Int’l Hum. Rts. 8, at Section D (2005) [reproduced in accompanying notebook at Tab 30].

[45] Daryl A. Mundis, “Improving the Operation and Functioning of the International Criminal Tribunals,” 94 A.J.I.L. 759, 760 (2000). [reproduced in accompanying notebook at Tab 22].

[46] *Id.*

possible stage. In this way, the Pre-Trial Judge and the Pre-Trial staff already familiar with the case will also serve on the trial and thus facilitate more efficient proceedings.

On May 30, 2006, at the second plenary of the Judges of the Tribunal, an amendment was adopted to Rule 73 *bis* of the Rules with regard to indictments. Because of the intricacy and extent of the indictments this can lead to a drawn out presentation of the parties' cases. Previous efforts by the judges to change this pleading practice had been fairly unsuccessful.[47] However, under the Rule 73 *bis* amendment, Trial Chambers now have the explicit ability, at the pre-trial stage, to invite the Prosecution to reduce the number of counts charged, or to direct the Prosecution to select a smaller number of counts on which the trial should proceed. This amendment follows common practice in national jurisdictions of avoiding overloaded indictments to protect the integrity of the proceedings.[48]

Pocar also acknowledged that substantial steps are being taken by pre-trial Judges to more proactively manage and focus pre-trial proceedings to ensure trial readiness and shorten the overall length of trials. Specifically, pre-trial Judges are:

- Establishing work-plans of the parties' obligations at trial with strict timetables for presenting their cases and ensuring a strict implementation of such work-plans;
- Requiring the Prosecution to, at an earlier stage, specify its trial strategy, submit a focused pre-trial brief, and produce the final statements of all Prosecution witnesses to be called at trial;
- Obliging the Defense to make timely submission of a focused pre-trial brief and disclosure of expert testimony in order to identify points of agreement and disagreement between the parties; and

[47] President Judge Fausto Pocar, "Statement to the Security Council," The Hague, (June 2006). [reproduced in accompanying notebook at Tab 17].

[48] *Id.*

- Making greater use of the power to sanction a party for failure to comply with disclosure obligations.[49]

Additionally, judges of the tribunal were recently convened in another extraordinary plenary on 13 September 2006 to adopt amendments to the Rules incorporating those proposals. That plenary led to the adoption by the Judges of two new provisions, Rules 92 *ter* and 92 *quater*.[50] In essence, the amendments have increased the ability of Trial Chambers to consider written statements and transcripts of witnesses in lieu of oral testimony where that evidence goes to the acts and conducts of an accused. Trial Chambers are now empowered to decide whether a witness should appear for cross-examination when written statements or transcripts are used, and to allow the admission of written evidence of witnesses who are not available to attend as witnesses at the tribunal.

Practical implementation of all of the aforementioned pre-trial and trial-stage steps to speed up the overall trial process, is noted in the following ICTY cases: In *Prlić et al.* and *Milutinović et al.* The assigning of a pre-trial judge to each case who would also be assigned to the trial stage resulted in the reduction of the anticipated length of trial by at least one-third and one-half respectively.[51] In addition, in these cases the Trial Chambers have placed restrictions on the amount of evidence that may be adduced in relation to some of the counts in the indictments. Furthermore, limitations have been placed on the

[49] President Judge Fausto Pocar, "Statement to the Security Council," The Hague, (June 2006). [reproduced in accompanying notebook at Tab 17].

[50] *Id.*

[51] President Judge Fausto Pocar, "Address to the General Assembly," The Hague (9 October 2006). [reproduced in accompanying notebook at Tab 24].

time allowed for each accused to conduct their cross-examination. In the *Šešelj* case, while the Trial Chamber is examining the indictment for purposes of reducing its scope by one-third, it has invited the Prosecutor to make proposals for that purpose.

1. Possible Limitations to Methods of Cross-Examination

Another way in which tribunals could potentially speed up the trial process would be to impose limitations on the parties' ability to cross-examine the witnesses. The rules and cases governing the rules of cross-examination in the jurisdictions of Western Australia and Germany are explored in this section,

a. Western Australia

Section 41 of the Uniform Evidence Acts of 1995 grants the court the power to disallow improper questions asked in cross-examination. The section reads as follows:

> (1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:
>
> (a) misleading, or
>
> (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.
>
> (2) Without limiting the matters that the court may take into account for the purposes of subsection (1), the court is to take into account:
>
> (a) any relevant condition or characteristic of the witness, including age, personality and education, and
>
> (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.[52]

[52]Lloyd Babb, Director, Criminal Law Review Division, "What Does Section 275(A) of the Criminal Procedure Act Mean to you as a Judicial Officer?", Judicial Commission of New South Wales (September 2005) [reproduced in accompanying notebook at Tab 25].

The duty of the court to intervene in cross-examination has existed since 1995 within section 42(3) of the Evidence Act, which requires the Court to "disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used."[53]

The Law Reform Commission of Western Australia, in its "Review of the Criminal and Civil Justice System" explored the limits of examination and cross-examination.[54] It explored the issue of whether or not Western Australian judges and magistrates have sufficient power to intervene in examination and cross-examination where appropriate. Section 25 of the *Evidence Act of 1906* provides for intervention to limit cross-examination:

(1) to relevant matters;
(2) to matters that are not indecent or scandalous even if these have some bearing but are not directly at issue; or
(3) so as to exclude matters which are needlessly offensive.

Under the Western Australian *Rules of the Supreme Court,* there is also a specific provision for judicial control over the time spent in trial in relation to a number of matters, including the examination and cross-examination of witnesses. In deciding these limits, Order 34 rule 5A requires a judge to consider a number of factors, including:

(1) reasonableness;
(2) fairness;
(3) the degree of complexity of the case;
(4) the number of witnesses;
(5) the state of the Court lists; and

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[53] *Id.*

[54]The Law Reform Commission of Western Australia, "Review of the Criminal and Civil Justice System," (2004), www.lrc.justice.wa.gov.au. [reproduced in accompanying notebook at Tab 26].

(6) the importance of the issues and case as a whole.[55]

These limitations provide for the reduction of misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive cross-examination.

b. Other Forms of Cross-Examination

In Germany, during trial, the witness will offer his or her applicable testimony in his or her own words and subsequently, the court will ask questions designed to test, clarify, and amplify it.[56] After that, counsel is permitted to ask extremely pertinent questions of the witness. However, in an ordinary case there is relatively little questioning by counsel for the parties, at least by common law standards.[57] One reason is that the judge will normally have asked all of the pertinent questions before counsel is given the chance. Additionally, for counsel to examine a witness at length after the judges have seemingly exhausted the witness might appear to imply that the court does not know its business, which is a dubious tactic.[58]

In Germany, there is no cross-examination in the sense of the common law, nor is there a full stenographic transcript of the testimony. Instead, the judge himself pauses from time to time to say aloud a summary of what the witness has said so far.[59] At the

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[55] *Id.*

[56] Michael Bohlander, "The German Advantage Revisited: An Inside View of German Civil Procedure in The Nineties," 13 Tul. Eur. & Civ. L.F. 25, 43 (1998). [reproduced in accompanying notebook at Tab 27].

[57] *Id.*

[58] *Id.*

[59] John Langbein, "The German Advantage in Civil Procedure," 52 U. Chi. L.R. 823, at 828 (1985) [reproduced in accompanying notebook at Tab 28].

close of testimony the clerk will read back the dictated summary in full, and either witness or counsel may carefully suggest improvements in the wording, again placing a burden on counsel to not offend the court. If the phrasing of a certain part of the testimony is believed to be of critical importance, counsel may insist on having it set down verbatim in the minutes, again with fear and trepidation, placing more control into the hands of the judges.

However, with this alternative method to cross-examination arranged to expedite the proceedings, there is always room for error. For example, the technique of inviting the witness to tell his story in narrative form and without general interruption provides an incentive, in the interest of presenting a conclusive, coherent, and convincing story, to fill in gaps by half-truths or fiction.[60]

Additionally, the ICTR already has similar provisions for this kind of judicial intervention and power. Evidentiary matters at trial are governed by Rule 85(B) which states that "a Judge may at any stage put any question to the witness." As for the recommendation that judges be permitted to "ask counsel for either party whether there is any dispute about a particular piece of evidence," this practice already exists. The exclusion of irrelevant or repetitive testimony and of witnesses whose testimony is cumulative or of no material assistance regarding disputed matters can be achieved under the current rules of evidence without any further amendments. Rule 90(G), for example, permits a trial chamber to "exercise control over the mode and order of interrogating witnesses and presenting evidence so as to avoid needless consumption of time." Other

[60] *Id.*

rules, including those governing pretrial conferences, clearly establish a system that enables the trial chambers to reduce the number of witnesses that either party proposes to call at trial.

D. The Use of Various Forms of Plea Bargaining to Facilitate Fair and Expeditious Trials

1. Overview of Plea Bargaining

Plea bargaining is one of the most favorable options for reducing the length of trials at international tribunals.[61] At the ICTR, one senior official from the Office of the Prosecutor noted: "The second largest cause of delay in my humble opinion is the failure to facilitate guilty pleas, which now results in trials of every accused as well as the loss of potential 'insider' witnesses who could otherwise strengthen the cases and therefore speed them up."[62] Trials at the ICTR tend to be lengthy because of their complexity in criminal counts and the high number of witnesses often involved. Plea bargaining presents an opportunity to streamline cases and speed up the trial process without sacrificing justice.[63]

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[61] Ahran Kang, "The Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL," Memorandum for the Iraqi Special tribunal (November 2004) [reproduced in accompanying notebook at Tab 6]; *See generally* Amar Khoday, "Whether a Guilty Plea is a Mitigating Factor for Sentencing Purposes, and if so, is it Mandatory of Permissive?" (December 2002) [reproduced in accompanying notebook at Tab 28]; Sohan S. Desai, "Plea Bargaining Under the Rwandan Statute and Rules of Evidence and Procedure," (December 1999) [reproduced in accompanying notebook at Tab 29]; Donald Gifford, "Meaningful Reform of Plea Bargaining the Control of Prosecutorial Discretion," 1983 Ill. L. Rev. 37, at 43 (1983) [reproduced in accompanying notebook at Tab 11]; Jay M. Zitter, "Guilty Plea Safeguards," 17 A.L.R. 4th 61 (1982) [reproduced in accompanying notebook at Tab 7].

[62] Erik Husketh, "Pole, Pole: Hastening Justice at the UNICTR," 3 Nw. U. J. Int'l Hum. Rts. 8 (Spring 2005) [reproduced in accompanying notebook at Tab 30].

[63] Nancy Amoury Combs, "Copping a Plea to Genocide: The Plea Bargaining of International Crimes," 151 Penn. L. Rev. 1, at 107 (2002) [reproduced in accompanying notebook at Tab 31].

Though the original Rules of Procedure and Evidence at the tribunals did not explicitly provide for plea bargaining, today both the ICTY and ICTR permit plea bargaining.[64] Case law at the ICTY has discussed whether or not a guilty plea can be a mitigating factor in a sentence.[65] *The Prosecutor v. Erdemovic*, which was decided in 1997, laid the foundation to what is now Rule 62 *bis*.[66] Rule 62 *bis* states that, for a guilty plea to be valid the tribunal must ensure that:

> (1) the guilty plea has been made voluntarily;
> (2) the guilty plea is informed;
> (3) the guilty plea is not equivocal; and
> (4) there is a sufficient factual basis for the crime and the defendant's participation in it. . .

In addition, the ICTR has the requirements of what constitutes a guilty plea embedded in its Rules of Procedure and Evidence, therefore making it simpler to facilitate such guilty pleas.[67] According to ICTR Rule 62(B), if a defendant is to plead guilty, the tribunal must be sure that the plea:

> (1) is made freely and voluntarily;
> (2) is an informed plea;
> (3) is unequivocal; and
> (4) is based on sufficient facts for the crime and defendant's participation in it, either on the basis of independent indicia or of lack of any material disagreement between the parties about the facts of the case.

2. Sentence Bargaining and Discounts

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[64] Erin J. Davies, Memorandum for the Prosecutor at the International Criminal Tribunal for Rwanda, "Plea Bargaining: What is it, Which Countries Allow it, and is it a Mitigating Factor During Sentencing: A Comparative Analysis of the Tribunals, Four Common Law Jurisdictions, and Three Civil Law Jurisdictions," p. 8 (November 2002) [reproduced in accompanying notebook at Tab 32].

[65] *See Prosecutor v. Erdemovic*, "Judgment: Joint Separate Opinion of JJ. McDonald and Vohrah," U.N. Doc. IT-96-22-A (1997) [reproduced in accompanying notebook at 33].

[66] *Id.*

[67] Rules of Procedure and Evidence, ICTR, Rule 62(B) (as amended 31 May 2001) (latest complete revision as of 27 November 2002) [reproduced in accompanying notebook at Tab 8].

Despite efforts by ICTR Trial Chambers and prosecutors to motivate various defendants to plead guilty, considerably few actually do. Some scholars have argued that sentencing discounts play an insignificant role in guilty-plea decisions in certain groups of international defendants, especially defendants at the ICTR, whereas at the ICTY, defendants are more likely to enter into plea bargaining.[68] This is because at the ICTY, defendants tend to esteem sentence reduction more than they esteem getting the chance to "set the record straight," as to their culpability regarding the genocide. By contrast, at the ICTR, studies have shown that defendants are less likely to be influenced by the prospect of sentence reduction, because they gain a larger degree of utility from having their "take" on the genocide heard and properly understood.[69] In addition, some defendants strongly feel that certain witnesses may be lying and feel compelled to set the record straight. Thus, to more effectively convince ICTR defendants that plea bargaining and sentence bargaining are good options, the ICTR should incorporate inducements beyond the promise of sentence reduction alone.[70]

During sentence bargaining, parties engage in negotiations concerning the sentence that will be imposed upon the defendant if trial were to continue, or alternatively, if the defendant were to plead guilty.[71] The prosecutor usually agrees to

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[68] Nancy Amoury Combs, "Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts," 59 Vand. L. Rev. 69, at 72 (2006) [reproduced in accompanying notebook at Tab 34].

[69] *Id.* at 73.

[70] *Id.*

[71] *Id.* at 74.

recommend to the Chambers one specific sentence or a small range of sentences.[72] In jurisdictions where sentence bargaining is practiced, courts typically sentence in accordance with prosecutorial recommendations.

Whether or not sentence bargaining will inspire defendants to plead guilty depends on a variety of factors including: (1) the nature of the crime allegedly committed; (2) the nature of the sentence recommended by the Prosecution; (3) the background and motivations of defense counsel, (4) the political and social status of the Defendants, and (5) the Defendants' cultural views about the genocide, the crime and its suitable punishment.[73]

3. Charge Bargaining

Charge bargaining involves negotiations regarding the specific charges in the indictment to which the defendant will plead guilty. During charge bargaining, the prosecutor typically agrees to dismiss certain charges, often the most grave, with the expectation that the defendant will receive a lower sentence as a result. Charge bargaining is most helpful where the criminal code classifies criminal activity into carefully delineated, distinct crimes; and constrains judicial sentencing discretion by setting forth presumptive sentencing ranges for particular crimes.[74] Charge bargaining is often very helpful in places like the United States were a crime of murder is subdivided into multiple categories of severity and sentence prescriptions, therefore defendants are fairly assured of their potential sentences should they go through the trial process. As a

[72] *Id.*

[73] *Id.* at 73.

[74] *Id.* at 5.

result some postulate that 90% of criminal cases in the United States involve plea bargains.[75]

Charge bargaining arguably loses some effectiveness when applied to international crimes, because tribunals' criminal codes define certain crimes more broadly, and some of the crimes encompass a broad range of behavior. Genocide and crimes against humanity constitute some of the core offenses over which the tribunals have jurisdiction and each of these crimes can be committed in a plethora of ways.[76] One of the crimes against humanity, persecution, may be committed by murder, extermination, or torture, "however the crime of persecution can also encompass arguably lesser crimes."[77] Consequently, two defendants convicted of persecution may have engaged in vastly different criminal behavior, yet still run the risk of receiving similar sentences.

To utilize one short example from the ICTY, General Blaskic was a military commander convicted for the crime of persecution for having ordered "attacks on towns and villages; murder and serious bodily injury; the destruction and plunder of property . . . inhuman and cruel treatment of civilians and, in particular, their being taken hostage and used as human shields; [and] the forcible transfer of civilians." By contrast, another defendant, Dragan Kolund, who was a lowly shift commander in a prison camp having "only a limited ability to prevent the mistreatment of prisoners or to improve the

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[75] Nancy Amoury Combs, "Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts," 59 Vand. L. Rev. 69, at 72 (2006) [reproduced in accompanying notebook at Tab 34].

[76] *Id.* at 76.

[77] *Id.*

conditions in which prisoners were held. . . [he himself] did not mistreat anyone; rather, his conviction of persecution stemmed from his continuing to act as a shift commander despite the abuse that others perpetrated on prisoners and the appalling conditions prevailing at the camp."[78] Therefore, two defendants accused of the same crime arguably have vastly different levels of culpability. Consequently, it is more difficult for counsel to motivate defendants to plead guilty at the ICTR, because certain crimes encompass a very wide spectrum of activity, but are not formally divided into degrees of severity to be applied to a defendant's sentence.[79] Charge bargaining could be more effective in the international criminal context if the prosecution is willing to withdraw charges in a way that would fundamentally alter either the legal or the factual description of the defendant's alleged criminal conduct.

4. The Judges' Role in the Sentencing Process

The statutes and procedural rules of the ICTR instruct judges to take into account many factors when sentencing, including the gravity of the offense and the individual circumstances of the defendant, the general practice regarding prison sentences in the courts of the former Yugoslavia and Rwanda, as well as any aggravating or mitigating circumstances that might influence the proposed duration of the sentence.[80] Incidentally, the statutes and the rules do not provide any instruction as to the relative "gravity" of the various offenses within the Tribunals' jurisdictions.[81]

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[78] *Id.* at 78.

[79] *Id.*

[80] ICTR Rules of Procedure and Evidence R. No. 101(B)(ii) [reproduced in accompanying notbook at Tab 8].

[81] Allison Marston Danner, Constructing a Hierarchy of Crimes in International Criminal Law Sentencing, 87 Va. L. Rev. 415, 420 (2002) [reproduced in accompanying notebook at Tab 35].

To date, only five defendants at the ICTR have pleaded guilty.[82] One reason why plea bargaining is relatively rare at the ICTR could be because defendants no longer have sufficient certainty that they will receive the sentencing discounts for which they bargained. In the past, defendants have counted on the prosecution's recommendation to the trial chamber to define the outer limit of their possible sentence. Plea bargaining proves to be an effective means of motivating defendants when the chambers is not forced to impose a sentence longer than that which the prosecution has recommended. It is arguable that when prosecutors offer only modest concessions to defendants pleading guilty; Trial Chambers are more likely to accommodate those recommendations, or even prescribe a lesser sentence than was recommended by the prosecution. However, when sentence recommendations are far more lenient, as they have been in the past two years, some Trial Chambers decline to sentence in accordance with them, which in turn can have a negative effect on the whole bargaining system.[83] Thus, it is advisable that the prosecution prescribe reasonable sentences that have been previously approved by the trial chambers in similar cases. This way, defendants can have a higher degree of certainty the type of sentence that they will receive.

E. Judicial Notice

Scholars have struggled with the fact that sometimes, the prospect of sentence reductions carries little persuasive value for ICTR defendants. Rather, these defendants

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[82] ICTR Publication: Tribunal at a Glance (2006) [reproduced in accompanying notebook at Tab 41].

[83] Nancy Amoury Combs, "Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts," 59 Vand. L. Rev. 69, at 98 (2006) [reproduced in accompanying notebook at Tab 34].

place greater weight on a variety of ideological factors.[84] Many ICTR defendants have refused to plead guilty because they truly do not believe that they are guilty of the crimes for which they have been charged, and desire a chance to have their side of the story heard.

Until June of 2006, a number of ICTR defendants still denied that genocide even occurred in Rwanda, maintaining instead that the conflict in 1994 happened because of a long-running war between the Rwandan government and the RPF.[85] While ICTR defendants often concede that events spiraled out of control and violence was, in fact, targeted against Tutsi civilians, they still maintain that this violence constituted the excesses of "a legitimate national defense effort, not a genocidal plan to eliminate the Tutsi."[86] Taking judicial notice of a certain disputed matters such as the occurrence of genocide in Rwanda in 1994 would mean that the fact of genocide would be taken as established beyond any dispute and not requiring any proof. Judicial notice of the genocide did indeed take place in June of 2006. The ICTR Appeals Chamber ruled in the trial of *The Prosecutor v. Karemera* that the all trial chambers must take judicial notice of the following facts:

(1) The existence of Twa, Tutsi and Hutu as protected groups falling under the Genocide Convention;
(2) The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994: there were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to person[s]

[84] *Id.* at 117.

[85] *Id.* at 118.

[86] *Id.* at 121.

perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity;

(3) Between 6 April 1994 and 17 July 1994 there was genocide in Rwanda against Tutsi ethnic group.[87]

Judicial notice is an incredible way to speed up trial proceedings because it serves to eliminate the time it takes to prove certain large and complex concepts, such as genocide, again and again. Judicial notice could be taken of many of the events that took place in Rwanda that have already been proven in cases that have already rendered judgments.

F. **Factual Stipulations**

Like judicial notice, factual stipulations are another tool that could shorten the length of trials by getting as much evidence on to the table up front as possible. In order to avoid prolonged testimony of multiple witnesses that usually slows down the trial proceedings, the parties could enter into factual stipulations resolving certain issues that are the subject of litigation.[88] A stipulation of fact is conclusive, "precluding withdrawal or further dispute by a party joining in the stipulation after the stipulation is accepted."[89] Factual stipulations by the parties should be allowed in order to speed up the trial process and avoid unnecessary disputes, however stipulations need to be fully representative of the facts of the offence.[90]

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[87] ICTR Press Release, "ICTR Appeals Chamber Takes Judicial Notice of Genocide in Rwanda" ICTR/INFO-9-2-481.EN (June 2006). http://69.94.11.53/ENGLISH/PRESSREL/2006/481.htm [reproduced in accompanying notebook at Tab 36]; *Prosecutor v. Karemera, Ngirumpatse and Nzirorera,* ICTR-98-44-AR73 [reproduced in accompanying notebook at Tab 37].

[88] The United States National Labor Relations Board, "Factual Stipulations," NLRB Database (2001) http://b08983web2001.wdc1.attens.net/nlrb/legal/manuals/hog9.htm, [reproduced in accompanying notebook at Tab 38].

[89] *Id.*

[90] The Law Reform Commission, "Consultation Paper on Sentencing," (Ireland: March 1993), http://www.lawreform.ie/publications/data/lrc74/lrc_74.html [reproduced in accompanying notebook at Tab 39].

One example of a case at the ICTY where factual stipulations were utilized was *The Prosecutor v. Dario Kordic & Mario Cerkez*.[91] In *Dario*, though the prosecution initially proposed that roughly 370 witnesses would be needed to prove their case, they opined that if the parties could come up with factual stipulations that were "less argumentative," and this would aid the court in moving forward at a faster pace.[92] However, the prosecution also argued that it can be difficult to stipulate potential exhibits without ruining the flow of the prosecution's case.[93] While factual stipulations may aid in speeding up the trial process, they also have the potential to take away from a prosecutor's overall trial plan of proving the defendant's culpability in stages. However, factual stipulations are one of the best ways that both parties can speed up the trial process, because they serve to quickly dismiss possible disputes that could arise in proving certain facts where evidence is either so overwhelming that no one could deny the truth, or so sparse that both parties will have to concede on a particular fact anyway.

E. The "Rocket Docket" Delay Reduction Strategies of Civil Courts in the United States and Their Applicability to Speeding up the Trial Process at Tribunals

Rule 1 of the United States Federal Rules of Civil Procedure mandates that the rules of trial procedure be "construed and administered to secure the just, speedy, and inexpensive determination of every action."[94] However, some U.S. scholars cite the

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[91] *Prosecutor v. Dario Kordic & Mario Cerkez*, Case No. IT-95-14/2-T (17 June 1999) [reproduced in Tab 40]

[92] *Id*. at lines 7-13.

[93] *Id.* at line 22.

[94] Federal Rules of Civil Procedure, "Scope of the Rules: Rule 1," law.cornell.edu/rules/frcp/Rule1.htm, [reproduced in accompanying notebook at Tab 9].

pretrial discovery phase as one of the principal reasons for the high cost and delay of trial proceedings.[95] A 1991 study of litigation problems, conducted by the President's Council on Competitiveness, concluded that "over 80% of the time and cost of a typical lawsuit involves the pre-trial examination of facts through discovery."[96]

Some argue that individual judges should rely on an inherent power model to justify their procedural decisions.[97] Under this model, judges should derive decision-making authority not only from textual sources, but from the history and politics of the judiciary as an institution. American case law reveals that docket management falls squarely within a judge's inherent power.[98] The Second Circuit court of Appeals, explained that, "since the trial judge must be entrusted with the power to alleviate calendar congestion, we shall not put obstacles in his way when he exercises his judgment wisely in achieving the desired goal."[99] Thus the tribunal judges should be given more authority under the inherent power of the judiciary found in jurisdictions such as the U.S., to speed up their case dockets, forcing parties to stricter deadlines to submit pre-trial evidentiary findings and amendments to the indictment.

Rocket dockets can be particularly effective in reducing agency costs, litigation

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[95] Alfred P. Ewert & Gabriel P. Kralik, "The Rocket Docket, Managing Intellectual Property," July-Aug. 1994, at 11 [reproduced in accompanying notebook at Tab 41]

[96] *Id.*

[97] Carrie E. Johnson, "Rocket Dockets: Reducing Delay in Federal Civil Litigation," 85 Calif. L. Rev. 225, 235 (1997). [reproduced in accompanying notebook at Tab 42].

[98] *Id.*

[99] Davis v. United Fruit Co., 402 F.2d 328, 332 (2d Cir. 1968); [reproduced in accompanying notebook at Tab 43].

costs and external costs.[100] By limiting preparation time, and imposing early trial dates, attorneys are, in a sense, forced to prioritize their litigation efforts. This incentive to develop efficient litigation strategies helps control the "common dilatory tactic of filing numerous peripheral motions to harass opponents."[101] In addition, "rocket dockets" can protect misinformed clients from over-discovery by their own attorneys. This is because "rocket dockets" force attorneys to create streamlined discovery plans that better reflect the compressed timeline, and to narrow the areas of inquiry for those that are truly relevant.[102] In this way, tribunal lawyers might also limit the amount of witnesses that they will call to the stand, as earlier discussed.

Potential Pitfalls: Disadvantages of "Rocket Dockets"

Although "rocket dockets" are intended to persuade attorneys to streamline their discovery plans, limited preparation time may actually prevent an attorney from carefully considering their discovery strategy, including what evidence is likely to be found. Attorneys may end up haphazardly filing too many motions, in an effort to beat the clock.[103] An earlier trial date imposed by the judge may force a party to prioritize various arguments without adequate time to consider optimal litigation strategies. The subsequent strict refusal to continue a trial date when a party realizes that its rushed

[100] Carrie E. Johnson, "Rocket Dockets: Reducing Delay in Federal Civil Litigation," 85 Calif. L. Rev. 225, 243 (1997). [reproduced in accompanying notebook at Tab 42].

[101] *Id.*

[102] *Id.* at 244.

[103] *Id.* at 245.

discovery choices were unwise or inadequate will force parties to abandon uninvestigated issues.[104]

Another potential pitfall of rocket dockets is that by selecting earlier trial dates than normal with little party input, judges may effectively reduce a party's process control, therefore decreasing a party's concept of procedural fairness.[105] In addition, some litigants highly value the opportunity to express themselves in their preparation concerns, and speeding up the court docket might take away from this. However, the ends of speeding up the trial process might justify the means of taking away some of the parties' process control.

If the priority of a speedy trial operates to prevent reasonable discovery, "rocket dockets" may also effectively exacerbate appellate-level congestion. Judge-imposed schedules that limit pretrial investigation may decrease the legitimacy of trial outcomes in the eyes of either party, and as a result, more verdicts could be likely to be challenged.[106]

A recent case from the Central District of California illustrates both the administration and potential dangers of a "rocket docket." In *Martel v. County of Los Angeles,* Martel filed a civil rights action against the County of Los Angeles, relating to some injuries incurred during a physical struggle with the police.[107] Two days later, the district judge issued a standing order describing his court's "rocket docket" scheduling procedure: "This court strives to set trial dates as early as possible and does not approve

[104] *Id.* at 262.

[105] *Id.* at 250.

[106] *Id*. at 242.

[107] Martel v. County of Los Angeles (Martel II), 56 F.3d 993, 994 (9th Cir.), cert. denied, 116 S. Ct. 381 (1995). [reproduced in a accompanying notebook at Tab 44].

of protracted discovery. Counsel should expect the case to go to trial within three months of the filing of the first answer."[108] The order emphasized that "continuances are rarely granted . . . The Court sets firm trial dates and will not change them except for emergencies." Four days before the pretrial conference, Martel moved for a continuance of the trial date for time to conduct additional discovery due to the fact that he had only just them found an additional defendant. The district court denied the motion, and the jury found for the Defendants.

The Ninth Circuit eventually denied Martel's appeal of the lower court's denial of his motion for a continuance, saying that the denial did not result in "actual and substantial prejudice."[109] However, this case demonstrates the problems that might arise given the strictness of some court's "rocket dockets." A way to mitigate the potential unfairness that parties' might complain of would be to set a similar "substantial prejudice" standard that must be met by a party to receive a continuance or extension. In the *Martel* case, the plaintiff only moved for a continuance because an additional defendant was discovered that substantially altered his case. In tribunal proceedings, a party could move for an extension if they could prove a similar "substantial prejudice" threshold.

IV. CONCLUSION

Indeed, there are numerous ways in which the trial chamber can be empowered to regulate both the prosecution and defense, such that frivolous motions, evidentiary overload, and quarrels between the parties can be resolved in a manner that is fair and expeditious.

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[108] *Id.*

[109] *Id*. at 995.