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## Undue Delay

Kelly M. Before

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**CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES PROJECT  
RWANDA GENOCIDE PROSECUTION**

(In conjunction with the New England School of Law)

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**MEMORANDUM FOR THE  
OFFICE OF THE PROSECUTOR**

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**ISSUE: UNDUE DELAY**

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**Prepared by Kelly M. Before**

**November 2001**

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25. Andrew West, *Reform of French Criminal Justice*, NEW LAW JOURNAL, Vol. 150 No 6956 p 1542 (2000).
26. Cristin Schmitz, *S. 11 (b) Doesn't Apply to Delay in Appeal Proceedings*, THE LAWYER'S WEEKLY (1993).
27. Forensis, *Without Undue Delay – "Young v. MacPhail" Considered*, JOURNAL OF THE LAW SOCIETY OF SCOTLAND (1991).
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# I. Introduction and Summary of Conclusions

## A. Issues

Article 20 of the Statute of the International Tribunal for Rwanda guarantees that any individual charged under the Statute shall be “tried without undue delay.”<sup>1</sup> What makes delay “undue,” however, is not defined.<sup>2</sup> Moreover, delay can be measured from multiple procedural markers: from initial arrest to transfer to the Tribunal; from provisional detention to indictment; or from transfer to the Tribunal to initial appearance. The Rules of Procedure and Evidence address some of these concerns.<sup>3</sup> But there are no provisions specifying how soon a defendant must be brought to trial.<sup>4</sup> This memo will address this deficiency by examining speedy-trial rules in eight national jurisdictions and posing two questions: 1) what factors are used to assess delay, and 2) how much delay can there be before it becomes due?<sup>5</sup>

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<sup>1</sup> Statute of the International Tribunal for Rwanda, Article 20 (4)(c). [Reproduced in accompanying notebook in Tab 6]

<sup>2</sup> This is not unusual. Because the drafting process was politically complicated, the Secretary-General often left key terms undefined, anticipating that the Tribunal would interpret them when it was necessary. *See* ANDRÉ KLIP AND GÖRAN SLUITER, ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, VOLUME I: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA. [Reproduced in accompanying notebook in Tab 18.]

<sup>3</sup> Under Rule 40 of the Tribunal Statute, a suspect who is transferred to provisional detention at the Tribunal must be released if he is not indicted within 20 days of the transfer. [Reproduced in accompanying notebook in Tab 6.]

<sup>4</sup> *Prosecutor v. Barayagwiza*, Case No.: ICTR-97-19-AR72, Decision, 3 November 1999, para. 105. [Reproduced in accompanying notebook in Tab 10.]

<sup>5</sup> *See* Andra Mobberly’s e-mail from the Prosecutor’s Office describing the issue. [Reproduced in accompanying notebook in Tab 37 (second Tab 7).]

## **B. Summary of Conclusions**

### ***1. The General Factors Relied on in Delay Assessing Tests***

Every state examined in this memorandum has a balancing test which assesses certain factors of the circumstances of the delay.<sup>6</sup> Depending on which side weighs more, delay is either deemed reasonable under the circumstances or unreasonable under the circumstances, in which case the charges may be dismissed or some other solution is arrived at.<sup>7</sup> The most common factors assessed are:

- (1) the prejudice to the accused as a result of delay;
- (2) the actual length of delay;
- (3) the complexity of the case;
- (4) the conduct of the prosecution;
- (5) the conduct of the accused; and
- (6) the lack of resources or other challenges faced by the prosecution or court.<sup>8</sup>

This type of factor assessment should be adopted by the ICTR. By doing so, the Prosecutor would be able to prioritize more efficiently so as to avoid future problems with undue delay such as that faced by the Tribunal in the *Barayagwiza* case. Also, it would give the Tribunal itself a consistent and internationally supported test to determine when the rights of the accused have been violated on grounds of undue delay.

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<sup>6</sup> These states include the United States, Canada, England, Scotland, South Africa, France, Belgium, and Germany.

<sup>7</sup> See balancing tests for each country in the following sections of the memorandum.

<sup>8</sup> See balancing tests for each country in the following sections of the memorandum.



## ***2. What Length of Delay is Unreasonable?***

States have many differing responses to this question. The United States has a federal statute saying that at seventy days after the arrest, delay can become unreasonable.<sup>9</sup> Some U.S. State Acts, however, extend undue delay, such as Texas which has a 120 day limit to undue delay.<sup>10</sup> Scotland and Canada are more apt to rule unreasonable delay after six or eight months.<sup>11</sup> Many of the Western European civil code countries do not have any time limits at all to define undue delay but rely almost solely on the factor test on the guidelines of the European Convention of Human Rights.<sup>12</sup> There are cases that were pending for as many as three years that were not found to be unreasonably delayed because of the complexity of the case.<sup>13</sup> Subsequently, the unreasonability of delay does not rely solely on the length of delay, but the entire circumstances of each case.

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<sup>9</sup> Speedy Trial Act, 18 USCS §3161 (2001). [Reproduced in accompanying notebook in Tab 5.]

<sup>10</sup> Lawyer's Cooperative Publishing Company, *Criminal Law: Rights of the Accused*, 20 Tex Jur Criminal Law §1477. [Reproduced in accompanying notebook in Tab 29.]

<sup>11</sup> *See High Court Clarifies Ruling of Trial Delays*, THE TORONTO STAR, 2, (1992). [Reproduced in accompanying notebook in Tab 35.] and *Tudhope v. McCarthy*, 1985 SC (JC) 48, 4. [Reproduced in accompanying notebook in Tab 14.]

<sup>12</sup> *See Wemhoff v. Germany*, ECHR (27/6/68). [Reproduced in accompanying notebook in Tab 15.]

<sup>13</sup> *See Id.* [Reproduced in accompanying notebook in Tab 15.]

## II. Factual Background

### A. Definition

The accused's right to trial without undue delay has become a basic right in many modern criminal procedure codes and constitutions. Principally, this right arises out of the idea that a trial that is delayed for an unreasonable length of time will ultimately result in an unfair or prejudicial trial that presupposes the guilt of the accused.<sup>14</sup>

Subsequently, in order to achieve justice, the accused must be prosecuted within a reasonable period of time. This period of time is sometimes defined by statute where it is often a substantial length of time because it is commonly understood that some delay in the trial and pretrial proceedings is necessary for both the Prosecutor and the accused to prepare adequately for trial.<sup>15</sup> Delay, however, should not be oppressive or purposeful, otherwise it could easily be considered a violation of the accused's rights.<sup>16</sup> Therefore, in

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<sup>14</sup> "Unnecessary delay: (1) results in hardship for the accused who is in custody; (2) renders it more difficult to ensure that any trial is fair; (3) is likely to be prejudicial to the prosecution case; (4) can have a devastating effect upon victims and key witnesses; (5) increases costs and places additional pressure upon scarce resources; and (6) breeds cynicism, and tends to bring the administration of justice into disrepute." Mark Weinberg, *Reform of Criminal Procedure: The Criminal Process and the Problem of Delay*, <http://www.aija.org.au/ctr/WEINBERG.HTM>. [Reproduced in accompanying notebook in Tab 30.]

<sup>15</sup> "Prosecutors require reasonable time in order to prepare cases adequately for committal, and then for trial... It is not delay as such which is the problem, but rather delay which could have been avoided." *Id.* [Reproduced in accompanying notebook in Tab 30.]

<sup>16</sup> In the U.S., "The Supreme Court has recognized that the right to a speedy trial is necessarily relative; that it is constitutionally permissible for there to be some delay in prosecuting a criminal case, but not inordinate, purposeful, or oppressive delay; and that whether the delay involved in completing a particular criminal prosecution violates the accused's right to a speedy trial depends upon the circumstances." Kenneth May, *Accused's Right to Speedy Trial Under Federal Constitution -- Supreme Court Cases*, 71 L. Ed.2d 983. [Reproduced in accompanying notebook at Tab 28.]

many jurisdictions, whether undue delay provisions were violated largely depends on the circumstances of the particular case.

When the ICTR adopted the Statute, it also adopted Article 20. This Article protects the rights of the accused in such a way as to be in keeping with other major human rights instruments, the most influential of which is the European Convention of Human Rights.<sup>17</sup> In order for states to comply with human rights treaties such as this, states must usually enact legislation or amend constitutions to provide appropriate protection for human rights. The primary purpose of this memo, therefore, is to examine these provisions in eight jurisdictions: the United States, Canada, England, Scotland, South Africa, France, Belgium, and Germany.

## **B. The Ramifications of the Case of *Jean Bosco Barayagwiza v. The Prosecutor***

The issue of the accused's right to a trial without undue delay first arose in the case of *Jean Bosco Barayagwiza v. The Prosecutor* in 1999 where the ICTR allowed the accused's appeal and ultimately dismissed the charges against him.<sup>18</sup> In that case, the tribunal decided that the Prosecutor had violated Rule 40 *bis* and Article 20 of the ICTR Statute which limits the length of time an accused can be held in detention without trial.<sup>19</sup>

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<sup>17</sup> The rights of the accused are specifically laid out in Article 6 of the European Convention on Human Rights. [Reproduced in accompanying notebook in Tab 3.]

<sup>18</sup> Appeals Chamber decision in the case of *Jean Bosco Barayagwiza v. The Prosecutor*, ICTR -97-19. [Reproduced in accompanying notebook in Tab 10.]

<sup>19</sup> Rule 40 *bis* (c) and (h) of the Statute of the International Criminal Tribunal for Rwanda states: (c) The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal. (h) The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event the indictment has not been confirmed and an

The court also invoked the abuse of process doctrine against the Prosecutor for failure to use due diligence to keep the proceedings within the acceptable time limits.<sup>20</sup> The accused was ultimately released and the indictment dismissed.<sup>21</sup>

The court used several bodies of law to arrive at its decision in this case. The court used the abuse of process doctrine from the case of *Bell v. DPP Jamaica* which set forth a guideline for determining whether a delay would deprive the accused of a fair trial.<sup>22</sup> The court also used various decisions from the United Nations Human Rights Committee, the United States Supreme Court, and also cited a number of human rights statutes regarding criminal procedure.<sup>23</sup> The court does not, however, give a well-balanced comparative discussion as to undue delay jurisprudence across multiple jurisdictions. This type of comparative law analysis will be necessary in future cases where undue delay becomes a major issue.

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arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made. [Reproduced in accompanying notebook at Tab 6.]

<sup>20</sup> *Barayagwiza* at 28. [Reproduced in accompanying notebook in Tab 10.]

<sup>21</sup> The accused was held for 96 days in detention, only six days longer than the maximum allowed by the ICTR Statute in Rule 40 *bis*. However, due to other unnecessary delays throughout the entire process as a result of the lack of diligence by the prosecution, the Tribunal opined that all of these delays, when looked at as a whole, were so significant as to invoke the abuse of process doctrine against the Prosecution. Thus, the indictment against the accused was dismissed and the accused released in accordance with Rule 40 *bis*. *Barayagwiza* at 22-28. [Reproduced in accompanying notebook in Tab 10.]

<sup>22</sup> *Barayagwiza* at 22. [Reproduced in accompanying notebook in Tab 10.]

<sup>23</sup> *Barayagwiza* at 13, 18-20. [Reproduced in accompanying notebook in Tab 10.]

### III. Legal Discussion

#### A. Undue Delay in Three Common Law Countries

##### 1. *United States*

In the United States, the accused’s right to a fair trial without undue delay is more commonly known as the accused’s right to a speedy trial. The Sixth Amendment of the U.S. Constitution concisely provides that “In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial.”<sup>24</sup> This right applies to both federal and state prosecutions. There is no bright-line rule setting forth exactly how courts should determine speedy-trial-violation cases. Instead, the Supreme Court uses a balancing test, in which the conduct of both the prosecution and the defendant is weighed.<sup>25</sup> The test balances:

- (1) the *length* of the delay;<sup>26</sup>
- (2) the *reason* for the delay;<sup>27</sup>
- (3) whether the defendant *asserted* the speedy trial right *before* a trial began;<sup>28</sup> and

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<sup>24</sup> The full text of the Sixth Amendment of the U.S. Constitution states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” [Reproduced in accompanying notebook in Tab 7.]

<sup>25</sup> Kenneth May, *Accused’s Right to Speedy Trial Under Federal Constitution – Supreme Court Cases*, 71 L. Ed. 2d 983, 2. [Reproduced in accompanying notebook in Tab 28.]

<sup>26</sup> In general, a delay of eight months or greater is presumptively prejudicial. *Id.* [Reproduced in accompanying notebook in Tab 28.]

<sup>27</sup> The standard tends to be that the more culpable the prosecution’s conduct regarding the delay, the better defendant’s claim. *Id.* [Reproduced in accompanying notebook in Tab 28.]

(4) what *prejudice* the defendant has suffered by the delay.<sup>29</sup>

The length of delay is often the “triggering mechanism”

since until there is a presumptively prejudicial delay, there is no need to apply the balancing test.<sup>30</sup>

None of these factors is a “necessary or sufficient condition” to finding a deprivation of the rights to a speedy trial. Instead, these factors must be considered together with the circumstances in any particular case.<sup>31</sup> The circumstances include both intentional and unintentional delays.

“Unintentional delays such as those caused by overcrowded court dockets or understaffed prosecutors were among the factors to be weighed less heavily than intentional delays, calculated to hamper the defense, in determining whether the right to a speedy trial has been violated, but such unintentional delays must nevertheless be considered, since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.”<sup>32</sup>

Furthermore, U.S. courts have recognized that, under certain circumstances, a pre-indictment delay may be taken into account in speedy trial claims.<sup>33</sup> The speedy trial

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<sup>28</sup> A defendant who waits until the trial is over and he has lost is unlikely to prevail. *Id.* [Reproduced in accompanying notebook at Tab 28.]

<sup>29</sup> Greater weight is given to prejudice which impairs the defendant’s ability to defend himself, such as the death or unavailability of witnesses. *Id.* [Reproduced in accompanying notebook in Tab 28.]

<sup>30</sup> *Id.* [Reproduced in accompanying notebook in Tab 28.]

<sup>31</sup> *Id.* [Reproduced in accompanying notebook in Tab 28.]

<sup>32</sup> *See Id.* at 8. [Reproduced in accompanying notebook in Tab 28.]

<sup>33</sup> *See May, supra* note 25, at 11 and 12, discussing *Smith v. United States*, 360 US 1 (1959) and *United States v. MacDonald*, 456 US 1, (1982) where the Supreme Court decided that under appropriate circumstances, the accused may invoke Sixth Amendment protection for pre-indictment delay. [Reproduced in accompanying notebook in Tab 28.]

clause of the Sixth Amendment does not apply to time, however, in which defendants in the criminal case were neither under indictment nor subject to any official restraint where:

- (1) defendant's indictment had been dismissed by the trial court, and
- (2) defendants had been unconditionally released pending appellate review of dismissal of their indictment.<sup>34</sup>

Furthermore, delays prior to the final disposition of the defendant's guilt or innocence do not violate the speedy trial clause when the delays were a result of appeals after trials.<sup>35</sup>

In federal prosecutions, speedy trial problems are covered by the Speedy Trial Act, which, as a very general rule, provides that the time between indictment and commencement of trial must normally be no more than 70 days, though it does allow various "periods of delay" that are not included in the 70-day limit.<sup>36</sup> Most states have developed similar statutes though the length of delays varies. More urban states, for example, are likely to have longer time limits because their caseloads are very heavy as compared to more rural states which may have shorter time limits because their court systems tend to have lighter caseloads.<sup>37</sup> Furthermore, nearly all states have clauses in

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<sup>34</sup> See May, *supra* note 25, at 13, discussing *States v. Loud Hawk*, 474 US 302 (1986). [Reproduced in accompanying notebook in Tab 28.]

<sup>35</sup> See May, *supra* note 25, at 18, discussing *Harrison v. United States*, 392 US 219 (1968). [Reproduced in accompanying notebook in Tab 28.]

<sup>36</sup> Time limits and exclusions are given in the Speedy Trial Act, 18 USCS §3161 (2001). [Reproduced in accompanying notebook in Tab 5.]

<sup>37</sup> See Missouri Criminal Procedure, Notes to Rule 50 which states, "Each [potential statute] shall include rules which specify time limits and a means for reporting the status of criminal cases. The appropriate length of the time limits is left to the discretion of the [states]. This permits each [state court] to establish time limits that are appropriate in

their state rules of criminal procedure for undue delay which are reinforced by these statutes.<sup>38</sup>

One example of this is the Texas Criminal Rules of Procedure which include an entire section that describes how to determine undue delay.<sup>39</sup> In Texas, the time limit extends to 120 days before undue delay may be triggered and a number of time exclusions that can be subtracted when the computation of delay occurs.<sup>40</sup> The time exclusions include a general catch-all type clause stating that “any other reasonable period of delay that is justified by exceptional circumstances” may be subtracted from the delay computation as well.<sup>41</sup> This, however, requires judicial discretion which limits the amount of frivolous attempts of using this last exclusion. Overall, though, these

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light of its criminal caseload, frequency of grand jury meetings, and any other factors which affect the progress of criminal actions.” [Reproduced in accompanying notebook in Tab 39 (second Tab 9).]

<sup>38</sup> See Judicial Rules and Procedures (Alabama), [wysiwyg://33/http://www.alacourt.org/locations/Rules/Criminal/rule04-3.htm](http://www.alacourt.org/locations/Rules/Criminal/rule04-3.htm) [Reproduced in accompanying notebook in Tab 38 (second Tab 8).]

<sup>39</sup> Lawyer’s Cooperative Publishing Company, *Criminal Procedure: Rights of the Accused*, 20 Tex Jur Criminal Law §1477. [Reproduced in accompanying notebook in Tab 29.]

<sup>39</sup> Some exclusions include: any period during which defendant is incompetent to stand trial, a period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel, as well as several others. *Id.* at 1 and 2. [Reproduced in accompanying notebook in Tab 29.]

<sup>39</sup> *Id.* [Reproduced in accompanying notebook in Tab 29.]

<sup>40</sup> Some exclusions include: any period during which defendant is incompetent to stand trial, a period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel, as well as several others. *Id.* at 1 and 2. [Reproduced in accompanying notebook in Tab 29.]

<sup>41</sup> *Id.* [Reproduced in accompanying notebook in Tab 29.]



exceptions are substantial. Indeed, in one case, a four year delay was not found to be in violation of speedy trial due to the subtraction of time promulgated by these exceptions.<sup>42</sup>

The remedy for speedy trial infringements in the United States is the same as in the ICTR: dismissal of the indictment.<sup>43</sup> Because the remedy has such serious consequences, courts tend to interpret speedy trial statutes narrowly.<sup>44</sup>

## 2. *Canada*

In Canada, the accused's right to a speedy trial is commonly referred to the accused's right to be tried within a reasonable time. This right is put forward in the Canadian Charter of Rights and Freedoms.<sup>45</sup> Unlike in the United States, there is no specific statute at either the provincial or national level that defines the parameters of this right. Both levels of the Canadian system rely on Canadian Supreme Court precedent to address questions of undue delay.<sup>46</sup>

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<sup>42</sup> See *Id.* at 3, discussing *United States v. Macdonald*, 71 Ed 2d 696 (1982). [Reproduced in accompanying notebook in Tab 29.]

<sup>43</sup> See May, *supra* note 25, at 9, discussing *Barker v. Wingo*, 407 US 514 (1972) where the court held that, "The only possible remedy for the denial of the right of speedy trial is dismissal of the indictment." [Reproduced in the accompanying notebook in Tab 28.]

<sup>44</sup> *Id.* [Reproduced in accompanying notebook in Tab 28.]

<sup>45</sup> According to s. 11 (b) of the Canadian Charter of Rights and Freedoms: 11. Any person charged with an offense has the right... (b) to be tried within a reasonable time... [Reproduced in accompanying notebook in Tab 1.]

<sup>46</sup> This includes Quebec even though Quebec has long been considered a "mixed jurisdiction" rather than simply common law as are other Canadian provinces. See VERNON VALENTINE PALMER, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY, 329-335. [Reproduced in accompanying notebook in Tab 24.]

Primarily, the general approach to a determination as to whether this Charter right has been infringed is not by the application of an elemental test but instead by a judicially determined balancing -of - interests test.<sup>47</sup> The commonly accepted factors to be weighed are:

- (1) the length of delay;<sup>48</sup>
- (2) waiver of time periods;<sup>49</sup>
- (3) the reasons for the delay, including:
  - (a) inherent time requirements of the case,<sup>50</sup>
  - (b) actions of the accused,<sup>51</sup>
  - (c) actions of the crown,<sup>52</sup>
  - (d) limits on institutional resources,<sup>53</sup> and

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<sup>47</sup> *High Court Clarifies Ruling of Trial Delays*, THE TORONTO STAR, 2 (1992). [Reproduced in accompanying notebook in Tab 35 (second Tab 5).]

<sup>48</sup> The point of unreasonable delay begins usually between eight and ten months. *Id.* [Reproduced in accompanying notebook in Tab 35 (second Tab 5).]

<sup>49</sup> A certain amount of time may be excluded from the calculation of delay for reasons dictated by the court. *Id.* [Reproduced in accompanying notebook in Tab 35 (second Tab 5).]

<sup>50</sup> Each case differs in complexity. The more complex it is, the greater amount of delay allowed. Courts will make little allowance for delay in simple cases. *Id.* [Reproduced in accompanying notebook in Tab 35(second Tab 5).]

<sup>51</sup> *See Regina v. Gordon*, 1987 W.C.B.J. LEXIS 11095. If delay is a result of the accused's actions, the accused is less likely to win the claim. [Reproduced in accompanying notebook in Tab 12.]

<sup>52</sup> Purposeful delay by the prosecutor weighs heavily in favor of the accused's claim of undue delay. *See High Court Clarifies Ruling of Trial Delays*. [Reproduced in accompanying notebook in Tab 35 (second Tab 5).]

- (e) other reasons for delay; and
- (4) prejudice to the accused.<sup>54</sup>

This judicial process requires an examination of the length of delay and its assessment in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable.<sup>55</sup>

The period of delay to be examined is the time elapsed from the date of the charge to the end of the trial.<sup>56</sup> Like the system in the United States, unreasonable delay infringements in Canada are triggered by an assertion by the defendant who then has the legal burden of establishing a rights violation.<sup>57</sup> However, if the actual length of delay is unexceptional, for example it failed to exceed eight months, no inquiry is warranted and no explanation for the delay is called for.<sup>58</sup>

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<sup>53</sup> The Canadian courts tend to be lenient if particular jurisdictions have abnormally large caseloads and lack the resources and staff to deal with it. However, the Supreme Court has said that this excuse does have limitations as well. *Id.* [Reproduced in accompanying notebook in Tab 35 (second Tab 5).]

<sup>54</sup> However, in cases where length of delay is exceptionally long, prejudice may be inferred simply from the length of the delay. *Id.* [Reproduced in accompanying notebook in Tab 35 (second Tab 5).]

<sup>55</sup> *Id.* [Reproduced in accompanying notebook in Tab 35 (second Tab 5).]

<sup>56</sup> *Id.* at 3. [Reproduced in accompanying notebook in Tab 35 (second Tab 5).]

<sup>57</sup> “An inquiry into unreasonable delay is triggered by an application under s. 24 (1) of the Charter. The applicant has the legal burden of establishing a Charter violation.” *Id.* [Reproduced in accompanying notebook in Tab 35 (second Tab 5).]

<sup>58</sup> “The inquiry, which can be complex, should only be undertaken if the period is of sufficient length to raise an issue as to its reasonableness.” *Id.* [Reproduced in accompanying notebook in Tab 35 (second Tab 5).]

Some delay is inevitable. The Canadian Supreme Court has opined on several occasions that a certain amount of delay is warranted, especially in jurisdictions where resources are scarce and the courts and prosecutors are understaffed. Delays resulting from these factors are called “institutional delays” and are given greater leniency.<sup>59</sup> This trend is in part a response to the circumstances such as occurred between October, 1990 and September, 1991 where over 47,000 charges were stayed or withdrawn in Ontario alone because the court/prosecutorial system could not keep up with the old six to eight common law limit to delay under which the courts were operating at that time.<sup>60</sup> Though the court system has become more lenient, it must also be noted that there is a boundary to the delay that can be tolerated on account of resource/staff limitations.<sup>61</sup>

Until 1995, the question of whether the accused on murder charges could initiate unreasonable delay proceedings remained unanswered. In that year, however, the Supreme Court used unreasonable delay to justify dismissing two men accused of murder in Ontario.<sup>62</sup> In this case, the length of delay measured well over 22 months – significantly longer than the usually accepted limits. This has raised a great deal of

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<sup>59</sup> *Regina v. Morin*, 71 C.C.C. (3d) 1, 2 (1992). [Reproduced in accompanying notebook in Tab 13.]

<sup>60</sup> *High Court Clarifies Ruling on Trial Delays*, THE TORONTO STAR, 1 (1992). [Reproduced in accompanying notebook in Tab 35 (second Tab 5).]

<sup>61</sup> “There is a point at which the court will no longer tolerate delay based on the plea of inadequate resources.” *Morin* at 2. [Reproduced in accompanying notebook in Tab 13.]

<sup>62</sup> David Vienneau, *Murder Charges Quashed Over Delay*, THE TORONTO STAR, 1 (1995). [Reproduced in accompanying notebook in Tab 33 (second Tab 3).]

public controversy because it means, essentially, the two potential murderers are free to walk the streets.<sup>63</sup>

The Supreme Court of Canada also settled another area of controversy in unreasonable delay jurisprudence in 1993. It decided at this time that s. 11(b) of the Charter, which gives the right to be tried within a reasonable time, does not protect the accused against appellate delay.<sup>64</sup> However, the Supreme Court did maintain that relief can be sought for the accused under s. 7 of the Charter on the basis that unreasonable appellate delay is an abuse of process.<sup>65</sup>

Overall, the Canadian method of dealing with undue delay is similar to that used in the United States. The balancing test and factors are generally the same. However, Canadian law does not define any specific limits to delay and, as a result, the point where delay becomes unreasonable is on a somewhat sliding scale which depends on multiple factors. This is unlike the U.S. system which defines limits in the Speedy Trial Act federally as well as in other individual statutes for the states. These differences, in the grand scheme of things, are minimal when compared to similarities between the balancing tests used by both the United States and Canada.

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<sup>63</sup>*Id.* [Reproduced in accompanying notebook in Tab 33 (second Tab 3).]

<sup>64</sup> Cristin Schmitz, *S. 11 (b) Doesn't Apply to Delay in Appeal Proceedings*, *S.C.C. Rules*, *THE LAWYER'S WEEKLY*, 1 (1993). [Reproduced in accompanying notebook in Tab 26.]

<sup>65</sup> s. 7 of the Charter guarantees the right to life, liberty, and security of the person and the right not to be deprived thereof except with in the principles of fundamental justice. [Reproduced in accompanying notebook in Tab 1.]

### *3. England*

British jurisprudence regarding an accused's right to trial without undue delay was greatly influenced by England's adoption of the European Convention on Human Rights in 1998. In Article 6.1 of the Convention, all member states are bound to provide for fair trials without undue delay<sup>66</sup>. Furthermore, member states agree to be bound by European Court of Human Rights precedent. Currently, the status of the law in England is somewhat changed from its former self, but the Convention was ultimately not dissimilar to the general principles of rights granted to British citizens, though questions do arise as to whether certain holdings by British courts are in violation of the Convention.<sup>67</sup> However, since the adoption of the Convention is still relatively recent, interpretation of clauses like 6.1 has been fairly difficult for British courts. Also, if the Queen's Bench, the highest court in England, should decide against the accused, the accused could potentially appeal to the European Court of Human Rights.<sup>68</sup>

Traditionally, the jurisprudence within England has followed the common law model of the Scottish system in unreasonable delay cases.<sup>69</sup> In this system, there was a two factor test:

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<sup>66</sup> Article 6.1 of the European Convention on Human Rights states: [Reproduced in accompanying notebook in Tab 3.]

<sup>67</sup> *See Reasonable Time for Trial Starts to Run from Charge*, TIMES NEWSPAPERS LIMITED, 1 (2001). [Reproduced in accompanying notebook in Tab 36 (second Tab 6).]

<sup>68</sup> *See Id.* [Reproduced in accompanying notebook in Tab 36 (second Tab 6).]

<sup>69</sup> The Scottish system is a mixed jurisdiction (as noted in section B.1. of the Legal Discussion). As such, the issue of undue delay is split into undue delay for common law criminal violations (which is the model Britain looks to) and undue delay set out in

(1) Was there undue delay?<sup>70</sup>

(2) Did it result in gross or grave prejudice to the accused?<sup>71</sup>

The British court system now combines this test with precedent in this area from the European Court of Human Rights. In considering when the delay period begins, the European Convention has said that time starts to run when the accused is charged by the police or is served with a summons.<sup>72</sup>

Another new policy is that it is only appropriate now to stay the indictment only if it could amount to an abuse of the process of the court to proceed with the prosecution.<sup>73</sup>

Unlike the United States or Canadian systems, however, a stay may never be imposed where the delay was due to the complexity of the case in question.<sup>74</sup> The European Court actually reinforced, however, the principle that “no stay was to be imposed unless a defendant established on the balance of probabilities that, owing to the delay, he could

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statutory provisions. *See Tudhope v. McCarthy*, 1985 SC (JC) 48, 4. [Reproduced in accompanying notebook in Tab 14.]

<sup>70</sup> More specifically, the question is whether there was an unnecessary period of time taken by the courts or the prosecution. *Supra* note 67. [Reproduced in accompanying notebook in Tab 36 (second Tab 6).]

<sup>71</sup> *Id.* [Reproduced in accompanying notebook in Tab 36 (second Tab 6).]

<sup>72</sup> As opposed, for example, to when the accused is first interviewed by the police. *Id.* [Reproduced in accompanying notebook in Tab 36 (second Tab 6).]

<sup>73</sup> *Id.* [Reproduced in accompanying notebook in Tab 36 (second Tab 6).]

<sup>74</sup> “Even more rarely could a stay properly be imposed in the absence of fault on the part of the complainant or the prosecution, and never where the delay was due merely to complexity.” *Id.* at 2. [Reproduced in accompanying notebook in Tab 36 (second Tab 6).]

suffer serious prejudice to the extent that no fair trial could be held.”<sup>75</sup> In general, the approach to staying proceedings has been confined, much as it was prior to the Convention becoming part of domestic law, to situations where the abuse of process is by the courts or prosecutors is the cause.<sup>76</sup>

One of the biggest differences that came about with the adoption of the Convention was in the area of remedies for undue delay infringement. In particular, now courts have the option to make awards of compensation.<sup>77</sup> Furthermore, if there had been prejudice caused to the accused which interfered with his right to fair trial in a way which could not otherwise be remedied, then it is the stay that is the appropriate remedy. However, in the absence of prejudice of that sort, there is normally no justification under the jurisprudence of the European Court to grant a stay.<sup>78</sup>

## **B. Undue Delay in Two Mixed Jurisdictions**

### ***1. Scotland***

Scotland is a mixed jurisdiction in the sense that it is comprised of principles that are both familiar to common law and civil code jurisdictions. For instance, there are

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<sup>75</sup> *Director of Public Prosecutions and Another v. Tokai and Others*, Privy Council [1996] 3WLR 149. [Reproduced in accompanying notebook in Tab 9.]

<sup>76</sup> *See Reasonable Time for Trial Starts to Run from Charge*, TIMES NEWSPAPERS LIMITED, 1 (2001). [Reproduced in accompanying notebook in Tab 36 (second Tab 6).]

<sup>77</sup> “Where a person was acquitted at a subsequent trial, it could be appropriate for there to be compensation if there had been delay which contravened Article 6.1 of the European Human Rights Convention.” *Id.* [Reproduced in accompanying notebook in Tab 36 (second Tab 6).]

<sup>78</sup> *Id.* [Reproduced in accompanying notebook in Tab 36 (second Tab 6).]



criminal delays that are statutory and some which are considered common law. Those who have been charged statutorily are subject to statutory provisions of procedure whereas those charged with common law offenses then are subject to common law procedural principles.<sup>79</sup> Therefore, the accused's right to trial without undue delay in Scotland has two separate approaches.

As mentioned in the section for the United Kingdom, there is a two part test for deciphering the question of whether the accused's right to a fair trial without undue delay has been breached in the common law. First, the length of the delay is assessed and it must be decided by the court if it is unreasonable under the circumstances. There is no time limit stated, but some judges have opined that the statutory limit of six months should be a guideline.<sup>80</sup> Second, it must be decided how prejudicial the results of the delay were to the accused. The less prejudicial the result, the less likely will the accused succeed in his undue delay claim.<sup>81</sup> Therefore, as in the Canadian system, there is a sort of sliding scale as to the length of delay so long as there is no prejudice.

On the other side of Scottish Law, the Criminal Procedure Act of 1975 sets out strict limitations as to the length of delay allowed before becoming unreasonable.<sup>82</sup> The

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<sup>79</sup> See VERNON VALENTINE PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY*, 203-204. [Reproduced in accompanying notebook in Tab 24.]

<sup>80</sup> See *Tudhope v. McCarthy*, 1985 SC (JC) 48, 4. [Reproduced in accompanying notebook in Tab 14.]

<sup>81</sup> *Id.* [Reproduced in accompanying notebook in Tab 14.]

<sup>82</sup> Section 331 (1) of the Criminal Procedure Act of 1975 provides that proceedings by way of summary complaint in respect of the contravention of any statute or order, unless the statute or order fixes a different period, require to be commenced within six months

six months affirmed in the statutory provision is considerably stricter than Canada's potential ten month limit. Furthermore, the Statute gives a guideline as to how to calculate the six month time limit. Time begins to run at the day that proceedings are commenced.<sup>83</sup> Delay is calculated once the six month period has run out.<sup>84</sup> It is up to the procurator fiscal at this point to demonstrate that no undue delay had occurred.<sup>85</sup> Furthermore, courts here must take into account that "the precise period of delay is always a question of circumstances and degree."<sup>86</sup> Subsequently, the courts are allowed a certain amount of latitude in decision making on the statutory side since facts and circumstances still play a significant role.

As a part of the United Kingdom, however, Scotland became a member of the European Convention of Human Rights in 1998, thus was required to integrate Convention principles with its domestic laws.<sup>87</sup> Therefore, all of the changes made in the law of England as a result of the integration were also made in Scotland. Ergo, the

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after the last date of such contravention. [Reproduced in accompanying notebook in Tab 2.]

<sup>83</sup> This is as opposed to the day the offense was committed. Forensis, *Without Undue Delay – "Young v. MacPhail" Considered*, JOURNAL OF THE LAW SOCIETY OF SCOTLAND, 1 (1991). [Reproduced in accompanying notebook in Tab 27.]

<sup>84</sup> *Id.* [Reproduced in accompanying notebook in Tab 27.]

<sup>85</sup> See *Young v. MacPhail*, [1991] SCCR 630, 4-5. [Reproduced in accompanying notebook in Tab 17.]

<sup>86</sup> *Id.* at 4. [Reproduced in accompanying notebook in Tab 16.]

<sup>87</sup> See *Building Society Worker Freed After Delay*, THE HERALD (Glasgow), 1 (2000). [Reproduced in accompanying notebook in Tab 32 (second Tab 2).]

British and Scottish judicial systems, especially taking into account Scotland's common law side, are more closely linked than ever.

## 2. *South Africa*

South Africa takes yet another approach to defining the parameters of the accused's right to a fair trial without undue delay. South Africa has been criticized by its citizens for unnecessary delay in the criminal trial process.<sup>88</sup> The delay, however, is not due solely to a lack of resources and magistrates.<sup>89</sup> South Africa has a split trial process in which one court hears a case and another determines sentence for those convicted by the first court.<sup>90</sup> This two-stage process involves many inherent delays which is in part at fault in the outrageous backlog in the South African provincial courts.<sup>91</sup>

Subsequently, the South African High Court hears many appeals for undue delay violations. The right to be tried within a reasonable time after having been charged is

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<sup>88</sup> "There are 29 regional court magistrates in the Cape division and each is assigned an average of 200 cases a month. Last month there was a backlog of 6,030.... The local system of criminal justice is one debilitated by inexperienced prosecutors, insufficient magistrates, cumbersome court procedures, delays and postponements and inadequate police investigations." David Yutar, *South Africa; Courts on Brink of Disaster, Says Chief*, AFRICA NEWS, 1 (1999). [Reproduced in accompanying notebook in Tab 34 (second Tab 4).]

<sup>89</sup> Bonile Ngqiyaza, *Two-Tier Trials System is to Stay*, BUSINESS DAY (South Africa), 1, (2000). [Reproduced in accompanying notebook in Tab 31.]

<sup>90</sup> See VERNON VALENTINE PALMER, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY, 96-99. [Reproduced in accompanying notebook in Tab 24.]

<sup>91</sup> *Supra* note 60. [Reproduced in accompanying notebook in Tab 35 (second Tab 5).]

stated in the South African Interim Constitution.<sup>92</sup> The High Court uses many of the same factors as the aforementioned to weigh undue delay considerations, such as:

- (1) conduct of the prosecution;<sup>93</sup>
- (2) the appropriateness of the remedy sought;<sup>94</sup>
- (3) whether delay could jeopardize the fairness of the trial itself;<sup>95</sup>
- (4) conduct of the accused;<sup>96</sup>
- (5) the gravity, nature, and complexity of the case;<sup>97</sup> and
- (6) length of the delay.<sup>98</sup>

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<sup>92</sup> In Section 25 (3) (a) of the South African Interim Constitution, states: “Every accused person shall have the right to a fair trial, which shall include the right: (a) to a public trial before an ordinary court of law within a reasonable time after having been charged.” [Reproduced in accompanying notebook in Tab 4.]

<sup>93</sup> “Where there was a period of ostensible culpable inactivity on the part of the prosecution, an inference of unreasonableness could more readily be drawn if no explanation were proffered.” *Wild v. Hoffert*, 1998 (6) BCLR 656 (CC), 2. [Reproduced in accompanying notebook in Tab 16.]

<sup>94</sup> Unlike other jurisdictions, the South African High Court will only grant a permanent stay if the trial would have been so prejudiced against the accused that guilt would have been presupposed. The High Court prefers to grant less drastic remedies. *Id.* at 15. [Reproduced in accompanying notebook in Tab 16.]

<sup>95</sup> For example, if there was a death or disappearance of witnesses as opposed to if the prejudice incurred would have no actual bearing on the trial itself, such as would be the case if the accused lost reputation, became socially ostracized, or lost employment of income. *Id.* at 5. [Reproduced in accompanying notebook in Tab 16.]

<sup>96</sup> “An accused who had been party to or the primary cause of delay would not be heard to complain of such delay.” *Id.* at 6. [Reproduced in accompanying notebook in Tab 16.]

<sup>97</sup> “This is not only a consideration in its own right but it interacts with the time lapse, and also with the prejudice suffered by the accused.” *Id.* [Reproduced in accompanying notebook in Tab 16.]

<sup>98</sup> “Although the starting point is to establish whether the time lapse between charge and trial is reasonable, time is not merely a trigger to an enquiry as to prejudice... no formal

The South African High Court has consistently and sometimes forcefully maintained that a permanent stay should be a rarely used remedy.<sup>99</sup> Instead, this court has come up with several novel and interesting alternative remedies.<sup>100</sup> Some of these are outlined in this statement,

“If the accused is in custody his or her release can be considered. Conditions of bail can be examined afresh and lightened. A relatively short period of remand can be ordered, coupled with an intimation that it will be the last unless there is a substantial application for further remand. Special orders can be considered to facilitate access by an accused who is in custody to defense witnesses or legal advisors. If the accused is not in custody but suffers some prejudice in having to attend court repeatedly, i.e. if difficult or expensive travel arrangements have to be made, steps to assist the accused or alleviate the burden can be considered.”<sup>101</sup>

In essence, the court attempts to reduce prejudice, which is the basic trigger to undue delay, by the use of these remedies. The High Court ostensibly admits that a stay of the prosecution would not be granted in the absence of “*irreparable* trial-related prejudice or *extraordinary* or *extreme* circumstances.”<sup>102</sup>

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line is drawn in our law between particular spans regarded as acceptable and those that do not pass muster. Our approach, rather, is to make a flexible evaluation of the time elapsed in the context of and in conjunction with all other relevant features of the case.” *Id.* at 5-6. [Reproduced in accompanying notebook in Tab 16.]

<sup>99</sup> *Id.* at 7. [Reproduced in accompanying notebook in Tab 16.]

<sup>100</sup> Section 7 (4) (A) of the Interim Constitution renders the aggrieved person to “appropriate relief.” *Id.* at 4. [Reproduced in accompanying notebook in Tab 16.]

<sup>101</sup> *Id.* at 15. [Reproduced in accompanying notebook in Tab 16.]

<sup>102</sup> *Id.* at 2. [Reproduced in accompanying notebook in Tab 16.]

### C. Undue Delay in Civil Code Jurisdictions

Western European civil code jurisdictions are based on several law traditions: Roman civil law, canon law, and commercial law.<sup>103</sup> However, substantive criminal law in western, capitalist civil law countries such as France, Belgium, and Germany is similar in many ways to that of common law countries.<sup>104</sup> There are, nevertheless, significant procedural differences. Civil code jurisdictions rely, ideally, on statutory provisions or codifications of the law. Therefore, all crimes are statutorily based.<sup>105</sup> The three civil code jurisdictions analyzed here are also all inquisitorial systems which often require a lengthier court process. This directly effects the question of the right to trial without undue delay. Subsequently, courts in some of those systems have traditionally been lenient with the prosecution in cases where delay was an issue. The European Convention of Human Rights, however, has made much headway in delay jurisprudence in many of these countries.<sup>106</sup>

#### 1. France

France has a reputation for being one of the worst culprits for undue delay rights infringements in Western Europe.<sup>107</sup> Indeed, as a result of the integration of the law of

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<sup>103</sup> JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION*, 132 (1969). [Reproduced in accompanying notebook in Tab 20.]

<sup>104</sup> *Id.* [Reproduced in accompanying notebook in Tab 20.]

<sup>105</sup> As opposed to the United States, for example, where many crimes are common law based. *Id.* at 134. [Reproduced in accompanying notebook in Tab 20.]

<sup>106</sup> See Andrew West, *Reform of French Criminal Justice*, *NEW LAW JOURNAL*, Vol 150 No 6956 p 1542, 2 (2000). [Reproduced in accompanying notebook in Tab 25.]

<sup>107</sup> See *Id.* [Reproduced in accompanying notebook in Tab 25.]

the European Convention of Human Rights, France has had to undergo reform in many procedural areas.<sup>108</sup> One of these was the setting out of a number of basic principles of criminal procedure in the preliminary article to the Criminal Procedure Code. Indeed, section III includes an explicit provision for trial without undue delay.<sup>109</sup> Despite the adoption of this provision, the French system has still attempted to allow lengthy delays. However, with the European Court having the jurisdiction to hear appeals of national decisions for questions of potential Convention breach, the French system will likely become less tolerant of lengthy trial delays.<sup>110</sup>

In one case, which was recently decided by the European Court, *Pélissier and Sassi v. France*, this situation was very evident.<sup>111</sup> According to the facts of this case, the accused was charged in 1984 and was not tried until 1994.<sup>112</sup> The delay question was raised at each level of the French Court system, but none of these courts, including the

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<sup>108</sup> “In the 1990 report of the Delmas-Marty Commission on criminal procedure, it was recognized that the French criminal justice system needed to give greater recognition to human rights if its coercive powers were to be regarded as legitimate.” *Id.* [Reproduced in accompanying notebook in Tab 25.]

<sup>109</sup> “A substantive decision on the accusations against the accused must be made within a reasonable time.” *Id.* at 2. [Reproduced in accompanying notebook in Tab 25.]

<sup>110</sup> *See Pélissier and Sassi v. France*, ECHR no. 25444/94 (25/5/99). [Reproduced in accompanying notebook in Tab 11.]

<sup>111</sup> The accused in this case was charged for forgery of commercial documents and fraud by the falsification of a balance sheet in a commercial transaction. The charge was in 1984 and the first lower court decision was delivered by the Toulon Court in 1991. At each court in the French system, the accused’s right to speedy trial under Article 6 of the European Convention of Human Rights was dismissed. The European Court finally decided in favor of the accused because a nine year delay in the trial proceedings was unreasonable since the circumstances of the case were not complex and the accused had done nothing to hinder the trial proceedings at any point. *Id.* at 17. [Reproduced in accompanying notebook in Tab 11.]

<sup>112</sup> *Id.* [Reproduced in accompanying notebook in Tab 11.]

French high court,<sup>113</sup> was willing to grant relief to the accused on the grounds of unreasonable delay as stated by Article 6.1 of the Convention.<sup>114</sup> The case was then appealed to the European Court which did find in favor of the accused.<sup>115</sup>

The most important principle to pull out of this case is the Court's assessment of the circumstances for the nine year delay. The factors taken into account that were included by the Court were:

- (1) the complexity of the case;<sup>116</sup>
- (2) the conduct of the applicants;<sup>117</sup>
- (3) the conduct of judicial authorities;<sup>118</sup> and
- (4) the length of the delay.<sup>119</sup>

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<sup>113</sup> The French high court for criminal proceedings is the Court of Cassation. *See* RENE DAVID, ENGLISH AND FRENCH LAW: A COMPARISON IN SUBSTANCE, 46. (1980) [Reproduced in accompanying notebook in Tab 23.]

<sup>114</sup> *See* Article 6.1 of the European Convention on Human Rights. [Reproduced in accompanying notebook in Tab 3.]

<sup>115</sup> "Having regard to all the evidence before it, the Court holds that the reasonable time requirement of Article 6.1 has been exceeded." *Pélissier* at 20. [Reproduced in accompanying notebook in Tab 11.]

<sup>116</sup> The Court in *Pélissier* found that the legal structures of French law should have been sophisticated enough to sift through the moderate complexities of the case with less delay than occurred. *Id.* at 19. [Reproduced in accompanying notebook in Tab 11.]

<sup>117</sup> In *Pélissier*, the Court found that there was nothing to suggest that the applicants were responsible for the delays in the proceedings. Had they been, the outcome may have been less favorable to them. *Id.* [Reproduced in accompanying notebook in Tab 11.]

<sup>118</sup> The Court states: "In the light of its findings that the case was not complex and that the applicant's conduct had been reasonable, the Court holds that there was no justification for the [judicial authorities'] investigation taking more than five years... there were unjustified delays and periods of inactivity during the investigation." *Id.* [Reproduced in accompanying notebook in Tab 11.]



The case of *Pélessier* also starts the clock at the time the accused was charged.<sup>120</sup>

Furthermore, the accused was granted compensatory damages rather than a dismissal of the charges.<sup>121</sup> It is, therefore, evident that the European Court is not an advocate for dismissal of the charges in cases where there has been undue delay since a significant length of time, such as nine years, did not warrant anything greater than compensatory damages.<sup>122</sup> It is to this guideline which the French Courts are now bound to use in order to examine undue delay cases.

## 2. *Belgium*

Belgium, as another member state of the European Convention of Human Rights, is bound to precedent set out by the European Court including issues of unreasonable delay. Subsequently, the balancing test in Belgium is the same used by the European Court in the case of *Pélessier*.<sup>123</sup> One point made by the Court in *Pélessier* was that the length of delay began with the criminal charge of the accused. This principle, however, was first expounded in a Belgian case before the European Court in *Deweert v.*

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<sup>119</sup> Though no particular time limit is given as unreasonable, this instance where proceedings took over nine years clearly qualifies as unreasonable. *Id.* [Reproduced in accompanying notebook in Tab 11.]

<sup>120</sup> *Id.* at 18. [Reproduced in accompanying notebook in Tab 11.]

<sup>121</sup> The Court awarded the accused 90,000 francs in compensatory damages as a result of the unreasonable delay. *Id.* at 19. [Reproduced in accompanying notebook in Tab 11.]

<sup>122</sup> *Id.* [Reproduced in accompanying notebook in Tab 11.]

<sup>123</sup> The factors weighed in *Pélessier* include: (1) the complexity of the case; (2) the conduct of the applicants; (3) the conduct of judicial authorities; and (4) the length of the delay. *Id.* [Reproduced in accompanying notebook in Tab 11.]

*Belgium*.<sup>124</sup> The Court also opined that “arrest” did not have to be physical detention. Instead, as was the factual situation in *Deweer*, arrest for the purposes of a delay starting point can be considered as beginning at the moment when the person was officially notified that he would be prosecuted or the moment when preliminary investigations were opened.<sup>125</sup> The court in this decision continued by adding:

“The prominent place held in a democratic society by the right to a fair trial prompts the Court to prefer a substantive, rather than a formal, conception of the charge contemplated by Article 6.1. The Court is compelled to look behind the appearances and investigate the realities of the procedure in question.”<sup>126</sup>

### 3. *Germany*

Like Belgium and France, Germany is a civil law country that is also a member of the European Convention of Human Rights. Unlike France, however, Germany has had few of its undue delay cases repealed by the European Court. This is a result of the strength of Constitutional rights in Germany.<sup>127</sup> Germany has seriously enforced these rights as a result of the infringement on all areas of basic human rights in Germany

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<sup>124</sup> This case held that the clock begins to run at the time of initial arrest. However, in this case, the accused was a butcher who had failed to follow national guidelines for pig products. He was notified that there was a criminal charge against him but he was never actually arrested. The Court held that this notification was equal to that of an actual, physical arrest so it was at that moment where time began to run. *Deweer v. Belgium*, ECHR, 1-5 (27/2/80). [Reproduced in accompanying notebook in Tab 8.]

<sup>125</sup> *Id.* at 16. [Reproduced in accompanying notebook in Tab 8.]

<sup>126</sup> This decision was prompted by the fact that there was some question as to whether Mr. Deweer was accused criminally because there was never a formal arrest. Instead Mr. Deweer received notification that criminal charges were being raised against him. *Id.* [Reproduced in accompanying notebook in Tab 8.]

<sup>127</sup> German Constitutional rights are called the “Basic Rights.” JOHN HENRY MERRYMAN, DAVID S. CLARK, AND JOHN O. HALEY, *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA*, 559. [Reproduced in accompanying notebook in Tab 20.]

during World War II. The German Constitution subsequently contains several provisions on the citizen's rights in relation to trial, arrest, and detention.<sup>128</sup> Consequently, the decision handed down in *Wemhoff v. Germany* is not a surprise.<sup>129</sup>

The German national court had ruled that the accused in that case, who had been detained for more than three years before his trial proceedings began, could not win a claim that Germany had breached Article 6.1 of the European Convention on Human Rights.<sup>130</sup> This case further defined Article 6.1 to a much greater extent. First, the European Court clarified the relationship between Articles 5.3<sup>131</sup> and 6.1.<sup>132</sup> The court opined that the balancing test of both Articles used the same factors but since 5.3 involves detainment or incarceration before trial, the balancing test for that section is

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<sup>128</sup> *Id.* at 560. [Reproduced in accompanying notebook in Tab 20.]

<sup>129</sup> *Wemhoff v. Germany*, ECHR (27/6/68). [Reproduced in accompanying notebook in Tab 15.]

<sup>130</sup> The European Court affirmed the German high court decision that there was no breach of Article 6.1 of the European Convention on Human Rights. Though there was considerable delay, it was a result of the extreme complexity of the facts in that case. The accused was involved in a big money laundering scheme that involved multiple victims, accomplices, banks (both in Germany and other countries), and companies. *Id.* at 28. [Reproduced in accompanying notebook in Tab 15.]

<sup>131</sup> Article 5.3 of the Convention concerns the accused's right to not be detained for an unreasonable length of time without trial. [Reproduced in accompanying notebook in Tab 3.] In this case, the accused had been detained for the entire length of the proceedings – over three years. *Id.* [Reproduced in accompanying notebook in Tab 15.]

<sup>132</sup> Article 6.1 of the European Convention of Human Rights pertains to the accused's right to a speedy trial. [Reproduced in accompanying notebook in Tab 3.]

more apt to tip in favor of the accused.<sup>133</sup> The factors considered to assess unreasonable delay are:

- (1) the actual length of delay;<sup>134</sup>
- (2) material, moral, or other effects on the accused;<sup>135</sup>
- (3) conduct of the accused;<sup>136</sup>
- (4) difficulties in the investigation of the case;<sup>137</sup> and
- (5) the manner in which the investigation was conducted.<sup>138</sup>

The conclusion in any particular case will be the outcome of an evaluation of all the above elements.<sup>139</sup>

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<sup>133</sup>The *Wemhoff* Court made the distinction between the balancing of the factors for purposes of 6.1 and 5.3: “The question of whether the time was reasonable for the purposes of Article 5.3 or of Article 6.1 must be judged differently in the two cases; the former, being intended to safeguard the physical freedom of the individual, requires stricter application than the latter, the object of which is to protect the individual against abnormally long judicial proceedings.” *Wemhoff* at 13. [Reproduced in accompanying notebook in Tab 15.]

<sup>134</sup> Time begins to run at the time of the charge. *Id.* at 10. [Reproduced in accompanying notebook in Tab 15.]

<sup>135</sup> This idea is similar to prejudice against the accused both in the trial proceedings and in society caused by the delay. *Id.* at 11. [Reproduced in accompanying notebook in Tab 15.]

<sup>136</sup> Courts should ask themselves: “Did [the accused] contribute to the delay or expedition of the investigation or trial? Was the procedure delayed as a result of applications for release pending trial, appeals, or other remedies resorted to by him?” *Id.* [Reproduced in accompanying notebook in Tab 15.]

<sup>137</sup> A case’s complexity is in respect to facts, number of witnesses, co-accused, and other circumstances. *Id.* [Reproduced in accompanying notebook in Tab 15.]

<sup>138</sup> Courts should consider the following in this category: (a) the system of investigation applicable, and (b) the conduct of the authorities of the investigation. *Id.* [Reproduced in accompanying notebook in Tab 15.]

Another conclusion drawn by the Court in *Wemhoff* is that Article 6 can also apply to appellate proceedings:

“The period to be taken into consideration in applying this provision lasts at least until acquittal or conviction, even if this decision is reached on appeal. There is furthermore no reason why the protection given to the persons concerned against the delays of the court should end at the first hearing in a trial: unwarranted adjournments or excessive delays on the part of trial courts are also to be feared.”<sup>140</sup>

This is a significant pronouncement by the European Court because it considerably broadens undue delay claims and allows the possibility of a great deal of added litigation. It is with these guidelines that Germany currently decides undue delay cases.

#### **D. Undue Delay in the ICTY/ICTR**

As seen by the case of *Jean-Bosco Barayagwiza*, the ICTY and ICTR have come across the issue of the accused’s right to fair trial without undue delay.<sup>141</sup> This principle is important not just because human rights calls for it but also because the ICTY and ICTR need to establish themselves as a fair, unbiased body in order to gain international confidence.<sup>142</sup> After Nuremburg, there was a great deal of controversy in the area of enforcement of the rights of the accused which left speculation as to the validity of

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<sup>139</sup> *Id.* [Reproduced in accompanying notebook in Tab 15.]

<sup>140</sup> *Id.* at 20. [Reproduced in accompanying notebook in Tab 15.]

<sup>141</sup> It is Article 21 (4)(c) of the Statute for the ICTR/ICTY refers to the accused’s right to trial without undue delay. JOHN R.W.D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA*, 182 (1998) [Reproduced in accompanying notebook in Tab 21.]

<sup>142</sup> MICHAEL P. SCHARF, *BALKAN JUSTICE*, 220 (1997). [Reproduced in accompanying notebook in Tab 22.]

International War Crimes Tribunals worldwide.<sup>143</sup> However, both the ICTY and ICTR take this issue very seriously and attempted to rectify this problem by strong enforcement of Article 28 (4)(c). Thus we arrive at the decision made in *Barayagwiza* where the charges against the accused were dismissed as a result of undue delay by the prosecution.<sup>144</sup>

This is not an issue, however, that only the ICTR has run into. One of the more interesting results of undue delay problems in the ICTY was an attempt to expedite trials by means of pre-trial briefs and by requesting parties to stipulate any non-disclosed facts before trial.<sup>145</sup> Also, with the same goal in mind, Trial Chamber II, in the *Dokmanović* case in November 1997, ordered that witness statements be presented to the Chamber before trial, not as evidence, but to enable the Chamber to familiarize itself with the case so the trial proceedings could move quickly<sup>146</sup>

The decision in *Barayagwiza* was based primarily on Article 28 and other international law, such as the European Convention of Human Rights. However, the Trial Chamber of the ICTY, in the case of *Prosecutor v. Tadić*, emphasized that the Tribunal must “interpret provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies.”<sup>147</sup> The Trial Chamber went

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<sup>143</sup> *Id.* at 11. [Reproduced in accompanying notebook in Tab 22.]

<sup>144</sup> *See Barayagwiza* at 30. [Reproduced in accompanying notebook in Tab 10.]

<sup>145</sup> *See JONES* at 181. [Reproduced in accompanying notebook in Tab 21.]

<sup>146</sup> *Id.* at 182. [Reproduced in accompanying notebook in Tab 21.]

<sup>147</sup> ANDRE KLIP AND GORAN SLUITER, ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, VOLUME I: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 190. [Reproduced in accompanying notebook in Tab 18.]

on to make a distinction between ordinary criminal law which these courts deal with and the heinous crimes committed by the perpetrators in Yugoslavia.<sup>148</sup> The Trial Chamber even compares itself with a military tribunal which may grant only limited rights of due process for the accused.<sup>149</sup> However, if the goal of the ICTY and ICTR is to increase the credibility of international war crimes tribunals, this may not be the approach to take because it is too reminiscent of the so often derogated Nuremburg Tribunal.

#### **E. Test for the ICTR**

In order to both protect the rights of the accused and allow the prosecutor to thoroughly prepare a fair case, some sort of factor based test must be adopted by the ICTR. Any test which looks at the complexity of the case will tend to tilt in favor of longer delays since most of the Tribunal cases are complex whereas tests which look more at the length of delay will tilt the other way since the Tribunal is backlogged and most cases are unlikely to be resolved quickly. In *Barayagwiza*, the Chamber conceded that the prosecutor was not directly responsible for the delay but it did not find that decisive.<sup>150</sup> Therefore, a test that balances several factors may be more efficient under the circumstances. I suggest a factor balancing test such as that used internationally that weighs:

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<sup>148</sup> *Id.* at 191. [Reproduced in accompanying notebook in Tab 18.]

<sup>149</sup> *Id.* [Reproduced in accompanying notebook in Tab 18.]

<sup>150</sup> Pre-trial delay in this case was primarily caused by the difficulties that arose out of the accused's transfer from Cameroon. *See Barayagwiza*. [Reproduced in accompanying notebook in Tab 10.]

- (1) the prejudice to the accused caused by the delay;<sup>151</sup>
- (2) the actual length of delay;<sup>152</sup>
- (3) the complexity of the case;<sup>153</sup>
- (4) the conduct of the prosecution;<sup>154</sup>
- (5) the conduct of the accused;<sup>155</sup> and
- (6) the lack of resources and other challenges faced by the prosecution.<sup>156</sup>

When these factors are assessed, it helps to clarify whether the delay was unreasonable under the circumstances of any particular case.

The ICTR may also want to adopt a point in time in which the balancing test is then triggered. For example, at six months after indictment<sup>157</sup>, if trial has yet to commence, the accused can raise the issue with the Tribunal and the factors would then

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<sup>151</sup> Refer to the prejudice theories that are weighed in the United States, Canada, and South Africa in earlier sections of the memorandum.

<sup>152</sup> There is a choice here between: (1) the common law view that length of delay can be considered unreasonable after a certain amount of time outlined by statute is exceeded which also acts as a trigger to the accused's claim, and (2) the civil code view that the length of delay does not need a definite amount of time to be considered unreasonable so long as all the factors in the assessment weigh more heavily on one side or the other. Refer back to earlier sections in the legal discussion.

<sup>153</sup> See *Wemhoff* at 28. [Reproduced in accompanying notebook in Tab 15.]

<sup>154</sup> So long as the accused is not himself responsible for the delay, he may make this claim. See *Pélissier* at 19. [Reproduced in accompanying notebook in Tab 11.]

<sup>155</sup> *Id.* [Reproduced in accompanying notebook in Tab 11.]

<sup>156</sup> Refer to United States and Canada sections.

<sup>157</sup> With any exclusions in time that may be applicable. A good model for these time exclusions can be found in the Texas Code of Criminal Procedure. Lawyer's Cooperative Publishing Company, *Criminal Procedure: Rights of the Accused*, 20 Tex Jur Criminal Law §1477. [Reproduced in accompanying notebook in Tab 29.]



be balanced to determine if the delay was unreasonable under the circumstances of that specific case. With a test such as this, the ICTR would have an internationally accepted mechanism for undue delay claims which would both be fair to the accused and allow a considerable over worked Prosecutor's office to be able to prioritize with greater facility.