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# THE COMPLEXITY OF INTERNATIONAL CRIMINAL TRIALS IS NECESSARY

STUART FORD\*

## ABSTRACT

*There is a widespread belief among both academics and policymakers that international criminal trials are too complex. As a result, tribunals have come under enormous pressure to reduce the complexity of their trials. However, changes to trial procedure have not meaningfully affected trial complexity. This Article explains why these changes have failed and argues that the complexity of international criminal trials is necessary for them to achieve their purposes.*

*Using a multiple regression model of the factors driving trial complexity at the International Criminal Tribunal for the former Yugoslavia (ICTY), this Article shows that the largest drivers of complexity are two factors that courts cannot control: the accused's seniority within the political or military hierarchy and whether the accused is a direct perpetrator. The complexity of international criminal trials appears to be driven by the need to attribute responsibility for serious violations of international criminal law to accused who are often both organizationally and geographically distant from the crimes with which they are charged. Attribution of responsibility is a necessary feature of most international criminal trials, and complexity associated with this process cannot be easily eliminated.*

*This Article considers various ways in which complexity could be significantly reduced—for example by making international criminal law violations strict liability offenses—but these all come with serious drawbacks that would likely undermine the purposes of international criminal justice. Ultimately, it appears that international criminal trials must be complex if they are to achieve the goals we have set for them.*

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## I. INTRODUCTION

International criminal trials are extremely complex.<sup>1</sup> The average trial at the International Criminal Tribunal for the former Yugoslavia (ICTY) takes 176 trial days and involves more than 120 witnesses and 2,000 exhibits.<sup>2</sup> In comparison, the average criminal trial in the United States takes less than one day<sup>3</sup> and an average murder trial takes only three or four days.<sup>4</sup> Even the most complex criminal trials conducted in the United States are only slightly more complex than the average ICTY trial.<sup>5</sup> Furthermore, two ICTY trials have been more complex than the prosecution of senior Nazi leaders at the International Military Tribunal at Nuremberg.<sup>6</sup>

As a result, there is a widespread belief that international criminal trials are too complex<sup>7</sup>—and international tribunals have come under enormous pressure to reduce that complexity.<sup>8</sup> Courts, including the ICTY, have often tried to achieve this by modifying the procedural and evidentiary rules.<sup>9</sup> However, the changes implemented by the ICTY failed to reduce trial complexity.<sup>10</sup> This failure is not surprising because trial complexity has not been studied quantitatively before and, until now, a good understanding of its causes was lacking.

The principal goal of this Article is to build an empirical model of what causes the complexity of international criminal trials. This

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1. See generally Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1 (2014) [hereinafter *Complexity and Efficiency*] (discussing complexity at international criminal trials and proposing a method to measure that complexity). Complexity is a very important concept for this Article. It was discussed extensively in *Complexity and Efficiency*. See *id.* at Section I. Key parts of that discussion are reprised below in Section II of this Article.

2. *Id.* at 27 tbl.2

3. *Id.* at 32–33.

4. *Id.* at 53–54.

5. *Id.* at 34 (noting that one of the most complex cases ever tried in the United States had a Complexity Score of 1.09—only slightly more complex than the average International Criminal Tribunal for the Former Yugoslavia (ICTY) trial, which had a Complexity Score of 0.97).

6. *Id.* at 31–32.

7. *Id.* at 3–4.

8. *Id.* at 38–41.

9. See Gillian Higgins, *The Impact of the Size, Scope and Scale of the Milošević Trial and the Development of Rule 73bis before the ICTY*, 7 NW. J. INT'L HUM. RTS. 239, 251 (2009); Maximo Langer & Joseph W. Doherty, *Managerial Judging Goes International, But Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms*, 36 YALE J. INT'L L. 241, 242 (2011).

10. See Langer & Doherty, *supra* note 9, at 267.

will be done through the use of a multiple regression model<sup>11</sup> with trial complexity as the response variable.<sup>12</sup> Various factors that one might expect to affect trial complexity are explanatory variables.<sup>13</sup> The model allows for the estimation of the effect of the explanatory variables on trial complexity.

In theory, a better understanding of what causes trial complexity could help us modify the process to reduce that complexity while still maintaining fundamentally fair trials.<sup>14</sup> However, the results of the multiple regression analysis employed by this Article suggest that it will be very difficult to meaningfully reduce the complexity of international trials without undermining the very reasons for having such trials. The largest drivers of complexity are two factors that courts cannot control: the accused's seniority within the political or military hierarchy and whether the accused is a direct perpetrator.<sup>15</sup> The factors that individual judges and prosecutors can most easily influence—such as the number of crime sites,<sup>16</sup> the particular modes of liability,<sup>17</sup> or the number of counts in the indictment—have small or nonexistent impacts on complexity.<sup>18</sup> Ultimately, the complexity of international criminal trials appears to be driven by the need to attribute responsibility for serious violations of international criminal law to accused individuals who are

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11. Multiple regression is a statistical method for estimating the effect of multiple explanatory variables on a response variable. See GRAHAM UPTON & IAN COOK, *A DICTIONARY OF STATISTICS* 285–88 (3d ed. 2014).

12. In a multiple regression model, the response variable is the variable that is hypothesized to respond to changes in the explanatory variables. See *id.* at 363.

13. The explanatory variables are hypothesized to explain the changes in the response variable. *Id.* at 362.

14. See Stuart Ford, *Fairness and Politics and Politics at the ICTY: Evidence from the Indictments*, 39 N.C. J. INT'L L. & COM. REG. 45, 55–58 (2013) [hereinafter *Fairness and Politics*] (noting that it is important that the trials remain fundamentally fair).

15. A direct perpetrator physically commits the crimes they are charged with. For example, the direct perpetrator of unlawful killings is the person who actually kills the victims. Indirect perpetrators, in contrast, may be legally liable for the acts of the direct perpetrators (for example, because they ordered the unlawful killings) but did not commit the acts of physical violence that form the basis for the charges. See *infra* text accompanying notes 54–58, 80–81.

16. A crime site is a location about which the prosecution intends to present evidence at trial. Usually it is a place where part of the crime occurred, like a mass grave site or the location where killings took place. See *infra* note 63.

17. The modes of liability are “doctrines by which a person may commit, participate in, or otherwise be found responsible for” violations of international criminal law. ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 361 (2d ed. 2010). They include some modes of liability that are common in domestic settings, like aiding and abetting, as well as some that are specific to international criminal law, including joint criminal enterprise and command responsibility. *Id.* at 361–62.

18. See *infra* Section VII(A) (discussing the results of the model).

often both organizationally and geographically distant from the crimes for which they are allegedly responsible.<sup>19</sup> As a result of the inherent complexity of this attribution process, it will be very difficult to meaningfully reduce trial complexity.

This Article considers six changes that could be made to reduce trial complexity: 1) prosecute only low-level direct perpetrators and forego prosecutions of high-level indirect perpetrators; 2) place arbitrary limits on the time that defense and prosecution teams have to present their cases; 3) make international criminal law a strict liability regime; 4) switch from a representative charging system to a symbolic charging system;<sup>20</sup> 5) switch from multi-accused trials to single-accused trials; and 6) encourage the use of plea bargains. While the model results suggest that these changes could reduce complexity significantly, each would involve significant drawbacks. In most cases, the downsides appear to outweigh any benefit that could be gained from reducing trial complexity. Ultimately, the complexity of international criminal trials appears to be a necessary feature of the prosecution of high-level accused for the acts of low-level perpetrators who are geographically and organizationally distant from the accused.

This Article will proceed as follows. Section II describes and defines complexity, as the term is used in this Article. Section III briefly describes the data that forms the basis for the analysis. Section IV develops eleven hypotheses about the causes of complexity in international criminal trials. Section V tests those hypotheses and describes the resulting model and its results. Section VI uses the model to predict the complexity of the ICTY's remaining trials. Section VII discusses the implications of the model with respect to the six possible changes that could be made to reduce trial complexity. Section VIII concludes.

## II. COMPLEXITY

The concept of complexity is central to this Article. It is also one that the Author has explored extensively in an earlier work titled,

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19. See *infra* Section VII(A).

20. Symbolic charging occurs when the accused is charged with a single (or small number) of crimes arising out of a single, significant, and easily-proven incident. In contrast, representative charging aims to charge the accused with a representative sample of the crimes he or she is allegedly responsible for. This almost always involves charging the accused with a larger number of counts arising out of a larger number of incidents. See discussion *infra* Section VII(B)(5).

*Complexity and Efficiency at International Criminal Courts.*<sup>21</sup> That earlier work dealt with the question of how to define trial complexity and measure it. This Section briefly summarizes the relevant portions of that article.<sup>22</sup>

Complexity occurs when multiple parts of a system interconnect and interact in such a way that the whole system becomes hard to understand or analyze.<sup>23</sup> This definition is broad enough to apply to a broad range of systems,<sup>24</sup> but, while it captures what a person means when she says that a trial is complex, there is no direct objective measure of trial complexity.<sup>25</sup> Rather, trial observers and participants perceive a trial to be complex when there are so many moving parts that it becomes hard to keep track of them all.<sup>26</sup> As the number of moving parts and the interactions between them increase, a person's ability to understand or analyze them decreases and she perceives the trial's complexity as having increased.<sup>27</sup> Complexity exists in the mind of a trial participant or observer. Thus, it is a subjective variable<sup>28</sup> and it exists as a continuum rather than as a threshold between the simple and the complex.<sup>29</sup>

There is broad agreement within the legal academy that there are different types of trial complexity.<sup>30</sup> The three main forms that are relevant to international criminal trials are legal complexity, factual complexity, and participant complexity.<sup>31</sup> Legal complexity arises when the law is hard to ascertain (e.g., because the existing precedents are inconsistent), technical in nature, dense (e.g., if the law has many elements or requirements), or is simply indeterminate (e.g., when there is no precedent that governs a particular issue).<sup>32</sup> Factual complexity exists when the facts necessary to decide the case are voluminous, technical, contradictory, or incom-

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21. See generally *Complexity and Efficiency*, *supra* note 1 (discussing the concept of complexity and its importance in the context of the International Criminal Court).

22. Readers interested in the theoretical basis for the definition of complexity or the complexity measure used in this Article should consult *Complexity and Efficiency*, *supra* note 1.

23. See *id.* at 12.

24. See *id.* at 12–13 (offering a plain language meaning of complexity that is not limited to legal systems).

25. See *id.* at 19.

26. See *id.* at 12.

27. See *id.* at 19.

28. See *id.*

29. See *id.* at 20.

30. See *id.* at 12.

31. See *id.* at 12–13.

32. See *id.* at 13.

plete.<sup>33</sup> Finally, legal decisions are made by people. Thus, the complexity of the overall process can be affected by both the number of participants necessary to reach a decision, and the ability and willingness of those participants to perform their roles in the process.<sup>34</sup>

Scholars have noted that while the different types of complexity are theoretically independent,<sup>35</sup> the types of trials identified as the most complex usually exhibit high levels of multiple kinds of complexity.<sup>36</sup> Trials at international criminal courts are widely recognized as enormously complex,<sup>37</sup> due to their high levels of legal, factual, and participant complexity.<sup>38</sup> Until recently, however, there had been no attempts to measure such complexity.

As noted above, trial complexity is a subjective characteristic that cannot be measured directly. However, it can be measured with a proxy variable.<sup>39</sup> *Complexity and Efficiency* developed a proxy called a Complexity Score to determine trial complexity.<sup>40</sup> Complexity Scores are created as a composite of the number of trial days, trial witnesses, and trial exhibits needed to complete a trial.<sup>41</sup> This particular mix of variables was chosen as a proxy for two main reasons. First, experts in the field usually identify these variables as indicative of complexity.<sup>42</sup> Second, empirical work in the field of domestic trial complexity has identified these factors as central to perceived complexity.<sup>43</sup> This Article uses the Complexity Scores as a proxy for the perceived complexity of trials at international criminal courts. Section V describes in more detail how Complexity Scores are utilized.

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33. See *id.* at 13–14.

34. See *id.* at 14.

35. It is possible to have factual complexity without legal complexity and vice versa. See *id.* at 15.

36. See *id.* at 14–15.

37. See, e.g., Patricia M. Wald, *ICTY Judicial Proceedings – An Appraisal from Within*, 2 J. INT'L CRIM. JUST. 466, 468 (2004) (noting that ICTY trials are “quite unlike most of the home-grown variety” because of their complexity).

38. See *Complexity and Efficiency*, *supra* note 1, at 15–19.

39. Proxy variables are variables that can be measured directly and are used in place of variables that cannot be measured. See UPTON & COOK, *supra* note 11, at 343.

40. See *Complexity and Efficiency*, *supra* note 1, at 20–24.

41. More detail on how they are calculated can be found in *Complexity and Efficiency*, *supra* note 1, at 27.

42. See *id.* at 20–21.

43. See *id.* at 21.

### III. THE DATA

Unless otherwise indicated, the data for this Article come from a database created by the Author based on trials conducted at the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>44</sup> The database was created using information from publicly available documents produced by the ICTY, including Case Information Sheets produced by the ICTY Registry and the indictments issued by its Office of the Prosecutor. The data include information on all trials completed through June 2013. They exclude the results of the trials of Ratko Mladić, Radovan Karadžić, and Goran Hadžić, which were still underway when the data were collected.<sup>45</sup> A copy of the data is available upon request.

### IV. HYPOTHESES

The principal goal of this Article is to build a model of the factors that drive the complexity of international criminal trials. The Complexity Scores of trials at the ICTY serve as a proxy for the complexity of those trials and are utilized as the response variable. The explanatory variables are those that explain changes in the response variable. In this case, the explanatory variables are based on hypotheses about what might cause the complexity of international criminal trials. The following eleven hypotheses were developed based on the Author's experience as a litigator before both domestic courts and international tribunals,<sup>46</sup> the literature on complexity, case law and literature about international criminal trials, and the results of empirical studies of domestic trial complexity.

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44. The ICTY was chosen largely because the majority of the information needed to assemble the database was easily and publicly available. For example, the ICTY's Case Information Sheets, which are made available on the ICTY's website, collect valuable information about each case, a process that would have been very difficult to duplicate for other tribunals without carefully reading a great number of documents, including the judgments. It would be possible to create a similar database for the International Criminal Tribunal for Rwanda (ICTR) but it would be much more difficult. The International Criminal Court (ICC), on the other hand, has not completed enough cases for a database of their trials to be useful.

45. Further information about the database can be found in two earlier works by the Author: *Fairness and Politics at the ICTY: Evidence from the Indictments*, and *Complexity and Efficiency at International Criminal Courts*. See *Fairness and Politics*, *supra* note 14, at app.; *Complexity and Efficiency*, *supra* note 1, at Section II.

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



H1. *Complexity increases as the number of accused tried together increases.*

There are many ways that additional defendants can add to the complexity of trials. Where multiple accused are present, the prosecution must present evidence related to the individual guilt of each accused, even if the defendants are accused of acting together. This increases the complexity of the trial. If different defendants have different trial strategies, then one would expect them to present different witnesses and different exhibits. Even if they have the same general trial strategy, one would still expect the lawyers for the individual accused to want to present individualized witnesses and exhibits and to cross-examine both the prosecution witnesses and witnesses of the co-accused.<sup>47</sup> Indeed, when multiple accused are tried together, they generally do present their own witnesses and exhibits.<sup>48</sup> Finally, for sentencing purposes, the evidence relating to aggravating and mitigating factors could be unique to each of the accused.<sup>49</sup> For these reasons, one would expect each additional accused tried to increase the complexity of the trial.<sup>50</sup> The presumption is supported by studies of domestic criminal trials, which have found additional accused to result in more complex trials.<sup>51</sup>

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47. Cf. Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 558, 568–71 (2008) (discussing the tactics and motivations of international criminal defense lawyers).

48. See *Prosecutor v. Prlić*, Case No. IT-04-74, Case Information Sheet, 7 (Int'l Crim. Trib. for the Former Yugoslavia 2013), [http://icty.org/x/cases/prlic/cis/en/cis\\_prlic\\_al\\_en.pdf](http://icty.org/x/cases/prlic/cis/en/cis_prlic_al_en.pdf) (last visited Sept. 27, 2013) (noting the number of witnesses called and exhibits offered by each individual defendant); *Prosecutor v. Popović*, Case No. IT-05-88, Case Information Sheet, 4 (Int'l Crim. Trib. for the Former Yugoslavia 2010), [http://icty.org/x/cases/popovic/cis/en/cis\\_popovic\\_al\\_en.pdf](http://icty.org/x/cases/popovic/cis/en/cis_popovic_al_en.pdf) (last visited Sept. 27, 2013) (same).

49. For example, the professional background of the accused and the accused's character are potentially aggravating factors. See *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Appeals Judgement, ¶ 678 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005); *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgement, ¶ 1114 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004); *Prosecutor v. Mucić*, Case No. IT-96-21-A, Appeals Judgement, ¶ 788 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001). Mitigating factors may include the accused's character and cooperation with the prosecutors and the court. See *Mucić*, Case No. IT-96-21-A, ¶ 788; *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-A, Judgement on Sentencing Appeal, ¶ 66 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 4, 2005).

50. See David Wippman, *The Cost of International Justice*, 100 AM. J. INT'L L. 861, 873 (2006).

51. See Michael Heise, *Criminal Case Complexity: An Empirical Perspective*, 1 J. EMPIRICAL LEGAL STUD. 331, 359–60 tbl.8, 360 (2004).

To test this hypothesis, a variable was created to record the number of accused present at trial. The variable excluded those who were named in the indictment but were not present during trial.

H2. *Complexity increases as the seniority of the accused in the political and military hierarchy increases.*

Individuals at international criminal tribunals are often charged as indirect perpetrators. Indirect perpetrators are alleged to be criminally responsible for acts they did not personally commit. As a result, evidence must be introduced that establishes their criminal responsibility for acts that they may be geographically and organizationally distant from. In these circumstances, proof of the individual's criminal responsibility is provided through evidence linking the accused to crimes committed by his or her subordinates or accomplices.<sup>52</sup> The presentation of such "linking evidence"<sup>53</sup> can be complicated and time consuming,<sup>54</sup> and tends to make trials more complex. In addition, the higher the accused's rank in a military or political hierarchy, the more organizational levels separate them from the physical commission of the crimes, which are usually carried out by those in the lowest levels of the hierarchy.<sup>55</sup> Consequently, more linking evidence is needed to establish their criminal responsibility. Thus, as the seniority of the accused increases, more linking evidence is necessary and trial complexity increases.

Senior political and military leaders may also approach their trials differently from less senior figures. For at least some senior figures tried at the ICTY, it appeared that the defendants viewed the trials as an opportunity to disrupt the proceedings, undermine the legitimacy of the court, influence public opinion among their supporters, and defend their "legacy." This was most noticeable in the trial of Slobodan Milošević, but was also present in other trials

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52. Cf. Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM. JUST. 159, 181 (2007) ("[I]nstead of proving a direct commission of crimes by the superior, it suffices to prove a crime base or pattern of commission and link the superior to it.").

53. Linking evidence, also called "linkage evidence," is the term used to describe the evidence needed to connect indirect perpetrators—who are often organizationally and geographically distant from the crimes—to the direct perpetrators that carry out the crimes. See Daryl A. Mundis, *Book Review of The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings*, 102 AM. J. INT'L L. 691, 694–95 (2008).

54. HUMAN RIGHTS WATCH, *WEIGHING THE EVIDENCE: LESSONS FROM THE SLOBODAN MILOŠEVIĆ TRIAL 3* (Dec. 2006) ("Proving the guilt of a senior official nowhere near the multiple crime scenes and establishing a chain of command in circumstances where no lawful authority existed is very difficult and time-consuming.").

55. See *Fairness and Politics*, *supra* note 14, at 66–67.

of senior political and military figures.<sup>56</sup> It is not surprising that trials of this kind are more complex due to defendant's efforts to disrupt or undermine the proceedings.

To test this hypothesis, a variable was created that ranked the accused's seniority within the political and military hierarchy. Seniority rankings were based upon biographical information about each of the accused identified in the indictments, paying particular attention to the positions and roles the accused were alleged to have held at the time of the alleged commission of the crimes.<sup>57</sup> For multi-accused trials, the rank of the trial was the rank of the highest-ranking individual accused.

### H3. *Complexity increases as the total number of counts in the indictment increases.*

As the number of counts charged in the indictment increases, the number of legal elements that must be proved by the prosecution also increases, presumably increasing the overall legal complexity of the trials. Increasing the number of counts also presumably increases the factual complexity of the trials, particularly if the counts relate to separate incidents. On the other hand, the prevalence of cumulative charging at international trials, where the same underlying facts are charged as more than one crime,<sup>58</sup> suggests that complexity will not increase linearly as the number of counts increases. This is because there may be substantial factual overlap between different counts. However, it still seems likely that additional counts will result in greater complexity because charges that relate to the same underlying set of facts must still have distinct legal elements to be charged as separate crimes.<sup>59</sup> Thus, additional counts add additional legal elements that the prosecution must prove. One would expect that the trial will require more evidence and become more complex as the number of counts alleged against the accused increases, even when taking cumulative charg-

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56. See Turner, *supra* note 47, at 573–74; Mundis, *supra* note 53, at 694.

57. See *Fairness and Politics*, *supra* note 14, at 71. Cf. James Meernik, *Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the former Yugoslavia*, 47 J. CONFLICT RESOL. 140, 151 (2003).

58. See Turner, *supra* note 47, at 588.

59. See *Prosecutor v. Kordić*, Case No. IT-95-14/2-A, Appeals Judgement, ¶ 1033 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) (“The Appeals Chamber will permit multiple convictions for the same act or omission where it clearly violates multiple distinct provisions of the Statute, where each statutory provision contains a materially distinct element not contained in the other(s), and which element requires proof of a fact which the elements of the other statutory provision(s) do not.”).

ing into account.<sup>60</sup> This presumption is evident in Rule 73 *bis* (E) of the Rules of Procedure and Evidence of the ICTY, which assumes that increasing the number of counts increases overall trial complexity.<sup>61</sup> To test this hypothesis, a variable was created that recorded the total number of counts contained in each indictment.

H4. *Complexity increases as the number of crime sites in the indictment increases.*

Crimes or parts of crimes are usually alleged to have taken place at specific locations, usually called crime sites.<sup>62</sup> Crime sites may be locations where mass graves were found, where killings took place, where victims were unlawfully detained, or any other location where the prosecution intends to prove a part of the crime was committed.<sup>63</sup> For every additional crime site described in the indictment, more evidence must be introduced at trial. Evidence must be presented about where the crime site is, how it relates to the other crime sites and what happened at the crime site. Thus one would expect that, all other things being equal, the addition of more crime sites to the indictment would result in a more complex trial. Indeed, Rule 73 *bis* (D) of the Rules of Procedure and Evidence of the ICTY presumes that the number of crime sites affects trial complexity.<sup>64</sup>

To test this hypothesis, a variable was created to record the number of individual crime sites in the indictment. Each indictment was read to identify the number of locations at which the prosecution intended to introduce evidence that a crime occurred. The results are somewhat subjective as the indictments often use vague language that could be interpreted differently by reasonable people; however, an attempt was made to be conservative and only record a crime site if it was clear from the indictment that the pro-

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60. See *Defence Counsel – Pre-Trial Legal Aid Policy*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA ¶ 22 (May 1, 2006), [http://www.icty.org/x/file/About/Defence/pretrial\\_payment\\_2006\\_en.doc](http://www.icty.org/x/file/About/Defence/pretrial_payment_2006_en.doc) (concluding that “the number and nature of the counts in the indictment” affects complexity).

61. See International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, IT/32/Rev. 44, Dec. 10, 2009, Rule 73 *bis* (E) (permitting the Trial Chamber to limit the number of counts on which the Prosecutor may proceed at trial).

62. See, e.g., *id.* at Rule 73 *bis* (D) (suggesting that “crime sites” are locations “in respect of which evidence may be presented by the Prosecutor”).

63. *Id.*

64. See *id.* (permitting the Trial Chamber to “fix” the number of crime sites the Prosecutor may introduce evidence about at trial).

ecution intended to prove at trial that part of a crime occurred there.

H5. *Complexity increases if the accused is charged with genocide.*

Genocide is the “crime of crimes,”<sup>65</sup> and it occupies a special place in the hierarchy of international criminal law.<sup>66</sup> It may be that, because of the opprobrium associated with a genocide conviction, defendants will fight genocide charges more vigorously than others, thereby increasing the complexity of the trials.<sup>67</sup> Genocide convictions also tend to result in longer sentences than convictions for other violations of international criminal law,<sup>68</sup> which may cause defendants to invest more resources in fighting genocide charges than they would charges of commission of war crimes or crimes against humanity. Genocide is also quite difficult to prove because of the specific intent requirement and because genocide trials tend to involve large amounts of circumstantial evidence.<sup>69</sup> This reliance on circumstantial evidence to prove specific intent may increase the factual complexity of the trials. For these reasons, one might expect genocide charges to add additional complexity to the trials. To test this hypothesis, a dummy variable<sup>70</sup> was created, which indicates whether the indictment contained a charge of genocide.

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65. Prosecutor v. Stakic, Case No. IT-97-24-T, Judgement, ¶ 502 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003).

66. See Prosecutor v. Krstic, Case No. IT-98-33-A, Appeals Judgement, ¶ 36 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (“Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium.”). But see Prosecutor v. Blaškic, Case No. IT-95-14-T, Judgement, ¶¶ 800–02 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (suggesting that there is no hierarchy amongst violations of international criminal law).

67. Some plea deals appear to have depended on the willingness of the prosecutor to drop genocide charges, suggesting that some accused found it more palatable to plead guilty to crimes against humanity than to plead guilty to genocide. For example, Biljana Plavšić was willing to plead guilty to persecution on political, racial, and religious grounds as a crime against humanity but not to genocide. See Jelena Subotic, *The Cruelty of False Remorse: Biljana Plavšić at The Hague*, 36 SE. EUR. 39, 42–43 (2012).

68. See *Fairness and Politics*, *supra* note 14, at 76.

69. See Robert Petit et al., *Exploring Critical Issues in Religious Genocide: Case Studies of Violence in Tibet, Iraq and Gujarat*, 40 CASE W. RES. J. INT'L L. 163, 213 (2008).

70. A dummy variable is a variable that can only take the value of 0 or 1. For this particular variable, it would take a value of 1 if there was a charge of genocide in the indictment and a value of 0 if there was no genocide charge. The use of dummy variables allows for the inclusion of categorical variables in multiple regression models. See UPTON & COOK, *supra* note 11, at 131.

H6. *Complexity increases if the accused are charged as members of a joint criminal enterprise (JCE).*

Using joint criminal enterprise (JCE) as a mode of liability requires proof that all of the members of the JCE shared a common criminal plan.<sup>71</sup> Thus, it often requires evidence about the actions and intentions of people who are not directly charged.<sup>72</sup> For example, in the portion of Slobodan Milošević's indictment that relates to crimes allegedly committed in Croatia, the indictment alleges that Milošević participated in a joint criminal enterprise with fifteen other named individuals.<sup>73</sup> The trial would thus have to include evidence about the allegedly unlawful actions of the other members of the JCE, even though they were not formally before the court. One might expect this to increase the complexity of the trial. In fact, defense attorneys have often criticized the use of JCE for allowing the prosecutor to bring in large amounts of evidence about the acts of individuals other than the accused.<sup>74</sup>

To test this hypothesis, a dummy variable was created that indicates whether joint criminal enterprise was charged as a mode of liability in the indictment.

H7. *Complexity increases if the accused are charged under a theory of superior responsibility.*

Charging individuals using superior responsibility as the mode of liability necessitates proof of their ability to control or command those who committed the actual crimes.<sup>75</sup> Often, this requires detailed proof about the structure and operation of political and military bodies.<sup>76</sup> Thus, this evidence adds factual complexity. In addition, this type of evidence is often provided by expert wit-

71. See Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeals Judgement, ¶ 82 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005); Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109, 110–11 (2007).

72. See Verena Haan, *The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia*, 5 INT'L CRIM. L. REV. 167, 182, 196 (2005).

73. See Prosecutor v. Milošević, Case No. IT-02-54-T, Second Amended Indictment Related to Croatia, ¶ 7 (Int'l Crim. Trib. for the Former Yugoslavia July 27, 2004).

74. See Turner, *supra* note 47, at 560–63.

75. See Prosecutor v. Kordić, Case No. IT-95-14/2-A, Appeals Judgement, ¶ 840 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) ("The basis of the superior-subordinate relationship is the power of the superior to control the actions of his subordinates."); Kai Ambos, *supra* note 52, at 161–62.

76. See Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶¶ 419–24 ("A starting point will be the official position held by the accused. Actual authority however will not be determined by looking at formal positions only. Whether *de jure* or *de facto*, military or

nesses,<sup>77</sup> who are thought to increase the overall complexity of a trial.<sup>78</sup> For these reasons, using superior responsibility as the mode of liability may increase the complexity of the trial.

On the other hand, some defense attorneys have criticized superior responsibility on the grounds that it allegedly operates as a form of strict liability, and that its main purpose is to reduce or eliminate the need to prove that the accused had the *mens rea* necessary to have committed the underlying crime.<sup>79</sup> If this were true, superior responsibility could reduce overall trial complexity by reducing the need for evidence related to the accused's *mens rea*.

To test this hypothesis, a dummy variable was created that indicates whether superior responsibility was charged as a mode of liability in the indictment.

H8. *Complexity decreases if an accused is charged as a direct perpetrator of violence.*

Direct perpetrators of violence are those who physically carry out the violence charged in the indictment. They are individuals who are accused of physically raping, torturing, or killing their alleged victims. Indirect perpetrators may be criminally liable for the acts of direct perpetrators, but do not physically commit violence.<sup>80</sup> Trials against direct perpetrators of violence may be simpler because they require less "linking evidence"—the evidence necessary to link individuals who are distant either geographically or hierarchically to the crimes for which they are legally responsible.<sup>81</sup> In theory at least, a single eyewitness to the accused's crime might constitute sufficient evidence for a direct perpetration conviction. Thus, trials of direct perpetrators should be less complex than trials of indirect perpetrators.

To test this hypothesis, a dummy variable was created that indicates whether any of the accused were charged with physically committing violence against their victims.

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civilian, the existence of a position of authority will have to be based upon an assessment of the reality of the authority of the accused.").

77. GIDEON BOAS ET AL., INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY: VOLUME III – INTERNATIONAL CRIMINAL PROCEDURE 357–58 (2011).

78. See Heise, *supra* note 51, at 355 (finding that perceived trial complexity increased as the number of expert witnesses increased); *id.* at 360.

79. See Turner, *supra* note 47, at 563–65.

80. See *Fairness and Politics*, *supra* note 14, at 64 n.85.

81. See *supra* text accompanying notes 53–57.

H9. *Complexity increases as the number of victims increases, particularly the number of victims alleged to have died.*

There is some evidence that the complexity of domestic trials increases as the number of victims increases.<sup>82</sup> The same is likely true of international trials. First, some information about the victims must be proved. In the case of unlawful killings, for example, this information usually includes that they have died, and that their death was caused by the acts of the accused.<sup>83</sup> As the number of victims increases, the amount of evidence related to the victims will increase, rendering the trial more factually complex. On the other hand, detailed information about each victim is not usually proved when there are many victims. For example, in the prosecution of Radislav Krstic for genocide arising out of the murder of thousands of Bosnian Muslim men at Srebrenica, the trial court did hear some evidence from eyewitnesses about the murders.<sup>84</sup> However, it is equally clear that the court did not receive detailed information on each victim. Rather, the number of victims was established using experts who summarized the available information for the court.<sup>85</sup> Forensic experts were permitted to testify about the number of bodies exhumed from mass graves,<sup>86</sup> while a demographics expert was allowed to testify about the number of victims based on listings of missing persons.<sup>87</sup> On the basis of this summary evidence, the court was able to conclude that between seven and eight thousand Bosnian Muslim men were executed by Serbian forces in the days following the capture of Srebrenica.<sup>88</sup> This use of summaries to establish the number and type of victims suggests that complexity will not increase linearly as the number of victims increases, although it is still likely to increase as the number of victims increases.

Other factors may also lead to increased complexity when there are large numbers of victims. For example, trials that focus on crimes with large numbers of victims may be viewed as strategically

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82. See Heise, *supra* note 51, at 356–57 tbl.7, 359–60 tbl.8.

83. See Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, ¶ 485 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (noting that murder has “consistently been defined” as the death of the victim resulting from an act or omission of the accused committed with the intent to kill or cause serious bodily harm which he or she should reasonably have known could result in death).

84. See *id.* ¶ 69.

85. See *id.* ¶¶ 71–84 (describing the expert testimony the court heard about the victims).

86. See *id.* ¶ 73.

87. See *id.* ¶ 81.

88. See *id.* ¶ 84.



important to the prosecution. Prosecutors may, as a result, devote additional resources to such trials. This increase in prosecutorial resources may result in additional trial complexity. On the other hand, this may be balanced by the desire of prosecutors to avoid making the trial too complex.<sup>89</sup>

To test this hypothesis, it was necessary to construct a variable for the number of victims alleged in the indictment. However, this was not feasible. To use unlawful killings as an example, it is very hard to tell from the indictments how many deaths the prosecution intended to prove each defendant was responsible for. Many indictments say things like “many people were killed” or “a large number of detainees died as a result of the conditions.”<sup>90</sup> The difficulty was largely the result of a consistent vagueness in the indictments about the exact number of victims.<sup>91</sup> It was impossible to code this language as a specific number of people killed.<sup>92</sup> As a result, the data collected for the number of people alleged to have been killed appears to be systematically inaccurate.<sup>93</sup>

An attempt was also made to collect information on the number of people alleged to have been deported or forcibly transferred, and the number of people alleged to have been unlawfully imprisoned. It was even harder to code these variables than it was to code the number of people killed. Data were missing for these two variables in the majority of cases. Ultimately, it proved impossible to construct a reliable variable for the number of victims that could be used to test this hypothesis.

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89. See *infra* text accompanying note 95 (noting that skilled prosecutors tend to decrease perceived complexity and arguing that this is a deliberate tactic).

90. *Fairness and Politics*, *supra* note 14, at 84–85 n.168.

91. This vagueness is likely due, in part, to limitations in the evidence. It is probable that in the majority of situations the prosecutor has no clear evidence about the exact number of people killed because the witnesses are unable to give precise figures. Unless the killers kept meticulous records it is often quite difficult after the fact, even for those who directly caused the deaths, to know exactly how many people died. The problem is even worse for survivors who cannot be expected to have witnessed all the deaths or to have kept records about what they saw. This vagueness may also be, in part, tactical. As a prosecutor, one would rather under-promise and over-prove than the other way round.

92. The problem was exacerbated by documents filed under seal. In a number of indictments, the exact number of dead being alleged is contained in a separate “Schedule” attached to the indictment that is not publicly available. *Fairness and Politics*, *supra* note 14, at 84. Consequently, in these situations, it was not possible to assign a specific value to the number of people allegedly killed, even though that figure is available somewhere. *Id.*

93. See *id.*

H10. *Complexity increases as the size and quality of the defense team increases.*

There is reason to believe that one component of complexity is participant complexity and that overall complexity increases as the number of participants increases.<sup>94</sup> Thus, as the number of lawyers representing the parties increases, complexity should also increase. This effect may be particularly pronounced for defense counsel and the defense team more generally. Some studies of domestic criminal trials have found that skilled prosecutors reduce overall trial complexity while skilled defense counsel increase it.<sup>95</sup>

One explanation for this finding lies in the standard of proof necessary for a conviction: proof beyond a reasonable doubt.<sup>96</sup> Prosecutors have an incentive to reduce the perceived complexity of the trial. Increasing complexity makes it harder for the decision-makers to understand and analyze the case, leading to uncertainty and doubt; too much doubt leads to acquittals. Defense counsel, on the other hand, may try to deliberately increase trial complexity, knowing that increased complexity could lead to increased doubt and eventually to an acquittal. Thus, defense counsel may have an incentive to increase overall trial complexity.<sup>97</sup> Moreover, the more accomplished the defense counsel, the more they can increase complexity.<sup>98</sup> At the same time, the more personnel on the defense team, the more resources that can be devoted to increasing the complexity of the trial. As a result, increasing the size and quality of the defense team could affect trial complexity.

This hypothesis was also not feasible to test. There was no easy way to measure defense team quality. It might be possible to construct a proxy variable for quality by interviewing other participants (e.g., prosecutors and defense counsel) about the quality of their colleagues, but this was not done due to time and funding constraints. Although an attempt was made to determine defense team size from the information available in the Case Information Sheets, this proved unworkable. The Case Information Sheets list

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94. See *Complexity and Efficiency*, *supra* note 1, at 14.

95. See Heise, *supra* note 51, at 355–56; Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Effects*, 18 *LAW & HUM. BEHAV.* 29, 41–42 (1994).

96. See, e.g., Prosecutor v. Milošević, Case No. IT-98-29/1-A, Appeals Judgement, ¶ 20 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009).

97. See Heise, *supra* note 51, at 355; Langer and Doherty, *supra* note 9, at 288.

98. See *supra* text accompanying note 95.

only the names of the two lead defense counsel for each accused.<sup>99</sup> They do not appear to provide accurate information about the overall size of the defense team or how defense team size varies by accused. Given doubts about the accuracy of the data collected for this variable, it was omitted from the model.

H11. *The personalities and abilities of particular participants affect the complexity of the trials.*

It seems likely that the personalities and abilities of individual participants (including the judges, prosecutors, defense counsel, and witnesses) will impact the complexity of the trial.<sup>100</sup> For example, some judges may be more willing to permit extensive cross-examinations than others; other judges might be predisposed to impose strict witness or time limits on the parties.<sup>101</sup> Some prosecutors may try to present more witnesses related to the same acts than others would in the same situation.<sup>102</sup> A less-skilled prosecutor might have difficulty getting the required information from the witness in a clear and concise way without introducing uncertainty or ambiguity into the record. A less-skilled prosecutor might also require more time than a more-skilled one to obtain the same information from a witness. On the defense side, a small number of defense counsel (and defendants) attempt to disrupt the proceedings, challenge the legitimacy of the court, or make a political statement.<sup>103</sup> However, the majority of defense counsel view their roles as primarily to ensure that their client receives a fair trial.<sup>104</sup> These differing approaches would probably result in trials of differ-

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99. For the vast majority of the accused in the database (82 percent), the Case Information Sheets listed exactly two counsels for the accused. *See, e.g.*, Prosecutor v. Brđanin, Case Information Sheet for Radoslav Brđanin, Case No. IT-99-36 (Int'l Crim. Trib. for the Former Yugoslavia 2004), [http://www.icty.org/x/cases/brdanin/cis/en/cis\\_brdjanin\\_en.pdf](http://www.icty.org/x/cases/brdanin/cis/en/cis_brdjanin_en.pdf) (listing defense counsel as John Ackerman and David Cunningham).

100. *See Complexity and Efficiency, supra* note 1, at 14.

101. This might, in part, be a function of the legal systems of the judges. Common law judges might be more willing to permit extensive cross-examination than judges with a civil law background, where cross-examination is rare. But it is also likely a function of the individual personalities and abilities of the judges. *Cf. Langer and Doherty, supra* note 9, at 256 ("Some of our interviewees and attendees at our presentations at the ICTY suggested [whether the judges came from common or civil law jurisdictions] as one of the factors that might affect phase duration").

102. This may be a function of how risk-averse the individual prosecutor is. *Cf. Langer & Doherty, supra* note 9, at 286–87 (discussing prosecutors' risk-aversion toward acquittals at trial).

103. *See supra* text accompanying note 56.

104. *See Turner, supra* note 47, at 566–67.

ing complexity, even for the same set of charges.<sup>105</sup> Finally, some witnesses may be overwhelmed by the experience, traumatized by recalling the past, recalcitrant, have poor memory, or be unable to express themselves clearly.<sup>106</sup> Such witnesses will increase trial complexity due to their difficulty fulfilling their role in the process.<sup>107</sup> In this sense, the personalities, motivations, and abilities of individual participants almost certainly have some impact on complexity.

This hypothesis also could not be tested. The number of trials is too small and there are few repeat players across trials, such that drawing useful conclusions about the impact of particular individuals on trial complexity is not workable. To isolate the effect of particular individuals, one would need a large sample and individuals would have to be repeat players. However, international trials are rare and take a long time to complete, and individuals rarely participate in more than a handful of trials.<sup>108</sup> Thus, it may never be practical to isolate the impact of particular individuals on trial complexity.

## V. MODEL AND RESULTS

The summary statistics of the variables that were used in the model are described below in Table 1. There were 41 observations for each variable (i.e., one observation for each trial that has been completed so far). Three trials were still underway at the time the data was collected.<sup>109</sup> Data on those trials were not included.

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105. Cf. Mundis, *supra* note 53, at 694 (noting that some accused at the ICTY used self-representation as a means to obstruct the process).

106. See, e.g., *Witnesses*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/158> (last visited June 2, 2015) (noting that the majority of the witnesses who have appeared before the ICTY have been victims or witnesses to horrific crimes and continue to suffer physical and psychological trauma as a result); see also NANCY A. COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATION OF INTERNATIONAL CRIMINAL CONVICTIONS 14–19* (2010) (describing some of the difficulties that witnesses at international tribunals face).

107. See *supra* text accompanying note 34 (noting that participant complexity can be increased by the ability and willingness of the participants to fulfill their roles in the process).

108. See, e.g., Turner, *supra* note 47, at 547 (noting that due to the length of the cases, very few of the defense counsel she interviewed for her article had represented more than three defendants at international criminal courts).

109. See *supra* Section III.

TABLE 1: SUMMARY STATISTICS

	Mean	Median	S.D.	Min.	Max.
Complexity Score	0.97	.77	0.58	.07	2.63
Total Accused	2.17	1	1.67	1	7
Seniority	5.78	6	1.99	1	8
Total Counts	13.44	8	11.64	1	49
Number of Crime Sites	39.37	16	82.66	1	499
Genocide*	0.17	-	0.38	0	1
JCE*	0.44	-	0.50	0	1
Superior Responsibility*	0.80	-	0.40	0	1
Direct Perpetrator*	0.34	-	0.48	0	1
* represents a dummy variable; medians not reported for dummy variables					

The hypotheses described above in Section IV were tested using a multiple regression model. There are many different methods available for statistical analysis, and choosing an appropriate method is important.<sup>110</sup> The key factors in choosing a method are the number and type of the response variables, and the number and type of the explanatory variables.<sup>111</sup> The data used in this Article have a single response variable (the Complexity Score) and it is an interval variable.<sup>112</sup> There are multiple explanatory variables, some of which are interval variables, and some of which are categorical variables.<sup>113</sup> Multiple regression was chosen to analyze the data because it best fits the number and type of the response and explanatory variables.<sup>114</sup>

110. See *What Statistical Analysis Should I Use?*, INST. FOR DIGITAL RES. & EDUC., [http://www.ats.ucla.edu/stat/mult\\_pkg/whatstat/](http://www.ats.ucla.edu/stat/mult_pkg/whatstat/) (last visited May 15, 2015) (listing a number of different methods and when they are appropriate).

111. See *id.*

112. An interval variable is one where the values of the variable have a clear ordering and the intervals between the values of the variables are equally spaced. See *What is the Difference Between Categorical, Ordinal and Interval Variables?*, INST. FOR DIGITAL RES. & EDUC., [http://www.ats.ucla.edu/stat/mult\\_pkg/whatstat/nominal\\_ordinal\\_interval.htm](http://www.ats.ucla.edu/stat/mult_pkg/whatstat/nominal_ordinal_interval.htm) (last visited May 7, 2015).

113. A categorical variable is one that has two or more categories, but there is no intrinsic ordering to the categories. *Id.* The dummy variables for genocide, direct perpetration, JCE, and superior responsibility are categorical variables. The variables for number of accused, number of counts, seniority, and number of crime sites are interval variables.

114. See *What Statistical Analysis Should I Use?*, *supra* note 110 (noting that multiple regression is appropriate where there is a single interval response variable and one or more interval explanatory variables as well as one or more categorical explanatory variables).

Once multiple regression was chosen as the method, an additional criterion had to be met. To be able to use multiple regression, the response variable should be normal.<sup>115</sup> The response variable (trial complexity) was tested using a Shapiro-Wilk test for normality,<sup>116</sup> but it was not normal.<sup>117</sup> As a result, the complexity variable was transformed. Transformations occur when a variable is subjected to a mathematical function. The goal is to transform the variable so that it meets the assumptions of the model.<sup>118</sup> A number of transformations were tried, but the square root was used because the square root of the complexity variable appears to be normal.<sup>119</sup> As a result, the multiple regression model uses the square root of the Complexity Scores as the response variable. The explanatory variables are those described above in the section on hypotheses.

The results of the model<sup>120</sup> are shown below in Table 2. The model as a whole is statistically significant ( $p < .0001$ )<sup>121</sup> and the residuals appear to be randomly distributed when plotted. Moreover, the adjusted  $R^2$  value is .59, demonstrating that the model explains approximately sixty percent of the variation in the com-

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115. For a technical definition of a normal variable, see UPTON & COOK, *supra* note 11, at 301. Less technically, a graph of the values of a normal variable will produce a bell curve. *Id.* at 35. Multiple regression depends on the assumption that the response variable is normal. See *What Statistical Analysis Should I Use?*, *supra* note 110.

116. A Shapiro-Wilk test checks whether the sample has a specified distribution. See UPTON & COOK, *supra* note 11, at 389. It is most often used to test whether a variable has a normal distribution.

117. To be more precise, the test rejected the null hypothesis (that complexity was normal) with a high degree of significance ( $p < .005$ ).

118. See UPTON & COOK, *supra* note 11, at 427.

119. Again, to be more precise, a Shapiro-Wilk test of the square root of the complexity variable was unable to reject the null hypothesis (that the transformed variable was normal) with  $p = .47$ .

120. This model, which uses multiple regression to regress the explanatory variables against the square root of the Complexity Scores, is also sometimes referred to in this Article as the principal regression, to distinguish it from alternative versions of the model that were tried as a means to test the robustness of the principal regression. See *infra* text accompanying note 141 (describing some of the alternative versions that were tested).

121. In statistics, the  $p$ -value represents the likelihood that the results could have been achieved by chance. See MICHAEL O. FINKELSTEIN, *BASIC CONCEPTS OF PROBABILITY AND STATISTICS IN THE LAW* 53–54 (Springer 2009); UPTON & COOK, *supra* note 11, at 195–97. The smaller the  $p$ -value, the less likely the results occurred by chance. *Id.* When the  $p$ -value is lower than a certain limit, the result is said to be statistically significant. *Id.* For this Article, a hypothesis test is significant when  $p < .05$ . *Id.* When the  $p$ -value is less than .05 the null hypothesis is rejected and the variable is significant. *Id.* In terms of the principal regression as a whole, the null hypothesis is that the model has no explanatory power. That hypothesis can be rejected because the  $p$ -value is less than .05.

plexity scores.<sup>122</sup> This is a strong result.<sup>123</sup> Thus, the model meets the assumptions necessary for multiple regression analysis, it is highly significant, the errors appear to be randomly distributed, and it explains the majority of the differences in trial complexity across different trials. This makes it a useful model for trying to understand the causes of trial complexity at the ICTY.<sup>124</sup>

TABLE 2: PRINCIPAL REGRESSION

	Regression Coefficient
Total Accused	0.077***
Seniority	0.065**
Total Counts	0.0061*
Crime Sites	0.00060
Genocide	0.066
JCE	0.048
Sup. Resp.	-0.088
Direct Perpetrator	-0.20*
Constant	0.40**
Observations	41
Adjusted $R^2$	0.59
* $p < 0.05$ , ** $p < 0.01$ , *** $p < 0.001$	

The model's results are consistent with some but not all of the tested hypotheses. The variable with the highest level of significance ( $p < .001$ ) was that complexity of the trial increases as the number of accused tried together increases. The next most significant variable was that seniority of the accused affects trial complexity ( $p < .01$ ). As the seniority of the accused increased, the complexity of the resulting trial also increased. The effect size<sup>125</sup>

122. See *infra* Table 2 (noting that the adjusted  $R^2$  is .59).

123. See ALAN C. ACOCK, A GENTLE INTRODUCTION TO STATA 252 (3d ed. 2012) (noting that an  $R^2$  value greater than .3 is usually considered a strong result).

124. See *infra* text accompanying notes 151–152 (noting that models cannot perfectly represent reality and that the key criterion is whether the model is useful).

125. The effect size measures the size of the effect the explanatory variable has on the response variable. In the principal regression, the effect size is represented by the absolute value of the regression coefficient. The larger the absolute value of the regression coefficient, the larger the effect that explanatory variable has on trial complexity. The direction of the effect is shown by whether the regression coefficient is positive or negative. Positive regression coefficients indicate variables that increase complexity, while negative regression coefficients indicate variables that decrease complexity. See JEFFERY T. WALKER & SEAN

was roughly equivalent to the effect size of the trial accused variable, suggesting that increasing the seniority of the accused by one level<sup>126</sup> is roughly equivalent to adding another accused to the trial.

Two other variables met the test of statistical significance (i.e.,  $p < .05$ ). Charging an accused as a direct perpetrator of violence resulted in a less complex trial as predicted. This variable had by far the largest effect size. Its effect was roughly equivalent to reducing the number of accused on trial by three or decreasing the seniority of the accused by three levels.

Finally, the total number of counts in the indictment also seems to predict trial complexity, with more counts leading to more complex trials. However, the effect size is small.<sup>127</sup> It is approximately an order of magnitude smaller than the effect size for either number of trial accused or seniority of the accused.<sup>128</sup> This suggests that while the number of counts matters as a factor in trial complexity, it matters a lot less than the number of accused or their seniority. For example, the median number of counts in an ICTY trial was 8.<sup>129</sup> Doubling the number of counts in the median trial would add less complexity than increasing the seniority of the accused by one level or adding one additional accused to the trial.

Four hypotheses failed the test of significance.<sup>130</sup> First, the number of crime sites identified in the indictment did not have any demonstrable effect on trial complexity when the other explanatory variables were taken into account.<sup>131</sup> Moreover, the effect size

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MADDAN, *STATISTICS IN CRIMINOLOGY AND CRIMINAL JUSTICE: ANALYSIS AND INTERPRETATION* 404–05 (4th ed., 2013).

126. The levels of seniority correspond roughly to organizational levels within the appropriate hierarchy. For example, individuals with political positions were coded as working at the individual, town, municipal, regional, national or international level. An increase in seniority of one level corresponds with moving, for example, from the leadership of a municipality to the leadership of a region. For military positions, the levels were soldier, squad, platoon, company, battalion, brigade, corps, or command staff. An increase in seniority of one level corresponds with moving, for example, from the leadership of a company to leadership of a battalion.

127. *See supra* Table 2.

128. *See id.*

129. *See supra* Table 1.

130. Technically, this failure means that the model was unable to reject the null hypothesis that the explanatory variable had no effect on the response variable. *See* UPTON & COOK, *supra* note 11, at 195 (“If the actual value of the statistic is close to its expected value the test is deemed to be not significant and the decision is not to reject [the null hypothesis].”). Consequently, one cannot be sure these variables have any effect on trial complexity. It is possible that they do have some effect, but the effect is so small that the model cannot detect it.

131. *See supra* Table 2.



was roughly a hundred times smaller than the effect of the number of trial accused or the accused's seniority.<sup>132</sup>

Similarly, there was no statistically significant effect on trial complexity from using JCE or superior responsibility as a mode of liability. The regression coefficient for superior responsibility is negative,<sup>133</sup> which may mean that using superior responsibility as a mode of liability decreases complexity.<sup>134</sup> However, given that the result is not significant, it would be unwise to read too much into this finding.

Finally, the genocide variable was not significant. This suggests that even though genocide is sometimes referred to as the "crime of crimes,"<sup>135</sup> trials that involve genocide charges are no more complex on average than trials of war crimes or crimes against humanity.<sup>136</sup> These negative results are somewhat surprising, given the theoretical reasons for believing that particular modes of liability or charges could increase trial complexity.<sup>137</sup>

In conclusion, the principal regression demonstrates that the strongest predictors of trial complexity are the number of accused, the seniority of the accused, and whether or not the accused are charged as direct perpetrators. Each of these factors is significant and the magnitude of the regression coefficients means they have a meaningful effect on trial complexity.<sup>138</sup> The total number of counts is also significant; however, its relatively small effect size means that it is less likely to meaningfully affect trial complexity.<sup>139</sup> Finally, the four remaining variables—number of crime sites, use of JCE, use of superior responsibility, and charging genocide—cannot be shown to have any statistically significant effect on trial complexity.<sup>140</sup>

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132. *See id.*

133. *See id.*

134. *See supra* text accompanying note 79 (noting that some defense counsel contend that using superior responsibility as a mode of liability decreases trial complexity by simplifying proof of the accused's *mens rea*).

135. *See* Petit et al., *supra* note 69, at 213.

136. *See supra* Table 2.

137. *See supra* Section IV, Hypotheses 5–7 (explaining the reasons to expect that these factors would have some effect on trial complexity).

138. *See supra* Table 2.

139. *See*, for example, Figure 1 *infra*, which shows the relative effect of the various explanatory variables on the median ICTY trial. Seniority and direct perpetration have much larger effects on the complexity of the median ICTY trial than any of the other explanatory variables.

140. *See supra* Table 2.

The robustness of the principal regression was checked using alternative models.<sup>141</sup> The results were remarkably consistent. The number of trial accused and the seniority of the accused were significant in all of the alternative models.<sup>142</sup> Direct perpetration was significant in all but one of the alternative models,<sup>143</sup> while the total number of counts was significant in a little over half of the alternative models.<sup>144</sup>

Moreover, the effect size of the variables was also consistent across the various models.<sup>145</sup> The regression coefficient for direct perpetration was always negative and approximately twice as large as the regression coefficients for seniority and number of accused.<sup>146</sup> The regression coefficient for total number of counts was always positive and approximately an order of magnitude smaller than the regression coefficients for seniority and number of accused.<sup>147</sup>

Thus, it appears that the results with respect to number of accused and seniority of the accused are robust, and do not depend on the particular model used. The finding that direct perpetration is significant is also quite robust. It was significant in all but one of the alternative models.<sup>148</sup> The least robust finding is that the number of counts is significant.<sup>149</sup> It is significant in the main regression, although barely so, but is not significant in a number of alternative models. This suggests that the finding with regard to the number of counts is partly dependent on the particular specifications of the model.

There are limitations to the model used in the principal regression, just as there are limitations with any statistical model. It proved impossible to test three of the eleven hypotheses.<sup>150</sup> It is

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141. A number of alternative models were tried, including: 1) a robust regression of the untransformed Complexity Scores; 2) a backwards stepwise regression of the transformed Complexity Scores; 3) a principal component analysis of the components of the Complexity Scores followed by a regression of the principal component; and 5) a regression of the number of trial days. None of the alternative models was markedly better than the principal regression at explaining the variance in trial complexity. See STUART FORD, OUTPUT OF THE DO FILE (2015) (unpublished document) (on file with author) (containing the output obtained from running all of the alternative models on the ICTY database).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. See *supra* text accompanying notes 82–108.

also likely that there are other factors that affect trial complexity that were not tested. In this sense, the model is incomplete.<sup>151</sup> Even though it is not perfect, the model is still useful<sup>152</sup> because it improves our understanding of the factors driving the complexity of international criminal trials.

## VI. PREDICTING TRIAL COMPLEXITY

The ability to predict trial complexity before trial would be highly useful, as international criminal tribunals have been unable to accurately predict how long their trials will take. For example, the ICTY has consistently underestimated the length and complexity of its trials resulting in a constantly shifting target for ending its work.<sup>153</sup> It has blamed its inability to predict the length of its trials on their complexity.<sup>154</sup>

If the ICTY had been better able to predict the length and complexity of its trials it could have: 1) made better estimates about the date on which all of the trials would be completed;<sup>155</sup> 2) made better estimates about the overall cost of the trials<sup>156</sup>; 3) allowed judges to make more informed decisions about how much time to allow the parties for the presentation of their cases<sup>157</sup>; 4) helped Registry officials manage legal aid costs<sup>158</sup>; 5) permitted the Registry, prosecutors and defense counsel to make more accurate decisions about staffing requirements<sup>159</sup>; and 6) helped states make informed decisions about the utility of international criminal tri-

151. See George E.P. Box, *Science and Statistics*, 71 J. AM. STAT. ASS'N 791, 792 (1976) ("Since all models are wrong the scientist cannot obtain a 'correct' one by excessive elaboration.").

152. See GEORGE E.P. BOX, *EMPIRICAL MODEL BUILDING AND RESPONSE SURFACES* 424 (1987) ("Essentially, all models are wrong, but some are useful.").

153. *Complexity and Efficiency*, *supra* note 1, at 16.

154. *Id.* at 17.

155. See *supra* text accompanying notes 153-54 (noting that the ICTY has been unable to accurately predict the length of its trials).

156. The cost of the ICTY's work has been driven, to a large extent, by the complexity of its trials. Because the ICTY has been unable to accurately predict the length of its trials, it has also been unable to accurately predict the total cost of those trials. Better predictions about trial complexity would ultimately lead to more accurate budgeting over the long-term.

157. Cf. Langer & Doherty, *supra* note 9, at 283 (noting that judges at international tribunals are at a disadvantage in managing the trials because they have significantly less information about the case than the parties). See also *id.* at 285 n.118 (same).

158. See *Defence Counsel - Pre-Trial Legal Aid Policy*, *supra* note 60, ¶ 22 (noting that legal aid costs are tied to the expected complexity of the cases).

159. It has often been difficult to know how many judges, prosecutors, translators, and other support staff a court will need at any given time because international criminal courts have consistently under-estimated the amount of time necessary to conduct their

als.<sup>160</sup> In short, being able to predict the complexity of the ICTY's cases would have had significant benefits.

The principal regression can be used to predict the majority of the complexity of the ICTY's trials. It produces the following equation for the complexity of ICTY trials:

$$\sqrt[2]{\text{Complexity}} = .077(A) + .065(S) + .0061(C) + .00060(CS) \\ + .066(G) + .048(J) - .088(R) - .20(D) + .40 + \varepsilon$$

Complexity is the expected Complexity Score for the trial; A is the number of accused on trial; S is the seniority of the accused; C is the total number of counts alleged in the indictment; CS is the number of crime sites in the indictment. G is 1 if a genocide charge is included in the indictment and 0 if it is not. J is 1 if the accused are charged as members of a JCE and 0 if it is not. R is 1 if superior responsibility is used as a mode of liability and 0 if it is not. D is 1 if the accused are alleged to have physically committed violence against the victims and 0 if they are not. Finally,  $\varepsilon$  is an error term. Solving for complexity, the result is:

$$\text{Complexity} = (.077(A) + .065(S) + .0061(C) + .00060(CS) + \\ .066(G) + .048(J) - .088(R) - .20(D) + .40 \\ + \varepsilon)^2$$

With this equation one can make predictions about how long individual trials will take.

Some of the most important trials at the ICTY are currently underway. The last three accused on trial are Ratko Mladić, Goran Hadžić, and Radovan Karadžić. Mladić is the former commander of the Bosnian Serb Army and is charged with genocide arising out of the killing of thousands of Bosnian Muslim men and boys at Srebrenica.<sup>161</sup> Radovan Karadžić is the former president of the

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trials. See, e.g., Dominic Raab, *Evaluating the ICTY and its Completion Strategy*, 3 J. INT'L CRIM. JUST. 86 (2002).

160. States presumably fund international trials because they believe the goals that such courts achieve justify the expense. But because courts (and by extension the states that pay for them) have been unable to make accurate predictions about the overall length or cost of their trials, states have not been able to make accurate calculations in advance about how much money they are committing to spend by funding a court. Better upfront predictions about length and cost could lead to better decision-making by states about whether to support such courts.

161. See Prosecutor v. Mladić, Case Information Sheet for Ratko Mladić, Case No. IT-09-92 (Int'l Crim. Trib. for the Former Yugoslavia 2011), [http://icty.org/x/cases/mladic/cis/en/cis\\_mladic\\_en.pdf](http://icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf) (last visited Oct. 10, 2012).

Republika Srpska and is also charged with genocide in connection with the massacre at Srebrenica.<sup>162</sup> Goran Hadžić is the former president of the Republic of Serbian Krajina (RSK) and is charged with various crimes against humanity and war crimes arising out of the treatment of non-Serbs within the territory of the RSK.<sup>163</sup> These are all important cases that involve some of the most senior surviving members of the Serb political and military leadership. They are all also cases that one would, intuitively, expect to be complex. But how complex will they be?

Using the equation above, one can predict the complexity of the ICTY's remaining trials. The result appears below in Table 3, and indicates that the trials of Mladić, Hadžić, and Karadžić will indeed be complex. Each trial is predicted to have a Complexity Score greater than one, which means each will be more complex than the average ICTY case,<sup>164</sup> despite each being a single-accused case. Their above average complexity appears to be a result of the seniority of the accused and the fact that all of them are charged as indirect perpetrators.

TABLE 3: EST. COMPLEXITY OF REMAINING TRIALS

Radovan Karadžić	1.22
Goran Hadžić	1.12
Ratko Mladić	1.08

Predicting the complexity of the remaining ICTY trials can also serve as a check on the validity of the model. By definition, the model can predict the complexity of the trials that were used to create the model. After all, we know the model is the best possible fit of the data used to create it. Making accurate predictions about trials that were not included in the database would show that trial complexity *can* be predicted in advance.<sup>165</sup> After these three trials have ended, it will be possible to calculate their actual complexity.

162. See Prosecutor v. Karadžić, Case Information Sheet for Radovan Karadžić, Case No. IT-95-5/18 (Int'l Crim. Trib. for the Former Yugoslavia 2014), [http://icty.org/x/cases/karadzic/cis/en/cis\\_karadzic\\_en.pdf](http://icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf) (last visited July 10, 2015).

163. See Prosecutor v. Hadžić, Case Information Sheet for Goran Hadžić, Case No. IT-04-75 (Int'l Crim. Trib. for the Former Yugoslavia), [http://icty.org/x/cases/hadzic/cis/en/cis\\_hadzic\\_en.pdf](http://icty.org/x/cases/hadzic/cis/en/cis_hadzic_en.pdf) (last visited July 10, 2015).

164. The average ICTY trial had a Complexity Score of .97. See *Complexity and Efficiency*, *supra* note 1, at 28.

165. See UPTON & COOK, *supra* note 11, at 105 (noting that a model is more likely to be valid if it shows predictive accuracy on out of sample data).

This value can then be compared to their predicted complexity in Table 3 to assess the validity of the model.

## VII. DISCUSSION

### A. *The Difficulty of Attributing Responsibility*

This Article began with the premise that understanding the drivers of trial complexity at international courts could help courts and trial participants decide how to reduce trial complexity. The model results do not offer a lot of hope for easy fixes. The results suggest that complexity is driven primarily by factors that individual judges and prosecutors have little control over: the accused's seniority and whether the accused is a direct perpetrator.<sup>166</sup>

In contrast, the results suggest that factors which judges and prosecutors have control over have negligible associations with trial complexity.<sup>167</sup> For example, adding or removing crime sites appears to have no effect on complexity.<sup>168</sup> Similarly, trial complexity does not appear to be driven by the legal qualification of the charges or the mode of liability alleged. Genocide trials were no more complex on average than trials involving other sorts of charges.<sup>169</sup> Neither the use of joint criminal enterprise (JCE) nor superior responsibility as modes of liability resulted in a statistically significant increase or decrease in trial complexity.<sup>170</sup> The total number of counts in the indictment was significant in the principal regression, but only barely so.<sup>171</sup> More importantly, the effect size was more than an order of magnitude lower than the effect size of the other three significant factors.<sup>172</sup>

There is one factor, however, that prosecutors and judges do control that significantly affects trial complexity: the number of accused tried together. The more accused tried together, the more complex the resulting trial.<sup>173</sup> This raises the possibility that complexity could be reduced by trying accused separately. But separating accused into individual trials would not reduce complexity for the system as a whole. It would replace one trial with multiple accused with multiple trials each with a single accused. This could

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166. See *infra* text accompanying notes 178–94.

167. See *infra* text accompanying notes 168–77.

168. See *infra* Table 2.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

reduce the complexity of the individual trials. However, it would significantly increase the total complexity of the group of trials in comparison to a single trial with multiple accused.<sup>174</sup>

In other words, the factors that individual prosecutors and judges are able to control are not factors that generate the majority of trial complexity. Prosecutors choose how many crime sites to include in the indictment. They choose the number of counts and the legal qualification of those counts in the indictment. They decide what modes of liability to use. At the ICTY, judges have some control over these factors as well.<sup>175</sup> For example, they can limit the number of crime sites and limit the number of counts.<sup>176</sup> But these are not the factors that cause the majority of trial complexity.<sup>177</sup>

FIGURE 1: MAGNITUDE OF COMPONENTS OF COMPLEXITY  
IN MEDIAN ICTY CASE

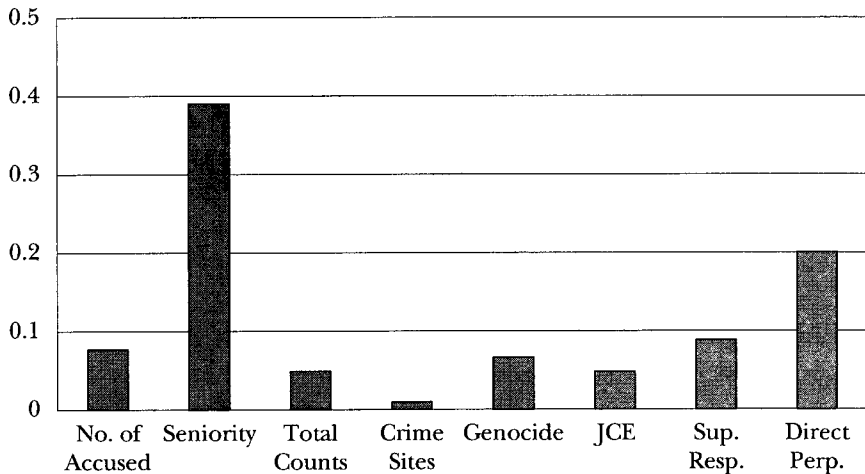


Figure 1 demonstrates the magnitude of the factors that affect the Complexity Score in the median ICTY trial. It shows the components of trial complexity in a case that has one accused with a seniority value of six where the indictment contains eight separate

174. *See infra* Section VII(B)(4) (using the model to predict the net effect of switching from multi-accused trials to single-accused trials and finding that multi-accused trials are less complex).

175. *See* International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, IT/32/Rev. 44, Dec. 10, 2009, Rule 73 *bis* (noting that the judge may direct the prosecutor to limit the number of crime sites and counts which will be included in the trial).

176. *Id.*

177. *See supra* Table 2.

counts that relate to sixteen different crime sites.<sup>178</sup> The absolute value of the effect size of the four dummy variables is also shown on the chart for comparison purposes. This shows the magnitude of the effect of the various factors that contribute to trial complexity in the median ICTY trial.

The explanatory variable that by far has the largest impact on trial complexity is seniority. The effect of seniority is eight times as large as the effect of the number of counts and forty times larger than the effect of the number of crime sites.<sup>179</sup> After seniority, the factor that has the most impact in trial complexity is whether the accused is a direct perpetrator.<sup>180</sup> It has more than twice the effect of any of the other dummy variables.<sup>181</sup> Collectively, seniority and direct perpetration account for the majority of trial complexity in the median case.<sup>182</sup> By comparison, the number of counts and the number of crime sites in the indictment represent only a small fraction of the resulting trial complexity.<sup>183</sup>

This helps to explain the results of Professors Máximo Langer and Joseph W. Doherty's study of efforts to reform the ICTY's Rules of Procedure and Evidence to reduce the length and cost of the trials. Professors Langer and Doherty found that the reforms did not reduce the length of the trials.<sup>184</sup> This result is unsurprising in light of the principal regression.<sup>185</sup> The ICTY reforms focused on giving the judges more control over factors like the number of crime sites and counts in the indictment, but these factors do not create the majority of trial complexity.<sup>186</sup>

The model results suggest that the causes of complexity cannot be easily addressed without major changes to international criminal law. To begin with, the complexity of the trials increases as the accused's seniority in their respective military or political hierarchy increases.<sup>187</sup> More importantly, this increase occurs independently of the number of crime sites in the indictment, the number of counts in the indictment, the mode of liability used, and the legal

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178. This represents the median ICTY trial. The data on a median trial comes from Table 1. The values in Figure 1 were calculated using the equation from Section VI.

179. *See supra* Figure 1.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *See* Langer and Doherty, *supra* note 9, at 267.

185. *See supra* Table 2 (presenting the results of the principal regression).

186. *See supra* Figure 1.

187. *See supra* Table 2.



qualification of the charges.<sup>188</sup> The increase in trial complexity appears to arise from the accused's position within the political or military hierarchy at the time of the commission of the alleged crimes. Moreover, the increase in complexity is substantial. Every increase in one level in the accused's seniority is almost equivalent to adding an additional accused to the trial.<sup>189</sup>

This suggests that the main cause of complexity in international criminal trials is the difficulty of attributing responsibility for crimes to senior accused rather than the need to prove that those crimes were committed. In effect, the number of crime sites functions as a proxy for the amount of evidence needed to prove the physical acts of violence.<sup>190</sup> Each crime site is a location at which some act of violence occurred.<sup>191</sup> The larger the number of crime sites, the more evidence will be needed to prove the physical violence. But increasing the number of crime sites does not meaningfully increase complexity,<sup>192</sup> suggesting that it is not the evidence necessary to prove that the crimes were committed that causes the bulk of trial complexity. Rather, it is the difficulty of demonstrating the accused's criminal responsibility for crimes that the accused is geographically and organizationally distant from that results in complexity.

This conclusion is corroborated by the effect of direct perpetration on trial complexity. When an accused is a direct perpetrator of the crimes (i.e., they inflicted the violence themselves rather than through subordinates or accomplices), trials are significantly less complex, even considering all other factors, including the accused's seniority.<sup>193</sup> The main difference between trying someone as the direct perpetrator of a crime and as an indirect perpetrator of that same crime is whether linking evidence is necessary to attribute criminal responsibility for the violence to the accused.<sup>194</sup> In other words, the fact that direct perpetrators have much shorter trials, independent of the other factors, indicates that it is the absence of linking evidence that makes their trials shorter.

If complexity is driven largely by the need to attribute responsibility for crimes to senior accused, then there may not be any sim-

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188. *Id.*

189. *Id.*

190. *See supra* text accompanying notes 63–64.

191. *See supra* text accompanying note 62.

192. *See supra* Table 2.

193. *See supra* Table 2.

194. *See supra* text accompanying notes 80–81.

ple way to reduce the complexity of international criminal trials. After all, indirect perpetration is a hallmark of international trials.<sup>195</sup> Unlike the vast majority of domestic criminal prosecutions, where the accused is alleged to have acted alone,<sup>196</sup> international crimes (at least the sort that are prosecuted at international tribunals) tend to be carried out by hierarchically organized groups, often military units or paramilitary groups.<sup>197</sup> Moreover, the physical violence tends to be carried out by those lowest in the hierarchy, while being orchestrated by those much higher up.<sup>198</sup> The result is that those responsible for orchestrating the crimes are usually geographically and organizationally distant from the violence committed by their subordinates.<sup>199</sup> This makes it much more difficult to attribute criminal responsibility to them. Furthermore, the more levels of the hierarchy separating the accused from the direct perpetrators, the more difficult it will be to establish the accused's criminal responsibility.

This explanation is consistent with the model results.<sup>200</sup> If the explanation is accurate, then courts will have difficulty reducing the complexity of their trials; they cannot directly control the accused's position in the hierarchy or whether the accused is a direct perpetrator in the same way that they can control the number of crime sites or the number of counts in the indictment. They can choose whether to try a particular individual, but once a decision to try that person has been taken, much of the resulting trial complexity is locked in by factors the court cannot control. Having said that, there may be some things courts can do to reduce complexity. The following Section will explore six options.

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195. See CRYER ET AL., *supra* note 17, at 361 (“Unlike in domestic law, where the traditional image of a criminal is the primary perpetrator such as the person who pulls the trigger, in international criminal law, the paradigmatic offender is often the person who orders, masterminds, or takes part in a plan at a high level.”).

196. See *Fairness and Politics*, *supra* note 14, at 67–68.

197. See *id.* at 67.

198. See *id.*

199. See ICC OFFICE OF THE PROSECUTOR, STRATEGIC PLAN JUNE 2012–2015 ¶ 19 (Oct. 11, 2013) [hereinafter STRATEGIC PLAN] (noting that one of the challenges the ICC faces is that the crimes involve “complex structures with the [individuals] most responsible often keeping a distance between themselves and the crimes, using different mechanisms to conceal their role.”).

200. An alternative explanation could be that there is something unusual about senior leaders that causes their trials to be more complex. See, e.g., *supra* text accompanying note 56 (suggesting that senior leaders see their trials largely in political terms and this viewpoint causes them to act in ways that increase the complexity of those trials). It is more likely that complexity is a result of both the difficulty of attributing responsibility and the political goals of senior leaders. Ultimately, this has little effect on this Article's findings because the court cannot easily control either factor.

### B. *Methods for Reducing Trial Complexity*

There are at least six ways that the overall complexity of trials at international criminal tribunals could be reduced, which are explored in the Section below. The ICTY has already tried incremental changes to the Rules of Procedure and Evidence, but those failed to reduce trial complexity.<sup>201</sup> The proposals below all involve more radical changes to the process, but all of them also carry very serious drawbacks. Ultimately, it may not be possible to dramatically reduce trial complexity without undermining the purposes of the trials.

#### 1. Changes to the Rules of Procedure

The most obvious solution, and the one already tried by the ICTY, is to modify its Rules of Procedure.<sup>202</sup> However, Professors Langer and Doherty's study found that the ICTY's attempts to reduce trial complexity by modifying the rules have not worked.<sup>203</sup> This does not mean that no changes to the Rules of Procedure and Evidence could be effective at reducing complexity. One can imagine a hypothetical rule that arbitrarily limited each side to twenty trial days and twenty trial witnesses to present their case. This would be a radical change to the rules, and it would undoubtedly reduce trial complexity. However, it would also undermine the fairness of the proceedings. The crimes tried at international criminal tribunals are factually and legally complex. They tend to involve violence that occurred over broad geographic areas and over months or years of time.<sup>204</sup> They also involve large numbers of victims.<sup>205</sup> In addition, they involve hierarchically organized groups acting together and the attendant need for linking evidence.<sup>206</sup> It would simply not be possible to try them fairly in arbitrarily short periods.

Arbitrarily short trials would be extremely problematic because it is crucial to a tribunal's success that the process remains fundamentally fair.<sup>207</sup> The changes that have been made to the ICTY's Rules of Procedure and Evidence to reduce complexity have already raised some fairly serious questions about their effect on

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201. See *supra* text accompanying note 184.

202. See *supra* text accompanying note 9.

203. See *supra* text accompanying note 10.

204. See *Fairness and Politics*, *supra* note 14, at 86–87.

205. See *id.* at 84–85.

206. See *id.*

207. See *id.* at 55–59.

the fairness of the proceedings.<sup>208</sup> It may not be possible to make further changes in favor of expediency without undermining the overall fairness of trials.<sup>209</sup> There are limits to the kind of changes one can make to procedural rules to reduce complexity, and the ICTY is already close to those limits.

## 2. Changes to International Criminal Law

Another way to reduce the complexity of international criminal trials would be to change the substance of international criminal law rather than the procedural rules. This might be done by making violations of international criminal law strict liability crimes. For example, one might make senior political and military leaders strictly liable for the criminal acts of agents of the state or organization when those acts constitute violations of international criminal law. This would greatly simplify the attribution of crimes. It would be sufficient to show that the crimes occurred, were caused by agents of the state or organization, and that the accused occupied a position of authority within the state or organization at the time they occurred. There would be no need to present evidence relating to the *mens rea* of the accused.<sup>210</sup> Such trials would be less complex than current trials because it would be much simpler to attribute criminal responsibility to senior accused.

However, switching to strict liability would be a bad idea because it would remove the requirement of culpability as a prerequisite to conviction.<sup>211</sup> Strict liability crimes are disfavored in domestic criminal justice systems.<sup>212</sup> Relatively few domestic crimes are strict liability crimes; those that tend to have small penalties and are not associated with strong moral condemnation.<sup>213</sup> The typical example of a strict liability offence in domestic law is speeding.<sup>214</sup> Strict

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208. See *Complexity and Efficiency*, *supra* note 1, at sec. IV(A).

209. See *id.*

210. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 145 (6th ed., 2012) (noting that a strict liability crime is one that does not contain a *mens rea* requirement as to one or more of the elements of the crime).

211. See *infra* text accompanying notes 212–18.

212. DRESSLER, *supra* note 210, at 145

213. See DRESSLER, *supra* note 210, at 145–46; Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 147 (2005) (“Strict liability, where the defendant need have no particularly blameworthy mental state, is rare and disfavored in criminal law; it most often appears in regulatory offenses for which no particular moral stigma attaches.”).

214. See John Shepard Wiley Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1024 (1999) (“One argument for the efficiency of strict liability, however, may have some force in petty cases when the stakes are low:

liability crimes are disfavored because when an individual is convicted of a crime, society is condemning that person as a wrongdoer and punishing them.<sup>215</sup> It is simply not fair to condemn and punish a person who has not committed any act that can be considered morally blameworthy.<sup>216</sup> For this reason, strict liability has generally been viewed unfavorably when applied to crimes that entail severe punishment or moral condemnation.<sup>217</sup> International criminal law is not an appropriate place for strict liability precisely because of the severe penalties and moral condemnation that accompany violations of international criminal law.<sup>218</sup>

Indeed, even the closest thing to strict liability in international criminal law—superior responsibility—is not really strict liability.<sup>219</sup> It still requires that the prosecution show that the superior had effective control over the direct perpetrators, that the superior failed to exercise proper control over the perpetrators, and that the accused knew or should have known that the perpetrators were

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traffic citations and the like, where a defendant faces neither the threat of prison nor the stain of a felony conviction.”). The exception to this general rule in the United States is statutory rape, which is often treated as a strict liability crime despite carrying a severe penalty. See DRESSLER, *supra* note 210, at 147.

215. See DRESSLER, *supra* note 210, at 120–21.

216. See *id.* See also Gerhard Werle & Florian Jessberger, *Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Elements of Crimes Under International Criminal Law*, 3 J. INT'L CRIM. JUST. 35, 36 (2005) (“The idea that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing and of the consequences that their actions may have is generally recognized in domestic and international criminal justice systems.”); ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 137 (2003) (“[A] person may only be held criminally liable if he is somehow *culpable* for any breach of criminal rules.”).

217. See DRESSLER, *supra* note 210, at 148 (“Most modern criminal law scholars look unkindly upon the abandonment of the *mens rea* requirement.”); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 831 (1999) (“Strict liability has endured decades of unremitting academic condemnation. Its use has been widely criticized as both inefficacious and unjust. . . .”); Wiley, *supra* note 214, at 1080 (“By definition, we cannot know that a person deserves the moral lash of criminal conviction if we have no proof of that person’s culpability. Most commentators therefore have concluded that strict criminal liability is simply a bad idea.”).

218. See George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 550 (2005) (arguing that strict liability is inappropriate in international criminal law); Danner & Martinez, *supra* note 213, at 139 (noting that the adoption of strict liability in international criminal law would be “fundamentally out of step with the moral and philosophical underpinnings of contemporary criminal justice.”).

219. See Turner, *supra* note 47, at 564–65 (noting that some defense counsel argue that superior responsibility introduces a form of strict liability into international criminal law). *But see Fairness and Politics*, *supra* note 14, at 83 (arguing that data indicates superior responsibility does not function as a form of strict liability at the ICTY).

committing or about to commit the crimes.<sup>220</sup> But even the use of superior responsibility has been sharply criticized for allegedly doing away with the requirement of proving that the accused had the appropriate *mens rea* for the crime.<sup>221</sup> As a result, moving further in the direction of strict liability would not be desirable, even if it reduced trial complexity.

### 3. Indicting Only Low-Level Perpetrators

Another way to reduce the complexity of international criminal trials would be to charge only low-level direct perpetrators and avoid trials of high-level indirect perpetrators.<sup>222</sup> This would reduce overall complexity by eliminating the most complex trials. However, international courts, under pressure from the international community, have been going in the opposite direction. While the ICTY did initially charge a number of low-level direct perpetrators,<sup>223</sup> it was forced to drop most of those cases and told to focus on “the most senior leaders.”<sup>224</sup> This focus on senior leaders has been a hallmark of the ICTY’s Completion Strategy for the last decade.<sup>225</sup>

Other courts have also focused on senior leaders. For example, this requirement was written into the statutes of the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Article 1 of the Statute of the SCSL limits the jurisdiction of the court to those who bear the “greatest responsibility” for violations of international criminal law, particularly “leaders” who threatened the peace in Sierra Leone.<sup>226</sup> Similarly, the constitutive document of the ECCC limits its jurisdiction to “senior leaders” and those “most responsible.”<sup>227</sup> In effect, the SCSL and ECCC have continued the ICTY’s focus on trying senior

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220. See, e.g., Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (laying out the elements of superior responsibility).

221. See Turner, *supra* note 47, at 564–65.

222. A simpler solution would be to not indict or try people for violations of international criminal law at all. The international community, however, has repeatedly rejected this possibility. See *Complexity and Efficiency*, *supra* note 1, at 63–64.

223. *Fairness and Politics*, *supra* note 14, at 72–73.

224. *Id.*

225. See *id.*

226. Statute of the Special Court for Sierra Leone U.N.-Sierra Leone art. 1, Jan. 16, 2002.

227. Law on the Establishment of the Extraordinary Chambers U.N.-Cambodia art. 1, Aug. 10, 2001 (amended Oct. 27, 2004).

figures thought to be most responsible for orchestrating the violence.<sup>228</sup>

The International Criminal Court (ICC) has no formal limitation to its personal jurisdiction. The Rome Statute says only that the court will have jurisdiction over “persons” responsible for the “most serious” crimes of international concern.<sup>229</sup> In practice, however, its Office of the Prosecutor (OTP) has focused on investigating “those who bear the greatest responsibility,” particularly “leaders of the State or organization” responsible for the alleged crimes.<sup>230</sup> The indictments evidence this focus on senior leaders.<sup>231</sup> However, the OTP has recently indicated a change in policy; going forward, it may indict some low and mid-ranking accused in addition to senior accused.<sup>232</sup>

This Article advocates for charging both those leaders most responsible for orchestrating acts of violence and some lower and mid-level perpetrators who have engaged in particularly egregious crimes within the jurisdiction of the tribunal. First, it is simply not true that only leaders are responsible for mass atrocities. While many of the direct perpetrators are somewhat interchangeable, those in the lower levels of the hierarchy still bear legal and moral

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228. See Charles Chernor Jalloh, *Prosecuting Those Bearing “Greatest Responsibility”: The Lessons of the Special Court for Sierra Leone*, 96 MARQ. L. REV. 863, 868 (2013) (describing the adoption of the “greatest responsibility” language in the SCSL’s constitutive instrument as continuing a “focus on prosecuting the top leaders and architects of mass atrocities” that began with the International Military Tribunal at Nuremberg and had continued with the ICTY); Sean Morrison, *Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal*, 37 CAP. U. L. REV. 583, 589 (2009) (arguing that the limiting language in the ECCC’s constitutive document was designed to narrow the focus of prosecutions).

229. Rome Statute, *supra* note 220, art. 1.

230. INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 7 (Sept. 2003), [http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf).

231. For example, the ICC has indicted several present and former heads of state, including Omar Bashir of Sudan, Muammar Gaddafi of Libya, Uhuru Kenyatta of Kenya, and Laurent Gbagbo of Côte d’Ivoire. ICC - Prosecutions, INT’L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/prosecutions/pages/prosecutions.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/prosecutions/pages/prosecutions.aspx) (last visited July 5, 2015).

232. See STRATEGIC PLAN, *supra* note 199, at 6 (“The required evidentiary standards to prove the criminal responsibility of those bearing the greatest responsibility might result in the OTP changing its approach due to limitations on investigative possibilities and/or a lack of cooperation. A strategy of gradually building upwards might then be needed in which the Office first investigates and prosecutes a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable prospect of conviction for those most responsible. The Office will also consider prosecuting lower level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety.”).

responsibility for their actions. Second, some of the crimes that have been identified by the ICTY as being the most heinous have been carried out by mid-level perpetrators.<sup>233</sup>

International criminal courts should retain the discretion to reach further down the organizational chart to prosecute such individuals. However, if the courts must choose between prosecuting senior leaders and lower level perpetrators, then it makes sense to focus on senior leaders, as they are the figures most likely to have the authority to both start and stop atrocities. In essence, if one expects international criminal law to reduce violations, it is logical to focus on senior leaders.

It appears very likely that international criminal courts will continue to focus on high-level indirect perpetrators.<sup>234</sup> The ICC may eventually prosecute some mid-level accused in addition to the senior accused, but it is not going to give up prosecuting senior leaders.<sup>235</sup> Thus, we can expect the majority of international trials to continue to be extremely complex.

#### 4. Single-Accused vs. Multi-Accused Trials

The ICTY and the International Criminal Tribunal for Rwanda (ICTR) have disagreed about whether it is more efficient to consolidate the cases against defendants accused of related criminal acts into large multi-accused cases, or to try the accused individually—even if the charges against them are related. The ICTY chose to combine its accused together into larger cases, arguing that doing so was more efficient because it would avoid the presentation of the same evidence in multiple trials.<sup>236</sup> The ICTR, meanwhile, has argued that trying the accused individually is more efficient because individual trials are much shorter.<sup>237</sup> This dispute has

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233. See *Fairness and Politics*, *supra* note 14, at 97.

234. See *supra* text accompanying notes 223–32.

235. See *supra* text accompanying note 232.

236. See Advisory Comm. on Admin. & Budgetary Questions, Second Performance Reports for the Biennium 2006–2007 and Proposed Budgets for the Biennium 2008–2009 of the International Criminal Tribunal for Rwanda and of the International Tribunal for the Former Yugoslavia, ¶ 11, U.N. Doc. A/62/578 (Dec. 11, 2007) (“[T]he [ICTY] considers that the multiple-accused trials reduce overall trial time substantially in comparison with holding separate trials for each of the accused.”); U.N. Secretary-General, *Budget for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 for the Biennium 2006–2007*, ¶ 63, U.N. Doc. A/60/264 (Aug. 17, 2005) (“Multiple-accused cases will undoubtedly be more efficient and make trials faster since the crime base will not be required to be proven in several separate trials.”).

237. See U.N. Advisory Committee on Administrative and Budgetary Questions, *supra* note 236, ¶ 11 (“By contrast, the Committee was informed that the experience of the



obvious implications for trial complexity. If it really is more efficient to try accused separately, even if their alleged crimes are related, doing so at all international tribunals would reduce overall trial complexity.

To test this question, all twenty of the multi-accused cases at the ICTY that had a completed first trial were examined.<sup>238</sup> These twenty trials represent a range of complexity, with eleven of them being less complex than the average ICTY case. On the other hand, the largest multi-accused cases also represented the most complex cases that have come before the ICTY, including the cases of *Šainović et al.*, *Popović et al.*, and *Prlić et al.*, which were the three most complex cases heard by the ICTY.<sup>239</sup>

For each of the multi-accused cases, the model was used to estimate the total complexity that would have resulted if each of the accused had been tried separately. The estimated complexity of the individual trials was combined and then compared to the actual Complexity Scores for the multi-accused trials. The results are presented below in Table 4.

Of the twenty multi-accused trials, the model estimates that only one of them, *Naletilić & Martinović*, could have been tried with less complexity if it had been divided into separate trials. For two other multi-accused trials, their complexity would be an estimated 5 to 10 percent higher if they were tried separately, compared to their actual complexity as multi-accused trials.<sup>240</sup> For these trials, it makes relatively little difference whether the accused are tried together or separately. The remaining seventeen multi-accused trials are estimated to have generated significantly more complexity if tried separately.<sup>241</sup> The model predicts that trying multi-accused trials as separate trials would have increased their overall complexity by 90 percent.<sup>242</sup>

The effect appears to be the greatest for the most complex cases. *Šainović et al.*, *Popović et al.*, and *Prlić et al.* had a combined actual Complexity Score of 6.88. However, if the accused had been tried separately, the model predicts that the resulting individual trials

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International Criminal Tribunal for Rwanda showed that trials of single-cases was a more efficient way to proceed, with one-single case trial taking no more than 16 weeks, while multiple-accused trials could last 300 days or even more.”).

238. See *Complexity and Efficiency*, *supra* note 1, at app. 68 (listing the ICTY cases sorted by complexity).

239. See *id.*

240. See *infra* Table 4.

241. *Id.*

242. *Id.*

would have had a combined complexity score of 18.83, an increase of 174 percent. It appears the ICTY correctly chose to consolidate the accused into large multi-accused trials. The model shows that the larger the number of accused tried together, the greater the reduction in overall complexity, even if the trials that result are still extremely complex. This suggests that where accused are alleged to have participated in the same or related crimes, multi-accused trials are the preferred solution.

TABLE 4: SINGLE VS. MULTI-ACCUSED TRIALS

Case	No. of Accused	Actual Comp. Score	Est. Comp. of Indiv. Trials	Percent Difference
Blagojević & Jokić	2	.77	1.51	+96%
Boškoski & Tarčulovski	2	.76	1.19	+57%
Hadžihasanović & Kubura	2	1.32	1.38	+5%
Kordić & Čerkez	2	1.72	1.88	+9%
Naletilić & Martinović	2	.82	.70	-15%
Lukic & Lukic	2	.51	.72	+41%
Stanisic & Simatovic	2	1.28	1.34	+47%
Stanisic & Zupljanin	2	1.84	2.39	+30%
Kunarac, Kovac, & Vukovic	3	.35	.79	+126%
Limaj et al.	3	.37	1.03	+178%
Mrkšić et al.	3	.77	1.50	+95%
Simić et al.	3	1.00	2.04	+104%
Haradinaj et al.	3	.62	1.90	+206%
Gotovina & Markač	3	1.60	2.62	+64%
Mucić et al.	4	.69	1.53	+122%
Kvočka et al.	5	.73	.89	+22%
Kupreškić et al.	6	.81	1.24	+53%
Prlić et al.	6	2.63	7.41	+182%
Šainović et al.	6	1.79	5.78	+223%
Popović et al.	7	2.46	5.64	+129%
<b>Total</b>		<b>22.84</b>	<b>43.48</b>	<b>+90%</b>

## 5. Symbolic vs. Representative Charging

Another possible way to reduce trial complexity would be to switch from a representative charging regime to a symbolic charging regime. Symbolic charging occurs when the accused is charged

with a single or small number of crimes arising out of a single or small number of significant or easily-proven incidents.<sup>243</sup> Examples of symbolic charging include the case of Thomas Lubanga at the ICC and that of Saddam Hussein at the Iraqi Special Tribunal. Mr. Lubanga was only charged with enlisting, conscripting, and using child soldiers,<sup>244</sup> even though it would have been possible to charge him with a broader range of crimes.<sup>245</sup> Similarly, Saddam Hussein was only charged with crimes arising out of a single location—Dujail—despite evidence that he had been involved in many other crimes.<sup>246</sup> Despite its potential as a way to reduce trial complexity, symbolic charging has been widely criticized for its failure to accurately capture the scope of the accused's criminality.<sup>247</sup>

In contrast to the trials of Lubanga and Hussein, the ICTY has consistently used a representative charging strategy.<sup>248</sup> The goal is not usually to charge the accused with every single crime that they could be found guilty of, but rather to charge the accused with a representative sample of the crimes they are allegedly responsible for.<sup>249</sup> Another objective is to convey an accurate, representative picture of the accused's overall criminality.<sup>250</sup> This almost always

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243. See *Complexity and Efficiency*, *supra* note 1, at 64–65.

244. See *Prosecutor v. Dyllo*, ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 1 (Mar. 14, 2012) (describing the charges).

245. See Suzan M. Pritchett, *Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court*, 17 *TRANSNAT'L L. & CONTEMP. PROBS.* 265, 286–91 (2008) (arguing that Lubanga could and should have been charged with crimes related to murder, torture, and sexual violence).

246. See Robert Cryer, *Prosecuting the Leaders: Promises, Politics and Practicalities*, 1 *GOTTINGEN J. INT'L L.* 45, 72–74 (2009).

247. *Complexity and Efficiency*, *supra* note 1, at 65. See, e.g., Mundis, *supra* note 53, at 693 (“Following World War II, would anyone have been satisfied if the Nazi killing machine were put on trial *solely* for Auschwitz as a ‘representative crime site’? Can anyone today claim that the trial of Saddam Hussein before the Iraqi Special Tribunal and his execution *solely* for the crimes in Dujail held him accountable for the totality of his criminal record?”).

248. See International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, IT/32/Rev. 44, Dec. 10, 2009, Rule 73 *bis* (D) (stating that the scope of the indictment should be “reasonably representative” of the accused's criminality, taking into account “all the relevant circumstances” including the classification and nature of the charges, the location of the alleged crimes, the scale of the crimes, and the victims of the crimes).

249. *Complexity and Efficiency*, *supra* note 1, at 64–65.

250. See Mundis, *supra* note 53, at 693 (“[P]rosecutors are duty bound to draft indictments that reflect the scale and scope of [the accused's] criminality.”); see also International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, IT/32/Rev. 44, Dec. 10, 2009, Rule 73 *bis* (D) (granting judges the ability to alter the number of crime sites and counts about which the prosecutor may present evidence at trial so long as the resulting trial would be “reasonably representative of the crimes charged”).

involves charging the accused with counts arising out of more than one incident or crime site.

While reducing the cost and complexity of the trials is not the only justification for symbolic charging, it is a key justification. For example, the ICC Prosecutor justified the decision to charge Lubanga with only a small number of crimes by arguing that “focused . . . prosecutions” would mean “short investigations” and “expeditious trials” involving “a limited number of incidents and as few witnesses as possible.”<sup>251</sup> This argument is premised on the idea that symbolic charging will dramatically reduce the complexity of both the investigations and the trials. The model of trial complexity in this Article casts doubt on this rationale, as it predicts that the accused’s seniority and whether they are a direct perpetrator drives the majority of complexity; focusing on a single crime site will not change the effect of those two factors.<sup>252</sup>

To see how much complexity could have been eliminated from ICTY trials by moving to a symbolic charging regime, the model was used to estimate the complexity of the ten most complex trials if those trials had been based on only a single crime site per trial and a single charge per accused. All other aspects of the trials were kept the same. The ten most complex trials were chosen because if symbolic charging has value, its value will presumably be most apparent when used in cases that would otherwise be very complex. The results are shown below in Table 5.

TABLE 5: SYMBOLIC VS. REPRESENTATIVE CHARGING

Case	Representative Charging <sup>253</sup>	Symbolic Charging <sup>254</sup>	Percent Difference
Hadžihasanović & Kubura	1.32	.87	-34%
Tolimir	1.47	1.11	-24%

251. See THE OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY 5 (Sept. 14, 2006), [http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf); see also INTERNATIONAL CRIMINAL COURT, NEWSLETTER # 10, 2 (Nov. 2006), [http://www.icc-cpi.int/NR/rdonlyres/2AD04DD6-6E18-4B9B-9477-4DFCD8D607A4/278462/ICCNL10200611\\_En.pdf](http://www.icc-cpi.int/NR/rdonlyres/2AD04DD6-6E18-4B9B-9477-4DFCD8D607A4/278462/ICCNL10200611_En.pdf) (quoting the Prosecutor as saying “[f]ocused investigations will limit the length of trials. Shorter trials will also mean the more efficient use of resources.”).

252. See *supra* Figure 1.

253. This column contains the complexity of the case as it was actually tried at the ICTY. See *Complexity and Efficiency*, *supra* note 1, app. at 68.

254. This column contains the estimated complexity of the case if it had been tried with only one crime site per trial and one count per accused. The model was used to estimate the complexity value.

Krajišnik	1.51	1.06	-30%
Gotovina & Markač	1.60	1.13	-29%
Brđanin	1.63	.93	-43%
Kordić & Čerkez	1.72	1.00	-42%
Šainović et al.	1.79	1.90	+6%
Stanišić & Župljanin	1.84	1.10	-40%
Popović et al.	2.46	2.14	-13%
Prlić et al.	2.63	1.90	-28%
<b>Total</b>	<b>17.97</b>	<b>13.14</b>	<b>-27%</b>

Adopting a symbolic charging strategy in these cases would have reduced their trial complexity by, at best, about 27 percent.<sup>255</sup> This is a significant reduction, but still results in very complex cases. But is reducing the complexity of the ICTY's trials by about a quarter a significant enough benefit to justify moving to a symbolic charging regime?

One way to think about the difference between a representative charging system and a symbolic charging system involves the purposes of international criminal justice, of which there are many.<sup>256</sup> At least three would be more difficult to achieve via symbolic charging: 1) finding closure for the victims; 2) setting the historical record; and 3) promoting post-conflict reconciliation.<sup>257</sup> There would be no closure for those victims of incidents other than the one charged because those other crimes would never be the subject of adjudication. Similarly, the trial would only be useful in setting the record with regard to the incident charged. Any other incidents would be left unexamined. Finally, having a court collect evidence of atrocities may be crucial to post-conflict reconcilia-

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255. This is the best case figure for two reasons. First, the calculation is based on the ten most complex cases. In other words, it is based on the cases where we would expect symbolic charging to have the greatest impact. This likely exaggerates the effect symbolic charging would have if used in all of a tribunal's cases. Second, this calculation assumes that each accused would be charged with just a single count occurring at a single crime site. In practice, symbolic charging rarely involves just one crime site and just one count. Thus it is likely that the actual effect of a switch to symbolic charging would be smaller than Table 5 suggests.

256. See Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 331 (2008) (describing purposes of international tribunals); Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT'L CRIM. JUST. 427, 428 (2004) (same); Turner, *supra* note 47, at 537-43 (same).

257. See Mundis, *supra* note 53, at 693 (arguing that these three purposes are served by representative charging).

tion.<sup>258</sup> If a court examines only a single incident, its ability to influence reconciliation will be diminished. A representative charging system is likely preferable to a symbolic one because it provides redress for many more victims than a symbolic charging strategy while establishing a fuller historical record, which in turn leads to a greater possibility of post-conflict reconciliation.

One can view the symbolic versus representative charging debate as a trade-off between the complexity of trials and the purposes they are meant to serve. The complexity of the ICTY's trials could be reduced by, at best, about one quarter by moving to a symbolic charging regime.<sup>259</sup> This would come at the cost of significantly reducing the court's ability to fulfill a number of its purposes.<sup>260</sup> In other words, it would probably have made the ICTY slightly quicker and cheaper but less effective.<sup>261</sup>

Assuming that the model used at the ICTY has some validity at the other international tribunals, there might be support for adopting a symbolic charging strategy from the members of the ICC's Assembly of States Parties. There has been a great deal of pressure in recent years from some of the ICC's biggest funders to keep the court's budget flat or reduce it.<sup>262</sup> Adopting a symbolic charging strategy would offer hope of reducing the complexity and cost of the ICC's trials.

Still, states should think carefully before pushing for such a strategy at the ICC. Reducing the complexity of individual trials would allow the court to either try more cases in the same amount of time and with the same budget, or try the same number of cases for less money in less time. But the trials are not conducted merely for the sake of doing so; they are conducted because of their expected contribution to the goals of international criminal justice. In other words, cost is not the only variable. Rather, cost and effectiveness must be viewed together, and decisions that modify how the ICC operates must be cost-effective rather than just cost-cutting. Given the risk that symbolic charging would make it dramatically harder

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258. See Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 *VAND. J. TRANSNAT'L L.* 405, 472–75 (2012).

259. See *supra* text accompanying note 255.

260. See *supra* text accompanying notes 257–58.

261. Effectiveness is measured by how the ICTY's trials contribute to the achievement of the court's overall purposes. See Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 *AM. J. INT'L L.* 225, 230 (2012).

262. See generally Stuart Ford, *How Much Money Does the ICC Need?*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* (Carsten Stahn ed., 2015).

for the ICC to achieve some of its aims, moving to a symbolic charging strategy may not be a wise decision, even if it is less expensive. Indeed, the ICC's Office of the Prosecutor has recently signaled its intent to move away from the "focused investigations and prosecutions" model that led to the very narrow indictment in the Lubanga case, as a result of criticism of this approach.<sup>263</sup>

## 6. Plea Bargaining

Another way to reduce trial complexity is to use plea bargaining. To the extent that the accused plead guilty in exchange for either reductions in the final sentence<sup>264</sup> or the dropping of charges,<sup>265</sup> plea bargaining could drastically reduce the complexity of trials by obviating the need to present evidence to establish the accused's guilt beyond a reasonable doubt.<sup>266</sup> Indeed, after initially opposing plea bargains, the ICTY eventually endorsed their use because of pressure from the international community to finish its work quickly.<sup>267</sup> Thus, in theory, greater use of plea bargaining could be used to reduce overall trial complexity.

There are at least two problems with this approach. The first problem is that everyone must be able to agree on a plea bargain.<sup>268</sup> If either the prosecutor or the accused is unwilling to countenance a plea, then plea bargaining is not a possibility. In such a situation, a full trial is the only way to resolve the impasse. The second problem is that having a significant number of trials is

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263. See STRATEGIC PLAN, *supra* note 199, ¶ 3 (noting that the judges at the ICC were not satisfied with the evidence the Office of the Prosecutor produced under its "focused investigations and prosecutions approach"); *Id.* ¶ 23 (noting that "the approach of focused investigations is therefore replaced with the principle of in-depth, open-ended investigations"). See also *supra* note 247 (noting that the OTP's symbolic charging strategy has been widely criticized by scholars).

264. This is known as sentence bargaining. See Michael P. Scharf, *Trading Justice for Efficiency: Plea-Bargaining and International Tribunals*, 2 J. INT'L CRIM. JUST. 1070, 1074 (2004).

265. This is known as charge bargaining. *Id.*

266. *Id.* at 1076 (noting that "international Tribunals have primarily justified plea-bargaining in terms of conserving scarce judicial resources"). See also Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 90-102 (2002) (arguing that plea bargains were adopted at the ICTY to reduce the complexity of the trials).

267. See Scharf, *supra* note 264, at 1073, 1077-78; Anna Petrig, *Negotiated Justice and the Goals of International Criminal Tribunals*, 8 CHL-KENT J. INT'L & COMP. L. 1, 8-9 (2008); Regina E. Rauxloh, *Plea Bargaining in International Criminal Justice: Can the International Criminal Court Afford to Avoid Trials?*, 1 J. CRIM. JUST. RES. 1, 10 (2011).

268. See, e.g., International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, IT/32/Rev. 49, May 22, 2013, Rule 62 *bis* (requiring that the court must ensure that a guilty plea "has been made voluntarily" before accepting it).

probably necessary to achieve the purposes of international criminal tribunals. This limits the extent to which plea bargains can be used as a substitute for trials.

With respect to the first problem, there are cases where neither side is willing to accept a plea bargain. For example, it seems unlikely that either the prosecutors or Slobodan Milošević would have been willing to countenance a plea bargain in his case. The prosecutors saw Mr. Milošević as the individual most responsible for the disintegration of the former Yugoslavia and consequent atrocities.<sup>269</sup> Given the prosecutors' perception of Milošević as the key figure in the conflict, it is hard to imagine that they would have been willing to offer a plea bargain.<sup>270</sup> Milošević, for his part, saw the trial as a platform from which he could make a political stand.<sup>271</sup> It is equally hard to imagine that Milošević would have agreed to either pleading guilty and accepting responsibility for what happened in the Balkans, or foregoing the platform that the trial afforded him.<sup>272</sup>

While not all accused are akin to Mr. Milošević, senior accused are less likely to enter into plea bargains than more junior accused.<sup>273</sup> This is true for at least two reasons. First, senior accused are more likely to be the accused in strategically important cases and prosecutors are less likely to offer plea bargains in strategically important cases.<sup>274</sup> Second, senior accused are more likely to see their trial in political terms and thus more likely prefer trials over plea bargains.<sup>275</sup> This conclusion is supported by the experience at the ICTY where the majority of plea bargains were accepted by relatively low-level accused.<sup>276</sup> The ICTY did secure plea bar-

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269. See Ford, *supra* note 258, at 415.

270. Cf. Combs, *supra* note 266, at 104–05 (noting that it “would seem perverse at best” for an ICTY prosecutor to negotiate a plea bargain that did not accurately reflect the accused’s criminal behavior given the underlying purposes of the tribunal); Petrig, *supra* note 267, at 16–21 (arguing that there is a duty to prosecute the most heinous crimes and that the more serious the charges against the accused, the less appropriate it is to offer a plea bargain).

271. See Ford, *supra* note 258, at 41 (noting that Milošević used the trial to argue that the West was responsible for the conflict in the Balkans and that he and the Serbs were victims).

272. See Combs, *supra* note 266, at 105 (noting that “the typical Tribunal defendant has committed large-scale atrocities motivated by intense nationalism or ethnic or religious hatred. Such a defendant is more apt to consider a guilty plea abhorrent, viewing it as capitulation before an illegitimate international body”).

273. See *infra* text accompanying notes 274–77.

274. See *supra* text accompanying notes 224–25, 270.

275. See *supra* text accompanying notes 56, 271–72.

276. *Fairness and Politics*, *supra* note 14, at 102 (noting that those who pled guilty at the ICTY were, on average, younger, less senior, charged with fewer counts, alleged to be



gains against a very small number of more senior accused, but these were the exception rather than the rule.<sup>277</sup>

The ICTY's experience suggests that the ability to use plea bargaining to reduce trial complexity has its limits. In all probability, plea bargaining at international tribunals will be used most frequently against low to mid-level accused and least frequently against high-level accused. The problem is that trials of high-level accused tend to be the most complex. Thus, plea bargains will result in the elimination of the least complex cases. The most complex cases involving senior accused are likely to require trials.

The second reason that the use of plea bargains will be limited in its ability to reduce trial complexity is that having a significant number of trials is probably necessary to achieve the purposes of international criminal tribunals. In theory, plea bargains can help international tribunals fulfill their purposes. For example, confessions obtained through plea bargains may assist the court's record-setting function by providing an insider's account of the events at issue.<sup>278</sup> A full and frank confession may also contribute to post-conflict reconciliation by helping both sides accept responsibility for crimes committed by members of their own group.<sup>279</sup> Confessions, particularly where the accused shows true remorse, may also help victims find closure.<sup>280</sup>

In practice, however, the guilty pleas at the ICTY have often failed to live up to their promise. For example, the guilty plea by Biljana Plavšić was initially hailed by prosecutors as "an unprecedented contribution to the establishment of truth and a significant effort toward the advancement of reconciliation."<sup>281</sup> However, her guilty plea upset many of her victims because she received a reduction in both the charges and her sentence in return for the confession.<sup>282</sup> In addition, she refused to inculcate others, which both reduced her confession's contribution to the court's record-setting function and called into question her sincerity and remorse.<sup>283</sup> Despite having received the benefit of her confession at sentenc-

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responsible for fewer deaths, and more likely to be charged as direct perpetrators than those accused who went to trial).

277. *Id.* at 88, 102.

278. *See* Combs, *supra* note 266, at 126; Petrig, *supra* note 267, at 14.

279. *See* Ford, *supra* note 258, at 473-74; Rauxloh, *supra* note 267, at 6-7.

280. *See* Ford, *supra* note 258, at 474.

281. *See* Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgement, ¶ 67 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003).

282. *See* Rauxloh, *supra*, note 267, at 7.

283. *See* Nancy Amoury Combs, *Prosecutor v. Plavšić*, 97 AM. J. INT'L L. 929, 933-34 (2003).

ing, she later repudiated her confession and claimed that she was innocent.<sup>284</sup> Hence, while plea bargains can contribute to the court's purposes, often they do not.<sup>285</sup>

What is more, plea bargains can undermine the purposes of international criminal law. For example, dropping crime sites or charges in return for a guilty plea can make it harder to establish a historical record, as evidence related to the dropped crime sites or charges will not become part of the record.<sup>286</sup> Even if no crime sites or charges are dropped as part of the plea bargain, the facts admitted by the accused are usually only a few pages in length and are much less comprehensive than the factual findings in the average ICTY judgment.<sup>287</sup> As a result, plea bargains can hinder the court's record-setting function. Because establishing the historical record is also one of the most important contributions international tribunals can make to post-conflict reconciliation,<sup>288</sup> plea bargains may also indirectly reduce the court's ability to foster reconciliation.

Plea bargaining can also make it more difficult to provide closure for victims. For example, a substantial number of victims may want to participate in the trial "in order to confront the accused with their grievance."<sup>289</sup> This is all but impossible if the charges are resolved through a plea bargain. In addition, victim communities often perceive plea bargaining as resulting in excessive leniency or even impunity for perpetrators of violence.<sup>290</sup> This may prevent them from accepting a plea bargain as a fair resolution of the matter. The victims' reluctance to accept a plea bargain can be compounded by the relatively light punishments given for violations of international criminal law relative to the punishments given in many domestic systems for crimes of the same gravity.<sup>291</sup> The effect of a reduction in the sentence for a guilty plea on top of a base sentence that already seems inadequate may make it very hard for victims to find closure. While there are undoubtedly situa-

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284. See Ford, *supra* note 258, at 474 n.349.

285. See *id.* at 473 n.346 (arguing that confessions are often vague about key details and minimize or deny responsibility for what occurred).

286. See Petrig, *supra* note 267, at 15–16.

287. See *id.* at 16.

288. See Ford, *supra* note 258, at 472.

289. See Petrig, *supra* note 267, at 22. See also Rauxloh, *supra* note 267, at 13 (noting that trials may provide victims with a chance to give their perspective).

290. See Rauxloh, *supra* note 267, at 14.

291. See *Fairness and Politics*, *supra* note 14, at 98–101.

tions in which offering a plea bargain would be appropriate,<sup>292</sup> it is inappropriate and ineffective to promote guilty pleas as a primary means of reducing a court's workload.<sup>293</sup>

In conclusion, the cases most likely to result in plea deals are the least complex, while the most complex cases are likely to go to trial. Furthermore, the practical experience at the ICTY has been that the outcome of guilty pleas has often been at odds with the court's purposes. Fulfillment of those purposes requires that the majority of cases at international criminal courts proceed to trial. For these reasons, it is unlikely that plea bargains can be used to meaningfully reduce a court's workload without undermining the purposes of international criminal justice.

### VIII. CONCLUSION

In the past ten years, international tribunals have focused their efforts on the most senior accused, almost none of whom are direct perpetrators of violence.<sup>294</sup> The result has been trials of enormous complexity, the causes of which are largely out of the control of judges and prosecutors. The model presented in this Article indicates that the complexity of these trials results from the policy decision to focus on senior leaders, and it cannot be meaningfully changed by varying the number of crime sites, counts, or modes of liability. Rather, the enormous complexity of these trials is a result of the difficulty of attributing responsibility for crimes to accused who are organizationally and geographically distant from the physical commission of those crimes. This suggests that the length and cost of international criminal trials is unlikely to be seriously changed by anything short of a fundamental change in our policy of indicting and trying senior leaders.

However, it is not clear that international tribunals should change their policy of indicting and trying senior leaders. After all,

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292. See, e.g., Rauxloh, *supra* note 267, at 21–22 (arguing that plea bargains should be used only to obtain evidence against senior accused who could not be prosecuted without that evidence; to secure evidence crucial to the historical record and otherwise unavailable; and to obtain admissions of guilt essential to fostering post-conflict reconciliation).

293. See *id.* at 11 (“[I]t is doubtful whether financial reasons alone are sufficient to legitimize plea bargains.”); see also Theresa Marie Clark, *Transplant Justice?: The Efficacy of a Purely Common Law Concept in the International Criminal Law Forum*, 9 BUFF. HUM. RTS. L. REV. 75, 109 (2003) (“Even recognizing the substantial administrative benefits of timely guilty pleas . . . the author nonetheless struggles to justify what is essentially an allowance of administrative concerns to mitigate the punishment of those convicted of the most heinous crimes known to humankind!”).

294. At the ICTY, direct perpetration and seniority were strongly negatively correlated. *Fairness and Politics*, *supra* note 14, at 67.

it is those senior leaders that have the greatest power over whether atrocities happen, and the authority to prevent them. While low-level perpetrators bear both moral and legal responsibility for their acts, they are largely cogs in a machine. Punishing them is unlikely to prevent the commission of future atrocities because they are easily replaceable. In that sense, focusing on senior leaders may be a wise policy choice.<sup>295</sup> Ultimately, the cost and complexity of international criminal trials are necessary consequences of that decision.

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295. We could also prosecute those lower down in the hierarchy in addition to senior leaders, but the international community has no appetite for increasing the size and cost of international courts in order to prosecute both types of defendants. *See, e.g., Fairness and Politics, supra* note 14, at 71–73 (noting that the Security Council pressured the ICTY to drop the indictments against the lowest ranking accused to save time and money).

