"External Stakeholder Benevolence"

An Emerging Policy Paradigm in International Criminal Justice?—Critical Reflections on the Paris Declaration 2017 and the Oslo Recommendations 2018 on the Efficiency and Legitimacy of International Courts

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Abstract
The debate about concerns surrounding the efficiency and legitimacy of international (criminal) courts has been joined by a new voice, judicial declarations on how proceedings can be expedited and the legitimacy deficit resolved, in particular the Paris Declaration of 2017 and the Oslo Recommendations of 2018, which deal with "enhancing their institutions' legitimacy in the eyes of diverse stakeholders." This article queries in detail whether either document manages to do that, as well as the emerging lens of "external stakeholder benevolence." It argues that a traditional stakeholder theory approach must break down when the decision about the interest (fair trial) against which other stakeholders' interests are to be balanced has been assigned exclusively to one stakeholder (judges), barring other stakeholders from encroaching on that stakeholder's position (judicial independence). The

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judicial perspective on stakeholder-theory-based attempts at defining the parameters of the judicial core environment will thus always be one of intrusion.

> *Finally, I note that the Prosecution references the Court's finite financial, human, and temporal resources to plead in favour of judicial efficiency. However, I deem necessary to reassert that the Court's paramount consideration should always be the interest of justice first, after which other factors may be considered. Expedience cannot come at the cost of full, robust, and in-depth contemplation of the complex issue of jurisdiction."*
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> *Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut to the ICC's Pre-Trial Chamber's Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*[1]

1. "A SPECTRE IS HAUNTING THE INTERNATIONAL JUDICIARY . . . "

It seems international judges are on the run—on the run from the political fallout from the allegedly less than efficient handling of international cases over the years, especially in the criminal justice environment since the establishment of the first ad-hoc criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and of the International Criminal Tribunal for Rwanda (ICTR) in 1994. The current debate in practice centres to a large extent on criminal proceedings, where concerns surrounding efficiency arise directly from principles such as the right to a speedy and fair trial. In recent years, the International Criminal Court (ICC), for example, has come under heavy criticism[2] for the record of cases tried and adjudicated since 2002, the year it became operational.[3] The cost-benefit analysis appeared slim to many observers and, more to the point, the donors. The uncomfortable question of whether the massive expense poured into international (criminal) justice was still justifiable reared its head—increasingly so after the recent resurgence of populism and national exceptionalism around the world. The ICC judges, not least at the repeated requests by the Assembly of States Parties (ASP),[4] began to investigate the

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[1] Case No. ICC-RoC46(3)-01/18-37-Anx-ENG at para. 42, online at https://www.icc-cpi.int/RelatedRecords/CR2018_04205.PDF. Judge de Brichambaut is a signatory to both the Paris Declaration 2017 and the Oslo Recommendations 2018.

[2] It now seems that there is even criticism of its—and other tribunals'—manner of determining what are "general principles of law" under Art. 38 ICJ Statute, with Chigara floating the idea of an observatory for monitoring compliance to enhance consistency. *See* Benedict A. Chigara, *Towards a* nemo judex in parte sua *Critique of the International Criminal Court?*, ICLR (2018), advance article DOI 10.1163/15718123-01806004, 1.

[3] *See* only Center for Security Studies, ETH Zurich, *The ICC: High Expectations, ambiguous record*, 2013, online at https://www.css.ethz.ch/publications/pdfs/CSS-Analysis-130-EN.pdf; Fergal Gaynor & Christopher Hale, *Rome Statute at 20: Suggestions to States to Strengthen the ICC*, EJIL: Talk!, 6 August 2018, online at https://www.ejiltalk.org/rome-statute-at-20-suggestions-to-states-to-strengthen-the-icc/; Jessica Hatcher-Moore, *Is the world's highest court fit for purpose?*, The Guardian, 5 April 2017, online at https://www.theguardian.com/global-development-professionals-network/2017/apr/05/international-criminal-court-fit-purpose.

[4] *See* the descriptions by Renan Villacis, *Working Methods of the Assembly of States Parties to the Rome Statute*, International Criminal Law Review 563 (2018); Osvaldo Zavala, *The Budgetary Efficiency of the International Criminal Court*, International Criminal Law Review 461 (2018); Hannah Woolaver & Emma Palmer, *Challenges to the Independence of the International Criminal Court from the Assembly of States Parties*, Journal of International Criminal Justice 641 (2017).

causes for the delays and lack of efficiency, publishing regular updates on the progress to a better degree of streamlining its procedures, culminating in the partial consensus on certain matters which had beset the ICC's practice in the early years in the Chambers Practice Manual.[5] Similar things are happening at other courts: The Extraordinary Chambers in the Courts of Cambodia (ECCC), for example, have published quarterly updates of their "completion plan" since 2014,[6] in order to provide (a semblance of?) accountability to the donors and the public. The literature related to judicial key performance indicators and ways of increasing efficiency is mushrooming.[7]

A new voice in the debate around of efficiency and budget-saving with a particular focus on international courts[8] has now appeared—the judicial declaration, or recommendation, on how proceedings can be expedited and the alleged legitimacy deficit resolved, i.e. in particular the Paris Declaration of 2017[9] (hereinafter PD) and the Oslo Recommendations of 2018[10] (hereinafter OR). These documents, which despite a clear thematic overlap make no explicit reference to prior and in part more extensive policy statements such as, for example, the *Bangalore Principles of Judicial Conduct* and the *Measures for [their] Effective Implementation*,[11] were drafted by judges from various international(ised) courts and tribunals, not only criminal ones, and ostensibly in their personal capacity; they are not binding instruments passed or even endorsed officially by the respective courts where those judges serve.

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[5] Online at https://www.legal-tools.org/doc/f0ee26/, *see also* the first-hand account by former ICC judge and President Silvia F. de Gurmendi, *Enhancing the Court's Efficiency*, JICJ 341(2018), and Yvonne Mc Dermott, *The International Criminal Court's Chambers Practice Manual*, Journal of International Criminal Justice 873 (2017).

[6] The completion plan updates since 2014 are available at https://www.eccc.gov.kh/en/about-eccc/finances under "Other Documents."

[7] *See* the EU Justice Score Board, COM (2018) 364 final; Bencze, Mátyás/Ng, Gar Yein (eds.), *How to Measure the Quality of Judicial Reasoning*, *Ius Gentium: Comparative Perspectives on Law and Justice*, vol. 69, 2018, as well as the contributions to the symposium volume in the International Criminal Law Review 2018: Hirad Abtahi & Rebecca Young, *Introduction. The Rome Statute at Twenty: Enhancing Efficiency and Effectiveness at the International Criminal Court*, International Criminal Law Review, 377 (2018); Hirad Abtahi & Shehzad Charania, *Expediting the ICC Criminal Process: Striking the Right Balance between the ICC and States Parties*, ibid., 383; Philipp Ambach, *Performance Indicators for International(ised) Criminal Courts—Potential for Increase of an Institution's Legacy or 'Just' a Means of Budgetary Control?*, ibid., 426; Osvaldo Zavala, *The Budgetary Efficiency of the International Criminal Court*, ibid., 461; Sam Sasan Shoamanesh, *Institution Building: Perspective from within the Office of the Prosecutor of the International Criminal Court*, ibid., 489; William St-Michel, Chloé Grandon & Marlene Yahya Haage, *Strengthening the Role of Defence at the International Criminal Court: Reflections on How Defence Is and Can Be Supported for Greater Effectiveness and Efficiencies*, ibid., 517; Mikel Delagrange, *The Path towards Greater Efficiency and Effectiveness in the Victim Application Processes of the International Criminal Court*, ibid., 540.

[8] *But see also* the 2018 Doha Declaration on Judicial Integrity, which dealt with national judiciaries but had also one ICC judge, Sanji Mmasenono Monageng, formerly First Vice-President of the ICC from 2012 to 2015, attending; online at https://www.unodc.org/ji/en/restricted/network-launch.html.

[9] *See* download facilities for both French and English versions at https://ihej.org/programmes/justice-penale-internationale/une-justice-penale-internationale-plus-efficace-la-declaration-de-paris-du-16-octobre-2017/.

[10] Link to pdf at https://www.brandeis.edu/ethics/internationaljustice/biij/2018.html.

[11] *See* the related documentation online at https://www.judicialintegritygroup.org/jig-downloads/jig-documents.

- Therein lies the first problem—for whom and with what authority do these judges speak publicly on matters of principle and policy, and why should other judges care about their declarations?
- The second problem relates to the substantive advancement of the matter at hand, especially if compared to documents such as the *Bangalore Principles*, and of the reassurance for the donors that these declarations actually produce, which in my view is minimal at best, not least due to a high degree of vagueness in many of the individual recommendations. Moreover, what are the consequences in particular proceedings of the violation of the recommendations so announced—if there are not meant to be any, what is the purpose of making them?
- Thirdly, the biggest concern of all, however, is an emerging new and ultimately neoliberal and managerial judicial mindset that appears to lurk behind the phrases used in the PD and OR, and its implications for judicial independence.

I will dissect these issues below with detailed reference to the two documents, focussing in my argument mostly on criminal proceedings, where efficiency concerns are most pressing for obvious reasons. However, two points need to be made before we embark upon that study. Firstly, as I have stated elsewhere before,[12] the concern[13] about efficiency in the handling of proceedings is real, even though things have improved since the early days of the ICTY and ICTR. However, comparisons to drives at efficiency in national courts, which are sometimes adduced,[14] are of limited usefulness. Domestic criminal courts

- operate in a much more smoothly organised and contained system,
- are regulated to a much higher degree through detailed codes of procedure,
- benefit from the knowledge of a long-established, regular and relatively speedy judicial appellate culture, even down to idiosyncrasies in specific court districts, which aids in keeping the application of the law in practice as uniform as possible,
- are populated by lawyers, prosecutors and judges who have all undergone the same legal training, a lot of whom tend to have the majority of their practice in a finite number of courts within their district and can thus build up grounded knowledge on individual judicial practices and mutual professional trust, which will often allow for a more pragmatic approach to procedural issues,
- enjoy much higher synergy effects because of the courts' well-oiled administrative support sections and the fact that the vast majority of cases in a domestic jurisdiction will tend to be run-of-the-mill which seasoned judges can much more easily dispose of, with complex cases being a minority,
- are partially cross-financed from court fees and expenses paid by parties, for example, in civil proceedings, or from cost orders against convicted defendants, as well as from fines, which usually go to the general fiscal budget.

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[12] *Paradise Postponed?—For a judge-led generic model of international criminal procedure and an end to "draft-as-you-go"*, Netherlands Yearbook of International Law 45, 331 (2014).

[13] A detailed account of the first years of the ICC and the diverging practices is given by de Gurmendi, *supra* note 5.

[14] Philipp Ambach, *Performance Indicators for International(ised) Criminal Courts—Potential for Increase of an Institution's Legacy or 'Just' a Means of Budgetary Control?*, International Criminal Law Review, 426 (2018).

None of the above apply, even over 25 years after the establishment of the ICTY and ICTR, to the same degree to international criminal courts:

- In particular, there is no self- or cross-financing aspect to their operation, because the convicted persons are not as a rule ordered to pay the costs of the proceedings—regardless of whether they may have the means to do so—and no-one pays any fees or costs for any part of the proceedings,
- any payments by the convicted person are primarily meant to be channelled to the victims as reparations in the wider sense, not to the courts' budgets,
- financing international courts in effect occurs thus almost entirely *à fonds perdu*,
- their cases are almost all in the category of complex litigation, probably even if the case proceeds on the basis of a guilty plea or confession,
- there is a myriad of procedural protagonists from diverse legal backgrounds without a common understanding of legal principles, rules of interpretation etc.,
- who have not built up a joint local practice—at best they will have come across each other in multiple international courts,
- some of the judges (still) come with, some without practical courtroom experience,
- procedural frameworks before international(ized) courts tend to differ as well, especially if a court is embedded in a national system, yet there is a constant stream of allegedly cross-fertilising citations from other international(ized) courts.

Secondly, on a note of full disclosure, I was the international (reserve) co-investigating judge at the ECCC from June 2015 to July 2019 and have myself, together with my then Cambodian colleague, been accused of causing undue delay[15] in the investigation of Case 004/1 by the ECCC's Pre-Trial Chamber; I am still on the roster of judges of the Kosovo Specialist Chambers (KSC). Neither can I, nor do I intend to, speak for either court or any of my judicial colleagues, domestic or international. Yet, it is legitimate for me to publicly express my own personal disagreement with other judges on matters of policy and principle as opposed to individual cases, if they themselves, some as sitting judges of the same courts I am/was a member of, chose to engage publicly in such sensitive and ultimately political announcements in their personal capacity. I am in any event already on public official record regarding my critical views on the topic of efficiency vs. fair trial through the ECCC co-investigating judges' budget impact decision of 11 August 2017.[16]

[15] *See* ECCC Pre-Trial Chamber, Case 004/1 against Im Chaem, Doc. No. D308/3/1/20, Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 29 June 2018, online at https://www.eccc.gov.kh/en/document/court/considerations-international-co-prosecutors-appeal-closing-order-reasons—Judicial ethics and decorum prevent me from discussing the merits of that charge here. My arguments in the context of another investigation affected by the Pre-Trial Chamber's views can be found in paras. 17–38 of the Closing Order in Case 004/2, online at https://eccc.gov.kh/en/document/court/redacted-closing-order-indictment; my colleague's views are available at paras. 8 ff. of his Dismissal Order D359 (not online at the time of writing).

[16] ECCC, Office of the Co-Investigating Judges, Combined decision on the impact of the budgetary situation etc., Case No. 004/2/07-09-2009-ECCC-OCIJ/D349/6, of 11 August 2017—online at https://www.eccc.gov.kh/en/document/court/combined-decision-impact-budgetary-situation-cases-003-004-and-0042-and-related.

2. PROVENANCE OF THE PARTICIPANTS

The PD and the OR differ markedly in their language as to who is talking in what capacity. The PD opens with

> The *representatives of international criminal courts and tribunals* meeting at the French National School for the Judiciary in Paris on 16 October 2017 . . .

whereas the OR conclude with

> These recommendations were drafted and endorsed by the following international judges, *acting in their personal capacities* . . .[17]

The PD's use of the word "representative/représentant" may be a mere linguistic fluke[18] or have been chosen for want of a more accurate expression, yet the PD, as opposed to the OR, has the distinct ring of a quasi-official announcement. Two judges participated in both the PD and the OR—both of which incidentally worked/had worked at the ICC—and it thus can be assumed that they at least did not in one instance wish to speak in their official capacity, and in another in a purely personal one. Yet, the answer to the question remains rather nebulous of how and by whom they were selected and invited to participate, whether the invitation was all-encompassing for judges of certain courts, whether and if so, how many judges declined the invitation and for which reasons etc. More transparency regarding that process, and possibly also publication of the minutes of the meetings/proceedings (if such were taken) might have lent at least some support to the legitimacy of the selection of participants.[19]

Given that the PD was concerned only with international criminal courts, whereas the OR referred to the wider array of international courts and tribunals, the provenance of the participants was also different. Table 1 lists them by court; judges who had held positions at several courts were listed at each court they (had) served on, but that fact is pointed out clearly in the table to avoid double-counting in the attendance.

Fifty percent of the judges who drafted the PD were/had been in high administrative positions in their courts, whereas with the OR, that percentage was just little over half that, namely 26.6%. It can be expected from experience that their exposure to managerial tasks at their courts may have coloured their views on the performance of their judicial colleagues and will also have sensitised them for, and possibly even have led to greater identification with, managerial needs, principles and processes. It is also striking that all PD judges came from international courts sitting in The Hague, whereas the OR court sample had a much

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[17] Emphases added in both quotes.

[18] However, the definition of the French "représentant" in the standard French dictionary *Larousse* (https://www.larousse.fr/dictionnaires/francais/repr%C3%A9sentant_repr%C3%A9sentante/68480) lists four different meanings, all but one of which have a connotation of someone being formally entrusted with a position. The other one refers to a person being a model or type representing the qualities of a certain group etc., such as "She is a typical representative of the middle class." That meaning can hardly have been what the PD drafters had in mind.—The same distinction between the meanings of "delegate" and "type" exists in English for the word "representative," *see* https://dictionary.cambridge.org/dictionary/english/representative.

[19] Confidential requests by the author for information in this regard to persons involved in either event showed no specific method of selection other than possibly participation in previous joint events or other avenues of personal/professional acquaintance.

TABLE 1 Provenance of Judicial Participants to PD and OR

PD	OR
• ICTY 3 (of which one former now at KSC) • ICC 8 (of which one former now at KSC) • STL 1 • KSC 2 (of which one each formerly at ICC and ICTY) • Total attendance: 12	• ECCC 1 • World Trade Organization Appellate Body 2 • STL 1 • African Court of Human and Peoples' Rights 1 • International Court of Justice 2 • Special Criminal Court for the Central African Republic 1 • International Tribunal for the Law of the Sea 1 • European Court of Human Rights 1 • Residual Mechanism for International Criminal Tribunals 1 • ICC 2 (of which one former not at KSC) • Caribbean Court of Justice 1 • KSC (formerly at ICC) 1 • East African Court of Justice 1 • Total attendance: 15
• The KSC/ICC judge and one ICC judge also participated in the OR. • 6 judges held/had held positions as a president or vice-president at their court.	• The KSC/ICC judge and the ICC judge also participated in the PD. • 4 judges held/had held positions as president or vice-president at their court.

greater geographical diversity. The high proportion of, partly former, ICC judges may also have influenced the tone of the recommendations adopted in the PD, because these judges will have been more or less acutely aware of the strong criticism of their own court as the most visible and controversial of all international criminal tribunals.

It is so far unclear how many other judges have endorsed either the PD or OR. The webpages of the relevant fora did not list any endorsements at the time of writing. During my time at the ECCC, the PD was internally circulated among the judges for endorsement and while there seemed to be a number of judges supporting it according to the email traffic, I am unaware if any endorsements were ultimately forthcoming. I and at least one other colleague declined the invitation for reasons of principle.

3. PURPOSE OF THE PD AND OR

3.1. Background Information

The webpage of the French *Institut des Hautes Études sur la Justice*, which hosted the discussion preceding the adoption of the PD, lists this explanation (available in French only) for the exercise:

> Fruit d'un consensus et du pluralisme des participants, les recommandations de ce document de référence peuvent être appliquées quel que soit le système juridique envisagé (*common law* ou *civil law)*. Elles s'avèrent donc particulièrement pertinentes dans le cadre de l'hybridation du droit mise en oeuvre par les cours et les tribunaux pénaux internationaux. Les propositions faites appellent à des changements de pratiques, à un dialogue continu entre les juges et les juridictions, et à la création éventuelle de nouveaux outils : fixation de délais indicatifs, phases procédurales successives non redondantes, rôle actif des présidents de chambre, corps international d'inspection commun, code de déontologie et formation continue, etc. Elles ne nécessitent pas de réformer ou réouvrir le Statut de Rome – qui célèbrera cette année ses 20 ans – et s'inscrivent *dans une perspective opérationnelle centrée sur les pratiques pour assurer une plus grande rapidité dans la conduite des procédures, dégager des règles et des pratiques de bonne gouvernance et renforcer la crédibilité de la justice pénale internationale.* [Emphasis added][20]

The *Brandeis Institute for International Judges* (BIIJ), a sub-programme of the International Center for Ethics, Justice and Public Life of Brandeis University, carries the following explanation on its website:

> The aim of the institute was to examine carefully the various ways in which some international courts are *currently experiencing "pushback," be it from member states, civil society groups, or even their own parent bodies*. The World Trade Organization (WTO) Appellate Body, for example, finds itself at a critical juncture as the United States blocks all new appointments to its 7-member bench, thereby threatening to bring its important trade dispute resolution work to a standstill. The International Criminal Court (ICC) has seen a move toward withdrawal by several member states in response to action by its Prosecutor to examine crimes upon their territories. More generally, international courts and tribunals *feel a waning of the late 20th century enthusiasm and support for international justice institutions and realize that a proactive response may assist them in negotiating current conditions.*
>
> Judges discussed various strategies for countering their current difficulties and *enhancing their institutions' legitimacy in the eyes of diverse stakeholders.* These strategies include establishing and conforming to codes of judicial ethics, ensuring the efficiency of their proceedings, and devising effective methods for communicating with the public. Attendees drafted a list of recommended strategies which they plan to share with the international justice field upon finalization. [Emphases added.][21]

The key concern that would appear to underlie both documents is found in the OR: ". . . enhancing their institutions' legitimacy *in the eyes of diverse stakeholders."* We shall examine, firstly, whether either of them will actually manage to do that, and, secondly, what is to be made of this emerging lens of analysis, which I choose to call the "external stakeholder benevolence" paradigm: In this article, looking mainly from the judicial perspective, as do the PD and OR, i.e. from the position of the persons entrusted with ensuring due process as well as fair and speedy trial, "stakeholder" has a selective, extraneous meaning not fully congruent with how it is used in the general business theory and ethics/philosophical

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[20] *See* https://ihej.org/programmes/justice-penale-internationale/une-justice-penale-internationale-plus-efficace-la-declaration-de-paris-du-16-octobre-2017/.

[21] *See* https://www.brandeis.edu/ethics/internationaljustice/biij/2018.html.

discussion[22] that looks at the entire system, including the judiciary, from the outside: In this article, stakeholder means anyone with a political, financial or similar interest in the operation of international courts *other than* the judges, and equally other than the prosecution and the defence who directly interact with the judiciary in individual proceedings and support the aim of due process and fair and speedy trial.

The above-cited quote from the OR, however, permits the conclusion that the judges endorsing it did not include themselves within the ranks of the "diverse stakeholders" but saw them as extraneous entities before whom they had to justify themselves. The PD is not materially different in that sense. In an overall outside view of the interactional environment of international courts, they would, of course, be stakeholders, too. The position of victims would seem to be at least ambiguous, as they are often linked to advancing the wider policy movements, and in particular in non-governmental organisations (NGOs), about ending impunity, reparations etc., which are in turn connected to the official policies of why international courts are established and supported. However, to the extent that they are reliant on funding and logistical support, for example, to perform their roles in individual proceedings, they are not external stakeholders themselves but affected by the decisions of other external stakeholders.

In essence, this article proceeds from the basic premise that a full stakeholder theory approach in its traditional sense, where every stakeholder gets to have an input into the decision-making process, is bound to break down when the decision about the "good" or "interest" against which other stakeholders' interests are meant to be balanced, in this case due process and fair trial, has been assigned by law exclusively to one stakeholder, i.e. the judges, and all other stakeholders are barred from interfering with the process if this means encroaching upon the one stakeholder's protected position, i.e. judicial independence, a concept the interpretation of which has *also* been assigned to the same stakeholder. As *Bronik and Anja Matwijkiw* have made clear,[23] we are essentially dealing with a clash between fact-based economic realism and the value-based judicial environment: Simply put, the former wants to give as much justice as money allows, whereas the latter wants to have as much money as justice requires.[24] The judicial default perspective on stakeholder-theory-based justification attempts at defining the contours and parameters of the core judicial environment will thus in principle always be one of intrusion, not one of mutual co-operation by equals with free discretion on a process of give-and-take.

3.2. The PD and OR Preambles

These sentiments are repeated in substance, although not fully identically, in the preambles of the PD and OR. Table 2 provides a synopsis.

The PD seeks to place the efficiency and legitimacy aspect in the wider panorama of victims' and defence positions such as speedy, expeditious and fair trial, whereas the OR straightforwardly address the issue of a "climate of waning support for many institutions

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[22] *See* on this debate more generally, Bronik Matwijkiw and Anja Matwijkiw, *Stakeholder Theory and Justice Issues: The Leap from Business Management to Contemporary International Law*, International Criminal Law Review 143 (2010).

[23] Ibid.

[24] *See also* Ernst Hirsch Ballin, *The Value of International Criminal Justice: How Much International Criminal Justice Can the World Afford?*, International Criminal Law Review (2018) advance article DOI: https://doi.org/10.1163/15718123-01806003. He argues that this is asking the wrong question and that we should rather "be asking whether the international community, if it is still concerned about establishing trust and peace among nations, can afford to do away with international criminal justice."

TABLE 2 Preambles of PD and OR Compared

PD	OR
Recalling that victims of serious violations of human rights and humanitarian law have a right to obtain justice and redress in a timely manner for the harms suffered;	Aware of the current climate of waning support for many institutions of international justice and increasing challenges to their legitimacy;
Emphasizing the paramount importance of safeguarding the rights of suspects and accused;	Mindful that each international court has its own specific mandate, jurisdiction and institutional organization, and that any recommendations below must reflect these specificities;
Mindful that, in compliance with their founding texts, specific procedures should be devised and practices developed to cater to the complexity of the crimes these courts and tribunals must adjudicate;	Emphasizing that the primary work of international judges is to produce well-reasoned and timely judgments, which are seen to be so;
Cognizant that while international courts and tribunals must be provided with the necessary resources to fulfil their mandate, they must also be accountable;	Recognizing that ensuring the legitimacy of international courts may still require more from both judges and their institutions;
Stressing that the expeditiousness of proceedings is an integral component of a fair trial and is at the heart of a good administration of justice;	The participants of the 2018 session of the Brandeis Institute for International Judges declare that international courts should seek to conform to the recommendations below in order to enhance their institutional legitimacy.
Declare that the following recommendations are conducive to making the conduct of the proceedings before international criminal courts and tribunals more expeditious and effective:	

of international justice and increasing challenges to their legitimacy." The conclusion both draw is that international judges should become more efficient. The PD also makes express reference to courts being "accountable," a term not used in the OR. The PD declares that "the following recommendations are conducive to making the conduct of the proceedings before international criminal courts and tribunals more expeditious and effective," whereas the OR declare that "international courts should seek to conform to the recommendations below in order to enhance their institutional legitimacy." In essence, the PD emphasises the deeper purpose for which international criminal courts were established and proceeds from there to the more organisational aspects, whereas the OR more or less immediately address the latter, presumably deeming the deep (criminal) justice background not worth discussing in detail, not least due to the wider remit of the type of courts in the OR, and possibly considering that point more as a given. The PD creates a justice policy problem for itself by the approach laid out in its preamble, as we will see.

4. ANALYSIS OF THE REASONING

I have alluded above that I have strong reservations about the merits of these documents in advancing the debate around efficiency and legitimacy, and regarding their added value in convincing the political actors in the international justice community to continue supporting the international courts. My quintessential concern is that the latter want to see deeds, not words by a very few people who in any event have no call or power to try to bind other independent judges to their views by exerting what can be called public peer pressure. Judges who do not agree with the thrust of the PD and OR now risk being seen as obstacles to "progress" and as averse to bringing the international judiciary into the twenty-first century.

Of course, it falls to each and every court to strive for efficiency in its own environment,[25] which is after all a banality: Judges should simply try their best to "walk the walk" rather than "talk the talk" of being efficient, they should *do* rather than *teach*. Good practice can and should be shared between courts without the need for grandiose public declarations outside any existing reporting structures with the relevant stakeholders. It is ultimately for the judges, and the judges alone, to decide, which measures of efficiency they still deem compatible with their judicial independence and the guarantees surrounding the fairness and integrity of the proceedings. The presumption must be against allowing any external intrusion into a court's judicial operations which are ultimately based on attempts at cost-cutting. There is no place, either, for anticipatory subservience of judges towards the wishes of the donor community. International justice, like any form of justice, is not to be had on the cheap. Geoffrey Robertson rightly said that

> [c]ourts which are so starved of funds that they cannot do justice should close themselves down rather than continue under the expectation that sufficient funding will be forthcoming only if they render verdicts acceptable to the funding body.[26]

It is far from clear how much the PD and OR, and similar statements, can further the legitimate path to efficiency in substance rather than in appearance. However, there is a danger that even mere appearances can easily create expectations that will at some stage make mere words coalesce into substance, but not necessarily in the manner intended by their drafters.

The ideas contained in the PD and OR on the surface seem to be so "common sense" that we need to investigate the individual recommendations in both documents one by one and in the necessary detail. The fact that the PD's and OR's arguments do, of course, not proceed according to a common table of contents makes it more difficult to do this jointly, for example, by the use of a fully synoptic table. I will thus use the more extensive PD as its starting point and, where appropriate, insert the related recommendations from the OR in the discussion. All remaining issues in the OR will then be looked at separately in another section.

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[25] A good example of how this can look in practice, and the difficulties surrounding such efforts, is provided by de Gurmendi, *supra* note 5.

[26] *Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)*, Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), 13 March 2004 – Separate Opinion of Justice Geoffrey Robertson, para. 3, online at https://sierralii.org/sl/judgment/special-court/2004/48.

4.1. Reasons for the Announcements

The reasons for the PD and OR can either be interpreted from the point of view of the drafters, or from the point of view of the audience, which, not to put too fine a point on it, is the international donor community for whose consumption they were after all intended in the first place. Their meaning then, as is beauty, is in the eyes of the beholder.

4.1.1. Criminal Justice Aspects

The PD and the OR differ, as was described above, in their argumentative foundations as reflected in their preambles. The PD's three justice-related reasons are, in that order:

> Recalling that victims of serious violations of human rights and humanitarian law have a right to obtain justice and redress in a timely manner for the harms suffered;
> Emphasizing the paramount importance of safeguarding the rights of suspects and accused;
> Stressing that the expeditiousness of proceedings is an integral component of a fair trial and is at the heart of a good administration of justice;

The OR have no reference to such general considerations of justice.

4.1.1.1. EMPHASIS ON VICTIM-CENTRED ARGUMENTS

The PD's first reason, the victims' right to justice and redress, [27] is rather problematic as a lens through which to analyse the legitimacy and effectiveness of international courts. Victims have a right to a remedy,[28] i.e. to the speedy treatment of their *alleged* grievances, they do not in effect have a *right* to "redress" *against* anyone unless a court finds that a particular person is responsible for the harm they suffered, and has established what that harm was.[29]

The general UN-supported definition of "victim" is clearly not linked to the precondition of the context or even outcome of a criminal trial, as evidenced by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985[30] (hereinafter: the 1985 Declaration) at para. 2:

> A person may be considered a victim, under this Declaration, *regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted* and regardless of the familial

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[27] Very revealing on the negotiation history of the Rome Statute regarding reparations and the notion that "you could not be seen to be 'anti-victim' at that time" the paper by Christoph Sperfeldt, *Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court*, International Criminal Law Review 351 (2017)—quote at 368.

[28] *See, e.g.*, Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in Article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

[29] *See* for an evaluation of the victims' position overall and in particular with regard to a recent EU initiative in that respect Kenneth S. Gallant, *The Enforceability Deficit Concerning Victims' Remedies*, ICLR (2018) advance article at DOI 10.1163/15718123-01806001, 15.

[30] *See* https://www.un.org/documents/ga/res/40/a40r034.htm.

> relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. [Emphasis added.]

Paras. 4 and 5 of the 1985 Declaration clarify the meaning of the right as one of access to justice mechanisms:

> Victims should be treated with compassion and respect for their dignity. They are entitled to *access to the mechanisms of justice* and to prompt redress . . . for the harm that they *have* suffered. [Emphasis added.][31]
>
> Judicial and administrative mechanisms should be established and strengthened where necessary to *enable victims to obtain redress through formal or informal procedures* that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms. [Emphasis added.]

In Resolution 60/147 of 16 December 2005,[32] the UN General Assembly (UNGA) adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles). The preamble makes clear that

> [. . .] the Basic Principles and Guidelines contained herein *do not entail new international or domestic legal obligations* but identify *mechanisms, modalities, procedures and methods for the implementation* of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms. [Emphasis added.]

The Basic Principles in their para. 9 repeat the 1985 Declaration's decoupling of victim status from the existence of any criminal proceedings. Their para. 11 provides that

> [r]emedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:
> (*a*) Equal and effective access to justice;
> (*b*) Adequate, effective and prompt reparation *for harm suffered*;
> (*c*) Access to relevant information concerning violations and reparation mechanisms. [Emphasis added.]

This wording does not represent a shift in substance from the 1985 Declaration as far as the nature of the right is concerned. The PD would thus on the face of it appear to be modelled on the 1985 Declaration and the Basic Principles, yet it differs in one small but important point in that the PD somewhat disingenuously conflates what is in essence a political

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[31] This concept is explained in more detail in para. 12 of the Basic Principles.

[32] *See* https://daccess-ods.un.org/TMP/6435390.11478424.html.

announcement[33] on victims' rights in general[34] with their rights against an individual defendant in a particular criminal case, even more so because the ICC Appeals Chamber in the *Lubanga* Reparations Judgment of 3 March 2015 made it clear that every order for reparations must be made against the convicted person.[35] The PD seems to apply a semantic shift to the meaning of "justice," as opposed to the 1985 Declaration and the Basic Principles, from procedural to material, or in other words, from process to outcome. *De Hoon* aptly calls the protagonists driving the policy agenda in international criminal justice "norm entrepreneurs"[36] and she warns that the ICC in particular is subjected to a conflict of tasks and expectations, and their normative consequences, something which the policy aspect of victims' rights is particularly prone to.[37]

The fundamental question that needs to be asked in a criminal justice context, as opposed to the political and/or state responsibility context, is this: *Whose* victims are they and what harm is *that person* responsible for? The ICC Pre-Trial Chamber in its decision of 6 September 2018 on the ICC's jurisdiction regarding the treatment of the Rohingya by Myanmar made that very clear.[38] In other words, the rights of the victims before and during ongoing proceedings are first and foremost *procedural rights* akin[39] to those of due process for the defence; the material right to, and the kind and amount of, reparations is *de facto*

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[33] The Basic Principles after all encourage states to adopt a victim-oriented approach in their preamble:

> *Convinced* that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines.

[34] Interestingly enough, the 2013 Resolution by the Assembly of States Parties (ASP), Doc. No. ICC-ASP/10/Res.3, on Reparations in its para. 2 is in conflict with the spirit of the 1985 Declaration in its paras. 12–13.

[35] No. ICC-01/04-01/06 A A 2 A 3 at paras. 64 ff.

[36] Marieke De Hoon, *The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy*, International Criminal Law Review, 591 at 592 (2017).

[37] "In its justification for existence, the ICC and its proponents have created unrealistically high expectations of what a court [. . .] can do [. . .]. Credos like 'ending impunity' and 'delivering justice' would never be found credible in a domestic [. . .] system, since all criminal law can do is strive after *reducing* impunity and *contributing* to feelings that justice is served [. . .]. [S]uch strange and utopian promises should have no place in international criminal law." De Hoon, ibid., 598.

[38] *See* ICC Pre-Trial Chamber, Case No. ICC-RoC46(3)-01/18-37, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 6 September 2018 at para. 88, online at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46(3)-01/18-37: "This means that the Prosecutor is mandated to respect the internationally recognized human rights of victims with regard to the conduct and result of her preliminary examination, especially the rights of victims to *know the truth*, to *have access to justice* and to *request* reparations, as already established in the jurisprudence of this Court. Moreover, the Chamber notes that the IACtHR has established that 'it is necessary to act with special promptness when, owing to the design of the domestic laws, *the possibility of filing a civil action* for damages depends on the criminal proceeding.' Within the Court's legal framework, the victims' *rights both to participate in the proceedings and to claim reparations* are entirely dependent on the Prosecutor starting an investigation or requesting authorization to do so. The *process of reparations is intrinsically linked to criminal proceedings*, as established in article 75 of the Statute, and any delay in the start of the investigation is a delay for the *victims to be in a position to claim* reparations for the harm suffered as a result of the commission of the crimes within the jurisdiction of this Court." (emphasis added).

[39] *See* in this sense the arguments advanced for an enhanced minimum standard of participatory victims' rights by Anni Pues, *A Victim's Right to a Fair Trial at the International Criminal Court?*, JICJ 951 (2017);

only triggered once a person has been found guilty by final verdict of committing crimes resulting in the harm which reparations are claimed for, and only once the nature and the extent of the harm have also been established. The practice at the ECCC has shown that even in the case of an indictment, not every civil party applicant, who may be a victim of the historical events in the wider sense, will necessarily be entitled to join the proceedings against a particular accused.[40]

The uncertain nature of the victims' rights in international criminal justice as bound to the existence of a case and an individual offender is also evidenced by the fact that it is so far unclear whether they continue to exist upon the death of the defendant, because no statute of any international court provides for a liability of the accused's heirs or estate for any reparation awarded directly against the convicted person, for example, under Arts. 75(2), 109 ICC Statute, nor do the 1985 Declaration or the Basic Principles. (Draft provisions on the right of the successors of the *victims*[41] to enforce previous judgments against the convicted person were dropped during the ICC Statute negotiations.[42]) This means that the matter seems to be left to the national jurisdictions, with curious and probably rather diverse consequences.

One example from a national system, *colorandi causa*, is the German law which under general domestic rules forbids the enforcement of fines into the convicted person's estate after their death (§ 459c (3) German Code of Criminal Procedure—GCCP). The enforcement of reparation orders by the ICC is regulated in § 45 of the Law on the Cooperation with the ICC (LCICC),[43] which refers to § 43 LCICC for the enforcement procedure for fines, which in its sub-section (4) in turn declares § 459c (3) GCCP applicable, i.e. it treats a monetary reparation order made for the benefit of the victims like a fine and prohibits its enforcement into the estate or against the heirs. Enforcement of non-monetary reparations such as a public apology etc. is not foreseen at all by § 45 LCICC, and would in any event make little sense. Victims are, of course, not precluded from pursuing a claim in the civil courts against the estate but they may, for example, run up, as the case may be, against the barrier of the German law's refusal to accept the superior responsibility variety of the superior's not investigating or punishing *previously* committed crimes as a mode of liability for the crime committed by the subordinates—this form of liability is deemed irreconcilable with the German idea of the *Schuldprinzip*, i.e. the requirement of *prior* fault by the offender, and § 15 of the *Völkerstrafgesetzbuch* (VStGB – Code of Crimes Against International Law[44]) makes this variety into a separate offence of dereliction of duty. It is

in a similar vein, Liesbeth Zegveld, *Victims as a Third Party: Empowerment of Victims?*, International Criminal Law Review (2017), advance article DOI: https://doi.org/10.1163/15718123-01806002.

[40] *See*, for a recent example, Case 004/2 against Ao An, Doc. No. D269, Order on admissibility of civil party applications, 28 November 2018, online at https://www.eccc.gov.kh/en/document/court/order-admissibility-civil-party-applications.

[41] *But see*, for example, Art. 14 of the 1984 Torture Convention, which allows for compensation claims by the dependants of a person killed during torture, and is in line with the wide definition of the term "victim," for example, in Rule 85 of the RPE-ICC. This is, however, a direct original, non-derivatory claim of the dependant and not the same as enforcing a previous award to the torture victim who died after the award; *cf.* William Schabas, The International Criminal Court, A Commentary on the Rome Statute (2010), 881–882.

[42] David Donat-Cattin in Otto Triffterer & Kai Ambos, The Rome Statute of the International Criminal Court—A Commentary, 3rd ed. (CH Beck/Hart/Nomos, 2016) (hereinafter "Triffterer & Ambos"), Art. 75 fn. 61.

[43] *See* https://www.gesetze-im-internet.de/istghg/index.html.

[44] *See* https://www.gesetze-im-internet.de/vstgb/index.html; translation at https://germanlawarchive.iuscomp.org/?p=758.

so far unclear whether the German courts would treat § 15 VStGB as a law meant to protect (also) the interests of individual natural or legal persons in the sense of tort law under § 823(2) of the *Bürgerliches Gesetzbuch* (BGB – German Civil Code[45]), and not only the general public order.

4.1.1.2. DEFENCE RIGHTS AS AN AFTERTHOUGHT?

It is unfortunate in the context of enhancing efficiency of proceedings, which appears to be equated mainly with greater speed by the PD, that the interests of the victims are listed before those of the defence, despite of the PD's use of the term "paramount."[46] This is not in keeping with the general hierarchy found in the statutes of international criminal courts and tribunals which consistently use the expression "*full respect* for the rights of the defence and *due regard* for the protection of victims and witnesses."[47] In other words, in a case of conceptual conflict, the former must always trump the latter, as is clarified by Art. 68(1) ICC Statute: "These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[48] Furthermore, the exhortation to have a "*fair and expeditious* trial" was originally meant to be in the interests of the *defence* (see also Art. 67(1)(c) ICC Statute), not the victims or even the donor community. The Basic Principles in para. 27 also restate this fundamental principle.[49]

The third reason of the PD could easily be seen as an attempt to recast speed, in the sense of facilitating the smooth running of the *administration* of justice, as an inherent quality of a *fair* trial—with the consequence that this new meaning, once it has been spliced into the DNA, thereby creating a new mutated strand of the fair trial principle, is then used to limit the original fair trial concept, by now interpreting the concept based on the induced mutation.[50] The drive for ever greater speed and cost-cutting, apart from endangering judicial independence and the "full, robust, and in-depth contemplation" of the issues at hand, has its most detrimental impact on the position of the defence, not least because international tribunals in particular have historically been, and still are, struggling with the implementation of the principle of equality of arms.[51] Quite simply, a fair trial should be allowed to take

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[45] https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3489.

[46] In this context, it is rather curious to read David Donat Cattin saying that the "role of the victims in the proceedings is that of the 'guardians of the fairness of the prosecution, not agents in search for retribution.'" Triffterer & Cattin, 2016, Art. 75 fn. 52.

[47] *See only* Art. 64(2) ICC Statute.

[48] *See also* the draft Articles 11 and 12 of the ILC Drafting Committee on Crimes Against Humanity of 26 May 2017, Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on first reading, UN Doc. A/CN.4/L.892.

[49] "Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process."

[50] One is reminded of Goethe's dictum in the Zahme Xenien II: "Im Auslegen seid frisch und munter! Legt ihr's nicht aus, so legt was unter." The translation: "Be bold, expound, read something out," listed in Derek Glass, Goethe in English—A Bibliography of the Translations in the Twentieth Century (Maney Publishing, 2005), 72 at 162, does not quite catch the meaning of that phrase. A better translation seems to be that by Belinda Cooper of Georg Jellinek, *Constitutional Amendment and Constitutional Transformation (1906), in* Weimar—A Jurisprudence of Crisis (Arthur Jacobson & Bernhard Schlink eds., University of California Press, 2000), 56: "Be bright and lively in expounding, if you can't expound, then pound it in." It means that if traditional methods of interpretation do not allow to draw a clear (or desired) meaning *out* of a provision, then the text interpreters should interpret their own (preferred) understanding *into* the provision.

[51] Stefania Negri, *The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure*, International Criminal Law Review, 513 (2005).

as long as it takes to present and test the evidence in a sound and thorough fashion under the circumstances of each individual case. This still leaves sufficient room to look for efficiency savings, finding and sharing good practice, and restricting sharp practices from the parties, including the prosecution and the defence, by an experienced bench.

4.1.2. Institutional Framework Aspects

Both the PD and the OR in their preambles relate to the need for embedding efficiency mechanisms in each court's institutional structure[52] and set-up, based, one would assume, on their statutes and the rules of procedure and evidence.

PD	OR
Mindful that, *in compliance with their founding texts*, specific procedures should be devised and practices developed to cater to the complexity of the crimes these courts and tribunals must adjudicate; [Emphases added.]	Mindful that *each international court has its own specific mandate, jurisdiction and institutional organization*, and that any recommendations below *must reflect these specificities*;

This realisation represents a significant and detracting qualifier on the ubiquity with which the PD and OR can be applied across different tribunals. The recommendations of the PD and the OR sound like straightforward emanations of common-sense thinking, yet the devil is often in the detail:

- Focusing on the criminal tribunals, this means different approaches may have to be found depending on whether a court subscribes to an adversarial, an inquisitorial/judge-led or a mixed model to begin with.
- How will the recommendation affect tribunals which are hybrid and possibly in principle even subject to the law of a certain host state, like the ECCC?
- The more advanced and detailed the procedural law—and established practice—of a court already is, the more difficult it will be to implement changes.
- Who is entitled to make such changes? If we look only at the example of the ICC, that may either be the ASP or the judges, depending on the structural level in the norm hierarchy at which a change is made.
- Can a change simply be made by judicial practice without adapting a relevant provision?
- What about judicial independence in the application of the law—can some sort of a mere "Code of Good Practice," possibly passed by a mere majority of a court's judges, demand the other judges' compliance, especially absent any rule of *stare decisis* on the international level or in civil-law-based courts?
- Linked to the previous concern: How will conflicts between codes of practice and the applicable law be solved, and by whom?

These are only a few questions that come to mind. Of course, the PD in particular contains a few more detailed recommendations in this context which will be looked at later.

[52] The OR contain a section on judicial recruitment which will be looked at separately below at 4.1.2.2.

4.1.3. Accountability Aspects

Both PD and OR contain exhortations about courts and judges being more pro-active and accountable.

PD	OR
Cognizant that while international courts and tribunals must be provided with the necessary resources to fulfil their mandate, they must also be accountable;	Recognizing that ensuring the legitimacy of international courts may still require more from both judges and their institutions;

Budget accountability and the need for establishing efficient workflow procedures are, of course, not per se objectionable. That sort of accountability rests with the court administration regarding the budget and any streamlining of administrative support for the judicial core business, for which judicial input should be sought as a matter of course. Accountability for core judicial conduct, i.e. decision-making and compliance with judicial ethics, is provided by the appellate structures for the genuine judicial case work, and by the disciplinary procedures for breaches of judicial ethics. Art. 112(2)(b) ICC Statute, for example, provides for an independent oversight mechanism (IOM) at the ASP,[53] which is, however, restricted to the *administrative* work of the Presidency, the Prosecutor and the Registrar. ASP Resolution ICC-ASP/12/Res. 6, which was—in our context rather tellingly—based on consensus with the ICC's three main organs (Presidency, Prosecutor and Registry)[54] expressly provides in its para. 27 that

> [t]he authority of the IOM does not in any way impede the authority or independence granted by the Rome Statute to the Presidency, judges, Registrar or Prosecutor of the Court. In particular, the IOM will fully respect the judicial and prosecutorial independence and its activities will not interfere with the effective functioning of the Court.

Oversight of any kind will pose a serious problem when the external budgetary and administrative accountability of the court as a whole is meant to pierce the veil of judicial independence in both its aspects, personal independence (security of tenure and emoluments etc.) and independence in decision-making. The report by the UN Advisory Committee on Administrative and Budgetary Questions (ACABQ) on the ECCC of 27 October 2017[55] amply demonstrates what this can mean for individual judges:

> **Court management**
>
> In addition, the report of the Secretary-General states that in May 2017 the co-investigating judges indicated their intention to request a permanent stay on judicial proceedings in cases 003, 004 and 004/02 owing to their deep concerns about the Court's funding situation. They subsequently decided to defer the decision on a stay. Upon enquiry, the Advisory Committee was informed that, pursuant to rule 73 of the internal rules of Extraordinary Chambers, the decision of the co-investigating judges to

[53] On the development and the mandate, *see* S. Rama Rao & Philipp Ambach in Triffterer & Ambos. Article 112, mn. 59 ff.

[54] Ibid., mn. 61.

[55] UN Doc. A/72/7/Add. 7.

> permanently stay the proceedings may be subject to appeal to the Pre-Trial Chamber. **The Committee notes that, pursuant to paragraphs 9 and 10 of the terms and conditions of service for the judges of the Extraordinary Chambers, provided to it upon request, international judges are subject to the authority of the Secretary-General in respect of all matters of a non-judicial nature arising in connection with or related to their service.** [Emphasis in bold in the original.][56]

That paragraph could easily be interpreted as an attempt at restricting the reach of judicial independence simply by deeming anything budget-related a court management issue, i.e. an administrative matter, and hence making the judge subject to the UNSG's line-management.

The language of the OR about realising that still more may be required from judges and their institutions is entering dangerous territory: It is the hallmark of neo-liberal ideology, the mechanics of which were trenchantly analysed by Michel Foucault, to shift the realisation of alleged shortcomings in their role to the individual who is said to cause them, with the aim of making the individual subjugate themselves to the external message that it is *they* who (always) need to do more and who are to blame for not keeping up with requirements, thus causing them to become their own ever-critical supervisors and to internalise the psychological self-blaming culture, which incessantly "requires still more," and which is so prevalent in the modern workplace. I have written elsewhere about this in the context of the phenomenon of the commodification of justice and refer to what I said there.[57] My Cambodian colleague at the ECCC and I, referring *inter alia* to a paper by Birju Kotecha, expressed our concerns in 2017 by holding that the increasingly executive-driven trend in the direction of applying managerial criteria to judicial core activities is "either

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[56] Ibid., para. 13.

[57] *Commodification of Justice—A personal view on managerial performance indicators in the judicial context, in* Contemporary Trends in Justice Systems (al-Qasimi, Mohammed eds., United Arab Emirates University (UAEU) Press, 2018), 9. In essence, I argued as follows: The lens of Foucauldian discourse, and in particular Foucault's views on the hidden technologies of governmentality controlling the behaviour of human beings, with the perfect means of control being full internalisation of the controllers' agenda by triggering a seemingly voluntary self-subjection, either by knowing alignment with the underlying agenda or through its subconscious acceptance, is helpful in this context. In his work, *Discipline and Punish*, Michel Foucault argues that corporal punishments were replaced by a system which subjects it to continuous and total monitoring, in order to control it and prevent deviant behaviour. In the chapter entitled "*Panopticism*" he refers to Bentham's idea of the panopticon, a form of prison architecture consisting of individual cells assembled around a central tower from which each inhabitant can be monitored at any time without noticing himself that he is being watched. Its ultimate aim is the impression of constant visibility and flowing from that, the creation of self-monitoring by and a consequential adaptation of the person's behaviour. This behavioural adaptation, in Foucault's view, leads to a state of affairs where the object of the surveillance simultaneously becomes the subject of their own submission.—*See* Michel Foucault, *Panopticism*, available online in Race/Ethnicity: Multidisciplinary Global Contexts, Vol. 2, No. 1, The Dynamics of Race and Incarceration: Social Integration, Social Welfare, and Social Control (Indiana University Press), at https://www.jstor.org/stable/25594995, 6 f.; German translation in *Überwachen und Strafen* (Suhrkamp), 16th ed., 2016, 258–260. Against the background of effective incentives for uniformity (career progression etc.) there is a danger that judges, despite the constitutional protection of their independence, may strive for showing compliance with overriding external policy objectives, some of which they might even share for their own ideological or political reasons. Such conformism may eventually lead to a looser view of the question of whether to prefer speed over due process, and that speed is not the same as efficiency, risking miscarriages of justice and that subscribing to the managerial target-setting attitude may lead to preferring quantity over quality and ultimately to a change in judicial role perception away from dispassionate truth-finder/mediator to self-motivated results-oriented manager.

bound to end as an exercise in futility or risks making dangerous inroads to the judicial self-perception."[58] Sara Kendall aptly identifies the neo-liberal impact in international criminal law, when she writes with regard to the ICC:

> International criminal law has adopted a neoliberal orientation, in the sense that neoliberalism draws market-based rationalities into traditionally non-market-based domains [. . .] In reading the work of the Court through the related optics of political interest and material conditions of possibility, claims regarding "global justice" through international criminal law appear in a different light. What emerges through this interpretive prism is a juridical field preoccupied by concerns with the *oikos* – investments and efficiencies – while sidelining matters of the *polis*, such as deliberation and accountability. While the Court and its proponents speak in the name of a universalist "international community", its shareholder constituency is partial and particular, with its own political commitments and seeking a "return" on its juridical investments. [. . .] Such expressions may be read as an uptake of neoliberal reasoning, extending the logic of the market to claims about "global justice", yet they arguably reveal even more about the politics of membership in the ICC's political economy. [. . .] This appeal to balance as a priority reveals the paradox or dilemma at the heart of the ICC's claim to "global justice". In order to secure sufficient political will to continue to appeal to its states parties (and by extension, to receive strong budgetary support), the ICC has to cast itself as more ambitious than it can be: hence its overdetermined claims to "ending impunity", "restoring the dignity of victims" and "bringing a sustainable peace". At the same time, its essentially retributive framework and focus on prosecuting a small number of individuals limits the ICC, which must market itself to states parties while drawing upon labour from an informal economy of intermediaries and volunteers.[59]

4.1.4. Aspects of Judicial Self-perception

Both the PD and OR contain markers that point to a particular judicial self-image propounded by the signatories. They can be broadly distinguished into the following categories:

- Judicial ethics
- Judicial efficiency
- Judicial transparency
- Judicial public relations

4.1.4.1. JUDICIAL ETHICS ASPECTS

Here, as with the subsequent efficiency aspects, the PD is more detailed than the OR, and there is only partial overlap in the actual recommendations.

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[58] *See* ECCC, Co-Investigating Judges, Combined decision on the impact of the budgetary situation etc., Case No. 004/2 /07-09-2009-ECCC-OCIJ/D349/6, of 11 August 2017, online at https://www.eccc.gov.kh/en/document/court/combined-decision-impact-budgetary-situation-cases-003-004-and-0042-and-related, at para. 43, with reference to Birju Kotecha, *The ICC's Office of the Prosecutor and the Limits of Performance Indicators*, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE (2017) 543 at 555: "In short, audit indicators may deeply implant audit values within professional identities. This may lead personnel to change their vision about who they professionally are and what it is they do."

[59] Sara Kendall, *Commodifying Global Justice*, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 113 at 117 and 132–133 (2015).

PD	OR
Call upon each Judge, regardless of his or her legal system of origin, to apply the normative framework governing the court or tribunal of which he or she is a member;	Emphasizing that the primary work of international judges is to produce well-reasoned and timely judgments, which are seen to be so;
Recall that, without prejudice to their respective responsibilities, there is a genuine interdependency between each organ of the court or tribunal, as well as between the Presidency and the Judges and Presiding Judges, which should be capitalized upon through dialogue in order to improve the expeditiousness and effectiveness of proceedings;	Each international court should have a code of judicial ethics whose provisions are well known to judges.
Ensure regular and ongoing communication between the Judges concerning professional practices, in a manner consistent with their independence;	Judges should behave in a manner that does not cast doubt upon their independence, integrity, and impartiality.
Promote, in keeping with the respective responsibilities of those involved in the trial, a dignified and constructive atmosphere for the hearings;	In situations where serious ethics violations by a judge are alleged and require an investigation, consideration should be given to the appointment of an external committee, provided the institution allows such a procedure, composed of individuals with relevant knowledge and experience, to conduct the investigation and make recommendations.
Adopt codes of conduct for Judges, in line with international standards and drawing inspiration from national practices in this area;	Judges should remain aware that producing well-reasoned judgments, based on the applicable law, remains their central role and the lynchpin of their institution's legitimacy.
Establish suitable disciplinary mechanisms in order to ensure that adopted codes of conduct are respected and to guarantee impartiality, the appearance of impartiality and the dignity of the disciplinary process. As far as possible use investigative bodies which are external to the relevant court or tribunal and entrust decision making to a separate panel of the Assembly of the Judges of the court or tribunal. Consideration could be given to establishing an investigative and decision-making body common to all international criminal courts and tribunals;	Dissenting or separate opinions, if allowed by the institution, should be delivered with restraint and formulated in respectful language so as not to undermine the authority of the court.
Promote the continuous education of Judges and Legal Officers, including through partnerships with national academies for the training of Judges.	

The first PD recommendation is a restatement of the obvious that judges should apply the law of their respective courts regardless of their own jurisdiction of origin, yet in its simplicity this exhortation seems to overlook the difficulties in practice of arriving at a joint interpretation of the law. It has been the bane of international criminal justice from the very beginning that legal concepts, the meaning of which appears straightforward for everyone in their own system, begin to oscillate when brought together with preconceptions from other legal backgrounds. This is particularly true when we consider the task of determining the content of customary international law built on state practice and *opinio iuris*, yet it holds no less true in principle for treaty-based institutions like the ICC.[60] *Anthea Roberts* in her recent monograph "Is International Law International?"[61] has shown impressively that there is a myriad of different and competing factors that influence the debate about the role and content of international law. I myself have repeatedly emphasised that the tools for finding customary law become even blunter when we look at the field of criminal law:[62] This area, with all its intricate sub-disciplines of doctrine and case law in substantive law and procedure, was never foremost in the mind of international diplomats and politicians when setting up international criminal tribunals, and they left it to the judges to deal with the details—a lesson learned at least in part during the negotiations of the Rome Statute, which reserved the power to make the ICC's RPE to the ASP, with only emergency decisions Between ASP meetings left to the judges. The political *desideratum* of having geographical, and hence systemic, diversity on the bench comes at a price and does not necessarily contribute to the smooth running of the process of law-finding, especially so

- when the court has jurisdiction over events occurring in a country with its own developed legal system, but no clear provision is made to apply that country's law,
- or if an international "override clause" is inserted into the Statute,[63]
- or if the judges decide to interpret the Statue in a way that allows introducing such an override through the back-door.[64]

The second PD item on the factual interdependency of the judges, the prosecution and the registry in the process of running a court is again a banality from the point of view of practice.

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[60] *See, for example*, only Art. 21 ICC Statute.

[61] Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017).

[62] *See* my papers Radbruch Redux: The need for revisiting the conversation between common and civil law at root level at the example of international criminal justice. [2011] *Leiden Journal of International Law* 393; *Nullum crimen sine poena—Zur Unberechenbarkeit völkerstrafrechtlicher Lehrenbildung*. In Freiheitsverluste in Recht, Rechtsregime und Gesellschaft in Heiner Alwart et al. (eds.) (Mohr Siebeck, 2014, 45); Language, intellectual culture, legal traditions and international criminal justice [2014] *Journal of International Criminal Justice*, 2014, 491.

[63] *See, for example*, Art. 24(1) ICTY Statute: "In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia." This phrase, in connection with Rule 101 of the RPE-ICTY, was interpreted by the ICTY from its earliest days as allowing recourse to other considerations than merely the sentencing framework of the former Yugoslavia, based among other things on "the special nature and purpose of the International Tribunal." *See* Case No. IT-94-1-T, *Prosecutor v. Dusko Tadic*, Sentencing Judgment of 14 July 1997, at para. 9, and the related Judgement in Sentencing Appeals, Case No. IT-94-1-A, of 26 January 2000, at para. 21, where the Appeals Chamber argued in effect that, *inter alia*, the—after all judge-made—RPE exempted the court from abiding by the maximum sentences applicable under the previous Yugoslav law.

[64] *See* my paper *"Statute? What Statute?" Norm hierarchy and judicial law-making in international criminal law at the example of the Special Tribunal for Lebanon*, Statute Law Review 186 (2014).

However, the utilisation of this interconnectedness finds its boundaries, on the one hand, at the independence of each *individual* judge—a point often overlooked—and the reluctance, both among the judiciary and the prosecution, to make prosecutors accountable for misconduct to the court, for example, via the contempt power. The ICTY very early on in *Furundzija*[65] refused to subject prosecutorial misconduct to its own disciplinary regime, and instead referred the matter to the disciplinary oversight of the Prosecutor. While defence counsel and former staff members[66] have been held in contempt, no such case is reported about a prosecution attorney for their conduct during the proceedings—yet, the law as such does not require such judicial restraint. Finally, the recommendation as it stands does not take into account the highly important need to have good relations with the defence,[67] and similarly to the victims' representatives. A non-confrontational approach especially vis-à-vis the defence often helps progress a case much more than any purely internal managerial tools designed within the institution.[68] However, as with the judges, any such cooperation finds its limits in the independence of counsel and the zealous representation of the client's interests.

The third point of the PD on regular communications on good practice within the limits of independence, presents yet another platitude for anyone who was socialised into their home judiciary before joining the international arena: A new judge will invariably be appointed to the bench in a court or district where there are older, more experienced judges already serving. In some countries, especially those with a career judiciary, a novice will often be assigned to a panel, where the daily interactions with one's "elder brethren" provides ample opportunity to discuss ways of making one's life easier by using tried-and-tested pragmatic approaches, notwithstanding the fact that even the new judge enjoys full independence within the panel. This exchange of views and knowledge transfer can be done over a cup of coffee in the judges' common room, during deliberations, or in a quiet corner of the cafeteria over lunch. There is in particular no need for "away-days" which have increasingly become the fashionable thing to do in a variety of organisational contexts.

However, this may not ring true for everyone on the international level, where even the "novices" are almost without exception rather advanced in age and often close or (well) beyond their 50th birthday. The need for such away-days may be evidenced by the press release of the ICC of 28 September 2018 on the judges holding a retreat over two days focusing on "collegiality" and various other procedural aspects.[69] It may be unsurprising that

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[65] *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-PT, The Trial Chamber's Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, 5 June 1998, at paras. 11 and 12, online at https://www.icty.org/x/cases/furundzija/related/en/980605e.pdf.

[66] So, for example, at the ICTY, Milan Vujin, Vojislav Seselj, Florence Hartmann, and at the ICC Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jena-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido.

[67] It bears remembering that the statutes of all international(ised) courts tend to treat the prosecution as a part of the institution, whereas the defence rarely, if ever, gets any institutional standing. Even if there is an office for the defence, its chief will not have the same standing as the chief prosecutor, and any international defence counsel organisation is yet to address either the UN Security Council or the General Assembly.

[68] It may admittedly not come easily to many of those conditioned in the "no impunity" environment that the defence is not the "enemy."

[69] *See* https://www.icc-cpi.int/Pages/item.aspx?name=pr1412. It may have been necessary to have such a meeting if the normal informal flow of communication at the ICC had indeed dried up, but one could be forgiven for questioning the wisdom of issuing a press release about it, which, contrary to its authors' intention of showcasing their efforts at being good colleagues, will in effect have done nothing but impart to the

this retreat came so shortly after the highly contentious *Bemba* appeals majority ruling of 8 June 2018.[70] The President, Judge Eboe-Osuji, is reported as having

> [. . .] emphasised the importance of cultivating a collegial judicial culture: "The judiciary of the ICC and the Court more broadly stand to benefit tremendously from a commitment to an open, respectful, dignified and inclusive approach to institutional decision-making by the judges. That is to say, it is highly desirable to cultivate a cohesive and constructive environment marked by the highest degree of dignity and respect for one another, encouraging judges to share their diverse expertise, experience and professional backgrounds to the benefit of the Court."[71]

This leads to the next PD recommendation, the promotion of a dignified and constructive atmosphere in the proceedings, and the related OR recommendation that judges should always act in a manner consistent with their independence, integrity and impartiality, and that dissenting or separate opinions should use restraint and respectful language in order to avoid undermining the authority of the court.[72] Again, a banality, yet all seems not well in that respect, either. The impact of judicial discord on individual proceedings was, for example, brought into sharp relief by another source through the public decision of Judge Meron at the International Residual Mechanism of Criminal Tribunals (MICT[73]) in the *Karadzic* appeal proceedings of 27 September 2018:[74] Meron had been disqualified by Judge Antonetti from sitting on the *Mladic* appeal a few weeks earlier, based on appearance of bias because Meron had already sat on appeals related to Mladic's subordinates. Judge Meron appeared rather exercised about Antonetti's reasoning and, in what looks almost like an act of sheer defiance, decided to withdraw from the case, despite the fact that (a) the accused had explicitly stated that he did not consider Judge Meron to be *actually* biased and (b) that Meron did not consider himself biased, either. The language is revealing:

> OBSERVING that the *Mladic* Disqualification Decision *clearly contradicts established jurisprudence and, in my view, harms the interests of the Mechanism by wrongly suggesting* that "there is a risk in terms of appearance where the superior officer [. . .] is being tried, even on appeal, by the judge who found his subordinates guilty"; [. . .]
>
> CONSIDERING that, in these circumstances, *allowing Judge Antonetti to adjudicate yet another motion* [. . .] is, in my view, liable to delay the proceedings in this case and *further harm the interests of the Mechanism*;

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wider global audience the fact that there *is* discord among the ICC's judges to such a degree that a proper meeting on the matter needed to be held.

[70] *See* Prosecutor v. Jean-Pierre Bemba Gombo, Judgement, Case No. ICC-01/05-01/08 A, 8 June 2018; with a joint separate opinion by Judges Van den Wyngaert and Morrison at ICC-01/05-01/08-3636-Anx2, and a separate opinion by Judge Eboe-Osuji at ICC-01/05-01/08-3636-Anx3; joint dissenting opinion of Judges Monageng and Hofmanski at ICC-01/05-01/08-3636-Anx-1-Red.

[71] Ibid. (fn. 70).

[72] Although, of course, a persuasive and trenchant dissent *fortiter in re* but *suaviter in modo* can—and is often meant to—undermine the authority of the majority's argument.

[73] This abbreviation was chosen at the time despite the fact that the acronym should have been IRMCT; the webpage URL is now https://www.irmct.org. The previous URL https://www.unmict.org automatically links the user to the new URL.

[74] Prosecutor v. Radovan Karadzic, Case No. MICT-13-55-A, Decision, of 27 September 2018, online at http://jrad.unmict.org/webdrawer/webdrawer.dll/webdrawer/rec/242289/view/.

> OBSERVING that Karadzic "has appreciated [my] procedural fairness during the appeal and [my] extraordinary concern for his health and detention conditions" and that Karadzic expressly "does not contend that [I] am actually biased against him";
>
> EMPHASIZING that I would continue to adjudicate the *Karadzic* Case with an impartial mind;
>
> CONSIDERING, however, that in order not to allow disqualification proceedings to impede the progress of the appeals in this case, it is in the interests of justice that I withdraw from this case; [Emphases added.][75]

The public use of such acerbic language by one judge against another, which was, of course, also duly reported in the relevant media,[76] does not augment public confidence in the judicial qualities mentioned by both the PD and the OR. Which is why both the PD and the OR also rightly call for the implementation of codes of judicial ethics, something which is still not the case in every international(ised) tribunal. However, where these codes exist, they are (a) public record and (b) contain specific provisions in point that (c) almost in *verbatim* language address exactly many of the issues which the signatories to the PD seemed so much in need of re-emphasising to the interested public, and which had, for example, also been elaborated *in extenso* in the Bangalore Principles of Judicial Conduct.[77]

Both the PD and the OR call for the establishment of rigorous disciplinary enforcement mechanisms, with an emphasis on the use of external investigators/examiners, and in the case of the PD, also for consideration of creating a common disciplinary body for all international criminal courts and tribunals. The use of external investigators is unobjectionable, as long as the majority of the panel consists of judges. The KSC Code of Judicial Ethics in Arts. 15 ff[78] may serve as an example: Complaints that are not obviously vexatious are referred to the Disciplinary Board by the President; the Board consists of three members, two of whom must be judges, from either international or domestic courts, with extensive experience in the investigation of professional misconduct. The third member may be a senior appointee by the EU. The Board makes recommendations, which in the case of a finding of improper conduct, are transmitted by the President to the Plenary of Judges for decision. In the case of the ICC, Art. 46 of the Statute requires a two-thirds majority recommendation by the other ICC judges for the ASP to be able to remove a judge from office; the investigation is done by the Presidency under Rule 26 ICC-RPE, assisted by one or more judges assigned by automatic rotation; the Presidency then reports to the Plenary for decision. Disciplinary measures short of removal are taken by the Presidency itself (Rule

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[75] Ibid (fn. 75)—footnotes omitted.

[76] *See* only the following selection of results from a simple Google search: https://www.jurist.org/news/2018/09/judge-withdraws-from-karadzic-appeal-in-bosnian-war-case/; https://www.justiceinfo.net/en/live-feed/39024-top-un-judge-withdraws-from-karadzic-case.html; https://www.france24.com/en/20180927-top-un-judge-withdraws-karadzic-case; https://sg.news.yahoo.com/top-un-judge-withdraws-karadzic-case-145401274.html; https://www.balkaninsight.com/en/article/presiding-judge-withdraws-from-radovan-karadzic-s-appeal-09-27-2018; https://www.dailymail.co.uk/wires/ap/article-6214625/Presiding-judge-withdraws-Radovan-Karadzic-appeal-case.html.

[77] *See, for example*, for the KSC at https://www.scp-ks.org/en/documents/code-judicial-ethics-judges-appointed-roster-international-judges-14-mar-2017, Arts. 5 and 8; for the ICC at https://www.icc-cpi.int/pages/item.aspx?name=icc-cje, Arts. 5 and 8; *see* the Bangalore Principles at https://www.judicialintegritygroup.org/jig-principles.

[78] Online at https://www.scp-ks.org/en/documents/code-judicial-ethics-judges-appointed-roster-international-judges-14-mar-2017.

30 ICC-RPE). The salient point is that the investigation and the decision on sanctions must remain in the hands of judges.

It will be difficult, to say the least, to establish a common disciplinary regime for all international criminal courts with a meaningful portfolio: The KSC is de facto run by the EU, the ICC is an independent treaty-based body merely partly affiliated with the UN, the ICTY and ICTR and now the RMICT are under the aegis of the UN, courts like the ECCC, the Special Court for Sierra Leone and its Residual Court, the Special Tribunal for Lebanon and the local war crimes courts in Kosovo and Bosnia, for example, are instances of hybrid courts with UN involvement, but are also comprised of local judges who are not normally subject to international oversight. And why restrict it to criminal courts, and not include other international courts such as, for example, the CJEU, the GCEU, the ECtHR, the IACtHR, ITLOS etc.? It would in any event take a major diplomatic and political effort to establish such a joint oversight mechanism *and* to ensure that it is under full judicial control, because this would be the first (albeit welcome) step towards the institutional independence of the international judiciary, something States are unlikely to agree to because of the loss of control it would entail. I had some time ago advocated considering the establishment of a General Council of Judges on the international level,[79] which could take up some of the functions alluded to in the PD and OR, among a wider array of competences. However, the very reason for the PD's and OR's announcement, i.e. the increasingly critical stance of states towards international judicial bodies, makes it seem like science fiction to entertain the prospect of such an idea coming to fruition anytime soon.

The PD's exhortation to let judges and legal officers engage in continuing professional development (CPD) is something I have experienced at the domestic level and have advocated myself for the international judiciary,[80] but it needs to be extended to predeployment education, something that is sorely lacking and which would allow judges and staff to hit the ground running, or at least walking faster than at a crawl. It is obvious that any time taken for meaningful training may be lost for the work on the actual cases, yet the time taken for training may very well pay off later.

I have serious reservations, however, against the OR's idea of what the "central role and lynchpin" of a judge's task is, i.e. writing well-reasoned judgments based on the applicable law, that "are seen to be so." Not all judges write judgments—investigating judges, for example, do not—and in fact most of the output of trial and appellate judges are not judgments but (interlocutory) orders and decisions. Even assuming that the use of the word "judgment" in this context is meant to be generic, this view does not even begin to describe accurately what a criminal judge's central role is—to ensure fair and speedy proceedings at any stage in the case, with the emphasis between the two being squarely on "fair." It is unclear what is meant by the qualifier "seen to be so": Does it refer to making all decisions public? Does it mean "being acceptable/intelligible to the readership"? Which readership—legally trained or lay persons? How about the recommendation of the PD, discussed below, that more use should be made of oral decisions *ex tempore*, and that judgments should refer more to the submissions of the parties instead of summarising them—how does that match the idea of writing well-reasoned and, presumably, independently intelligible judgmentss? At least the two judges who attended both the PD and the OR sessions should have flagged up these

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[79] Separation of Powers and the International Judiciary—A vision of institutional judicial independence in international law. In Culture of Judicial Independence: Conceptual Foundations and Practical Challenges. S. Shetreet and C. Forsyth (eds.), (Martinus Nijhoff Publishers), 2011, 269.

[80] *Pride and Prejudice or Sense and Sensibility? A pragmatic proposal for the recruitment of judges at the ICC and other international criminal courts*, New Criminal Law Review 529 (2009).

problems—which maybe they did without success. There may, however, be another explanation, which is more of a *soupçon*, in that the form of words may be meant to steer judges away from judicial activism or using their legal imagination, and to ensure that they adopt a narrow "tools-of-the-trade," "nuts-and-bolts" or "by-the-book" attitude, as many might do in national systems. If that is the real reason, the answer to the question of how this can be reconciled with the need to conduct research in often uncharted territories of law is not immediately clear.

4.1.4.2. JUDICIAL EFFICIENCY ASPECTS

This aspect is where the PD is much more detailed than the OR and displays a very specific attitude to where the alleged causes for inefficient handling of cases lie. The PD recommendations were broken up into three thematic sub-lists due to their length. These do, of course, overlap to some extent:

- 4.1.4.2.1. General organisational measures
- 4.1.4.2.2. Governance measures
- 4.1.4.2.3. Procedural measures

4.1.4.2.1. General Organisational Measures

PD	OR
Call upon judges, upon assignment to a case, to thoroughly prepare and maintain in-depth knowledge of the circumstances of the case, including by developing of common and pertinent methods of familiarization with and analysis of facts and issues in dispute;	Judges should deal with a case in an efficient and timely manner, avoiding any unnecessary delay.
Ensure that each procedural phase of the proceedings serves its own purpose and avoids duplication to the extent possible;	Judges should give priority to the work of their court, ensure their availability, and avoid distractions from other professional activities.
Devise, at the earliest possible opportunity and in consultation with the Parties, a realistic work plan for the pre-trial, trial and appellate phases, taking into account the specific features of each case and which may be modified if necessary;	
Strive to reduce the duration of proceedings, in particular by setting deadlines for the disclosure of materials and the filing of written submissions;	
Strive to reduce the time spent on the final deliberations as well as the time spent writing judgments by setting indicative deadlines;	

PD	OR
Encourage the development of professional practices whereby Chambers Legal Officers start drafting, on a provisional basis and at the earliest opportunity, those parts of a draft judgment which are unlikely to undergo significant changes;	
Promote the practice of provisional but continuing deliberations after the testimony of each witness, rather than postponing all deliberations until the final stage;	
Continue reflecting upon the practice of totally or partially postponing to the deliberation stage the assessment of the admissibility of the evidence presented;	
Simplify the drafting of written decisions by referring to the arguments developed by the Parties in their written submissions without necessarily summarizing them in the body of the decision;	

The first PD comment regarding case familiarisation is yet another banality for any judge who has had sufficient practice in their home system. The recommendation is furthermore so vague that it remains unclear what is meant by "common and pertinent" methods of case familiarization. Given that most international courts do not run their proceedings on the basis of a finite dossier created under or submitted to judicial control at the beginning of the trial phase, but based on the advancement of evidence by the parties, it is also questionable when the familiarization process will be complete: When will the judges know the parties' case theory or the totality of the evidence—especially when the defence is not under any enhanced duty to reveal its strategy in advance?

The advice on avoiding duplication apparently is probably meant to be understood against the background of problems such as how evidence taken in pre-trial is introduced at trial, and trial evidence treated at the appellate level. In most courts, the default approach is that of having live evidence at each stage where it is relevant, and not simply referring to previously taken statements, even if they were taken under judicial oversight. A case in point is the ultimately French-law-based ECCC, where the pre-trial investigations were conducted by two investigating judges and their investigators, with immediate access by the prosecution and charged persons' counsel to the material on the case file, yet at trial the vast majority of the evidence was rehashed in detail by live witness testimony etc. based on the judicial investigation case file, although in Case 002/2, for example, there was a massive disclosure of evidence from other investigation case files not previously available in the case file on which the trial proceedings were based. To the extent that an appeal based on evidential matters is allowed, the appellate court may need to hear a witness again, or even hear new witnesses not previously available. Otherwise, it is unclear how different phases of proceedings could duplicate each other. It appears that the PD advocates greater direct

reliance on prior statements, documents etc. The problem with that is, however, that in many cases these statements will have been taken without the presence of defence counsel and thus can be adversarially tested for the first time only at trial. This has, for example, led to a reluctance in allowing such evidence to be used if it goes to the heart of the charges.[81]

The comment related to the establishment of a work plan, clearly inspired by managerial thinking, that can be adjusted as necessary is an idea whose feasibility has been proven questionable in practice time and time again. Judicial proceedings are primarily focused on fair trial rules; speed and efficiency can only be adduced to the benefit of the defence in that environment; the value of victim-centred exhortations about speed has been addressed above. As the comment by Judge *de Brichambaut* cited above alone shows, the managerial understanding of the latter two, which seems to underlie the PD comment, is in systemic tension with that primary judicial task. The ECCC again, as an example in a related context, has had ample experience with its quarterly completion plan updates, which repeatedly had to extend deadlines because circumstances beyond the judges' control impacted the course of proceedings, such as massive staff attrition especially in the court's end phase, or lack of funding to recruit sufficient staff or pay for speedy translation etc. Adjustable work plans will inevitably be overtaken by events and will need to be adjusted. If there is no sanction for adjusting them, what is the point in having them in the first place and spending time lost[82] on the actual judicial activities the work plan is meant to map out on their conceptual preparation, drafting, coordination with all parties involved, monitoring compliance, adjustment etc.? Effective judicial organisation of a court's—and more to the point in this context: a panel's—business is an undeniable necessity, but it is doubtful whether the proposal of a case-specific work plan with the typically ensuing busy and often hectic scheduling and monitoring activity can do more than create and convey the illusion of judicial efficiency and diligence or, put in simpler terms, of the court "being busy."

The remarks on reducing the duration of proceedings and setting deadlines for disclosure and filings are related to the previous comment, subject to the same criticism, and equally vacuous: The idea about setting deadlines only bites if the consequence of a late filing or disclosure, for example, is the preclusion of the filing party's material from consideration in the proceedings, a problematic concept in any (serious) criminal case especially when it applies to filings by the defence which are not merely vexatious and dilatory. Will a court really be willing to throw out crucial evidence from either side because it was filed too late?[83] When does "too late" begin? This proposed bar could not apply at all to the disclosure of exculpatory material, for which there is an ongoing duty of disclosure *and* consideration throughout the entirety of the proceedings. Nor can it conceptually encompass evidence not known or available at the time the deadline elapsed.

Reducing the time spent on final deliberations and setting "indicative" deadlines for drafting of judgments also belongs in the category of half-hearted measures. What is the

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[81] *See, for example*, Rules 92bis to 92quater RPE-ICTY.

[82] In fact, as *Renan Villacis* has shown, the number meetings of the ASP and its committees with the attendant requests for input from the ICC's judicial and other sections had already taken its toll in the years from 2013 to 2017; *see* R. Villacis, *Working Methods of the Assembly of States Parties to the Rome Statute*, International Criminal Law Review, 563 at 570–571 (2018).

[83] *See* for an example from the United States the 1988 landmark case of *Taylor v. Illinois*, 484 U.S. 400, in which a defence witness was excluded from testifying for reasons of vexatiousness and attorney error, and the academic commentary by M.R. Atkinson, *Discovery Sanctions against the Criminal Defendant: Preclusion, Judicial Discretion and Truth-Seeking*, 14 Pace Law Review 597 (1994).

consequence if the "indicative" deadline for the judgment is breached? Does the PD envisage a procedure whereby the court issues a judgment *ex tempore* with the (full) reasons reserved, as happened, for example, on 16 November 2018 at the ECCC with the trial judgment in Case 002/2?[84] For any of this to produce a measurable effect, there would have to be a consequence attached to missing the deadline. An example for such a provision from a national jurisdiction the author is familiar with, Germany, is § 275(1) of the GCCP:

> (1) If the judgment including reasons has not been fully incorporated in the record, it shall be placed on file without delay. This must be done no later than five weeks after pronouncement; this time limit shall be extended by two weeks if the main hearing lasted longer than three days, and, if the main hearing lasted longer than ten days, by another two weeks for every ten days of the main hearing or part thereof. Once the time limit has expired the reasons for the judgment may no longer be amended. The time limit may be exceeded only if and so long as the court, due to a circumstance which cannot be anticipated or averted in the particular case, has been prevented from observing it. The date of receipt and any amendment of the reasons shall be noted by the registry.[85]

Then consequence of missing the deadline under § 275(1) is spelt out in § 338 No. 7 GCCP, an absolute ground of appeal, i.e. typically without the possibility of arguing harmless error:[86]

> A judgment shall always be considered to be based on a violation of the law . . .
> 7. if the judgment contains no reasons for the decision or the reasons have not been placed on the file within the time limit applicable pursuant to Section 275 subsection (1), second and fourth sentences;[87]

Of interest in this context is a related provision on adjournments, § 229 GCCP:

> (1) A main hearing may be interrupted for a period of up to three weeks.
> (2) A main hearing may be interrupted for a period of up to one month if it has been conducted for at least ten days prior thereto.
> (3) If a defendant or a person called upon to reach a judgment is unable, due to sickness, to appear at a main hearing which has already continued for at least ten days, the running of the time limits referred to in subsections (1) and (2) shall be suspended for the duration of the incapacity, up to a maximum of six weeks; these time periods shall expire no earlier than ten days after the suspension has ended.

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[84] Judgment summary available online at https://www.eccc.gov.kh/en/document/court/summary-judgement-case-00202-against-nuon-chea-and-khieu-samphan; the full judgment can be found at https://www.eccc.gov.kh/en/document/court/case-00202-judgement.

[85] Online at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1813.

[86] M. Bohlander, Principles of German Criminal Procedure (Hart Publishing, 2012), 260 ff. (hereinafter "PGCP"); *see* for the details LUTZ Meyer-Goßner & BERTRAM Schmitt, Strafprozessordnung (61st ed., C.H. Beck, 2018), § 338 mn. 51 ff. However, note that according to the jurisprudence of the Federal Court of Justice, the absolute lack of reasons is typically already caught be the basic appeal on the merits under § 337 GCCP, i.e. the so-called *Sachrüge*, which does not require the appellant to give any reasons for the appeal other than the contention that the law has been incorrectly applied. *See also* M. Bohlander, PGCP, 273, on the remaining ambit of application of § 338 No. 7 GCCP.

[87] Online at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p2003.

> The court shall determine the commencement and end date of the suspension in an incontestable ruling.
>
> (4) *If the main hearing has not been re-continued at the latest by the day following expiry of the time limit referred to in the previous subsections, the main hearing shall commence de novo.* If the day following expiry of the time limit is a Sunday, a public holiday or a Saturday, the main hearing may be re-continued on the next working day. [Emphasis added.][88]

Such a strict canon of rules, which has real potential to focus judicial minds, is conspicuously absent from any of the legal frameworks in international courts—probably because even more than in domestic cases, the high degree of unpredictability of procedural developments is ever present in the minds of the drafters of statutes and rules of procedure. However, the irony of the situation is that applying such a rule in international courts in order to speed up the judicial work could very well prove counter-productive, especially from the donors' point of view, because it would not only lead to a waste and duplication of judicial work but also of funding. At the end of the day, practical experience at national level tends to show that this problem is directly linked to the number of judges available to work on incoming cases, and the ratio of judges to cases at international tribunals is simply much too low, bearing in mind the complexity of the proceedings. Hence it is very unlikely that such a rule would be adopted at the international level, for purely pragmatic reasons.[89]

The recommendations about legal officers drafting sections which are unlikely to undergo changes as early as possible—and deliberating on evidence on an ongoing basis—are fraught with problems. The parts that are unlikely to undergo changes are the procedural history sections which can be updated continuously, but they are on the one hand not the ones that cause the most work, and on the other hand, continuous drafting from an early stage has a tendency to lead to bloated documents which do not recount merely the essential elements, but a myriad of ultimately superfluous things. It is also telling that the drafting is apparently meant to be shifted to the legal support staff, away from the judges. My own experience as an investigating judge at the ECCC running four cases at the same time has somewhat sobered me in that respect compared to my previous academic stance on the matter,[90] because the sheer mass of drafting in four cases running simultaneously over many years, with a plethora of motions by the parties, cannot be adequately done by one judge alone, unless one is prepared to accept long delays even in interlocutory proceedings. Yet, at the end of the day, the judge is in charge and responsible for the output; this can create issues if one relies too much on the work of legal officers, many of whom, brilliant as they may be, may not have had enough forensic experience.

The continuous deliberation approach is subject to the banality of foreseeable changes in evidentiary evaluation, especially in a party-driven environment of prosecution case followed by defence case etc. It is useful if it is the judges who are structuring the evidence presentation and if there is a willingness to engage openly with the parties about the

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[88] Available at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1583.

[89] In fact, the issue was raised during the negotiations of the ICC Statue and based on advice from the ICTY's former President, Claude Jorda, it was decided that a strict time limit should not be adopted; *see* P. Lewis, Trial Procedure, in R.S. Lee (ed.), The International Criminal Court—Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers), 2001, 551 f.

[90] *See* M. Bohlander & M. Findlay, The use of domestic sources as a basis for international criminal law principles. In [2002] The Global Community, Yearbook of International Law and Jurisprudence. (Oceana Publications), 2003, 3.

direction the evidence is taking in the court's view. However, from my own experience as a trial judge in Germany, in cases where the defence in particular is running an aggressive or disruptive strategy, this risks recusal motions on the grounds of the appearance that the court has pre-judged the evidence. As a matter of purely experiential statistics, the cases of a clear watershed moment in mid-trial are not as frequent as the recommendation might suggest.

In any event, the next idea of postponing the decision on the *admissibility* of evidence to the latest stage possible, would appear to run counter to the recommendation just discussed: What is the purpose of continuous deliberation on evidence that may be excluded only later? Evidence tends to be interconnected, and allowing Evidence A to be presented on day 21 of a trial may lead to the presentation of Evidence B, C, D etc. on days 22–29 under the case strategy of the parties, yet those might have been irrelevant or themselves been inadmissible if A had been excluded immediately. If Evidence A is then excluded only on day 278 of the trial, what does that do to B, C and D and more generally to the parties' case strategy? If A had been excluded early on, the other party would not have had to respond to it, either. What the PD may have meant is to exclude interlocutory appeals against the admission or exclusion of pieces of evidence and to restrict attacks to an appeal against the final judgment. Yet, that seems to be the prevailing practice anyway.

Finally, as already briefly addressed in the previous section, referring to the filings of the parties without summarizing them is a step in the right direction, i.e. shorter judgments; however, it risks the creation of texts that are not intelligible in and of themselves without referring to other documents. The parties may not be disadvantaged by this, but the average reader will be. It is also worth noting that two judges of the ICC Appeals Chamber majority in *Bemba* criticised the Trial Chamber for making extensive use of cross-references *within* its judgment.[91] How much more would this criticism apply if the reference was made to documents extraneous to the judgment? Moreover, one must bear in mind the difference between trial and appellate judgments. The former can, as in the German practice,[92] simply state what *the court* considers to be the proven facts without going into any detail about the parties' submissions—many of which incidentally will often have been dealt with in interlocutory decisions during the trial—but an appellate court must at least summarize the grounds of appeal.

Turning to the OR, the first recommendation is another banality not worth discussing any further after what was already said above. The second one related to outside activities preventing full commitment to the judicial responsibilities should also be understood; however, there are issues that may make this difficult. Take the KSC, for example, where all judges except the President are merely on a roster and assigned to cases only once a need arises. They have other occupations with which they earn their livelihood, they have responsibilities to their employers, in the case of academics also to their students and/or long-term funded research or publication projects, and finally in the case of private counsel, to their clients under pain of liability for malpractice. Not everyone can just stop what they are doing at the drop of a hat and go sit on a trial lasting maybe two years; there will be some unavoidable friction loss due to the need to accommodate other commitments. Moreover, it is a well-known phenomenon that judges at appellate courts in particular—much like

[91] Prosecutor v. Jean-Pierre Bemba Gombo, Judgement, Case No. ICC-01/05-01/08 A, 8 June 2018—joint separate opinion by Judges Van den Wyngaert and Morrison at ICC-01/05-01/08-3636-Anx2, paras. 7–10, 64.

[92] *See* M. Bohlander, PGCP, 128 ff., 290 ff.

experienced counsel and prosecutors—are sought-after authors for legal commentaries and manuals. This is in principle unobjectionable as long as the work does not suffer; in fact, the published experience of such judges can be essential for keeping the interpretation of the law within the limits of practical relevance and usefulness.

4.1.4.2.2. Governance Measures

PD	OR
Encourage Presiding Judges, in addition to their purely judicial activities, to fulfil their managerial role in preparation of any hearing and in the conduct of proceedings;	The efficient and cost-effective use of technology should be encouraged. Courts should create searchable databases of their jurisprudence for reference by other courts and the public.
Support the implementation of provisions entrusting the pre-trial and pre-appeal case management to a Single Judge, with the obligation for the latter to discuss with and report regularly to the other Judges composing the Chamber;	
Develop technical tools tailored to the mandate of each court or tribunal that can facilitate and optimize the conduct of proceedings;	
Develop regularly updated databases of jurisprudence;	
Encourage standardized collection of statistical data between international criminal courts and tribunals to identify possible common challenges and foster the dissemination of best practices;	
Reflect on the identification of indicators aimed at optimizing the work of international criminal courts and tribunals and making it more transparent, in order to benefit from qualitative information capable of enhancing procedures and practices;	
Ensure that audit teams are staffed with professionals who possess in-depth knowledge and expertise relating to the operation of the organs of international courts and tribunals and their work, and reflect upon the creation of a common international audit body;	

This category contains some of the more generic second-order criteria of governance, some of which are fleshed out in more detail in the next section, with some appearing in multiple sections due to different areas of impact.

The meaning of the first PD point about encouraging presiding judges to fulfil their managerial role in addition to their judicial activity in preparing hearings and the conduct

of proceedings is unclear: They are one and the same. A presiding judge exercises only judicial activities when a specific case is concerned, as opposed to general organisational matters, such as, for example, selecting chamber support staff, authorising requests for office supplies[93] or making contributions to the chambers' budget plans etc. That a chamber's presiding judge's primary role, as opposed to that of a reporting judge (*juge rapporteur/ Berichterstatter*) whose task is to focus on the substance of the case, is the overall management of an individual proceeding and any hearing is obvious. Is the PD trying to say that at present not all presiding judges live up to that expectation? What does the PD mean when it talks about "the presiding judge": The judge who has been elected as the presiding judge of a chamber in general, or the presiding judge in a particular case, which is not always one and the same thing and happens in many international criminal courts? Should the two ever be separated? Running a (complex) trial requires experience and building up a routine. That becomes more difficult if, as it were, everyone gets a shot at presiding on the basis of a rotation system.

In a sense, the first recommendation directly conflicts with the next one of entrusting the pre-trial and pre-appeal proceedings to a single judge, who has to consult regularly with the rest of the chamber. In such a scenario, what is the (residual?) function of the presiding judge as just outlined above? Again, drawing on my own experience from having been on a three-judge collegiate panel in a domestic system, the presiding judge did all that work in every case, in consultation with the reporting judge or the full chamber, as the case required. Given the much higher case load and much tighter turnaround times in domestic courts, surely the few cases on the docket of any panel in international criminal courts could be handled in the same manner?

The effective use of technology is addressed by both the PD and OR. From my experience as a legal officer at the ICTY in 1999–2001, a judge in a domestic system and later at the ECCC and KSC, this has been happening for years and progressively so. It is unclear what particular grievance both the PD and OR are trying to remedy here. Is it that too many judges still do not use IT themselves, write their drafts by hand or dictate them—if they engage in primary drafting of any kind at all (see above)? I see no evidence of that being a major issue. Or is it an encouragement to move to a paperless file—again something that is more or less already standard practice? If it is the latter, then some judges might legitimately raise occupational health reservations based on risk to their eyesight through overexposure to computer monitors, for example. With all due respect for age equality concerns, some of the older judges, who based on previous experience of judicial selection may be in their 70s or even 80s, may also find it more difficult to engage with IT beyond mere word processing software than their younger colleagues in their 50s and 60s, leave alone their legal support staff.

The creation and maintenance of judicial databases mentioned by both PD and OR is a necessary tool to achieve consistency in the case law, yet again in most courts that has been happening for some time, albeit with differing degrees of sophistication. I see no resistance to the concept other than potential financing or logistical problems. In that context, since the advent of the rapidly improving ICC Legal Tools database, it might also be an idea not to duplicate efforts at each court but to cooperate, at least as far as criminal tribunals are concerned, with the ICC in expanding its database as a kind of central repository to cover decisions by other courts, to the extent that these are public record, and

[93] This is not meant to be specious: I had to do that for my office at the ECCC.

retain a confidential database at each court as needed for decisions that cannot be shared publicly.

The collection of data across courts in order to promote best practices is in principle not objectionable as long as judicial independence is fully respected, and as far as the publication of regular reports by each court are concerned, it is already happening to some extent—not to forget informal events such as those preceding the PD and OR. The problem lies more in the standardization aspect. On which basis are those standards to be determined if the procedural rules of the courts do not fully align, as is the case with almost all current tribunals? Looking at, for example, pre-trial prosecutorial performance in the ICTY and other courts based on that model, and comparing it with the prosecution role, for example, in the ICC pre-trial environment, or in its interplay with the pre-trial judge of the STL or the investigating judges of the ECCC, one is quickly in danger of either comparing apples and oranges or of adopting levels of abstraction that make practically useful findings unlikely.

The PD's recommendation of identifying cross-institutional key performance indicators (KPI) to optimize and enhance the procedure and practice is the lynchpin of the target-based, managerial mindset driving a good part of the exercise in my view. I have already alluded to my principled opposition to this idea above, and refer for more detail to the ECCC's co-investigating judges' 2017 joint decision on budgetary impact on fair trial rules, where my colleague and I held as follows:

> Use of results-based budgeting (RBB)
>
> > We [. . .] consider an application of RBB or "milestones" as a measure of success and/or progress to judicial decision-making processes incompatible with judicial independence in decision-making [. . .]
> >
> > It is worth noting in this context the ICC's recent efforts at developing its own performance indicators, which are a telling example of the difficulties a court faces when trying to reconcile managerialist demands around effectiveness and efficiency from the donor community with those arising out of fair trial principles [. . .]
>
> Discussions regarding their interplay in the past have highlighted the
>
> > [. . .] question of viability of performance indicators for an international criminal court and the need to preserve judicial and prosecutorial independence while striving for an optimal organisational performance. It was also emphasized that the ICC's performance depends in many respects on the support and cooperation that it receives from the global community.
>
> The [ICC] explicitly recognises the complexity of indicator selection particularly in relation to the fairness of the proceedings which can be very difficult to measure The [ICC] notes that the goal of fairness potentially conflicts with that of expeditiousness, evidencing the difficulties of qualitatively measuring the performance of a judicial institution.
>
> The [ICC] wisely acknowledges that the speed of proceedings will be constrained by the time and participation that must be afforded to the parties in accordance with the needs for procedural fairness and to establish the truth and that in
>
> > [ ] practice what appears to be mostly used to measure fairness at the national level are workload indicators on defence issues that could point towards a level of fairness of proceedings such as time spent addressing concerns raised by the defence time given to defence in making their case etc.

> The [ICC] warns against equating duration and speed of cases with efficiency, noting that care must be taken to balance speed with fairness, [and] against benchmarking across cases stating
>
> > [E]ach case has its unique features and benchmarking from one case to another will therefore not be possible strictu sensu The duration of each case is affected by a number of case-specific factors such as the number of accused persons, the number and nature of the charges the volume of evidence and likely number of witnesses and the geographical scope of the case localised or extensive cooperation of States in providing needed assistance and the speed with which such assistance is provided These and any other relevant factors taken together may contribute to assess the relative complexity of a case which is likely to affect its overall duration In principle the more complex and voluminous a case the longer its duration.
>
> The same considerations apply mutatis mutandis to the proceedings before the ECCC The [. . .] findings strengthen us in our view that despite the executive driven trend in that direction applying managerial criteria to the core judicial activity is either bound to end as an exercise in futility or risks making dangerous inroads to the judicial self-perception.[94]

Apart from these principled objections, the same criticism as the one described above with regard to attempts at standardized data exchange applies. Regrettably, none of this seems to stop the advance of this kind of thinking even among judges, domestic or international, who are increasingly at risk of falling into the trap of externally induced self-regulation by motivational alignment with the criteria espoused and propounded by extraneous actors who may be subscribing to advancing a wholly different societal meta-agenda, such as, for example, subjecting every aspect of society to a managerial, cost-benefit or target-driven and ultimately commercialised approach of full behavioural control, where the system provides as much justice as it can—or wants to?—afford and judges have to compromise on their compliance with the demands of the rule of law, for which countless people suffered and died over centuries, but which are no longer deemed sufficiently relevant from the meta-agents' point of view. Shoshana Zuboff has recently described the emerging phenomenon of "surveillance capitalism," which is a striking example of such a deleterious and clandestine meta-agenda.[95]

The final recommendation on "audit teams" and creating a common international audit body staffed by people experienced in court administration would appear to be related to the previous one on establishing KPI. There already is such a body at least as far as all UN-related courts and tribunals are concerned, i.e. the ACABQ. As the example from the experience with that body at the ECCC cited above shows, there is—even over 25 years since the creation of the ICTY—still reason to seriously doubt that any such expertise in the operation of judicial entities beyond mere budgetary concerns has been accumulated into a permanent institutional memory, or is observed beyond mere formulaic lip-service. It is also highly questionable whether other international organisations supporting international courts such as the CJEU, GCEU, ECtHR, IACtHR, KSC etc. would be willing or even constitutionally able to submit to such an all-encompassing oversight of their own financial operations.

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[94] *See supra* note 16, paras. 35–43 (footnotes omitted).

[95] Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs, New York, 2019).

4.1.4.2.3. Procedural Measures

PD	OR
Encourage the Parties, and particularly the Prosecutor, to ensure that documents and supporting materials are disclosed or submitted in a manner that facilitates their consideration and analysis;	N/A
Encourage Presiding Judges, Pre-Trial Judges and Pre-Appeal Judges to play an active role prior to the opening of the case and during the course of the proceedings, in close consultation with the Parties, to continuously determine the number of witnesses to be heard, the modalities of hearings, and the time required for the presentation of evidence;	
Encourage Pre-Trial Judges to determine all preliminary and interlocutory issues raised at that stage unless the issue is one which ought plainly to be left for determination by the Trial Chamber;	
Encourage, where appropriate, the use of procedures which allow for the presentation of witness evidence or portions of such evidence in written form, with the opportunity to examine and cross-examine the witness if required;	
Encourage the use of oral decisions to rule on applications, as appropriate;	
Consider more streamlined cross-examination procedures that are better suited to individual witnesses, consistent with the rights of the Parties;	
Recommend to the Parties, wherever possible, to make use of procedures for recording points of agreements on matters of law and fact and to favour the taking of judicial notice of facts of common knowledge;	
Consider the use of innovative measures to allow for the gathering of evidence under judicial supervision at the pre-trial stage, including expanded use of provisions such as the unique investigative opportunities regime;	

As mentioned in the previous section, there is some overlap with the criteria in this section, and the choice to put the above recommendations under this heading is to some extent arbitrary, yet based on a subjective perception of their comparative degree of specificity. Again, quite a number of the recommendations are nothing out of the ordinary as far as good judicial practice is concerned, but nonetheless the way in which they are presented can raise concerns in the international context.

Encouraging in particular the prosecution to disclose relevant materials in a manner "that facilitates their consideration and analysis" is a desire that has been expressed for many

years, and the phenomenon of the prosecution "burying" the defence in CD-ROMs with millions of pages has not been forgotten. The extent to which the disclosure obligations are honoured still very much depends on the ethical disposition of the prosecutor in charge of a case. I profess a clear preference for the way this was handled at the ECCC, where the defence had access to the full confidential case file as created by the co-investigating judges, and as soon as the suspect had been formally charged. Exceptions were rare, such as records of disagreements between the judges, material which fell under the internal work product rule, or evidentiary leads that needed to be exhausted and were protected until any danger of tampering had passed. What was not on the case file at the time of the closing order[96] could not be used at trial by any party, unless it was not available at the time or—as happened frequently in case 002/2—material from another case file relevant to the charges in the trial but not yet available at the start of the trial had to be transferred to the current proceedings, mainly via cross-case disclosure requests by the prosecution who, of course and unlike the defence or victims, enjoyed the benefit of having access to all case files. The earlier judicial control over the evidence sets in, the fewer problems will arise in this context.

There is a certain overlap with the previous sections when it comes to the recommendation encouraging presiding, pre-trial and pre-appeal judges to play an active part in the proceedings in close consultation with the parties, to "continuously determine the number of witnesses to be heard, the modalities of hearings, and the time required for the presentation of evidence." As I have said elsewhere,[97] I would much prefer if the judges took it upon themselves to structure the hearings and call the evidence themselves, to get rid of the adversarial approach of prosecution and defence case, based on a finite—and ideally final—dossier prepared by the prosecution or a pre-trial judge in advance of the trial; only then will they have full control over the time and resource issue and avoid making possibly ill-informed rulings on how much time a witness can spend on the stand. No judge worth their salt will cut off a crucial witness in mid-testimony simply because they overran, and the same applies to deducting any "overtime" from the overall time budget available for a party to call its witnesses. These things do not lend themselves to micro-managing and target-based scheduling.

Having the pre-trial judge(s) determine all pre-trial and interlocutory issues at that stage is, one would have thought, a natural function of that office; in essence this recommendation is only a subset of the earlier ones on the extensive use of pre-trial or pre-appeal judges. However, the question of what needs to be submitted to the full chamber requires a properly circumscribed mechanism, it cannot be left to the free discretion of the single judge. This can either be done by, for example, enumerating reserved topics in the law, or by allowing the parties to ask for a re-hearing *en banc*.

The extended use of written forms of evidence, including witness statements, and the concomitant concerns have already been addressed above. The qualifier of having the witness available for direct or cross-examination "as required" is very likely an expression of the unease that even the signatories of the PD had with the idea, and follows established international practice. So the question is: Why yet another exhortation to do the obvious?

The extended use of oral rulings, issued directly from the bench on the trial record, has often been advocated but rarely, if ever, been properly implemented. Apart from the fact that sometimes the issues are too complex to do this in a sufficient number of cases, my personal impression is that not few international judges are uncomfortable with making such *ex tempore* rulings on the record because many (still) do not have sufficient prior judicial

[96] Or possibly added by the PTC during the appellate stage.

[97] *See supra* note 12.

experience in (international) criminal procedure, in particular for dealing with, for example, evidentiary objections beyond the most basic categories. To make this recommendation work would require intensive pre-deployment training in the trial advocacy rules applicable before the court to which a judge is being sent, something which after over 25 years of the "new generation" of international tribunals is still not happening.

The comment on more streamlined and "customized" cross-examination procedure consistent with the rights of the parties is entirely unclear. What does "better suited to individual witnesses" mean? The court can already control and restrict excessive or abusive cross-examination practices. Protections for vulnerable witnesses exist. As mentioned at the beginning, this is another example why one would have wished for some greater detail or a kind of commentary/explanatory note on the meaning of particular recommendations.

In the same vein, the increased use—with the consent of the parties—of agreed facts or even points of law, as well as taking judicial notice seems *prima facie* sensible, but is not without concerns. The previous episode at the ICTY around agreed facts in *Brdjanin*[98] alone is testament to the potential for mischief and the defence in particular will often not be in any hurry to make the court's work any easier. To ask the parties to agree on the *law* is a dereliction of duty by the judges—*iura novit curia*. An agreement on the law can in any event never be binding on the court, even if the judges give it their seal of approval, when the judges' views change ex post facto; the experience of the uncertainties created by instruments such as preliminary motions and decisions on the applicable law as attempted at the STL[99] also militates against the extensive use of such procedural devices. Finally, judicial notice of facts of common knowledge is not the real problem—that category is mostly restricted to proven and generally accepted facts of science; it becomes already problematic when it is meant to stretch to historical facts, as exemplified by the sporadic recurrence of free speech litigation over the details or even the occurrence of the Holocaust under the Nazi regime. The real time-saver would be cross-case and possibly even cross-panel judicial notice of previously adjudicated facts; however, that category is highly controversial and the very fact that a judge has previously ruled on facts identical to a second case is often the basis of recusal motions (see above with regard to the *Antonetti/Meron* dispute); neither the PD nor the OR ask for its use—rightly so. In any event, in many cases the use of judicial notice could itself be subjected to (possibly interlocutory?) litigation, negating any time savings intended to be gained by the use of the procedure.

Lastly, the extended use of innovative measures for pre-trial evidence gathering under judicial supervision, especially the expanded use of the unique investigative opportunity regime, is also somewhat nebulous and could have done with some explanation. Having served as an investigating judge *à la française* in an internationalised court, I am unsure whether such a regime is what the PD had in mind: It is pre-trial evidence gathering under judicial supervision—but what would be innovative about it? The unique investigative opportunity regime mentioned here is probably the one already found in Art. 56 of the ICC Statute, i.e. "a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, *which may not be available subsequently for the purposes of a trial*" [Emphasis added]. Art. 56 also establishes certain safeguards for the defence. The application of this regime is conceptually driven by the qualifier of the risk that the evidence my not be available at trial. Those cases will not be legion—what would be the suggested grounds for the "innovative" expansion of its application, if the judicial supervision criterion

[98] *See supra* note 12.

[99] *Nullum crimen sine poena—Zur Unberechenbarkeit völkerstrafrechtlicher Lehrenbildung*. In Heiner Alwart et al. (eds), Freiheitsverluste in Recht, Rechtsregime und Gesellschaft (Mohr Siebeck), 2014, 45.

is still meant to apply to it generically? If the witness is after all and unexpectedly available at trial, it would be questionable not to call them or have them at least standing by for giving live evidence, unless the parties agree and the court is satisfied of the reliability of the previous record so taken.

4.1.4.3. JUDICIAL TRANSPARENCY ASPECTS

On this topic, the OR put a much greater emphasis. Clearly, the drafters see the need to provide as much easily accessible information as possible as crucial both for their legacy to the public and for the donor community.

PD	OR
Develop regularly updated databases of jurisprudence;	Hearings should, in principle, be open and accessible to the public and livestreamed for remote viewing. Subject to the specific character of the institution, there may be need for some part or all of proceedings to remain confidential. Judicial deliberations should remain confidential. Video footage should be archived and made available online to the extent possible. Judgments and other judicial decisions, normative institutional documents such as rules of procedure, submissions by parties, and evidentiary materials (depending on the specificity of the institution) should be easily accessible to the public via the court's website or archived elsewhere. Courts should create searchable databases of their jurisprudence for reference by other courts and the public.

Both the PD and OR emphasise the creation of regularly updated and searchable databases, with the OR stressing the public access aspect as well, which will be of particular use for academic and governmental research. Otherwise, this point has been addressed above.

The OR re-state the well-known open justice rule, augmented by a live-streaming option. Given that so-called "Courtroom TV" has been gaining ground domestically for some years, but especially so in international proceedings, this also merely re-states current practice. The same applies to the third OR point on archived video footage.

Since 25 April 2018, however, the additional question has arisen of whether international courts and tribunals operating in the territory of the EU or using data of EU nationals will be bound by the 2016 General Data Protection Regulation (GDPR),[100] because it also applies in principle to public authorities and international organisations (see Nos. 101 ff of the Preliminaries, Art. 4(7)–(10), (26) GDPR), with no express exception being made

[100] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

regarding internationally established courts etc., except for data processing etc. necessary when acting in a judicial task.[101] While the situation may be relatively straightforward with regard to the accused, it becomes less clear when witnesses or even the general public in the public gallery are concerned (compare Arts. 6(1)(e), 9(f), 23 GDPR): Is streaming or archiving their pictures necessary for the performance of the judicial task? Is the video-recording an act of a court acting in a judicial task? What about the defendant's right to rectification and erasure under Arts. 16 and 17 GDPR in case of an acquittal? ICC legal expert *Philipp Ambach* expressed the view that, for example, "for ICC cooperation requests to EU member states, as noted in art. 99(1) [of the Rome Statute], these states could be held to comply with the Regulation as 'relevant procedure under the law of the requested State' in their response to the ICC. This could create a conflict—one that could be encompassed by the consultation provision in art. 97 [of the Rome Statute] (the second sentence is non-exhaustive)."[102]

These concerns apply equally to the fourth recommendation regarding the archiving of evidence and submissions.

Full transparency will nonetheless still have to be subject to any protective measures or closed sessions, as is indicated by the OR in the second point. However, it is striking that the OR use the word "should" instead of "shall," when it comes to the secrecy of judicial deliberations. Except for the context of separate or dissenting opinions, the secrecy of deliberations is typically inviolable.

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[101] *See, e.g.*, Nos. 101 and 102 of the Preliminaries:

> (101) Flows of personal data to and from countries outside the Union *and international organisations* are necessary for the expansion of international trade and international cooperation. The increase in such flows has raised new challenges and concerns with regard to the protection of personal data. However, when personal data are transferred from the Union to controllers, processors or other recipients in third countries or *to international organisations,* the level of protection of natural persons ensured in the Union by this Regulation should not be undermined, including in cases of onward transfers of personal data from the third country *or international organisation to controllers, processors in the same or another* third country or *international organisation. In any event, transfers to* third countries and *international organisations may only be carried out in full compliance with this Regulation. A transfer could take place only if, subject to the other provisions of this Regulation, the conditions laid down in the provisions of this Regulation* relating to the transfer of personal data to third countries or *international organisations are complied with by the controller or processor*.
>
> (102) This Regulation is *without prejudice to international agreements concluded between the Union and third countries* regulating the transfer of personal data including appropriate safeguards for the data subjects. *Member States may conclude international agreements which involve the transfer of personal data to third countries or international organisations, as far as such agreements do not affect this Regulation or any other provisions of Union law and include an appropriate level of protection for the fundamental rights of the data subjects.* [Emphasis added.]

[102] Email from Dr Philipp Ambach of 24 January 2019—on file with the author.

4.1.4.4. JUDICIAL PUBLIC RELATIONS ASPECTS

PD	OR
Develop regularly updated databases of jurisprudence;	In view of the complex and shifting global context, courts must increasingly pay attention to communicating their decisions, tasks and responsibilities. Court Presidents should assume primary responsibility, their caseload and other duties permitting, for interacting with states parties and relevant organizations. Judges should endeavor to promote the tasks and functioning of their court by explaining its work to the public—including visitors, students, and practitioners—as appropriate. International courts, assisted by departments responsible for communication and outreach, should coordinate the outreach activities of their members and offices to ensure correct and consistent messaging to their various constituencies.

Again, the PD only engages with this topic by way of the database recommendation. The first OR recommendation is unobjectionable but also nothing novel, given that each international court has some form of public affairs and/or outreach section, also addressed in the fourth recommendation. In the age of the internet and ubiquitous smart phones and tablets, automated emailing lists or RSS notifications, this aspect seems to be well taken care of.

The second point regarding the primary responsibility of the Presidents is also taken and again, seems to be the current practice anyway, applying equally to the Chief Prosecutors for their area of responsibility but not mentioned by the OR.

As far as judges are meant to engage in promoting and explaining the work of their courts to the public, I have some reservations based on the impact on their position and work load: Firstly, such activities may require frequent and long-distance travel, media or speaking engagements, or conference attendance, taking time away from them that could be put to better use in advancing the actual proceedings. Secondly, and speaking from my own experience, engaging as a judge with the public—and in particular the media—will quickly and inevitably lead to questions about ongoing cases, something on which judges should, of course, never allow themselves to be drawn.[103] If judicial engagement is seen as necessary, one might consider appointing one judge[104] as the overall spokesperson for the court—something not uncommon in some domestic courts—and granting them an adequate

[103] The ECCC, for example, had its own examples in Case 002 of where judicial contacts outside the confines of the proceedings proper can lead. This concerned especially Judge Silvia Cartwright of the Trial Chamber—the several instances when she was recused can be found by typing "Cartwright disqualifications" into the "Search" field on the front page at https://www.eccc.gov.kh/en.

[104] The same applies for the prosecution, of course.

workload allocation[105] for this task, while making sure that run-of-the-mill announcements are handled by experienced public affairs staff.

4.1.4.5. JUDICIAL RECRUITMENT

Only the OR contain a section on judicial recruitment:

> The process of nomination and selection of judges for international courts should respect the relevant rules of the institution and be open and transparent.
>
> As a matter of principle, it is desirable that for every regular judicial vacancy there be a plurality of candidates.
>
> Nominators should bring forward candidates who demonstrate the necessary competence and expertise and are clearly fit to perform their judicial duties. Institutions may consider establishing a maximum age limit for candidates to ensure the fitness of selected judges into the future.
>
> Nominators and selectors should give consideration to the diverse composition of international benches, including diversity by gender.
>
> The nomination and selection authorities should ensure that judges may work independently and in security.

The first recommendation mostly re-states the obvious; it is unclear whether the last part of the sentence is intended to require a higher degree of transparency than currently practiced, possibly confirmation hearings like in the United States etc. The second recommendation would again seem to reproduce what should be seen as common sense, yet given the opaque initial stages of proposals for judicial candidates between nominators and the recipient of the proposals in the relevant organisation, it is currently difficult to see whether and when a pre-selection occurs, or whether more than one person even applied.

The third point about candidates having the necessary competence and fitness for duty, the latter especially with regard to their age, is something I have extensively written on elsewhere[106] and with which I wholeheartedly agree. Point four on diversity is equally taken, and especially as far as gender diversity is concerned, work clearly remains to be done. I commend, however, the approach taken by the ICC's Advisory Committee on Nominations (ACN) which considers the expertise of any candidate first, before proceeding to scrutinise those applicants who surpass that hurdle under the different diversity criteria.[107]

The meaning of the last comment is very unclear: How can the nomination and selection authorities, rather than the authorities in control at the judges' duty station, ensure that judges can work "independently and in security"—is that meant to refer to security of tenure, adequate remuneration and judicial independence, and maybe freedom from outside political interference etc.? If so, that would be nothing new, either. Again, one would have wished for even a few words of explanation and background.

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[105] While this can relatively easily be accommodated in larger domestic courts, the small number of judges at any of the international courts means a proportionately bigger impact on available court time.

[106] *See* the references at Bohlander, Art. 36 mn. 3–9, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT—A COMMENTARY, 3rd ed. (Triffterer & Ambos eds., CH Beck/Hart/NOMOS, 2016).

[107] *See* Bohlander, ibid., mn. 10.

5. CONCLUSION

> *Among the reasons for the perceived lack of independence of courts and judges, the* interference or pressure from government and politicians *was the most stated reason, followed by the pressure from economic or other specific interests.*
>
> The 2018 EU Justice Scoreboard[108]

If "justice delayed is justice denied," then equally, "justice rushed is justice crushed."[109]

Indeed, my first spontaneous working title for this article was "Act in Haste—Repent at Leisure." Both the PD and OR seem to proceed from a managerial point of departure, and their professed aim of appeasing the international donor community and countering pervasive donor fatigue leaves little room for any conclusion but the one that the main drive of both declarations is to create the impression that a "coalition of the willing" is prepared to exhort other judges to "get with the programme," as it were.

I have tried to explain in this article that both the PD and OR are questionable documents:

- They lack official or even peer legitimacy but have the potential for causing peer pressure among the judicial community,
- they—especially the PD—are in places adopting a somewhat condescending, not to say "preachy," tone about the lack of judicial qualities that other judges seem to have,
- they are in many instances vexingly vague without giving the reader any aid to their intended interpretation, or
- they are merely re-stating the obvious, giving rise to the question of what added value they represent;
- in a number of cases, they display clear potential for creating substantial problems in the context of fair trial and judicial independence.

This applies across all areas that have been interrogated. In my opinion, the PD and OR are ultimately and at best futile attempts at making the donors think that the international judiciary has reached the necessary degree of problem awareness and that the donors should now trust them to have their financial interests at heart and to speed up the process as much as they can. They are more likely to give the donors unintended but welcome ammunition for future budget negotiations, because now the donors can point to these examples of judicial self-criticism and hold the judges to their words. At worst, they are a real-life vindication of Foucauldian analysis in that the signatories of the PD and OR have intentionally, knowingly and fully subscribed to a managerial and neo-liberal judicial mindset, and hold the resource requirements on a par with fair trial guarantees and judicial independence.

The reason for this development can in many cases be traced back to a vicious circle and the absence of lessons learnt: The establishment of courts with jurisdiction over war crimes, crimes against humanity or genocide may often have proceeded on the basis of what Jeremy Rabkin has called a certain "giddy, frivolous atmosphere"[110] of the moment, driven

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[108] COM (2018) 364 final, 52—Emphasis in the original.

[109] The second phrase is not as common as the first, but has been used by others on previous occasions, *see, e.g.*, the media reports at https://tribune.com.pk/story/677852/future-of-law-justice-rushed-is-justice-crushed/; http://thebirminghampress.com/2013/11/justice-rushed-is-justice-crushed/.

[110] Jeremy Rabkin, *Global Criminal Justice: An Idea Whose Time Has Passed*, Cornell International Law Journal 753 at 777 (2005).

by the understandable impulse to ensure there is no longer any impunity for such atrocities. However, often the period of establishment was coupled with (unspoken) expectations or promises of quick solutions and Nuremberg-like time frames which were at best illusionary to begin with for anyone with some experience in preparing and running complex criminal investigations and trials. The enthusiasm of each beginning soon and invariably gives way to donor fatigue, leading to fewer funds and short-term contracts, which in turn lead to more delays through staff attrition and general logistical strictures. This is nothing new and the consequences had already been experienced drastically once the completion strategy of the ICTY and ICTR was implemented in earnest. The right lessons have, however, not been learnt, it would seem.

How, for example, were the co-investigating judges at the ECCC with their staff budget supposed to adequately investigate massive atrocities from almost 40 years ago, leading to millions of victims, with evidence and especially thousands of witnesses spread across the entire country and abroad, with varyingly difficult conditions of access throughout the year due to the rainy season and the rice harvest periods when many witnesses were unwilling to speak to investigators because they had to ensure their livelihood? They were difficult to track down to begin with in the absence of a proper residence register, with only a small contingent of experienced investigators, even bearing in mind the generous support from Canada which seconded a number of investigators to our office. The staff contingent of the ECCC's Office of the Co-Investigating Judges would have been dwarfed by any domestic police task force assigned to a high-profile single murder or terrorist attack. My direct predecessor had thus considered it necessary to initiate the practice of having appropriate legal officers and even legal consultants accredited and sworn in as (deputy) investigators, in order to increase the number of persons who could conduct interviews, but of course the time they prepared, conducted and processed witness interviews was lost for working on the legal aspects of each case, not to mention that not all of them had previously conducted interviews. Almost half the staff in my office at any given time soon after I took over consisted of interns, some of whom did not even have their law degrees yet.

International criminal proceedings are almost invariably situated in the category of complex litigation, which even in domestic settings can take years to complete.[111] They are additionally hamstrung by the fact that there are almost always problems of state co-operation and political tensions underlying the crimes investigated and/or prosecuted, coupled with the quandary of whether it is better to move on instead of raking over the horrors of the past—"no peace without justice" or "no justice without peace." They require resources for funding categories that are largely unknown in domestic jurisdictions even when dealing with complex cases. In a word, international criminal justice is expensive by design and nature. Unless the international community is willing to put the necessary funds forward, possibly by each country deciding to buy just one modern attack fighter plane,[112] helicopter[113] or even one battle tank[114] less in every alternate defence budget cycle, and

[111] See e.g. the recent so-called "NSU (*Nationalsozialisticher Untergrund*) trial" in Germany, at http://www.spiegel.de/international/germany/neo-nazi-terror-trial-fails-to-answer-all-questions-a-1218727.html; http://www.tellerreport.com/life/--judgment-in-the-nsu-trial--zsch%C3%A4pes-life-in-the-cell-.Hk1s8ZBXQ.html; and references to the related case law at https://dejure.org/2018,19114.

[112] *See* https://www.defensenews.com/air/2018/09/28/f-35-price-falls-before-90m-for-first-time-ever-in-new-deal/.

[113] *See* https://militarymachine.com/most-expensive-military-helicopters/.

[114] *See* https://www.quora.com/How-much-does-a-common-battle-tank-cost.

instead channelling that money to international courts, then international criminal justice is not worth having. The UN itself acknowledged the underlying problems in 2012 in the Secretary-General's report *Delivering justice: programme of action to strengthen the rule of law at the national and international levels*,[115] which states:

> International adjudicative bodies themselves are often underresourced [sic!] and do not have the necessary political support, especially in view of their lack of enforcement mechanisms. Accordingly, the non-implementation of decisions of such bodies is an enduring problem. In this connection:
>
> (a) Member States should resolve to provide international adjudicative bodies with sufficient resources for them to deal with their caseloads efficiently; [. . .].[116]

Indeed, based on the *status quo* of the international community's willingness to put its money where its mouth is, some might say that it would be better if international criminal justice died and the charade came to an end.

I for one would prefer for it to be given a second, and much stronger, lease on life. I would like to see every country of the world submit to the power of law, not the law of power. I would wish for the major global actors and others who have, for example, not found it necessary to accept the jurisdiction of the ICC for purely power-political reasons,

- to realise that selective justice leaves a sour taste in the mouths of those who have been selected to be judged—regardless of whether rightly or wrongly—by those who will never allow themselves to be judged; and
- to understand that the current complementarity regime of the ICC as the prime candidate and model for a real "world criminal court" is *de facto* rigged in favour of established states because their jurisdictions are under a lesser systemic risk of being considered unable or unwilling than those in post-conflict or less developed countries, and because a credible domestic investigation or prosecution is not required to end in a trial, let alone a conviction.

That seems a lot, maybe too much, to wish for in an age of resurgent nationalism, protectionism and populism, when executive power increasingly trumps legal process, when unmanned drone strikes have the appeal of swift and decisive action, something which Lady Justice cannot deliver equally fast or in real time. However, that is no reason to take away her scales and replace them with a balance sheet, leaving her only the sword.

A judicial colleague of mine wisely said a while ago that each court's procedural framework, its Statute and Rules of Procedure and Evidence and the case law emanating on that basis, determine its *modus operandi*, and that any generic declarations of intent or principle, regardless of who makes them, cannot override the considered and balanced opinion of the judges of each court. I will be the first to admit that there is always room for improvement in the manner of how the judicial task is fulfilled, bearing in mind the reality that the perfect is the enemy of the good, but judges should never allow themselves to be pressured into becoming nothing more than managers of the law vying to be the "employee of the month."

The international community, despite its manifold invocations of the Rule of Law and decades of establishing courts of all sorts, still seems to lack a real and deep understanding

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[115] UN Doc. A/66/749—online at http://undocs.org/A/66/749.

[116] Ibid., para. 17.

of the fact that a judicial institution can never be a subsidiary organ of another: As soon as it is clothed in the mantle of judicial independence, it becomes a primary organ in its own right and sphere of operation, subject only to other judicial bodies to the extent that these are given appellate or supervisory functions in relation to it. Every judge has the choice—and the duty—to be a free agent: No political party, no government, not even the UN Security Council have the right to interfere in their decision-making. Judges must not seek to curry favour with the external stakeholders by cutting corners for what are ultimately financial reasons. The only acceptable ethical choice which the creators of judicial entities are left with after they have given birth to them, is to nurture them to full growth until their mandate is completed. Neglect is not a moral option—it is death by a thousand cuts.