

**Of efficiency and fairness in the administration
of international justice: Can the Residual Mechanism
provide adequately reasoned judgments?**

*Andrea Carcano**

1. *The issue*

This paper discusses some of the structural and procedural innovations that the Security Council introduced in the Statute of the International Residual Mechanism for Criminal Tribunals (Mechanism)¹ and reflects on how some of these developments impact on the exercise of the Mechanism's judicial function. These innovations constitute a

* Adjunct Professor of International Humanitarian Law and Human Rights Law at the School of Law of the University of Milano-Bicocca.

¹ UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966, para 1. The text of the Statute of the Mechanism is contained in Annex 1 of Resolution 1966 (Statute). As indicated in the Preamble of Resolution 1966 (2010), the establishment of the Mechanism was necessary 'to combat impunity for those responsible for serious violations of international humanitarian law' and to ensure that 'all persons indicted by the ICTY and ICTR are brought to justice'. The Mechanism is tasked, *inter alia*, with completing the judicial work left over by the International Criminal Tribunal for the Former Yugoslavia (ICTY), which is set for closure by 31 December 2017, and the International Criminal Tribunal for Rwanda (ICTR), which was closed on 31 December 2015 (together the '*ad hoc* Tribunals'). Art 2 (para 1) of the Statute vests the Mechanism with the power to prosecute 'the persons indicated by the ICTY or the ICTR who are among the most senior leaders suspected of being most responsible for the crimes covered by paragraph 1 of this Article [crimes under the jurisdiction of the ICTY and the ICTR]'. The Mechanism also has the jurisdiction to try 'any person who knowingly or wilfully interferes or has interfered with the administration of justice by the Mechanism or the Tribunals and to hold such persons in contempt' and 'a witness who knowingly and wilfully gives or has given false testimony'. Other tasks of the Mechanism include: the referral of cases of less gravity to national jurisdictions (art 6); the review of indictments (art 17); the protection of victims and witnesses (art 20); the examination of requests for review of judgments (art 24); the pardon or commutation of sentences (art 26); and the management of archives, including preservation and access of the archives of the ICTY and the ICTR (art 27).



unicum in the field of international criminal justice. At a micro-level, they bring about a shift in the modalities through which the judges of the Mechanism shall exercise the judicial function in respect of their colleagues at the *ad hoc* Tribunals. At a macro-level, they provide an opportunity to reflect on the kind of judicial institutions that should be devised in future in order to combat impunity in a fair and efficient manner.²

Despite the name assigned to it, the Mechanism is – in essence and scope – a new international criminal tribunal.³ The judges and personnel of the Mechanism are internationally recruited and several important cases ‘inherited’ from the *ad hoc* Tribunals are currently on its docket.⁴ As with any judicial institution, the Mechanism is bound to respect the human rights of the accused.⁵ A key question that therefore arises is whether this new institution can exercise its judicial function whilst fully respecting the human rights of the accused, combining fairness with efficiency. A related question is whether the Mechanism shall be able to deliver a degree of justice in terms of procedural and substantive fairness that is comparable, or at least not inferior, to that the accused would have

² Unlike what happened at the *ad hoc* Tribunals, the accused before the Mechanism have not, as yet, directly challenged the jurisdiction of the Mechanism to try them. This may be taken as a validation of the innovations introduced by the Security Council, which could make the present inquiry somewhat less relevant. However, as the reasons for this absence of jurisdictional challenges are not known, it is better to be cautious and not to infer validation from silence, and still to examine the proposed topic in some detail.

³ On the nature of the Mechanism as an international tribunal, see the debate on the blog of the European Journal of International Law (EJIL: Talk!) with comments from Carsten Stahn, Dapo Akande and (in particular) Roger O’Keefe at <www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers-and-the-turn-to-new-hybridity/>.

⁴ Currently, there are three former ICTY cases pending before the Mechanism: the appeals of Radovan Karadžić and Vojislav Šešelj, and the trial of Jovica Stanišić and Franko Simatović. There is no ICTR case pending before the Mechanism. Three ICTR fugitives are expected to be tried by the Mechanism when apprehended. The ICTY is currently completing the trial of Ratko Mladić. This means that in 2018, the Mechanism shall have the cases of five ICTY accused on its docket: two at the trial level and three at the appeals level. See <www.unmict.org/en/cases#ongoing-cases>.

⁵ See in this regard F Pocar, ‘Reflections on International Criminal Justice Twenty Years Later’ in P Acconci, D Donat Cattin, A Marchesi, G Palmisano, V Santori (eds), *International Law and the Protection of Humanity Essays in Honor of Flavia Lattanzi* (Brill/Nijhoff 2016) 488, 492.



received if prosecuted before the *ad hoc* Tribunals. A disparity of treatment penalizing the accused before the Mechanism would be hard to justify from a legal and a moral perspective.

The President of the Mechanism, Theodor Meron, appears confident in the ability of the Mechanism to ensure both efficiency and fairness. In recent remarks, he stated that the structure of the Mechanism and the various measures decided by the Security Council will make possible ‘a significant reduction in judicial expenses as compared with the two Tribunals’ and, notably, that the Mechanism shall ‘stand as a new model of international court: one that is leaner and more efficient, while continuing to meet the highest international standards of due process’.⁶ In a scholarly article, Gabrielle McIntyre, *Chef de Cabinet* to the President of the Mechanism, suggests that the Security Council has provided the Mechanism with sufficient tools to ensure that its proceedings are conducted in accordance with those of the Tribunals, and that the responsibility of ensuring the highest standards of international due process and fairness shall ultimately fall on the judges of the Mechanism.⁷

Without disregarding the possibility that the Mechanism’s judges might in fact succeed in ensuring a full degree of fairness, this paper takes a more critical view. It recommends caution before heralding what is essentially a remedial measure as a model for international penal jurisdictions. It argues that, unless appropriate remedies are devised, the structural constraints on the Mechanism’s judges might curtail the ability of the judges—or at least the public perception of such an ability—to discharge the judicial function to the best of their ability and deliver adequately reasoned judgments.

⁶ President Press Release The Hague (20 September 2016) <www.unmict.org/en/news/president-meron-discusses-mict-new-model-international-justice>. See also ‘Third annual report of the International Residual Mechanism for Criminal Tribunals’ (31 July 2015) UN Doc S/2015/586, para 75, which provides: ‘The Mechanism’s progress in completing its judicial and other work swiftly while maintaining the highest of standards underscores its commitment to the mandate entrusted to it by the Security Council and to serving as a *model for international criminal justice institutions*. As the Mechanism increasingly assumes responsibility for all aspects of the two Tribunals’ work, it will continue to focus on completing its mandate in a lean and efficient manner’ (emphasis added).

⁷ G McIntyre, ‘The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda’ (2011) 3 *Goettingen J Intl L* 923, 983.

2. *From the Completion Strategy to the Mechanism*

Devised by the then President of the ICTY, Judge Claude Jorda, the so-called Completion Strategy rested on the correct perception that the ICTY could not (and should not) itself try all the cases resulting from events in the territory of the former Yugoslavia after 1991.⁸ It was therefore necessary to divide the work between international and national judicial systems.⁹ The Security Council officially embraced the Completion Strategy in Resolution 1503 (2003) and made it its own.¹⁰ Resolution 1503 (2003) required the ICTY to concentrate ‘on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction’ and transfer ‘cases involving those who may not bear this level of responsibility to competent national jurisdictions’.¹¹ In the same Resolution, the Security Council adhered to the ICTY’s proposed timeline, which envisaged the completion of ‘the investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010’.¹² The Security Council endorsed the establishment of a War Crimes Chamber within the State Court of Bosnia and Herzegovina to which ‘lower- or intermediate-rank accused’ should be referred.¹³ And urged the ICTR to devise its own ‘detailed strategy, modelled on the ICTY Completion Strategy’.¹⁴

A few months later, in Resolution 1534 (2004), the Security Council emphasized ‘the importance of fully implementing the Completion Strategies’¹⁵ and, to this end, called on the *ad hoc* Tribunals to take ‘all possible

⁸ See Judge Claude Jorda, ‘Address to the United Nations Security Council’ ICTY Press Release JDH/PIS/690-e (23 July 2002) 1. For commentary and criticism see, in particular, DA Mundis, ‘The Judicial Effects of the ‘the Completion Strategies’ on the *ad hoc* International Criminal Tribunals’ (2005) 99 *AJIL* 142, 143-9 and TW Pittman, ‘The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals’ (2011) 9 *J Intl Criminal Justice* 797, 799-804.

⁹ *ibid.*

¹⁰ UNSC Res 1503 (28 August 2003) UN Doc S/RES/1503, Preamble. See also UNSC Presidential Statement (23 July 2002) UN Doc S/PRST/2002/21, at 1, showing support early support for the Completion Strategy.

¹¹ UNSC Res 1503 (n 10) Preamble.

¹² *ibid.*

¹³ *ibid.*

¹⁴ *ibid.*, Preamble.

¹⁵ UNSC Res 1534 (26 March 2004) UN Doc S/RES/1534, para 3.



measures' and 'to plan and act accordingly'.¹⁶ However, despite plans for closure, the caseload of the ICTY and ICTR increased over the years, so the Completion Strategy could not be completed. The Security Council acknowledged as much in 2008 in a Presidential Statement voicing its 'concern' at the fact that 'the Tribunals have indicated that their work [was] not likely to end in 2010'.¹⁷ Stressing that 'all persons indicted by the ICTY and ICTR' should nonetheless be 'brought to justice',¹⁸ the Security Council accepted the recommendation of the Informal Working Group on International Tribunals to 'establish an *ad hoc* mechanism to carry out a number of essential functions of the Tribunals, including the trial of high-level fugitives, after the closure of the Tribunals'.¹⁹ In Resolution 1966, the Security Council indicated that because of 'the substantially reduced nature of these residual functions', the Mechanism 'was to be a small, temporary and efficient structure, whose functions and size will diminish over time'²⁰ with only 'a small number of staff commensurate with [its] reduced functions'.²¹ Unlike at the *ad hoc* Tribunals, Article 8(3) of the Statute of the Mechanism makes clear that, apart from the President, judges are to work remotely insofar as possible unless the President determines otherwise.²² This Article is worth being cited in full:

'The judges of the Mechanism *shall only be present* at the seats of the branches of the Mechanism as necessary at the request of the President to exercise the functions requiring their presence. *In so far as possible, and as decided by the President, the functions may be exercised remotely, away from the seats of the branches of the Mechanism.*'²³

¹⁶ *ibid.* In the Preamble, the Security Council noted with concern 'indications in the presentations made [before the Council by the ICTY and ICTR Presidents on 9 October 2003] that it might not be possible to implement the Completion Strategies set out in Resolution 1503 (2003)'.

¹⁷ UNSC Presidential Statement (19 December 2008) UN Doc S/PRST/2008/46, at 1.

¹⁸ *ibid.*

¹⁹ *ibid.*, at 2.

²⁰ *ibid.*

²¹ UNSC Res 1966 (n 1) Preamble.

²² UNSC Res 1966 (n 1) art 8(2). See also 'First Annual Report of the International Residual Mechanism for Criminal Tribunals' (2 August 2013) UN Doc S/2013/464, para 16.

²³ UNSC Res 1966 (n 1) art 8(3) (emphasis added).



This Article makes clear that, apart from the President, judges of the Mechanism do not work full time. Like the judges *ad hoc* of the International Court of Justice, they shall be paid only for ‘each day on which they exercise their functions for the Mechanism’²⁴ in accordance with the ‘President’s indication of time reasonably necessary for the assignment’.²⁵

What these developments suggest is that the Mechanism is a *sui generis* institution created to remedy the failed *grand design* that was the Completion Strategy. The Mechanism was the means of closing down both Tribunals before the conclusion of their mandates, while simultaneously ensuring the completion of their respective mandates and the trial of those at large. Because of the latter reason, the Mechanism was also conceived as an ‘institution in waiting’. The structure of the Mechanism had to be ‘light’ because it would have far fewer cases than the *ad hoc* Tribunals; because of the uncertainty as to whether and when high-level indictees might be captured; and the possibility that its work would gradually reduce over time. The denomination ‘Residual Mechanism for International Criminal Tribunals’ signalled the break from the two *ad hoc* Tribunals, thus marking the end of their tenure in no uncertain terms. It certainly did not end their mandate, however, which is now for the Mechanism to accomplish.

3. *The Security Council’s and Mechanism’s quest for efficiency and effectiveness*

More than seven years after the Mechanism’s conception and establishment, the climate is such that international justice is, to an extent, in retreat and under criticism for its considerable costs. Accordingly, the context in which the Mechanism is to carry out its mandate has been somewhat muted, as have the expectations towards it. The Mechanism is increasingly depicted as an innovative, cost-saving measure that could

²⁴ *ibid.*

²⁵ The judges of the Mechanism receive remuneration in accordance with the Statute and as set forth in the internal Guidelines on Remuneration and Entitlements for Judges of the Mechanism (revised, June 2015).



pave the way to more efficient international justice. Under the supervision of the Security Council and the leadership of President Meron, the Mechanism is unwaveringly committed to finding ways to minimize expenses, cut costs, and increase efficiency and effectiveness. This effort is palpable, *inter alia*, in Reports issued by the Mechanism and in the practice of the Security Council.

In the November 2015 Progress Report to the Security Council,²⁶ the Mechanism made projections for the completion of key ICTY cases²⁷ and confirmed them in subsequent reports.²⁸ The Progress Report calculated the length of the appeal process, assessing that: (i) the ‘*Karadžić* case will take approximately three years to complete from the issuance of the trial judgement to the issuance of the appeal judgement’;²⁹ (ii) the ‘*Šešelj* case is also estimated at three years, which takes into account a one-year period for the translation of the trial judgement into Bosnian/Croatian/Serbian’;³⁰ and (iii) that the *Mladić* case will take ‘two and a half to three years from the issuance of the trial judgement to the issuance of the appeal judgement.’³¹

According to the November 2015 Progress Report, ‘approximately two thirds of the projected time for completion will be required for briefing and preparation of the case for the appeals hearing’.³² The Report made clear that, in this pre-appeal phase, ‘only the presiding judge, who is normally the President and who also acts as the pre-appeal judge’ will

²⁶ ‘Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period’ (20 November 2015) UN Doc S/2015/896 (November 2015 Progress Report) para 15.

²⁷ *ibid.*

²⁸ See ‘Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunal, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016’ (17 May 2016) UN Doc S/2016/453, para 37; ‘Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunal, Judge Theodor Meron, for the period from 16 May to 15 November 2016’ (17 November 2016) UN Doc S/2016/975, para 42; ‘Assessment and Progress Report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2016 to 15 May 2017’ (17 May 2017) UN Doc S/2017/434, para 41.

²⁹ November 2015 Progress Report (n 26) para 15.

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid* para 16.

be required at one of the seats of the Mechanism's branch.³³ The 'other judges on the bench would be expected to work remotely' and shall be called to the seat of the Mechanism only when the case is ready for the judges to 'hear the parties and conduct deliberations.'³⁴ Judges, the Report stressed, would 'only be remunerated for each day on which they exercise their functions'³⁵ in accordance with 'the President's indication of time reasonably necessary for the assignment.'³⁶ While acknowledging that 'it is difficult to provide greater detail with regard to these estimates', the Report drew a comparison with the *ad hoc* Tribunals:

'Nevertheless, for comparison purposes, it is estimated that a month of pre-appeal activity and a month of appeal activity at the Mechanism would produce savings in judicial expenses of close to one half as compared to the expenses incurred for the same judicial activity at the two Tribunals.'³⁷

This comparison is illuminating. It reveals the concern of the Mechanism for reducing expenses and the pride of the Mechanism in being able to do just that. The Security Council responded to the Progress Report by expressing full support³⁸ and praising the 'light' structure of the Mechanism. It underlined, *inter alia*, the implementation by the Mechanism of the policies of: 'double-hatting of personnel [staff working for both the Mechanism and one of the *ad hoc* Tribunals]';³⁹ the 'use of rosters to ensure judges and staff are utilized only when required';⁴⁰ 'enabling judges and staff to work remotely to the maximum extent possible'; and 'minimizing the need for full bench participation in pre-trial and pre-appeal work'.⁴¹ In view of all this, the Security Council praised the Mech-

³³ *ibid.*

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.* The judges of the Mechanism receive remuneration in accordance with the Statute and as set forth in the internal Guidelines on Remuneration and Entitlements for Judges of the Mechanism (revised, June 2015), which is a non-public document.

³⁷ November 2015 Progress Report (n 26) para 16; November 2016 Progress Report UN Doc S/2016/975 (n 28) para 37.

³⁸ UNSC Res 2256 (22 December 2015) UN Doc S/RES/2256, Preamble.

³⁹ *ibid.* para. 18.

⁴⁰ *ibid.*

⁴¹ *ibid.*



anism for its efforts ‘to produce substantial reductions in the costs of judicial activities compared to those of the ICTY and ICTR’.⁴² The Council also called for a ‘further reduction of costs, including through, but not limited to, flexible staff engagement’⁴³ and for the Mechanism to continue to take steps ‘to further enhance efficiency and effective and transparent management’.⁴⁴ Moreover, the Security Council requested that the Mechanism ‘include in its six-monthly report to the Council information on progress achieved in implementing this resolution, as well as detailed information on the staffing of the Mechanism, respective workload and related costs’.⁴⁵ In the same ‘managerial’ spirit, the Security Council recommended that the Mechanism implement the recommendations made by the Council’s Informal Working Group on International Tribunals, and ‘continue to take steps ... to further enhance efficiency and effective and transparent management’.⁴⁶ It asked for more focused projections of completion timelines and the ‘implementation of a human resources policy consistent with its temporary mandate; and further reduction of costs, including through, but not limited to, flexible staff engagement’.⁴⁷

In August 2016, the Mechanism issued its fourth annual report in which it spoke of its ‘progress in completing its judicial and other work swiftly, while *maintaining the highest of standards*’ and underscored the commitment of the Mechanism to serve ‘*as an efficient and effective model for international criminal justice institutions*’ dedicated to carrying out ‘its mandate in a timely, lean and efficient manner’.⁴⁸ Subsequently, in the November 2016 Progress Report, the Mechanism reiterated its focus on ‘crafting innovative approaches across the institution to do so flexibly and effectively’ and in carrying out ‘its mandate in an efficient and cost effective manner’,⁴⁹ although in this Report it did not make reference to the ‘highest standards’ of fairness as it had previously done.⁵⁰

⁴² *ibid.*

⁴³ *ibid.* para.19.

⁴⁴ *ibid.*

⁴⁵ *ibid.* para. 20.

⁴⁶ *ibid.* para. 19.

⁴⁷ *ibid.*

⁴⁸ ‘Fourth Annual Report of the International Residual Mechanism for Criminal Tribunals’ (1 August 2016) UN Doc S/2016/669, para 86 (emphasis added).

⁴⁹ November 2016 Progress Report UN Doc S/2016/975 (n 28) para 105.

⁵⁰ *ibid.*

4. *The Mechanism's duty to provide adequately reasoned judgments*

What the joint and sustained effort of the Mechanism and the Security Council to maximise 'effectiveness and efficiency'⁵¹ seems to boil down to is a reduction in the costs of salaries and facilities assigned to the judges of the Mechanism, and in the number of personnel working on a case. Judges shall be paid only on the basis of the time effectively spent on working on a specific case. In working remotely, away from the seat of the Mechanism, judges will no longer benefit from an office space, library and easy access to the trial record of a case. Moreover, there is no indication that the judges of the Mechanism, unlike their colleagues at the *ad hoc* Tribunals, will have a legal assistant (normally an associate legal officer at the P-2 level or, in some cases, a legal officer at the P-3 level), or a secretary (normally a UN staff member at the G-5 level), nor one or more interns.⁵² As noted above, the question that arises is to what extent these innovations have an impact on the exercise of the judicial function at the Mechanism.

4.1. *Does the Mechanism's structure undermine collegiality?*

As imposing structural constraints on how the judicial function will be exercised and simultaneously limiting the resources available for the judges, this paper argues that the innovations described in the previous sections have the potential – unless appropriate measures are taken – to hamper collegiality in the making of judgments at the Mechanism. Reduced collegiality is likely to affect the quality and thoroughness of the reasoning of these judgments, which would have an impact on the authority of the Mechanism as a judicial institution. This claim needs step-by-step articulation, beginning with a clarification of the notion of collegiality.

As lucidly put by John Edwards, a judge who presided for several years over the D.C. Court of Appeals (Washington), collegiality is the

⁵¹ May 2016 Progress Report UN Doc S/2016/453 (n 28) para. 6.

⁵² At the time of writing, these reforms have not been fully implemented. Several judges of the Mechanism who are also ICTY judges are not yet working remotely from the seat of the Mechanism due to the continuation of their cases at the ICTY. Nonetheless, considering the imminent closure of the ICTY and that the ICTR has already been closed, it is not too early to reflect on the consequences of these changes from the practice of the *ad hoc* Tribunals.



realization that judges have a common interest in getting the facts and the law right and that, therefore, they are willing to engage in the process of listening to each other, persuading each other and being persuaded by each other.⁵³ Collegiality requires that all judges, regardless of their specific individual opinions, are expected to contribute to a judgment and be responsible for it.⁵⁴ Collegiality serves the purposes of ensuring that the outcome of a case is not preordained and that the submissions of the parties are taken seriously; in a collegial body, all points of view are, in fact, to be aired and considered.⁵⁵ In the case of international tribunals, collegiality is instrumental to ensure that judges leave their comfort zone. This is because it is plausibly difficult for a judge who has been working all his or her life in a given legal system to work in a different legal framework with colleagues from different backgrounds.⁵⁶ The importance of collegiality has also been stressed in the Code of Conduct for the judges of the Mechanism.⁵⁷ In the Preamble, the judges expressly recognize that they are ‘members of a collegial body, with each judge pursuing the same objective of ensuring the achievement of international criminal justice’.⁵⁸

Where the Mechanism’s set up lends itself to potential weakness vis-à-vis collegiality is the circumstance that judges might have too limited an opportunity to discuss the factual and legal issues of a case in person. This is a problem that concerns primarily the proceedings before the Appeals Chamber of the Mechanism. As for the judges of the Mechanism sitting on a trial, their presence is clearly required during the trial proceedings in order to hear the case.⁵⁹ However, it is not clear whether these judges will physically remain at the Mechanism to write the judgments after the trial is concluded. If they will not, the following considerations,

⁵³ HT Edwards, ‘The Effects of Collegiality on Judicial Decision Making’ (2003) 151 U Pennsylvania L Rev 1639, 1644-46.

⁵⁴ R Jennings ‘The Collegiate Responsibility and Authority of the International Court of Justice’ in R Jennings (ed), *Collected Writings of Sir Robert Jennings* vol 1 (Kluwer 1998) 343, 345.

⁵⁵ *ibid.*

⁵⁶ Y McDermott, ‘Strengthening the Evaluation of Evidence in International Criminal Trials’ (2017) 17 Intl Criminal L Rev 1, 16.

⁵⁷ Code of Professional Conduct for the Judges of the Mechanism (MICT/14) (11 May 2015) Preamble.

⁵⁸ *ibid.*

⁵⁹ The re-trial of *Jovica Stanišić* and *Franko Simatović* case opened before a Trial Chamber of the Mechanism on 13 June 2017. See the Case Information Sheet at <www.unmict.org/en/cases/mict-15-96>.

although written with the forthcoming appeal cases in mind, may also be relevant for cases at the trial stage when the issue will arise.

The preparation of a written judgment may well begin just after the appeal briefs have been filed. However, it is only after hearing the parties' arguments that the content of a judgment can take shape and become final. The practice of the *ad hoc* Tribunals indicates that the period from the hearing of a case to the delivery of the judgment may range, on average, between four and seven months.⁶⁰ Evidently, considering its length, it is in this broad period of time, that the reasoning supporting a judgment of the Appeals Chamber is clarified, shaped and fine-tuned. Inevitably, this process may involve not only a main meeting among the judges in which deliberations on the key issues of the case are decided, but also a continuous series of negotiations and sub-determinations until the judgment is rendered and agreement on its content is reached unanimously or by majority. The importance of what happens in the temporal framework that goes from the hearing of the case to the delivery of the judgment can therefore hardly be underestimated.

While it is clear that the judges of the Appeals Chamber of the Mechanism will be present at the seat of the Mechanism during the appeal hearing and the ensuing deliberations,⁶¹ it is not clear from public documentation whether they will remain at the seat of the Mechanism until the period of finalising the judgment. Looking at the wording of Article

⁶⁰ A few examples from the ICTY and ICTR Appeals Chamber judgments can be recalled here. The period from the hearing of the appeal to the delivery of the judgment took before the ICTY, for example: (i) more than six months (hearing on 16 December 2015) in *Prosecutor v Mićo Stanišić and Stojan Župljanin* IT-08-91-A (30 June 2016) para 16; (ii) almost six months (hearing on 12 November 2014) in *Prosecutor v Zdravko Tolimir* (Appeal Judgment) IT-05-88/2-A (8 April 2015) para 649; (iii) more than seven months (hearing on 13 May 2013) in *Prosecutor v Vladimir Đorđević* IT-05-87/1-A (29 January 2014) para 11; (iv) six months (hearing on 14 May 2012) in *Prosecutor v Anto Gotovina* IT-06-90-A (16 November 2012) para 8; and (v) four months (hearing on 29 August 2006) in *Prosecutor v. Stanislav Galić* IT-98-29-A (30 November 2006) para 24. As concerns the ICTR, the period from the hearing of the appeal to the delivery of the judgment took, for example: (i) more than a year (hearing from 7 to 10 May 2013) in *Augustin Bizimungu v The Prosecutor* ICTR-00-56B-A (30 June 2014) para 7; (ii) five months (hearing on 7 May 2012) *Jean-Baptiste Gatete v The Prosecutor* ICTR-00-61-A (9 October 2012) para 288; and (iii) six months (hearing on 28 March 2011) in *The Prosecutor v Yussuf Munyakazi* ICTR-97-36A-A (28 September 2011) para 4.

⁶¹ November 2015 Progress Report (n 26) para 16.



8 of the Statute of the Mechanism,⁶² it might be presumed that they will not, as the preference is for judges to work remotely. Perhaps it could be argued that there is no need for the presence of the judges in the mentioned period because they may submit written memoranda in response to draft judgments and communicate with their colleagues through a variety of electronic channels. This approach may indeed be fitting with the Statute of the Mechanism and bring about considerable economic savings even though it is not a given that it would be faster than the approach at the *ad hoc* Tribunals, whereby judges did not work remotely.

The overall problem with the approach that may be used at the Mechanism, however, is that it would discard a higher consideration of the judicial function that sees in protracted and genuine collegiality the (only) way in which high-level judgments can be construed over several months. Judges working collegially should also be able to form their views through oral communication in person. This should be to the extent perceived necessary to better understand each other's position and consider one another's ideas and convictions. It would take place over a protracted period of time in a dialectical framework that requires dialogue, and moments of aggregation to encourage and facilitate genuine and constructive dialogue. E-mailing or other forms of electronic communication may not be suited to discussing complicated factual and legal issues, such as those surrounding matters of evidence, which require looking at the relevant documents.

Presence at the seat of the Mechanism during the process of finalizing a judgment also presents the opportunity to have better informed judges. They could have access to facilities not available in their home country, and discuss issues with a legal assistant or members of the drafting team who may know the case in question well, having worked on it since its very beginning. Likewise, the circumstance that judges shall be paid only for the time worked on a case on the basis of the President's determinations of the 'the amount of time reasonably necessary for a given assignment' may undermine collegiality and the judges' preparation. It is very difficult to determine in a fair manner how much time is necessary for a given assignment and it could become a contentious issue. To ensure high-quality judgments, the remunerated time should factor in the time a judge may spend discussing the case with colleagues and legal officers,

⁶² See relevant text in Section 2 above.

familiarizing with the case law of the *ad hoc* Tribunals, reading lengthy trial judgments, studying the facts of the case, and keeping abreast with relevant developments in the doctrine. All of these efforts could require weeks, if not months, of work.

Collegiality could also be affected by the disparity in the quantity of input that the presiding judge, who sits at the Mechanism and presumably supervises the team of legal officers assigned to the preparation of the draft judgment, may give in respect of his colleagues. In practice, there is always a disparity of contributions in the working of a judicial institution between judges leading and judges following. Nonetheless, such a disparity would be difficult to justify from a fairness perspective if it were implicitly institutionalized as a cost-saving measure.

Certainly, it could be argued—and indeed hoped for—that committed judges are zealous enough to find ways to overcome the practical difficulties of being physically separated from each other. They could work together in a collegial way irrespective of their locations, and such isolation could be an incentive to make the best out of an unusual setting. It could also be said that collegiality is an idea more than a reality. It belongs to the categories of ideals that the international judicial function should be about, rather than what it actually is in its everyday practice. In some chambers or in the course of some judicial cases, there is no collegiality; judges may engage in battles of attrition. More worryingly, some judges might not wish to speak with colleagues and might contribute to a judgment less than the honour bestowed on them would require. Nevertheless, caution is necessary not to make a general rule out of optimistic expectations or bad habits. Neither the possible zeal of the judges nor the difficulties of realising the ideal of collegiality in practice are justifications for institutionalizing procedures that make the possibility of collegiality more difficult and could legitimise differences among judges in the exercise of the judicial function.

4.2. *Collegiality and the duty to provide reasons*

The duty to give reasons for judicial decisions is well entrenched in international (criminal) law.⁶³ Article 21(1) of the Statute of the Mechanism provides that ‘All judgements shall be delivered in public and shall

⁶³ See, among others, art 23(2) of the Statute and Rule 117(B) of the Rules of Procedure and Evidence of the ICTY, art 22(2) and Rule 117(B) of the Rules and Procedure of



be accompanied by a reasoned opinion in writing' and Rule 144(B) of the Rules of Procedure and Evidence of the Mechanism makes clear that this duty also applies to judgments rendered by the Appeals Chamber.⁶⁴

As Hersch Lauterpacht has explained, full judicial reasoning is essential as it 'renders it practicable for everyone to know and to assess the value of the grounds of the decisions given by an international tribunal.'⁶⁵ It is necessary to show that the parties' arguments have been heard and taken seriously, to avoid any impression of bias,⁶⁶ to apply and develop the law in an authoritative manner,⁶⁷ to legitimize the decision given, and, consequently, the institution rendering it.⁶⁸ Within the field of criminal law,⁶⁹ the duty to give reasons is considered an element of a fair trial.⁷⁰

The duty to give reasons is normally interpreted in a quantitative sense as an obligation to clarify the *ratio decidendi* of a case, that is, to explain the points of law and facts on which a decision is based⁷¹ and to do so in a clear and straightforward way.⁷² Even from a quantitative perspective, the duty to provide reasons is not interpreted as obliging

the ICTR, art 82(4) of the Statute of the International Criminal Court, and art 54 of the Statute of the International Court of Justice.

⁶⁴ See MICT, Rules of Procedure and Evidence of the Residual Mechanism for International Criminal Tribunals, MICT/1/REV.2 (26 September 2016) Rule 144 <www.unmict.org/sites/default/files/documents/160926-rules-rev2-en.pdf>.

⁶⁵ H Lauterpacht, *The Development of International Law by the International Court* (Praeger 1958) 40.

⁶⁶ *ibid.* See also GI Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014), at 100.

⁶⁷ M Kirby, 'On the Writing of Judgments' (1990) 64 Australian L J 689, 692.

⁶⁸ H Ascensio, 'La motivation des décisions des juridictions pénales internationales' in H Ruiz Fabri and JM Sorel (eds), *La motivation des décisions des juridictions internationales* (Editions Pedone 2008) 217, 214.

⁶⁹ The general duty to give reasons for decisions might be thought to apply with particular force to criminal trials. RA Duff 'Law, Language and Community: Some Preconditions of Criminal Liability' (1998) 18 Oxford J Legal Studies 189-206.

⁷⁰ W Schabas, *The European Convention on Human Rights* (OUP 2015) 297. See also generally P Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?' (2011) 11 Human Rights L Rev 213.

⁷¹ See G Cahin, 'La motivation des décisions de la Cour internationale de Justice' in H Ruiz Fabri and J-M Sorel (eds), *La motivation des décisions des juridictions internationales* (Editions Pedone 2008) 9.

⁷² See P Lalive, 'On the Reasoning of International Arbitral Awards' (2010) 1 J Intl Dispute Settlement 55, 64.

judges to give an answer to every single point made by the parties.⁷³ However, in the case of the Mechanism, because of its peculiarities, the problem with the reasoning proffered may not be one of quantity so much as one of quality.

It is not suggested that the judgments of the Mechanism risk being insufficiently reasoned from a quantitative perspective. Quite to the contrary, drafting teams of well-experienced legal officers assigned to a case at the seat of the Mechanism, under the leadership of the presiding judge and written inputs from the other judges, may well be capable of producing well-reasoned judgments with formally impeccable results. What this methodology cannot do, it is submitted, is to produce judgments of the highest quality that are worthy of the legacy that the Mechanism is meant to preserve. Judgments of the Mechanism risk being poorly reasoned because working remotely judges may contribute less than they could (and should) do to shaping the content of those judgments.

The duty to provide reasons is a collective duty of a judicial body as a whole. It means that each member of a judicial body is required to contribute to it to the best of his or her abilities. As one reflects on it, it appears superficial to construe such a duty in the field of criminal law as a mere procedural requirement of listing one reason after the other. It goes to the very fairness of a case in a substantive sense. The reasons are the data that the parties, and all those concerned look at to understand not only what a court thought, but whether it thought it correctly and fairly in light of the submissions proffered. It is from the quantity and quality of the reasons provided that the parties to a case can gauge the level of attention that a judge has paid to the case, and his or her commitment to responding adequately to the issues raised. Adequate, finely-tuned and well-articulated reasoning is a way to show that those who have been trusted with the task of deciding a case have made all the possible efforts to render judgments that, in their view, are just, balanced, and correct in both fact and law.

Last but not least, the unquestionable historical relevance and complexity of the cases the Mechanism will decide is to be underlined. Judicial institutions do not make history, but inevitably their factual and legal determinations do contribute to the determination of historical facts, and

⁷³ *Prosecutor v Dragoljub Kunarac and others* (Appeal Judgment) IT-96-23&IT-96-23/1-A (12 June 2002) para 41.



can be used by either side to justify its own claims about what that history should be. This is a consideration relevant to both ICTR and ICTY cases. Each case the Mechanism is going to adjudicate is part – small or big – of a history that has affected millions of people. For instance, the Mechanism will have the final word on the somewhat trite, yet fundamental question, which is still debated in the Balkans, of whether there was a genocide in Srebrenica in July 1995 and whether this was the only instance of genocide in the Balkans since 1991. This will surely be a central issue in the appeals of Ratko Mladić and Radovan Karadžić. Answering persuasively and comprehensively this question and others of historical significance that the Mechanism will face, requires robust engagement from all the judges of the Mechanism and the provision of all the necessary resources to make this engagement possible.

5. Conclusion

The purpose of the preceding observations has been to draw attention to the policy currently being pursued by the Security Council and the Mechanism. This policy shows a laudable effort to increase efficiency and reduce costs in the administration of international justice. Efficiency is an enabling device of international justice. The more efficient international justice is, the more it gains the resources and support to be effective, and to pursue its goals adequately and fairly. However, the risk that the structural constraints on the Mechanism's judges may hamper their ability to produce adequate work is real, as this paper has tried to show. Therefore, before exporting them to other contexts, it is necessary to test the innovations introduced by the Security Council against the requirements of a fair and just exercise of the judicial function.

As the Mechanism ends the tenure of the *ad hoc* Tribunals but not their mandate, the pursuit of this mandate remains paramount and is a daunting task. It is about the preservation of the legacy of the *ad hoc* Tribunals as independent, authoritative and fair international courts, and the ability of the Mechanism to be up to the task and gain credibility among those subject to its jurisdiction. It is submitted that the provision of high-quality and well-reasoned judgments as described in this

paper is the most efficient and effective way through which the Mechanism can preserve and foster that admirable legacy, and discharge authoritatively the ‘special’ responsibility it owes (as not being a domestic judge but one imposed by the Security Council via a Chapter VII Resolution) to all the peoples concerned.

