

# INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE

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## GLOBAL MEASURES OF COURT PERFORMANCE

Second Edition 2018



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## PREFACE

Court officials ask themselves the key question: *How are our courts or court systems performing?* Yet practical advice and specific guidance for how to undertake performance measurement and management (PMM) for courts and court systems is still very limited today, in contrast to the voluminous commentary on the myriad obstacles and challenges to its implementation.<sup>1</sup> The *Global Measures of Court Performance* (hereinafter *Global Measures*<sup>2</sup>) fills this gap, deconstructing the key question by answering four pragmatic questions:

- Why should we measure court performance?
- What should we measure?
- How should we measure it?
- How can we use the results to achieve court excellence?

This is the second edition of the *Global Measures*, the first edition of which appeared as a part of the *International Framework for Court Excellence* (IFCE)<sup>3</sup> in November 2012. The *Global Measures* is an integral part of the IFCE and greatly expands the first edition's coverage of the discipline of performance measurement and management (PMM), including its underlying values, principles and concepts, as well as its challenges, opportunities and risks. The same eleven core performance measures appear in this second edition but have been substantially updated and expanded.

The assumptions, general concepts, principles, and ideas of PMM covered in Part I – e.g., measurement drives behaviour; and effective performance measurement focuses on outcomes that matters to ordinary citizens served by courts – likely will remain largely unchanged in future editions of the *Global Measures*. However, the detailed prescriptions of the eleven core measures in Part 2 will require regular updating as courts gain experience in implementing the measures and as up-and-coming technologies and innovations, such as online dispute resolution (ODR) and artificial intelligence (AI), enter the mainstream of court administration. The *Economist* declared in a lead article in May 2017 that, in today's "data economy," data replaces oil as the most valuable resource. Undoubtedly, as the value of data increases exponentially, updates of the prescriptions of the core measures of the *Global Measures* will need to be more extensive and more frequent than every five to six years.

We encourage readers to share lessons learned and experiences with the *Global Measures* with us. Since the first edition of the *Global Measures* appeared as a part of the IFCE, the eleven core performance measures of the *Global Measures* have been adopted and adapted in

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<sup>1</sup> See, generally, Linn A. Hammergren (2014). *Justice Reform and Development: Rethinking Donor Assistance to Developing and Transition Countries* (New York: Routledge).

<sup>2</sup> As this guide is more than a collection of performance measures, the term "*Global Measures*" is used as a collective noun taking the singular as opposed the plural verb.

<sup>3</sup> International Consortium for Court Excellence. *International Framework for Court Excellence*: accessed 19 July 2018 from <http://www.courtexcellence.com/Resources/The-Framework.aspx> ("*International Framework*").

various ways by many courts and court systems, and with enthusiasm in some countries (e.g., Australia, Indonesia, Kenya, and Moldova).

Before adoption or adaptation of the *Global Measures*, court leaders and managers are likely to ask *Who is using the measures?* and *Which ones are they using?* They will want to know what countries or institutions are building their capacities for PMM and are using particular performance measures. Even though we highlight the experiences of some countries under the headings “Notes on Effective Use” in the descriptions of each of the eleven core measures of the *Global Measures*<sup>4</sup> in Part I, the information remains limited. This is an area that we will seek to expand in subsequent editions of the *Global Measures* as more courts share their experiences with us.

In the past courts and court systems have been reluctant to share such information as they are focused on their internal reporting requirements and have not seen the benefit of documenting their work for the international justice community on a regular basis. Naturally, the use of *Global Measures* by means of local PMM (i.e., locally operated and “owned”) is bound to be directed inward to court operations, not outward to the international justice community; dissemination of the PMM results are first and foremost to their local stakeholders.

The International Consortium for Court Excellence has begun to remedy this by inviting countries and courts to post relevant information in the “Resources” section of its website.<sup>5</sup> Similarly, in a section of the *CourTools* website, the National Center for State Courts gathers links to reports from states and individual courts in the United States on implementation of the trial court performance measures and appellate court performance measures.<sup>6</sup> It identifies twelve states that have implemented the *CourTools* trial measures on a state-wide basis and 14 individual general and limited jurisdiction courts that have used the *CourTools*, and eight states that have implemented the *CourTools* at the appellate court level.

More needs to be done to gather the experiences and the extent of use of PMM, and the results of the *Global Measures*: In what countries have justice systems or individual institutions adopted or adapted core measures of the *Global Measures*? What measures are being used and what combination of measures is most widespread? What prompted the adoption of some measures over others? How far have adaptations of the measures deviated from the prescriptions of the measures in the *Global Measures*?

While we have expressed our guesses and estimates, we cannot yet provide definitive responses to such questions. An exhaustive catalogue and description of the uses of the *Global Measures* are beyond the scope of this second edition. Fortunately, some members of

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<sup>4</sup> For example, we describe the experience of Australia with the *Global Measures*. In 2015-2016 three measures of the *Global Measures* were integrated by the Victoria Courts into the Victorian Budget Papers: Court Services Victoria (2016). Annual Report 2015 – 2016: accessed 19 July 2018 from [https://www.courts.vic.gov.au/sites/default/files/publications/csv\\_annual\\_report\\_2015-16.pdf](https://www.courts.vic.gov.au/sites/default/files/publications/csv_annual_report_2015-16.pdf).

<sup>5</sup> International Consortium for Court Excellence. *Resources from the Courts*: accessed 19 July 2018 from <http://www.courtexcellence.com/Resources/Other-Resources.aspx> (“IFCE Resources”).

<sup>6</sup> National Center for State Courts. *CourTools*: accessed 19 July 2018 from [www.courttools.org](http://www.courttools.org) (“*CourTools*”).

the International Consortium for Court Excellence are considering such an effort, perhaps beginning with a matrix of core measures and countries and court systems in which they have been adopted, annotated with the results of an analysis of each of the adoptions. In the meantime, we ask readers to share their experiences with the *Global Measures* directly with us.

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## INTRODUCTION TO THE GLOBAL MEASURES

The goal of the International Consortium for Court Excellence ('Consortium') in developing the *International Framework for Court Excellence* ('IFCE') was to create a practical guide that includes values, performance areas for court excellence, concepts, and tools that courts, tribunals and their stakeholders worldwide can use to assess and improve the administration of justice. As expressed by the Consortium, performance measurement and management (PMM) is an integral component of the IFCE:

A foundation stone of excellent court planning and performance is the maintenance of accurate, comprehensive and reliable information and databases. It is essential not only to assessing the performance of a court but also assessing whether its strategies or activities for improvement are having a positive effect. In many cases courts may find their existing information systems and databases are not capturing what is truly needed to assess performance and progress.<sup>7</sup>

The *Global Measures* describes eleven focused, clear, and actionable performance measures that are aligned with the values and performance areas of court excellence of the IFCE (see accompanying Box 1). It is a guide for policy makers and practitioners — including judges, justice ministers, court administrators, academicians, analysts, and researchers — who are committed to improving the performance of courts, tribunals, and justice systems as a whole.<sup>8</sup>

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<sup>7</sup> *International Framework* at 28 (cited in note 3).

<sup>8</sup> In broad organizational terms, a justice system can include not only courts and tribunals but all “formal and informal institutions that address breaches of law and facilitate peaceful contests over rights and obligations spanning all three branches of government and multiple non-state actors – police, prosecutors, public defenders, state and civil society legal aid providers, alternative dispute resolution providers, administrative adjudication and enforcement mechanisms, customary and community-based institutions, anticorruption and human rights commissions, ombuds offices, and property and commercial registries.” See The World Bank (2012). *New Directions in Justice Reform*. Paper No. 70640 (Washington, DC: Legal Vice Presidency, The World Bank): accessed 19 July 2018 from [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/06/000386194\\_20120906024506/Rendered/PDF/706400REPLACEM0Justice0Reform0Final.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/06/000386194_20120906024506/Rendered/PDF/706400REPLACEM0Justice0Reform0Final.pdf). “Justice sector services” in Australia, comprise civil and criminal courts administration, police services, and adult corrective services. Other agencies also deliver some of these functions (e.g., government departments may investigate and prosecute social security fraud or tax evasion). Other government services that contribute to criminal and justice outcomes in Australia also include” legal aid services; public prosecutions; alternative dispute resolution services; offices of fair trading or consumer affairs; victim support services; and prisoner reintegration services. Australian Government Productivity Commission, Report on Government Services, Section C, Justice Sector Summary, at c.2: accessed 19 July 2018 from <https://www.pc.gov.au/research/ongoing/report-on-government-services/2018/justice> (“Productivity Commission”).



### Box 1. The Eleven Core Measures of the *Global Measures*

1. **Court User Satisfaction.** The percent of court users who believe that the court provides procedural justice, i.e., accessible, fair, accurate, timely, knowledgeable, and courteous judicial services.
2. **Access Fees.** The average court fees paid in civil cases.
3. **Case Clearance Rate.** The number of outgoing cases as a proportion of the number incoming cases.
4. **On-Time Case Processing.** The percentage of cases disposed or otherwise resolved within established timeframes.
5. **Duration of Pre-Trial Custody.** The average elapsed time criminal defendants who have not been convicted of crime are detained awaiting trial.
6. **Court File Integrity.** The percentage of case files that can be located and retrieved in a timely manner and meet established standards of accuracy, organization and completeness.
7. **Case Backlog.** The proportion of cases in a court's inventory of pending cases that have exceeded established timeframes or time standards.
8. **Trial Date Certainty.** The certainty with which important case processing events occur when scheduled expressed as a proportion of trials that are held when first scheduled.
9. **Employee Engagement.** The percent of employee of a court who, as measured by a court-wide survey, are passionate about their job, committed to the mission of the court and, as a result, put discretionary effort into their work.
10. **Compliance with Court Orders.** The total amount of payments of monetary penalties (fines and fees) collected by a court or court system, expressed as a proportion of the total amount of monetary penalties ordered by a court in a given period of time.
11. **Cost Per Case.** The average cost of resolving a single court case, disaggregated by level and location of court, and by case type.

The eleven core measures of the *Global Measures* are aligned with ten judicial values (e.g., equality under law, transparency, and certainty) and seven areas of court excellence (e.g., user satisfaction and affordable and accessible court service) identified as the keys to successful functioning of courts by the IFCE. The *Global Measures* operationalizes these values and areas of court excellence into actionable measures, helping to ensure that they become the foundation of all court operations.

In addition, the *Global Measures* constitute a limited and manageable set of core performance measures — a "vital few instead of a trivial many" metrics<sup>9</sup> — that form a "balanced scorecard" of a court's or court systems performance. They reflect a strong preference for *outcome* measurement that gauges the impact of services on the status or condition of those served

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<sup>9</sup> The phrase "vital few versus trivial many" used in relation to the number of desirable performance measures is attributable to Mark Graham Brown (1996). *Keeping Score: Using the Right Metrics to Drive World-Class Performance*. (New York: Quality Resources).

by courts and tribunals, instead of measurement of *outputs* (degree of effort and number of service units delivered), and *inputs* (resources such as the number of staff, costs, or hours worked by judges and staff).

## Purpose of the *Global Measures*

The purpose of the *Global Measures* is to provide individual courts, justice systems, and countries with a guide for good practices for successful performance measurement and management, including comparative analysis and benchmarking within (e.g., different times and locations of courts) and across different jurisdictions.<sup>10</sup> The way we measure success drives the very success we achieve. The *Global Measures* help guide policymakers and practitioners in the selection, development, and use of the “right” court performance measures that are aligned with their values, missions, and strategic goals.

The eleven core measures of the *Global Measures* are not compulsory rules or regulations that stifle innovation and creativity. Instead, they are a guide that can be followed to the degree that policy makers and practitioners, upon careful consideration, find them constructive and appropriate to their local contexts and working environments. Ultimately, as explored further below, the right measures, the right delivery of the results, and the right use of those results, are what is right for them.

## Organization of the *Global Measures*

Part I of the *Global Measures* is a primer of the discipline of court PMM. It describes underlying values, principles, and concepts, as well as challenges and risks of PMM. One challenge, for example, is overcoming the resistance to PMM that may be inherent in our nature. Nobody likes to be judged; especially when we fear that the judgement is negative. The American minister and author, Norman Vincent Peal, may have been right when he wrote, “The trouble with most of us that we would rather be ruined by praise than saved by criticism.”<sup>11</sup>

Part 2 is prescriptive, describing eleven specific core measures in terms of precise operational definitions and instructions that render the measures actionable and SMART — specific, measurable, attainable, relevant, and time-bound.<sup>12</sup> Readers interested in specific measures,

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<sup>10</sup> In this context, comparative analysis and benchmarking across countries refers to the process of comparing the performance – particularly in terms of outcomes and outputs — of one judicial system against those of other countries that are considered models on various dimensions of efficiency, effectiveness, and quality. The work of Maria Dakolias and colleagues at the World Bank is an example. See Maria Dakolias (1999). *Court performance around the World. World Bank Technical Paper No. 430*. Washington, DC: World Bank accessed 19 July 2018 from <http://documents.worldbank.org/curated/en/1999/07/440392/court-performance-around-world-comparative-perspective> (“Dakolias”); and Edgardo Buscaglia and Maria Dakolias (1999). *Comparative International Study of Court Performance Indicators: A Descriptive and Analytical Account*. Legal and Judicial Reform Series. Washington, DC: World Bank: accessed 19 July 2018 from <http://documents.worldbank.org/curated/en/1999/08/728946/comparative-international-study-court-performance-indicators-descriptive-analytical-account>.

<sup>11</sup> Norman Vincent Peale (2003). *The Power of Positive Thinking. Fireside Edition*. (New York: Simon & Schuster).

<sup>12</sup> The mnemonic acronym “SMART” has been used to guide the setting of goals and objectives, and the formulation of performance targets in the fields of management for more than 50 years. SMART criteria are often attributed to management guru Peter Drucker’s “management by objectives” concept popularized in his 1954 book *The Practice of Management* (New York: Harper & Row), 121-136. In a 2016 paper, Ingo Keilitz argued

who already are familiar with the concepts and the political and organizational context of PMM, including such issues as the use of performance measurement as instruments of power and control, and the importance of local ownership of PMM, may wish to skip ahead to the performance measures in Part 2.

Part I acknowledges that performance measures are instruments of power and control and encourages judiciaries and courts, as the legitimate authorities for assessing their performance, to take ownership of PMM. Good governance, including effective PMM, is seldom imposed from the outside. As Rachel Kleinfeld has pointed out, “outsiders” parachute into a weak country, lure local staff with higher wages than they would earn in the local economy, set up a parallel economy, and soon pack up and go, often leaving things worse off than they were.<sup>13</sup> There is today no longer much doubt whether good measures and indicators of performance can help achieve worthy ends. The question is whose values and vision of justice and court excellence they advance.<sup>14</sup>

PMM is defined as both discipline and a process of monitoring, analysing, and using organizational performance data on a regular (ideally in real or near-real time) and continuous basis for improvements in organizational efficiency and effectiveness, in transparency and accountability, and in increasing public trust and confidence in the courts. It distinguishes *core* performance measures that have an outcome orientation from operational *input* measures such as the number of staff and *output* measures as the amount of time of court invests in certain tasks. It emphasizes the critical importance of an alignment of the “right” performance measures with a court system’s values, mission, strategic goals, and distinctive role in society is vital.

The last section of Part I describes how PMM fits into the *International Framework for Court Excellence* (IFCE) by mapping the eleven core performance measures of the *Global Measures* against the IFCE’s values and areas of court excellence. It concludes with a summary of three overlapping and interdependent requirements of, and corresponding phases of development of, PMM: (1) identifying and developing the right performance measures; (2) ensuring that the right measures are delivered to the right people, at the right time, and in the right way, i.e., in an easy to understand way; and (3) adopting, implementing, and integrating the measures of performance, as well as the delivery system and distribution system, with key management processes and operations, including budgeting and finance, resource and workload allocation, strategic planning, organizational management, and staff development.

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that the United Nation’s Sustainable Development Goals (SDGs) are unlikely to have an impact approaching their ambitious goals because in their current formulation the 17 goals, 169 targets (sub-goals), and 200+ are not sufficiently SMART. Ingo Keilitz (2016). “The Trouble with Justice in the United Nations Sustainable Development Goals 2016-2030.” *William & Mary Policy Review*, Volume 7, Issue 1, 74-103.

<sup>13</sup> Rachel Kleinfeld (2012). *Advancing the Rule of Law Abroad: Next Generation Reform* (Washington, DC: Carnegie Endowment for International Peace), 33, noting that because outside reformers are not there for the long haul, while locals stay, reformers must work through local actors to achieve sustainable societal change.

<sup>14</sup> Christopher Stone (2012). “Problems of Power in the Design of Indicators of Safety and Justice in the Global South.” In Kevin E. Davis, Angelina fisher, Benedict Kingsbury, and Sally Engle Merry (eds.), *Governance by Indicators: Global Power Through Quantification and Rankings*. (Oxford: Oxford University Press).

Part 2 of this guide is the most extensive. Following a brief introduction, it includes detailed and generally uniform descriptions of all eleven of the core performance measures of the *Global Measures* including their operational definitions, purposes, and methodologies (including how the measures are calculated and reported) and, for several of the measures, alternative approaches and options.

## PART I: THE DISCIPLINE OF PERFORMANCE MEASUREMENT AND MANAGEMENT

### What is Performance Measurement?

There is no precise agreed upon meaning of “performance measurement.” For the purposes of the presentation of the *Global Measures*, it is defined as both a management discipline and a process:

*Court performance measurement and management (PMM)* is the discipline and the process of monitoring, analyzing, and using organizational performance data on a regular (ideally in real or near-real time) and continuous basis for the purposes of improvements in organizational efficiency and effectiveness, in transparency and accountability, and in public trust and confidence in the courts and the justice system.

Several parts of this definition merit highlighting. First, performance measurement is defined as a management *discipline* encompassing a system of concepts, methods, and techniques, as well as a *process*. By embracing this broad definition, the *Global Measures* are made wholly compatible with the *International Framework for Court Excellence*. The definition of PMM as a discipline addressing the key question “How is the court performing?” emphasizes that PMM is a rigorous way of thinking about solving problems and discovering opportunities and possible solutions (whatever moves the measurement dial), rather than a predetermined set of strategies toward pre-set goals and anticipated outcomes.

Second, recognizing that performance measurement data are of no value if not used, *measurement* is explicitly paired with performance *management* to emphasize that to be used effectively PMM should be infused into the very DNA of a court’s governance and management of business processes and operations such as budgeting, resource management, and strategic planning. This joining, which firmly anchors the discipline of PMM in the tradition of management and business, is a relatively new development widely seen as a major step in transforming measurement into management for real organizational change.<sup>15</sup>

A third part of the definition of PMM worth highlighting is that the discipline of PMM should be practiced on a *regular and continuing* basis, ideally in real time or near real time, as performance occurs and as the needs of users of specific measures dictate. Actionable performance measures are sensitive to interventions and, therefore, must be taken and used in tight timeframes, not months or even years after the performance that is measured occurred. PMM is analogous to the “measurements” we take as we monitor the performance of our car using the car’s dashboard of indicators. It would be nonsensical and unsafe if our car’s speedometer only registered speeds a few seconds every hour.

Finally, the definition aims PMM toward specific purposes including efficiency and effectiveness, transparency and accountability, and in public trust and confidence in the courts. Measurement of performance is an effective, practical tool that helps organizations get results

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<sup>15</sup> Harry P. Hatry (2010). “Looking into the Crystal Ball: Performance Management Over the Next Decade.” *Public Administration Review*, 70: s208–s211.

that focus on mission and goals. It is seen as the best way both to improve the quality of programs and services and to achieve major policy and organizational goals.

## An Essential Tool

It is important to stress that PMM is an essential tool, i.e., a means to an end, not an end in and of itself, though it can enable worthy ends. It is necessary but not sufficient, analogous to the set of instruments on the dashboard of a car. A speedometer, odometer, tachometer, and other gauges for temperature, gas, and oil pressure on the dashboard do not guarantee a safe, efficient and timely journey to a desired destination, but it is unlikely to occur without them.

PMM enables court leaders and managers to:

- Translate vision, mission and broad goals into clear performance targets
- Communicate progress and success succinctly in the language of performance metrics
- Respond to legislative and executive branch representatives' and the public's demand for transparency and accountability
- Respond quickly to performance downturns and upturns in performance
- Spot and promptly address problems
- Formulate and justify budget requests
- Provide incentives and motivate court staff to make improvements in programs and services
- Make resource allocation decisions
- Comply with government regulations and international norms
- Set future performance expectations based on past and current performance levels
- Insulate the court from inappropriate performance audits and appraisals imposed by executive and legislative agencies

## Box 2. Performance Measurement is Good Management

Does performance measurement work? Does it really make a difference? Yes, is the answer, based both on our common understanding and on compelling empirical evidence. The maxims “you can’t manage what you can’t measure” and “what gets measured gets done” have acquired the status of received wisdom. The way we measure our success drives the very success we have.

Our common understanding that performance measurement is simply good management has considerable empirical support. An economist-led, international group of researchers studied the performance of more than 10,000 private and public-sector organizations in 20 countries using rigorous econometric methods. They found that good management works and that, in particular, performance measurement is the critical ingredient of good management practice. Specifically, they concluded that three essential management practices — measuring results, setting targets, and establishing incentives - are strongly correlated with improved organizational performance measured in terms of productivity, return on capital assets, growth, and organizational survival, and that these essential practices make a difference in a country’s performance and can address even the most complex global problems.

Bringing these essential management practices to justice institutions and justice systems that need them, promises to improve delivery of justice services measurably and dramatically. As noted by three of the researchers, Nicholas Bloom of Stanford University, Raffaella Sadun of the Harvard Business School, and John Van Reenen of the London Schools of Economics and Political Science, a “call for ‘better management’ may not seem like a cutting-edge idea, but given the potential large effects on incomes, productivity, and delivery of critically needed services worldwide, it may actually be a radical one.” \*

\* Bloom, Nicholas, Raffaella Sadun, and John Van Reenen (2012). “Does Management Really Work?” *Harvard Business Review*, November 2012: accessed 19 July 2018 at <https://hbr.org/2012/11/does-management-really-work>; see also The World Management Survey: accessed 19 July 2018 from [www.worldmanagementsurvey.com](http://www.worldmanagementsurvey.com).

PMM fits well into a broad vision of judicial leadership of self-governed, well managed, effective, and operationally efficient courts. It rests on five basic assumptions that speak to the relationship between judicial leadership and PMM.

**First, performance matters.** Successful leaders show a strong preference for measurement of *outcomes* that gauges the desired results of program of services instead of measures of *inputs* (such as the number of staff, costs, or hours worked by judges and staff) or *outputs* — what is put in, taken in, or operated on by any process or system. Nothing else really matters as much as results defined in terms of quality, i.e., the achievement of good results as efficiently as possible. The quality of courts’ success should not be measured by how many hearings are held or even by the number of cases that are resolved, or by the number of programs and processes they call for. What is important are outcomes that matter to the condition or status of the people served by courts.<sup>16</sup>

Effective performance measures focus on ends, not the means to achieve them. They emphasize the condition or status of the recipients of services or the participants in court programs (outcomes) rather than the internal aspects of processes, programs and activities (inputs and outputs). Effective performance measures focus on results rather than quantification of resources, activity, or level of effort.

For example, many courts measure *inputs* or resources, such as the amount of training and education provided to judicial officers and court staff to “sharpen” their skills, and stop there,

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<sup>16</sup> The Australian Government has taken a clear position on this issue with a restrictive definition of “outputs” and “outcomes” noting that “[t]o date, no specific outcome indicators have been identified for court administration. Productivity Commission at 7.52 (cited in note 8).

simply assuming that those inputs are somehow related to or directly produce (cause) *outcomes* such as improved on-time case processing or court user satisfaction. This is a questionable assumption analogous to thinking that sharpening of a saw, an *input* and tool for building a house, necessarily guarantees that a good house will be built.

Traditionally, court managers have relied on measures of volume or frequency in three categories: (a) amount of work demand (such as the number of cases finalised); (b) number of activities or degree of effort expended (such as the number of hearings held); and (c) the number of people served. Increasingly, there is recognition that while such measures show demand and how much effort has been expended to meet that demand, they reveal little about whether the effort has made any difference – i.e., whether anyone is better off as a result.

**Second, performance is not about the numbers themselves.** Yes, performance measurement uses numbers, but it is not about the numbers. It is about the perception, the understanding and the insight required of effective leadership and management. Ultimately, it is not the specific measure itself that is important, but rather the questions that it compels judicial leaders and court managers to confront.

*How are we doing?* This is the fundamental question that leads to subsequent follow-up questions and answers that provide understanding, insight, and practical guidance:

- *Baseline Performance.* Where is the court or court system today? Where is the court system or individual court starting from? What is the current performance level compared to established upper and lower “controls” or boundaries (e.g., performance targets, objectives, benchmarks and tolerance levels)?
- *Trends.* How well is the court performing – trending — over time? Is performance better, worse, or flat?
- *Variability.* How much variance in performance is there over time and across various dimensions? Does performance depend on the location or division of the court, case type, or some other variable? Are there any positive deviants or “bright spots” that might serve as examples or models? Where are the “trouble spots” that demand immediate attention?
- *Performance Patterns.* Are there any apparent predictable regularities?
- *Analysis and Problem Diagnoses.* Why are changes or variations in performance occurring? What may have happened that coincides with performance decline or improvement? Where is the problem area? What are some credible explanations?
- *Planning.* Given past performance, what can one predict and plan for the future? What is the organization doing to improve or maintain performance levels (planning and strategy)? What actions, strategies, or initiatives should be started, continued, or stopped altogether as a result of what the measure reveals? What should be done to improve poor performance, reverse a declining trend, or recognize good performance?
- *Goals and Targets.* What broad and specific performance goals, objectives, and specific performance targets should be set or reset?



**Third, courts must count what counts and measure what matters.** Figuratively and literally, performance does not count unless it is related to the things that really matter, that are critical to the success of a court. Such key success factors as access to justice and timeliness have been referred to in the literature of organizational performance measurement as major performance areas, high level goals and objectives, standards of success, perspectives, domains, performance criteria, key results factors, and key outcomes. Whatever they are called, they form the framework of a court's accountability and transparency to the public and other stakeholders.

Alignment of performance measurement with purpose and fundamental responsibilities is critical. Identifying the right performance measures begins with setting strategic objectives and defining key success factors. Well-conceived performance measures, linked to key success factors, serve to align an organization's efforts with the achievement of its mission. The requirement of linkage of performance measures to a court system's mission and strategic goals is vital to a successful performance measurement system.

**Fourth, performance measurement is a powerful antidote for too much information.** Information overload is one of the biggest irritations of modern life. And it seems to be getting worse. Justice policymakers are awash with reports, white papers, and studies. This profusion of too much information can make judges, justice system executives, and court managers feel anxious and powerless, reduce their creativity, and render them less productive. Colorful phrases describe the anxiety caused by too much information: data asphyxiation, data smog, information fatigue syndrome, and cognitive overload. Surveys have found that most managers believe that the data deluge and the resulting data fog have made their jobs less satisfying or hurt their relationships. Many managers think most of the information they receive is useless.

In a recent interview in *Science*, Paul Cairney, a political scientist at the University of Stirling in the United Kingdom and author of the book *The Politics of Evidence-Based Policy Making*, said that scientists and others who produce policy-relevant data play an important role as "sifters, synthesizers, and analyzers." They need to make the data speak to policymakers and cut through the data fog. They cannot assume that the evidence speaks for itself.<sup>17</sup>

The explosion of information hitting the courts is going off within systems and operations that are too fragmented and disorganized to absorb it. Performance measurement, supported by business intelligence tools like performance dashboards, offers an antidote. It focuses on what counts and filters out the rest.

**Finally, measuring and managing court performance provide focus and attention, essential survival skills for court leaders and managers.** The right performance measures effectively delivered are clear, unambiguous and actionable. Focus and clarity are factors of effective leadership. Above all, leaders need to be clear. Performance measures such as clearance rates and court user satisfaction focus on a limited number of success factors

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<sup>17</sup> Erik Stokstad (2017). "How to be Heard." *Science*, Vol. 355, Issue 6325 (February 10, 2017), 572.

like access, fairness, and timeliness of case processing. They count only what counts and measure only what matters in these areas of court performance.

The discipline of PMM provides a conceptual shortcut, a convenient lens, to a host of organizational competencies like strategic planning, resource management, and communication with stakeholders. The benefits of an effective court performance measurement and management system are the same, for example, as those of strategic planning: accountability, consensus building, focus, coordination, control, learning, communication, hope and inspiration.

To identify the right performance measures, a court must address the same fundamental questions about guiding ideals, values, mission, goals and broad strategies as it must address in strategic planning. When it identifies a core performance measure such as *Court User Satisfaction*, Measure 1 of the *Global Measures*, for example, it communicates a clear, simple and penetrating theory of its “business” – its ideals and purpose — that informs decisions and actions.

### What Are Core Performance Measures?

The eleven measures of the *Global Measures* are “core” measures. A core performance measure is a primary performance measure that is aligned with, but distinguished from, subordinate measures in a hierarchy of measures that may be used by courts. The word “core” means that the measure is overarching, superordinate, or strategic, not just operational or tactical such as the number of times court staff engage in certain tasks or the time required for certain activities (e.g., answering telephone inquiries). Core measures have the following characteristics and attributes:

- *Linkage to Values, Mission and Strategic Goals* - They are aligned with one or more of the IFCE’s court values and areas of court excellence such as accessibility, fairness, timeliness, and public trust and confidence. It is this linkage with values and key performance areas that limits the number of core measures to a vital few insofar as a court’s fundamental success factors like access to justice are few in number when compared to the myriad of operational tasks and activities of a court.
- *Aggregation* – Core measures are a combination, an index, or a conjunction of a number of indicators, variables or aspects of court performance that may be identified with subordinate measures in a hierarchy. For example, Measure 6, *Court File Integrity*, joins the elements of the availability of the files to users, their accuracy, and their organization and completeness into a single metric. Though the eleven core measures are relatively few, this aggregation provides literally thousands of breakouts (disaggregations) across the eleven measures that give further insights into a court’s performance. The composite *Court File Integrity* can be disaggregated not only into separate scores for the three elements of the measures – availability, accuracy, and completeness and organization – but also by various case types and whether the case files are for pending cases or closed cases, both filed on-site or archived off-site.

- *Outcome Orientation* – Increasingly, court systems’ stakeholders – ordinary citizens, litigants, legislators, jurors, witnesses, and court employees – are calling for clear evidence that the resources court systems expend actually produce, or at least are clearly associated with, benefits for people. Core measures emphasize the condition or status of the recipients of court services or the participants in court programs (outcomes) rather than the resources (inputs) or the activities and processes, programs and activities (outputs). That is, they measure results and accomplishments, not merely resources, level of effort, and work performed. In other words, they measure ends rather than the means to achieve them. It is by this outcome orientation that the *Global Measures* help link the IFCE’s *areas* of court excellence referred to “drivers” (court management and leadership) and “systems and enablers” (court policies; human, material, and financial resources; and court proceedings) to results and outcomes.
- *Consistency Across Entire Court* – Core measures are consistent across the organization of the court divided into various units and divisions. Ideally, they are also consistent across levels of courts (e.g., first instance, appeals, supreme, and special or limited jurisdiction) and geographic location in a region or country.
- *Drivers of Success* – Core measures are drivers of success. They serve both as incentives and practical tools for improvement. The key to collecting data for court performance measurement is identifying those performance measures that will help to achieve the desired results (i.e., measures that are drivers of success).
- *Emblem or Symbol* - Finally, core measures stand for a value or strategic goal of the court. Their meaning and significance are easily understood by the court and its stakeholders.

### How Does Performance Measurement Fit into the *International Framework for Court Excellence*?

The IFCE is a framework for quality management designed to assist courts and court systems wishing to improve their performance. Courts are essential institutions for good governance and stable society.<sup>18</sup> To maintain legitimacy and public trust and confidence courts must perform their roles well and be perceived as doing so. The hallmark of a court that has achieved excellence as prescribed by the IFCE is the capacity and the political will to engage in rigorous performance measurement and management that addresses the key question “How are we performing?”

Well-conceived performance measures serve to link an organization’s efforts with the achievement of its mission and goals. The requirement of linkage of performance measures to a court system’s values, mission, strategic goals, and distinctive role in society is vital. If

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<sup>18</sup> See Daron Acemoglu and James A. Robinson (2012). *Why Nations Fail: The Origins of Power, Prosperity and Poverty*. (New York: Random House).

policymakers and practitioners define what they are trying to achieve very clearly, then the ideas for how to measure those achievements present themselves more easily.

### Box 3. Why is Performance Measurement an Important Part of the IFCE?

What are the benefits of performance measurement and performance management (PMM)? As noted by the National Center for State Courts in 2005 when it introduced PMM:

Not everyone will see and accept the purported benefits of court performance measurement. Sceptical reactions range from “performance measurement won’t tell us anything we don’t already know” to “we’re happy with the way things get done now” to “we just don’t have the time and money to even try this.” Simply stated, an understandable response to the call for a new set of responsibilities is “why shouldn’t we just continue to try to do a good job, rely on our sense of how we’re doing, and strive to minimize daily problems as much as possible?”\*

There are two principal related reasons why courts should embrace PMM. One is practical and based in common sense and the other is more nuanced and has to do with politics, governance, authority and control. The first reason stems from our common sense that good data and evidence matters, and that decisions made with scientific data are far more likely to succeed. Courts should embrace PMM and follow the performance data wherever it leads rather rely on incomplete truths and ideology (e.g., more legal representation invariably leads to better access to justice and increased efficiency). The reason is expressed aptly by the maxim, “You can’t manage what you can’t measure” and its sequels, “What gets measured gets attention” and “What gets measured gets done.” It is exemplified by the “smart policing” made possible by CompStat, the computerized system of introduced by Bill Bratton during his tenure as New York City’s police commissioner in the mid-1990s, which has been improved and expanded over the years. The system tracks minute details of the occurrence of crimes including what crimes are committed where and by whom. Police constantly analyze the highly-detailed data produced by the system looking for patterns and trends to inform their crime reduction tactics and strategies in response (e.g., “hot spot policing,” an approach that identifies neighborhoods down to the block and even house where most crime occurs and concentrates patrols and community involvement there). CompStat has contributed to New York’s policing success in reducing crime.

The second reason courts should embrace PMM is that it helps courts to shape and control their own affairs, strengthening their judicial independence. PMM is not just a diagnostic exercise but also an instrument of power, control, and politics. By producing reliable performance data that they use to inform effective tactics and strategies, courts put themselves into the role of the primary legitimate authority for court administration, as well as being recognized and trusted in that role by the public and other stakeholders. As noted by the Chief Justice of Victoria, Marilyn Warren, in speeches to international conference in Ottawa, Canada, in 2015 and Singapore in 2016, the Supreme Court of Victoria adopted and committed to the use of the *Global Measures* in 2013, in part, as an explicit policy and strategy to maintain its independence from the executive branch of government and to minimize its reliance on the Court Services Victoria, an independent statutory body created in 2014 directly accountable to parliament to provide services and facilities to Victoria’s courts, the Victorian Civil and Administrative Tribunal and the Judicial College of Victoria.

\* (National Center for State Courts (2005). Why Measure Performance? [http://www.courtools.org/~media/Microsites/Files/CourTools/CourTools\\_Trial\\_Why\\_Measure.ashx](http://www.courtools.org/~media/Microsites/Files/CourTools/CourTools_Trial_Why_Measure.ashx)); see also Marilyn Warren (2016). *The Aspiration of Excellence. Judiciary of the Future – International Conference on Court Excellence*. Singapore, January 28-29, 2016.

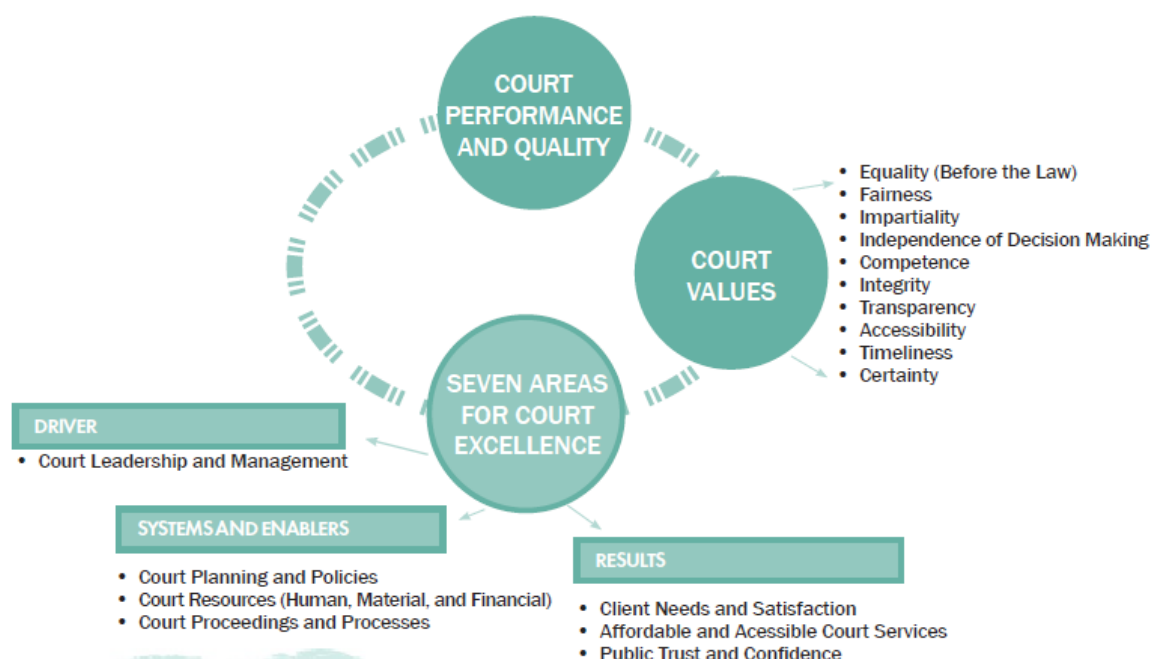
## Alignment of Performance Measures with the IFCE’s Values and Areas of Court Excellence

Courts should count what counts and measure what matters. Figuratively and literally, performance does not count unless it is related to the things that really matter and are critical to the success of a court. The IFCE refers to these key success factors in terms of high level goals and objectives expressed in terms of ten values and seven areas of court excellence. In building the IFCE, the International Consortium for Court Excellence recognized broad international agreement about the most important values that embody the purpose and fundamental responsibilities of courts in society including equality before the law, fairness, impartiality and independence, competence and integrity, accessibility, timeliness and certainty, and transparency. As highlighted in Figure 1, the IFCE also captures seven areas of court excellence that focus on a court’s governance, organization, and operation.

The eleven core court performance measures of the *Global Measures* are anchored in the core court values and areas of excellence of the IFCE. Together, they form the framework of a court’s accountability to the public and other stakeholders.

**Figure 1. The International Framework for Court Excellence**

### Framework for Court Excellence



### Mapping Performance Measures to Values and Areas of Excellence

Table 1 and Table 2 align the eleven core performance measures of the *Global Measures* with the ten court values and seven areas of court excellence of the IFCE.<sup>19</sup> The four types of

<sup>19</sup> The IFCE provides a similar mapping of court performance measurement systems and court values and areas of court excellence. *International Framework* at 18 (cited in note 3).

ideograms, commonly referred to as Harvey Balls, are used in the tables to show the degree to which a measure aligns with a value or area of excellence of the IFCE. A completely filled ball indicates that the measure is highly relevant and aligns well with a value or area of excellence; a three-quarters filled ball means that the measure is relevant and largely aligns with a value or excellence area; a half-filled ball indicates moderate relevance and alignment; a quarter-filled ball indicates some relevance and alignment; and, finally, an empty ideogram signifies no relevance and alignment.

For example, the single completely filled Harvey Ball for *Case Clearance Rate* in Table I suggests that the measure is highly relevant and aligns well with the value of transparency insofar as clearance rate indicates whether a court is keeping up with its incoming workload and avoiding backlog; the four half-filled Harvey Balls suggests that the measure has moderate relevance and alignment with the IFCE values of competence, accessibility, timeliness, and certainty; and the measure has no relevance for equality, fairness, impartiality, and independence. *Court Use Satisfaction* is a measure that focuses on accessibility and procedural fairness from the perspective of those served by the court and aligns well with all the core court values. All eleven core measures give operational meaning to the value of transparency and accountability insofar as they keep judicial institutions responsible to the citizens, and keep people informed about how the courts are performing.

**Table 1. Alignment of the Ten Core Court Values of the IFCE and the Eleven Measures of the *Global Measures***

Performance Measures	Core Court Values									
	Equality	Fairness	Impartiality	Independence	Competence	Integrity	Transparency	Accessibility	Timeliness	Certainty
Court User Satisfaction										
Access Fees										
Case Clearance Rate										
On-Time Case Processing										
Pre-Trial Custody										
Court File Integrity										
Backlog										
Trial Date Certainty										
Employee Engagement										
Collection of Fines and Fees										
Cost Per Case										



Table 2 illustrates how the IFCE’s areas of court excellence, referred to as “drivers” (court management and leadership) and “systems and enablers” (court policies; human, material, and financial resources; and court proceedings), link with the results and outcomes identified by the eleven measures.

**Table 2. Alignment of the Seven Areas of Court Excellence of the IFCE and the Eleven Core Court Performance Measures of the *Global Measures***

Performance Measures	Areas of Court Excellence						
	Court Management and Leadership	Court Policies	Human, Material, And Financial Resources	Court Proceedings	Client Needs and Satisfaction	Affordable and Accessible Court Services	Public trust and Confidence
Court User Satisfaction							
Court Fees							
Case Clearance Rate							
On-Time Case Processing							
Pre-Trial Custody							
Court File Integrity							
Backlog							
Trial Date Certainty							
Employee Engagement							
Collection of Fines and Fees							
Cost Per Case							

**How to Use Table 1 and Table 2.** Like the mapping of court values and court performance systems highlighted in the IFCE, the specific alignment suggested in each of the cells of the two tables is meant to be illustrative. Ultimately, the fundamental questions of what to measure and how to measure it must be answered by individual courts or justice systems. Court policymakers and practitioners should do a similar mapping exercise to that illustrated in Table 1 and Table 2 that is unique to their circumstances and needs. Courts and justice systems must give meaning to the performance measures aligned with their own values and success factors. The evidence performance measures produce cannot speak for itself; it must be made to speak by breathing meaning into it (see Box 4, “Animating Court Performance Measures”).

#### **Box 4. Animating Court Performance Measures\***

We must breathe life into the prescriptions for the performance measures that we exhort courts to use. We must make the performance data speak to us.

The connection between well-known health indicators (blood pressure, cholesterol level, and blood glucose levels) and our health seems self-evident to most of us. We know that these indicators mean something vital and important to our wellbeing. When these vital signs are below or above normal ranges most of us know that we must take corrective actions.

This kind self-evident connection between core measures of court performance, on the one hand, and core court values and areas of court excellence, on the other, does not seem to exist. Many policymakers, analysts, and practitioners, judges and court managers, view such measures as “statistics,” lifeless sets of numbers that are disconnected from the fundamental responsibilities and duties of courts. They are relegated to the domain of those for whom it’s all about the numbers — the number crunchers, the spreadsheet guys, and the IT folks who manage the case management system. The measures, quite simply, do not matter to them.

This, if accurately perceived, cannot be blamed on judges, court managers, and analysts. It is largely the fault of those who preach the gospel of court performance measurement and management. They have failed to breathe life into the prescriptions for the performance measures that they exhort courts to use on a regular and continuous basis. They have failed to make the data speak to us.

The need for animating court performance measurement is brought to mind by how the Honorable Albie Sachs spoke about his confinement in a speech, “The Strange Alchemy of Life and Law,” at an event in January 21, 2010 sponsored by the Open Society Institute.\*\* Sachs is a passionate man and his views evoke strong emotional responses from an audience. He is former judge on the Constitutional Court of South Africa, an activist, and a leading campaigner in the fight against apartheid in South Africa. In his speech Sachs discussed his 2011 book, *The Strange Alchemy of Life and the Law*. He talks about his deprivations of access to justice and solitary confinement and time in detention without trial during his struggles for rights in South Africa under the apartheid regime. In 1988, while in exile in Mozambique, he lost an arm and sight in one eye by a bomb placed in his car by South African security agents.

Of course, stripped of Albie Sach’s emotion and animation of his terrible time in detention without trial, which is measured by Measure 5 *Duration of Pre-Trial Custody* of the *Global Measures*, may appear as just another lifeless statistic. Sach’s account of his detention without trial bears no resemblance to how we often characterized the measure. The typical description of time in detention without trial seems lame and lifeless compared to his description. He speaks of his delay and denial of access to justice in lofty terms of a denial of rights, deprivations of liberty, a failure of democracy, big important things that matter.

While we cannot match Judge Sach’s passion and eloquence, we can do a much better job at aligning court performance measures with the higher values, mission, fundamental responsibilities, and obligations of courts to ordinary citizens. This is conveyed in the statements of purpose for each of the eleven core measures in Part 2 of the *Global Measures*. For example, Measure 5 *Trial Date Certainty* is made vital by not only connecting it to more effective case calendaring and a court’s continuance policies and practices, but also by aligning it primarily with certainty, a universal principle defining the rule of law. And Measure 10 *Compliance with Court Orders* is shown to be much more than merely a financial measure of the rate of collection of court fines and fees, and

revenue generation by a court. Instead, like blood pressure is linked to good health, the primary purpose of *Compliance with Court Orders* is described in terms of a court's fundamental obligation to enforce its orders and maximize compliance with the rule of law.

\* Adapted from [Made2Measure](#), July 17, 2012.

\*\* Albie Sachs, "The Strange Alchemy of Life and Law," Open Society Institute, audio recording accessed July 19 2018: <https://www.opensocietyfoundations.org/events/strange-alchemy-life-and-law>.

## The Right Measures, Delivery, and Use

Developing the "right" performance measures for an individual justice institution or an entire country's justice system, and making sure that they are used effectively, can be translated operationally into three (overlapping and interdependent) requirements and corresponding phases of development:

- **The Right Measures** - Identifying and developing the right performance measures. Court managers tend to manage what they can measure. Much too often this means what is easy to measure. The right measures are measures that matter, and count what counts, i.e., measures that are aligned with agreed-upon success factors and measures that matter to the status and condition of ordinary citizens. The connection between familiar health indicators like blood pressure, cholesterol level, and blood glucose and our health and wellbeing is self-evident to most people. We know that these measures mean something vital and something very important to us.
- **The Right Delivery and Distribution of Performance Data** - Ensuring that the right measures are delivered to the right people, at the right time, and in the right way, i.e., in an easy to understand way. Increasingly, this is done by information technology – including performance dashboards, business intelligence and data visualization applications – that let users view critical performance information at a glance, and move easily through successive layers of strategic, tactical and operational information on a self-help, on-demand basis, allowing them to spot patterns, anomalies, proportions, and relationships that they would otherwise miss.<sup>20</sup>
- **The Right Use** - Adopting, implementing, and integrating the measures of performance, as well as the delivery system and distribution system (e.g., performance "scorecards" or "dashboard"), with key management processes and operations, including budgeting and finance, resource and workload allocation, strategic planning, organizational management, and staff development. Designing a piece of technology like a court performance dashboard to facilitate the right delivery and distribution is not the same as ushering a transformation of the way a justice system is governed, based on evidence of performance. Social factors must figure into change management to ensure the right use of PMM.

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<sup>20</sup> Ingo Keilitz (2009). "Smart Courts: Performance Dashboards and Business Intelligence." In *Future Trends in State Courts 2010*. (Williamsburg, VA: National Center for State Courts, 2009): accessed 19 July 2018 at <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/1613/>

These three requirements and phases of development are described here in sequential fashion. In practice, they are likely to be iterative. The third requirement and phase, the *right use*, for example, is likely to need addressing early in the development process to ensure that a judiciary's leaders and top management are engaged early and remain engaged throughout the development of the PMM system. While it may be frustrating for developers, it is inevitable that the question of the right measures will need to be answered in the context of satisfactory answers – albeit preliminary and speculative – to the questions of the right use.

The first two requirements and phases in the development depend on an effective design and capacity building. The right measures are not chosen haphazardly. And they certainly are not indicators of everything. The right measures are aligned with the judiciary's values, strategic goals and objectives. They are logically and factually sound and correspond accurately to the concept that is the object of the measurement. This minimizes the risks of a measure distorting the social outcome it is intended to measure.

Most failures of developing a performance measurement and management system occur at the implementation stage, not the design stage. The second requirement and phase of right delivery and distribution is premised on the common understanding that a PMM system is meaningless until it is put into the hands of people who can put it to good use, understand what it is telling them, and apply that learning. This is where information technology comes into play, including performance dashboards and business intelligence. That said, the absence of technology should not deter those building a performance measurement system to meet the first requirement of the right measures and to build information technology into sound manual processes where they exist.

The third requirement and phase of "right use" is the key to effective implementation and institutionalization of performance measurement. We can't just throw an innovative PMM system "over the wall" to executives, managers and staff to adopt and to implement. Even well-conceived, well-designed systems are unlikely to get implemented unless they are woven into the very fabric of a court's management practices and processes. For a judiciary, the *right use* of performance measurement will not happen until a judiciary makes changes such as assigning new responsibilities, instituting specific policies, creating governance structures, and starting processes, procedures and practices to ensure adoption, implementation and institutionalization of a PMM system.

## PART 2: CORE PERFORMANCE MEASURES

Part 2 of this guide is the most extensive. It includes detailed and generally uniform descriptions of each of the eleven core performance measures of the *Global Measures* including a brief operational definition, a statement of purpose, methodology (and, for several of the measures, alternative approaches and options), and notes on effective use.

To accommodate readers who are interested only in a particular measure or two, the descriptions of the measures, for the most part, are self-standing. For this reason, parts of the descriptions, especially references to resources, are repeated for most of the measures.

Nine of the eleven measures are adaptations — in some cases close adaptations — of the corresponding measures described in the *CourTools* for trial courts and appellate courts.<sup>21</sup> (Two measures, Measure 2 *Access Fees*, and Measure 5 *Pre-Trial Custody* are original to the *Global Measures*). The *CourTools* include operational definitions, examples of analyses and interpretations, Excel templates for calculating the measures, as well as reports of the experiences of courts with various measures. Representatives of justice systems and individual institutions are encouraged to review both the prescriptions of the measures in Part 2, as well as that of the corresponding measures in the *CourTools*, especially if they are in the design stage of a performance measurement initiative.<sup>22</sup>

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<sup>21</sup> *CourTools* (cited in note 6).

<sup>22</sup> Reviewing the methodology of corresponding measures in the *CourTools* may be particularly helpful for considering technical issues not explored here such as how for Measure 4, *On-Time Case Processing*, time should be subtracted from the overall elapsed time of case processing counted for certain kinds of cases (e.g., a civil contract case that is “interrupted” by bankruptcy proceedings and considered inactive for case processing until the resolution of the bankruptcy matter is settled, whereupon the contract case resumes and elapsed time continues to be counted).

## Measure 1. Court User Satisfaction

### Definition

The percent of court users who believe that the court provides procedural justice, i.e., accessible, fair, accurate, timely, knowledgeable, and courteous judicial services.

### Purpose

Public organizations, including courts and court systems, increasingly are using the perceptions and opinions of those who receive public services as a major source of performance feedback.<sup>23</sup> Measure I gauges the performance of courts and other tribunals in critical areas of access to justice, timeliness, procedural fairness, and the overall effectiveness of the courts as seen from the perspectives of those served by the courts on a typical day.

It is often assumed that "winning" and "losing" is what matters most to those who have encounters with courts. However, this is not what counts most in shaping the public's trust and confidence in the courts. Even those who dislike and may dispute the outcomes of court proceedings may respect the legitimacy and fairness of the court proceedings. Ultimately, it is the rule of law and procedural justice that matters more than the outcome. Research consistently shows that it is people's personal perceptions about their access to justice, how they were treated by the justice system, and whether a court or other tribunal makes its decisions fairly that shapes their satisfaction or dissatisfaction.<sup>24</sup>

To realize the values and to succeed in the areas of court excellence defined by the *International Framework for Court Excellence*,<sup>25</sup> (IFCE) it is imperative that a court continuously receives and evaluates feedback about how individuals were treated when they use the courts, and whether the court's processes of making decisions seem fair to them. This measure provides an effective tool to survey court users about their experiences. It allows for analysis by court location, division, type of user, and across different types and levels of courts and tribunals.

Measure I has its origins in a ten-item survey, referred to as the "Q-10," first used in the Basic Court of Tetovo, Macedonia, in September of 2003.<sup>26</sup> It subsequently was implemented

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<sup>23</sup> See World Bank (2014). *Serbia Judicial Functional Review. Multi-Donor Trust Fund for Justice Sector Support in Serbia*. (Washington, D.C.: World Bank Group), 235 ("*Serbia Judicial Functional Review*"): accessed 19 July 2018 at <https://openknowledge.worldbank.org/handle/10986/21531>, noting that "advanced judiciaries in Europe and around the world, are increasingly using surveys as a routine data collection method to supplement statistical data. Surveys can be particularly useful in areas such as user satisfaction in terms of timeliness, costs, access to justice and integrity."

<sup>24</sup> See, generally, Tom R. Tyler (1990). *Why People Obey the Law* (New York: New York University Press, 1990); Tom R. Tyler (2001). "Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions." *Behavioral Science and the Law*, 19: 215 – 235.

<sup>25</sup> See in Part I, "How Does Performance Measurement Fit into the *International Framework for Court Excellence*?"

<sup>26</sup> A total of 420 survey questionnaires were completed by citizens and court users exiting the Tetovo Basic Court between 7:00 am, when the court opened its doors, and 3:00 pm, when the courthouse doors were closed. The greatest volume of survey respondents completed questionnaires between the hours of 10:00 am and 1:00 pm. Ingo Keilitz (2003). *Survey of Citizens/Court Users of Macedonian Pilot Courts: Final Report and*

in ten “pilot” courts from 2003 to 2007 by the Court Modernization Project<sup>27</sup> as a reliable, speedy instrument to assess court users’ responses to key issues of public satisfaction with the courts in Macedonia. The survey questionnaire asked respondents to rate their level of agreement with ten simple statements ranging from their access to justice (“Getting to the courthouse was easy”) to statements about their treatment by the court system (“The judge hearing my case listened to me and was courteous respectful and fair”). Here is how the results of the results of the Court Modernization Project were characterized in 2007:

The Q-10 was a dramatic breakthrough in assessing public satisfaction with court performance. In a direct, transparent way, it gave immediate voice to all court users without jargon or methodological barriers. Where there’s a will, there’s a way: the courts of Macedonia can be proud of dramatic increases in user satisfaction especially in categories of judicial fairness, promptness, and overall effectiveness.<sup>28</sup>

In 2008, the Administrative Office of the Courts Budget Council (AO), the administrative arm of the Macedonia courts, agreed to assume full responsibility for the implementation of the court user satisfaction survey. From 2008 to 2010, the AO independently conducted six nation-wide surveys and used the results to identify improvements.<sup>29</sup> Reportedly, the court user satisfaction survey is, at this writing, still in use in Macedonia.

Numerous courts throughout the world have utilized Measure I as described here or adaptations tailored to local needs. For example, the Family Court of Australia and the Federal Circuit Court of Australia, which have adopted the IFCE, first conducted an adaptation of Measure I in 2011 nationally, repeated in 2014. The results of the 2014 survey are presented in a 2015 report.<sup>30</sup> In the foreword of the report, Richard Foster, the then Chief Executive Officer of the Family Court Australia and the Federal Court, noted that “the Courts have repeatedly sought the views of court users and been open to feedback, and at times criticism, with respect to services. This openness to the public and to those people, who rely on our Courts, has made us innovative, responsive and willing to embrace change.”<sup>31</sup>

## Methodology

The methodology of this measure addresses five key questions:

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*Recommendations.* Macedonia Court Modernization Project. United States Agency for International Development, 1 (“Macedonia”).

<sup>27</sup> The project was funded by the United States Agency for International Development (USAID) and implemented by DPK Consulting.

<sup>28</sup> Court Modernization Project (2007). *An Effective Judiciary – Court Modernization Project 2002 -2007* (Washington, DC: USAID), 31.

<sup>29</sup> United States Agency for International Development (2012). *Judicial Reform Implementation Project*. Final Report: September 2007 – June 2011 (Washington, DC: USAID), 27: accessed May 18, 2018 at [http://pdf.usaid.gov/pdf\\_docs/pdacx118.pdf](http://pdf.usaid.gov/pdf_docs/pdacx118.pdf).

<sup>30</sup> Family Court of Australia and the Federal Circuit Court of Australia (2015). *Court User Satisfaction Survey*: accessed 19 July 2018 at [http://www.familycourt.gov.au/wps/wcm/connect/417abc77-b360-400d-af75-fcb8097c8785/UserSatisfactionSurvey\\_2015\\_final\\_access\\_V2.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=417abc77-b360-400d-af75-fcb8097c8785](http://www.familycourt.gov.au/wps/wcm/connect/417abc77-b360-400d-af75-fcb8097c8785/UserSatisfactionSurvey_2015_final_access_V2.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=417abc77-b360-400d-af75-fcb8097c8785).

<sup>31</sup> *Id.*, at i.

- *Who is surveyed?* Actual users of the court on a “typical” day. The general public (individuals who do not use the court) are not surveyed.
- *About what?* Agreement with 10 simple statements about accessibility, convenience, and treatment by the courts (fairness, equality, and courtesy) and a limited number of demographic questions.
- *When?* One typical day (a day that would be considered *generally* representative of all court days) twice a year on a continuous and regular basis.
- *By whom? How?* Court staff using a simple questionnaire.
- *Where?* All courts, possibly beginning with pilot courts before it is implemented in all courts.

The approach for taking this measure is a close adaptation of the corresponding measure in the *CourTools* and closely follows the methods prescribed for that measure.<sup>32</sup> Reviewing the descriptions and methodology of this corresponding measure in the — *CourTools*, which includes definitions, examples of analyses and interpretations, templates for calculating the measure, as well as a report of courts that have taken this measure, will be of benefit to courts seriously considering measuring *Court User Satisfaction*. Courts considering *Court User Satisfaction* should also review Measure 9, *Court Employee Engagement*, here in Part 2, because both measures are based on surveys.

Everyone in the court on a “typical day”<sup>33</sup> – litigants and their families and friends, victims and witnesses including experts for the case, attorneys/lawyers, law enforcement officers, and other groups of individuals who are not employees of the court – is asked to fill out a brief self-administered questionnaire as he or she exits the courthouse.

### **Planning and Preparation**

**Review of Survey Questionnaire.** The survey questionnaire of Measure 1 includes ten succinct statements with which respondents are asked to register their agreement:

1. Getting to the courthouse was easy.
2. Finding where I needed to go in the courthouse was easy and convenient.
3. I felt safe in the courthouse.
4. I had no difficulty getting the information I needed when I came to the courthouse.
5. Court personnel treated me with courtesy and respect.
6. The judge or other judicial officer hearing my case listened to me and was courteous, respectful, and fair.
7. I understood the instructions of the court and what I needed to do next.
8. The case or other business I had with the court was handled in a timely and in an efficient manner.
9. I was treated equally. My ethnicity, gender, economic status, or age made no difference in how I was treated by the court.

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<sup>32</sup> *CourTools* (cited in note 6).

<sup>33</sup> A typical day in this context means any regular day with regular activities taking place in the courthouse.



## 10. Overall, I think the court performs effectively.

The first task of planning and preparation for taking Measure I is to review the items of the survey. The items should be adapted as necessary to local requirements and conditions. However, any changes or additions to the 10 items should not be made haphazardly. They should be deliberate and governed by two important considerations — one substantive and the other practical. First, the specific items were deliberately formulated to assess achievements or ends — *outcomes* for court users (e.g., access to justice, fairness, and equality) that are consistent with the values and success factors identified by the IFCE and the seminal *Trial Court Performance Standards*.<sup>34</sup> Measure I is not intended to assess the myriad means — *inputs* such as adequate numbers of judicial officers and court staff and effective information technology and *outputs* such as the number of court hearings and other court proceedings — that might be marshalled to achieve the *outcomes*. Only after Measure I is taken, ideally on a regular and continuous basis, will the results inform the correct identification of the *inputs* and *outputs* that might be required as part of effective improvement strategies to address performance deficiencies.

The second consideration before making changes to the survey items of Measure I is related, but more practical. Some courts may be tempted to add survey items to assess the satisfaction of court users with *inputs* and *outputs* of programs or processes recently implemented (e.g., an information kiosk in the lobby of the courthouse or the use of a new case management system). Besides the problem that these means may not have a causal relationship to such *outcomes* as access to justice, too many of such items may cause the survey questionnaire to be too lengthy, driving down the survey response rate.

In addition to the 10 substantive items of the survey, courts need to pay particular attention to the demographic questions included in the survey because these items do require adaptations to local requirements (see sample survey below). Technical, legal, and political issues may need to be addressed in formulating the demographic questions. How should the respondents identify themselves in the survey? What information about the respondents can and properly should be sought? Do local policies or regulations dictate certain approaches? For example, is race or national origin too sensitive or inappropriate as a demographic item?

Finally, in smaller jurisdictions, a limited number of responses to demographic questions might reveal the identity of individual respondents (e.g., a jurisdiction in which there are only a few attorneys). If this is a potential problem, planners may find it best to eliminate some or all of the demographic questions. The best approach to addressing these technical, legal, and political issues is to think about how the results might be used in practice.

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<sup>34</sup> Ingo Keilitz (2000). "Standards and Measures of Court Performance." In *Criminal Justice 2000, Volume 4, Measurement and Analysis of Crime and Justice* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice), 559-593: accessed 19 July 2018 at [https://www.ncjrs.gov/criminal\\_justice2000/vol4\\_2000.html](https://www.ncjrs.gov/criminal_justice2000/vol4_2000.html).

Open-ended, short-answer questions (e.g., "What did you like most/least about your experience in the courthouse?" "How can we improve?") are not included in the sample survey instrument, but they easily can be added if desired. However, while answers to open-ended questions might be considered interesting, they are often biased or not informative. They also may present challenges for analysis and interpretation as the number of respondents and the number and length of answers increases.

***Preparation of Survey Questionnaire.*** The survey instrument should be prepared and printed in an easy-to-read and attractive format, and if possible, aim to fit all the items on a single sheet, using both sides if necessary, to avoid a cluttered and confusing look. It should include precise directions and guidelines for the respondents, covering all possible groups eligible to take the survey. Questionnaires should be available in several languages if appropriate. (In Macedonia, for example, the survey instrument was made available in Macedonian, Albanian and Turkish.) Finally, it might be helpful for the survey team to prepare a checklist for all the steps and items that need to be taken care of before the start of the survey. The Macedonian survey can be viewed on the next two pages.

### Sample Survey of Macedonian Court User Satisfaction

The (appropriate name of jurisdiction) is conducting this brief survey to learn about citizens' experiences in using the court. Your opinion is very important to us. We want to serve you better. Please take a few minutes to complete this very brief survey. Your responses will help the court evaluate and improve its services. All responses are confidential — we do not need to know your name.

Thank you for your help. (signed by influential representative)

**Directions:** Please respond to the statements below based on your experience in the courthouse today. Please circle the number that best describes your level of agreement with each statement. By circling 5 you are indicating strong agreement with the statement. Circling 1 denotes that you strongly disagree with the statement. Circling 3 indicates neither agreement or disagreement, or that you have no opinion on the statement. Circle only one number for each statement. If the statement does not apply to your experience with the court, please place a check the “not applicable” box in the last column.

	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree	Not Applicable
1. Getting to the courthouse was easy.	1	2	3	4	5	
2. Finding where I needed to go in the courthouse was easy and convenient.	1	2	3	4	5	
3. I felt safe in the courthouse.	1	2	3	4	5	
4. I had no difficulty getting the information I needed when I came to the courthouse.	1	2	3	4	5	
5. Court personnel treated me with courtesy and respect.	1	2	3	4	5	
6. The judge hearing my case listened to me and was courteous, respectful and fair.	1	2	3	4	5	
7. I understand the instructions of the court and what I need to do next.	1	2	3	4	5	
8. The case or other business I had with the court was handled in a timely and in an efficient manner.	1	2	3	4	5	
9. I was treated equally. My ethnicity, gender, economic status, or age made no difference in how I was treated by the court.	1	2	3	4	5	
10. Overall, I think the court performs effectively.	1	2	3	4	5	

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Please provide the court with some additional information about yourself and what brought you to the court. Your answers will help the court understand the results of the survey. Remember that your responses are confidential.

A. What is your gender?

- Male  
 Female

B. What is your formal education (please check ONE only)?

- No formal education or uncompleted elementary  
 Vocational  
 Elementary  
 Higher  
 Secondary  
 University

C. What is your nationality (please check ONE only)?

- Macedonian  
 Serbian  
 Albanian  
 Vlach  
 Turkish  
 Other  
 Romany  
 I do not wish to answer.

D. How often are you in the courthouse or one of the court's facilities? (Please check ONE only)

- Daily  
 Several times a year  
 Weekly  
 Once a year or less  
 Monthly

E. What type of case or matter brought you to the court today? (check ALL that apply)

- Major Criminal  
 Wills and Inheritances  
 Minor Criminal  
 Juvenile  
 Traffic Violation  
 Enforcement of Money Judgments  
 Commercial/Business Claim  
 Other Dispute or Legal Claim  
 Family (e.g., divorce, adoption)  
 Other (e.g., documents, registration, information)

F. What was your role or how were you involved in the matter or business that you had with the court today? (Please check ONE only)

- Judge  
 Friend or Family Member  
 Law enforcement officer  
 Court Employee  
 Attorney  
 Citizen Seeking Information, Documents, Information  
 Litigant (party to a legal matter)  
 Business user (e.g., company filing, corporate records, searching archives)  
 Victim or Witness  
 Other

## Sampling Design

The self-administered questionnaire is offered to *all* the individuals who "use" the court on a given day (i.e., exit the court after they have conducted their "business") with the possible exception of regular court employees.<sup>35</sup> Instead of probability sampling, this measure uses purposive sampling (a type of non-probability sampling) whereby every user of the courthouse(s) on a single typical day is surveyed.<sup>36</sup>

A typical day is a one considered *generally* representative of all "court" days. If the day is typical of most days at the courthouse, it can be assumed that the responses represent a broad cross-section of those using the court. If a court conducts certain proceedings (e.g., arraignments or settlements) only on a particular day, the survey should be conducted over the course of several days reflecting the general "business" of the court.

Similarly, in courts with very small case volume, the survey should be conducted over a period of days or even a week or more. Courts considering taking this measure should consider the minimum questionnaires that need to be completed in order for the survey results to be considered valid.<sup>37</sup> For this, they should take into consideration the population size covered by the particular court. Courts where the number of users per day is less than 30 should expand the administration of the survey to two days or more.

## Survey Administration

**Survey Team.** The court should identify a group of people, a survey team, who will administer the survey. The team should include mostly court staff, but can include, for example, interns working in the court and/or volunteer law students.

The advantages of mobilizing mostly court staff to administer the survey is two-fold. First, in most courts, court staff are familiar with many of the potential respondents who "use" the court on a regular basis (e.g., attorneys and law enforcement officers) and as regular users of the court may be most prone to refuse to participate in the survey. Court staff who are familiar with them are likely to be more compelling in asking them to participate in the survey than student interns, thereby increasing the survey's response rate. Second, based on the experiences of many courts with Measure I, staff participation in survey administration (even by judges) tends to increase interest in Measure I, as well as in performance measurement

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<sup>35</sup> In some courts, the definition of "employees" is not clear, Courts may need to decide if certain employees or contractors in the courthouse (e.g., cleaning personnel or maintenance workers) on the day of the survey should be considered employees or visitors; the latter may have valuable insights. Most courts have allowed some "non-regular" employees to participate in the survey.

<sup>36</sup> This approach shifts the sampling focus to the representativeness of the court day(s) on which the survey is conducted and away from the role/ group identity of the respondents (i.e., litigant, attorney or other court "user"). It avoids sampling issues such as who among various court users is important to survey, sampling rate, strata, and so forth. Sampling of respondent groups is not required because the entire "population" of users (on that day) is surveyed in a "snapshot."

<sup>37</sup> While there is no hard and fast scientific rule regarding survey response rates, generally response rates below 50% are questionable on grounds of what researchers refer to as "response bias," i.e., the possibility that those that did respond do not represent the court's users/clients population. Questions such as these arise: Are the individuals who responded particularly prone to answer questions in a much different way than those who did not respond? Are they more negatively or positively inclined toward the court? Absent evidence that there is no response bias, the court takes a risk of basing strategy on erroneous or misleading results.

and management in general. Moreover, informal observations and accounts of staff participation as members of survey teams suggest that court staff generally find that the experience is enjoyable and fulfilling.

Based on an estimate of approximately 500 court users in a courthouse of a mid-size court on a typical day, for example, a survey team of seven to ten court staff should be sufficient to administer the survey and enter the survey data. The size of the survey team should be determined by the maximum numbers of individuals exiting the courtroom during any hour of the day. A team of six to eight should be able to handle as many as 100 respondents exiting the courthouse over the course of an hour. For planning how many team members are needed throughout the day, the survey team should count and record the number of users exiting the court for every 15 minutes throughout the court day on a typical day in advance of the survey administration.

Team members might assume the following duties and roles:

- *Greeters* (2 or 3 team members) – these team members would be stationed around the entry/exit of the courthouse and approach court users exiting the courthouse and ask them to participate in the survey and directing them to tables (or clipboards) where they can complete the survey questionnaire.
- *Helpers* (3 to 5 team members) – helpers would be available to assist court users in completing the survey. Some respondents who are unable to read will need to have the survey read to them. Other respondents may need assistance in filling out the questionnaire or have questions about the process.
- *Checkers* (one team member) – This individual collects the completed surveys, checks them for completeness, if possible retrieves the respondents who may have failed to complete the reverse side of the survey (for example), and delivers the completed survey for data entry.
- *Data Entry Person* (one team member) – This individual enters the survey data into a database for analysis.

Team members' duties and roles should not be rigidly defined. Instead, team members should be flexible and fluid, with members assuming different roles as needed or desired. A checker might switch roles with the data entry person for part of the day, greeters might switch with helpers, and the team might invite other court staff to participate and so forth, depending on local conditions and needs.

Participation in survey administration should be on volunteer basis. The survey team members should get enough training so they are familiar and feel comfortable with their duties and roles, as well as with answering typical questions they might get from respondents.

***Interactions with Court Users.*** Survey team members should be made aware that it is very important how they interact with respondents. The interactions will influence the response rate of the survey. Team members should be friendly and polite, treat survey respondents

with respect, be patient, and be ready to help any respondent if he or she requests assistance in completing the survey.

The team should create a working environment that facilitates the anonymity of the respondents and the confidentiality of their responses. Respondents should be instructed to place completed questionnaires in a nearby receptacle instead of simply handing it to one of the team members. This makes it clear to respondents that their responses are anonymous and confidential. Of course, this is not possible for respondents who are not literate and must be helped in completing the survey. In such cases, the helper should put the completed questionnaire in the receptacle right away to give the impression that he or she is not examining and recording the responses.

Greeters should approach court users who are coming to the exit(s) of the courthouse and ask them to participate in the survey and then direct them to a table or the place where they can complete the questionnaire. They should try not to block the entrance/exit as much as possible, so they do not create any confusion to those entering the courthouse.

**Publicity.** Some courts that implemented this measure have created positive publicity about the survey by placing posters describing the survey, including a facsimile of the questionnaire, around the waiting areas and near the entrances of the courthouse to get the attention of the users of the court as they enter and conduct their business with the court. This will give some time to the court users to anticipate their participation in the survey. The posters should be in all the official languages that are spoken in the community so everybody coming to the court can understand them. Survey team members might also approach court users entering the courthouse and alert them to the survey and ask them to be sure to stop by on their way out.

Some courts have found it useful to decorate the area where the survey tables and chairs are placed near the court exits with balloons, flags, or any other “distractions” that might cause respondents to attend to the survey administration. After the questionnaire is completed, a survey team member can “reward” respondents with a sticker, balloon, or candy.

**Data Collection.** Survey team members should be stationed near the court exit(s) and distribute the questionnaire to all individuals (belonging to the groups identified above) who exit the courthouse. Some individuals will refuse or simply will not want to take part in the survey. In order to assess the response rate of the survey, the survey team should record or estimate the number of non-respondents — i.e., those refusing or somehow missed in the survey. The court should assign members of the survey team to take notes on those who refuse to fill out the questionnaire, including the number of people refusing, the group they belong to (as much as possible, i.e. if they are known to be lawyers, their gender, ethnicity, etc.) and also emphasize the reasons for refusal, if possible (i.e. no time, I don’t want to..., etc.).

The number of respondents exiting the court will vary by court and by the time of the day. Tables and chairs should be placed around the exit(s) to the courthouse(s) to accommodate the maximum number of survey respondents who may be filling out questionnaires and

members of the team helping them at all times throughout the day. The team is responsible for the arrangements of the tables and chairs and their number (keeping in mind the court size, number of visitors, and size of entrance/exit area), so the tables and chairs don't block the entrance(s).

### **Data Organization, Analysis and Interpretation**

Compute the percent of total respondents in the following ways:

- (1) overall across all ten items;<sup>38</sup>
- (2) for each single response category (e.g., strongly agree) and category of background information (e.g., lawyers); and
- (3) for every cross-tabulation<sup>39</sup> (e.g., lawyers who have come to the court for the first time).

*Court User Satisfaction*, the percent of respondents who agree (i.e., strongly agree and agree) with the 10 statements about their encounter with the court and the court's treatment of them, is calculated as noted in the Box 5 below. (Responses of "no opinion," which may be the third on a five-point scale or "not applicable," which some courts have added as a sixth response, are tallied but do not figure in the calculation.) The frequencies of such responses to particular questions by a group of respondents (victims and witnesses) in a particular case type (major criminal) may provide a check on the survey response rate and provide useful insight for improving the court's treatment of such respondents. For example, high frequencies of "no opinion" answers by respondents in particular types of cases, compared to others responding to the survey, may suggest that the treatment of these respondents in court may require special procedures (e.g., clear separation of defendants and witnesses).

#### **Box 5. Formula for the Calculation of Court User Satisfaction**

$$\text{Court User Satisfaction} = ((A + B)/(A + B + C + D)) \times 100$$

**A = Strongly Agree**

**B = Agree**

**C = Disagree**

**D = Strongly Disagree**

Simple computations enable powerful functions of this performance measure: establishing a baseline for current performance, indicating whether performance is within determined boundaries or tolerances (controls), identifying and diagnosing problems.

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<sup>38</sup> The convention is to compute the overall metric in terms of the percent of respondents who "strongly agree" and "agree" as shown in Box 5.

<sup>39</sup> Cross-tabulation or crosstabs refers to the means for organizing or displaying the values or levels of one variable (e.g., item number 5 of the survey) according to the values or levels of a second variable (e.g., frequency using the court).



For example, assuming that 25 percent of the survey respondents “strongly agree” and 42 percent “agree” that they were treated with courtesy and respect (survey Item 5), combining the “strongly agree” and “agree” categories yields a *baseline* of 67 percent of the respondents. When this baseline performance is compared to a hypothetical goal of 75 percent set by the court, the computation enables the *control* function by answering the question of whether performance is at acceptable levels or within tolerable boundaries established by the court.

These performance measurement functions are enhanced by further analyses that “filter” the overall survey results by the various background variables of the survey respondents: by gender and race of the respondent; by type of case or by matter that brought the survey respondents into the courthouse, and so forth. For example, a simple analysis compares respondents who are in the courthouse frequently (daily or weekly) versus those who are in the courthouse infrequently (no more than several times a year). This analysis may show that frequency of court use is consistently associated with greater (or less) satisfaction across all areas of performance.

### Alternative Methodology for Appellate Courts

Measure I *Quality Court Services* of the Appellate Court Performance of the *CourTools*,<sup>40</sup> is an alternative to the methodology of *Court User Satisfaction* at the trial court level. Two U.S. states, Montana and Oregon,<sup>41</sup> are using this measure.

There are two significant differences in this measure at the appellate level. First, “court users” are identified differently. With the exception of a relatively few *pro se* litigants (individuals not represented by attorneys, also referred to as “self-represented litigants” and “litigants in person”), at the appellate level most litigants seldom interact directly with appellate courts but instead have their interactions with the court mediated by attorneys. Therefore, their opinions about the court may not be an accurate reflection of reality. This is why they are not included in the appellate version of this measure.<sup>42</sup>

Trial court judges and members of the appellate bar, however, are uniquely positioned to assess how well an appellate court is fulfilling its responsibility to consider each case and resolve it in accordance with the law. The *Quality Court Services* measures appellate lawyers’ and trial court judges’ ratings on the quality of the appellate court’s judicial and administrative services using a survey and questionnaire approach similar to *Court User Satisfaction*. Survey respondents are asked to provide their responses to each of the survey items on a five-point scale from “strongly agree” to “strongly disagree,” and “undecided or unknown.” In addition to the ten substantive items, respondents are asked to identify themselves by job (judge, attorney/lawyer or law professor), gender, race, and/or national origin, and experience.

Appellate courts may consider if it is in their interest to expand the court users beyond trial court judges and appellate and attorneys as the State of Montana has done, including members

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<sup>40</sup> Appellate Court Performance Measures, *CourTools* (cited in note 6).

<sup>41</sup> *Id.*, “Reports from Courts.”

<sup>42</sup> Some observers have suggested that *pro se* litigants whose email addresses could be obtained for the electronic administration of this measure should be included in the measure.

of its law school teaching faculty in its “Bar and Bench Survey.”<sup>43</sup> The option of such expansion is encouraged. The survey could include law school faculty, self-represented litigants, or even the general public, though these last two constituencies would not easily be accommodated by the online survey method of this measure. The utility of expanding the survey hinges on the appellate court’s objectives and whether responses from additional constituencies would add valuable information to that provided by the appellate attorneys and trial court judges.

The second difference between the appellate alternative to Measure I is its recommended reliance on an efficient and inexpensive online survey instrument such as SurveyMonkey, an instrument recommended for Measure 9 *Court Employee Engagement*.

### Notes on Effective Use

*Court User Satisfaction* should be assessed on a regular and continuous basis – preferably every six months. By tracking the average rating with one or more areas identified in the survey over time, court managers will be able to ascertain trends or changes associated with improvement initiatives against baselines established the first or second time the measure is taken.

For most court systems, comparisons of survey results across locations, for example, can be a useful basis for identifying successful improvement strategies. Different courts (of the same level) might be compared on the percent of users who believed that they were treated with courtesy and respect, and that everyone was treated equally, regardless of ethnic background or nationality.<sup>44</sup> Follow-up queries can then be made to probe the comparisons: Why are some locations more successful than others? What makes them the bright spots? What are they doing that the other locations are not? Asking staff in both the most successful and least successful locations these simple questions can help to identify “evidence based” good practices.

Generally, the relevant analysis is two-fold. First, each individual question should be examined to determine the respondents' views of the court's performance. The average response to one of the questions, an overall aggregate, or aggregate responses to two or more questions can be used as a baseline for future comparisons. Inferences can be drawn from the results of analyses of the responses of various subgroups of respondents (e.g., attorneys, litigants, frequent or infrequent users of the court). Is there a difference, for example, between respondents who use the court on a regular basis and those who used the court for the first time on the day of the survey? Do women, particularly those in court for family cases, feel less safe than men? Answers to the latter question may prompt an examination of the layouts of the courthouse and courtrooms.

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<sup>43</sup> Bar and Bench Survey, Montana Supreme Court Performance Measures: accessed 19 July 2018 at <http://courts.mt.gov/courts/statistics>.

<sup>44</sup> In a news release the day of the survey of court users of the Tetovo Basic Court in Tetovo (located in the Northeast of Macedonia where most of the ethnic Albanians live among the country's two million people), President Judge Dzemaili Arifi, the only judge of Albanian origin among Basic Court president judges in Macedonia, was particularly pleased to point out that Macedonians and Albanians were almost identical in their opinions that the Tetovo Basic Court does its job well, with 68 percent of Macedonians and 71 percent of Albanians strongly agreeing. Macedonia, Appendix (cited in note 26).

The responses to different items also can be examined in relationship to one another. Do the respondents' personal experiences with the court's accessibility tend to correlate with his or her views of how safe they felt in the court?

For the purposes of establishing baselines or control levels (e.g., performance levels below which the court will take immediate corrective actions), the responses to some or all of the questions can be aggregated to yield one or more scores (e.g., the percent of respondents who said it was easy or very easy to gain access to the court). Courts might consider establishing benchmarks for "poor," "adequate," and "good" ratings or "controls." For example, an "adequate" rating might mean that four out of five (80 percent) respondents agreed or strongly agreed that court personnel were helpful and treated them with courtesy and respect. Courts should then strive to meet the benchmark or control when conducting the measure in the future. Because different groups of respondents may experience different problems in different situations (e.g., cases), benchmarks or controls might differ for each group or situation.

## Measure 2. Access Fees

### Definition

The average court fees paid by litigants in civil cases disaggregated by court level (e.g., supreme, appellate, and first instance) or court type (e.g., commercial or probate), jurisdiction, case type, case and litigant characteristics (e.g., corporations or individuals), and litigants' ability to pay.

### Purpose

This measure is an indicator of a courts' success in ensuring that they are accessible to litigants in terms of the costs of access to a court's services, proceedings, and records. Those costs, i.e., court fees in civil cases for the purpose of this measure, should be reasonable, fair, and affordable.

Court rulings in civil cases benefit not only the immediate parties to a case, but everyone who uses or is affected by the civil justice system. Given the public and private benefits associated with court usage, it is appropriate that litigants bear a share of court costs through fees. Those fees should not, however, constitute a barrier to access to justice.

The five performance standards of the seminal *Trial Court Performance Standards*<sup>45</sup> in the performance area of access to justice require a court to eliminate unnecessary barriers to its services.<sup>46</sup> Such barriers can be physical, geographic, attitudinal, procedural, and financial. Specifically, Standard 1.5, "Affordable Costs of Access," recognizes the financial barriers to access to justice. Litigants and others who use the services of a court face three main financial barriers to effective access to the courts: court fees, third-party expenses (e.g., cost of a court reporter and transcripts for depositions of expert witnesses), and the cost of legal representation, mainly lawyer fees. Standard 1.5 requires that the court minimize its own fees<sup>47</sup> for access and participation in its proceedings and, where possible, scale its procedures and those of others under its influence or control to the reasonable requirements of matters before the court.<sup>48</sup>

Access to justice, including reasonable filing fees and other court costs, is among the ten universally accepted judicial values and areas of court excellence underpinning the IFCE. Access Fees can be considered highly relevant to IFCE's values of "Accessibility" and "Transparency," moderately relevant to the values of "Fairness" and "Equality," and somewhat relevant to "Impartiality" and "Integrity." The measure is relevant and "largely aligned" with one of the IFCE's areas for court excellence, "Affordable and Accessible Court Services,"

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<sup>45</sup> Commission on Trial Court Performance Standards (1995). *Trial Court Performance Standards with Commentary*. (Williamsburg, Virginia, US: National Center for State Courts: accessed 19 July 2018 at <https://www.ncjrs.gov/pdffiles1/161570.pdf> ("Trial Court Performance Standards"); see also Commission on Trial Court Performance Standards (1997); see also *Trial Court Performance Standards and Measurement System*: accessed 19 July 2018 from <https://www.ncjrs.gov/pdffiles1/161569.pdf> ("Trial Court Performance Standards and Measurement System").

<sup>46</sup> Some court fees may be considered necessary insofar they send appropriate price signals to potential litigants encouraging them to consider all appropriate options to resolve disputes.

<sup>47</sup> In some countries and jurisdictions, court fees are set by government and not by courts.

<sup>48</sup> *Trial Court Performance Standards* at 9 (cited in note 45).

moderately relevant to “Client Need and Satisfaction” and “Public Trust and Confidence,” and has some relevance to “Court Management and Leadership,” “Court Policies,” and “Human, Material, and Financial Resources.” It is against these values and areas of court excellence that the results of Measure 2 should be assessed.<sup>49</sup>

Arguably, Australia has paid more attention to this measure than any other country as part of its annual reporting on the equity, efficiency, and cost effectiveness in the Report on Government Services (ROGS).<sup>50</sup> The ROGS is a good source of information for courts contemplating the development and use of Measure 2.<sup>51</sup>

The framework of performance measures in Chapter 7 (Courts) of the ROGS focuses on meeting common objectives of court administration. The first of the objectives is to be “open and accessible.”<sup>52</sup> The measure “fees paid by applicants,” defined as average court fees paid per lodgment (filing), is used to monitor the affordability of court fees paid by litigants.

“Fees paid by applicants” is an indicator of governments’ achievement against the objective of providing services that are accessible to the community. Court fees may have a range of functions, including recovering costs and sending appropriate price signals to potential litigants (with the intention of ensuring that parties consider all appropriate options to resolve disputes).<sup>53</sup>

The Australian Productivity Commission’s latest ROGS includes extensive 2014-2015 data on fees paid by applicants in Australia’s five states at various levels of Australian courts including average civil court fees paid per case, civil court fees collected as a proportion of civil recurrent expenditure (cost recovery), court fee relief (waivers and reductions), exemptions, and cost recovery for civil courts, and the proportion of total payable civil court fees which were waived or reduced.<sup>54</sup>

The Productivity Commission recognized that court fees are only part of the broader legal costs faced by litigants,<sup>55</sup> citing its estimate in a separate study that court fees comprise approximately one tenth of a party’s full legal costs.<sup>56</sup> The Commission found that court fees

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<sup>49</sup> See Table 1 and 2 and accompanying text in Part I under the heading “Mapping Performance Measures, to Values and Areas of Excellence.”

<sup>50</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2016*, Vol. C (Justice) (Canberra: Productivity Commission). Volume C of this report, which is produced by the Productivity Commission, *supra* note 6, the secretariat of the Steering Committee, provides an overview of justice services, comprising police services (Chapter 6), civil and criminal courts’ administration (Chapter 7) and adult corrective services (Chapter 8). It provides an extensive overview of the justice sector, presenting both contextual information and high-level performance information.

<sup>51</sup> Detailed data quality information for fees paid by applicants as set against the seven Australian Bureau of Statistics (ABS) data quality framework dimensions is provided in an annex of Chapter 7 (Courts) of the ROGS. Productivity Commission at 2-3 (cited in note 8).

<sup>52</sup> *Id.*, at 7.19.

<sup>53</sup> *Id.*, at 7.20.

<sup>54</sup> *Id.*, at 7.21 – 7.25.

<sup>55</sup> *Id.*, at 7.21.

<sup>56</sup> Productivity Commission (2014). *Access to Justice Arrangements: Overview*, Inquiry Report No. 72 (Canberra: Productivity Commission): accessed 19 July 2018 from <http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>. The Commission noted that “[c]onsistent with this estimate, empirical studies have found that court fees are not a significant source of financial concern to litigants. Further,

are not set according to a common framework, vary widely across jurisdictions, and provide a significant subsidy to many parties who do not need it. For many parties, court fees do not provide an appropriate signal for the aim of encouraging parties to resolve disputes expeditiously. The Commission recommended that fees should be set to recover a greater proportion of costs depending on the characteristics of parties and the dispute, and that waivers should continue to be provided to disadvantaged litigants.<sup>57</sup>

In 2014, as part of an effort to bolster Serbia's aspirations to become a member of the European Union (EU), a project funded by the Multi-Donor Trust Fund for Justice Sector Support in Serbia and implemented by the World Bank,<sup>58</sup> used the measure of court access fees to benchmark Serbia's performance against that of the members of the EU. Court users cited the court-related costs as a considerable obstacle to access to the judicial system in Serbia. Fees are paid for every motion submitted, every decision rendered, and every court settlement reached in all litigious processes and commercial disputes. The schedule for court fees is complex, making it difficult for court users to estimate likely costs. Moreover, private businesses reported that the courts are becoming increasingly inaccessible to them due to high costs. Waiver of court fees is available for indigent court users, but implementation is uneven; for example, there are no guidelines or standardized forms for judges who grant a waiver and waivers go unmonitored. The World Bank recommended that Serbia simplify its court fee structure to enable users to estimate likely costs, remove the cap on court fees, standardize the court fee waiver process, and collect and analyze data on court fee waivers, recommendations that would align with EU standards and good international practice.<sup>59</sup>

### Methodology

Measure 2 is calculated by dividing the total court fees collected by the number of cases in a period of time (e.g., month, quarter, or year).

#### **Box 6. Formula for the Calculation of Access Fees**

$$\text{Average Access Fees} = \text{Total Fees Paid} / \text{Total Cases}$$

Calculating this measure requires the following data elements:

- 1) the total amount of court fees paid by all civil litigants over a specified period of time; and,
- 2) the total number of civil cases filed over that same period of time.

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recent fee increases in the federal courts have not significantly reduced filings, suggesting that fees do not pose a barrier to most parties at their current levels." *Id.*, 19.

<sup>57</sup> *Id.*, at 37.

<sup>58</sup> *Serbia Judicial Functional Review* (cited in note 23).

<sup>59</sup> *Id.*, at 183.

The result of this measurement is the ratio of these two elements – total court fees collected in a period of time (numerator) by the total cases (denominator) expressed as a percentage. Data reported for this measure are comparable and especially informative when disaggregated by court level, jurisdiction, case type, case and litigant characteristics (e.g., corporations or individuals), litigants’ ability to pay, and other variables. Further breakouts like those provided by the Australian Productivity Commission (e.g., waiver of fees),<sup>60</sup> provide additional insights. In most jurisdictions, the data for this measure is collected and compiled by a court’s administration or a court administration authority. In other jurisdictions, it is collected and compiled by the government’s executive branch.

### Notes on Effective Use

Access Fees is a measure of courts’ success in realizing the values and areas of court excellence of the IFCE. Consistent with the maxim “what gets measured gets attention,” the compilation and reporting of the data for this measure, even without much analysis, will go a long way toward achieving transparency, accountability, and integrity in jurisdictions where information about court fees is not readily available. For example, simple breakouts of fees assessed by first instance courts across a region or country and by case type will lead to these questions:

- Why are there significant variations across jurisdictions in the amounts of fees assessed for the same case type?
- Do differences in fees across case types reflect differences in the complexity and work requirements of the case and generally proportionate to the issues in dispute?
- Does the overall framework of the fees make any sense?
- Does it seem to have integrity?
- On its face, does a court fee for filing a particular type of case (e.g., modification of custody) seem unreasonable, unfair, and constitute a barrier to access?

Answers to these fundamental questions identify areas for improvement (e.g., setting of standards for uniform court fees across jurisdiction) even in the absence of further analysis.

Access fees, disaggregated by litigants’ ability to pay, highlight the utility of this measure. It provides insight into achievement of the IFCE’s core value of accessibility and success in setting court fees that prevent litigants from accessing the courts, which is essential to delivering affordable and accessible court services. For example, it is important to ascertain the average court fee paid by litigants identified as indigent (or other markers for ability to pay such as having been granted legal aid or holding a pensioner “concession” card) and how that compares with fees paid by litigants not so identified? If the average court fees paid by indigent litigants are substantial and the difference between the fees paid by indigent and well-to-do

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<sup>60</sup> Most courts can waive or reduce court fees to ameliorate the impact on financially disadvantaged parties and allow them to proceed at reduced or no cost.

litigants is slight, it is safe to assume there is little fee relief (an equity indicator) and consequently cost barriers to access to the courts for disadvantaged persons.



## Measure 3. Case Clearance Rate

### Definition

The number of outgoing cases (i.e., resolved, disposed, or closed) as a proportion of the number of incoming cases (i.e., filed, registered, or opened) expressed as a percentage.

### Purpose

*Case Clearance Rate* is an indicator of efficiency and productivity. Along with the companion measures, Measure 4, *On-Time Case Processing*, and Measure 7, *Case Backlog*, this measure arguably is the most used measure of court performance throughout the world. In addition to efficiency and productivity, it also can be an indicator of fundamental fairness insofar as the maxim attributed to the British politician William E. Gladstone (1809-1898) suggests — justice delayed is justice denied.

The purpose of this performance indicator is to help courts and judges:

- (1) to understand whether they complete as many cases as are registered; and
- (2) to identify similarities and differences between the case clearance rates for different types of cases and different periods of time.

This information can be used to help courts and judges to allocate resources better or to change processes to examine cases more efficiently.

Courts should monitor whether they cope with their workload by means of the case clearance rate regularly and permanently rather than once a year or once in several months. Knowing case clearance rates for various types of cases can help judges and court administrators to quickly identify issues and solutions.

The initial values of this indicator can serve as a baseline to answer the questions “What is our current level?” and “Where are improvements necessary?” Repeated assessments can show how the case clearance rate evolves over time in comparison with the baseline. The trends thus identified can quickly highlight the changes in the working mode of courts and answer the question “What results did our efforts to manage the caseload over the past months or from the beginning of this year yield?”

*Case Clearance Rate* is an indicator of whether or not a court or court system is keeping up with the demands for judicial services in terms of its incoming and outgoing caseload - the number of outgoing cases represented as a percentage of the number of incoming cases. A rate of 100 percent indicates the ability of the court or judicial system to resolve as many cases as the number of incoming cases within a given time period. If a court is “clearing” (i.e., resolving or disposing) fewer cases than are registered or filed, a current inventory of pending cases or worse, a serious backlog of cases, is inevitable.<sup>61</sup>

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<sup>61</sup> The terms “current inventory” and “backlog” refer to the two parts of a court’s total active pending caseload. “Current inventory” refers to those active pending cases that are not yet “old,” that is, not yet beyond the established time reference point. “Backlog” refers to all those active pending cases that have aged beyond the time reference point.

For example, a court that resolves or disposes 95,000 cases in a year in which a total number of 100,000 cases are registered or filed has a *Case Clearance Rate* of 95 percent ( $95,000/100,000 = 95$  percent). At this rate of incoming and outgoing cases held constant, the court will carry over an inventory of 5,000 “old” cases from one year to the next. If it continued at this level of performance (i.e., a 95 percent clearance rate) over a period of ten years, it would build a serious backlog of 5,000 cases a year and a total of 50,000 cases. This backlog would take the court more than a half a year to “clear” at its current level of performance (i.e., 95,000 cases per year) *if it accepted no new incoming cases*. Of course, under normal circumstances, a court must accept new cases. If the court in this example experienced the same rate of incoming cases as in the past (i.e., 100,000 a year), and if it mobilized and managed to improve its *Case Clearance Rate* 10 percent from 95 percent to a much more efficient rate of 104.5 percent, it would clear the equivalent of all of its incoming cases (i.e., 100 percent or 100,000) but still only chip away at its 50,000 case backlog at a rate of an additional 4.5 percent or 2,250 cases per year. At that rate, it would take the court *more than 22 years* to eliminate the backlog of 50,000 ( $50,000/2,250 = 22.2$  years).

This situation could even be worse. The example assumes that the “old” cases are of the same complexity and mix of outgoing cases. This assumption is often proven false by a comparison of cases in the backlog and a sample of incoming cases showing that “old” cases are more complex than the average current incoming cases. This may be a reason why these more complex cases languished. Unfortunately, old and more complex cases take longer to finalise and therefore an increasing backlog is not usually disposed of at the same rate as a “normal current” caseload.

Expressed as a single percentage, the clearance rate can be compared across court systems of different countries, across courts in a single country or region, and within a single court over time. Knowledge of case clearance rates, especially when disaggregated by case types and courts, can help pinpoint emerging problems of court delay and congestion and suggest where improvement efforts can have the greatest effects. For an individual court or court system, the initial results of Measure 3 can serve as a baseline, answering the question, “Where are we today?” Successive measures can show how the case clearance rate is trending over time compared against the baseline.

Assuming a steady flow of incoming cases, an improvement in a court’s clearance rate indicates increased efficiency and productivity. However, an increase in the clearance rate does not necessarily indicate efficiency and productivity gains. It can also occur as a result of a decrease in demand, i.e., when there are fewer incoming cases, something that occurred in Serbia between 2010 and 2014.<sup>62</sup>

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<sup>62</sup> Increases in clearance rates, particularly in the Basic, Commercial and Misdemeanor Courts, were largely due to falls in incoming cases, rather than improved performance. *Serbia Judicial Functional Review* at 27, 76-79 (cited in note 23).

## Methodology

The methodology for taking this measure is a close adaptation of the corresponding measure in the *CourTools* and closely follows the approach prescribed for that measure.<sup>63</sup> Reviewing the descriptions and methodology of the *CourTools*, which includes definitions, examples of analyses and interpretations, templates for calculating the measure, as well as reports of courts in the United States that have taken this measure, will be of benefit to courts seriously considering Measure 3, *Case Clearance Rate*.

Descriptions and concise operational definitions of the work that is handled by courts are fundamental to transparency and accountability for performance. Both are critical to the methodology of performance measurement of efficient and effective case processing. Typically, this is done by categorizing what might be dozens or more types of matters that come to the court into a reasonable number of well-defined case types. For the purposes of performance measurement, for example, the Montana State District Courts in the United States classified their cases as follows<sup>64</sup>:

1. Criminal
2. Civil
3. Child Abuse and Neglect
4. Juvenile
5. Adoptions
6. Domestic Relations
7. Paternity
8. Probate
9. Guardianship/Conservatorship
10. Commitments

Some courts may choose to reduce such case types further by aggregating some of them into “family” cases. A 2014 study comparing clearance rates of Serbian courts with those of European member states examined only six case types: non-criminal cases, civil and commercial litigious cases, civil and commercial non-litigious cases, enforcement cases, administrative, and other cases.<sup>65</sup>

*Case Clearance Rate* requires information about the number of incoming and outgoing cases, preferably disaggregated by case type, during a given period of time. It is critical that an “incoming” case and an “outgoing” case is operationally defined. Though there is a wide variation across jurisdictions, generally, an incoming case is one in which some filing or initiating document has been registered and a “case” taken on by a court. An outgoing case

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<sup>63</sup> *CourTools* (cited in note 6).

<sup>64</sup> Solely for the purposes of performance measurement, two case types, investigative subpoena and search warrants were not considered.

<sup>65</sup> *Serbia Judicial Functional Review* at 79 (cited in note 23).

is one that has been resolved, disposed, or otherwise closed or removed from the court’s caseload as evidenced by a “docket entry” in the case register.

*Case Clearance Rate* is calculated by dividing the total number of incoming cases by the number of outgoing cases as shown in Box 7.

**Box 7. Formula for the Calculation of Case Clearance Rate**

$$\% \text{ Clearance} = (A + B + C) / (D + E) * 100$$

A = Cases closed within time period  
 B = Dispositions of reopened cases within time period  
 C = Cases placed in suspended status in time period  
 D = Cases opened within time period  
 E = Cases reopened within time period

To obtain the clearance ratio for individual case types, the number of incoming cases is divided by the number of outgoing cases within each case type category.

The resulting data can be displayed very simply. For example, Table 4 shows test data from the automated case management system of seven types of cases filed (opened/reopened) and cases closed (closed/disposed) in the Flathead County District Court, Montana, in the United States, July through August 2008.

**Table 3. Clearance Rates by Case Type**

Case Type	Closed/Reclosed	Opened/Reopened	Clearance
Abuse and Neglect	14	19	74%
Civil	643	665	97%
Commitment	35	30	117%
Criminal	226	227	100%
Family	273	275	99%
Juvenile	39	35	111%
Probate/Guardianship	84	107	79%
<b>Total</b>	<b>1,314</b>	<b>1,358</b>	<b>97%</b>

**Notes on Effective Use**

As noted above, *Case Clearance Rate* is a relatively common performance measure for individual courts and court systems within a region or state. It is particularly attractive

because it is simple, clear, and actionable. Few would argue against a case clearance rate of 100 percent as an unambiguous benchmark of performance. Clearance rates below 100 percent for a court system as a whole, for an individual court, a particular court location, or a segment of cases (e.g., commercial cases) are cause for concern. Even for a relatively short period of time, clearance rates below 100 percent spell trouble in the form of delay, backlog, and congestion. Even in the absence of known causes, lower than expected case clearance rates are actionable insofar as variations in the rates across court levels, courts, court locations, case types, and other variables can pinpoint “trouble spots” where court leaders and managers can focus resources. For example, among the case clearance rates for the seven case types displayed in Table 3 above, two case types – abuse and neglect cases and probate/guardianship cases are problematic.

*Case Clearance Rate* has been used increasingly to compare court performance across countries and to benchmark one country’s performance against others. Every two years over the last decade, the 47 member states of the Council of Europe — from Azerbaijan to Iceland — report on the efficiency and quality of their judicial systems using two main indicators, clearance rate and the disposition time. The reports are compiled and analyzed by the European Commission for the Efficiency of Justice (CEPEJ).<sup>66</sup> The fifth biennial edition of CEPEJ’s report, *European Judicial Systems – Edition 2014 (2012 Data): Efficiency and Quality of Justice*<sup>67</sup> reports the result of the evaluation of the judicial systems of 45<sup>68</sup> of the 47 countries in the Council of Europe (Lichtenstein and San Marino did not provide data). A significant advancement over previous CEPEJ’s evaluations, the report is a treasure trove of information that deserves the attention of policy makers and justice professionals, academics and researchers, especially those who are reform-minded.

The database for the Report consists of the responses to CEPEJ’s 208-item survey by “national correspondents” of the 45 countries, supported by CEPEJ members, observers, and experts. CEPEJ has done extensive work to verify and to improve the quality of the data submitted by the member states including frequent contacts with the national correspondents to validate or to clarify the submitted data.

Issues addressed in the CEPEJ report include not only “supply” side questions (e.g., numbers of courts within and across countries over time; and public expenditures for courts, prosecution, and legal aid per inhabitant) but also “demand” side questions (e.g., the number of land registry cases handled by courts). How courts are actually performing is answered in terms of their case clearance rates and case disposition times? These issues and many more

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<sup>66</sup> CEPEJ is a body made up of qualified experts from 47 member states of the Council of Europe: accessed July 19 2018 at <https://www.coe.int/en/web/cepej/about-cepej>.

<sup>67</sup> European Commission for the Efficiency of Justice (CEPEJ) (2015). *European Judicial Systems – Edition 2014 (2012 Data): Efficiency and Quality of Justice* (Strasbourg: CEPEJ): accessed 19 July 2018 from <https://rm.coe.int/european-judicial-systems-edition-2014-2012-data-efficiency-and-qualit/1680785d95> (“*European Judicial Systems*”).

<sup>68</sup> Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom.

are addressed in 500-plus pages of text and over 250 figures and tables divided into 18 chapters, as well as two appendices containing the survey in its entirety and an extensive note with general comments and question-by-question explanations of each of the 208 survey items.

Clearance rates are analyzed and evaluated in Chapter 9, *Court Efficiency*.<sup>69</sup> They are highlighted by a series of tables and figures including: (a) clearance rates for civil (and commercial) litigious and non-litigious cases in first instance courts in the member states; (b) the number of first instance incoming and resolved civil (and commercial) litigious and non-litigious cases per 100,000 inhabitants in 2012; and (3) the evolution of the clearance rate of civil litigious cases between 2006 and 2012. Results showed that the most productive civil (and commercial) first instance court systems in 2012 were those in Azerbaijan, Georgia, Hungary, Lithuania, Luxembourg and Ukraine; Austria, Armenia, Denmark, Estonia, Germany, Russian Federation, Macedonia, and Turkey. In contrast, first instance courts in Greece, Slovakia, as well as in Croatia, Poland, and Portugal were shown to have difficulties in handling their incoming cases.

As part of an effort to bolster Serbia's aspirations to become a member of the European Union (EU), a project funded by the Multi-Donor Trust Fund for Justice Sector Support in Serbia and implemented by the World Bank<sup>70</sup> used case clearance rates to benchmark Serbia's performance against that of the members of the EU. Clearance rates were found to have risen from 2010 to 2014 in line with EU averages and are now consistently over 100 percent (see figures below), but this success was found to be due largely to declines in incoming cases. This is an improvement on previous performance. However, as noted by the World Bank, Serbia has nearly twice the European average for judges per 100,000 inhabitants, as well as a declining number of incoming cases, this "improvement" should not be surprising.<sup>71</sup>

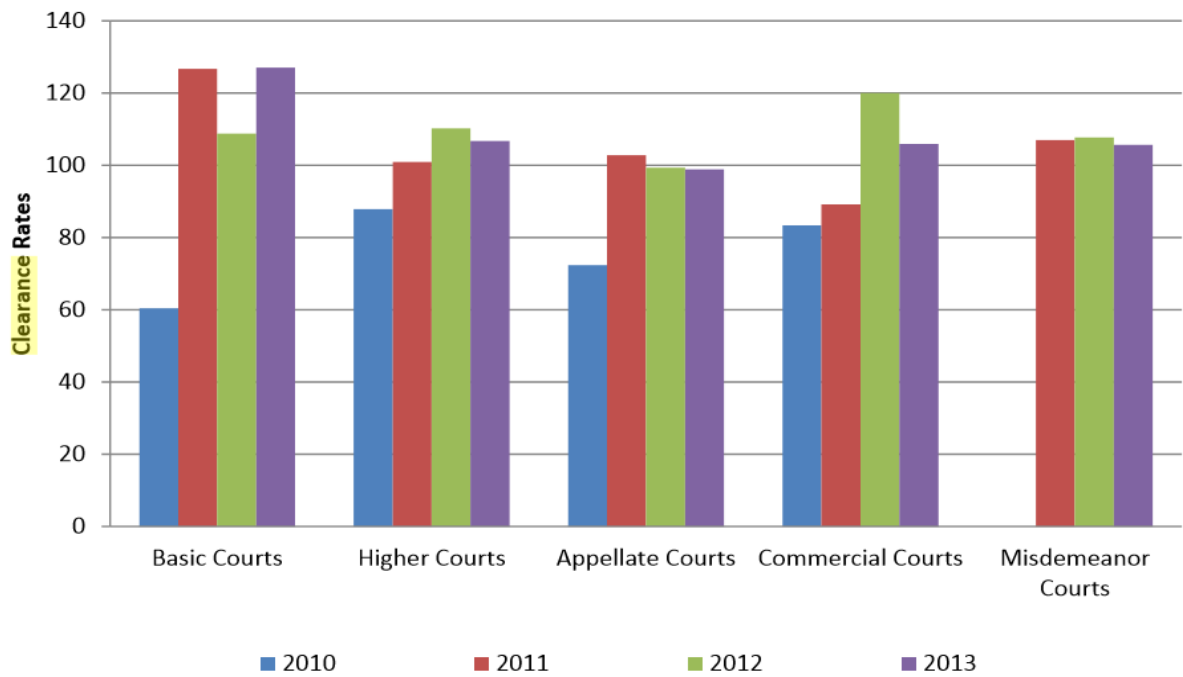
**Figure 2. Case Clearance Rates in Courts in Serbia, 2010-2013**

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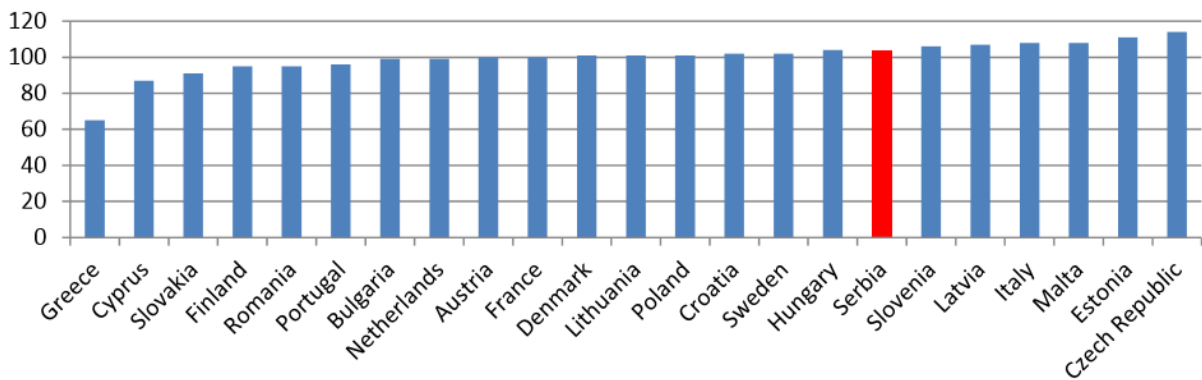
<sup>69</sup> *European Judicial Systems* at 188 – 263 (cited in note 67).

<sup>70</sup> *Serbia Judicial Functional Review* (cited in note 23).

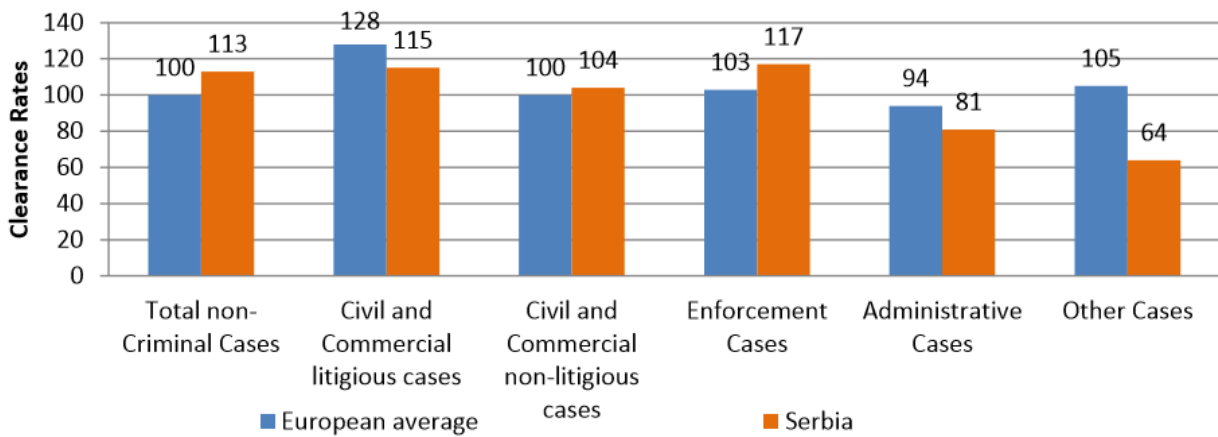
<sup>71</sup> *Id.*, at 79.



**Figure 3. Clearance Rates for Non-Criminal Cases Serbia and EU Countries in 2012**



**Figure 4: Clearance Rates by Case Type, Serbia and EU Average, 2012**



## Measure 4. On-Time Case Processing

### Definition

The percentage of cases disposed or otherwise resolved (closed) within established time reference points (e.g., 365 days for serious criminal cases) by case type in a specified time period (e.g., month, quarter or year).

### Purpose

*On-Time Case Processing* provides information about the length of time it takes a court to process cases of different types. It allows comparison of case processing times against local, state, and national guidelines, and international benchmarks.

Timeliness is one of the eleven values of the IFCE. “Timeliness reflects a balance between the time required to properly obtain, present, and weigh the evidence, law and arguments, and unreasonable delay due to inefficient processes and insufficient resources.”<sup>72</sup> Aligned with the values of the IFCE, this core performance measure is an indicator of the certainty, predictability, timeliness and efficiency of case processing.

Court systems should resolve cases expeditiously. Although virtually all litigants and other court users want their cases resolved as quickly as possible, adequate review of a case requires careful consideration by a court. Thus, on-time case processing is a balance between the time needed for review and the court’s commitment to expedite the issuance of a decision.<sup>73</sup>

By resolving cases within established time frames, a court increases trust and confidence in the judicial process.<sup>74</sup> This measure, especially when used in conjunction with Measure 3, *Case Clearance Rate*, Measure 7, *Case Backlog*, and Measure 8, *Trial Date Certainty*, is a management tool for courts to assess and to manage timeliness and efficiency. *On-Time Case Processing* provides information about the length of time it takes to process cases. It allows comparison of case processing times with local, state or national guidelines, and evaluation of the degree of compliance with these guidelines. It is calculated from case processing information drawn from automated case information systems or, in non-automated systems, collected from a random sample (or the population) of cases reaching the final outcome.

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<sup>72</sup> *International Framework* at 4 (cited in note 3).

<sup>73</sup> In her comparison of court efficiency measures of various countries, Maria Dakolias points out what other scholars have suggested: the causal relationship between reforms and success in reducing on-time case processing may be difficult to ascertain. For example, courts in different jurisdictions and different countries will tend to adjust their timeliness of case processing to their unique “equilibrium level.” When workload increases and contributes to increased delay, they will become more efficient and return to their equilibrium level. Dakolias (cited in note 10).

<sup>74</sup> See Standard 2.50, American Bar Association (1992). *Caseflow Management and Delay Reduction: General Principle. ABA Standards Relating to Court Delay Reduction American Bar Association*: “From the commencement of litigation to its resolution, whether by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery, and court events, is unacceptable and should be eliminated. To enable just and efficient resolution of cases, the court, not the lawyers or litigants, should control the pace of litigation. A strong judicial commitment is essential to reducing delay and, once achieved, maintaining a current docket.”



## Methodology

The approach for taking this measure is a close adaptation of the corresponding measure in the *CourTools* and closely follows the method prescribed for that measure.<sup>75</sup> Reviewing the methodology of this measure in the *CourTools* may be particularly helpful for considering technical issues not explored here, such as how to count suspended cases and the related issue of how the elapsed time of cases processing should be counted for particular kinds of cases (e.g., a civil contract case that is “interrupted” by bankruptcy proceedings and considered inactive for case processing until the resolution of the bankruptcy matter is settled, whereupon the contract case resumes and elapsed time continues to be counted).

Requirements for calculating this measure include four critical elements:

- 1) the identification and definition of case types;
- 2) the operational definition of the filing (opening) and resolution (disposition, closing or suspension) of each type of case, as well as the significant case processing milestones in between;
- 3) the establishment of time reference points, or the identification of established benchmarks and standards of timeliness for each case type (e.g., 150 days from filing to decision for criminal cases); and,
- 4) the number of elapsed days from opening to closing of a case.

*On-Time Case Processing* is calculated for all cases aggregated (overall) and disaggregated for each case type as described in the box below.

### **Box 8. Formula for the Calculation of *On-Time Case Processing***

$$\% \text{ On-Time} = ((A + B)/C) * 100$$

**A** = Cases closed within the reporting period that do not exceed the time reference points (e.g., 365 days)

**B** = Cases suspended within the reporting period that do not exceed the time reference points

**C** = All cases closed or suspended within the reporting period

### **Box 9. Calculated Disposition Time: The CEPEJ Proxy Measure for *On-Time Case Processing***

In the absence of data on the actual elapsed time required to process a case (i.e., actual number of elapsed days from case initiation to resolution), the European Commission for the Efficiency of Justice (CEPEJ), including the 47 member states of the Council of Europe and a number of non-member countries (e.g., Kenya), recommends the use of a proxy measure for *On-Time Case Processing*, “calculated disposition time” or DT, which includes another measure “case turnover ratio,” in its denominator (see below). DT is conceptually identical to Measure 4 *On-Time Case Processing* but its assumptions, methodology, and calculation are quite different. A proxy is a measure that is not in itself directly relevant, but that serves in place of an unmeasurable metric, i.e., in this discussion, the actual elapsed days to resolve a case.

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<sup>75</sup> *CourTools* (cited in notes 6).

CEPEJ explains, in paragraphs 43 of its report, “Measuring the Quality of Justice,” that the actual time elapsed between the date on which a new case is initiated and the date when the judgement is issued is the preferred measure, but “the legal systems do not always have the database containing information relating to the effective duration” (CEPEJ, 2016: accessed 19 July 2018 from <https://rm.coe.int/1680747548>.) Therefore, CEPEJ recommends the use of the proxy measure DT, but only for courts and court systems that do not have the data for *On-time Case Processing*.

DT used as a proxy for *On-Time Case Processing* is based on several assumptions that might be problematic and should be carefully considered before DT is used. Court systems and individual courts should not compare results obtained by *On-Time Case Processing* and DT. First, *all other things being equal*, DT assumes that the time it takes courts to process cases is directly related to the accrual of cases in their inventories of pending cases. On its face, this is a logical assumption. The more cases in the inventory of cases awaiting processing, the longer it will take to process cases on average. The accuracy of this estimate rests on another related assumption that the larger the case turnover ratio, the longer it will take a court to resolve incoming cases. However, this assumption is valid only if a court adheres *strictly* to a “first in, first out” policy of case processing as opposed to a “last in, first out” policy. This means that under this policy a court tackles its docket in chronological order. “Older” cases, no matter how long they have been awaiting processing, are disposed of first before any new cases are processed. This would be an extraordinary policy in practice, especially in situations where a court’s backlog is great. Consider why a court would routinely process a ten-year old case before it would initiate a case just filed, letting the new filing languish for years.

To increase understanding of DT and make it more intuitively appealing as a proxy for *On-Time Case Processing*, CEPEJ converts the case turnover ratio into elapsed days and reports it as “disposition time” in terms of number of days. As stated by CEPEJ, “translation of the result [case turnover ratio] into days simplifies the understanding of what this relationship entails. For example, a lengthening of a judicial disposition time from 57 days to 72 days is much easier to grasp than a decline in case turnover ratio from 6.4 to 5.1. While this conversion into elapsed days makes it more understandable for comparing a judicial system’s turnover with the projected overall length of proceedings or established standards for the duration of proceedings, DT remains, at best, a very rough estimate that has questionable validity. Taken together, these assumptions and the steps of calculation of the proxy might be considered convoluted and somewhat confusing.

DT is computed in two steps. First, the number of resolved cases during the observed period is divided by the number of *all unresolved cases* at the end of the observed period, i.e., the case turnover ratio. (This calculation is similar to the calculation of Measure 3 *Case Clearance Rate* with one importance difference: Measure 3 calculates the ratio of outgoing cases to incoming cases in the same period of time, whereas case turnover ratio compares the number of outgoing (resolved) cases to the number of all unresolved cases, regardless how long they have been in the system.) Second, the turnover ratio is converted into the number of calendar days in a year by dividing 365 by the turnover ratio.

$$\text{Step 1: Case Turnover Ratio} = \frac{\text{Number of Resolved Cases}}{\text{Number of Unresolved Cases}}$$

$$\text{Step 2: Calculated Disposition Time} = \frac{365 \text{ days}}{\text{Case Turnover Ratio}}$$

A simpler one-step way of calculating DT yielding the same result is as follows:

$$\text{Calculated Disposition Time} = \frac{\text{Number of Unresolved Cases} * 365 \text{ days}}{\text{Number of Resolved Cases}}$$

CEPEJ provides two examples. A court with 60 incoming cases that can resolve 50 of those cases in 365 days, leaving 10 cases unresolved, has a disposition time of  $10/50 * 365 = 73$  days. If the court receives 90 cases in a year but still can resolve only 50, leaving 40 cases unresolved, the DT increases to  $40/50 * 365 = 292$  days.

As acknowledged by CEPEJ, the DT does not provide a clear estimate of the average actual time needed to process cases. It can result in estimates that are unrealistic and misleading for courts with relatively large inventories of pending cases (i.e., backlogs). For example, a court that has a long-standing large inventory of pending unresolved cases (i.e., a backlog) totalling 50,000 at the end of a year in which it only resolved 5,000

cases, will have DT of  $50,000/5,000 * 365 = 3,650$  days or ten years. It is highly unlikely that *On-Time Case Processing*, as calculated for Measure 4, would be anywhere near 3,650 days. Nor would it be likely that a judge or court administrator, except in extraordinary situations such as that in the New Delhi Court mentioned in footnote 118 and accompanying text, state publicly that the average time to disposition in the court is a decade and that trial dates for new filing might have to be scheduled ten years into the future. However, as a proxy for on-time case processing *in the absence of actual data* on the amount of time needed to process cases, DT has some limited utility.

*On-Time Case Processing* may be expressed in terms of the number of cases, the mean elapsed days, the median elapsed days, and the 90th percentile of elapsed days. Further, for each case type, the measure can be expressed in terms of (a) the number of cases, (b) the percent, and (c) the cumulative percent of cases disposed in 25, 30, 60 or 90-day increments to some appropriate upper limit (e.g., over 730 days).

Much, if not all, of the information that is needed to make the calculations for this measure may be obtained from a court's automated case management system or collected from a random sample (or, in courts with smaller caseloads, the entire population) of cases reaching the first and final outcome. If all information is not available from a case management system, a court may need to evaluate whether the information should be obtained manually or if reprogramming of the system is preferable.

Because this measure is designed to capture the actual time that a case is considered "active" with the court, the number of days (if any) that a case was placed on inactive status during the reporting period for whatever reasons deemed appropriate by the court (e.g., elapsed days in bankruptcy proceedings in a civil contract case) should be subtracted from the measure. In such cases a court will take no further action until an event (e.g., resolution of the bankruptcy proceedings) restores the case to the court's active caseload.

### Notes on Effective Use

As a court uses and develops the measure of *On-Time Case Processing*, it can begin to look at a more finely-grained picture. For example, an appellate court might analyse and interpret breakouts of the overall value across all dimensions as follows.

#### **Time from Appeal Request to Decision/Disposition**

- Overall across all case types and all courts
- By case type
- By legal or factual issues raised on appeal
- By type of conviction code/severity of offense
- By legal representation on appeal
- By state, region, county, and court
- By total number of issues presented
- By appellate court disposition (e.g., reversed, affirmed, dismissed)
- By type of opinion (e.g., full, memorandum)
- By total of issues addressed by opinion

### **Time Between Appeal Processing Milestones**

- Appeal requested
- Appeal granted/denied
- Record filed
- Transcript filed
- Appellant's initial brief filed
- Reply briefs filed
- Briefing completed
- Oral argument
- Decision/disposition

### **Elements of Court Structure and Organization**

- Structure and jurisdiction of the court
- Specific death penalty procedures, if applicable
- Number and characteristics of official positions
- Case processing milestone deadlines
- Authority to compel parties to meet deadlines
- Docketing procedures
- Sentencing guidelines
- Rules for decision/opinion availability
- On-line access

## Measure 5. Duration of Pretrial Custody

### Definition

The average elapsed time criminal defendants who have not been convicted of crime are detained awaiting trial.

### Purpose

Because the presumption of innocence is a universal principle, prolonged pretrial detention whereby criminal defendants are in effect punished before they are tried, should be the exception used sparingly. “Few rights are so broadly accepted in theory, but so commonly abused in practice,” writes Martin Schönleich in the Open Society Foundations’ 2014 publication, *Presumption of Guilt: The Global Overuse of Pretrial Detention*. “It is fair to say that the global overuse of detention is one of the most overlooked human rights crises of our time.”<sup>76</sup>

*Duration of Pretrial Custody* is an easily understood measure that resonates with ordinary citizens<sup>77</sup> and policy reformers alike who worry about the injustices, as well the attendant financial burdens and societal costs, of prolonged and unjust pretrial detention.<sup>78</sup> It brings people together for joint work on improvements across institutional boundaries – the courts, law enforcement, jails, prosecution, and defense services.

Individuals in pretrial custody account for roughly one-third of all incarcerated individuals globally according to some estimates.<sup>79</sup> *Duration of Pretrial Custody* is a performance measure with the potential of having an outsized effect. It has drawn the attention not only of justice system insiders (judges, prosecutors and defense attorneys, and law enforcement and corrections officials) but also of many groups and individuals outside the formal justice systems who care about reducing crime, ensuring public safety, fighting poverty, reducing costs, making wise use of public resources, combating disease, promoting human rights, and making our legal systems more just. *Duration of Pretrial Custody* taps fundamental values such as equality

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<sup>76</sup> Martin Schönleich (2014). *Presumption of Guilt: The Global Overuse of Pretrial Detention* (New York, NY: Open Society Foundations) at 1: accessed 19 July 2018 from <https://www.opensocietyfoundations.org/publications/presumption-guilt-global-overuse-pretrial-detention> (“*Presumption of Guilt*”).

<sup>77</sup> “The best indicators make intuitive sense to most people who hear about them. That means that they should be expressed in units with which most people are comfortable. For example, avoiding references to legal categories or stages of judicial proceedings and instead building indicators that speak about days in custody can help the wider public understand and use the indicators in their own conversations about safety and justice.” Vera Institute of Justice (2003). *Measuring Progress Toward Safety and Justice: A Global Guide to the Design of Performance Indicators Across the Justice Sector*. (New York, NY: Vera Institute), 12: accessed 19 July 2018 from [https://storage.googleapis.com/vera-web-assets/downloads/Publications/measuring-progress-toward-safety-and-justice-a-global-guide-to-the-design-of-performance-indicators-across-the-justice-sector/legacy\\_downloads/207\\_404.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/measuring-progress-toward-safety-and-justice-a-global-guide-to-the-design-of-performance-indicators-across-the-justice-sector/legacy_downloads/207_404.pdf) (“*Global Design of Performance Indicators*”).

<sup>78</sup> See, generally, *Presumption of Guilt* (cited in note 76); and Ram Subramanian et al. (2015). *Incarcerations Front Door: The Misuse of Jails in America* (New York, NY: Vera Institute of Justice): accessed 19 July 2018 at <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf>.

<sup>79</sup> *Presumption of Guilt* at 1 (cited in note 76).

and access to justice, as well as expedition and timeliness, embodied by the IFCE.<sup>80</sup> It is a measure with global reach that can become the rallying point of reform efforts that depend on justice system partners working together.

Prolonged unjust detention, the inequitable treatment of incarcerated pretrial defendants who are poor or belong to marginalized groups, and the staggering financial and social costs of jail and prison overcrowding are societal problems common throughout the world. Almost one third of the prisoners around the world are pretrial detainees and, collectively, the roughly 3.3 million pretrial defendants in custody *on any day* spend 660 million days in pretrial detention.<sup>81</sup> This can be especially devastating for people living in poverty.

In Bangladesh, prisons are severely overcrowded and imprisonment simply means “locking away” defendants without offering prospects for rehabilitation or reintegration into society. Almost 70 percent of prisoners in Bangladesh are held in pretrial detention,<sup>82</sup> a percentage equaled or exceeded by some regions and countries in South and Central America and Africa, according estimates by the World Bank (see Table 4).<sup>83</sup> While there are different ways of measuring the problem (e.g., percent of prisoners unsentenced, the number of pretrial detainees as a proportion of all prisoners or as a proportion of a country’s entire population, and as the average duration of pretrial custody), and considerable variations within and across countries, the extent of overuse of pretrial detention is staggering.<sup>84</sup>

**Table 4. Percent of Untried and Unsented Prison Inmates in Selected Regions and Countries in 2005**

Country	Untried and Unsented Inmates (%)
England and Wales	34.9
United States	21.2
South Africa	27.0
Nigeria	64.3

<sup>80</sup> See supra Table 1, “Alignment of the Ten Core Court Values and Eleven Core Court Performance Measures of the *Global Measures*, in Part 1.

<sup>81</sup> *Presumption of Guilt* at 1 (cited in note 76).

<sup>82</sup> Deutsche Gesellschaft für Internationale Zusammenarbeit (2014) “Justice and prison reform for promoting human rights and preventing corruption.” Accessed 19 July 2018 at <https://www.giz.de/en/worldwide/15042.html>.

<sup>83</sup> Dory Reiling, Linn Hammergren & Adrian Di Giovanni (2007). *Justice Sector Assessments: A Handbook* (Washington, D.C.: The World Bank), 63-64 (“Reiling et al”): accessed 19 July 2018 at <http://documents.worldbank.org/curated/en/803711468338346161/pdf/437070WP0Box3210March0200701PUBLIC1.pdf>.

<sup>84</sup> For an informative overview of the extent of pretrial detention around the globe using different measures, see *Presumption of Guilt* at 15-27 (cited in note 76).

Honduras, Paraguay, and Uruguay	90.0
Dominican Republic, Haiti, Peru, and Venezuela	65.0 – 85.0
Argentina	89.0

Source: The World Bank

Many pretrial detainees are low-risk or moderate-risk defendants who are unlikely to commit other crimes and who can often be managed through supervision, monitoring, or other interventions in the community. Among low- and moderate-risk defendants, the length of pretrial detention is positively associated with the likelihood that pretrial detainees will reoffend.<sup>85</sup> Pretrial detention is associated with a greater likelihood that defendants who eventually come to trial will be sentenced to jail or prison instead of release and community supervision, as well as given longer sentences than other defendants who are similar in every known way except their pretrial release status. Prolonged pretrial detention can also have negative impacts on a nation’s public health. Evidence indicates that the risk of exposure of pretrial detainees as well as other detainees and prison guards to infectious diseases such as HIV and tuberculosis is heightened, particularly where prisons are overcrowded.<sup>86</sup>

On September 25, 2015, the United Nations General Assembly adopted the Sustainable Development Goals (SDGs), officially known as “Transforming Our World: The 2030 Agenda for Sustainable Development.”<sup>87</sup> To measure the success of Goal 16, referred to as the “justice goal,”<sup>88</sup> the United Nations Statistical Commission working with an Inter-Agency and Expert Group on SDG Indicators,<sup>89</sup> recommended the provisional indicator, “percentage of

<sup>85</sup> Laura and John Arnold Foundation (2016). *Pretrial Criminal Justice Research: Research Brief*: accessed 19 July 2018 from [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf).

<sup>86</sup> Open Society Foundations (2011). *Improving health in pre-trial detention: Pilot Interventions and the Need for Evaluation*: accessed 19 July 2018 <https://www.opensocietyfoundations.org/fact-sheets/improving-health-pretrial-detention>.

<sup>87</sup> General Assembly resolution 70/1, *Transforming our World: the 2030 Agenda for Sustainable Development*, A/RES/70/1 (Sept. 25, 2015), p. 14, available from [undocs.org/A/RES/70/1](http://undocs.org/A/RES/70/1).

<sup>88</sup> Ingo Keilitz (2016). “The Trouble with Justice in the United Nations Sustainable Development Goals 2016 – 2030.” *William & Mary Policy Review*, Volume 7, Issue 1, 74-103.

<sup>89</sup> United Nations Statistical Commission. *Technical Report on the Process of the Development of an Indicator Framework for the Goals and Targets*. (New York: United Nations, March 6, 2015).

total detainees who have been held in detention for more than 12 months while awaiting sentencing or a final disposition of their case,”<sup>90</sup> a measure wholly consistent with Measure 5, *Duration of Pretrial Custody*. Commenting on the SDGs, Samantha Powers, the former U.S. Representative to the United Nations, noted that a variation of Measure 5 – unsentenced detainees as a percentage of the overall prison population — was “the only single agreed upon indicator to track progress on equal access justice.”<sup>91</sup>

Because it is clear, focused, and actionable, and because it is an easily understood indicator of an entrenched social problem, *Duration of Pretrial Custody* is a potential rallying point for reform and improvement efforts that can bring government, citizens, groups, and organizations together in what has been referred to as the “solution economy.” In such an economy, justice institutions, social enterprises, and businesses can collaborate to reduce the average duration of pretrial custody, thereby not only creating efficiencies in court case processing that may not only reduce the prison population, but also address a host of related social problems.<sup>92</sup>

## Methodology

Courts considering *Duration of Pretrial Custody* should review the methodology of Measure 4, *On-Time Case Processing*. From a methodological viewpoint, *Duration of Pretrial Custody* can be seen as a more finely-grained variant of *On-Time Case Processing*<sup>93</sup> insofar as it focuses on the time elapsed between two case processing milestones: the date a defendant in a criminal case is detained and taken into custody and the date of his or her trial. As suggested in the description of the Methodology of Measure 4, most of the information that is needed to make the calculations for this measure may be obtained from a court’s or a detention facility’s statistics, ideally available from automated case management systems. In the absence of systems in courts and prisons, the data for *Duration of Pretrial Custody* may need to be collected manually from a random sample or, in smaller jurisdictions, the entire population of detained defendants.

Much like the other measures of the *Global Measures*, successful development of *Duration of Pretrial Custody*, begins with establishing common definitions. As noted by Martin Schönreich, agreeing on the operational definitions of the criminal status of “pretrial detention” and the identity of “pretrial detainees” is not as easy as it might seem. Nomenclature may be confusing. He notes that in English-speaking countries alone, pretrial detainees may be referred to as “remand prisoners”, “remandees”, “awaiting trial detainees”, “untried prisoners”,

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<sup>90</sup> *Id.*, at Annex 5: accessed 19 July 2018 from [https://sustainabledevelopment.un.org/content/documents/6754Technical%20report%20of%20the%20UNSC%20Bureau%20\(final\).pdf](https://sustainabledevelopment.un.org/content/documents/6754Technical%20report%20of%20the%20UNSC%20Bureau%20(final).pdf).

<sup>91</sup> Samantha Powers (2016). “Remarks at the United Nations Event on Access to Legal Aid as Measure of Access to Justice.” New York City, February 24, 2016.

<sup>92</sup> Ingo Keilitz & Harold Epineuse (2014). “A Solution Economy in Justice Reform.” Deloitte University Press: accessed 19 July 2018 from <https://www2.deloitte.com/insights/us/en/topics/social-impact/justice-reform-social-change.html>.

<sup>93</sup> In their 2007 review, the World Bank’s Dory Reiling, Linn Hammergren and Adrian Di Giovanni express this view noting that in “criminal cases, the rates of pretrial detention have been used as proxy indicators for delay.” Reiling et al at 63 (cited in note 83).



“unconvicted prisoners’, or “unsentenced prisoners’.<sup>94</sup> The definitional issues that need to be resolved are suggested by this excerpt of Schönteich’s exploration of the issues:

Persons popularly understood to be pretrial detainees can fall into one of four categories. In chronological order, according to the flow of the criminal justice process, the categories are: (i) detainees who have been formally charged and are awaiting the commencement of their trial; (ii) detainees whose trial has begun but has yet to conclude with a finding of guilt or innocence; (iii) detainees who have been convicted but not sentenced; and (iv) detainees who have been sentenced by a court of first instance but who have appealed against their sentence or are within the statutory time limit for doing so. In some countries, notably in common law jurisdictions, persons falling in the last category are not classified as pretrial detainees ...

Generally not included in the definition of pretrial detention are arrested persons or suspects who have not yet appeared in front of a judicial officer for a determination whether they should be released or detained awaiting trial (also known as “remanded in custody”). Also excluded from most countries’ count of the pretrial detention population are asylum seekers, undocumented migrants, and others held administratively.<sup>95</sup>

Similar but more restricted than those for Measure 4, the requirements for *On-Time Case* include:

- 1) the identification and definition of the criminal case types involving pre-trial detention;
- 2) the operational definitions of the two case processing milestones, i.e., custody date and trial date; and,
- 3) the number of elapsed days between those two milestones.

Simple statistics describing the average (mean), median, range, and variance of the time defendants spend in pretrial custody can be computed across numerous variables and disaggregated by criminal case type, location and units of courts, and locus of detention (jails, prison, and police lock-ups), defendant characteristics (such as income level), type of prosecution and defense, and other factors.

As noted by the Vera Institute, divergence of the mean and median days of pretrial custody may be an indicator of inequality of treatment. For example, long pre-trial detention may be concentrated in a small proportion of the detained population, inflating the mean but not the median. When mean and median diverge, it is a signal to identify the characteristics of those defendants with long stays.<sup>96</sup>

Depending on the ease or difficulty of acquiring the required data, calculations may include the mean and median days that defendants are in custody, the 90th and 99th percentile in days, as well as the number of defendants, percent of defendants, and cumulative percentage

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<sup>94</sup> *Presumption of Guilt* at 12 (cited in note 76).

<sup>95</sup> *Id.*, footnotes omitted.

<sup>96</sup> *Global Design of Performance Indicators* at 28 (cited in note 77).

in various durations of pre-trial detention (e.g., 10 days or fewer, 11 – 25 days, 26 – 50 days, 51 – 100 days, more than 100 days).

**Box 10: Formula for the Calculation of Duration of Pretrial Custody**

$$\text{Average Duration of Pre-Trial Custody} = A/B$$

**A** = Total number of elapsed days spent by criminal defendants in pre-trial custody within a specified time period (e.g., year)

**B** = Total number of pre-trial criminal defendants

A 2015 report by the Open Society Foundations' Justice Initiative, *Strengthening Pretrial Justice: A Guide to Effective Use of Indicators*,<sup>97</sup> is a valuable guide for developing, refining, and deploying measures of pretrial detention such as *Duration of Pretrial Custody* to obtain a picture of how a pretrial justice system is performing and to identify both exemplary and problematic pretrial practices. In addition to notes on how to take the measure, the report describes the measure's strengths, weaknesses, disaggregated data, and ancillary uses.

#### Notes on Effective Use

Many jurisdictions face mandates to eliminate the overuse and misuse of pretrial detention, alleviate jail overcrowding, and address the myriad attendant societal problems. Ideally, a coalition of justice system partners should build the business architecture (e.g., identification of system success factors) and technical architecture (e.g., query and reporting application) to support continuous monitoring, analyzing and managing the performance of various partners using Measure 5. Justice system leaders and managers can be seen as responsive, and reap considerable political capital in their communities, simply by (a) establishing a baseline of the median number of days defendants spend in pretrial custody, and by (b) vowing to examine case processing and important pretrial issues (e.g., warrants, initial appearance/arraignment, plea agreements, bail decision making, pretrial services, and alternative sentencing) that, if addressed, might reduce the number of days defendants spend in jail before trial. If, in fact, the trend of *Duration of Pretrial Custody* is downward over time, it demonstrates that courts and their justice system partners are doing something to address injustice and alleviate jail overcrowding.

Relying on the clear, focused, and actionable measure such as *Duration of Pre-Trial Custody* to reduce pretrial detention provides the quintessential opportunity to measure not only timeliness and responsiveness, but also fundamental fairness, that depend on the combined and sustained efforts of courts, police, prosecution, defense and jails. Successfully implementing large-scale improvement initiatives that depend on the joint efforts across the justice system but that are not as focused often run into intractable justice system governance

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<sup>97</sup> Open Society Justice Initiative (2015). *Strengthening Pretrial Justice: A Guide to Effective Use of Indicators* (New York, NY: Open Justice Foundations), 17–19: accessed 19 July 2018 from <https://www.opensocietyfoundations.org/sites/default/files/indicators-pretrial-eng-20160205.pdf>

issues that are impossible to tackle head-on. Consequently, important initiatives get diverted, unfocused, and little gets done.

Local ownership of the performance measurement effort is critical. Scholar Christopher E. Stone has advocated for the design and development of “active indicators” such as *Duration of Pretrial Custody* that are designed for use by officials of local institutions as management tools and distinguished from ones designed without the participation of local authorities. He argues that such active indicators and a bottoms-up approach “is not only possible and practical, but has the potential to engage citizens and domestic leaders enthusiastically in a creative and democratic construction of justice.”<sup>98</sup>

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<sup>98</sup> Christopher E. Stone (2015). “Problems of Power in the Design of Indicators of Safety and Justice in the Global South,” *Indicators in Development: Safety and Justice Series*, Program in Criminal Justice Policy and Management, Harvard Kennedy School of Government, 283-284: accessed April 11, 2017 from [https://dash.harvard.edu/bitstream/handle/1/8160719/Stone\\_Indicators-ProblemsOfPower.pdf](https://dash.harvard.edu/bitstream/handle/1/8160719/Stone_Indicators-ProblemsOfPower.pdf).

## Measure 6. Court File Integrity

### Definition

The percentage of court files that can be located and retrieved in a timely manner and that meet established standards of accuracy, organization and completeness.

### Purpose

Accurate, complete, up-to-date, and readily available case files and records are critical to the effectiveness and efficiency of daily court operations and the fairness of judicial proceedings and decisions at both the trial and appellate level. They are fundamental to the values and responsibilities of courts identified by the International Consortium for Court Excellence in the IFCE.<sup>99</sup> Court file integrity affects not only the decision-making process but also has direct impact on the organizational effectiveness of a court. It provides performance data for three elements of performance: (a) *availability*, or how long it takes to locate a file or case record, (b) the *accuracy* of the file compared to case summary information, and (c) the organization and completeness of the file.

### Methodology

This measure consists of three elements: availability, accuracy, and organization and completeness. Each of these elements is assessed and calculated for a random sample of at least 50 cases for each case type. Some courts may choose to draw 50 random samples for all case types for pending cases, on-site files (i.e., files that are stored in the same building as the court unit or division responsible for those files) and archived off-site files (i.e., files stored in a building or facility other than the site of the court unit or division responsible for those files). As further explained below, analysis and interpretation of the results of *Court File Integrity* should cover not only the aggregate data (e.g., summaries of percentages across all three elements of the measure), which may be most appropriate for wide public reporting, but also disaggregated data broken down by element, case type, and so forth, most helpful to court administrators.

How often should this measure be taken by a court? The Supreme Court of Victoria (see “Notes on Effective Use” below) chose to do so, on a quarterly basis. Ideally, *Court File Integrity* should be measured on a regular and continuous basis, in real-time or near real-time. This can prove to be quite labour-intensive. However, the work of data file inspection and data entry could be distributed across all staff responsible for case files. For example, in considering the work of taking this measure on a regular and continuing basis, one court administrator reasoned that if each of 40 clerks in the clerk’s office handles an estimated 100 files each day, each clerk need not examine more than one randomly selected file every day to yield a sufficient sample of 40 files per day and 200 files per week to satisfy the sampling requirements. Further, if data collection and data entry demand 10 to 20 minutes per file, each clerk would not have to spend more than 10 to 20 minutes each day in data collection

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<sup>99</sup> See *supra*, Part 1, “Mapping Performance Measures to Values and Areas of Excellence.”

if the work of file examination and data entry — a full-time-equivalent of a 0.8 to 1.6 person-day — are distributed across all 40 clerks.<sup>100</sup>

### **Availability**

The first element of this measure, availability or accessibility of the file, is measured by reviewing a random sample of case files or records, and individually recording the amount of time it takes to locate and retrieve each file. Retrieval times are recorded and analysed in 15-minute increments (i.e., 0-15, 16 – 30, 31 – 45, 46 – 60, and 60+ minutes), means, and ranges for each case types; case files not found should also be counted. The actual times are then compared to a court’s desired or established objective or performance target, e.g., 95 percent of all case files/records should be available for use within 15 minutes of the request of the case file. Varying performance targets can be established for pending, closed (on-site), and closed (off-site) case files, as appropriate.

Courts should set a high target for being able to locate court files, e.g., 98 percent or more are found. A case file that is missing or that cannot be located is a serious problem that should be considered a “never event.”<sup>101</sup> A similar high target should be set for locating the files within the 15-minute time frame, e.g., 90 percent or more of pending and closed on-site files. The court should define a standard for locating off-site files as well, e.g., 90 percent of the off-site files within one working day.

### **Accuracy**

Accuracy of court files is measured by the extent of agreement between what should be included in the file and what is actually in the file. The content and format of the case file summary (variously referred to as the case docket, case file register, register of actions, and so forth) vary across jurisdictions and court levels and types, but generally includes a complete listing of the documents filed with the court for each case. What *should be* found in the file is identified in the case file summary. This element measures whether the case file summary of documents accurately describes all the documents filed with the court that are supposed to be in the file and, conversely, whether the documents in the file are accurately recorded on the summary of documents. This is measured by performing comparisons between entries in the summary of documents and the actual documents included in each file, and vice-versa.

For each case file in the pending, closed-on-site, and closed-off-site samples examined in the first element of the measure, the first step is a careful review of the case file summary and the case file contents. For each case file, the answers to the following two questions are recorded, tallied, and *positive responses to both questions* (i.e., every document listed in the summary is in

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<sup>100</sup> John Douglas, Ingo Keilitz, and Daniel J. Hall (2007). *Building a Performance Measurement System for the Office of the District Clerk, Collin County, Texas*. Project Phase 2, Final Report, January 2007. (Denver, CO: National Center for State Courts).

<sup>101</sup> Ingo Keilitz (2009). “‘Never Events’ in Court Administration: Lessons from Health Care Reform.” *The Court Manager*, Volume 24, Number 1 (Spring 2009), 6-15: accessed July 18 2018 from [https://www.nacmnet.org/sites/default/files/images/WEB\\_CM\\_24No1\\_BOOK.pdf](https://www.nacmnet.org/sites/default/files/images/WEB_CM_24No1_BOOK.pdf).

the file and every document in the actually in the file is identified in the summary) calculated as percentages:

- Does every document-related entry on the case file summary have a corresponding document in the case file?
- Is every document in the case file listed as an entry on the case file summary system?

As with the availability element of this measure, results are compared against an established target, objective or standard (90 percent agreement between the case summary and contents of the file) for each case type and for pending cases, on-site files, and off-site files.

This element of the measure examines agreement between the file contents and case file summary. However, it does not explicitly assess whether documents are missing from both the file and summary. That is done by the third element of *Court File Integrity* described in the next section.

Trial courts have direct control of the documents filed with them. These materials are recorded and placed in case record files. The case record, which is critical to the appellate review process, is constructed by the trial court or agency from which an appeal is taken. This construction of the case files is commonly at the direction, and according to the specifications of the parties. Thus, an appellate court may control the availability of the case record after it is received but have only limited capacity to shape its accuracy and organization.<sup>102</sup>

### **Organization and Completeness**

The third element of *Court File Integrity* measures the organization of the court file and the completeness of the file — i.e., whether documents filed with the court are actually contained within the case file. Because the specific criteria for evaluating the organization and completeness of case files may vary across courts and by case type, the first step of the design of this measure is the identification of five to seven “criteria” of file organization and completeness for each case type against which each file will be examined. Among the criteria that should be considered is the presence of critical documents (e.g., complaint, proof of service, answer, motion, and order or judgement). Other criteria might include whether the documents filed with the court have been submitted and processed correctly (e.g., date stamped and appropriately captioned) and ordered according to the jurisdiction’s specifications for case files (e.g., confidential documents properly identified and sealed).

Once the criteria are established, data collection can proceed with the examination of each of the files in the sample of cases, and the recording of whether the files meet each of the

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<sup>102</sup> More than 30 years ago the American Bar Association recognized that “management of that record is an essential part of appellate court administration. This includes not only monitoring preparations of the records, but also keeping them in order pending decision, returning them to the lower court when necessary, and providing their disposition in closed cases.” This view has prevailed today. American Bar Association Commission on Standards of Judicial Administration (1977). *Standards Relating to Appellate Courts* (Chicago: American Bar Association), 84.

criteria. In a sample of 50, for example, all files (100 percent) might contain a complaint document, 48 (96 percent) files might have a proper date and time stamp, 45 (90 percent) a correct caption, and so forth. Like the other two elements of *Court File Integrity*, results should be analysed and interpreted in both aggregated and disaggregated form. At the highest level of aggregation, organization and completeness could be viewed as a single percentage across all case types and across all criteria. At the most disaggregated level, the percent of organization and completeness of court files could be viewed for each criteria in each case type, a total of 35 data points, for example, for seven criteria across five case types.

A careful review of the aggregated and disaggregated data will reveal both “bright spots” and “trouble spots”, and suggest where corrective actions might be taken. The initial measurement also serves as baseline against which subsequent measurements can be compared.

Many courts today use or plan to use digital files and electronic case records. Electronic court files will necessitate a modification of this measure to correspond with the software and hardware systems that support electronic court files. Electronic records systems often include audit trails and checks but they also present many new challenges for the modifications of this measure which, undoubtedly, will be addressed in future editions of the *Global Measures*.<sup>103</sup>

The approach for taking this measure is a close adaptation of the corresponding measure in the *CourTools*, both at the trial and the appellate level, and closely follows the methods prescribed there for the measure.<sup>104</sup> Reviewing the descriptions and methodology of the *CourTools*, which includes definitions, examples of analyses and interpretations, templates for calculating the measure, as well as reports of courts that have taken this measure, will be of benefit to courts seriously considering measuring *Court File Integrity*. A review of the Excel spreadsheet template in the *CourTools* provides a good overview of the methodology for *Court File Integrity*. The spreadsheet can be used to enter case file data and, as data are entered, results are generated and graphed automatically.

#### Notes on Effective Use

The Supreme Court of Victoria Australia adopted the *Global Measures* in 2013 shortly after the first edition became a part of the IFCE, which the Court had adopted as its foundation management model. The Court embraced both the definition of performance measurement and management, as well as the eleven measures of the *Global Measures* as its suite of key

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<sup>103</sup> See Nial Raaen (2016). *Electronic Records Management Guide for the Judiciary*. Williamsburg, VA: National Association for Court Management: accessed 19 July 2018 from [https://nacmnet.org/sites/default/files/NACM\\_ERM\\_GuideFINAL.pdf](https://nacmnet.org/sites/default/files/NACM_ERM_GuideFINAL.pdf).

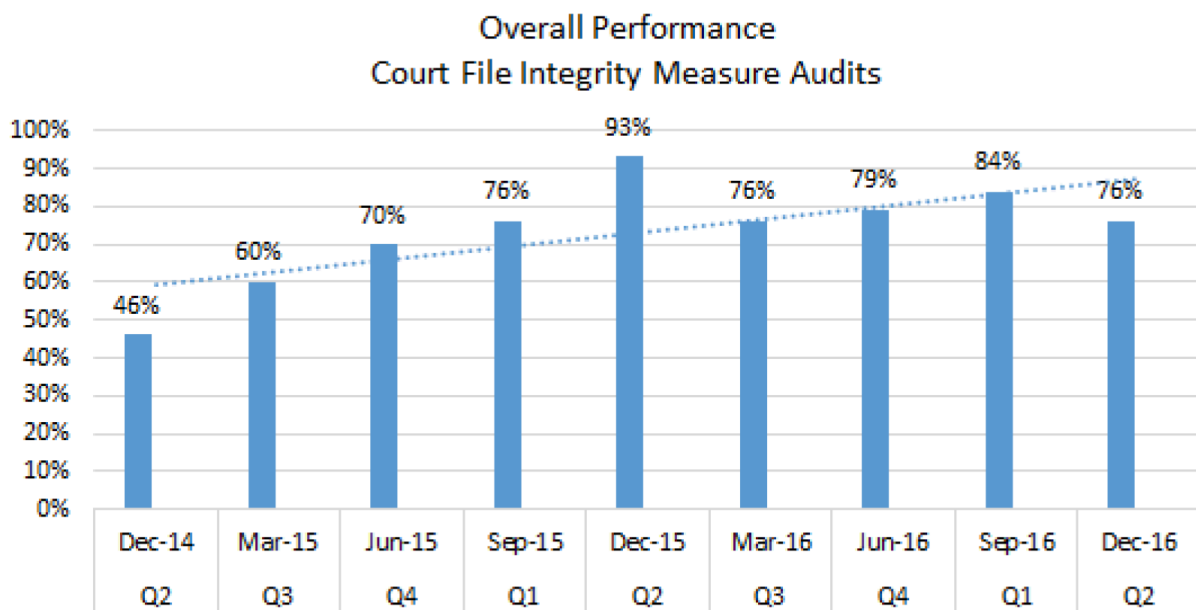
<sup>104</sup> *CourTools* (cited in note 6).

performance measures.<sup>105</sup> Its commitment to the *Global Measures* as part of the IFCE is expressed in the Supreme Court Strategy – Vision 3 (2013-14).<sup>106</sup>

Along with four other measures,<sup>107</sup> the Court began implementation of *Court File Integrity* because it considered it a key measure that would help the Court improve its performance, and not merely as an “obligatory chore” to meet government reporting requirements.<sup>108</sup> The measure was developed first as part of the Supreme Court’s own performance measurement and management. The experience of its own development of the measure served as example and a model for other courts in Victoria.

In a quarterly report in January 2016, the Court Business Group, the Court’s principal body that oversees the Court’s performance, reported the results of the Court’s routine file “audits”. Proving the maxims, “What gets measured gets attention” and “What gets measured gets done”, *Court File Integrity* more than doubled from a rate of 46 percent in the second quarter of 2014 to 93 percent in the second quarter of 2015, exceeding the Court’s target benchmark of 90 percent of its case files meeting the standards of availability, accuracy and organization.<sup>109</sup>

**Figure 5. Court File Integrity, Supreme Court of Victoria, 2014 - 2016**



<sup>105</sup> Mike Vallance (2016). Performance Management Policy: International Framework for Court Excellence. Supreme Court of Victoria. CD/15/558933 (Version 1), January 2016, 3. See also, Mike Vallance (2017). Global Measures of Court Performance Measurement in Victoria. *Innovation and Excellence in Courts*. International Conference sponsored by the Victoria Supreme Court in collaboration with the Australasian Institute of Judicial Administration, Melbourne, Victoria, Australia, March 27-28, 2017 (“Vallance”).

<sup>106</sup> Supreme Court of Victoria (2015). The International Framework for Court Excellence and the Global Measures of Court Performance at the Supreme Court of Victoria. CD/15/34723, February 2015, 18.

<sup>107</sup> *Case Clearance Rate, On-Time Case Processing, Case Backlog, and Cost Per Case*.

<sup>108</sup> Supreme Court of Victoria. Court File Integrity Measure Implementation Overview in Victoria, Australia. Unpublished document, no date. The remainder of this subsection is based this document.

<sup>109</sup> Vallance (cited in note 105).



Source: Vallance (2017)

The *Court File Integrity* measure has had an impact on the operations of the Court including: regular and continuous audits of the measure; a formal liaison forum between the Registry staff and judicial officers; a subject for education and training; a routine agenda item on Registry staff meetings; and inclusion of the measure as part of the individual performance and development plans for Registry staff.

### **Recognizing the Challenges for the Court**

The Supreme Court was also instrumental in establishing the *Court File Integrity* measure as one of a small suite of measures applied by the Victorian Government to monitor performance of courts within that State of Australia. Recognizing that the task of developing and implementing the measure may prove to be burdensome for other jurisdictions in Victoria, especially for meeting requirements such as those for random sampling of case files across various case types, the Court recognized that a “jurisdiction will be challenged to decide whether it is performing the audits simply to acquit a government reporting obligation or whether it intends to use the audit outcomes to bring about process improvement and efficiency gains that will more than offset the burden of the auditing process.”

By July 2015, the Supreme Court had crafted “policies” for eight of the core measures of the *Global Measures*, including *Court File Integrity*, built a “new audit database,” and was conducting routine audits of the measure. In an unpublished document, the Supreme Court of Victoria related its experience with *Court File Integrity*, beginning with the drafting of a “policy” for taking the measure, and provided guidance to jurisdictions for implementation of the measure.<sup>110</sup> The policy identified the requirements of the measure and served to prompt dialogue with a working group of registry staff of the Court. This working group explored different circumstances and scenarios for different case types as a case moved through various stages in the life of a case. For example, the Court had set an arbitrary “availability test benchmark” of 15 minutes, i.e., a file needed to be retrieved within that time. The working group determined that this was not practical if the file was in a judge’s chambers. In such instances, the Court determined that the case availability “test” is met if the file is “located” within 15 minutes and “retrieved” within 24 hours.

To prepare the Victoria courts for implementation of *Court File Integrity*, the Supreme Court issued several cautions. The Court determined that the implementation of the measure, what it referred to as the “file auditing process”, would need to be performed by the registry of the Court. This determination was reportedly met with “some degree of resistance” because, among other reasons, the staff already had “fully occupied jobs”. The most important caution was directed at the registry staff to whom the bulk of the work of development of the measure would likely fall.

Jurisdictions would do well to recognise that introduction of this measure will be very threatening to registry management and staff. While the measure is clearly intended to be a

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<sup>110</sup> Supreme Court of Victoria (no date). *Court File Integrity Measure Implementation Overview in Victoria, Australia*. Unpublished document (“Victoria Court File Integrity Implementation”).

jurisdiction key performance measure, it will initially appear to centre on performance within registries. Jurisdiction leaders need to be clear with registries that if the data resulting from auditing files is less than desirable, it will not be used as a big stick to beat up registry staff. Of interest, the Supreme Court actually found that one of its main improvement areas was with staff in chambers who were not diligently updating the Court's case management database.<sup>111</sup>

Implementation would require "a good deal of effort", likely involving new or modified work processes within court registries and "possibly even within chambers," counselled the Supreme Court. Further, it will require a team effort of registry and chamber staff, managers of data repositories or warehouses, and other persons charged specifically with PMM. Judicial officers were forewarned that they will be asked to support and approve change.

Like other court systems that have implemented the *Global Measures*, the Supreme Court of Victoria recognized that the data requirements of *Court File Integrity* would require improvements to its file management processes. The relationship between the demands of the *Global Measures* and supporting information technology is a synergy that courts should exploit to facilitate implementation.<sup>112</sup>

Finally, the Supreme Court acknowledged that its initial audits of *Court File Integrity* were "quite mediocre". It noted:

The Court believes that a target or benchmark set for this measure would have to be somewhere upwards of 90%. Therefore, substantial improvements have been necessary in its case file management processes to attain that level of performance. Jurisdictions may wish to speculate that they will need time for process improvement as well as measure development of this measure.<sup>113</sup>

Unlike measures such as *Case Clearance Rate* and *On-Time Case Processing*, there is no widely-accepted performance targets associated with *Case File Integrity*, and the Supreme Court suggested that lower court set their own targets.<sup>114</sup>

### **Fundamental Development Rules**

In order to ensure that the measurement results are consistent, reliable and able to be used for government reporting purposes," the Victoria Supreme Court posed a number of "fundamental development rules" which, although focused on *Court File Integrity*, apply more or less to the other core measures of the *Global Measures* as well:

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<sup>111</sup> *Id.*, at 3. The last sentence of this cautionary note points to the lesson of the maxim, "What gets measured gets attention".

<sup>112</sup> During a series of half-day training programs for all first-instance courts in Moldova on the "Moldova Performance Dashboard," a measure delivery system, participating judges and managers became more interested in their courts case management system when they suspected that the real-time displays of their courts' performance on several measures were incomplete because registry staff did not enter case data in a timely manner: Ingo Keilitz (2009). *The Moldova Court Performance Dashboard: An Automated System for Monitoring, Analyzing and Managing the Performance of the Courts in Moldova*. Moldova Governance Threshold Country Program, a project of the USAID implemented by the Millennium Challenge Corporation, September 1, 2009.

<sup>113</sup> Victoria Court File Integrity Implementation (cited in note 110).

<sup>114</sup> *Id.*

- 1) there should be only one operational definition of the measure consistent with that in the *Global Measures* across all jurisdiction to enable benchmarking across jurisdiction in Victoria and on a wider scale across jurisdiction outside of Victoria;
- 2) similarly, the methodology for calculating the measure for availability, accuracy, and organization of the court file should be consistent with the measure as described here;
- 3) the case file meets the requirements of *Court File Integrity* only if meets all three “tests” for availability, accuracy and organization;
- 4) the measure would be taken, analysed, and reported once every three months;
- 5) because most jurisdictions in Victoria still rely on hard-copy case files, the methodology for this measure does not yet apply to electronic files (the Supreme Court acknowledged that when electronic filing becomes the predominant means of case file management, the methodology will need to be adapted);
- 6) for the “audit outcome” results to be statistically valid, random sampling is necessary for each jurisdiction adopting the measure;<sup>115</sup>
- 7) close attention needs to be paid to the “aspects” of the file used to test the organization of the file (e.g., separation of confidential documents and application of a court seal); and,
- 8) data analysts need to be involved in the measure development and implementation from the beginning to ensure, among other things, that the data elements required of the measure exist in the court’s databases and that access to the databases would require software.

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<sup>115</sup> The Court’s deliberations about random sampling are worth quoting in full: “The Supreme Court determined it wanted to audit files within its criminal division, commercial court, common law division and probate area every three months. However, the Court quickly determined that it would be prohibitive (from a resource perspective) to audit a statically valid number of files in each of these areas every three months. Consequently, it decided that statistical validity would be applied to the cumulative annual outcomes for each of these areas; thereby decreasing the number of files audited every three months. At the same time, the Court confidently believes that the outcomes of all audits throughout each year still provide strong guidance for improvement efforts... This is an area where all jurisdictions should eventually come together in defining uniform sampling size criteria, just to make sure that outcomes across jurisdictions are comparable and that data can be amalgamated for government reporting purposes.” *Id.*

## Measure 7. Case Backlog

### Definition

The proportion of cases in a court's inventory of pending unresolved cases that have exceeded established timeframes or time standards. (The measure is expressed in terms of the percentage of all the pending cases that are considered to be a backlog – that is, the proportion of cases that exceed the on-time case processing time reference points, benchmarks, and established time standards,<sup>116</sup> or, simply, the proportion of pending cases that already have taken too long.)

### Purpose

The most common complaint about justice system performance is excessive delay in processing cases.<sup>117</sup> An almost universally shared opinion is that overburdened courts and other justice sector institutions take too long to provide judicial services. Huge backlogs are not unusual. For an extreme example, following the release of a 2006-08 report, Chief Justice Ajit Prakash Shah admitted that his New Delhi High Court was “so much up to its neck in arrears that it would take 466 years to clear the gigantic backlog.”<sup>118</sup>

The International Covenant on Civil and Political Rights (Article 14), and various other regional human rights treaties, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6), the American Convention on Human Rights (Article 8), and the African Charter on Human and Peoples' Rights (Article 7), require that cases be disposed by courts without undue delay or within a reasonable time. As time passes, suspects and witnesses become less accessible as they change addresses or disappear altogether, and evidence may go stale. Actual or expected delay in civil cases may discourage legitimate plaintiffs and contribute to a poor climate for foreign investments. In criminal cases, delay contributes to unwarranted pre-trial detention and other injustices (e.g., extending investigations and making their successful pursuit less likely). Delay denies access to the poor who cannot afford bail or legal defence.

All cases filed or registered but not yet resolved or otherwise disposed make up a court's active pending caseload. A complete, accurate, and current inventory of active pending cases, as well as the number, types, and “ages” of the cases in the inventory, provide performance data for a quantitative assessment of a court's efficiency and timeliness. The terms “current inventory” and “backlog” are used here to distinguish two parts of a court's total active pending caseload. “Current inventory” refers to *all* active pending cases, including recent “fresh” cases that are not yet “old,” i.e., not yet beyond established time reference points.

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<sup>116</sup> The Australian Productivity Commission defines backlog as “the number of pending cases older than applicable reporting standards, divided by the total pending caseload (multiplied by 100 to convert to a percentage). Productivity Commission at 7.63 (cited in note 8).

<sup>117</sup> Reiling et al, at 61-65 (cited in note 83).

<sup>118</sup> At 5 minutes per case, Delhi High Court Clears 94,000 in 2 years. *The Times of India*, May 30, 2012: accessed 19 July 2018 from <http://timesofindia.indiatimes.com/city/delhi/At-5-minutes-per-case-Delhi-high-court-clears-94000-in-2-years/articleshow/13663493.cms>; see also Ingo Keilitz (2009), “Annals of Backlog and Congestion: New Delhi, India.” *Made2Measure*, February 17, 2009: accessed 19 July 2018 from <http://made2measure.blogspot.com/2009/02/annals-of-backlog-and-congestion-new.html>.

“Backlog” refers to the proportion of the current inventory of active pending cases that have “aged” beyond the time reference points.

Measure 7, *Case Backlog*, is closely related to Measure 3, *Case Clearance*. Both are expressed as a percentage. The latter indicates whether a court is keeping up with its incoming caseload; it simply looks at “in-and-out” productivity of case processing, i.e., whether a court is keeping up with its incoming case workload. As noted in the description of *Case Clearance Rate*, a court that has a clearance below 100 percent is not keeping up with its incoming workload and will develop a greater inventory of pending cases. And as noted by the European Commission for the Efficiency of Justice (CEPEJ), courts with a *Clearance Rate* “below 90%, and mainly below 80%, can expect significant difficulties as regards the increase of their backlogs.”<sup>119</sup> *Case Backlog* measures the proportion of pending cases that already have taken too long as determined by the same time standards of Measure 4 *On-Time Case Processing*.

By keeping *Case Backlog* within established time frames, a court enhances trust and confidence in the judicial process. This measure – especially when used in conjunction with *Measure 3, Case Clearance Rate*, *Measure 4, On-Time Case processing*, and *Measure 8, Trial Date Certainty* — is a critical management tool for courts to assess and to manage the timeliness and efficiency of their case processing. Furthermore, as noted above, *Case Backlog* is also an indicator of fundamental fairness insofar as excessive delay in case processing is a denial of justice.

### Methodology

*Case Backlog* is an assessment of the age of the pending cases awaiting resolution or disposition expressed in terms of the number of elapsed calendar days between the date of filing or start of processing of the case and the current date. Required data elements for this measure include:

- 1) the number of cases in the inventory of active pending cases by major case type, level of court, court location, and other variables;
- 2) the number of elapsed days each case in the inventory has been pending since it was registered, filed, opened or reopened; and,
- 3) identification of the points of reference, benchmarks or time standards (in days) for on-time case processing of major case types.<sup>120</sup>

Critical to this measure are precise descriptions and concise definitions of the major case types, the identification of time reference points, standards or time benchmarks, and the case processing events that constitute filing (opening) and resolution or disposition (closing) of cases by case type.

The approach for taking this measure is a close adaptation of the corresponding measure, *Age of Pending Caseload*, in the *CourTools* and closely follows the methodology of that measure in

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<sup>119</sup> *European Judicial Systems* at 197 (cited in note 67).

trial and appellate courts.<sup>121</sup> Courts that are seriously considering Case Backlog are recommended to review the descriptions and methodology of this measure in the *CourTools*, as well as reports of courts in the states and jurisdictions in the U.S. that have taken this measure.

The first task for taking this measure is to compile a list of all pending cases for each case type. Next, the cases are arranged according to their filing dates, beginning with the oldest pending case. This arrangement will permit the determination of how many cases fall within specified time intervals (e.g., the number of civil second instance cases pending in a district court for 240 days or more, the number of cases pending 300 days or more, and so forth).

For example, an appellate court may have established a time standard or target of resolving 80 percent of all active civil appeals within 540 days of filing and all active criminal appeals within 730 days of filing. The listing of cases in the inventory should be compiled in a way that helps to determine the number of cases and percentage of the total active pending caseload that fall within various time brackets. For instance, 0 – 90 days, 91-180 days, 181 – 270 days, 271 – 365 days, 366 – 450 days, 451 – 540 days, 541 – 630 days, 631 – 730 days, and greater than 730 days. What distinguishes this information from that provided by Measure 4, *On-Time Case Processing*, which provides a quantitative assessment of the time from the opening to the closing of a case, is that this measure provides a court with the range of case ages within the active *pending* caseload.

“Backlog” refers to all those cases beyond the time reference point. *Case Backlog* is expressed in terms of the proportion of cases in a court’s current inventory of pending cases. The formula for the calculation of *Case Backlog* is relatively straightforward.

**Box 11. Formula for the Calculation of Case Backlog**

$$\text{Case Backlog} = A/B * 100$$

**A = Total Number of Cases in Backlog**

**B = Total Number of Cases in the Current Inventory of Pending Cases**

For example, a court that has 45 cases in its backlog of criminal second instance cases (cases older than 240 days), the value for “A,” and 256 total cases in its inventory of pending cases, no matter how “old,” the value for “B,” has a *Case Backlog* of 17.6% ( $A/B = 45/256 * 100 = 17.6\%$ ).

#### Notes on Effective Use

Measure 7, *Case Backlog*, is among the most used court performance measures around the world. For example, it is reported in one form or another by 36 of the 47 member states or entities of the Council of Europe to measure backlogs in civil, criminal and administrative cases. In five countries — Austria, Azerbaijan, Belgium, Italy and UK-England and Wales —

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<sup>121</sup> *CourTools* (cited in note 6).

the backlogs are measured only for civil and criminal cases. Only six countries — Andorra, Armenia, Germany, Ireland, Luxembourg and Ukraine — do not measure case backlog.<sup>122</sup>

In Slovenia, data collected and published four times a year by the Department of Justice includes court backlogs. Consistent with the methodology of *Case Backlog*, cases are considered as part of backlog when they exceed a certain delay starting from the moment they are filed, which varies according to the types of cases. The courts make special activity reports which include performance standards and advice for presidents and directors of courts which may include backlog data and strategies to reduce it.<sup>123</sup> Commenting on the economic climate for foreign investment in Slovenia in 2015, the U.S. Department of State pointed to the improved efficiency of Slovenian courts noting the decrease in the number of cases assessed as backlogs from 199,923 in 2012 to 175,040 in 2015.<sup>124</sup>

In Montenegro, if a performance report states that a court or a chamber of a court has a backlog higher than the three months allowed for a new case, the chief judge must implement a program to eliminate the backlog by the end of January in the following year.<sup>125</sup> In Bosnia and Herzegovina, reserve judges appointed on a temporary basis (up to two years) by the High Judicial and Prosecutorial Council at the request of a court president, assist courts in reducing case backlogs.<sup>126</sup>

*Case Backlog* can be used effectively at three levels of detail, especially when used in conjunction with Measure 3, *Case Clearance*, and Measure 4, *On-Time Case Processing*. At its simplest, expressed as a single number — the percentage of cases in the current inventory that exceed established timeframes — it serves to draw the attention of court leaders and management. For example, a *Case Backlog* of 10 percent spells trouble that begs for backlog reduction efforts, particularly if accompanied by a *Case Clearance Rate* and *On-Time Case Processing* below 100 percent. At this level, the single number, percent of *Case Backlog*, serves the valuable functions of focusing judges' and court managers' attention on a potentially serious problem and creating a sense of urgency, an element of change management.<sup>127</sup>

Once the attention of court administration is drawn to a possible “trouble spot”, at the second level of effective use, disaggregation (breakouts) of the *Case Backlog* percentage provides insight and understanding of the nature, extent, and location of that trouble spot. A comparison of the backlog in various case categories with the overall backlog (the average backlog across all case categories) will pinpoint where case processing problems may be concentrated and where improvement efforts may prove most useful, especially if the problems persist over time. For example, disaggregated by case type, *Case Backlog* may show

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<sup>122</sup> *European Judicial Systems* at 138 (cited in note 67).

<sup>123</sup> *Id.*, at 137.

<sup>124</sup> Bureau of Economic and Business Affairs (2014). *2015 Investment Climate Statement – Slovenia*. (Washington, DC: U.S. Department of State): accessed 19 July 2018 from <http://www.state.gov/e/eb/rls/othr/ics/2015/241742.htm>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*, at 166.

<sup>127</sup> Establishing a sense of urgency is crucial to gaining needed cooperation for change. It is the first stage in the eight-stage process of successful change. See John P. Kotter (1996). *Leading Change* (Boston: Harvard Business School Press), 35-49.

that one or two case types account for almost all of a 10 percent *Case Backlog*. This information provides insight and understanding in formulating solutions. Furthermore, disaggregated by court location, *Case Backlog* may pinpoint both the location of “trouble spots” and “bright spots”, the latter serving to inform improvement strategies for the former.

Finally, at the third level of effective use, the performance data used for calculating *Case Backlog* can be translated into terms that may be more intuitively meaningful and more effective in prompting reform. Instead of communicating a *Case Backlog* percentage such as 10 percent or 30 percent, which may be too abstract for many to grasp, the size of the backlog is expressed in terms of the time in months or years it would take a court to dispose of all the cases in the backlog *at its current level of productivity*.



## Measure 8. Trial Date Certainty

### Definition

The certainty with which important case processing events occur when scheduled, expressed as a proportion of trials that are held when first scheduled.

### Purpose

*Trial Date Certainty* measures a court's success in holding important case processing events on the dates they are scheduled to be held, and provides a tool to evaluate the effectiveness and efficiency of various case management processes such as court calendar management and continuance policies and practices. Certainty is one of the eleven values of the *International Framework for Court Excellence* (IFCE). Aligned with the values of the IFCE, this core performance measure is an indicator of the certainty, predictability, timeliness and efficiency of case processing. Among the other values, "[n]o less important is the guarantee of certainty; that a decision will at some point be considered 'final' whether at first instance or through an appeal process."<sup>128</sup>

Setting firm trial dates is associated with shorter times to disposition of cases. For example, a higher proportion of trials that start on the first scheduled trial date is correlated with a more expeditious pace of litigation.<sup>129</sup> Effectively monitored, analysed and managed, this performance measure points to various proven steps to ensure firm and credible dates for trials or adjudicatory hearings:

- 1) disposing of as many cases before the setting of trial dates for those cases;
- 2) having realistic calendar-setting practices;
- 3) limiting continuances; and
- 4) providing for "back-up" judges.<sup>130</sup>

### Methodology

The approach for taking this measure is a close adaptation of the corresponding measure in the *CourTools* and closely follows the method prescribed for that measure.<sup>131</sup> Reviewing the descriptions and methodology of the *CourTools*, which includes definitions, examples of analyses and interpretations, and templates for calculating the measure not contained herein, will be of benefit to courts seriously considering measuring *Trial Date Certainty*.

Data collection for this measure requires several steps to be taken. First, is the identification of all cases disposed by trial<sup>132</sup> during a given time period (e.g., a year, quarter, or month)

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<sup>128</sup> *International Framework* at 4 (cited in note 3).

<sup>129</sup> John Goerdts (1989). *Examining Court Delay: The Pace of Litigation in 26 Urban Trial Courts, 1987* (Williamsburg, VA: National Center for State Courts), 32-35. See also Barry Mahoney, et al (1988). *Changing Times in Trial Courts: Caseflow Management and Delay Reduction in Urban Trial Courts* (Williamsburg, VA: National Center for State Courts), 81-82.

<sup>130</sup> See David Steelman, John Goerdts and James McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (Williamsburg, VA: National Center for State Courts, 2000), 9-16.

<sup>131</sup> *CourTools* (cited in note 6).

<sup>132</sup> In 2010, as part of its development of this measure, an advisory committee of the State of Montana in the United States defined a "trial" as a hearing at which the parties contest the facts in the case and present evidence

organized by case type. Next, it requires counting and recording the number of trial dates set — how often each of the disposed cases was scheduled for trial (i.e., had a trial date set). For example, a case that was scheduled for trial but was continued or postponed three times before it came to trial would receive a score of 4, i.e., it was scheduled three times but continued and scheduled one more time and the trial was held. The third step is the creation of a summary table showing the number of cases of each type with one date set for the trial to begin, those with two trial-start dates, and so on, up to the maximum number of dates on which the trial was set to begin, by case type and type of trial. The Excel worksheet provided for this measure in the National Center for State Courts' *CourTools* provides an example and specific instructions for compiling such a summary table.<sup>133</sup>

The best way to examine the resulting data is to look first at the proportion of cases that meet a specific performance target set by the court. For example, a court may seek to have 90 percent of its cases go to trial in no more than two trial settings. Excellent performance would be measured by 90 percent of the cases disposed by trial actually going to trial on the first or second scheduled trial date. *Trial Date Certainty* is calculated (to one decimal point) and expressed as percentages as follows: (1) a single percentage overall across all case types and (2) a percentage for trial cases in each of the case types and other factors or circumstances (e.g., court location or unit, and type of case processing).

**Box 12. Formula for the Calculation of Trial Date Certainty**

$$\% \text{ Cases with no more than prescribed (P) trial settings} = (A/B) \times 100$$

**P** = Number of prescribed or target trial settings (e.g., 2)

**A** = Number of cases with no more than the prescribed or target settings

**B** = Total number of closed trial cases

For which type of cases or circumstances is *Trial Date Certainty* better or worse? This question can be answered by disaggregating the measure by case type, court or court location, court

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before a judge in open court, and in which the judge or jury renders a decision that results in an entry of judgment in the case. Most courts are able to provide information on jury trials, but the recording of non-jury trials may be more difficult. Similarly, the adjudicatory hearing in a juvenile delinquency or child protection case may be called something different across countries. For purposes of simplicity in measurement, there are certain kinds of events that, while often dispositive, should not be called “trials” for purposes of this measure. A hearing on a motion for summary judgment should not be counted as a critical event; a contested omnibus hearing or suppression hearing should not be considered a critical event; nor should a default or show cause hearing be counted as a critical event. A summary judgment hearing is *not* a trial by this definition because the parties agree on the facts; appropriate application or interpretation of the law is the only issue at a summary judgment hearing. A contested omnibus hearing or suppression hearing should not be considered a critical event because it may or may not be dispositive, so that one cannot tell beforehand that it will result in the entry of a judgment. In contrast, the trial on a petition to terminate parental rights should be included in this measure, because it meets all the criteria above for a “trial.” See *CourTools* or “more terms you should know” related to this: accessed 19 July 2018 from [http://www.courttools.org/~media/Microsites/Files/CourTools/courttools\\_Trial\\_measure5\\_Trial\\_Date\\_Certainty.ashx](http://www.courttools.org/~media/Microsites/Files/CourTools/courttools_Trial_measure5_Trial_Date_Certainty.ashx)

<sup>133</sup> *Id.*

division or unit, attorney, judge, and case processing type (e.g., standard versus expedited processing). Answers provide helpful insight and understanding for improvement strategies. For example, the factors explaining significant differences in *Trial Date Certainty* in different locations can become the basis for improvement in the location with poorer performance.

#### Notes on Effective Use

Once a court has taken a baseline measure of *Trial Date Certainty*, it should consider if corrective actions should be taken immediately or, alternatively, if the baseline results are satisfactory (e.g., 90 percent of the disposed cases proceeded to trial with no more than two trial settings) and all that may be required is that the court monitor the measure on a regular and continuous basis. Of course, the court should look not only at aggregate data across all case types or all court locations but also at disaggregated data by case type or location to determine if the 90 percent baseline could be improved by targeting *Trial Date Certainty* for a lagging case type or court location.

*Trial Date Certainty* has common-sense appeal for stakeholders beyond court insiders who might be inured to a high rate of case continuances. It resonates with policy makers (ministries, parliaments), justice professionals including prosecutors and defence attorneys, as well as justice system partners outside of court and members of the general public who care about how the lack of certainty in case proceedings adversely effects the costs and fairness of the courts. Posing to them the simple question at the heart of the measure, “How often *should* it take to schedule a trial before it is held?”, is likely to elicit answers close to the example target given above, i.e., only once or perhaps twice under exceptional circumstances. Advocates of *Trial Date Certainty* have likened the question to ones regarding how often one might entertain going to a dinner party that has repeatedly been set and then postponed by the host, or continuing to go to a doctor who consistently postpones appointments with little notice.

Perhaps more than other core measures of the *Global Measures*, the common-sense appeal of *Trial Date Certainty* makes it easier for it to become the rallying point of wide support for its development and implementation, beginning with the setting of a relatively stringent target of trial settings, the value of “P” in the formula for the calculation of the measure in Box 12. A working group reviewing a baseline score across all case types and court locations of 42 percent and an average number of trial settings of five or more, for example, is likely to feel a sense of urgency for implementing corrective measure such as changes in the policy and practices for continuances, the adjournment or postponement of a trial to a subsequent day. The practicing attorneys in the working group are likely to be all too familiar with the vicious circle caused by lenient continuance policies and practices: attorneys not ready for trial request a continuance; the court routinely grants continuances (e.g., on oral motion only); too few cases are ever ready for trial to keep judges busy; in response, the court schedules an unrealistically high number of trials; cases low on the list of scheduled cases are not reached and continued; attorneys whose cases are low on the list do not adequately prepare (e.g., do not call witnesses) because they do not expect the trial to be held); and, finally, the vicious

cycle continues and *Trial Date Certainty* deteriorates even further.<sup>134</sup> This cycle can be broken by relatively simple procedures (e.g., requiring all motions for continuance to be in writing, and ongoing feedback on court calendar management) that will drive up *Trial Date Certainty*.

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<sup>134</sup> Maureen Solomon (1973). *Caseflow Management in the Trial Court*. (Chicago: American Bar Association), at 50.

## Measure 9. Court Employee Engagement

### Definition

The percent of the employees of a court who, as measured by a court-wide survey, are passionate about their job, committed to the mission of the court and, as a result, put discretionary effort into their work.

### Purpose

The greatest asset of any organization is the talent, energies, enthusiasm, and interest of its employees. Engaged employees have a direct positive impact on a court system's performance by their exemplary or discretionary effort beyond the strict requirements of their assigned duties. A measure of this asset is a proxy for an organization's overall success.<sup>135</sup>

Successful courts, like all public and private organizations, have strong, vibrant workplaces in which judges, managers and court staff exhibit good working relationships. Employee engagement correlates with individual, group and organizational performance in areas such as retention, turnover, productivity, customer service and loyalty. Engaged employees get more done in less time, are more innovative, and more likely to share new ideas.

Important to the understanding of *Court Employee Engagement* is the difference between employee engagement and employee satisfaction. The latter only reflects how happy employees are, not necessarily their level of motivation, involvement, or emotional commitment to their work. Disengaged employees can be quite satisfied but not motivated and dedicated to their work. For some, being happy and satisfied simply means collecting a paycheck, while doing as little work as possible. Employee engagement is more complex and nuanced. It comes from a feeling of accomplishment, meaning, and achievement.<sup>136</sup>

The results from the largest worldwide study of employee engagement conducted by the Gallup Organization based on more than a million surveys of worker attitudes around the world,<sup>137</sup> as well as evidence from the use of the corresponding measure in the *CourTools* at the trial and appellate court levels,<sup>138</sup> indicate that in "engaged workplaces" employees tend to respond positively to simple questions about the quality of their relationships with

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<sup>135</sup> Good measures are often proxies - measures that are not in themselves directly relevant to a complex outcome or concept of interest but that serve in their place.

<sup>136</sup> Social psychologist Roy F. Baumeister makes a similar distinction between two types of happiness. The first is associated with immediate pleasure that satisfies our wishes of the moment— watching a sporting event and eating a good meal. The second is associated with engagement in ones' career, deepest values, and sense of who we are and how we fit into this world: "Authentic Happiness": accessed 19 July 2018 from <https://www.authentichappiness.sas.upenn.edu/faculty-profile/roy-f-baumeister-phd>.

<sup>137</sup> Marcus Buckingham and Curt Coffman (1999). *First Break All the Rules: What the World's Greatest Managers Do Differently*. (New York: Simon & Schuster). The Gallup Organization's research included focus groups, factor analyses, regression analyses, and a meta-analysis of 28 studies conducted as proprietary research for various private organizations. For the latter, data were aggregated at the business unit level and correlated with aggregate performance measures of customer satisfaction/loyalty, profitability, productivity, and employee turnover. The study included 105,680 employees, 2,528 business units, an average of 42 employees per business unit and 90 business units per company.

<sup>138</sup> *Court Employee Engagement* has been used in over 100 individual courts and court systems throughout the United States. See *supra* *CourTools*, "Report from Courts," (cited in note 6).

supervisors or managers. These are organizations with higher levels of productivity, profits, worker retention rates and customer loyalty. Moreover, employees answered the questions differently according to the unit or division in which they worked, rather than the organization as a whole, indicating that their answers were largely formed by the quality of the relationships between them and their immediate supervisors.

Gallup's multiyear assessment of employee engagement is the basis of the human performance improvement model described by John H. Fleming and Jim Asplund in their book, *Human Sigma: Managing the Employee-Customer Encounter*.<sup>139</sup> In their work, Fleming and Asplund assert that employee engagement is the starting point for improving organizational performance.

How can one measure this human capital? What does a strong, vibrant workplace and employee engagement look like?

### Methodology

*Court Employee Engagement* uses a survey – a 20-item self-administered anonymous questionnaire — of the strength of the court's workforce and the quality of the relationships of its employees. It is adapted from the survey included in the National Center for State Courts' *CourTools* Measure 9, *Employee Satisfaction*.<sup>140</sup> Reviewing the descriptions and methodology of this corresponding measure in the *CourTools*, which includes definitions, examples of analyses and interpretations, templates for calculating the measure, as well as a report of courts in the United States that have taken this measure, will be of benefit to courts seriously considering measuring *Court Employee Engagement*. Courts considering using the measure should also review Measure 1, *Court User Satisfaction*, because both measures are based on surveys and their organization and methodologies are similar.

Designed to be completed in approximately 10 minutes, the questionnaire asks respondents to rate their agreement with each of 20 simple statements on a five-point scale from “Strongly Disagree” to “Strongly Agree.” (See below the sample questionnaire adapted for the Kosovo courts by the National Center for State Courts in 2009). In addition to the 20 substantive items, respondents are asked to identify the organizational divisions, unit or current work location, and demographic information about themselves like gender, race and/or national origin, length of court service, position grade level (e.g., management or line staff position), and experience.

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<sup>139</sup> John H. Fleming and Jim Asplund (2007). *Human Sigma: Managing the Employee-Customer Encounter*. (New York: Gallup Press).

<sup>140</sup> In naming this measure with the word “satisfaction,” the National Center for State Courts does not acknowledge the distinction between employee engagement and satisfaction made here. Notwithstanding this difference in the name of measure, the methodology of the two corresponding measures is virtually the same. *CourTools*, accessed 19 July 2018 from [http://www.courtools.org/~media/Microsites/Files/CourTools/courtools\\_Trial\\_measure9\\_Court\\_Employee\\_Satisfaction.ashx](http://www.courtools.org/~media/Microsites/Files/CourTools/courtools_Trial_measure9_Court_Employee_Satisfaction.ashx).

The percent of respondents who agree with each the 20 statements is calculated as shown in

1.	I am kept informed about matters that affect me.
2.	I understand what is expected of me.
3.	I have the resources (materials, equipment, supplies, etc.) necessary to do my job well.
4.	I am able to do my best every day.
5.	Communication within my division/department/unit is good.
6.	In the last month, I was recognized and praised for doing a good job.
7.	Someone at work cares about me as a person.
8.	I have opportunities to express my opinion about how things are done in my division.
9.	The Judicial Branch is respected in the community.
10.	My co-workers work well together.
11.	I am encouraged to try new ways of doing things.
12.	I understand the relationship between the work I do and the mission and goals of the Judicial Branch.
13.	My working conditions and environment enable me to do my job well.
14.	I feel valued by my supervisor based on my knowledge and contributions to my department, unit or division.
15.	I feel free to speak my mind.
16.	In the last month, someone at work has talked to me about my performance.
17.	I enjoy coming to work.
18.	My co-workers care about the quality of services and programs we provide.
19.	I am treated with respect.
20.	I am proud that I work in the Judicial Branch.

Box 13 below. A percentage is calculated as an average across the entire court and all 20 statements (aggregate) as well as disaggregated by each of the 20 survey items, by division or unit of the court, by different locations of the court, and by demographic characteristics of the respondents.

Responses of “no opinion,” which is the third on a five-point scale, or “not applicable,” which some courts have added as a sixth response, are tallied but do not figure in the calculations. The frequencies of such responses to particular questions, however, do provide a check on the survey response rate, for example, when respondents in a particular court division or unit are suspected of being hesitant to reveal their opinions, which might be a useful insight for improving performance in that division or unit.

**Box 13. Formula for the Calculation of Court Employee Engagement Survey Results**

$$\text{Court Employee Engagement} = ((A + B)/(A + B + C + D)) \times 100$$

- A** = Strongly Agree
- B** = Agree
- C** = Disagree
- D** = Strongly Disagree

Breakouts or disaggregation of the data by court unit or division, or by court location, have the potential of yielding insights and practical guidance for establishing baseline performance levels, setting goals and objectives, identifying trends and patterns, discovering “bright spots” that exceed norms (e.g., a unit or division of the court that stands out with exemplary responses to the survey or particular items), analysing problems, seeing patterns and trends, discovering solutions, planning, and formulating strategy (see “Notes on Effective Use” below).

Such breakouts or disaggregation will, however, require attention be paid to the number of possible respondents within a particular court division or unit identified in the survey questionnaire (e.g., probate division or accounting department). Although the questionnaire does not request the respondents to identify themselves by name, the breakdown of the survey by location, division, or unit of the court needs to ensure that a small number of employees in the location, division, or unit is not so small (e.g., five employees or fewer) that anonymity of individual survey respondents will be threatened because particular responses might be traced to particular employees. For example, in a unit with only two employees and one manager, it may be quite possible to match responses to the manager and each of the two employees. In such situations, it is advisable to merge two units of the court and increase the number of employees to a sample size to protect anonymity.

Survey organization and administration are relatively straightforward and can be accomplished by most courts without employment of an outside consultant with expertise in survey administration. It is most efficient and effective to administer the survey by means of a free online survey instrument such as SurveyMonkey.<sup>141</sup> Each employee during the survey timeframe (e.g., a week) is sent an e-mail with a link to a secure and anonymous online site where the electronic survey is completed. In courts and court system with limited internet

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<sup>141</sup> SurveyMonkey is an online survey instrument providing free, customizable surveys, as well as a suite of paid back-end programs that include data analysis, sample selection, bias elimination, and data representation tools. See a video overview at <https://www.youtube.com/user/SurveyMonkey> accessed 26 May 2018.



connectivity or email capacity, the survey can be administered by pen and paper similar to that for the questionnaire for Measure I *Court User Satisfaction*.

Whether administered online or by pen and paper, the administrator should distribute the questionnaire to every employee working in the court in order to ensure the greatest number of respondents. Factors that may inhibit full participation in the survey include fears about the anonymity and confidentiality of the survey, apathy, or scepticism that court leaders and managers will pay attention to the results.

Employees should be given advance notice of the survey including the dates of its administration, instructions for completing the survey, a contact person to whom potential respondents and managers can ask questions and raise concerns. Email communications regarding an online survey or instructions included in a paper questionnaire should guarantee anonymity and confidentiality.<sup>142</sup> When employees raise concerns about the purpose, content or administration of the survey, court management should address them promptly and honestly, seeing it as an opportunity to discuss the use of the results of the measure. For example, surveys raise reasonable expectations that results will be examined and actions taken. Scepticism that actions will be taken as the result of the survey can be seen as an opportunity to talk with employees about their importance in improvement initiatives, i.e., each employee of the court is responsible for making the court successful, and that working together toward maintaining an efficient and positive work culture is a goal all employees share, regardless of whether they identify themselves as staff or management.

Similar to voting procedures and election processes, for pen and paper administration of the survey, the survey administrator should provide an anonymous and confidential environment for survey administration, and explain at all times that the survey is anonymous and no personally identifying information is required. The facilitator should restrain from making remarks or suggestions regarding the respondents' answers to the survey questions. Once respondents complete the survey, they should not be handed to the administrator but instead respondents should be instructed to place the completed questionnaire in a secure box or other receptacle with a small opening at the top. It is very important that the employees do this by themselves. Although the facilitator or court staff assisting with survey administration may have no such intent, their collection and handling of the questionnaire may give the appearance that anonymity and confidentiality may be compromised.

A cover letter, written by a presiding judge or other influential leader of the court system encouraging completion of the survey should accompany a survey. Box 14 contains such a letter accompanying a survey conducted by the District of Columbia Courts in Washington, D.C., and signed by the Chief Judge of the Court of Appeals and the Chief Judge of the Superior Court.

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<sup>142</sup> Iron-clad guarantees may not be possible. For example, it may not be clear if completed surveys are subject to public records requests. Although such public record requests are rare, courts may be asked hypothetical questions about such occurrences that they may not be able to answer.

#### **Box 14. Cover Letter Accompanying Employee Engagement Survey**

Please take a few minutes to complete this survey (an electronic version is available on the Courts' Intranet for your convenience). Your responses will assist the Courts in developing our 2008-2012 Strategic Plan. We need everyone's views in order to assess the progress we have made with the 2003-2007 Strategic Plan, to be sure that we identify critical issues the Courts must address in the next few years, and to develop realistic goals and strategies that we can all achieve. **Please complete and return this survey by August 14, 2006.** We also invite you to participate in a strategic planning discussion group to be held later in the year. Information on signing up for a discussion group will be provided via email and voicemail in the future. Thank you for helping the Courts plan for our future!

#### Notes on Effective Use

The power of *Court Employee Engagement* lies in its simplicity. Much like Measure I, *Court User Satisfaction*, is intuitively appealing, easy to understand, and produces actionable data. It highlights the importance of a court's or court system's workforce and encourages leaders, managers, supervisors and staff to find ways to energize and engage. It readily reveals "trouble spots" as well as "bright spots," and is easily translated into improvement actions. By tracking the results of the survey over time, court managers are able to ascertain trends or changes associated with improvement initiatives.

*Court Employee Engagement* is actionable and its effective use is easily revealed both at the (a) most aggregated level of data (averaged across all court locations, divisions, and units of a court or court system, and across all 20 items of the questionnaire) likely to be the focus of the top management of a court or court system, as well as at (b) the most disaggregated level (broken down to the percent of agreement for one item among the 20 items of the questionnaire in a particular unit of a court), likely the focus of line managers and supervisors at the unit level of a court.

What is the minimally acceptable level of employee engagement across a court or court system as whole? Across all 20 items? For each item? The initial measurement of *Court Employee Engagement* can provide a court system the data to answer these questions and establish baselines against which subsequent measurements can be compared. It can help establish priorities. Identifying the five items with the lowest percent of agreement, for example, may be good practical starting point for improving organizational performance in the areas of most concern to employees. Discussion of these areas might lead to re-evaluating on-the-job training needs of new employees, providing employees better and more timely information about performance expectations and feedback, improving the flow of communication, and creating an environment where employees feel safe expressing opinions and sharing new ideas.

When the measure is assessed at the level of a court department, division, unit, as well as different locations of a court or court system (e.g., main and satellite courthouses or separate juvenile courts) managers can learn a lot about organizational performance. Simply by

identifying other divisions or situations with superior results, (i.e., the “bright spots”), astute managers may be close to identifying possible solutions for “trouble spots.” Different courts (of the same level) or different divisions of a single court might be compared, for example, on the percent of employees who agreed that they understand what is expected of them (Item 1) and are proud to be working in the court (Item 20). Follow-up queries can then be made to probe the comparisons. Why are some locations more successful than others? What makes them the “bright spots”? What are they doing that the other locations are not? Asking staff in both the most successful and least successful locations these simple questions can help to identify “evidenced based” good practices.

## Measure 10. Compliance with Court Orders

### Definition

The total amount of payments of monetary penalties (fines and fees) collected by a court or court system, expressed as a proportion of the total amount of monetary penalties ordered by a court in a given period, e.g., a month or quarter

### Purpose

*Compliance with Court Orders*, like most of the measures in the *Global Measures*, aligns in varying degrees with all of the core values and most areas of excellence of the *International Framework for Court Excellence (IFCE)*.<sup>143</sup> It measures two areas of performance, one more important than the other. The first represents an *outcome* — compliance with the law — that is fundamental to the rule of law and the proper functioning of a justice system. The second is an *output* – effective revenue collection and efficient financial management — the happy byproduct of good performance in ensuring compliance with court orders.<sup>144</sup>

Courts should not order that certain actions be taken or prohibited and then allow those bound by the orders (e.g., the payment of a fine or fee) to fail to comply. Ordinary citizens have a reasonable expectation that when a judge issues an order that the individuals subject to the order comply with it. Standard 3.5 (Responsibility for Enforcement) of the *Trial Court Performance Standards*<sup>145</sup> requires a trial court to ensure that its orders are enforced.

Moreover, as discussed below under the heading “Notes on Effective Use,” a court must practice consistent sentence enforcement and related policies and practices in which fines and fees are imposed so that similarly situated defendants and respondents are treated alike.

Integrity and public trust in the administration of justice depend on how well orders of a court are observed and enforced. Noncompliance may indicate miscommunication, misunderstanding, misrepresentation, or lack of respect for or confidence in the courts.

While court orders establish a wide variety of sanctions, monetary penalties are clearly understood and easily measurable. Monetary penalties include such financial obligations as child support, civil damage awards, traffic fines, criminal fines and fees, restitutions, reparations, and other remittances.<sup>146</sup>

*Compliance with Court Orders* is an indicator of compliance with law, as well as the efficiency and cost-effectiveness of the process of collection of fines, fees and other monetary penalties by courts and other components of the justice system. It is premised on the principle that

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<sup>143</sup> See *supra*, Tables 1 and 2 in Part I.

<sup>144</sup> See *supra*, Part I, “What Are Core Performance Measures?”

<sup>145</sup> *Trial Court Performance Standards* at 16 (cited in note 45).

<sup>146</sup> The revenue from the collection of monetary penalties does not include court income derived from court library revenue, court reporting revenue, sheriff and bailiff revenue, probate revenue, mediation revenue, rental income and any other sources of revenue (excluding fines, fees and other income from the collection of monetary penalties). Total income from these other sources by the Australian, State and Territory courts was \$270 million in 2010-11. Productivity Commission at Table 7A.11(cited in note 8).

justice is not fully served until all court orders have been enforced and complied with and all parties are held accountable for their financial obligations under law.

Integrity and public trust in the dispute resolution process depends in part on how well court orders are complied with or enforced in cases of non-compliance. In particular, enforcement of fines, fees and other monetary penalties are issues of intense public interest and concern. The focus of this measure is on how well court orders are observed and the degree to which a court takes responsibility for the enforcement of its orders requiring payment of monetary penalties. It measures the success of judicial and staff actions, as well as the collaborative programs with other justice system partners that result in increasing the collection rate of all fees, fines and other monetary penalties.

### Methodology

This measure is similar to a corresponding measure in the *CourTools*,<sup>147</sup> but its methodology is simpler. The *CourTools* prescribed methodology has proven problematic for larger jurisdictions in the United States that have attempted to use the measure. Nonetheless, reviewing the descriptions and methodology of the *CourTools*, which includes definitions, examples of analyses and interpretations, and other information not contained herein, might be of benefit to courts seriously considering measuring *Compliance with Court Orders*.<sup>148</sup>

This core measure uses a simple “accounts receivable” or “money owed” accounting approach used by private businesses. It refers to the outstanding invoices a company has or the money the company is owed from its customers. For example, a court that imposed a total of \$2 million in fines, fees and other monetary penalties over the course of a year, and collected \$500,000 of payments in that same year, has a rate of compliance of 25 percent for that year.

Using this approach, only two data elements are required: (1) the total amount of payments ordered in a specified time period by case type or category; and (2) the total amount of payments made in the same type or category in the same period of time. The result of the measure simply is the ratio of these two elements expressed as a percent (see accompanying box).

**Box 15. Formula for the Calculation of *Compliance with Court Orders***

$$\text{Compliance with Court Orders} = A/B$$

**A = Total Amount of Monetary Obligations Collected**

**B = Total Amount of Monetary Obligations Imposed**

<sup>147</sup> See Measure 7b, *Management of Financial Obligations* of the *CourTools* (cited in note 6). This second part of a three-part measure focused on legal financial obligations imposed by courts is more expansive than *Compliance with Court Orders*, requiring more data elements and more extensive methods.

<sup>148</sup> *Id.* Measure 7b, for example, includes an explanation that the ease of collecting the necessary data for this measure will depend on the quality of a court’s systems for tracking compliance with financial obligations. If data is not available without review of case files, a reliable sampling and review of case may be required.

Like the computation of Measure 3, *Case Clearance Rate* - the number of outgoing cases expressed as a percentage of incoming cases - the *individual* payments collected do not necessarily correspond to the *individual* monetary obligations imposed. That is, specific payments *ordered* in a specified period of time are counted even if those payments were not actually made in that period of time. For example, a restitution payment of \$10,000 ordered to be paid in a criminal case in September of 2012 is counted only as part of the total amount imposed (the bottom part of the ratio above) if it is not paid by the end of 2012. Any full or partial payments collected are counted (the amount tallied for the top of the ratio) in the year they are collected.

Like the other core measures, *Compliance with Court Orders* should be calculated, monitored, analyzed, and used in terms of the overall compliance rate across all breakouts (i.e., single value, the average across all case type) and disaggregated into various breakouts including type of monetary penalties, case types, court locations and units, courts, and other variables.

#### Notes on Effective Use

Adopting and using *Compliance with Court Orders* on a regular and continuous basis gives courts and court systems a mechanism to investigate two potential problems with the imposition of fines and fees and to explore appropriate responses. Fines, fees, service charges and court costs are important though controversial sources of revenue for justice systems. As the justice sector in most countries struggle with shrinking budgets, this source of funds has received increased attention by governments.

The first problem is spotlighted by the title of a 2012 policy paper, “Courts Are Not Revenue Centers,” written on behalf of the United States’ Conference of State Court Administrators by Carl Reynolds, then the state court administrator of Texas.<sup>149</sup> The policy paper recommends standards to help ensure that court fees are used to support court related functions and are not just another form of taxation. Raising money to increase revenue for government coffers is not a function of courts, writes Reynolds, and pressuring courts to do so by the imposition of fines and fees is a threat to the independence of the judiciary. Court leaders should resist the pressure to force courts to become “revenue centers.” Such pressure on courts and court systems to increase their collection of fines and fees in order to raise revenues for funding government services can be countered by court leaders pointing to the dual purpose of *Compliance with Court Orders*. That is, the first *outcome* measure of compliance with the rule of law is the *raison d’être* of the measure and revenue collection a mere byproduct. Of course, courts should be held accountable for effective financial management, including its accounts receivable, but it may be inappropriate for governments adhering to clear separation of powers of the executive and judicial branches for courts to raise the funds for their own operations.

The second problem is that fines and fees may disproportionately impact the poor, a problem that has drawn the attention of court leaders in the United States and elsewhere. For example, the imposition of legal financial obligations may result in criminal defendants

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<sup>149</sup> See the resource guide, “Fines, Fees and Bail,” on the website of the National Center for State Courts: accessed 19 July 2018 from <http://www.ncsc.org/Topics/Financial/Fines-Costs-and-Fees/Resource-Guide.aspx>.

accumulating “court debt” and being incarcerated for failure to pay at a “cost” to them and their families far in excess of the original fine or fee.<sup>150</sup> Breaking down *Compliance with Court Orders* by ability to pay can provide insights into this problem. Courts that want to go further into this line of inquiry should study the National Center’s *CourTools*’ Measure 7a, *Ensuring Fairness in Legal Obligations*, which surveys defendants’ or, in civil proceedings, respondents’ ratings of their treatment in cases in which the court has imposed financial obligations.<sup>151</sup> Results can be compared by location of the court, division, case type, and demographic information of respondents.

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<sup>150</sup> Arthur W. Pepin (2015). “The End of Debtors’ Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations.” 2015–2016 Policy Paper. Conference of State Court Administrators: accessed 19 July 2018 from <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx>.

<sup>151</sup> *CourTools* (cited in note 6).

## Measure 11. Cost Per Case

### Definition

The average cost of resolving a single court case, disaggregated by level and location of court, and by case type.

### Purpose

A primary obligation of courts is efficient and effective case processing, and *Cost Per Case* is a useful indicator of a court's efficient and effective use of its resources. To many international court observers, "quality" means the effective and efficient use of resources.<sup>152</sup> "Affordable and accessible court services" is one of the areas of court excellence in the International Consortium for Court Excellence's *International Framework for Court Excellence* (IFCE).<sup>153</sup>

*Cost Per Case* helps court managers forge a direct connection between how much money is spent and what is accomplished. Monitoring the cost of processing cases across a court and by case type and by court location, from month to month, quarter to quarter, and year to year, provides court managers with a concrete and practical means to evaluate and to improve existing policies and practices of resource allocation for processing cases. If there are significant variances from court to court in a single jurisdiction, for example, without any evidence that higher costs produce higher quality of judicial services, adjustment may need to be made.

This measure and Measure 2 *On-Time Case Processing* go hand in hand. Time and money are the two most fundamental concerns voiced by citizens and other stakeholders of court services. How long does a case take to process? How much does the processing of cases by the courts cost taxpayers? While the time it takes to process (i.e., the timeliness and expedition of case processing) has long been of central concern for almost all courts and justice systems throughout the world, the costs associated with delivering that service, as important as it might seem, has not received the attention that timeliness has. Most courts are not used to thinking about their costs of processing cases and have not made any attempts to gather the necessary data to identify costs (see Box 16 under "Notes on Effective Use" below).

*Cost Per Case* can be viewed as a proxy for efficiency and effectiveness of case processing. It can provide within-state and cross-court comparisons where separate courts utilize similar staffing and funding models. It allows costs to be compared across case types and over time. It is a diagnostic tool for measuring the impact of new policies, practices, and procedures (e.g. caseload management practices such as expedited dockets, or specialized case assignments; implementation of enhanced technologies like electronic filing and document management; and innovative forms of alternative dispute resolution or settlement programs). Of course, many factors can contribute to significant differences in expenditures across jurisdictions

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<sup>152</sup> Dakolias at 24 (cited in note 10).

<sup>153</sup> See, *supra*, Table 2 in Part 1, "Alignment of the Seven Areas of Court Excellence of the IFCE and the Eleven Core Court Performance Measures of the *Global Measures*," Part I.



including geographic dispersion, economies of scale, socio-economic factors, as well as differences in justice policies and scope of services delivered by justice agencies.

## Methodology

The methodology of this measure conforms closely to that prescribed in the *CourTools*.<sup>154</sup> Reviewing the descriptions and methodology of the latter, which includes definitions, examples of analyses and interpretations, and templates for calculating the measure not contained herein, is of benefit to courts seriously considering measuring *Cost Per Case*. A brief review of the Excel template accompanying the *CourTools* for calculating this measure including data entry, generating and displaying the results, especially, may be helpful for understanding this measure even before reviewing the Methodology below.<sup>155</sup>

*Cost per Case* requires the following data element for a given time period (e.g., a month or a year):

- total court expenditures
- case dispositions (or filings) by major case type
- a complete inventory of all judicial officers and court staff in terms of full-time-equivalent (FTE) positions.

The court's allocation of personnel costs across case types is used to estimate the court's total expenses across case types. This method is used because the vast majority of court expenditures are personnel-related and courts generally allocate their judicial and staff resources rationally to accommodate their workload across case types. Total costs by case type are then divided by the total number of cases in each case type category to obtain the cost of a single case.

While cross-court comparisons may be broadly instructive, the primary use of this measure is within a court over time. The utility of the measure increases when it can be linked directly to other elements of court performance as it provides important perspective for interpreting the relationship between cost and outcomes. Once a court determines how it is currently performing in different case type areas, court managers can make more informed decisions regarding the level and type of resources (e.g., judicial versus non-judicial human resources) to devote to the processing of each case type.

The methodology of this measure requires four steps:

- 1) sorting of all court personnel by their assignment to case types or, alternatively, determining the "weight" or complexity of the case types;
- 2) determining total court expenditures across all categories including all non-personnel costs;
- 3) determining total costs by case type using the results of the first two steps; and, finally,
- 4) calculating the cost per case.

While this measure and its calculation are relatively straightforward, sorting court personnel by case type (Step 1) may be more challenging for some courts as explained below.

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<sup>154</sup> *CourTools* (cited in note 6).

<sup>155</sup> Cost Per Case Worksheet Instructions, *id.*

## Step 1. Sort Court Personnel by Case Type

In this first step, the court's allocation of personnel across case types is the exclusive method used to estimate the court's total expenditures across case types, *unless* specific non-personnel expenses can be directly related to a particular case type (e.g., the expenses of a case settlement or mediation program with only one type of civil case). For example, if 42 percent of a court's personnel including judges and staff are assigned to process civil cases, it is assumed that 42 percent of a court's total expenditures, not only personnel costs, are associated with the processing of civil cases. As noted earlier, this simple approach can be used because the vast majority of most courts' expenditures are personnel-related.

It is important to emphasize that this approach covers all court expenditures (e.g., equipment, supplies, and rental costs), and not only personnel costs. It simply uses the proportion of personnel associated with various types of cases to estimate the percent of overall expenditures associated with those case types, as further explained below.

First, using information about work assignments and job responsibilities of all employees (or, alternatively, the results of an abbreviated workload assessment study), sort all full-time and part-time judges and staff by case type in terms of full-time-equivalents (FTEs). Once all court personnel are classified by major case type that can be classified in this way, compute the proportion of the total classified personnel in each major case type by dividing the number of classified individuals in a case type by the total classified individuals. Again, this calculation is done solely for the purpose of estimating the costs known to be associated with case types, not a complete audit of the workforce. This step covers only those individuals classified by case type, not the total number of individuals in court's personnel directory (which includes those persons who are difficult to identify with a particular case type because they support common functions not related to case types).

For example, consider an appellate court with a total staff of 58, 48 of whom have responsibilities that can be related to one or more case types, allocated across major case types, as illustrated in Table 5; ten employees work in units or departments (e.g., accounting or human resources) that have responsibilities across all case types. In this example, the allocation of all 48 personnel (100 percent) across four case types and two other categories is as follows: *civil* = 20 personnel/total of 48 personnel = 42 percent; *criminal* 14/48 = 29 percent; *administrative agency* 9.5/48 = 20 percent; and *other* 4.5/48 = 9 percent. This allocation of personnel across case types is used in Step 2 to distribute the court's total expenditures across case types.

What about the ten personnel in the court that cannot be classified by case type? Their personnel costs will be captured by the total expenditures of the court calculated in Step 2 and distributed proportionately across the four case types.

**Table 5. Example of Results of Step 1 for Measure 11 Cost Per Case**

Personnel Classification	Case Type				
	Civil	Criminal	Administrative Agency	Other	Total

<b>Judges</b>	4	3	2	1	10
<b>Law Clerks</b>	8	6	4	2	20
<b>Staff Attorneys</b>	3	2	2	1	8
<b>Court Clerks/Other</b>	5	3	1.5	0.5	10
<b>Total FTE Personal (%)</b>	20 (42%)	14 (29%)	9.5 (20%)	4.5 (9%)	48 (100%)

As further explained below, the allotment in this hypothetical example can be the result of a simple classification or, alternatively, a systematic time study, workload analysis or an estimate based on expert opinion (i.e., the Delphi technique).<sup>156</sup>

### **Alternative Approaches for Step I**

When a court routinely assigns cases to judges or staff based on case type, or a court has separate divisions or units identified with case types, as is done in many courts throughout the world, costs associated with personnel are allocated easily to those case types and Step I can be taken without difficulties. However, there are two problems using this approach for some courts. First, some courts make *general* docket assignments so that all (or most) judges and staff work with a mix of all case types instead of restricting their work mostly to one type of case. Second, some courts of last resort are responsible for overseeing the administration of the entire judicial system and regulating the practice of law (e.g., attorney disciplinary matters) in addition to the responsibility of deciding cases. Separating the amount of time spent on such “non-case related” responsibilities, and the corresponding costs, can present a challenge.

There are two alternatives to the approach taken in Step I described above, both designed to establish the relative “weights” of the case types in terms of time spent for an average case (e.g., 127 minutes for the average civil case):

#### **I. Workload Assessment<sup>157</sup>**

- An in-depth time study designed to determine the weight of various case types
- Labor intensive process

<sup>156</sup> The burden of data collection may be a serious limitation of an abbreviated workload assessment based on a time study. Determining the amount of time devoted to major case types requires a significant commitment of time and effort by judges and staff. An alternative – referred to as the Delphi Technique – is to have judges and staff *estimate* the amount of time allotted to cases in major categories take, without directly measuring time spent on each case activity. See Chapter VII. “The Delphi Technique,” in Victor Flango and Brian Ostrom (1996). *Assessing the Need for Judges and Court Support Staff*. (Williamsburg, VA: National Center for State Courts).

<sup>157</sup> See *Colorado Court of Appeals Workload Analysis: Final Report*. National Center for State Courts. September 2005 for an example of a full staff workload study; accessed 19 July 2018 from <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1097>.

- Provides extensive information regarding relative case weights and distribution of efforts
- Relative weights are used to distribute costs by case type.

## 2. Delphi Technique

- Essentially a focus group approach
- Compared to workload assessment, limited commitment of time and effort to develop relative case weights
- Some reduced degree of accuracy
- Conclusions can be used to distribute costs by case type.

Both of these alternative methods yield “weights” (average processing time in minutes) of the major case types. The proportion of the weight of each case type, expressed as a percentage of the total weights of the case types (i.e., 100 percent) can then be used in the next steps, like the allotted percentages of personnel time across case types.

Typically, a workload assessment consists of a four to six week time study in which a representative sample or (ideally) all judges and staff participate. It includes a detailed accounting of time spent on various case processing activities by case type. Time spent per day is tabulated and divided by the number of cases processed in the time study period in order to arrive at preliminary results. A representative group of judges and staff then evaluate the preliminary results and reach consensus on the relative case weights, or average judge/staff time required for each case type. Developed as a systematic method for determining judge and court staff requirements based on caseload, the results, or average amount of time spent on particular case types, can also be used for projecting the cost per case.

The Delphi Technique presents a less complex, inexpensive alternative to a workload study. It is often used by courts as an interim method of periodically revising the results from a workload study. It entails the formation of a “focus group” of representative judges and court staff with broad knowledge of the case types and case processing requirements, estimating the time required for various case activities by case types. The group pays special attention to the inherent differences in case types and brings its collective knowledge and experience to achieving consensus on the average time requirements.

### **Step 2. Determine Total Court Expenditures**

Once the allotted percentages of personnel time across case types or, alternatively, the weights or complexity of the case types have been calculated, Step 2 requires the determination of the total expenditures of the court in the fiscal period. Total expenditures are used in this step (instead of total budget) because they are what a court actually spent instead what it plans to spend. All expenditures should be included (e.g., salaries and benefits, goods and services, facility expenses, and administrative overhead). Assembling all expenditure data may be labour-intensive, at first. However, once the initial total expenditures are defined and documented, relatively simple processes can be utilized to capture data on a routine basis.

Continuing with the hypothetical example used above, assume that the total expenditure of the court for the year is \$4,750,000, as illustrated in Table 6. This amount includes the cost of personnel not classified into case categories, as well as all other non-classified items such as overhead and general costs. (Note that expenditures pertaining to the civil settlement program are not distributed to all case types because this program handles only civil cases.)

### Step 3. Allocate Total Cost Across by Case Type

Using the results of Step 1 and Step 2, the percentage allocation of personnel across the four case types is used to distribute the court’s total expenditures across case types, unless specific expenses can be directly related to a particular case type (e.g., a settlement program) as illustrated in Table 6. Of the total expenditures of \$4,750,00 42 percent or \$2,064,00 is for civil cases, 29 percent or \$1,342,700 is for criminal cases, and so forth. Again, this simple approach can be used because the vast majority of court expenditures are personnel-related and the results will not be affected materially by using a more sophisticated process.

**Table 6. Example of Results of Step 2 and 3 for Measure II Cost Per Case**

Expenditures		Case Type			
		Civil 42%	Criminal 29%	Administrative Agency 20%	Other 9%
	Total				
Salaries & Personnel	\$3,850,000	\$1,617,000	\$1,116,500	\$ 770,000	\$ 346,500
General Operating Costs	\$ 180,000	\$ 75,600	\$ 52,200	\$36,000	\$16,200
Civil Settlement Program	\$ 120,000	\$ 120,000	\$ 0	\$ 0	\$ 0
Facility	\$ 600,000	\$ 252,000	\$ 174,000	\$120,000	\$54,000
<b>Categorized Totals</b>	<b>\$4,750,000</b>	<b>\$2,064,600</b>	<b>\$1,342,700</b>	<b>\$926,000</b>	<b>\$416,700</b>

### Step 4. Calculate Cost per Case

Finally, in Step 4, the total costs by case type are divided by the total number of dispositions by case type to obtain the cost of a single case to yield the average cost per case: \$1,703 for a civil case, \$1,651 for a criminal case, \$1,651 for an administrative agency case, and \$1,174 for cases classified as “other” in this court).

**Table 7. Example of Results of Step 4 for Measure II Cost Per Case**

	Case Type			
	Civil	Criminal	Administrative Agency	Other
<b>Distributed Expenditures</b>	\$2,064,600	\$1,342,700	\$926,000	\$416,700
<b>Dispositions by Case Type</b>	1,212	1,153	561	355
<b>Average Cost Per Case</b>	\$1,703	\$1,165	\$1651	\$1,174

### Notes on Effective Use

*Cost Per Case* can provide important insight into effects of changes in case management policies and practices and, generally, the management of a court’s limited resources. Changes in a court’s case management policies and processes include, for example, shifting available resources from one type of case to another, moving the responsibility for routine matters from judges to non-judicial officers and to litigants and other court users, and even taking certain cases out of the courts altogether, all of which are likely to be accelerated by innovation and technology.<sup>158</sup>

#### **Box 16. Why is Cost Per Case Not Used as Much as it Should?**

How long does it take? How much does it cost? These are the most frequently asked questions by customers, clients, and other consumers of services. We ask these questions when we consider seeking the assistance of a lawyer or getting our car fixed. The questions are fundamental for companies and service providers.

Even though the cost analysis prescribed by Measure 11, *Cost Per Case*, is still relatively new in courts in the United States and, with the possible exception of Australia,\* throughout the world, it is somewhat of a mystery why courts are comfortably fixated on answering the question *How long does it take?* while all but neglecting answers to the question *How much does it cost?* Measure 4, *On-Time Case Processing* — the percent of cases resolved within established timeframes — is a performance measure that has been around for more than 25 years and is used by a majority of courts. On the other hand, *Cost Per Case* is a performance measure that is considered seriously by only a handful of courts and court systems.

Time and cost go hand in hand. Why should a measure of one be embraced while a measure of the other shunned? The simple answer to the question is that the methods for *Cost Per Case* are not as well-developed and accepted as those for *On-Time Case Processing*. A more complex and arguably more troubling answer might be that court executives fear that cost data in the hands of groups and individuals unfriendly to the courts could be used to hurt them. They fear that *Cost Per Case* will always be seen as too high and, therefore, will be used as ammunition for budget-cutters.

#### **Methods for Determining Cost per Case Not Developed in the U.S. Until 2000**

<sup>158</sup> See generally, Victor E. Flango and Thomas M. Clarke (2014). *Reimagining Courts: A Design for the Twenty-First Century*. (Philadelphia: Temple University Press).

Effective court management requires sufficient resources to do justice and to keep costs affordable. While cost analysis in the courts has received considerable attention in the literature of court administration (see, for example, National Institute of Justice's 1987 *Analyzing Costs in the Courts*), performance measures of cost have not seen widespread use among courts. Standard 4.2, Accountability for Public Resources, of the *Trial Court Performance Standards* (TCPS), requires courts to responsibly seek the resources needed to meet their judicial responsibilities, use those resources prudently (even if they are inadequate), and account for their use. *Cost Per Case* is not a performance measure identified in the TCPS. *Cost Per Case* was first introduced as part of the *CourTools* in 2005. Its metric and calculation are relatively simple and straightforward.

### **Fear of Misuse**

Some court managers have expressed reservations about the use of *Cost Per Case* as a court performance measure. And, traditionally, in most courts, judges have not had experience in managing budgets and much interest in the cost of court administration. They see little value in using it for internal court management and they fear that others may use the measure in ways that are not in the court's best interest. It is best not to brush these reservations under the rug. They may be anchored in strong norms, beliefs, and assumptions including: (1) a fear of exposure to criticism from comparative performance measurement that may point out that a particular court does not "stack up" to other courts (Why hand over to anyone such potent ammunition?); (2) the conviction that no two jurisdictions are alike and thus "our" court is incomparable; (3) a concern that performance data can be misused; (4) worries that performance measurement takes too much time, effort and money; and (5) the belief that performance trend data, by themselves, do not tell us why things are different, only that they are different. (See I. Keilitz. "How Do We Stack Up Against Other Courts? The Challenges of Comparative Performance Measurement," *Court Manager*, Volume 19, Number 4, 2005).

Changing negative mental model, norms, and pernicious narratives (e.g., performance measurement is a zero-sum instead of a positive-sum game where all stakeholders can gain something) is difficult. Overcoming the resistance to performance measurement in general among court leaders, managers, and practitioners, and especially with regard to less familiar and more controversial measures such as *Cost Per Case*, is perhaps the greatest challenge in starting a performance management initiative. Many of the best ideas — in particular our reliance on performance measurement for management decisions — fail to get put into practice in courts and court systems because they conflict with powerful social norms and narratives formed by those norms. Because they are often below the level of awareness, these norms and narratives often remain unexamined and untested. The social psychologist Kurt Lewin, who studied the factors that influence people to change, suggested that rather than trying to sell people on some change, we should identify the reasons for the resistance and address those directly.

It is, perhaps, naïve to think that it is sufficient to proclaim the advantages of *Cost Per Case* and expect court managers to embrace the measure. We must first acknowledge and address the norms and narratives that may impede its acceptance. The fear that measures such as *On-Time Case Processing* and *Cost Per Case* will put a court, or even an individual judge or court administrator, in an unfavourable light is not necessarily unfounded. In any event, it is best to acknowledge the limitations of *Cost Per Case*, and threats to its use for internal court management and comparative performance measurement, and to strive to minimize them in specific ways, and to demonstrate in specific terms that the benefits outweigh the real risks that these limitations and threats may pose for individuals and courts.

\*See Productivity Commission (cited in note 8).

Tracking changes in *Cost Per Case* over time allows for a meaningful evidence-based assessment of court policies and the impact of case management practices. This measure also may provide valuable and useful information for the courts during budget negotiations.

Monitoring *Cost Per Case* over time provides a practical means to evaluate existing case processing practices and to improve court operations. Comparisons across court locations and courts on cost per case can lend insights about areas for improvement, especially when the cost of handling the same type of case differs dramatically across courts or court locations.

The measure forges a direct connection between how much is spent and what is accomplished. It can be used to assess return on investment in new technologies, reengineering of business practices, staff training, or the adoption of “best practices.” It also helps determine where court operations may be slack, including inefficient procedures or underutilized staff.

Finally, it is worth noting why *Cost Per Case* relies on a court’s allocation of personnel costs across case types to estimate the court’s total expenses across case types, instead of calculating expenditures directly, though at least one court system has attempted this with some difficulties.<sup>159</sup> The European Commission on the Efficiency of Justice (CEPEJ) noted that the adoption of a cost accounting system that captures all the cost related to an individual case is expensive financially and in terms of human resources. “Even if such an information system existed,” it wrote, “it would constantly need to be fed with information not only by those directly involved, who would have to record the time spent on a particular case, but also by a specialised staff responsible for allocating all fixed costs (rent, consumables, etc.) and variable costs (expert appraisals, travel expenses, safe custody charges, etc.) for the different cases. Particular attention should obviously be paid to ensuring that the same cost units are used for comparison purposes.”<sup>160</sup>

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<sup>159</sup> In the spring of 2017, the Moldova court system expanded its performance measurement system to include *Cost Per Case*. The measure utilizes ten budget items identified in the IC Enterprise 8 financial software used by the courts: office supplies and household effects; books and periodicals; medication and consumables; telecommunications and mail services; current repairs of equipment and inventory; local and state symbols, state distinction signs; professional training; editorial services; editorial services; protocol services; and goods and services not attributable to other budget items. The measure does not include salaries among the ten budget expenditures, the largest expense for most courts, nor does it provide disaggregation by case type. Open Justice Project (2018). *Court Performance Intelligence: Design and Development of a Cutting Edge Automated Performance Measurement and Management System for the Courts of Moldova*. United States Agency for International Development (USAID). Contract No. 117-TO-17-00001. *Court Per Case*, 129 – 135.

<sup>160</sup> European Commission on the Efficiency of Justice (CEPEJ) (2016). *Measuring the Quality of Justice*, December 2016, paragraph 71: accessed 19 July 2018 at <https://rm.coe.int/1680747548>.



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