Chapter 3

The Effects and Effectiveness of the Functioning of the International Criminal Court

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Abstract

The Rome Statute of the International Criminal Court (hereinafter: the ICC) was adopted in 1998 and entered into force in 2002, marking the establishment of the ICC. Quarter of a century later and more than two decades since the ICC became operational, sufficient time has passed to undertake a comprehensive assessment of its performance - evaluating both its achievements and shortcomings, as well as the lessons learned along the way. In recent years, a range of actors—including scholars, expert bodies, non-governmental organizations, and the ICC itself—have conducted various assessments of the Court's work. After a brief introductory mapping of these different assessments, the central part of the paper deals with a methodological dilemma of choosing the right metrics. The paper identifies several evaluative approaches frequently referenced in academic literature and policy discourse, but also others that, while less commonly employed, merit inclusion in any serious discussion about the Court's effectiveness. In turn, it explores quantitative approach focused on empirical data, goal-oriented analysis with special emphasis on deterrence, assessment grounded in gender justice considerations and finally evaluations that take into account post-trial (in) justices. By examining these varied methodologies, the paper reveals the inherent complexities and limitations of measuring the ICC's effectiveness. These difficulties are then zoomed in in the last part of the paper which

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critically reflects on the challenges and promises of looking at the ICC effectiveness through different possible lenses.

Keywords: the ICC, effectiveness, metrics, goals, deterrence, gender justice, post-trial justice

1. Introduction

The Rome Statute of the International Criminal Court (ICC) was adopted in 1998, and entered into force on 1 July 2002, following its ratification by 60 states, marking the formal establishment of the ICC. Regardless of whether 2002 or 1998 is taken as its birth date, in 2023, the ICC became a fully-fledged adult. Having passed the vulnerable teething years and adolescence, reaching adulthood[1] can be seen as an appropriate time to pause for a moment and reflect on its past achievements, as well as the challenges faced and lessons learned so far.

Of course, this is not the first attempt to map the achievements and failures of the ICC. Since its inception, and in recent years in particular, systematic assessments of various aspects of the ICC's functioning have been carried out by different stakeholders, including the ICC itself. In 2010, the Study Group on Governance (hereinafter, the Study Group) was established by the Assembly of State Parties (ASP) of the ICC in the hope of facilitating 'a structured dialogue between State Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence'.[2] In less abstract terms, the goal of the Study Group was to identify issues calling for further action and formulate recommendations for improvements to the ASP. The Study Group has continued to do so on an annual basis and its mandate has been continuously extended.[3]

In 2011, the International Bar Association (IBA) issued a report entitled, 'Enhancing Efficiency and Efficacy of the ICC: A Work in Progress'.[4] This report placed emphasis on effective judicial management and timely and consistent decision making, issues particularly important from the practitioners' perspective. It noted a number of factors contributing to notoriously lengthy proceedings. At the same time, it considered the foundational phase that the ICC had recently gone through and highlighted the major role played by states in ensuring its efficiency and effectiveness.

1 Even in legal systems that require a higher threshold of 21 for reaching the age of majority.
2 ICC-ASP/9/Res.2.
3 Available at https://asp.icc-cpi.int/bureau/WorkingGroups/SGG
4 Available at https://www.ibanet.org/document?id=January-2011-Enhancing-Efficiency-and-Effectiveness

The effects of the ICC have also been analysed by the non-governmental organisations (NGOs). In 2018, Human Rights Watch, one of the most renowned organisations in the field, published a report entitled, 'Pressure Point: The ICC's Impact on National Justice: Lessons from Colombia, Georgia, Guinea, and the United Kingdom'.[5] This report approached the ICC's effectiveness through the prism of enforcing (positive) complementarity and its success in inducing domestic prosecutions of core crimes.

One of the most comprehensive analyses to date was carried out by the ICC itself, namely, the ASP commissioned Independent Expert Review (IER).[6] The establishment of the IER reflected the ICC's growing recognition of the need to systematically assess its own functioning. The Final Report of the IER set forth 384 recommendations aimed at assisting the ASP and the Court in enhancing the Court's impact through higher efficiency and cost-effectiveness.[7] The highly detailed recommendations provided by the appointed external members, albeit in consultation with a number of current or former officials and members of Staff, concerned three clusters: governance, judiciary and preliminary examinations, and investigations and prosecutions. The implementation of these recommendations, which addressed both court-wide and organ-specific measures as well as external governance, is now monitored by the so-called Review Mechanism, a body comprising two State Party representatives and three ad-country Focal Points.[8]

That improving its effects and effectiveness is a key concern of the ICC is evident from the ICC strategic plans for the 2023–2025 period,[9] launched in 2023. The overarching Strategic Plan mentions the word "effective" as many as 36 times and contains 27 measurable and specific key performance indicators linked to the 10 ICC goals, with the aim of strengthening efficiency, effectiveness, and performance management.[10]

In addition to these practice-oriented documents, there is a considerable body of scholarly literature, upon which this chapter builds. Researchers have explored effectiveness from different angles, including highly conceptual and methodological analyses focusing on goal-oriented effectiveness,[11] critical explorations of legitimate objections to the functioning of the ICC,[12] and the use of gender-based metrics.[13]

Following this brief introductory mapping of the landscape, the following section turns to methodological dilemmas involved in measuring "effects" and "effectiveness", that is, of choosing the right metrics. It identifies different possible

5 Available at https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_0.pdf
6 ICC-ASP/18/Res.7.
7 Para. 988.
8 ICC-ASP/19/Res.7. See also the Review Mechanism's Proposal for a Comprehensive action plan for the assessment of the recommendations of the Group of Independent Experts.
9 Three organ-specific and the overarching strategic plan are available at https://www.icc-cpi.int/news/international-criminal-court-launches-strategic-plans-2023-2025
10 Paras. 68 and 71 of the ICC Strategic Plan 2023–2025.
11 Shany, 2012.
12 Robinson, 2015.
13 Seelinger, 2022.

approaches often relied upon in the literature or policy documents. Arguably, these approaches should be seen as a part and parcel of the discussion on the ICC's effectiveness. The analysis of these different methodological approaches does not aim to be exhaustive or entirely detailed and comprehensive, but to illustrate the difficulties inherent in any discussion of the ICC's effectiveness. The final section of this chapter examines these difficulties in closer detail, critically reflecting on the challenges and promises of viewing the ICC's effectiveness through different lenses.

2. Measuring effectiveness: Choosing the right metrics

While most authors contend that measuring the ICC's effects on international peace, stability, deterrence and/or its effectiveness is important to enhance its performance,[14] there is no consensus in either academic discussions or policy documents on how this should be done.[15] Epistemologically, there is a divide between those who look at ICC effectiveness from a theoretical and symbolic perspective, assessing normative logical consistency or looking at its mandate, actions, and outcomes from a value-based perspective,[16] and those who seek to assess the ICC's effects through an evidence-based approach and empirical assessment.[17] Empiricists either base their findings on quantitative methodology, studying statistical significance and the impact of certain variables, or on qualitative methodology, focusing on case studies and comparative research.

Although researchers tend to measure the Court's effectiveness externally, as outsiders, some have sought to include internal perspectives in their analyses.[18] The views of the ICC personnel, that is, practitioners working at the ICC, have long been neglected, despite the fact that their daily involvement in the work of the ICC means that they can offer valuable insights into the Court's strengths and weaknesses. However, research has revealed significant divergences in practitioners' views. In other words, ICC personnel have different ideas about what the Court's priorities should be and how these should be reflected in the ICC's daily activities. Their differing views surely affect how they evaluate the Court's effectiveness.[19]

14 Of course, there are also those who reject the legitimacy of the ICC from the outset or argue that the Court cannot be effective without the support of major powers. See, for example, Gordin, no date.
15 A similar conclusion has been reached by Muhammad, Hola, and Dirkzwager, 2021, p. 28.
16 For example, symbolic value has been emphasised by ICC personnel. Ibid., pp. 135, 137.
17 For example, Appel, 2018.
18 Muhammad, Hola, and Dirkzwager, 2021.
19 Ibid, p. 135.

2.1. Relying on the numbers: Facts and figures

Perhaps the most straightforward approach to measuring the effectiveness of the ICC is to look at quantifiable data. The statistical assessment of effectiveness may be a good starting point. Effectiveness can be defined as efficiency, that is, the degree to which maximum productivity is achieved without wasted energy or effort.[20] A set of indicators may be relied upon for this purpose, such as number of cases in the broadest sense (including preliminary examinations, situations under investigation, issued arrest warrants, and confirmed charges and/or convictions) against the length of trials and/or certain phases of proceedings and financial resources used.

This approach was taken by the European Parliamentary Research Service (EPRS), for example. In its 2018 'Briefing on Achievements and Challenges 20 Years after the Adoption of the Rome Statute', under the heading 'The Court's Effectiveness', the EPRS analysed the number of convictions made by the Court. At the time, only three convictions had been made, which was considered "very low" given the expenditure of almost EUR 1.5 billion between 2004 and 2018.[21] These first three proceedings were also criticised for their length.[22] The EPRS further emphasised that the ICC budget had been continuously rising, amounting to some EUR 147.4 million in 2018, a 2 per cent increase over the previous year.

This budgetary trend continued in the following years, with the budget reaching EUR 169,649,200 in 2023.[23] At the same time, however, the number of finally disposed of cases increased significantly. Since 2018, seven additional convictions and four acquittals have been issued, changing the balance slightly in favour of greater effectiveness. ICC judges have issued 40 arrest warrants and nine summons to appear, resulting in 21 suspects being detained in the ICC detention centre.[24] This almost exponential rise in the number of cases in the last five years compared to the first fifteen since the Court became operational indicates that it is impossible to look at the foundational years through the same assessment lenses, as will be examined further in this chapter.

The ICC itself often conflates effectiveness with expeditiousness and efficiency. The ICC Strategic Plan for the 2023–2025 period reflect an expectation – or hope – that the Court 'can contribute to the pursuit of universality by performing its work independently, impartially but also effectively and efficiently'.[25] Increasing the expeditiousness and efficiency of the Court's core activities (preliminary examinations,

20 See IBA Report, 2011, p. 16. relying on the Oxford Dictionary.

21 International Criminal Court. Achievements and challenges 20 years after the adoption of the Rome Statute, p. 10.

22 The Lubanga criminal proceedings lasted more than eight and a half years, the Katanga proceedings more than six and a half, and the Ngdjolo proceedings more than seven years. The first trial leading to acquittal, the Bemba case lasted over ten years. Gumpert and Nuzban, 2021, p. 561.

23 ICC Facts and Figures. Available at https://www.icc-cpi.int/about/the-court

24 Ibid.

25 ICC Strategic Plan, p. 12.

investigations, trials, and reparations) is the ICC's first strategic goal (i.e. Strategic Goal 1) for this timeframe.[26] The Court will rely on various indicators when measuring the implementation of this goal, including the time elapsed between key judicial decisions and activities vs. target advisory deadlines for key judicial activities and decisions as determined by the Chambers Practice Manual,[27] percentage of cancelled hearing days out of total scheduled hearing days, number of AWAs (or summons to appear) filed before the judges, and ratios of counts issued vs. counts confirmed and convicted (upon warrants, confirmation decisions, trials and appeals).

However, these indicators tell little about the quality of proceedings or their independence and fairness, which are included in Strategic Goal 1, together with expeditiousness and efficiency. Strategic goal 1 aims to:

> *Increase the expeditiousness and efficiency of the Court's core activities (preliminary examinations, investigations, trials and reparations) while preserving the independence, fairness and highest legal standards and quality of its proceedings, and protecting the safety and well-being of the persons involved, in particular victims and witnesses.*[28]

In fact, although the ICC practitioners from the Office of the Prosecutor (OTP), Chambers, and Defence did not agree on what to include as a measure of effectiveness, they reached a clear point of consensus in rejecting the number of convictions as the sole or most important metric.[29] Some argued that even acquittals, if fair, would indicate the ICC's effectiveness, emphasising the role of the ICC in providing fair, independent, and impartial trials where domestic courts have failed.[30]

Needless to say, the number of prosecuted cases does not necessarily correlate to the quality and fairness of the process. The Court itself has argued that its impact does not rely on the prosecutions that it undertakes, because 'the absence of trials by the ICC, as a consequence of the effective function on national systems, would be a major success'.[31] This statement goes hand in hand with the notion of positive complementarity, which sees the ICC as the court of last resort and emphasises its positive impact in exerting an influence on domestic jurisdictions to prosecute core crimes.

26 Ibid.

27 The Strategic document points to the fifth edition, which was amended twice in the meantime. The most recent version is the seventh edition, available at https://www.icc-cpi.int/sites/default/files/2023-07/230707-chambers-manual-eng.pdf. These indicators should address two major shortcomings contributing to the duration of trials: first, long periods of interstitial time elapse between the various steps in the proceedings, such as first appearance, confirmation of charges decision, start of trial, trial judgement, and appeal judgement; second, the small number of days on which courtroom proceedings take place. Gumpert and Nuzban, p. 560.

28 ICC Strategic Plan, p. 12. This goal is further linked to linked to OTP Goals 1, 3, 6, 7, 8; Registry Goal 1; Priority Objective 1.1 and 1.6; and TFV Goal 4.

29 Muhammad, Hola, and Dirkzwager, 2021, p. 146.

30 Ibid, p. 148.

31 ICC, Paper on some policy issues before the Office of the Prosecutor, 2003, p. 4.

This leads us to the challenges involved in the numerical approach to assessing the functioning of the ICC. First, while length of the proceedings is problematic, as illustrated by the well-known maxim "justice delayed is justice denied", and hence seen as a relevant indicator of expeditiousness and effectiveness, one must understand and allow for delays associated with building the institution and developing (consistent) jurisprudence.[32] Consequently, the measured unit of time must be selected carefully and different units of time must be approached and assessed differently. Furthermore, the number of issued judicial decisions alone does not indicate whether these decisions were ever enforced. While judicial decisions that remain unenforced may carry a symbolic value, they may also lead to disappointment in and decrease the legitimacy of the Court. As Helfer and Slaughter have pointed out, while effectiveness depends on compliance with judicial decisions to some extent, compliance rates may hinge not only on the perceived quality of the Court and its decisions, but also on the nature of the remedies issued. These authors rightly warn that a "low aiming" court that issues minimalist remedies may generate high levels of compliance, but have a little impact on the state of the world.[33] Of course, compliance with judicial decisions also depends more generally on co-operation with states, which is often inadequate or completely lacking.

Given all of these challenges, doubts have been raised as to whether quantitative performance indicators can be developed and meaningfully applied to the ICC's functioning. The 2011 IBA Report pointed out that there is no measurable performance indicator for the quality of judicial making. Indicators based on the turnover of cases, regardless of length and complexity, seem insufficient if not inappropriate.[34] Consequently, while assessing the functioning of the ICC based on facts and figures may serve as a starting point, it should not be the end point of such an inquiry.

2.2. Goal-oriented approach to measuring effectiveness

Social sciences research looks at effectiveness based on the so-called "rational system approach", according to which an action is considered effective if it accomplishes its specific objective aim.[35] Translated to the international criminal justice arena, this means that the ICC can be seen as effective to the extent that it has achieved its goals. However, to quote Seneca, '[i]f a man knows not to which port he sails, no wind is favourable'.[36] Consequently, it is important to first identify the

32 In its 2011 Report, the IBA emphasised that despite delays, it is important that the practice of the ICC is allowed to develop organically in order to ensure that sound foundational decisions are made at this stage of the ICC's judicial development. See IBA Report, 2011, p. 8.

33 Helfer and Slaughter, 2005, pp. 918–919; Shany, 2012, p. 227.

34 IBA Report, 2011, p. 17.

35 Shany, 2012, p. 230.

36 A quote attributed to Seneca, available at https://www.goodreads.com/author/quotes/4918776.Seneca (Accessed June 3, 2025)

desired goal or goals of international criminal justice and the ICC in order to assess whether these goals have been accomplished.

This is by no means an easy task. Scholars have raised concerns regarding the ambiguity or fuzziness of many of the goals of international criminal justice.[37] Some of these goals have been set by the mandate providers in the founding documents (i.e. official, external goals), while others have been explicitly or tacitly self-proclaimed by international courts (internal and oftentimes, but not necessarily, more specific operative goals such as those listed in the Strategic Goals).[38] The list is long. In addition to the standard set of goals inherent in criminal law enforcement (retribution, special, and general prevention/deterrence), international criminal courts have been tasked with a number of additional goals, which may lead to what Damaška refers to as an "overabundance" of goals.[39] One of the prominent goals in this goal matrix is to contribute to peace and security. In 'Policy Paper on the Interests of Justice', the Court emphasised that it was created 'on the premise that justice is an essential component of a stable peace'.[40] Other goals frequently invoked in the context of international criminal adjudication include producing a reliable historical record, stopping ongoing conflicts and contributing to reconciliation in the affected regions, giving voice to victims of mass atrocities by ensuring their participation in the proceedings and addressing harm resulting from core international crimes through comprehensive compensation and reparations schemes, and propagating the values of human rights.[41] While an aspiration to fulfil a number of commendable goals can be seen as a value in itself, these goals may be internally incoherent and mutually competing, hindering the effective functioning of the Court.[42] Furthermore, many of these goals are distant and conceptually unclear, making it difficult to assess their achievability.[43] Scholars have also warned against "limitless optimism" with regard to institutional competence to achieve some of these goals.[44]

Finally, as Shany has astutely noted, even if one remains optimistic about the possibility of identifying, ranking, and assessing the accomplishment of different types of ICC goals, one needs to be conscious of two things. First, while an organisation may fulfil its goals, doing so may incur considerable costs and negative side-effects, offsetting the desired impact. Second, failure to meet the goals may create unintended benefits, which may outweigh the negative effects of failure.[45]

37 Kersten, 2015; Shany, 2012, p. 233.
38 For further detail regarding the different types of goals (official vs. operative goals, external vs. internal goals, ultimate/long-term vs. intermediate/short-term goals, and explicit, implicit, and non-stated goals), see Shany, 2012, pp. 231–233.
39 Damaška, 2007, p. 331.
40 ICC, Policy Paper on the Interests of Justice, 2007, p. 8.
41 Damaška, 2007, p. 331.
42 Ibid, pp. 331–335.
43 Kersten, 2015.
44 Weerdesteijn, M., Holá, B . 2020
45 Shanym 2012, p. 237.

2.3. Deterrence as a key measure

Deterrence is one of the primary goals of the ICC, one widely accepted as the main justification for the establishment of the ICC. This is evident from the very preamble of the Rome Statute, which emphasises the resolve to 'put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'. Similarly, the former Secretary General highlighted the deterrent role of the ICC, arguing that '[t]he threat of referrals to ICC can undoubtedly serve a preventative purpose and the engagement of ICC in response to the alleged perpetration of crimes can contribute to the overall response'.[46] While deterrence is without a doubt a noble goal of the ICC, using deterrence as the main metric for measuring the effectiveness of the ICC is highly problematic for a number of reasons.

First, deterrence is an elusive goal.[47] As observed by Schabas, 'while we can readily point to those who are not deterred, it is nearly impossible to identify those who are'.[48] Correlation between the actions of the ICC and prevention of mass atrocities is not easy to establish. How can we test the relationship between the levels and nature of violence and the ICC (or ICC intervention)? To what extent can we link state or individual conduct to specific actions or the mere existence of an international criminal court? Empirical scholarship in this area is scarce and evidence is hard to obtain or verify. Nevertheless, preliminary research indicates that states that ratified the Rome Statute tend to engage less in human rights violations.[49] Using Cingranelli and Richard's Physical Integrity Rights Index (comprising four key indicators of human rights violations, namely, torture, summary executions, physical disappearance, and political imprisonment), Appel found that although governments with better human rights record are more likely to ratify the Rome Statute, their human rights practices continue to improve after ratification, whereas the practice of non-member states does not change significantly.[50] Prorok similarly observed that the mere ratification of the Rome Statute significantly contributes to civil war termination.[51]At the same time, however, it seems that more active involvement of the ICC, in the form of preliminary examinations and investigations, can have the opposite effect of actually extending conflicts.[52] Recent evidence supporting this conclusions is provided by the case of former Yugoslavia, where the worst crimes, including genocide in Srebrenica, occurred after the establishment of the ICTY. Similarly, in the Democratic Republic of the Congo, child recruitment continued after Lubanga was found guilty, although at lower rates.[53] This is perhaps not surprising

46 Ki-Moon, 2012, p. 9.
47 Schense and Carter, 2017, p. 4. These authors discuss different meanings of the notion of deterrence.
48 Kersten, 2012, quoting Schabas.
49 Appel, 2018, p. 5.
50 Ibid., pp. 4–5.
51 Prorok, 2017, p. 231.
52 Ibid, p. 228.
53 Schense and Carter, 2017, p. 430.

given that ICC involvement is often undesirable for at least one side to the conflict, and the prospects of possible international prosecution may inform leaders' strategic decisions and actually prolong civil wars. This concern has often been emphasised in the long-standing peace v. justice debate.[54]

However, drawing statistical conclusions about the effects of ICC interventions runs the risk of 'decontextualizing political violence, [and] attributing responsibility for increases and decreases in violence to the ICC without adequately considering other factors which also contribute to alterations in levels of violence'.[55] It is also premised on the idea of being able to rationally calculate costs and benefits. Even if the perpetrators of ordinary crimes are rational actors who weigh the potential costs entailed in possible prosecution and the benefits of commissioning a crime, it is questionable if the same premise applies to the extraordinary circumstances of mass atrocities and armed conflicts.[56]

It is further paradoxical to emphasise the role of deterrence in circumstances of high selectivity in which the ICC operates. The ICC's jurisdictional reach is legally limited, and even where it exists, the enforcement net is still not sufficiently strong and wide. Compounding matters, the ICC's reliance on co-operation, particularly that of third states, often undermines compliance. Moreover, due to legal, structural, and political reasons, entire categories of perpetrators are either *de iure* or *de facto* exempt from accountability. Even in the eighteenth century, Cesare Beccaria argued that it is the certainty of punishment (and probability of being apprehended) rather than its mere existence or severity that acts as a deterrent.[57]

These objections have led some authors to discard deterrence as the leading goal and focus instead on building a culture of accountability through pedagogic influence, norm-internalisation,[58] and stigmatisation of extreme forms of inhumanity, thereby bolstering national jurisdictions and encouraging domestic prosecutions[59] in line with the principle of positive complementarity. Although these goals are not precisely measurable, they should contribute to the prevention of mass atrocities in the long run.

2.4. Gendered assessment of the effective functioning of the ICC

One metric gaining ground as the yardstick for measuring the performance of the ICC is that of its record regarding sexual and gender-based crimes (SGBCs).[60] In this sphere, positive results, at least in comparison to how gender-based crimes

54 See, for example, Kersten, 2015b.
55 Ibid.
56 Drumbl, 2007, p. 17.
57 Beccaria, 1775.
58 In line with Harold Koh's seminal piece, Koh, 1999. See also Damaška, 2007, p. 345. In order to exercise this socio-pedagogic role, the ICC must be perceived as a fair and legitimate authority.
59 Human Rights Watch. (2018).
60 See, for example, Seelinger, 2022. See also Chappel, 2015, cited by Drumbl, 2016.

have been treated in the past, are immediately palpable. While it is true that some important progressive developments have been made through their case law,[61] the Statutes of the *ad hoc* tribunals included rape explicitly only as a form of crimes against humanity, not war crimes, without mentioning any other form of sexual or gender-based crimes. In stark contrast, the Rome Statute of the ICC mentions the term "gender" nine times and for the first time in international criminal law explicitly incriminated various forms of SGBCs as underlying acts of both crimes against humanity and war crimes, regardless of the nature of an armed conflict. In addition to rape, the Rome Statute expressly mentioned sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence (of comparable gravity),[62] thereby acknowledging that conflict-related sexual violence manifests in multiple ways, not "just" rape.

Another novelty is the recognition of gender persecution as a crime against humanity.[63] The Statute was the first to define gender as referring to 'the two sexes, male and female, within the context of society'.[64] The Statute also clarifies that the term does not indicate any different meaning from the one explicitly specified. Although this definition, the product of negotiations and political compromise, is surely not as comprehensive as a modern understanding of gender would require,[65] it constitutes an important first step towards fully recognising sexual and gender-based violence, opening the way to further developments.

These developments have been made through both ICC case law and its policy documents, notably the Office of the Prosecutor's (OTP) 2014 Policy Paper on Sexual and Gender Based Crimes (hereinafter, the Policy Paper).[66] Starting from the World Health Organization's distinction of sex and gender,[67] the OTP "explained" that the

61 See, for example, the case of Furundžija, interpreting rape broadly and recognising that rape and other forms of sexual violence in armed conflict constitute war crime of torture within the definitions of war crimes (art. 2. of the ICTY Statute). See Case information sheet, available at https://www.icty.org/x/cases/furundzija/cis/en/cis_furundzija.pdf. Another landmark decision in this regard is Akayesu, in which the ICTR Chamber held that rape and other sexual offences could also constitute genocide and in particular conduct of 'imposing measures intended to prevent births within the group' by sexual mutilation, the practice of sterilisation, forced birth control, separation of sexes, and prohibition of marriages. The Chamber further emphasised that rape can be a (mental) measure intended to prevent births 'when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate'. See The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, paras. 507–508.

62 See art. 7(1)(g) and art. 8(2)(b) (xxii) and (e)(vi) of the Rome Statute.

63 Art. 7(1)(h).

64 Art. 7(3).

65 For further discussion of negotiations that resulted in constructive ambiguity, that is, vague language that can simultaneously mean different things to different people, see Oostervald, 2016. She argues that the initial uncertainty about the exact meaning and scope of the term caused reluctance to rely on the term at first.

66 ICC, Policy Paper on Sexual and Gender Based Crimes, 2014. Earlier this year, in May 2023, the OTP launched public consultations to renew the policy, see https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-renew-policy-paper-sexual-and-gender-based

67 According to which sex refers to the biological and physiological characteristics that define men and

definition of gender in Art. 7(3) of the Rome Statute 'acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys'. Once it broadened the understanding of the notion of gender, the next logical step was to define "gender-based crimes" as crimes committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. The Policy Paper also clarified that gender-based crimes are not always manifested as a form of sexual violence and that they may include non-sexual attacks on women and girls, as well as men and boys, because of their gender. Finally, the Policy Paper highlighted the need for a gender perspective and gender analysis, both requiring understanding of differences in status, power, roles, and needs between males and females, as well as the impact of gender on people's opportunities and interactions and their experience of harm.

It is neither necessary nor possible to cover the whole Policy Paper here. In a nutshell, the Policy Paper recognised that SGBCs are amongst the gravest crimes under the Statute and pledged to ensure that henceforth, charges would be brought whenever supported by sufficient evidence.[68] The OTP also promised to bring cumulative charges if possible; to reflect the gravity, range, and multifaceted character of these crimes; and to propose sentences adequately reflecting the impact of these crimes. The Policy Paper also gender-mainstreamed reparations policies to encompass gender specific impact on victims of this type of harm.

At roughly the same time as it published the Policy Paper on SGBCs, the OTP elevated the prosecution of sexual and gender-based crimes to one of its key strategic goals (Strategic Plan 2012–2015) and the Office has remained committed to this goal. Indeed, subsequent OTP Strategic Plans have included the prosecution of SGBC as one of the OTP's top priorities,[69] and the most recent overarching ICC Strategic Plan (2023–2025) integrated gender perspective in various aspects of its work, not just prosecution of mass atrocities.[70]

Another step forward in the field of gender justice can be seen in the 2022 Policy on the Crime of Gender Persecution.[71] Throughout history, gender persecution was normalised through institutionalised gender discrimination and violence, resulting in not being perceived as a wrongdoing, let alone a crime. This has yet to change sufficiently, even with the elevation of gender persecution to the level of an (international) crime.[72] Indeed, almost 20 years after its adoption in the Rome Statute, it has

women.

68 In response to criticisms surrounding the Lubanga judgement, in which the prosecutor charged (only) the recruitment of child soldiers and not any form of SGBC, despite the presence of preliminary evidence pointing in that regard.

69 The OTP's Strategic Goal no. 6. for 2023–2025 is to '[e]nsure effective investigations and prosecutions of Sexual and Gender-Based Crimes and Crimes Against Children'.

70 Gender mainstreaming in all activities of the court is Strategic Goal no. 3.

71 ICC, Policy on the Crime of Gender Persecution, 2022. Policy was drafted by the Special Adviser on Gender Persecution and published in December 2022.

72 For an overview of the most recent instances of gender persecution, see Davis, L., 2023.

hardly been investigated or adequately charged, underscoring the significance of the Policy on the Crime of Gender Persecution to further clarify the meaning and importance of this crime. This policy recognises that 'gender-based crimes are used by perpetrators to regulate or punish those who are perceived to transgress gender criteria that define "accepted" forms of gender expression manifest in, for example, roles, behaviors, activities and attributes'. Consequently, persecution is often the result of trying to force people into gender "boxes" of maleness and femaleness as perceived by the perpetrator.[73] The Policy on the Crime of Gender Persecution further explains that the recognition of gender persecution is important not only because it helps to unearth the discriminatory intent that can drive mass atrocities or entire conflicts, but also because it can shed light on the particular vulnerability of victims due to multiple and intersecting forms of discrimination.[74] Moreover, (gender) persecution charges can link different violations into patterns of crimes, thereby connecting individual acts into a connected series of events, which can help attribute criminal responsibility to those who have not been physically involved, such as commanders.[75]

Exciting breakthroughs have been made through the case law as well. Although overturned on appeal, the Bemba trial judgement is groundbreaking for its condemnation of sexual violence committed against men and boys, not just women and girls.[76] However, the first final conviction for SGBC occurred more than two decades after the adoption of the Rome Statute. The striking accountability gap in the ICC's SGBC-related jurisprudence was closed in 2019, with the final conviction in the Ntaganda case. What distinguishes this case is not just that it represents the first ICC conviction for rape and sexual slavery against male and female civilians, but that Bosco Ntaganda was convicted for sex-related inter-party crimes as war crimes, namely, rape and sexual slavery allegedly committed against child soldiers recruited into the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC) by fellow soldiers of the same armed group. The Court thus rejected the argument that sexual violence in intra-party relations, that is, within the same group, did not amount to a war crime under the Statute, as such conduct does not constitute a violation of the underlying rules of international humanitarian law.[77] The third landmark case in this respect is the 2020 conviction of Dominic Ongwen, who was convicted of multiple SGBCs committed while he was a commander in the Lord's Resistance Army in Uganda from 2002 to 2005. This case is remarkable for many reasons, including being the first to charge for forced pregnancy as a standalone crime against humanity under Art. 7(1)(g), along with forced marriage as an

73 Oosterveld, 2013.

74 It gives example of LGBTQI+ persons who can belong to women, girls, men, and boys groups, and who can also be targeted for belonging to LGBTQI+ groups.

75 Jarvis, 2023.

76 Seelinger, 2022.

77 The issue of whether or not the Rome Statute imports from IHL a status requirement and makes it a constituent element of the sex-related offences listed under Articles 8(2)(b)(xxii) and 8(2)(e)(vi) has been heavily contested in the literature. Comp. Heller, 2017 and Poltronieri Rossetti, 2019.

"other inhumane act" as a crime against humanity under Art. 7(1)(k), indicating that these offences do not solely constitute a sexual violation.[78] This approach has been celebrated in the feminist literature for recognising the multitude of harms involved in forced marriages – harms that transgress sexual slavery alone.[79]

In addition to these pioneering convictions, the OTP successfully charged the crime of gender persecution in the Prosecutor v. Al Hassan case.[80] For ten months in the Malian city of Timbuktu, women and girls were forced to cover their faces, prohibited from going out at night or being alone with or speaking to men other than their husbands and close relatives, and girls were banned from schools.[81] Gender capturing of this type of conduct in the Al Hassan case has opened the door for similar charges in two other cases: charges of persecution on the grounds of gender (along with ethnic, political, and/or religious grounds) have since been brought in the Central African Republic and Darfur situations.[82]

Finally, while not directly relevant to the issues related to accountability for SGBCs, partially in response to the IER Final Report, the ICC recently and openly affirmed its commitment to integrating a gender perspective and analysis into all of its work. In this vein, in December 2022, the first comprehensive Court-wide Gender Equality and Workplace Culture Strategy (GEWC Strategy) was launched with the aim of promoting gender parity and equal opportunities, safe and inclusive workplace culture, and life–work balance.[83] Given all of the above, while recognising that it remains a work in progress, even before the latest developments, in 2016, Drumbl already characterised gender justice as 'infusing the aesthetics of international criminal law'.[84]

2.5. Assessing effectiveness through the post-trial glasses

Unlike the Court's record in dealing with SGBC, which has permeated the literature on the ICC's effectiveness, a metric that has rarely, if ever, been used in this context is that of post-trial justice. What happens to defendants after conviction, or release, has generally been overlooked. Therefore, it is not surprising that the fate of ICC convicted or even released persons, either after serving their sentences

78 See counts 50 and 58 of the Trial Judgment, Prosecutor v. Ongwen, ICC-02/04-01/15.

79 It encompasses forced cooking, cleaning, childbearing, and child-rearing, and all inherently gendered forms of forced labour. See Oosterveld, 2016.

80 Earlier attempts failed. The Prosecutor attempted to bring charges of gender persecution in the Mbarushimana case, but these were ultimately excluded from the document containing the charges. Prosecutor v. Mbarushimana, Pre-Trial Chamber I, ICC-01/04-01/10. In the Al Hassan case, charges of persecution on grounds of gender were confirmed by the ICC Pre-Trial Chamber on 30 September 2019. Prosecutor v. Al Hassan, Pre-Trial Chamber I, ICC-01/12-01/18-461-Corr-Red.

81 Oosterveld, 2023.

82 See Prosecutor v. Al Rahman, Confirmation Decision, ICC-02/05- 01/20 and Prosecutor v. Said, Confirmation Decision, ICC-01/14- 01/21.

83 ICC, Gender Equality and Workplace Culture Strategy, 2022.

84 Drumbl, 2016.

or following acquittals, has not been regarded as a measure by which to judge the performance of the ICC. This is a clear consequence of a strong anti-impunity discourse, which has shaped the narratives of international criminal justice. Primary focus on prosecution and punishment with conviction as the end goal has obscured everything that happens after trial, which is probably why legal schemes were not envisaged at all, or why the existing ones remained underdeveloped and unable to adequately address different (human rights) issues arising out of convictions, acquittals, and releases.[85] These issues are an integral part of executing international justice and cannot be ignored when assessing the successes and failures of international criminal tribunals, including the ICC.

A striking feature of the post-trial phase of international criminal justice is that the issues arising from conviction, or release, are often reverted back to states, which are generally reluctant or even unwilling to address these issues in a meaningful way.[86] In general, the system of international criminal justice rests on the co-operation of states. Even when co-operation is present during trial, it often ceases once the trial ends. From that point on, the general sense of responsibility seems to disappear and no one is or feels legally or *de facto* responsible, as was recently demonstrated by the so-called Niger crises.[87]

The number of enforcement of sentence agreements with states is relatively low,[88] and there is only one such agreement on the release of ICC detained persons, signed by Argentina.[89] However, to date, all 51 defendants at the ICC have come from other continents, primarily Africa.[90] Given this fact and in view of Argentina's geographical distance and cultural, religious, and linguistic differences, as well as problems connected with family reunification, Argentina can hardly be seen as an ideal destination for the relocation of released persons. Moreover, these post-trial co-operation agreements are structured as double consent agreements, which means that a State that has declared general willingness to enforce the ICC's sentences – or accept released persons – must reiterate their consent with respect to specific individuals.[91] Accordingly, in practice, it may prove difficult to find a plausible solution

85 Holá, Mulgrew, and Munivrana, 2023, pp. 55–59.

86 Ibid, p. 58.

87 On 5 December 2021, eight acquitted and released individuals from the International Criminal Tribunal for Rwanda (ICTR) were transferred to the Republic of Niger by the United Nations (UN) International Residual Mechanism for Criminal Tribunals (IRMCT). They had been unable and unwilling to return to Rwanda for fear of persecution, and had failed to obtain relocation elsewhere as other states refused to resettle them or grant them access to their territory. Despite the relocation agreement between Niger and the UN, on 27 December 2021, the men were served with a "definitive expulsion order" issued by the Nigerian authorities, and the eight men have since been held under house arrest in Niamey for more than a year. See Lecolle, 2023, p. 168.

88 See https://www.icc-cpi.int/news/icc-and-spain-conclude-agreement-enforcement-sentences

89 See International Criminal Court, 'Argentina and ICC sign agreements on Interim Release and Release of Persons, reinforcing Argentina's commitment to accountability and fair trial'.

90 For a list of defendants, see https://www.icc-cpi.int/defendants

91 ICC, Cooperation agreements, p. 19.

for the relocation of former ICC defendants, even when co-operation agreements exist, especially when dealing with defendants coming from countries with unstable political situations. Consequently, the Court has and will have to continue to negotiate *ad hoc* agreements to avoid situations of a legal limbo.[92]

Another gap in the legal post-trial framework can be found in the treatment of convicted persons serving their prison sentences, particularly that of the terminally ill. The Rome Statute permits a sentence reduction review only *after* two thirds of a determinate sentence or 25 years of a life sentence has been served.[93] It does not recognise either conditional or compassionate release. If a sentence reduction is granted, this reduction constitutes an unconditional and permanent form of release. There is no system for granting early release subject to conditions, a scheme recognised by the *ad hoc* tribunals, or for revoking release in any situation, including one in which there has been an (unexpected) improvement in the convict's health, which could be relevant when sentence reduction was specifically granted due to a worsening state of physical or mental health (Rule 223[e]).[94]

Naturally, these post-trial issues did not come to the fore during the first years of the ICC. Nonetheless, they will surely become more prominent as the number of ICC defendants serving their prison sentences and/or being released rises. Possible human rights violations resulting from, or at least in connection to or as a consequence of, ICC proceedings cannot be ignored and should affect the way in which the ICC's performance is measured and assessed.

3. Concluding remarks

Several conclusions can be drawn from the foregoing analysis. First, there is no consensus on what constitutes effectiveness. Measuring the effects and effectiveness of the ICC can and should be approached from different angles, as looking at it from only one perspective – such as solely from the perspective of facts and figures or that of overarching goals – will create a distorted or at least a limited picture. For example, a court can be very effective in terms of the number of convicted persons, but this may be based on unfair proceedings jeopardising the right to a fair trial. Different metrics reflect an array of sometimes contradictory assignments that the ICC is expected to fulfil.[95] The Court is advancing valuable aims that are diverse in nature, many of which transcend the trial itself.[96] Even when these aims or ex-

92 Lecolle, 2023, p. 177.
93 Rule 223(e) of the ICC Rules of Procedure and evidence and Art. 110(3) of the Rome Statute.
94 Mulgrew, 2023, p. 77.
95 On overabundance of goals, see Damaška above.
96 This is particularly the case with deterrence and other goal-oriented metrics.

pectations are not mutually exclusive, not all of them can be achieved at once and achieving balance between them is necessary.

Second, when evaluating the work of the ICC, to a large extent, we are not dealing with measurable and empirically verifiable data.[97] Many of the metrics used are symbolic, value-based, or normative, particularly those assessing the gender dimension, post-trial justice, and so on. Even when conclusions about the effects of the ICC are supported by empirical evidence, one cannot ignore the complex environment within which the ICC is acting, with multiple factors simultaneously affecting the behaviour of states and individuals.

Finally, underdeveloped ideas about what constitutes effectiveness and how to measure it may lead to unsatisfactory results and disappointment with the ICC.[98] Clearly, valid objections to and a sober reflection on failures and achievements are welcome, but, as Robinson illustrated with a number of examples, almost every decision of the Court may be legitimately criticised. One must be aware of the elusiveness of "just right" solutions and of the "inescapable dyads" the ICC is facing as a part of a system that seeks to create "a vertical regime on a horizontal plane".[99] Expectations need to be managed. At the same time, outreach activities should be intensified. It is not sufficient to focus on how the international community perceives effectiveness. At least equally important is how the work of the Court is assessed by local constituencies. The importance of considering local responses is closely connected with the Court's pedagogic role.[100] Research shows that views on the work of an international criminal court held by the local target population will inevitably differ – after all, the local population does not speak in a single voice – and inducing a change in attitudes, particularly among those who reject the Court's legitimacy, has proven immensely difficult for the *ad hoc* tribunals.[101] In addition to placing more emphasis on its outreach activities, the ICC will have to fight negative propaganda, omnipresent in the era of fake news and internet (ir)responsibility. Greater efforts should also be made to overcome legitimate objections regarding selectivity – not just in terms of limited jurisdictional reach of the Court, but also with respect to case selection and prioritisation.[102] Taken together, these steps can have meaningful, if not transformative, effects and contribute to building a culture of global accountability.

97 Shany, Y. 2012, p. 270.
98 Ibid. p. 229.
99 Robinson, D. 2015, p. 332.
100 Damaška, M. 2007, p. 348.
101 Milanović, M. 2016, pp. 233–259.
102 International Criminal Court, Office of the Prosecutor. (2016) p. 16, argues that "feasibility" should not be a separate legal factor for determining the opening of investigations as it could prejudice the consistent application of the Statute and might encourage obstructionism to dissuade ICC intervention. However, operational feasibility is a criterium for case selection.

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