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# Is the ICC Effective?

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## Is the International Criminal Court effective?

The International Criminal Court was established by the Rome Statute in 1998, and began operating in 2002, to the widespread applause in the international community. Under the post-UN Charter multilateral system, the ICC's formation was a welcomed extension of the UN Security Council's reach, as part of the new supra-state legal order whereby consenting states hold certain criminal acts arising to a scale of severity—crimes of scale—unacceptable by all. Yet, in its near 19-year history, it remains unclear whether the ICC is effective. This lack of clarity is in part attributable to divergent and elusive approaches to defining and measuring effectiveness, and the strong views by ICC proponents and detractors who find dispositive evidence for held views through myriad means. What follows is a discussion of different ways ICC effectiveness is defined and measured, the existing conflicting evidence on its effectiveness, and additional considerations required to form a conclusive opinion. I conclude that the most telling measure of ICC effectiveness is its ability to deter crimes of scale, and that on that measure, the ICC is thus far ineffective.

Currently, there exists little clarity of the ICC's purpose in practice, and therefore little-to-no consensus on defining and measuring its effectiveness.<sup>1</sup> Under the Rome Statute, the States Parties established the court in furtherance of ending and preventing impunity for those who perpetrate “unimaginable atrocities that deeply shock the conscience of humanity,” . . . “[concerning] the international community as a whole.”<sup>2</sup> Others have sought to define the Court's purpose and measure its effectiveness by examining its ability to deter atrocities, to either instil peace or exacerbate violence post-intervention, or, to satisfy victims.<sup>3</sup> In 2020, the Assembly of States Parties to the Rome Statute convened an expert panel to evaluate ICC processes and make recommendations to advance the ICC's role in combating impunity and improve efficiency.<sup>4</sup> While the mandate of the panel did not include an assessment of the Court's effectiveness, the experts identified many endemic defects in the ICC's procedure and management, prompting sum 384 recommendations, collectively aimed at enhancing

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<sup>1</sup> Samaria Muhammad et al 'Reimagining the ICC: Exploring Practitioners' Perspectives on the Effectiveness of the International Criminal Court' [2021] 21 International Criminal Law Review 127

<sup>2</sup> UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 2187 UNTS 90, Preamble

<sup>3</sup> *Muhammad* (n 1) 127-128

<sup>4</sup> Assembly of States Parties 'Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report' 30 September 2020, 7

efficiency and cost-effectiveness so that the ICC would be capable of addressing global challenges within its remit.<sup>5</sup>

There also exists little-to-no consensus on the ICC's impact on peace, post-intervention stability, or deterrence; or, the manner in which such outcomes can be measured.<sup>6</sup> Cronin-Furman has clarified the ICC's immediate goals to punishing violations of international law, underpinned by attempts to deter the commission of mass atrocities.<sup>7</sup> This view is critical of those who narrowly draw ICC effectiveness onto whether successful prosecutions deter crime under the ICC's remit.<sup>8</sup> Many who place the Court's effectiveness in its ability to deter individual perpetrators assume that such actors are rational: they weigh the utility of an offence over other acts, and elect a course of action with the most utility.<sup>9</sup> This remains unproven, whereas others insist that perpetrators of atrocities are "profoundly irrational and motivated by bloodlust religious fervour or ancient ethnic hatreds"<sup>10</sup>—also unproven. Further, even if rational, perpetrators may perceive the reach of the ICC as too remote to factor into calculating the utility of their conduct.<sup>11</sup> If there is little appreciation for the potential for domestic prosecution and no meaningful example of ICC intervention within the territory or even in mind, a perpetrator is unlikely to be deterred by there being ongoing proceedings pursued in The Hague.<sup>12</sup>

There is also little-to-no consensus on the ICC's primary goals among those who work within the ICC,<sup>13</sup> which suggests that even among ICC personnel, defining or measuring effectiveness remains divergent or elusive.<sup>14</sup> Some practitioners place effectiveness in the Court's symbolic value, and measure it in terms of the Court's impact on domestic constituencies' demand on government to honour commitments under the Rome Statute; others in terms of its global reach, and ability to effectively replace *ad hoc* tribunals with very limited remits.<sup>15</sup> Still, many practitioners see the ICC as largely ineffective, mostly due to its reliance on state cooperation. State cooperation has been

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<sup>5</sup> Ibid 329

<sup>6</sup> *Muhammad* (n 1) 128

<sup>7</sup> Kate Cronin-Furman 'Can We Tell If The ICC Can Deter Atrocity?' (International Criminal Justice, 21 March 2016) <<http://jamesgstewart.com/can-we-tell-if-the-icc-can-deter-atrocity>>

<sup>8</sup> *ibid*

<sup>9</sup> Kate Cronin-Furman 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' [2013] 7 *The International Journal of Transitional Justice* 439

<sup>10</sup> *Ibid* 439-440

<sup>11</sup> *Ibid* 440

<sup>12</sup> *ibid*

<sup>13</sup> *Muhammad* (n 1) 131

<sup>14</sup> *Ibid* 134-135

<sup>15</sup> *Ibid* 136-137

characterised by some practitioners as “politically-motivated and flimsy,” ultimately biasing investigations and presenting the problem of The Hague being used for political advantage in domestic politics.<sup>16</sup> Notably, many serving Defence Counsel have offered a different view in interview: that ICC ineffectiveness is due to a lack of a police force with arrest powers, exacerbating reliance on state cooperation and the political will of state actors.<sup>17</sup>

Defence counsel have also criticised ICC practice as unfair to the accused,<sup>18</sup> rife with a pervasive lack of exculpatory disclosure,<sup>19</sup> intransigence of the OTP,<sup>20</sup> asymmetric and limited ability to cross-examine witnesses,<sup>21</sup> as well as missing mechanisms for effective response to *ex parte* motions<sup>22</sup> and a gross imbalance of resources between the prosecution and defence.<sup>23</sup> Others have attributed ICC ineffectiveness to its design, given a built-in escape-mechanism within the Rome Statute allowing for states to contest jurisdiction;<sup>24</sup> coupled with “unnecessary and unrealistic expectations” by victims who generally hold insufficient knowledge of the ICC’s purpose and procedure.<sup>25</sup>

Jo and Simmons’ empirical work has found that in states that ratified the Rome Statute and have implemented it into domestic law, there are less intentional civilian killings; and, that a perceived threat of ICC action also reduces rebel violence.<sup>26</sup> They also suggest that civil society and a state’s reliance on foreign aid is correlated with reduced violence post-ratification of the Rome Statute.<sup>27</sup> Their conclusion is that state promulgated violence is reduced by around 50% post ratification of the Rome Statute.<sup>28</sup> They also conclude that ICC action is correlated with a statistically significant reduction in rebel-group violence perpetrated against civilians.<sup>29</sup> Hillebrecht found that in the case of Libya, ICC intervention was

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<sup>16</sup> Ibid 139

<sup>17</sup> Ibid

<sup>18</sup> Ibid 141

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> Ibid 142

<sup>22</sup> Ibid

<sup>23</sup> Ibid 143

<sup>24</sup> Moses Retselisitsoe Phooko ‘How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court’ [2011] 1 Notre Dame Journal of International & Comparative Law 203

<sup>25</sup> Ibid 206

<sup>26</sup> *Cronin-Furman* (n 7)

<sup>27</sup> Ibid

<sup>28</sup> Stuart Ford ‘Can the International Criminal Court Succeed? An Analysis of the Empirical Evidence of Violence Prevention’ [2020] 43 Loy. L.A. Int’l & Comp. L. Rev. 101, 114

<sup>29</sup> Ibid 114-115

correlated with a significant reduction in general violence and violence against civilians.<sup>30</sup> Dancy et al found that a state's ratification of the Rome Statute while conflict is ongoing is correlated with conflict coming to an end.<sup>31</sup> They also found that ICC intervention is correlated with shorter periods of conflict when compared with conflicts where the ICC had not intervened.<sup>32</sup> Further, they found that states that have ratified the Rome Statute are less likely to become involved in new conflicts than non-ratified states.<sup>33</sup> They conclude that ICC involvement does not prolong conflict or inhibit peace-making.<sup>34</sup> Appel found that state ratification of the Rome Statute was also correlated with continued improvement of human rights records when compared with non-ratifiers. He concluded that human rights practices improve post-ratification of the Rome Statute, which in turn suggests that the Court does deter state actors from committing atrocities.<sup>35</sup> These findings exemplify the point that ICC effectiveness will depend on how one defines and measures effectiveness.

Detractors remain unconvinced, citing equally dispositive evidence that the ICC is ineffective, including the failure to effectuate arrest of President Al Bashir, who remains on an outstanding ICC warrant for war crimes and crimes against humanity;<sup>36</sup> an apparent focus on African perpetrators;<sup>37</sup> extended periods without successful prosecutions;<sup>38</sup> and, a general view that the ICC is simply too bureaucratic and too slow to act.<sup>39</sup> In the near nineteen years since the ICC's first proceedings, the Court has seen fourteen completed proceedings and nine convictions.<sup>40</sup> Of the nine, four were for "Article 70 administration of justice offences [(non-atrocities)]," one stemmed from a guilty plea, and another was overturned on appeal.<sup>41</sup> The majority of prosecutions before the court have been unsuccessful.<sup>42</sup> Perhaps even more troubling, ICC judges have diverged on issues of substantive law and ruled

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<sup>30</sup> *ibid* 111

<sup>31</sup> *ibid* 115-116

<sup>32</sup> *ibid*

<sup>33</sup> *ibid* 116

<sup>34</sup> *ibid*

<sup>35</sup> *ibid* 118

<sup>36</sup> *Phooko* (n 24) 183

<sup>37</sup> *ibid* 185

<sup>38</sup> *ibid*

<sup>39</sup> *ibid* 193

<sup>40</sup> Sarah J Goodman 'The Effectiveness of the International Criminal Court: Challenges and Pathways for Prosecuting Human Rights Violations' [2020] *Inquiries Journal* [Online], 12 <<http://www.inquiriesjournal.com/a?id=1806>>

<sup>41</sup> Milena Sterio 'The International Criminal Court: Current Challenges and Prospect of Future Success' [2020] 52 *Case W Res J Int'l L* 467, 469

<sup>42</sup> *ibid*

inconsistently, have expressed disdain for each other publicly, and in one instance, publicly accused each other of not assigning the appropriate weight to the burden of proof standard under criminal law and “due process rights of the accused.”<sup>43</sup> Further, the OTP has thus far failed to prosecute senior leaders, actors from powerful states, and crimes of sexual violence.<sup>44</sup> While there are divergent views on defining ICC effectiveness, the above signals to most that the ICC is an abject failure. This perception is compounded by the ICC’s behemoth annual budget, currently at €148,259,000 for 2021.<sup>45</sup>

Practitioners within the ICC mostly agree that successful convictions should not be the sole measure of ICC effectiveness.<sup>46</sup> Many have stated that “victims’ satisfaction, fairness of trials, and long-term effects,” should also be part of determining effectiveness.<sup>47</sup> Defence practitioners add that fairness, independence, and impartiality of trials should also serve as a metric of ICC effectiveness.<sup>48</sup> This suggests a view held by those within the ICC that drawing a measure of ICC effectiveness narrowly is likely to result in a finding that the ICC is ineffective, but that any such evaluation is incomplete.<sup>49</sup> Still, this lack of uniformity of views and apparent dysfunctionality from within the ICC no doubt impacts effectiveness, or at a minimum, transmits illegitimacy to observers. What follows from the internal view of the ICC is that the aims of international criminal law are not defeated, but that the ICC suffers from severe operational and organisational mismanagement. Ascribing the purpose of preventing crimes of scale onto such a state of affairs ultimately situates an ever-widening gap between ICC aims and accomplishments.

Divergent views on the ICC’s goals add to the ambiguity in assessing ICC effectiveness. If the measure of effectiveness is focused onto the institution’s goals, it follows that success is synonymous with effectiveness. This requires a clear delineation of the institution’s purpose, which remains nebulous and difficult to plot in a clear and categorical manner.<sup>50</sup> At present, ‘ending impunity’ and ‘contributing to peace’ as ICC goals are also too nebulous to measure in a manner that clearly illustrates ICC effectiveness. Certainly, measuring effectiveness by adding the number of successful investigations and

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<sup>43</sup> Ibid 471-472

<sup>44</sup> Ford (n 28) 103

<sup>45</sup> Assembly of States Parties *Proposed Programme Budget for 2021 of the International Criminal Court* (2010) 8

<sup>46</sup> Muhammad (n 1) 146

<sup>47</sup> Ibid

<sup>48</sup> Ibid 148

<sup>49</sup> Ibid

<sup>50</sup> Ford (n 28) 104

prosecutions gives little insight into whether the ICC has any effect on impunity and peace.<sup>51</sup> Perhaps what remains most difficult to measure is impunity and peace; still, others have ascribed goals onto the ICC, including, *inter alia*, “fostering post-conflict reconciliation;” “expressing condemnation of abhorrent acts;” and, “developing international criminal law.”<sup>52</sup> If myriad goals are to be ascribed to the ICC, it follows that certain goals must be prioritised over others so as to focus efforts onto those that produce the greatest utility.<sup>53</sup>

Ford has plotted the greatest utility onto the goal of “preventing violations of international criminal law,”<sup>54</sup> as the violations are so widespread and destructive, that societal costs are highest, particularly since victims are usually civilians.<sup>55</sup> According to Ford, these costs make prevention the ICC’s most important goal.<sup>56</sup> Whether the ICC actually prevents violations of international criminal law remains “highly contested,”<sup>57</sup> though there is no evidence that ICC intervention actually increases violations of international criminal law.<sup>58</sup> However, recent empirical work discussed above establishes a correlation between Rome Statute ratification and/or ICC intervention with reduced violence. This supports the plotting of the ICC’s most important goal at its ability to prevent international criminal law violations, and therefore makes it logical that ICC effectiveness be measured against the ICC’s ability to prevent violations.

If a clear delineation and prioritisation of the ICC’s goals is required so as to determine the ICC’s effectiveness, then ICC effectiveness lies in its ability to deter violations of international criminal law. As Cronin-Furman points out, the ICC’s ability to raise the costs of perpetrating atrocities beyond their perceived benefits by individual actors is unknown.<sup>59</sup> This largely depends on how individual perpetrators perceive ICC intervention.<sup>60</sup> At a minimum, perpetrators must believe that the ICC’s reach extends to them so as to “disincentivize” perpetration of acts of atrocity, assuming that perpetrators act rationally.<sup>61</sup> Presently, in light of the apparent limited activity of the ICC, the potential for being tried for

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<sup>51</sup> Ibid 104-105

<sup>52</sup> Ibid 105-106

<sup>53</sup> Ibid 106

<sup>54</sup> Ibid

<sup>55</sup> Ibid 106-107

<sup>56</sup> Ibid 108

<sup>57</sup> Ibid 109

<sup>58</sup> Ibid 120

<sup>59</sup> *Cronin-Furman* (n 9) 441

<sup>60</sup> Ibid 442

<sup>61</sup> Ibid

violations of international criminal law likely appear too remote to the perpetrator who is calculating on a perceived battlefield.<sup>62</sup> Further, if the perpetrator perceives there being more severe consequences than a remote possibility of being tried in the Hague, ICC intervention is unlikely to play a part in the perpetrator's calculus.<sup>63</sup>

Subjective perception of the utility of a particular act likely varies across different individuals, which suggests that the motivation to or deterrence from committing criminal acts of scale may be varied and divergent.<sup>64</sup> As Cronin-Furman points out, this makes understanding the motives of perpetrators essential to understanding whether they can be deterred by ICC intervention.<sup>65</sup> Some examples of divergent motives are to overcome a stronger opponent in a classical 'do or die' scenario; to compel an opponent to negotiate or concede; to prompt political pressure by civilians; to avoid defeat; or to seize "territorial control."<sup>66</sup> Thus, evidence of perpetrator motives and interests that may 'override'<sup>67</sup> fear of being tried in the Hague speaks to whether ICC intervention has a deterrent effect, of which ICC effectiveness can be measured by. While Cronin-Furman utilises a rational choice model (weighing costs and benefits) to discern the difference in motives between leaders and military commanders—the two groups that may order acts of atrocity,<sup>68</sup> it is not entirely clear if either calculate at such a level when ordering such crimes of scale.

This begs the question: does the threat of prosecution and punishment deter crimes of atrocity at all? It is well documented by proponents of deterrence theory that certainty of punishment deters criminal acts, whereas increased severity of punishment does not.<sup>69</sup> It follows that this should apply to perpetrators of crimes of scale as well. On this basis, an examination of the ICC's pursuit of perpetrators of crimes of atrocity (not including Article 70 Administration Crimes), reveals that the ICC has an 11% conviction rate and a 14% acquittal rate.<sup>70</sup> 30% of its cases were either withdrawn or vacated.<sup>71</sup> 32% of

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<sup>62</sup> Ibid 443

<sup>63</sup> Ibid

<sup>64</sup> Ibid 444

<sup>65</sup> Ibid

<sup>66</sup> Ibid 444-445

<sup>67</sup> Ibid 445

<sup>68</sup> Ibid 447

<sup>69</sup> Valerie Wright 'Deterrence in Criminal Justice: Evaluating Certainty vs Severity of Punishment' [2010] The Sentencing Project, 4

<sup>70</sup> Fondation Hirondelle 'La Justice Doit Être Vue Pour Être Rendue' (27 May 2019)  
<<https://www.justiceinfo.net/en/41532-welcome-to-the-icc-facts-and-figures.html>>

<sup>71</sup> Ibid



indicted individuals for crimes of atrocity remain at large.<sup>72</sup> These numbers are plainly abysmal. It is not clear whether ICC effectiveness is part of an individual actor's decision-making, but if certainty of punishment is the only provable measure of deterrence, then the ICC does not deter acts of atrocity. If ICC effectiveness is based on its ability to deter and therefore prevent such crimes, then the ICC is the opposite: ineffective. With the Court's legitimacy at stake due to its apparent ineffectiveness, it is reasonable that ICC proponents would attempt to measure effectiveness through other performance markers. This typically turns the question onto the unquantifiable, such as whether the ICC symbolically promotes peace. However, the weight of such simple performance markers such as conviction rate is inescapable when compared with the undefinable and unmeasurable.

If one adopts a view that the ICC is effective, then military intervention by outside states may be the only alternative to credibly deterring acts of atrocity better than ICC intervention, as the effects are immediate and are more likely associated with overwhelming defeat on the battlefield.<sup>73</sup> This extreme appears to put ICC criminal proceedings in tension with humanitarian intervention, but instead highlights just how far the ICC falls short of presenting a credible alternative for deterring crimes of scale. Even by comparison with the costliest alternative course of action to deter atrocity, the ICC woefully underperforms. As the costs to human life associated with atrocity are the most extreme, punishing crimes of scale carry an implicit purpose to limit or even eradicate such acts in the future. There is no indication whatsoever that ICC ineffectiveness is due to a lack of the occurrence of crimes of scale in the world, let alone member states. There does exist however a widely held view, supported by empirical evidence that the certainty of punishment is the best marker for the deterrence prevention of criminal acts. Thus, it is rational to define and measure ICC effectiveness by its ability to deter and prevent crimes of scale, and on that measure, the ICC has plainly underperformed thus far, and is therefore ineffective on a scale that demands immediate organisational change. The status quo suggests that atrocity is inevitable.

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<sup>72</sup> *ibid*

<sup>73</sup> Michael L Smidt, 'The International Criminal Court: An Effective Means of Deterrence' (2001) 167 *Mil L Rev* 156, 157