

Measuring Performance and Shaping Identity: Performance Indicators and the International Criminal Court

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Abstract: Amid pressure to increase the efficiency and effectiveness of the International Criminal Court (ICC), work has progressed on the development of a set of performance indicators for the ICC. This article argues that performance indicators play into tensions that underpin the international criminal justice process at the ICC, in particular between expeditiousness, on the one hand, and fairness and victim satisfaction, on the other. It argues that while the ICC's performance indicators extend assessment of the ICC beyond the speedy completion of cases and embrace goals of fairness and victim access to justice, they inevitably support the former to the detriment of the latter, with implications for the Court's identity. While acknowledging the benefits of performance indicators for the ICC, the article outlines several measures to counter the risks that they pose for the balance between these goals.

Keywords: *International Criminal Court; performance indicators; efficiency; expeditiousness; fairness; victim access to justice.*

1. Introduction

Disappointment in the slow pace of justice at the International Criminal Court (ICC) has fuelled calls for the Court to increase the efficiency and effectiveness of its operation. A raft of measures has been taken within the Court to this end, from the development of a Chambers Practice Manual to reorganisation of the Court's Registry. Expressing their commitment to further strengthening of the Court and the Rome Statute system, state parties to the ICC Statute adopted a resolution in 2019 initiating an independent expert review of the ICC, which is aimed at enhancing the performance, efficiency and effectiveness of the Court and Rome Statute system as a whole.¹ Alongside these measures,² work has slowly progressed on the development of a set of indicators to measure the Court's performance against a number of high-level goals.³

¹ ICC ASP Resolution, Review of the International Criminal Court and the Rome Statute System, ICC-ASP/18/Res.7, adopted at the 9th plenary meeting, on 6 December 2019, by consensus.

² The most recent ICC ASP Resolution on Strengthening the International Criminal Court at the Assembly of States Parties (Resolution ICC-ASP/18/Res.6, 2019), § 91, '[w]elcomes the continued work of the Court on the topic of performance indicators as an important tool to fulfil its functions', indicating the continuation of this work alongside other reform measures.

³ ICC, Report of the Court on the Development of Performance Indicators for the International Criminal Court, 12 November 2015, available at https://www.icc-cpi.int/itemsDocuments/Court_report-development_of_performance_indicators-ENG.pdf (last accessed 20 February 2020) (First Report on

The turn to performance indicators in international criminal justice forms part of a broader infiltration of audit culture into the sphere of global governance, including the protection of human rights.⁴ The term ‘audit culture’ has been used to refer to ‘the process by which the principles and techniques of accountancy and financial management are applied to the governance of people and organisations – and, more importantly, the social and cultural consequences of that translation’.⁵ It describes a context where ‘rankings have become increasingly pervasive, both as instruments in the internal management of organizations and in the external representations of their quality, efficiency, and accountability to the wider public’.⁶ While the use of rankings and measures, with their capacity to ‘convert complicated contextually variable phenomena into unambiguous, clear, and impersonal measures’ has become a popular governance tool,⁷ their limitations,⁸ in particular the range of unintended consequences that flow from their use,⁹ have been widely acknowledged.

The ICC is not the first international criminal justice institution to be subject to performance monitoring.¹⁰ It is, however, the first to publish a set of indicators intended to assess various aspects of the Court’s operation in order to produce data that is available to audiences beyond the Court. The development of performance indicators for the ICC is unsurprising in an era of

Performance Indicators); ICC, Second Court’s Report on the Development of Performance Indicators for the International Criminal Court, 11 November 2016, available at https://www.icc-cpi.int/itemsDocuments/ICC-Second-Court_report-on-indicators.pdf (last accessed 20 February 2020) (Second Report on Performance Indicators); ICC, Third Court’s Report on the Development of Performance Indicators for the International Criminal Court, 15 November 2017, available at <https://www.icc-cpi.int/itemsDocuments/171115-Third-Report-performance-indicators-ENG.pdf> (last accessed 20 February 2020) (Third Report on Performance Indicators).

⁴ For discussion of the use of indicators in the human rights context, see, for example, S. E. Merry, ‘Measuring the World: Indicators, Human Rights, and Global Governance’, 52(3) *Current Anthropology* (2011), S83. For discussion of indicators as audit practice, see A. Rosga and M. L. Satterthwaite, ‘The Trust in Indicators: Measuring Human Rights’, 27(2) *Berkeley Journal of International Law* (2009) 253, at 279.

⁵ C. Shore and S. Wright, ‘Governing by Numbers: Audit Culture, Rankings and the New World Order’, 23(1) *Social Anthropology* (2015) 22, at 24. For acknowledgment of ambiguity surrounding the concept of audit, see M. Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1997), at 6.

⁶ C. Shore and S. Wright, ‘Audit Culture Revisited: Rankings, Ratings, and the Reassembling of Society’, 56(3) *Current Anthropology* (2015) 421, at 421.

⁷ Merry, *supra* note 4, at S84. As Espeland and Sauder have noted, ‘[p]roponents of [performance indicators] see these measures as making important information more accessible to consumers and clients, motivating organizations to improve, providing crucial feedback about policies, and extending market discipline to other institutions’. See W. N. Espeland and M. Sauder, ‘Rankings and Reactivity: How Public Measures Recreate Social Worlds’, 113(1) *American Journal of Sociology* (2007) 1, at 2.

⁸ The growth of audit culture across various areas of public governance has attracted criticism on numerous grounds, including their propensity to result in ‘increasing bureaucratisation, occupational stress and burnout, employee disengagement and cynicism, gaming strategies, loss of trust and diminished professionalism’. See Shore and Wright, *supra* note 5, at 26.

⁹ See, for example, S. van Thiel and F. L. Leeuw, ‘The Performance Paradox in the Public Sector’, 25(3) *Public Performance & Management Review* (2002) 267, at 267; Espeland and Sauder, *supra* note 7, at 2.

¹⁰ See discussion of performance monitoring under the completion strategies of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda in Section 2, below.

unmet expectations and demand from states for greater fiscal accountability. However, the limits of performance indicators, which have been acknowledged in other areas of governance, call into question their appropriateness in the context of the ICC.

While the adoption of performance indicators in the context of the ICC has attracted some critique,¹¹ their potential to play into widely recognised tensions that underpin the international criminal justice process – namely, between expeditiousness, on the one hand, and fairness and victim satisfaction on the other – is underexplored.¹² Consideration of the implications of performance monitoring and, in particular, the potential for performance indicators to have a *negative* impact on the ability of the Court to realise any of its goals, is timely in light of the independent expert review, which will contemplate the strengthening of the Court’s ‘performance appraisal framework’.¹³

Drawing from research into audit culture and the use of performance indicators in other fields, this article argues that despite recognising fairness and victim access to justice as key goals of the Court, the ICC’s performance indicators will inevitably support the promotion of expeditiousness to the detriment of fairness and victim satisfaction with the Court’s proceedings. This is for three interrelated reasons: difficulty in measuring – and, in particular, quantifying – the concepts of fairness and victim satisfaction, the tendency for the measurable to be prioritised, and the fact that performance indicators increase opportunities for state involvement in the operation of the ICC. The article does not propose how expeditiousness, fairness and victim satisfaction *should* be reconciled in the ICC’s proceedings. Rather, it critiques the *manner* in which performance indicators may influence the balance that is struck

¹¹ See, for example, ‘Question on Performance’, ICC Forum Debate, July 2017 – February 2018, available at <https://iccforum.com/performance> (last accessed 20 February 2020). For discussion of the performance indicators adopted by the Office of the Prosecutor of the ICC, see B. Kotecha, ‘The ICC’s Office of the Prosecutor and the Limits of Performance Indicators’, 15(3) *Journal of International Criminal Justice (JICJ)* (2017) 543.

¹² Although, on the implications of performance monitoring for victims, see E. Haslam and R. Edmunds, ‘Whose Number is it Anyway? Common Legal Representation, Consultations and the “Statistical Victim”’, 15(5) *JICJ* (2017) 931. On the impact of performance monitoring on the judicial function more generally, see M. Bohlander, ‘External Stakeholder Benevolence: An Emerging Policy Paradigm in International Criminal Justice? – Critical Reflections on the Paris Declaration 2017 and the Oslo Recommendations 2018 on the Efficiency and Legitimacy of International Courts’, in G. Z. Capaldo (ed), *The Global Yearbook of International Law and Jurisprudence 2018* (OUP, 2019) and M. Bohlander, ‘Commodification of Justice – A Personal View on Managerial Performance Indicators in the Judicial Context’, in S. Shetreet and H. Choodosh (eds), *Measuring Justice: Contemporary Issues on Judicial Independence* (Hiram Brill/Martinus Nijhoff, 2020). On the implications of performance indicators for the quality of judicial decision-making, see A. Carcano, ‘On the Governance of International Judicial Institutions: The Development of Performance Indicators for the International Criminal Court’ 22(1) *Max Planck Yearbook of United Nations Law Online* (2019) 83, at 105.

¹³ ICC ASP Resolution, Review of the International Criminal Court and the Rome Statute System, *supra* note 1, Appendix II, Section 2.1.16.

between these goals, arguing that it is likely to be unconscious, unprincipled and threatening to the independence of the Court.¹⁴ It concludes by outlining several measures that must be taken to counter this risk.

In the course of the article, it is argued that the use of performance indicators has implications for the identity of the ICC insofar as they affect the balance that is struck between the goals of expeditiousness, fairness and victim satisfaction. The importance of each of these goals to the identity of the ICC has been recognised elsewhere, as has their ability to conflict.¹⁵ It is acknowledged that the balance between these goals is one of many factors that feed into the identity of the ICC,¹⁶ and that other Court goals may indeed be affected by the use of performance indicators at the ICC. While the Court's use of performance indicators to project a particular identity, or set of identities, to external audiences is touched upon below, the topic exceeds the scope of this article and warrants further independent study.¹⁷

The following section sets out the background to the development of performance indicators at the ICC, highlights the distinctive features of the Court's approach to performance measurement when compared with other international criminal courts and tribunals and notes its benefits. Section 3 links the ICC's performance indicators to tensions between conflicting goals that underpin the international criminal justice process, and which feed into the identity of the ICC. Section 4 sets out reasons for anticipating that the ICC's turn to performance indicators will lead to the prioritisation of expeditiousness over fairness and victim satisfaction. Section 5 sets out responses to the risks that have been identified.

¹⁴ On the potential for demand for efficiency in international criminal proceedings to support 'quiet' transformation in the balance that is struck between the goals of expeditiousness, fairness and victim satisfaction more generally, see also A. Jones, 'A Quiet Transformation? Efficiency Building in the "Fall" of International Criminal Justice', 19(3) *International Criminal Law Review (ICLR)* (2019) 445.

¹⁵ See references in Section 3, below.

¹⁶ For discussion of the identity of international criminal law and the ICC, and conflicts between different aspects of these identities, see D. Robinson, 'The Identity Crisis of International Criminal Law', 21 *Leiden Journal of International Law (LJIL)* (2008) 925; F. Mégret, 'The Anxieties of International Criminal Justice', 29(1) *LJIL* (2016) 197, at 213-14; F. Jessberger and J. Geneuss, 'The Many Faces of the International Criminal Court', 10(5) *JICJ* (2012) 1081, at 1087; D. S. Koller, 'The Faith of the International Criminal Lawyer', 40 *New York University Journal of International Law and Politics* (2008) 1019, at 1046-49 (on the role of professional identities in shaping international criminal law and the biases they create); T. Mariniello, "'One, No One and One Hundred Thousand": Reflections on the Multiple Identities of the ICC' in T. Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity* (Routledge, 2015), at 4.

¹⁷ The communicative effect of performance indicators, whereby the indicators 'can communicate with, and seek to influence the, expectations of external constituencies' has been noted elsewhere. See Kotecha, *supra* note 12, at 545.

2. The Distinct Approach to Performance Measurement at the ICC

The initiation of performance monitoring at the ICC came amid rising concern about the pace of the Court's proceedings.¹⁸ Slow progress in the Court's early cases, which took on average four to six years at trial, prompted critical reflection from actors within and beyond the Court on its speed of operation.¹⁹ State parties to the ICC Statute began to call on the Court to take measures to increase its efficiency.²⁰ In 2014, the ICC Assembly of States Parties (ASP) adopted a resolution requesting the Court not only to 'intensify its efforts to enhance the efficiency and effectiveness of proceedings including by adopting further changes of practice', but also to 'intensify its efforts to develop qualitative and quantitative indicators that would allow [it] to demonstrate better its achievements and needs, as well as allowing state parties to assess the Court's performance in a more strategic manner'.²¹

The Court responded by developing a set of Court-wide goals that could be translated into specific indicators for measurement. The goals were designed to focus on 'issues which are essentially under the control of the institution itself', excluding aspects of the ICC Statute system that extend beyond it, such as state engagement and cooperation with the Court.²²

The list of goals is as follows:

- (a) The Court's proceedings are expeditious, fair and transparent at every stage;
- (b) The ICC's leadership and management are effective;

¹⁸ An early proposal from within the ICC to develop performance indicators to measure and communicate information about the Court's work was rejected by its judges. See S. Charania, 'Open for Business – An Interview with the ICC's First-Ever Staff Members, Sam Muller and Phakiso Mochochoko', *Justice in Conflict*, 15 December 2015, available at <https://justiceinconflict.org/2015/12/15/open-for-business-an-interview-with-the-iccs-first-ever-staff-members-sam-muller-and-phakiso-mochochoko/> (last visited 20 February 2020) ('Sam and Phakiso, in conjunction with the Registrar, had tried to create clear benchmarks, or indicators for success, so that the Court would be able to measure its progress in the future and be able to communicate its successes more effectively to the wider public. But the idea did not survive a meeting with the Judges').

¹⁹ See, for example, P. Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice', 11 *JICJ* (2013) 527, at 535; A. Fulford, 'The Reflections of a Trial Judge' 22 *Criminal Law Forum* (2011) 215, at 217-18.

²⁰ P. Ambach, 'Performance Indicators for International(ised) Criminal Courts – Potential for Increase of an Institution's Legacy or 'Just' a Means of Budgetary Control?', 18 *ICLR* (2018) 426, at 432.

²¹ ICC ASP Resolution, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/13/Res.5, 17 December 2014, Annex I, paras 7(a) and (b).

²² First Report on Performance Indicators, *supra* note 3, at § 9.

- (c) The ICC ensures adequate security for its work, including protection of those at risk from involvement with the Court; and
- (d) Victims have access to the Court.²³

In respect of each goal, the Court has produced a list of indicators that are intended to show the extent to which the goals have been realised. The indicators measure the Court's performance 'mostly in quantitative terms'.²⁴ Indicators developed to measure the Court's first goal, for example, include the time lapse between transfer of the suspect in ICC custody and assignment/appointment of permanent counsel, the number of hearing days used, the absolute duration of each phase of the criminal justice process, and so on.²⁵ The data that has been produced by reference to these indicators has been communicated publicly via the Court's reports on performance indicators.

The Court's reports on performance indicators acknowledge the limits of the indicators that have been developed to date in measuring each of the Court-wide goals. The second report, for example, refers to 'modesty' in the selection of indicators, which are intended to 'concentrate on a reduced number of measurable criteria that adequately reflect the *overall* operational performance of the Court without overburdening the exercise with too many criteria and details'.²⁶ It describes the indicators listed therein as a 'sample of potential future indicators' and acknowledges that 'further indicators may need to be added'.²⁷ The report also notes the impact of external factors 'such as the local security conditions and the cooperation local and international partners' on the achievement of Court goals and, consequently, the need to properly contextualise the data that they produce.²⁸

The ICC's approach to performance measurement distinguishes it from the performance monitoring that took place under the completion strategies of the ad hoc tribunals International

²³ Third Report on Performance Indicators, *supra* note 3. The only change in the formulation of the key goals in their three iterations is the removal of the word 'adequate' in the fourth goal, which, in the First Report on Performance Indicators, read 'Victims have adequate access to the Court'.

²⁴ Second Report on Performance Indicators, *supra* note 3, at § 4.

²⁵ Third Report on Performance Indicators, *supra* note 3, Annex 1.

²⁶ Second Report on Performance Indicators, *supra* note 3, at § 21.

²⁷ Second Report on Performance Indicators, *supra* note 3, at § 28. The Court's third report also notes under the fourth goal, regarding victim access to the Court, that units and sections of the Court are involved in the 'active process of developing further indicators to complement those already existing'. See Third Report on Performance Indicators, *supra* note 3, at § 36.

²⁸ First Report on Performance Indicators, *supra* note 3, at § 9, and 12-13; Second Report on Performance Indicators, *supra* note 3, at § 24. The Court's third report similarly recalls that 'indicators are to be taken and understood in context', noting that 'values on their own cannot account for the reality or complexity of a case'. See Third Report on Performance Indicators, *supra* note 3, at § 26.

Criminal Tribunals for the former Yugoslavia and Rwanda (ad hoc tribunals). The UN Security Council Resolutions that implemented the completion strategies required the tribunals to report on measures that had been taken to complete their work within agreed timescales.²⁹ They did not, however, require the tribunals to report on other aspects of the tribunals' operation, such as their ability to engage victims or uphold high levels of procedural fairness.³⁰ Consequently, the ICC is charting a new course in measuring the performance of an international criminal court or tribunal. While the Special Tribunal for Lebanon has engaged in the process of developing indicators to measure its performance, it has done so alongside the ICC and limited lessons can, therefore, be drawn from its experience.³¹ As the ICC has noted, issues are also raised in drawing lessons from performance monitoring at the national level given the comparatively small number of cases that the ICC has overseen and the diversity of the underlying country situations in which they have been based.³²

The development of performance indicators for the ICC, and for international criminal courts generally, carries a number of benefits. The first is in their capacity to moderate expectations of international criminal justice. Stahn has highlighted the role of measurement in moving from a 'faith-based' to a 'fact-based' understanding of international criminal justice.³³ He argues that assessment of the strengths and weaknesses of international criminal justice can help to 'reduce unrealistic expectations' that could inhibit its real world impact.³⁴ This is important from the perspective of victims as well as state funders of the Court and other stakeholders in its proceedings. Not only may performance indicators help to reframe expectations about what the Court can offer, the involvement of the Court in the construction of performance indicators

²⁹ UN Security Council Resolution 1503, 28 August 2003 (SC Res. 1503); United Nations Security Council Resolution 1534, 26 March 2004 (SC Res. 1534).

³⁰ This article is focussed on performance monitoring for an external audience. Internal monitoring of the tribunals' operation was also undertaken. See ICTY Press Release, Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council, 30 October 2002, JDH/P.I.S./708-e, announcing 'a monthly statistical overview of [the Tribunal's] activities which it measures using several specific parameters... called the International Tribunal's Table of Indicators'.

³¹ Special Tribunal for Lebanon, Eighth Annual Report (2016-2017), available at <https://www.stl-tsl.org/sites/default/files/documents/annual-reports/STLZ8thZAnnualZReportZ2016-2017ZENZweb.pdf>. For discussion, see Ambach, *supra* note 21, at 448.

³² First Report on Performance Indicators, *supra* note 3, § 10; Second Report on Performance Indicators, *supra* note 3, §§ 18-19.

³³ C. Stahn, 'Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice', 25(2) *LJIL* (2012) 251, at 257.

³⁴ *Ibid.*

provides it with agency in how it is assessed, allowing it to highlight areas of work that extend beyond – and may delay – the completion of cases.³⁵

A second benefit of performance indicators is that they provide a response to calls from stakeholders for greater accountability and transparency in the Court's work. Ambach has highlighted the role of performance indicators in this regard, arguing that, in doing so, they can contribute to the legitimacy of international criminal justice institutions and help to foster critical forms of state support for the ICC.³⁶ He argues that by allowing the ICC to present an 'interesting, transparent and serious business model', performance indicators can 'help to keep national governments willing to finance and support international justice'.³⁷ While the relationship between performance indicators and state support for the ICC is yet to be seen, engagement in the development of performance indicators demonstrates that the Court is listening to the demands and frustrations of states, whose support it relies upon.

Thirdly, and perhaps most obviously, performance indicators have the potential to identify issues that the Court could address to improve its performance in relation to each of the aforementioned Court-wide goals. In its paper on the establishment of performance indicators for the ICC, the Open Society Justice Initiative notes the role of indicators in 'point[ing] to problems and lay[ing] the ground for improving the performance in areas on which the Court may be underachieving'.³⁸

The use of performance indicators in the context of the ICC does, however, also carry risks, including for the realisation of fairness and victim satisfaction in the Court's proceedings. By including fairness and victim access to justice as key goals of the Court, the ICC's performance indicators not only reflect the prominent role that these considerations have come to play in international criminal proceedings, but also indicate the Court's commitment to realising them. Nonetheless, the use of performance indicators at the ICC could have the effect of limiting the Court's ability to ensure high levels of fairness and victim satisfaction. This is due to the combined effect of tensions between demand for expeditiousness, fairness and victim

³⁵ The Court's reports on performance indicators acknowledge this benefit. See Third Report on Performance Indicators, *supra* note 3, at § 37.

³⁶ Ambach, *supra* note 21.

³⁷ *Ibid*, at 459.

³⁸ OSJI, *Establishing Performance Indicators for the International Criminal Court*, available at <https://www.justiceinitiative.org/uploads/b14d7fe9-0548-4b5e-9ebe-f97a6cf119ed/briefing-icc-perforamnce-indicators-20151208.pdf>, (last accessed 20 February 2020), at 6. The report gives an example of the use of indicators to identify causes of delays in proceedings or the rescheduling of hearings.

satisfaction in international criminal trials and the limits and implications of performance measurement. These issues will be explored in turn in the two sections that follow.

3. The Root of the Problem: Conflicting Goals

While expeditiousness is often in the interests of fairness and victim satisfaction, it is widely recognised that these goals can conflict.³⁹ The following subsections set out the importance of expeditiousness in the ICC's proceedings, including for fairness and victim satisfaction, before turning to its ability to conflict with these goals. It also explains the significance of the balance between these goals for the Court's identity.

A. Expeditiousness

The importance of expeditiousness in the ICC's proceedings is reflected in Article 64(2) ICC Statute, which places an obligation on the ICC's Trial Chambers to 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.

The pace of the ICC's proceedings has clear implications for the Court's compliance with the right of the accused to trial without undue delay, which is protected under Article 67(1)(c) ICC Statute. When interpreting this right, international criminal tribunals have followed the approach taken by human rights courts in considering the conduct of the relevant authorities; in this context, the conduct of the Court authorities.⁴⁰ Factors that prolong the international criminal justice process, such as delay between the end of the trial and the issuance of a

³⁹ See references *infra*. Conflict between pursuit of efficiency and competing objectives such as fairness and satisfaction have been discussed at length in literature on performance measurement and managerialism. See, for example C. Pollitt, 'The Politics of Performance Assessment: Lessons for Higher Education?', 12(1) *Studies in Higher Education* (1987) 87. For discussion of conflict between these goals in the context of domestic criminal justice, see, for example, C. Jones, 'Auditing Criminal Justice', 33(2) *British Journal of Criminology* (1993) 187; P. Rogerson, 'Performance Measurement and Policing: Police Service or Law Enforcement Agency?', 15(4) *Public Money & Management* (1995) 25; A. Freiberg, 'Managerialism in Australian Criminal Justice: RIP for KPIs', 31 *Monash University Law Review* (2003) 12.

⁴⁰ Other considerations are the complexity of the case, the conduct of the accused and the prejudice suffered by the accused. See Y. McDermott, *Fairness in International Criminal Trials* (OUP, 2016), at 52-53.

judgment, have, consequently, raised concerns about the ability of international criminal courts and tribunals to uphold the rights of the accused.⁴¹

Prompt proceedings are also necessary to address the impunity gap that so often follows the commission of international crimes, which typically occur on a mass scale and involve large numbers of perpetrators. In this respect, expeditiousness also has significance from the perspective of victims and other stakeholders affected by the commission of international crimes. By allowing more individuals to be brought to justice, expeditiousness responds to calls for accountability and contributes to the satisfaction of the range of goals that have been attributed to the international criminal justice process, from retribution to deterrence, the promotion of the rule of law, reconciliation and peace building.⁴²

The pace of proceedings at the ICC allows the Court to reduce the impunity gap by increasing the number of cases that can be overseen by the Court itself and by incentivising the initiation of criminal proceedings at the domestic level. The ICC's complementarity regime, which allows the Court to exercise jurisdiction if states are unable or unwilling to investigate or prosecute,⁴³ creates an incentive to states to initiate domestic proceedings so as to avoid the intervention of the ICC in situations involving their territory or nationals.⁴⁴ This incentive will only work, however, if the ICC is viewed as an active court that is likely to exercise jurisdiction if states are unwilling or unable to undertake genuine proceedings.⁴⁵ Speedy proceedings are instrumental to this perception.

⁴¹ McDermott, *ibid*, at 52-53. In response to efficiency concerns, the judges of the ICC have adopted guidelines on the judgment drafting process and on the timeframe for issuance of key judicial decisions. See ICC Press Release, 'ICC judges hold retreat, adopt guidelines on the judgment drafting process and on the timeframe for issuance of key judicial decisions', ICC-CPI-20191007-PR1485, 7 October 2019.

⁴² For discussion of the goals that underpin the international criminal justice process, see M. Damaška, 'What is the Point of International Criminal Justice?', 83(1) *Chicago-Kent Law Review* (2008) 329.

⁴³ Rome Statute of the International Criminal Court (1998) 2187 UNTS 90, entered into force 1 July 2002 (ICCSt), Art. 17.

⁴⁴ For discussion of this incentive, see W. W. Burke-White and A-M Slaughter, 'The Future of International Law is Domestic (or, The European Way of Law)', 47(2) *Harvard Journal of International Law* (2006) 327, at 342-3. Jessberger and Geneuss have argued that the principle of complementarity facilitates a key purpose of the ICC, in its function as a 'watchdog court', by encouraging states to 'comply with their international obligation *erga omnes* to investigate, prosecute and punish perpetrators of international crimes'. See Jessberger and Geneuss, *supra* note 17, at 1087. The ICC's preliminary investigation in Colombia has, for example, been argued to have encouraged the investigation and prosecution of international crimes at the domestic level. See R. Uruña, 'Prosecution Politics: The ICC's Influence in Colombian Peace Processes, 2003-2017', 111(1) *American Journal of International Law (AJIL)* (2017) 104.

⁴⁵ It should be stressed that the threat of ICC intervention is not the only incentive for domestic proceedings and other factors, such as reputational harm, may be influential in prompting states to investigate and prosecute crimes involving their territory or nationals.

Not only can expeditiousness affect the number of individuals that can be brought to justice, it can also affect the strength of the ICC's cases and their prospect of ending in conviction. Delays in the criminal justice process can weaken cases in various ways, including by increasing the likelihood of evidence deterioration and witness interference. Lengthy proceedings may also increase the chances of issues related to the age and health of the accused, or of participating victims and witnesses.

The speed of the criminal justice process also has implications for state support for the ICC's system of justice, which is critical for the Court's effective operation. The early years of the ICC's operation have shown its reliance on states not only for funding but also for various forms of cooperation with its proceedings, including the arrest and surrender of suspects, preservation of evidence and protection of witnesses. Both the Prosecutor of the ICC and its former President, Judge Fernández de Gurmendi, have drawn connections between the Court's performance and the cooperation of external bodies.⁴⁶ In her end of mandate report, Judge Fernández de Gurmendi emphasised her conviction that 'enhancing the Court's mandate is necessary to create a virtuous circle leading to more cooperation', adding that 'the Court must constantly strive to enhance the speed and quality of the justice that it delivers in order to enhance its own credibility and foster and maintain external support'.⁴⁷

B. Conflict with Fairness

Despite its importance for compliance with the right of the accused to trial without undue delay, pursuit of expeditiousness can conflict with other requirements of a fair trial that are enshrined in the ICC Statute, including the list of rights that are outlined in Article 67(1) of the ICC Statute. The Trial Chamber of the ICC is under an obligation to uphold these rights under Article 64(2). Conflicts can be envisaged, for example, between the pursuit of speed and the right of the accused under Article 67(1)(b) of the ICC Statute to have adequate time and facilities for the preparation of the defence, or the right of the accused under Article 67(1)(e)

⁴⁶ S. Charania, "'Without Fear of Favour' – An Interview with the ICC Prosecutor Fatou Bensouda", *Justice in Conflict*, 15 October 2015, available at <https://justiceinconflict.org/2015/10/15/without-fear-or-favour-an-interview-with-the-icc-prosecutor-fatou-bensouda/> (last accessed 20 February 2020) ('The Prosecutor wanted above all to see increased support for the ICC, and a Court moving towards full universality. This would be achieved by demonstrating an effective and efficient institution, within which her independence must be maintained'). ICC Presidency 2015-2018, End of Mandate Report by President Silvia Fernández de Gurmendi, 9 March 2018, available at https://www.icc-cpi.int/itemsDocuments/180309-pres-report_ENG.pdf, at § 3.

⁴⁷ ICC Presidency 2015-2018, End of Mandate Report by President Silvia Fernández de Gurmendi, *ibid.*

to examine, or have examined, the witnesses against him or her.⁴⁸ Consequently, while expeditiousness is, generally speaking, in the interests of the defence, efforts to increase the speed of proceedings also have the potential to impinge on the rights of the accused.

The completion strategies at the ad hoc tribunals, which were focused on bringing the work of the tribunals to an end, raised concerns about their implications for the fairness of the tribunals' proceedings.⁴⁹ Various measures that were implemented alongside the completion strategies with a view to expediting proceedings at the ad hoc tribunals have been criticized because of their implications for compliance with fair trial standards.⁵⁰ These criticisms indicate that pressure for efficiency can have detrimental implications for the fairness – or, at least, the perceived fairness – of international criminal trials.

Fairness is widely considered to be an essential characteristic of the international criminal justice process, and one that feeds into its legitimacy.⁵¹ The influence of concepts of liberal criminal justice over the development of international criminal law has supported the incorporation of fairness and compliance with the rights of the accused into the fabric of international criminal law, and its identity.⁵² The ICC's own website lists 'trials are fair' and

⁴⁸ For an example of defence objections to measures taken on the basis of efficiency because of their implications for the right of the accused under Article 67(1)(b), see Decision on the Request for Postponement of the Appearance of Witness P-583 submitted by the Defence for Mr Gbagbo, *Laurent Gbagbo and Charles Blé Goudé* (02/11-01/15-947), Trial Chamber 1, 31 May 2017. In this decision, the defence teams objected to the proposed amendment to the scheduled appearance of witnesses, which had been made to preserve the efficiency of the proceedings, submitting that 'they would not be in a position to adequately prepare [for the appearance of the witness] in light of the short notice' (at § 1). The issue was resolved in favour of the defence. Another example can be taken from a defence application for leave to appeal in the *Ntaganda* case. Following the Chamber's refusal of a defence request for extension of time to prepare for its presentation of evidence, the defence objected to judges 'rushing the start of the Defence case in order to have an expeditious trial' and, in doing so, 'neglect[ing] the [a]ccused's fundamental right to a fair trial and [...] to prepare his [d]efence adequately'. The Chamber found that the defence had not satisfied the criteria for appeal. See Decision on Defence Request for Leave to Appeal the 'Decision on Defence Request for an Extension of Time to Prepare for its Presentation of Evidence', *Bosco Ntaganda* (ICC-01/04-02/06-1860), Trial Chamber 1, 13 April 2017, § 11.

⁴⁹ See discussion in D. A. Mundis, 'The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals', 99(1) *AJIL* (2005) 142, at 155-56.

⁵⁰ See, for example, criticism of the tribunals' use of time limits for the presentation of evidence, use of previously adjudicated fact and use of guilty pleas, respectively, in M. G. Karnavas, 'The ICTY Legacy: A Defence Counsel's Perspective', 3 *Goettingen Journal of International Law (GJIL)* (2011) 1053, at 1056; P. M. Wald, 'ICTY Judicial Proceedings: An Appraisal from Within', 2 *JICJ* (2004) 466, at 473; S. Bourgon, 'Procedural Problems Hindering Expeditious and Fair Justice', 2 *JICJ* (2004) 526, at 532. For criticism of the implications of the tribunals' increasing reliance on written evidence, see S. Kay, 'The Move from Oral Evidence to Written Evidence: "The Law is Always Too Short and Too Tight for Growing Humankind"', 2 *JICJ* (2004) 495, at 495-96; M. Fairlie, 'Due Process Erosion: The Diminution of Live Testimony at the ICTY', 34 *California Western International Law Journal* (2003) 47, at 63-83; J. Turner, 'Defence Perspectives on Law and Politics in International Criminal Trials', 48(3) *Virginia Journal of International Law* (2008) 529, at 590.

⁵¹ J. Nicholson, "'Too High", "Too Low", or "Just Fair Enough"? Finding Legitimacy Through the Accused's Right to a Fair Trial', 17 *JICJ* (2019) 351, at 352.

⁵² See generally Robinson, *supra* note 17.

‘defendants’ rights are upheld’ as ‘key features’ of the Court, reflecting the integral nature of fairness to the Court’s proceedings.⁵³ The multiple provisions of the ICC Statute that outline and require compliance with the rights of those suspected and accused of having committed international crimes provide further confirmation of the integral place of fairness in the ICC’s system of justice.⁵⁴

While there is no doubt as to the importance of fairness in international criminal proceedings, disagreement remains as to what standards of fairness must be upheld at the international level in light of the peculiarities of international criminal justice, and how these standards translate into day-to-day proceedings in the courtroom.⁵⁵ In particular, there is need to reconcile demand for fairness and compliance with the rights of the accused with the human rights impetus that underpins international criminal law, and which is reflected in demand for those suspected of international crimes to be brought promptly to justice.⁵⁶ The way in which conflicts between fairness and expeditiousness are reconciled at the ICC could affect, positively or negatively, the Court’s identity as a fair and legitimate institution. While one study has suggested that certain measures that have been taken to expedite proceedings at the ICC have not infringed the fairness of the Court’s proceedings thus far,⁵⁷ the tension between the goals of expeditiousness and fairness could be exacerbated by the use of performance indicators for the reasons set out in Section 4, below.

C. Conflict with Victim Satisfaction

Pursuit of expeditiousness also has the potential to have a negative impact on victim satisfaction with the ICC’s proceedings. The ICC’s ability to support the rights and interests of victims in its proceedings is significant in light of growing emphasis that has been placed on victims in the international criminal justice process and the central role that victims have been

⁵³ See <https://www.icc-cpi.int/about#> (last accessed 20 February 2020).

⁵⁴ These include Arts 22-24, 55, 63(1), 64(2), 66 and 67 ICCSt.

⁵⁵ For the argument that international criminal procedure should be ‘fair enough’, see M. R. Damaška, ‘Reflections on Fairness in International Criminal Justice’, 10 *JICJ* (2012) 611, at 616; M. Damaška, ‘The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals’, 36(2) *North Carolina Journal of International Law & Commercial Regulation* (2011) 365, at 381; C. Warbrick, ‘International Criminal Courts and Fair Trial’, 3 *Journal of Armed Conflict Law* (1998) 45, at 54. For the argument that international criminal tribunals should seek to uphold the highest standards of fairness, see McDermott, *supra* note 43, Chapter 5.

⁵⁶ Robinson has described these conflicting demands in terms of international criminal law’s ‘identity crisis’. See Robinson, *supra* note 17. See also Mégret, *supra* note 17, at 209-11.

⁵⁷ J. I. Turner, ‘Defence Perspectives on Fairness and Efficiency at the International Criminal Court’ in K. J. Heller et al (eds.), *Oxford Handbook on International Criminal Law* (Oxford: Oxford University Press, 2019).

given under the ICC's legal framework, where, in contrast with the ad hoc tribunals, victims can participate in proceedings in their own right.⁵⁸ The role given to victims under the ICC Statute is frequently recognised as a defining characteristic of the ICC,⁵⁹ and part of the Court's identity.⁶⁰ While the ICC Statute provides the framework for victims to play an important role in the Court's proceedings, the scope of their role is still being established in the Court's practice.⁶¹

As with the relationship between expeditiousness and fairness, the relationship between expeditiousness and victim satisfaction is two-pronged: while speedy proceedings can further the interests of victims by increasing the number of perpetrators that are held accountable and improving the prospects of conviction, pursuit of speed can also conflict with victims' interests. Conflicts may arise, for example, between the speed of proceedings and the interest of victims in multiple or broad charges, or the direct participation of a large number of victims in trial proceedings.⁶²

The tension between speed and victim satisfaction has been raised in relation to the ad hoc tribunals, where the completion strategy has been argued to have frustrated the tribunals' ability

⁵⁸ Art. 68(3) ICCSt.

⁵⁹ S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', 76 *Law and Contemporary Problems* (2013) 235, at 239-41.

⁶⁰ Mariniello has included the idea of the Court as 'a form of restorative justice, which – as a forum for victims to express their views and concerns – contributes to reconciliation' and as 'a pedagogic institution strengthening the public sense of accountability for human rights violations' in the 'multiplicity of identities' of the ICC. See Mariniello, *supra* note 17, at 4. Jessberger and Geneuss have also noted that 'given the unique and unprecedented regime of victims' participation and reparations the ICC may be regarded as a 'reparations court' – raising issues quite different from the one of an ordinary criminal court'. See Jessberger and Geneuss, *supra* note 17, at 1083.

⁶¹ For discussion, see S. Kendall and S. Nouwen, *ibid.* See also FIDH, *Victims at the Center of Justice: From 1998-2018: Reflections on the Promises and the Reality of Victim Participation at the ICC*, available at https://www.fidh.org/IMG/pdf/droitsdesvictimes730a_final.pdf (last accessed 20 February 2020) at 4-5. The ongoing resolution of the role of victims in the ICC's proceedings can be seen, for example, in recent decisions relating to the ICC's Situation in Afghanistan that address the status of victims as parties to the proceedings and their standing to bring an appeal under Article 82(1)(a) ICC Statute. See Reasons for the Appeals Chamber's Oral Decision Dismissing as Inadmissible the Victims' Appeals Against the Decision Rejecting the Authorisation of an Investigation into the Situation in Afghanistan, *Situation in the Islamic Republic of Afghanistan* (ICC-02/17-137), Appeals Chamber, 4 March 2020. See also Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Majority's Oral Ruling of 5 December 2019 Denying Victims' Standing to Appeal (Preliminary Reasons), *Situation in the Islamic Republic of Afghanistan* (ICC-02/17-133), 5 December 2019.

⁶² For discussion of the tension between victim participation and efficiency in the ICC's proceedings, see E. Baumgartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court', 90 (870) *International Review of the Red Cross* (2008) 409. Baumgartner notes the ICC's acknowledgment of the tension in the context of victim participation in early stages of the Court's proceedings (at 415) and common legal representation in relation to the personal appearance of a large number of victims (at 430). See also B. Perrin, 'Victim Participation at the International Criminal Court: Examining the First Decade of Investigative and Pre-Trial Proceedings', 15 *ICLR* (2015) 298.

to engage with victim communities by limiting the participation of witnesses in tribunal proceedings in terms of the number of victims that were able to participate and the scope of their participation.⁶³ Demand for expeditiousness at the ICC could similarly have negative implications for the Court's ability to accommodate the interest of victims' and affect its identity as an institution that puts victims at the heart of the criminal justice process.

D. Issues of Policy and Process

For the reasons set out below, the introduction of performance indicators is set to play into the balance that is struck between expeditiousness, fairness and victim satisfaction at the ICC, supporting the prioritisation of the former over the latter. In response to this argument, it might be reasoned that after 20 years of the Court's operation the time is ripe for reconsideration of how these goals should be balanced; that fair trial standards need to be (re-)interpreted in a manner that allows the Court to operate more quickly, or that the role of victims in proceedings should be reduced so as to allow the Court to process a larger case load. The appropriate balance between these goals is an important policy question,⁶⁴ but one that exceeds the scope of this article. The problem raised here is not the potential for performance indicators to affect the Court's approach to fairness or victim satisfaction per se, but the unconscious and potentially politicized process by which this could happen; one that allows the limits of measurement and the power of numbers to trump policy and principle.

4. Performance Indicators and (Re-)Prioritisation of the Court's Goals

There are several reasons to anticipate that the introduction of performance indicators will support the prioritisation of speed over fairness and victim satisfaction in light of the tensions discussed above.

A. Difficulty in Measuring Fairness and Victim Satisfaction

⁶³ G. M. Frisso, 'The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims', 3 *GJIL* (2011) 1093, at 1102-1105.

⁶⁴ It has been argued elsewhere that lack of clarity as to the purpose and identity of the Court 'constitutes one of the main reasons for which initial enthusiasm has, in a relatively short period, disappeared, increasingly turning to gradual disenchantment'. See Mariniello, *supra* note 17, at 4.

The first is the difficulty in measuring – and, in particular, quantifying – the concepts of fairness and victim access to justice. The challenge of measuring the fairness of the Court’s proceedings is acknowledged in consecutive reports of the ICC on the development of performance indicators.⁶⁵ The Court’s Second Report on Performance Indicators, for example, recognises that:

‘[s]ome aspects [of the Court’s operation], while central to key goals of the institution, are very difficult to measure in practice. This is particularly the case of fairness, which may be very difficult to measure as such and would require great efforts to identify relevant proxy values instead’.⁶⁶

In light of this, it is unsurprising that the measurement of fairness in the Court’s performance indicator reports to date have been narrow. As has already been noted, the indicators focus on quantitative rather than qualitative data.⁶⁷ They measure, for example, the timespan of different phases of proceedings, the number of motions and pages put forward by the parties, the amount of disclosed material and the preparation time of the parties.⁶⁸ While the quantitative measures assess aspects of the Court’s proceedings that have implications for fairness, they do not indicate the extent to which the proceedings have, as a result, been deemed fair. As Stahn has noted elsewhere, ‘[t]he level of ‘fairness’ is predominantly a normative judgement’.⁶⁹ An assessment of the fairness of the ICC’s proceedings therefore requires a qualitative approach which is not reflected in the performance indicators that have been developed by the Court so far.

The difficulty in measuring fairness may explain why it is encapsulated in the same ‘Court-wide goal’ as expeditiousness, a concept that is much more susceptible to measurement. The Court’s Second Report on Performance Indicators recognises the positive relationship between fairness and expeditiousness and, for this reason, sets out ‘common indicators which seek to

⁶⁵ First Report on Performance Indicators, *supra* note 3, at § 28; Second Report on Performance Indicators, *supra* note 3, at § 22.

⁶⁶ Second Report on Performance Indicators, *ibid.*

⁶⁷ First Report on Performance Indicators, *supra* note 3, at § 29; Second Report on Performance Indicators, *supra* note 3, at §§ 37-39; Third Report on Performance Indicators, *supra* note 3 at §§ 13-20.

⁶⁸ Second Report on Performance Indicators, *ibid.*, Annex I; Third Report on Performance Indicators, *ibid.*, Annex I.

⁶⁹ Stahn, *supra* note 34, at 267.

measure relevant aspects of both concepts taken together’,⁷⁰ despite having acknowledged the potential for the two concepts to conflict.⁷¹

The concept of victim satisfaction also raises measurement challenges. Under a heading on meaningful victim participation, the Court’s Second Report on Performance Indicators highlights indicators that are ‘inherently difficult to measure’, which include the ‘[d]egree of satisfaction expressed by victims about their participation’.⁷² Despite reference to ‘meaningful’ victim participation in the Court’s reports on performance indicators,⁷³ the measures that have been developed so far go to aspects of the proceedings that are pre-requisites for victim satisfaction rather than victim satisfaction with the process per se, which is far more difficult to measure. The measures include the number of victims participating at each stage of the case, the number of field trips of Court-appointed legal representatives of victims, the number of victims for each case that has benefitted from reparations projects, the number of events organised by the Court’s Outreach Unit and the numbers reached through radio and television.⁷⁴ The approach mirrors the Court’s focus on measures that ‘point towards a level of fairness’,⁷⁵ rather than those that indicate the resulting fairness of the proceedings; it is similarly reductive.

The Court has received criticism for its narrow approach to measuring victim access to justice. Carayon and O’Donohue have argued that the ICC’s performance indicators ‘focus too much on measuring quantity (i.e. the number of trips conducted by legal representatives to meet with their clients) over quality (i.e. victims’ satisfaction with the systems and services provided)’.⁷⁶ Hirst has criticized the relevant performance indicators as being ‘so limited and arbitrary that it appears they have been chosen by reference to what quantitative data was available, rather than what information is most relevant to assessing victim participation’.⁷⁷ She concludes that the ICC’s current performance indicators ‘cannot be sufficient to enable any real evaluation of

⁷⁰ Second Report on Performance Indicators, *supra* note 3, at §§ 33 and 34.

⁷¹ Second Report on Performance Indicators, *ibid*, at § 22.

⁷² Second Report on Performance Indicators, *ibid*, at §§ 81 and 93.

⁷³ Second Report on Performance Indicators, *ibid*, at p.17 and Annex IV; Third Report on Performance Indicators, *supra* note 3, at 7 and Annex IV.

⁷⁴ Third Report on Performance Indicators, *ibid*, Annex IV.

⁷⁵ Second Report on Performance Indicators, *supra* note 3, at § 32.

⁷⁶ G. Carayon and J. O’Donohue, ‘The International Criminal Court’s Strategies in Relation to Victims’, 15(3) *JICJ* (2017) 567, at 589.

⁷⁷ M. Hirst, ‘Valuing Victim Participation: Why We Need Better Systems to Evaluate Victims’ Participation at the ICC’ in FIDH, *Victims at the Centre of Justice: From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC*, available at https://www.fidh.org/IMG/pdf/droitsdesvictimes730a_final.pdf (last accessed 20 February 2020), at 85.

victim participation'.⁷⁸ As with an evaluation of the fairness of the Court's proceedings, this would necessitate the collection of qualitative data.⁷⁹

B. What Gets Measured Gets Done

Difficulty in measuring concepts of fairness and victim satisfaction is problematic because of the impact of measurement on behaviour. The detrimental impact on fairness and victim satisfaction lies in the tendency to prioritise the measurable over the unmeasurable, and the quantifiable over the unquantifiable.

Research has shown the impact of measurement and audit culture on behaviour within a variety of organisations and areas of public life.⁸⁰ It has also highlighted that various 'unintended consequences' can result from attempts to measure performance.⁸¹ Smith has set out a range of such unintended consequences, two of which have particular significance for the realisation of fairness and victim satisfaction at the ICC.⁸² The first, referred to as 'tunnel vision', describes 'an emphasis by management on phenomena that are quantified in the performance measurement scheme, at the expense of unquantified aspects of performance'.⁸³ In the international criminal justice context, 'tunnel vision' supports the prioritisation of expeditiousness over fairness and victim satisfaction, the former being more suited to quantification than the latter.

Support for the potential for this unintended consequence to be realised can be drawn from the ad hoc tribunals, which have been criticized for prioritising the completion of proceedings under the completion strategies – which was reviewed in quantitative terms⁸⁴ – over the unquantified goal of fairness. One of the most notorious criticisms of the completion strategy along these lines was articulated by Judge Hunt, who argued that the completion strategy had caused the ICTY Appeals Chamber to 'reverse or ignore its previously carefully considered

⁷⁸ Hirst, *ibid.*

⁷⁹ Hirst, *ibid.*, at 85-6.

⁸⁰ See, for example, Espeland and Sauder, *supra* note 7. Merry, *supra* note 4. D. McGrogan, 'Human Rights Indicators and the Sovereignty of Technique', 27(2) *European Journal of International Law* (2016) 385. C. Pollitt, 'Performance Management 40 Years On: A Review. Some Key Decisions and Consequences', 38(3) *Public Money & Management* (2018) 167.

⁸¹ P. Smith, 'On the Unintended Consequences of Publishing Performance Data in the Public Sector', 18 *International Journal of Public Administration* (1995) 277, at 283.

⁸² *Ibid.*, at 283.

⁸³ *Ibid.*, at 284.

⁸⁴ This is evident from any of the completion strategy reports, which indicate how many cases remain to be completed at key stages of the criminal justice process. For all of the ICTY completion strategy reports, see <https://www.icty.org/en/documents/completion-strategy-and-mict> (last accessed 20 February 2020).

interpretations of the law or of the procedural rules, with a consequential destruction of the rights of the accused'.⁸⁵

Another unintended consequence that has significance for fairness and victim satisfaction is what Smith refers to as 'measure fixation'.⁸⁶ This arises where 'a measure does not fully capture all dimensions of the associated objective', which results in a tendency to 'pursue strategies which enhance the reported measure rather than further the associated objective'.⁸⁷ Power has made a similar argument, noting the potential of measurement to 'shift the focus away from the proper moral concern... to something altogether more abstract and ultimately often meaningless: the creation of auditable outputs to satisfy external monitors as an end in itself'.⁸⁸ Examples of this unintended consequence of measurement have been found in various areas of public sector activity.⁸⁹ In the field of human rights, Rosga and Satterthwaite have highlighted the risk that 'the incentive to demonstrate success... according to given indicators may become greater than any incentive to substantively ensure the fulfilment and/or enjoyment of human rights themselves'.⁹⁰

The foundations for measure fixation can be seen in the ICC's performance indicators, which focus on a small number of pre-requisites to fairness and meaningful victim access to the Court rather than perceptions of whether or not these goals have, in fact, been realised. Concerns have been raised about the potential for measure fixation in the context of victim engagement with the ICC. Reflecting on the use of statistics to monitor victim participation in the Court's proceedings, Haslam and Edmunds have highlighted the risk of minimising the significance of victims' concerns that are not captured by the 'headline statistical figure' and the potential for satisfaction ratings to affect practice because they are 'seen as an appraisal of legal representation, even if that is not their intended purpose'.⁹¹

Not only may the introduction of performance indicators affect behaviour within the ICC to the possible detriment of fairness and victim access to justice, it may ultimately have the effect

⁸⁵ Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, *Prosecutor v Slobodan Milošević* (IT-02-54-AR73), Appeals Chamber, 21 October 2003, § 20.

⁸⁶ Smith, *supra* note 88, at 290.

⁸⁷ *Ibid.*, at 290.

⁸⁸ M. Power, *The Audit Society* (OUP, 1997), at 121. Cited in McGrogan, *supra* note 87, at 398.

⁸⁹ C. Propper and D. Wilson, 'The Use and Usefulness of Performance Measures in the Public Sector', 19(2) *Oxford Review of Economic Policy* (2003) 250, at 252.

⁹⁰ Rosga and Satterthwaite, *supra* note 4, at 286.

⁹¹ Haslam and Edmunds, *supra* note 13, at 943.

of shaping the meaning and scope of those concepts, distorting them to focus on aspects of Court operation that are easily measurable. This issue has drawn attention in the field of human rights. Thede has, for example, highlighted the potential for indicators to ‘distort the very meaning and intent of the right’ concerned, questioning whether indicators ‘will impoverish the very concepts human rights defenders have striven so long and hard to enrich’.⁹² Similarly, McGrogan has argued that ‘[r]emoving moral discourse from the sphere of human rights and driving it into “what is measurable instead of what matters”... has the effect of depriving the human rights movement of its power as a mechanism for justice, and diminishing its potential by focusing on what is measurement friendly’.⁹³ In light of their capacity to clarify human rights concepts, indicators have even been understood as having an equivalent role to jurisprudence.⁹⁴ In the same way, the development of performance indicators that seek to measure fairness and victim access to justice at the ICC could result in a narrowing of the concepts, limiting them to aspects that are easily measurable. This risk is particularly great given the uncertainties that surround the scope of these concepts at the international level.⁹⁵

C. A Basis for Greater State Involvement in the Operation of the ICC

The detrimental impact of performance indicators on fairness and victim satisfaction flows not only from the difficulty of measuring these concepts and the impact of measurement on behaviour, but also from the fact that performance indicators provide a further basis for states to influence the operation of the ICC.

The impact of performance indicators must be considered in the context of a Court that is far more closely regulated by states than its predecessors. The establishment of a permanent institution with wide-ranging, prospective jurisdiction necessarily entailed a Court that states could control through a permanent legislative and management body: the ASP. States regulate the Court through management oversight and budgetary decisions made during meetings of the ASP,⁹⁶ as well as through control of the Court’s legal framework, including the ICC Statute

⁹² N. Thede, ‘Human Rights and Statistics: Some Reflections on the No-Man's-Land between Concept and Indicator’, 18 *Statistical Journal of the United Nations Economic Commission for Europe* (2001) 259, at 266.

⁹³ McGrogan, *supra* note 87, at 402.

⁹⁴ G. de Beco, ‘Measuring Human Rights: Underlying Approach’, 3 *European Human Rights Law Review* (2007) 266, at 271-72.

⁹⁵ See Section 2 above.

⁹⁶ Art 112 ICCSt outlines the functions of the ASP, including (in paragraph 2(b)) ‘provid[ing] management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court’ and (in paragraph 2(d)) ‘consider[ing] and decid[ing] the budget for the Court’.

and Rules of Procedure and Evidence.⁹⁷ States can also affect the operation of the Court in a less formal way through their political support for and cooperation with the Court's activities, as has already been highlighted.

As demand for efficiency has grown, concerns have been raised about the level of state involvement in the operation of the ICC, largely through the budget, and the detrimental impact of micromanagement on the ability of the Court to operate effectively.⁹⁸ A paper on the development of performance indicators by the Open Society Justice Initiative, for example, notes that the request of the ASP for the Court to develop performance indicators 'comes in the context of a growing demand [amongst States] to better understand the Court's workings. States have been increasingly active in ASP Working Groups relating to governance and efficiencies'.⁹⁹ It stresses that performance indicators 'should not be viewed as a tool to hold the Court at ransom, but rather as one of the means to improve its performance'.¹⁰⁰

The introduction of performance indicators and the data that they produce provide a foundation for states to deepen their involvement in the Court's activities by providing justification for changes to financial or political support and alterations to the Court's legal framework.¹⁰¹ It is clear from ICC and ASP policy documents that performance indicators are intended to affect the way that states regulate the ICC. The objectives underpinning the Court's development of performance indicators, from the perspective of the ASP, were (i) to 'allow the Court to demonstrate better its achievements and needs' and (ii) to '[allow] States Parties to assess the Court's performance in a more strategic manner, bearing in mind existing recommendations and discussions, in particular in the context of the Study Group on Governance and the Committee on Budget and Finance'.¹⁰² The connection between performance indicators and

⁹⁷ Judges can implement changes to the ICC's Rules of Procedure and Evidence without state involvement, but these must be subsequently approved by the ASP. See Art. 51(3) ICCSt.

⁹⁸ See, for example, FIDH, "States should not hinder ICC's independence and victims' rights" (2012), available at <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/States-should-not-hinder-ICC-s-12423>.

⁹⁹ See OSJI, *supra* note 39, at 2 and 10, respectively.

¹⁰⁰ *Ibid.*

¹⁰¹ See Carcano, *supra* note 13, at 85. The Office of the Co-Investigating Judges (OCIJ) of the ECCC has rejected the application of managerial criteria to 'core judicial activity' in light its implications for the performance of the judicial function. The OCIJ noted, in particular, the difficulty of measuring the fairness of proceedings with direct reference to the ICC's performance indicators. See Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004 and 004/2 and Related Submissions by the Defence for Yim Tith, (case file 004/2/07-09-2009-ECCC-OCIJ, No D349/6), Office of the Co-Investigating Judges, 11 August 2017, §§ 35-43.

¹⁰² ICC Assembly of States Parties Resolution, Strengthening the International Criminal Court and the Assembly of States Parties, *supra* note 22, Annex I, para 7(b).

the budget is also evident from the Court's reports on performance indicators.¹⁰³ The ASP resolution prompting the development of performance indicators recognises the need to 'fully [preserve] [the Court's] judicial independence'.¹⁰⁴

While the introduction of performance indicators can be considered positive in that it allows states to interact with the Court on a more informed basis, scope for greater state involvement in the Court's operation is problematic insofar as it encourages a bias towards expeditiousness over other competing goals. Reliance on performance indicators entails reliance on narrow and potentially misleading data, rather than direct experience of the Court's operation. This is particularly the case in relation to fairness and victim satisfaction, given the difficulties in measuring the Court's ability to realise these goals. The data that states receive will not necessarily show where additional resources, or legislative, policy or institutional changes are required in relation to these goals. Performance indicators may, therefore, have the effect of shifting attention away from issues of fairness and victim access to the Court and on to expeditiousness, which can be more easily measured.

A related concern is that greater state intervention into the Court's activities, facilitated by the use of performance indicators, allows the Court to be more heavily subject to the political interests of states. This has implications for the Court's independence and impartiality, and, in turn, its fairness.¹⁰⁵ Despite provisions in the ICC Statute that acknowledge the importance of the Court's independence and limit the functions of the ASP so as not to encroach on the Court's judicial activities,¹⁰⁶ attention has been drawn to the way in which the ASP can be used by state parties to influence the exercise of judicial and prosecutorial functions.¹⁰⁷ In the context of growing demand for efficiency, the independence of the Court could be affected by

¹⁰³ Second Report on Performance Indicators, *supra* note 3, at § 26 ('The development of performance indicators may partially overlap with a number of other managerial initiatives and reporting obligations that also require identification of objectives or measurement of workload such as budget...') and § 27 ('... as performance indicators flow from the Court's Strategic Plan, relevant key performance indicators ideally link to the Court's budgetary requirements and such connection could be highlighted in relevant budget documentation').

¹⁰⁴ ICC Assembly of States Parties Resolution, Strengthening the International Criminal Court and the Assembly of States Parties, *supra* note 22, at § 51.

¹⁰⁵ Concerns about the impact of managerialism on the independence of the judiciary have been raised at the domestic level. See J. W. Raine, 'Courts, Sentencing and Justice in a Changing Managerial Context', 25(5) *Public Money and Management* (2005) 290.

¹⁰⁶ These include Arts 40 and 67(1) ICCSt., which protect the independence and impartiality of the Court, Art. 42 ICCSt., which guarantees the independence of the Court's Prosecutor, and Arts 112 and 119(1) ICCSt., which limit the function of the ICC ASP. For further discussion see H. Woolaver and E. Palmer, 'Challenges to the Independence of the International Criminal Court from the Assembly of States Parties', 15 *JICJ* (2017) 641, at 644-45.

¹⁰⁷ Woolaver and Palmer, *ibid.*

pressure to demonstrate productivity through convictions,¹⁰⁸ or to decline to initiate proceedings that are opposed by powerful states and may, therefore, progress slowly due to difficulties in securing state cooperation.¹⁰⁹ This concern is pertinent in the context of a Court, and a branch of international law, that is frequently criticized for bending to the will of powerful states.

5. Responses to the Risks of Performance Indicators

There are several measures that can be taken to respond to the risks highlighted above while retaining the benefits of performance indicators at the ICC.

A. *Qualitative Measurement of Fairness and Victim Satisfaction*

Perhaps most importantly, there is need for greater engagement in the task of developing qualitative measurement of aspects of the Court's operation that are less susceptible to quantification, including fairness and victim satisfaction. This is in line with the original call from states for the development of performance indicators that 'go beyond the mere production of workload statistics and progress descriptions in on-going proceedings'.¹¹⁰

Greater investment in qualitative measurement would be encouraged by the inclusion of qualitative reflection on the achievement of each of the Court's goals alongside any quantitative data that the Court produces, particularly in future reports on performance indicators. Impetus for the collection of qualitative data would also be encouraged by its inclusion in a regular review of the ICC's performance in meetings of the ASP. Not only would such review encourage critical reflection on the Court's performance in relation to each of its identified goals, it would also provide a forum to discuss the possible evolution and expansion of the Court's goals and the policy issues raised by conflicts between them.

¹⁰⁸ For related discussion of the impact of neoliberalism on the judicial function in international criminal law, see Bohlander, *supra* note 13, at 39-40 and S. Kendall, 'Commodifying Global Justice', 13(1) *JICJ* (2015) 113, at 117 and 132-33, cited therein.

¹⁰⁹ As De Bertodano has highlighted, threats to the independence of the Court can arise from both resistance to the initiation of proceedings in certain situations and the tendency to expect convictions in international criminal trials. See S. De Bertodano, 'Judicial Independence in the International Criminal Court', 15 *LJIL* (2002) 409, at 409-410. On the tendency to expect convictions, see also J. K. Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects', 27 *Yale Journal of International Law* (2002) 111, at 133.

¹¹⁰ Ambach, *supra* note 21, at 433.

The development of qualitative measurement of fairness and victim satisfaction does, however, raise challenges. One challenge is the availability of time and resources to develop an appropriate methodology and, subsequently, to collect and analyse the data produced. The ICC's Second Report on Performance Indicators recognises that a 'more comprehensive system of measuring [meaningful victim participation] such as the conduct of surveys... would be impossible for the Court to undertake within existing resources'.¹¹¹ The report acknowledges the role of other entities in conducting surveys that can be used by the Court, including those conducted by the Human Rights Center of US Berkeley School of Law and the International Bar Association.¹¹² Given the current resistance of states to increases in the Court's budget, reliance on external bodies is inevitable in the short term. However, this raises issues of continuity, due to reliance on external funding streams, as well as practical and security issues raised by the need for access to the relevant data.¹¹³ In the long term, qualitative measurement of fairness and victim satisfaction with the ICC's proceedings must be brought within the Court's budget.

A second challenge is that of developing a methodology for surveying fairness and victim access to justice or satisfaction in the Court's proceedings. While uncertainty remains as to the scope of these concepts at the international level, such uncertainty does not preclude measurement. As has been argued elsewhere, agreed definitions of fairness and victim access to justice are not necessary for inductive research that asks stakeholders and affected communities about their perceptions of the criminal justice process.¹¹⁴ An important consideration from the perspective of victim satisfaction is survey design that encompasses the range of victims that engage with the ICC at various stages of the criminal justice process, and that allows for reflection on all relevant aspects of victim engagement with the Court.¹¹⁵

B. Resistance to Over-Reliance on Quantitative Data

¹¹¹ Second Report on Performance Indicators, *supra* note 3, at § 82.

¹¹² *Ibid.*

¹¹³ Hirst has highlighted that the 2015 Berkeley Human Rights Center survey has demonstrated 'that it is feasible for the Court to contract an independent agency to undertake this kind of evaluation, even despite the protective measure which prevent disclosure of victims' identities to the public'. See Hirst, *supra* note 84, at 86.

¹¹⁴ G. Dancy, 'Question on Performance', ICC Forum Debate, July 2017 – February 2018, available at <https://iccforum.com/performance#Dancy> (last accessed 20 February 2020).

¹¹⁵ See Hirst's reflection on the limitations of the survey conducted by the Human Rights Center of US Berkeley School of Law and proposed areas for improvement in Hirst, *supra* note 84, at 86.

Regardless of the progress that is made in the collection of qualitative data on fairness and victim satisfaction, it is unlikely to command the same attention as the quantitative data that performance indicators will produce. Literature on measurement and audit culture has emphasised the ability of numbers to ‘circulate more easily’ and to be ‘more easily remembered than more complicated forms of information’.¹¹⁶ Their power has been attributed to their accessibility and the appearance of certainty and objectivity that they convey.¹¹⁷

It has been argued above that quantitative data raises particular difficulties in measuring fairness and victim satisfaction, and, consequently, has the potential to provide misleading data as to the ICC’s performance in these areas, and even to distort the concepts. In light of this, it might be argued that quantification should be avoided altogether in measuring these aspects of the Court’s operation. However, provided that it is contextualised and treated with caution, the benefits of numerical data could be exploited in these areas without incurring its risks.¹¹⁸ Numerical data could usefully show, for example, the number of victim participants in a case against the number of applicants, or even potential applicants.¹¹⁹ Quantitative data also has clear value in reflecting on the expeditiousness of the Court’s proceedings, despite the potential for this data to draw attention away from the competing demands of fairness and victim satisfaction.

What is needed is not outright rejection of quantification, but greater ‘indicator literacy’.¹²⁰ Quantitative data must be used with caution, with understanding of its risks and limitations,¹²¹ including those that have been highlighted above. The inclusion of qualitative data in future Court reports on performance indicators and scrutiny of quantitative data through meetings of the ASP would help to highlight gaps in the data and problems of misinterpretation.

C. Participation in Indicator Construction

¹¹⁶ Espeland and Sauder, *supra* note 7, at 18.

¹¹⁷ Merry, *supra* note 4, at S84.

¹¹⁸ Haslam and Edmunds recognise that “if deployed with care and in a way that explicitly acknowledges any contextual limitations, [statistics] could play a constructive and meaningful role in measuring victim satisfaction”. See Haslam and Edmunds, *supra* note 13, at 952.

¹¹⁹ Hirst criticizes the ICC’s performance indicators for presenting data on the number of victim participants without data on the number of applicants or potential applicants. See Hirst, *supra* note 84, at 85.

¹²⁰ This term has been used by Merry in the context of human rights protection. See, for example, S. E. Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (University of Chicago Press, 2016), at 26.

¹²¹ On the need for caution, see Stahn, *supra* note 34, at 257. McGrogan, *supra* note 87, at 408; De Beco, *supra* note 102, at 271-72. Haslam and Edmunds, *supra* note 13, at 952.

A third response is to ensure broad participation in the construction of performance indicators. This is necessary because of the political choices that underpin the way that indicators are framed. A key criticism of performance indicators – and those that produce quantitative data, in particular – is their ability to obscure underlying political choices, replacing ‘[e]mbedded theories, decisions about measures, and interpretations of the data’ with ‘certainty and lack of ambiguity of a number’.¹²² Rosga and Satterthwaite have observed that ‘reliance on the language of quantification... obscures evidence of the human judgment involved in statistical production’.¹²³

In the context of the ICC, indicator construction raises fundamental questions about the scope of fair trial guarantees at the international level and the role of victims in international criminal proceedings. With effective input of defence and victim representatives in the construction of performance indicators and the interpretation of the data that they produce, the performance indicator project can benefit from the expertise of those most closely associated with the realisation of relevant Court goals,¹²⁴ but also empower those affected by the Court’s operation in identifying areas of performance that should be monitored.

In light of the above, it is important that those affected by performance indicators are involved in their construction. However, in practice, performance indicators tend to be shaped by technical experts, who are typically from the global North.¹²⁵ This has the effect of disempowering affected communities and devaluing local knowledge.¹²⁶ The ICC’s reports suggest that defence and victim representatives have been consulted in the development of the Court’s performance indicators.¹²⁷ The reports suggest, however, that they have not been involved in all stages of indicator development,¹²⁸ and it is unclear which representatives were

¹²² Merry, *supra* note 4. See also Merry, *supra* note 135, at 20.

¹²³ Rosga and Satterthwaite, *supra* note 4, at 283-84.

¹²⁴ For recognition of the importance of affected stakeholders as a source of expertise in the field of human rights, see Rosga and Satterthwaite, *supra* note 4, at 314. In relation to the ICC, see OSJI, *supra* note 65, at 7. Hirst’s reflections on the ICC’s performance indicators, which highlight the need for additional measures of the Court’s goals, provide evidence of the contribution of defence counsel to the performance indicators project. See Hirst, *supra* note 84, at 85. A similar contribution could be envisaged from legal representatives of victims. In other areas of public sector governance, engagement of ‘external sources... such as the national ombudsman, grassroots organizations, and client panels’ has been argued to reduce dissonance between performance indicators and policy objectives, reducing the ‘performance paradox’ whereby performance declines through use of performance indicators. See van Thiel and Leeuw, *supra* note 9, at 276.

¹²⁵ Rosga and Satterthwaite, *ibid*, at 304-306. See also Merry, *supra* note 135, at 6.

¹²⁶ *Ibid*.

¹²⁷ Second Report on Performance Indicators, *supra* note 3, at §§ 9 and 13-15; Third Report on Performance Indicators, *supra* note 3, at § 4.

¹²⁸ See, for example, Second Report on Performance Indicators, *supra* note 3, at § 11, describing the 2016 Retreat in Gilon, which ‘offered an important opportunity to discuss during two days the initiative as well as the

consulted and how much weight has been given to their input when it has been sought. This is an issue that should be remedied in future reports on performance indicators.

D. Protection of the Court's Independence

Finally, it is important that states, civil society and other stakeholders in the Court's proceedings work with the ICC to resist incursions by states into the judicial and prosecutorial independence of the Court through the use of performance indicators. As already discussed, such incursions may come in the form of opposition to the initiation of proceedings in situations where non-cooperation is anticipated, or pressure on the Court to demonstrate productivity in the form of convictions. They may occur through amendments to the Court's Rules of Procedure and Evidence, regulation of the Court's budget, or discussion of the interpretation of the Court's legal framework in relation to ongoing proceedings.¹²⁹ Attempts to influence judicial and prosecutorial decision-making in ongoing proceedings must be resisted absolutely in light of their implications for the Court's independence.

6. Conclusion

The development of performance indicators is a predictable response to frustrations about the productivity of the ICC. There are several significant benefits to their use in this context; in moderating expectations of the Court, meeting calls for accountability and transparency, and identifying areas where the Court's efficiency and effectiveness can be improved. The approach that the Court has taken, identifying Court-wide goals that extend beyond the expeditiousness of its proceedings, recognises the complexity of the Court's work and factors that must be balanced against, and perhaps prioritised over, speed. The Court's goals acknowledge the importance of ensuring that proceedings are fair and the central role that has been given to victims under the Court's legal framework. As a result, they have the potential to support the Court in pushing back against simplistic assessments of its work, which are based

goals and criteria relevant to assess the performance of the Court' and which was 'attended by the President and sixteen of her fellow judges of the Court, the Registrar and Deputy Prosecutor and a number of officials of the Court's organs, as well as a few representatives of State Parties and civil society'.

¹²⁹ For discussion of the implications of amendment of the ICC RPE and debate in the ASP as to the interpretation of the Court's legal framework for the Court's independence, see Woolaver and Palmer, *supra* note 114, at 646-52. For discussion of the implications of budgetary oversight for the independence of the Court, see *ibid* at 656-59.

on speed alone, and in highlighting areas in which fairness and victim satisfaction can be enhanced.

At the same time, however, the turn to measurement, and quantitative assessment of the Court's performance in particular, has the potential to have a negative impact on fairness and victim satisfaction at the ICC, which have been cornerstones of the ICC's identity since its establishment. This is due to the conflicts that can arise between demand for expeditiousness, fairness and victim satisfaction when combined with the limits and unintended consequences of measurement. While there is a policy debate to be had about standards of fairness and the most appropriate role for victims in international criminal proceedings, the difficulty raised by performance indicators is their potential to feed into the balance between expeditiousness, fairness and victim satisfaction in an unconscious and unprincipled manner, and in a way that increases the Court's susceptibility to political interference. It has been argued above that the best way to respond to these risks is through investment in qualitative measurement of fairness and victim satisfaction, careful use of quantitative data, meaningful participation of affected stakeholders in the construction of indicators, as well as resistance to threats that performance indicators pose to the Court's independence. These measures should be considered in future work on performance monitoring at the ICC, including that being undertaken under the aegis of the Court's independent expert review.