

ORIGINAL ARTICLE

HAGUE INTERNATIONAL TRIBUNALS: INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

From bureaucracy to management: The International Criminal Court's internal progress narrative

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Abstract

Within international institutions such as the International Criminal Court (ICC), lawyers increasingly encounter managerial practices which are designed to improve organizational efficiency and cost-effectiveness. Charting this trend, scholars have analyzed these practices with a view to make them more legitimate. However, this scholarly focus overlooks the role of managerial practices in legitimizing and thus sustaining the institutions in which they are embedded. In this article, I ask how managerial practices operate to boost the ICC's reputation among its global audience. I find the answer in the Court's use of the juxtaposed images of bureaucracy and management, with all their negative and positive associations. The Court uses these images to narrate a story of its own internal evolution from inefficient bureaucracy to efficient and well-managed organization. This hidden narrative of institutional progress functions rhetorically to frame, focus and distract the attention of the Court's global constituencies.

Keywords: bureaucracy; International Criminal Court; management; managerialism; narratives

1. Introduction

In international institutions such as the ICC, international lawyers increasingly encounter managerial practices which are designed to improve organizational efficiency and cost-effectiveness. Charting this trend, scholars have analyzed these practices with a view to make them more accurate, effective and objective; in a word, more legitimate. However, with this focus, scholars and practitioners have overlooked the role of managerial practices in legitimizing and thus sustaining the institutions in which they are embedded. In this article, I ask how managerial practices operate to legitimize or boost the ICC's reputation among its global audience. To answer this, I first rethink managerial practices and 'managerialism' as the discourse of efficiency. This discourse, like any, has certain legitimating strategies, devices and images which help to sustain it.¹ Here I focus on the two juxtaposed images of bureaucracy and management. I argue that these images are deployed by the ICC as rhetorical book-ends in a narrative of the Court's institutional development. After recognizing these rhetorical images, I then reveal the narrative arc that the Court would have its global audience see, namely its move from inefficient bureaucracy in the early days to efficient and well-managed organization today. This is best illustrated through a retelling of the Court's history as a history of managerial practices, which have only expanded since the Court's inception. Identifying this hidden yet powerful narrative, I seek to render contestable not only the

I would like to thank Surabhi Ranganathan, Christine Schwöbel-Patel, participants in the Cambridge Legal Theory Discussion Group, and two anonymous reviewers for feedback on earlier drafts of this article. Any errors remain my own.

¹On 'legitimizing strategies' see S. Marks, *The Riddle of All Constitutions* (2000), 18–25.

Court's internal evolution, but the whole managerial apparatus on which the Court depends so heavily to keep up appearances on the international plane.

2. A new managerialism

Before revealing the ICC's internal progress narrative, I clarify the definition of managerialism adopted throughout. Managerialism here being understood as the discourse of efficiency and management, it is distinguishable from the managerialism of Martti Koskenniemi or David Kennedy, who have used the term synonymously with technocracy and expert rule.² While there are several overlaps between both managerialisms – not least their capacity to turn international lawyers into efficiency-minded technicians³ – the origins differ. I identify managerialism's roots in the twentieth century management theories of engineers and businessmen such as Frederick Taylor and Henri Fayol.⁴ A largely Anglo-Saxon endeavour (and later discipline), management techniques were originally devised to optimize the performance of industrial factory workers.⁵ The managerialism whose ideas of efficiency and worker control now permeate not only private but also public and international organizations, grew from here. More recently, they have emerged from the New Public Management of the 1970s which sought to transpose theories of efficiency and worker performance into the public sector.⁶ Coming to fruition at this crucial time in Western politics, the New Public Management or new managerialism aided the marketization projects led by Ronald Reagan and Margaret Thatcher. This has led managerialism to be dubbed 'the organizational arm of neoliberalism', and one that has been strategically deployed as part of that project since its commencement.⁷

While I subscribe to this definition of managerialism, and while its political origins demand further scrutiny, there are other reasons why international lawyers would want to problematize managerial practices and the narratives they weave. Firstly, if international law really is what international lawyers do, then now is an appropriate time to notice aspects of our professional life and work that we have hitherto ignored.⁸ This includes the non-legal aspects of the international lawyer's work. It now seems unreasonable to argue that, whether in her daily work or in her self-perception, the international lawyer remains unaffected by the frequent audits, assessments, and appraisals she must go through in institutions like the ICC, or – as is more the case – in the increasingly managerial university in which she works.⁹ Managerial practices

²M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', (2007) 70 *MLR* 1 ('Fate'); M. Koskenniemi, 'The Politics of International Law – 20 Years Later', (2009) 20 *EJIL* 7, at 14. While preferring the term 'expertise', David Kennedy has also used 'managerialism' to characterize the same phenomenon in his writings: D. Kennedy, 'Challenging Expert Rule: The Politics of Global Governance', (2005) 27 *Sydney Law Review* 1; D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (2016); D. Kennedy, 'Introducing *A World of Struggle*', (2015) 4 *London Review of International Law* 443, at 447: 'a world of "expertise" and "technocracy" or "managerialism"'. I also distinguish managerialism here from the 'managerial approach' recently advocated by Laurence Boisson de Chazournes: L. Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', (2017) 28 *EJIL* 13.

³See Koskenniemi, 'Fate', *supra* note 2, at 24.

⁴F. Taylor, *The Principles of Scientific Management* (1911); H. Fayol, *General and Industrial Management* (1967 [1908]).

⁵See Taylor, *ibid.*, at 7: 'This paper has been written . . . to point out, through a series of simple illustrations, the great loss which the whole country is suffering through inefficiency in almost all of our daily acts.'

⁶C. Hood, 'A Public Management for All Seasons?', (1991) 69 *Public Administration* 3, at 3–5; T. Klikauer, 'What Is Managerialism?', (2013) 41 *Critical Sociology* 1103.

⁷K. Lynch, 'New Managerialism: The Impact on Education', (2014) 5(3) *Concept: The Journal of Contemporary Community Education Practice Theory* 1, at 1.

⁸M. Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice', in J. d'Aspremont, et al. (eds.), *International Law as a Profession* (2017), 38, at 65.

⁹There is a wealth of literature on the impact of managerialism on primarily Anglophone universities: see, e.g., R. Deem and K. Brehony, 'Management as ideology: the case of "new managerialism" in higher education', (2005) 31 *Oxford Review of Education* 217; K. Lynch, B. Grummell and D. Devine, *New Managerialism in Education: Commercialisation, Carelessness and Gender* (2012); C. Clarke and D. Knights, 'Careering through academia: Securing identities or engaging ethical subjectivities?', (2015) 68 *Human Relations* 1865.

have been on the international lawyer's radar for at least 40 years¹⁰ and a detailed study of their effects has yet to be conducted.

Another reason for contesting managerialism, and for contesting it through the method of re-description applied here,¹¹ is to demonstrate just how central perception and image have become to sustaining the ICC and the international criminal justice project. The ICC has already been described as a 'spectacle' and as 'marketing' itself globally but when viewed as moving from bureaucracy to managerial organization, the symbolic effect of even these banal terms comes into sharper focus.¹² There are perils to such image-obsession when considering the risks at stake and the expectations the Court has set up for itself as the protagonist in the self-styled fight for global justice. It is thus important to foreground the narratives that reinforce this obsession. To begin this foregrounding exercise, I turn to the two images that render this narrative self-evident, namely bureaucracy and management.

3. Bureaucracy and management: Two images

As deployed by the ICC, the notions of management and bureaucracy can be understood as images the Court spends considerable time sculpting, maintaining and presenting to a range of global constituencies, including states parties, victims groups, civil society, scholars, journalists, and the general public. Through the constant upkeep and promotion of these images by its most senior and high-profile figures, the Court effectively manages its global reputation.¹³ It does so specifically by presenting its own seemingly inexorable move from inefficient bureaucracy to efficient, well-managed organization. How I describe these two images is, thus, how the Court would have its audience see them.¹⁴

The first image, bureaucracy, is a long-suffering concept pejoratively equated with inefficiency, professional pedantry and 'red tape'.¹⁵ Max Weber's century-old description of bureaucracy as the most rational and efficient form of organization has since been eclipsed by its negative connotations.¹⁶ Bureaucracy now connotes over-adherence to rules, lack of human empathy and an illogical spiral of endless paperwork.¹⁷ It has also suffered further derision since the rise of late-twentieth century management thought. In a business-minded world which idealizes

¹⁰See Section 3, above.

¹¹Re-description is a key critical methodology designed to re-evaluate and challenge common tropes or descriptions of events. It identifies an interconnected patchwork where once there was thought to be only a set of fragmentary and unconnected moments: see, e.g., M. Koskenniemi, 'What is Critical Research in International Law? Celebrating Structuralism', (2016) 29 LJIL 727, at 732. Prominent examples include M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001) and A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2007).

¹²C. Schwöbel-Patel, 'Spectacle in international criminal law: the fundraising image of victimhood', (2016) 4 *London Review of International Law* 247; C. Schwöbel, 'The market and marketing culture of international criminal law', in C. Schwöbel (ed.), *Critical Approaches to International Criminal Law* (2014), 264. See also S. Kendall, 'Commodifying Global Justice: Economies of Accountability at the International Criminal Court', (2015) 13 JICJ 113, at 123.

¹³See Section 4.4.2., below.

¹⁴It is irrelevant for this article whether the Court's treatment of the two terms are accurate, given that the Court and this article are concerned with their perception.

¹⁵Bureaucracy's reception in modern literature is indicative: see, e.g., C. Dickens, *Little Dorrit* (1857); F. Kafka, *The Trial* (1925). See also the negative treatment of bureaucracy in organizations theory: R. Bendix, 'Bureaucracy and the Problem of Power', in R. Merton (ed.), *Reader in Bureaucracy* (1960), 114–15; M. Albrow, *Bureaucracy* (1970), 13. Most often these connotations are reinforced in public debate: see, e.g., D. Shaw, 'Wales Bill Makes Devolution "More Complex and Bureaucratic"', *BBC News*, 6 October 2016, available at www.bbc.co.uk/news/av/uk-wales-politics-37573265/wales-bill-makes-devolution-more-complex-and-bureaucratic, accessed 11 March 2018; T. Wilkinson and N. Bierman, 'Trump Condemns "Bureaucracy and Mismanagement" at the UN', *Los Angeles Times*, 18 September 2017, available at www.latimes.com/nation/la-fg-trump-un-reform-20170918-story.html, accessed 11 March 2018.

¹⁶M. Weber, *Wirtschaft und Gesellschaft* (translated by E. Shils and M. Rheinstein) (1925).

¹⁷For representations of bureaucracy in film see, e.g., A. Kurosawa, *Ikiru* (1952); T. Gilliam, *Brazil* (1985); S. Stroman, *The Producers* (2005).

entrepreneurialism and being one's authentic self at work, bureaucracy is scorned for caging individual talent and turning enthusiastic people into cynical automatons.¹⁸

The *Oxford Dictionary of Business and Management*, while describing bureaucracy as 'a set of strict and impersonal rules', also contains etymological offshoots such as bureausis ('a reaction against bureaucratic behaviour by an individual') and bureaupathology or red tape syndrome ('the manifestations of exaggerated bureaucratic behaviour').¹⁹ These terms no doubt reflect evolving views about bureaucracy and bureaucrats over time. Managerial circles therefore 'tend to represent the bureau in language that leaves very little room for anything but a negative evaluation'.²⁰ The result of such condemnation is that any sign of bureaucracy, whether real or imagined, must be swiftly purged if organizations are to succeed, and be seen to succeed, in achieving their aims.

This bureaucracy image performs a range of functions. It allows the Court to contrast two positive and negative imaginaries: one desirable, the other threatening. The bureaucracy image may also serve as what Grietje Baars calls a site of 'pre-fab critique', a well-worn trench of criticism that scholars and others automatically resort to when problematizing the Court's activities.²¹ The critique of 'inefficiency' and overly bureaucratic rules already features in large swathes of scholarly criticism of the Court's performance.²² On another level, instrumentalizing the bureaucracy image also distracts from less successful aspects of the Court's work. It is a saving grace for the Court to be able to cite its putatively successful battle against bureaucracy when confronted with the more complex challenges of lack of state co-operation or allegations of an African bias. Finally, by reframing multifactorial issues as organizational ones, the Court is able to shape the discourse about its performance, and about what success looks like. For each of these functions, the image of bureaucracy I describe is crucial. It can focus minds on a threat, distract or redirect attention away from other problems, and re-frame the definition of success. When deployed as a book-end, or the starting point in an internal narrative, the bureaucracy image performs all of these rhetorical functions.

The second image and latter component of the internal narrative is that of management. Although the term also connotes an organizational group, it is normally defined as 'an activity that performs certain functions to obtain the effective acquisition, allocation, and utilization of human efforts and physical resources to accomplish some goal'.²³ Its core aim is efficiency, or achieving maximum output with minimum input of time, effort and resources. As vague as these definitions may be, management techniques and thought have had a profound effect not only on private and public organizations but also on modern society and culture. In 1941, James Burnham identified a 'managerial revolution' taking place in American society, typified by 'a drive for social dominance, for power and privilege, for the position of ruling class, by the social group or class of the managers'.²⁴

Today, irrespective of the power of any managerial class, management is ubiquitous not only as a set of practices but also as the idea that progress comes with the measurement and optimization of organizational performance.²⁵ Indeed, management itself is thought to be inherently bound up with societal progress.²⁶ In a telling example of management's seeming indispensability, leading

¹⁸P. du Gay, *In Praise of Bureaucracy: Weber, Organization and Ethics* (2000), 5; P. Fleming, *Authenticity and the Cultural Politics of Work: New Forms of Internal Control* (2009).

¹⁹Bureaupathology also connotes 'resistance to change, an obsessive reliance on rules and regulations, and an individual incapability of responding to unpredictable events. The bureaupath tends to believe the policies and procedures of an organization constitute an end in themselves, rather than a means to an end': J. Law, *A Dictionary of Business and Management* (2016).

²⁰Du Gay, *supra* note 18, at 77.

²¹G. Baars, 'Making ICL history: On the need to move beyond pre-fab critiques of ICL', in C. Schwöbel (ed.), *Critical Approaches to International Criminal Law* (2014), 204.

²²See text at note 98, *infra*.

²³D. Wren, *The Evolution of Management Thought* (1994), 3.

²⁴J. Burnham, *The Managerial Revolution* (1941), 71.

²⁵T. Morden, *Principles of Management* (1996), 4.

²⁶One management textbook cites the work of Frederick Taylor as 'the most lasting contribution America has made to Western thought since the Federalist Papers': see, e.g., P. Kelly and G. Cole, *Management Theory and Practice* (2011), 119.

management theorist Peter Drucker posited that '[m]anagement will remain a basic and dominant institution perhaps as long as Western civilization itself survives'.²⁷

The widespread impact of management and its ideas has not bypassed international law and its organizations. Within the United Nations, for example, actors began promoting the use of managerial techniques in the 1970s in response to a burgeoning institutional machinery based on 'the need to maintain overall administrative efficiency, productivity and cost effectiveness'.²⁸ Setting up a range of bodies designed to review internal structures and the 'financial functioning' of the UN and its organs, the UN mirrored many public sector organizations in the OECD countries which were then injecting the ethos of New Public Management into their structures.²⁹ Thirty years later, the General Assembly was still affirming 'the importance of adopting efficient and effective management practices' and, in 2002, authorized Secretary-General Kofi Annan to 'pursue the necessary management improvement measures'.³⁰

These measures, alongside recent and successive UN Annual Reports, attest to the global image of management as effective, necessary and desirable.³¹ This was the image taken up by the ICC to promote itself as a successful and functional institution. The management image performs the same rhetorical functions as that of bureaucracy by framing the institutional discourse and directing audiences toward more 'successful' aspects of its work. Although the management image also book-ends the progress narrative, the Court is careful not to argue that its transformation is now complete.³² This would devalue the narrative by removing bureaucracy as an apparent threat and opening the ICC up to criticism where managerial practices are found to be imperfect. Building on the progress narratives of the 1990s era of proliferation, the management image represents the present age of post-proliferation, and operates as a book-end, located sometime in the (intentionally vague) future.³³ In the remainder of the article, I elucidate this hidden yet powerful narrative by sketching a history of the Court's managerial practices.

4. A managerial history of the International Criminal Court

4.1 Origins of the 'from bureaucracy to management' narrative

The origins of the institutional narrative give an insight into its content and purpose. Its foundations were already being laid before the ICC commenced its work, during the drafting stage of the Rome Statute. In 1995, during the International Law Commission debates on the creation of a permanent international criminal court, experts and delegates raised concerns about the efficient and cost-effective performance of any future mechanism. These and later debates represent the introduction of the efficiency logic of managerialism into mainstream debates on the ICC. In addition to the more general managerial trend in institutions like the UN from the 1970s onwards, these ICC-specific references also helped to frame the future court's main organizational priorities. First raised by states during the preparatory stages, efficiency and cost-effectiveness would dictate many of the parameters, as well as the kinds of questions and solutions posed, when it came to

²⁷P. Drucker, *The Practice of Management* (1955), 1. This comment is also a telling sign of management's Anglo-American origins: see Section 2, *supra*.

²⁸UN, 'Group of High Level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations – Report', (1987) 26 *International Legal Materials* 145, para. 4.

²⁹UN General Assembly, Review of the Efficiency of the Administrative and Financial Functioning of the United Nations, UN Doc. A/RES/40/237 (1985), para. 2.

³⁰UN General Assembly, Questions Relating to the Proposed Programme Budget for the Biennium 2002–2003, UN Doc. A/RES/56/253 (2002), paras. 26–7.

³¹UN Secretary-General, Report of the Secretary-General on the work of the Organisation, UN Doc. A/71/1 (2016), paras. 15, 118.

³²T. Skouteris, 'The New Tribunalism: Strategies of (De)Legitimation in the Era of International Adjudication', (2006) 17 *FYbIL* 307, at 352: 'this type of work will never come to an end'.

³³*Ibid.*

deciding on the Court's early internal practices. Similarly, the managerial narrative would also cease to be the preserve of states and would be gladly taken up by the court for its own purposes. But first, looking at the travaux préparatoires, I locate the origins of managerial practices and their attendant narratives in the designs of powerful states parties.

Examples of states' efficiency-mindedness abound. At an Ad Hoc Committee (AHC) meeting in April 1995, delegates considered the proposal that the Court be a full-time and permanent institution. In its report to the UN General Assembly, the AHC outlined the different positions on the issue:

The approach reflected in article 4, paragraph 1, of the draft statute, whereby the court would be established as a permanent institution which would act when required to consider a case submitted to it, was described as an acceptable compromise which sought to strike a balance between, on the one hand, the requirements of flexibility and cost-effectiveness in the operation of the court and, on the other hand, the need to promote, as an alternative to ad hoc tribunals, a permanent judicial organ, able to ensure uniformity and consistency in the application and further development of international criminal law.³⁴

Tellingly, this passage reflects delegates' desire to rank the court's efficiency and cost-effectiveness on a par with the need for a uniform jurisprudence in this growing sub-field. During the AHC debates, some delegations including the United Kingdom's raised concerns about whether the new court could provide value-for-money compared to existing national mechanisms. The delegation queried whether it was 'the best use of limited resources to undertake international investigations and prosecutions with all the difficulties and duplication of personnel that that involves, or should those resources continue to be devoted to national prosecutions'.³⁵ Undoubtedly, queries such as these were also coloured by states' desire to create a circumscribed and manageable institution that would not attempt to overstep its mandate. Yet whatever states' motivation for raising them, such concerns demonstrate that efficiency and cost-effectiveness were already being put on the agenda by some of the most influential and wealthy would-be members.

A similar dynamic is visible in the US approach. In a March 1995 memo to the AHC, US delegates raised several 'major concerns' with the ILC Draft Statute as it then stood.³⁶ They suggested that 'to provide for effective functioning and adequate oversight, a number of such matters must be addressed as part of the statute of the court'.³⁷ Among these, they listed the lack of any current provisions on 'budget and administration'³⁸ despite their being 'of the highest priority in the consideration of the draft statute and the ability of the international community to support the international criminal court'.³⁹ Accordingly, US delegates recommended that the court be given a budgetary approval procedure, among others, to ensure its 'cost-effective' administration.⁴⁰

Consistent reference to the future court's efficiency and cost-effectiveness, whatever the rationale for such references, evince the prioritization of an efficiency logic in the run-up to the Rome Conference. This prioritization would accelerate at the conference itself, although this time as a

³⁴UN General Assembly, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22 (1995).

³⁵United Kingdom Missions to the United Nations New York, Ad Hoc Committee on the Establishment of an International Criminal Court: Summary of Observations Made by the Representative of the United Kingdom of Great Britain and Northern Ireland on 3, 4, 5, 6 and 7 April 1995, *UK Press Release No. 32/95*, 7 April 1995, 11–12, available at www.legal-tools.org/doc/664ac1/pdf (accessed 11 March 2018).

³⁶UN General Assembly, Report of the UN Secretary-General Addendum: Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, UN Doc. A/AC.244/1/Add.2 (1995).

³⁷*Ibid.*, at 9.

³⁸*Ibid.*, at 23.

³⁹*Ibid.*, at 23.

⁴⁰*Ibid.*, at 24.

result of external forces. On 6 February 1997, only 18 months before the Rome Conference opened, the UN Undersecretary-General for Internal Oversight, Karl Paschke, laid bare the organizational failings of the International Criminal Tribunal for Rwanda (ICTR).⁴¹ Paschke had been mandated by the UN General Assembly to inspect the running of the ICTR 'with a view to identifying problems and recommending measures to enhance the efficient utilization of resources'.⁴² From his investigations, Paschke identified 'serious operational deficiencies in the management of the Tribunal'⁴³ as well as 'frequent violations of United Nations rules and regulations'.⁴⁴ He concluded that 'not a single administrative area of the Registry (Finance, Procurement, Personnel, Security, General Services) functioned effectively'.⁴⁵

This indictment of the ICTR's structure cast a shadow over subsequent organizational debates happening in Rome. Several attendees of the Rome Conference have attested to the impact of the ICTR's legacy on the structure and priorities agreed for the ICC. John Jones noted in an authoritative commentary to the Statute that the final wording of Articles 43 and 44 on the Registry and Court staff was impacted by the Paschke Report and 'tales, whether justified or not, of Registry mismanagement at the ICTR'.⁴⁶

After the Statute was finalized, a Preparatory Commission (PrepCom) took on the role of filling in the gaps left by negotiators, including drafting the Rules of Procedure and Evidence and the Elements of Crimes. In a draft paper prepared in April 2002, PrepCom stated that administrative functions would be divided among several organs to 'maximise the cost-effectiveness' of the Court.⁴⁷ In a glimpse of what was to follow, PrepCom also extended certain managerial practices already enshrined in the Statute such as the provisions on audit and staffing by introducing regulations for external audit and a system of 'human resources management'.⁴⁸

By the time the Court commenced its work in July 2002, states parties had successfully infused the new Court with the ideas of efficiency and cost-effectiveness. As this section has shown, states were largely responsible for mainstreaming the managerial logic, using the experience of the *ad hoc* Tribunals as justification for their demands. But ICTY and ICTR officials such as one-time Deputy Registrar David Tolbert and UN Assistant Secretary-General for Legal Affairs, Ralph Zacklin, also took the opportunity to recount those tribunals' 'cumbersome bureaucratic structure[s]' in a bid to help the fledgling ICC.⁴⁹ The Court would reinforce this logic in its early practice thereby satisfying states of its commitment to such aims. This prioritization of efficiency and cost-effectiveness in the drafting stages of the Rome Statute explain the Court's resort to managerial practices and to their attendant images and narratives.

⁴¹K. Paschke, Report of the Office of Internal Oversight Services on the Audit and Investigation of the International Criminal Tribunal for Rwanda, UN Doc. A/51/789 (1997).

⁴²*Ibid.*, at 1.

⁴³*Ibid.*, at 2.

⁴⁴*Ibid.*, at 7.

⁴⁵*Ibid.*, at 9.

⁴⁶J. Jones, 'The Registry and Staff', in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 280. See also A. Lachowska, 'The Support Work of the Court's Registry', in J. Doria, H. Gasser and M. Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009), 391–2; P. Ambach and K. Rackwitz, 'A Model of International Judicial Administration: The Evolution of Managerial Practices at the International Criminal Court', (2013) 76 *Law & Contemporary Problems* 119, at 136.

⁴⁷Preparatory Commission for the International Criminal Court, Proceedings of the Preparatory Commission at its Ninth Session, UN Doc. PCNICC/2002/L.1/Rev.1/Add.1 (2002), at para. 34.

⁴⁸Preparatory Commission for the International Criminal Court, Provisional Internal Rules and Regulations of the ICC, UN Doc. PCNICC/2002/INF/2 (2002); Preparatory Commission for the International Criminal Court, Working Group on a Draft Budget for the First Financial Period of the Court, UN Doc. PCNICC/2002/WGFYB/L.4 (2002); Preparatory Commission for the International Criminal Court, Working Group on a Draft Budget for the First Financial Period of the Court, UN Doc. PCNICC/2002/WGFYB/RT.5 (2002).

⁴⁹R. Zacklin, 'The Failings of Ad Hoc International Tribunals', (2004) 2 JICJ 541, at 542; see also M. Schrag, 'Lessons Learned from ICTY Experience', (2004) 2 JICJ 427; D. Tolbert, 'Reflections on the ICTY Registry', (2004) 2 JICJ 480; C. Jorda, 'The Major Hurdles and Accomplishments of the ICTY: What the ICC Can Learn From Them', (2004) 2 JICJ 572.

4.2 Introducing the narrative: 2002–2006

If the travaux are to be seen as framing the discourse around the ICC's structure, then the Court's first few years already evince its desire to live up to states' expectations. It wished to be perceived as efficient, cost-effective and internally well-organized. This image was being disseminated even within the first few months. With a total of zero cases on the judicial docket, the ICC decided to launch an expert consultation on how best to reduce the length of proceedings.⁵⁰ The Court and its organs were keen to showcase their efficient internal machinery.

In doing so, they began to deploy some of the images associated with the notions of bureaucracy and management. In September 2003, the Office of the Prosecutor (OTP) emphasized how the Court's 'first few months have guided it in shaping the most effective structure to carry out its mission'.⁵¹ In an earlier draft of the same paper, the OTP said it would be cognisant of situation-specific needs and priorities when thinking about its internal structure rather than seek to impose 'a static organisation model'.⁵² The OTP imagined an undesirable Court characterized by 'static organisation . . . post levels and fixed hierarchies' and then juxtaposed this with its opposite, namely a 'project-oriented' organ that would 'bring the desired results'.⁵³ As for the OTP's criminal investigations, these would be arranged along 'open, horizontal organisation . . . with very short vertical lines of authority'.⁵⁴ Preliminary examinations would be 'process focused and cost-effective' while OTP units mandated to provide vital services such as translation and information storage were to be 'efficient, comprehensive, rational and cost-effective' bodies.⁵⁵

Throughout these initial years, the Court's organs conducted several rounds of isolated organizational reforms to demonstrate that it had become a 'fully functional judicial institution'.⁵⁶ In 2003–2004, the OTP 'critically examined its structure to find ways to increase integration and efficiency'.⁵⁷ After consulting with internal and external experts, the OTP concluded that several units needed to be 'restructured'.⁵⁸ Thus the External Relations and Complementarity Unit became the Jurisdiction, Complementarity and Cooperation Division and the Analysis Section, Experts Unit, and Unit for Victims were encompassed in the new Investigation Planning and Support Section.⁵⁹ An Executive Committee headed by the Prosecutor was also established to take 'major strategic and operational decisions'.⁶⁰ The Registry, the largest of the Court's organs and with the most staff, took similar action. In 2004, the Registry implemented a 'revised structure . . . to enable it effectively and efficiently to fulfil its mandate'.⁶¹ The result was the creation of a new Office of Internal Audit in July 2004.⁶² Other reforms resulted in the creation of an 'enterprise

⁵⁰This was also guided by the 'experience of the Tribunals': International Criminal Court Office of the Prosecutor, Informal Expert Paper: Measures Available to the International Criminal Court to Reduce the Length of Proceedings, (2003), para. 2, available at www.legal-tools.org/doc/7eba03/pdf (accessed 11 March 2018).

⁵¹International Criminal Court Office of the Prosecutor, Annex to the 'Paper on Some Policy Issues before the Office of the Prosecutor': Referrals and Communications' (2003), at 5, available at www.legal-tools.org/doc/5df43d/pdf/ (accessed 11 March 2018).

⁵²International Criminal Court Office of the Prosecutor, Draft Paper on Some Policy Issues before the Office of the Prosecutor for Discussion at the Public Hearing in The Hague on 17 and 18 June 2003, at 7, available at www.legal-tools.org/doc/abb9f7/pdf (accessed 11 March 2018).

⁵³*Ibid.*

⁵⁴*Ibid.*, at 11.

⁵⁵*Ibid.*, at 9.

⁵⁶International Criminal Court, 'International Criminal Court "Now a Fully Functional Judicial Institution", Assembly of States Parties Told as it Begins One-Week Session', *Press Release No. ASP2004.003-EN*, 6 September 2004, available at asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP20040906.003-E.Rev.21.pdf (accessed 11 March 2018).

⁵⁷International Criminal Court, Report on the Activities of the Court, ICC Doc. No. ICC-ASP/3/10, (2004), para. 44.

⁵⁸*Ibid.*

⁵⁹*Ibid.*, at 46–7.

⁶⁰*Ibid.*, at 47.

⁶¹*Ibid.*, at 57.

⁶²*Ibid.*, at 59.

resource planning project' intended to co-ordinate all sections of the Division of Common Administrative Services to enable it to 'operate efficiently under one roof'.⁶³

Despite such concrete practices, it was by publicizing these practices that the Court began to narrate its own internal evolution both to respond to and push against state pressure.⁶⁴ This is evinced by the premium set on public relations and communication efforts. As early as 2004, the President and other high-profile officials were 'focused, in particular, on explaining the history, role, characteristics, mandate and current state of the Court' by 'raising public awareness' among its diverse audience.⁶⁵ An External Relations Strategy outlined 'core message themes' intended to portray the Court as 'judicial; impartial; effective; efficient; mindful of context; responsive to victims'.⁶⁶ The message of 'effective' and 'efficient' were instrumental in constructing the Court's internal narrative.

This narrative was also reinforced by senior Court figures in their appearances before diplomatic fora such as the plenary session of the ASP. The Court's first Prosecutor, Luis Moreno Ocampo, used his ASP speech in November 2005 to update states parties on various challenges the Court faced in terms of its workload, effectiveness of investigations, and state co-operation. For Moreno Ocampo, what was needed to overcome these challenges was the effective deployment of resources across all situation countries as well as to respect flexibility and 'cost-efficiency'.⁶⁷ In another diplomatic setting, Registrar Bruno Cathala made similar commitments. He stated that:

we must adapt our working methods on a case-by-case basis: we have to plan our projects according to constantly differing political and cultural contexts . . . In this drive to adapt to the requirements of the field, we are constantly looking for the most efficient use possible of our budgetary resources.⁶⁸

Through these interventions, key internal figures not only promoted their organs' managerial efforts, but also began to construct a positive image of an efficient and well-managed court. This image functioned to appease states parties whose major concerns related to questions of budget and finance, but it also built support among the Court's other diverse constituencies. Cognisant of the fact that it must 'communicate with different audiences for different purposes and tailor its message', the Court did not prioritize efficiency in its Outreach Strategy at this stage but included it among other aims such as fairness, impartiality and responsiveness to victims.⁶⁹ Yet its early inclusion would pave the way for a gradual creep up the list of priorities. Moreover, the distracting power of this narrative is illustrated by the ICC's ability to retain and enhance its widespread support despite having commenced only three investigations and no trials in the space of four years. US opposition to the Court was well-known by then and the Bush administration's signing of over 100 'Bilateral Immunity Agreements' with states parties in order to shield US military personnel from ICC prosecution, seemed to puncture the notion of a truly global ICC regime.⁷⁰

⁶³*Ibid.*, at 63.

⁶⁴Also characterized as 'marketing': see, e.g., Schwöbel, 'The market and marketing culture of international criminal law', *supra* note 12, at 274–5.

⁶⁵International Criminal Court, Report on the Activities of the Court, ICC Doc. No. ICC-ASP/3/10(2004), paras. 19, 32.

⁶⁶International Criminal Court, Integrated Strategy for External Relations, Public Information and Outreach (2007), at 4, available at www.legal-tools.org/en/doc/840afa (accessed 11 March 2018).

⁶⁷Statement by Luis Moreno-Ocampo, Fourth Session of the Assembly of States Parties to the International Criminal Court, 28 November 2005, at 1 and 5, available at www.icc-cpi.int/NR/rdonlyres/0CBFF4AC-1238-4DA1-9F4A-70D763F90F91/278514/LMO_20051128_English.pdf (accessed 11 March 2018).

⁶⁸Speech by Bruno Cathala, Information session for diplomatic representations, 8 June 2005, at 6, available at www.icc-cpi.int/NR/rdonlyres/ECD36817-DE8D-4F2B-A75F-DA282FED1AA1/278492/DB200506_BC_En.pdf (accessed 11 March 2018).

⁶⁹International Criminal Court, Strategic Plan for Outreach of the International Criminal Court, ICC Doc. No. ICC-ASP/5/12 (2006), paras. 18, 46

⁷⁰S. Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (2014), 215.

Yet the managerial rhetoric persisted. The twin images of bureaucracy and management would appear most explicitly in the Court's first Strategic Plan, published in August 2006.⁷¹ In this Plan, the Court lists the need to become a 'model of public administration' as one of its strategic goals.⁷² To this end, it would foster a 'non-bureaucratic culture' and become 'a non-bureaucratic administration focused on results rather than processes, relying on rules where necessary to guarantee rights or minimise risks'.⁷³ In contrast with this negative image, the Court promoted the positive, forward-looking idea that it would 'excel in achieving desired results with minimal resources through streamlined structures and processes while maintaining flexibility'.⁷⁴ Its approach would be 'flexible and results-oriented'.⁷⁵ Two clear images are posed and a narrative bridge constructed between them.

The Strategic Plan and other early managerial tools demonstrate a rudimentary, albeit consistent, focus on organizational performance. Yet, as more than simply objective techniques, managerial practices brought with them certain rhetorical devices which helped solidify those practices and legitimize the Court in the eyes of its global constituents, not least the states parties who had originally advocated such measures. Thus, the images of bureaucracy and management were deployed and a progress narrative constructed from this early stage which portrayed the Court's evolution from inefficient bureaucracy to an efficient, well-managed, modern organization.

4.3 Extending managerial practices: 2007-2010

Once the 2006 Strategic Plan was implemented, managerial practices emerged much more frequently and cohesively within the Court's structures. In 2007, the ASP's Committee on Budget and Finance (CBF) recommended that the Court 'undertake a review of administrative procedures with the aim of eliminating red tape'.⁷⁶ Central to this review was an overhaul of staff procedures and a new 'strategic approach to human resources management'.⁷⁷ The 2008 Human Resources Strategy aimed to improve performance by recruiting efficient and competent staff, creating a caring environment and instituting an employee advancement scheme.⁷⁸ The report recommended that 'performance indicators would need to be internally established to measure the success of the implementation of each objective'.⁷⁹ In doing so, it implicitly narrowed the meaning of success down to internal markers such as individual competence and dedication of staff. Although such an elision is difficult to justify given the range of factors contributing to success or failure, it is even more problematic when considered against the Court's record. By 2008, the Court had yet to commence its first trial, despite having had an accused person, Thomas Lubanga, in custody since March 2006. Moreover, despite having unsealed an arrest warrant against Lord's Resistance Army chief Joseph Kony in October 2005 and despite a well-publicized global campaign, the Court had (and at the time of writing has still) failed to apprehend Kony.⁸⁰ A look at the Court's work evinces a gap between the rhetoric of organizational success and the reality of its slow and faltering start.

Nevertheless, managerial practices were portrayed as a remedy for the Court's ills. Other techniques created as part of the Human Resources Strategy were a performance management and

⁷¹International Criminal Court, Strategic Plan of the International Criminal Court, ICC Doc. No. ICC-ASP/5/6 (2006).

⁷²*Ibid.*, at 28.

⁷³*Ibid.*, at 40.

⁷⁴*Ibid.*

⁷⁵*Ibid.*, at 41.

⁷⁶International Criminal Court, Report of the Committee on Budget and Finance on the Work of its Eleventh Session, ICC. Doc. No. ICC-ASP/7/15(2008), para. 56.

⁷⁷International Criminal Court, Report of the Court on Human Resources, Development of a Human Resources Strategy: Progress Report, ICC. Doc. No. ICC-ASP/7/6 (2008), para. 3.

⁷⁸*Ibid.*, at 6.

⁷⁹*Ibid.*

⁸⁰P. Wenger, 'Kony 2012: The Invisible Children Advocacy Campaign to Catch Kony', *Justice in Conflict*, 7 March 2012, available at justiceinconflict.org/2012/03/07/kony-2012-the-invisible-children-advocacy-campaign-to-catch-kony/ (accessed 11 March 2018).

performance-based incentive system, and career management processes for staff advancement.⁸¹ Also in 2008, the Court recruited external consultants to conduct a ‘comprehensive enterprise risk management exercise’.⁸² The consultants identified 22 risks the Court’s administrative structures faced. These included ‘diverging or conflicting objectives/non-alignment of priorities’ and ‘lack of clarity on responsibilities between different organs’.⁸³ Again, the criterion for success was largely organizational.

By 2008–2009, managerial practices were considered vital to the Court’s success. This much can be discerned from new Registrar Silvana Arbia’s comments to the ASP in 2008. She stated that ‘the Court will spare no effort in ensuring optimum administrative and management actions in order to secure the best results with minimum costs without in any way jeopardizing the quality and efficiency of justice’.⁸⁴ Similarly, the then President of the Court, Philippe Kirsch, promised that ‘it will review rigorously its administrative processes and policies with the aim of realizing substantial savings in its ongoing activities to the States Parties’.⁸⁵ Reporting to the Assembly the following year, the new President, Judge Sang-Hyun Song, did not mention the outcome of the preceding year’s cost-cutting efforts. Instead, the message was reiterated. ‘Efficiency is paramount’, he noted and as such, ‘Court officials bear the heavy responsibility of ensuring that public funds are put to their proper use, with no tolerance for waste . . . [W]e are doing more with the same amount of money.’⁸⁶

Indeed, the Court appeared to be taking the responsibility of employees for the overall success of the Court seriously. In the same year, the ASP established an Independent Oversight Mechanism under Article 112(4) of the Statute as a subsidiary body of the ASP.⁸⁷ Its mandate comprised the ‘effective and comprehensive oversight of the Court in order to enhance its efficiency and economy’.⁸⁸ Additional managerial measures were introduced at the same time as a response to the risk management exercise of 2008. These included an expansion of the Audit Committee and a ‘re-engineering’ of business processes.

Principal among these measures was a Corporate Governance Statement. During the 2008 exercise, the Court concluded that such a statement would ‘provide concise clarification of the roles and responsibilities of the different organs at a general level, which could be applied in resolving any specific issues which arise’.⁸⁹ Adopted in February 2010, this document is a telling example of the discursive shift to ‘management-speak’ and a clean break from the previous language used to describe Court structures. The Statement rebrands the Court’s ‘composition and administration’ – as described in Part 4 of the Statute – as a ‘corporate governance framework’.⁹⁰

⁸¹International Criminal Court, *supra* note 77, at 10.

⁸²International Criminal Court, Report of the Court on Measures to Increase Clarity on the Responsibilities of the Different Organs, ICC Doc. No. ICC-ASP/9/34 (2010), para. 2.

⁸³*Ibid.*, at 2.

⁸⁴Statement by Silvana Arbia, Seventh Session of the Assembly of States Parties to the International Criminal Court, 17 November 2008, available at asp.icc-cpi.int/NR/rdonlyres/6FFBBD-313D-4765-A603-0CCE900B4B83/0/ICCASPASP7StatementRegistrar.pdf (accessed 11 March 2018).

⁸⁵Statement by Philippe Kirsch, Seventh Session of the Assembly of States Parties to the International Criminal Court, 14 November 2008, available at asp.icc-cpi.int/NR/rdonlyres/EB40944C-C250-4466-B99A-2F5ACDC8C941/0/ICCASPASP7GenDebePresident_Kirsch.pdf (accessed 11 March 2018).

⁸⁶Statement by Sang-Hyun Song, Eighth Session of the Assembly of States Parties to the International Criminal Court, 18 November 2009, at 9, available at asp.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-statements-President-ENG.pdf (accessed 11 March 2018). Other heads of organs repeated this line: see, e.g., Statement by Luis Moreno Ocampo, Eighth Session of the Assembly of States Parties of the International Criminal Court, 18 November 2009, at 7, available at asp.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-statements-OTP-ENG.pdf (accessed 11 March 2018).

⁸⁷International Criminal Court, Establishment of an Independent Oversight Mechanism, ICC Doc. No. ICC-ASP/8/Res.1 (2009).

⁸⁸International Criminal Court, Independent Oversight Mechanism, ICC Doc. No. ICC/ASP/12/Res.6 (2013), para. 3.

⁸⁹International Criminal Court, *supra* note 82, at para. 32.

⁹⁰*Ibid.*, at 5.

This shift reinforces the Court's strategy of narrating its evolution from erstwhile bureaucratic body to well-managed organization.

This period of consolidating managerial practices illustrates two familiar trends. First, the turn to managerial practices evinces the Court's attempt to placate states parties on fiscal and budgetary issues. Having raised such concerns during the drafting stages of the Statute, states continued to put pressure on the Court. In 2006, the UK welcomed the Court's 'commitment to continued dialogue with States as it works to fulfil its mandate fairly, effectively and independently whilst seeking to ensure the most efficient use of the resources contributed by States Parties'.⁹¹ Reflecting on the upcoming negotiations on the 2007 budget and the Strategic Plan, Denmark acknowledged that, whilst these would be protracted debates, states parties nevertheless shared a 'common aim', namely a 'stronger, more efficient, more effective Court'.⁹² The Court's resort to managerial practices must therefore be seen as a response to these and similar concerns. Silvana Arbia's comments to the ASP's 7th session are illustrative. She guaranteed that 'the Court will spare no effort in ensuring optimum administrative and management actions in order to secure the best results with minimum costs'.⁹³ More than any other constituency, states parties were the primary addressees of such sentiments.

The second trend was the further construction of the internal progress narrative. The late 2000s were characterized by frequent resort to the images of bureaucracy and management. Again, we see the Court using the concept of bureaucracy in rhetorical juxtaposition to management. This is visible in the CBF's commitment to 'eliminating red tape' but also in its reflection that 'many inefficient bureaucratic policies had been adopted in the early years of the Court'.⁹⁴ This harking back to the Court's early years re-imagined a gradual evolution from bad to good management, despite the fact that managerial practices had begun to be introduced from as early as 2003 in the belief that they would enhance organizational efficiency. Such 'retrospective re-description' allowed imperfections or limitations of managerial practices to be conveniently glossed over and forgotten.⁹⁵

Taking a snapshot of the Court in 2009, it still regarded 'rigorous examination' as necessary in order to 'yield significant cost savings' despite the seven-year-long implementation of managerial practices and the apparent internal evolution it had engendered.⁹⁶ In a hat-tip to familiar images, the ASP held that 'becoming a non-bureaucratic administration remained a key objective'.⁹⁷ From this continuing deployment of the bureaucracy image, its rhetorical functions become clearer. The notion could continue to be deployed long after managerial practices had been introduced to rectify the problem of bureaucracy. Any problem could be labelled a problem of bureaucracy and automatically earmarked for replacement through updated and 'effective' managerial techniques. Through constant retrospective re-description, the bureaucracy image ensured that the narrative end-point always lay just over the horizon, delaying any final assessment of the success of managerial practices. Deployed in this manner, the

⁹¹Opening Statement by the United Kingdom of Great Britain and Northern Ireland at the Fifth Session of the Assembly of States Parties to the International Criminal Court, 24 November 2006, available at asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP5_Statement_uk.pdf (accessed 2 November 2018).

⁹²K. Biering, Statement of Denmark at the General Debate of the Fifth Assembly of States Parties to the Rome Statute of the International Criminal Court, 23 November 2006, at 2, available at asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP5_Statement_denmark.pdf (accessed 2 November 2018).

⁹³Arbia, *supra* note 84, at 5.

⁹⁴International Criminal Court, *supra* note 76, at para. 56.

⁹⁵S. Pahuja, Hersch Lauterpacht Memorial Lecture 2018: The Changing Place of the Corporation in International Law, 9 March 2018, available at www.law.cam.ac.uk/press/events/2018/03/friday-9-march-2018-hersch-lauterpacht-memorial-lecture-2018-changing-place-corporation (accessed 12 March 2018).

⁹⁶International Criminal Court, *supra* note 76, at para. 56.

⁹⁷International Criminal Court, Status Report on the Court's Investigations into Efficiency Measures for 2010, ICC Doc. No. ICC-ASP/8/6 (2009), para. 6.

bureaucracy and management images consolidated the idea of an ever-evolving, more successful Court.⁹⁸

4.4 Embedding managerial practices: 2011 and beyond

The final and most recent stage cemented managerial practices within the Court's infrastructure. In two sequential trends, the Court affirmed that it had reached the highest (although never the last) stage of its development. The first trend is visible in the creation of the Study Group on Governance, which permanently embedded managerial practices and ideas – and crucially the positive image of management – within the Court. The second is the promotion of the internal progress narrative by certain individuals elected to senior positions within the Court from 2011 onwards. Together these trends represent the most recent and concerted effort to depict the Court's transformation from inefficient bureaucracy to well-managed organization. I consider these trends in turn.

4.4.1 Study Group on Governance

On 10 December 2010, the ASP adopted Resolution 9/2 establishing a Study Group on Governance (SGG).⁹⁹ The SGG was established 'for a period of one year'¹⁰⁰ under the remit of The Hague Working Group, which had been operating since 2004.¹⁰¹ The SGG was intended to facilitate dialogue between the Court and states parties 'with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court'.¹⁰² Early in its discussions, the SGG organized itself around three work 'clusters': the relationship between the Court and the ASP; strengthening the institutional framework; and expediting the criminal process.¹⁰³ The SGG was to report periodically throughout 2011 to the Bureau, which would then report back to the plenary session of the Assembly.¹⁰⁴

Reporting first in July 2011, the SGG outlined its progress to date listing areas of Court structure and administration in potential need of reform. In its report to the ASP that November, the

⁹⁸By the late 2000s, segments of the Court's audience, including civil society organizations and scholars, also subscribed to the notion of a narrative arc from bureaucracy to management. While I do not expand on this point, their interventions in ICC debates illustrate their uptake of managerial priorities of efficiency and cost-effectiveness in the Court's internal structures. See, e.g., Human Rights Watch, Memorandum for the Seventh Session of the International Criminal Court Assembly of States Parties, 7 November 2008, available at www.hrw.org/report/2008/11/07/human-rights-watch-memorandum-seventh-session-international-criminal-court (accessed 3 November 2018); Coalition for the International Criminal Court, 'Key Issues at the Eighth Assembly of States Parties', (2009–2010) 39 *The Monitor* 4: 'the best way to achieve cost savings is for the ASP and ICC to undertake a major effort to reform procedures and regulations, and achieve efficiencies that would make ICC processes shorter, fairer and much more effective'. See also, International Bar Association, Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress (2011), available at file:///C:/Users/User/Downloads/ICC%20Monitoring%20January%202011.pdf (accessed 3 November 2018): wherein the IBA advocated streamlined processes across the organs and urged the Court to 'continue in its ongoing efforts to review its processes and maximise its level of efficiency through coordinated, systematic effort and internal restructuring where appropriate' (at 11). Scholars also advocated, and continue to advocate, for an efficient, value-for-money Court, see, e.g., M. Bassiouni, 'The ICC — Quo Vadis?', (2006) 4 JICJ 421, at 426; A. Cassese, 'The International Criminal Court Five Years on: Andante or Moderato?', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), 21; B. Taylor, 'Demystifying the Procedural Framework of the International Criminal Court: A Modest Proposal for Radical Revision', in Stahn and Sluiter, *ibid.*, at 755; S. Ford, 'Complexity and Efficiency at International Criminal Courts', (2014) 29 *Emory International Law Review* 1; Ambach and Rackwitz, *supra* note 46.

⁹⁹International Criminal Court, Establishment of a Study Group on Governance, ICC Doc. No. ICC-ASP/9/Res.2 (2010).

¹⁰⁰*Ibid.*, at 2.

¹⁰¹International Criminal Court, Intensifying Dialogue Between the Assembly of States Parties and the International Criminal Court, ICC Doc. No. ICC-ASP/3/Res.8 (2004).

¹⁰²*Ibid.*, at 1.

¹⁰³International Criminal Court, Report of the Bureau on the Study Group on Governance, ICC Doc. No. ICC-ASP/10/30 (2011), para. 3.

¹⁰⁴*Ibid.*, at 5–6.

Bureau listed the ‘broad range of activities’ already undertaken by the Study Group.¹⁰⁵ For example, under cluster I on the relationship between the Court and the Assembly, the SGG had identified the problem of judges overstaying their official term in office.¹⁰⁶ This was caused by delays to trial proceedings and the need to retain judges in office until trials were complete. The SGG met with the Presidency to discuss an extension policy that would ensure ‘the proper functioning of the Court’.¹⁰⁷ They agreed to produce a Presidency Information Note which set out the legal framework on the issue and the Presidency’s powers regarding judicial mandates.¹⁰⁸ This is just one example of the kind of work the SGG conducted and, indeed, its limited capacity to address root problems, such as lengthy trials. Notably, the trial of Thomas Lubanga was already in its third year and would continue for another four months after the note was published.

The Study Group engaged in similar investigations and dialogue on the issues of judicial elections, relationship between the Presidency and the Registry, administrative accountability of the OTP, expediting the criminal process, and the issuing of reparations orders. By the end of its first year, it concluded that further discussion was required on these issues. According to its members, it had ‘become clear that one year is insufficient on the one hand to address in depth issues that require attention and on the other hand to take up new issues’.¹⁰⁹ The ASP therefore extended the SGG’s mandate by a further year in December 2011.¹¹⁰ This slow crystallization of temporary bodies into permanent fixtures is a telling sign of the embedding of managerial practices.

But the SGG was also a crucial site for cementing the Court’s internal narrative. It contributed to the image of an organization in constant need of reform in the face of lurking bureaucracy. Its 2012 report illustrates the point:

The Study Group recognised the need to avoid overlap and integrate Court activities and emphasised the value of regular and targeted reviews of Court policies, programs and administrative and legal framework, including those based on mandates provided by the Rome Statute and the ASP, with a view to re-evaluating their value and enhancing their efficiency. The Study Group commended the Court’s efforts to find efficiencies in existing programs and welcomed the Court’s reporting on efficiency measures to the Assembly. The Study Group urged the Court to continue to undertake efforts to find efficiencies in existing programs and to continue to report on its efforts to the Assembly and to the Committee [on Budget and Finance].¹¹¹

The SGG thus upheld the view, well-entrenched by now, that the Court was struggling against bureaucracy and winning the battle by introducing effective managerial techniques. But in order that it might win the war and ‘bear fruit’, the SGG’s work would have to be ‘an ongoing process’.¹¹² Therefore, the SGG’s year-long mandate was extended first for another year and annually thereafter.¹¹³ Where originally it was intended to provide limited proposals for reform, it was now

¹⁰⁵*Ibid.*, at 8.

¹⁰⁶*Ibid.*, at 9.

¹⁰⁷*Ibid.*, at 9.

¹⁰⁸*Ibid.*, at 11.

¹⁰⁹*Ibid.*, at 8.

¹¹⁰International Criminal Court, Strengthening the International Criminal Court and the Assembly of States Parties, ICC Doc. No. ICC-ASP/10/Res.5 (2011).

¹¹¹International Criminal Court, Report of the Bureau on the Study Group on Governance, ICC Doc. No. ICC-ASP/11/31 (2012), para. 41.

¹¹²*Ibid.*, at 9.

¹¹³International Criminal Court, Report of the Bureau on Study Group on Governance, ICC Doc. No. ICC-ASP/12/37 (2013), para. 8; International Criminal Court, Report of the Bureau on Study Group on Governance, ICC Doc. No. ICC-ASP/13/28 (2014), para. 51(1).

producing yearly reports of 45 and 77 pages in length, each identifying better processes and new bodies required to execute them.¹¹⁴

The SGG's slow but steady entrenchment within the Court and the various ASP debates on its performance helped to consolidate the notion of a Court struggling but ultimately succeeding in its move from bureaucracy to management. Yet this seemed to gloss over some of the other high-profile issues then facing the Court, including the detention of four ICC officials in Libya¹¹⁵ and, despite securing a first conviction, criticisms that the Prosecutor's charging policies deprioritized sexual and gender-based crimes.¹¹⁶ That the Court managed to retain state and NGO support and continue to reinforce its narrative of institutional progress attests to the rhetorical force of the SGG.

Accordingly, the threat of bureaucracy would continue to be used as a rhetorical weapon designed to juxtapose the modern Court against its erstwhile form. By 2012, the Court had already provided seven status reports to the ASP on its efficiency-saving efforts.¹¹⁷ Nevertheless, President Song still emphasized that '[t]he Court is keen to find continuing cost and efficiency savings wherever possible'.¹¹⁸ In the same year, the Court launched 'a thorough evaluation/review of its organisational structure with a view to streamlining functions, processes and corresponding structures'.¹¹⁹

The structural review was certainly the most comprehensive reform process to date, beginning with an evaluation of individual organs and followed by an investigation into 'inter-organ' coordination and performance.¹²⁰ The Court concluded that it would need to recruit expert external consultants to ensure the reform process went smoothly. It finally awarded the contract to PricewaterhouseCoopers, whom the Court said offered 'the best value, in both technical and commercial terms'.¹²¹ Another set of sweeping reforms administered to the Registry in 2013 – branded *ReVision* – also captured the zeitgeist which demanded the elimination of bureaucratic tendencies and their replacement with management processes.¹²² Again, the purchase of both bureaucracy and management images attests to the long shadow they could cast almost a decade after managerial processes had first been introduced.¹²³

4.4.2 'People with projects'¹²⁴

The second trend which reinforced the Court's internal narrative was the election of several individuals to key positions after 2011. These individuals – former Registrar Herman von Hebel,

¹¹⁴The original report in 2011 was ten pages. However, after ballooning in the intervening years, the report shrunk to 22 pages in 2016.

¹¹⁵M. Simons, 'Libya Frees Four from International Court's Team', *New York Times*, 2 July 2012.

¹¹⁶*Prosecutor v. Thomas Lubanga Dyilo*, Judgment, ICC-01/04-01/06, Trial Chamber I, 14 March 2012, at 629–30.

¹¹⁷International Criminal Court, Seventh Status Report on the Court's Progress Regarding Efficiency Measures, ICC Doc. No. ICC-ASP/11/9 (2012), para. 1.

¹¹⁸Statement by Sang-Hyun Song, Remarks to the 22nd Diplomatic Briefing of the International Criminal Court, 19 September 2012, at 5, available at www.icc-cpi.int/iccdocs/other/120919ICCPresidentRemarksTo22thDiplomaticBriefing.pdf (accessed 12 March 2018).

¹¹⁹International Criminal Court, Report of the Court on its Organizational Structure, ICC Doc. No. ICC-ASP/11/6 (2012), para. 2.

¹²⁰*Ibid.*, at 7, 9.

¹²¹International Criminal Court, Report on the Organisational Structure of the Court, ICC Doc. No. ICC-ASP/11/46 (2012), para. 4.

¹²²International Criminal Court, *Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court* (2016), available at www.icc-cpi.int/itemsdocuments/icc-registry-cr.pdf (accessed 12 March 2018).

¹²³This long shadow is apparent in the scholarly literature: see, e.g., P. Akhavan, 'The Rise, and Fall, and Rise of International Criminal Justice', (2013) 11 JICJ 527, at 535: 'The inordinate bureaucratization of international tribunals, and the inordinate length and cost of trials, is a substantial challenge to the viability of international criminal justice. Serious consideration must be given to improving performance, not least because the ICC has a global reach and must address multiple situations simultaneously, within its budget constraints.'

¹²⁴I borrow this phrase from David Kennedy: D. Kennedy, 'The Mystery of Global Governance', (2008) 34 *Ohio Northern University Law Review* 827, at 847.

Prosecutor Fatou Bensouda, and former ICC President Silvia Fernández de Gurmendi – were instrumental in promoting a narrative of the Court’s internal evolution and newfound maturity by trading on the twin images of bureaucracy and management.¹²⁵ Indeed, they also helped to redirect attention away from criticisms that were by then plaguing the Court, particularly the popular disapproval with Ocampo’s prosecutorial and public relations tactics.¹²⁶ The new Heads of Organs provided the opportunity for new blood and a refreshed and positive message.

The first of these figures, Herman von Hebel, was elected as the Court’s third Registrar in March 2013.¹²⁷ While canvassing for the position, von Hebel promised that if elected he would restructure the entire organ.¹²⁸ His election therefore proved an important moment in the shifting priorities of the Registry. Upon his successful election, von Hebel described to states parties his ‘vision of building an efficient and effective institution’.¹²⁹ The restructuring exercise to which he had committed was about clarifying and realizing ‘the vision, mission, culture and values of the Registry, improving Court and Registry-wide coordination, and ... ensuring the continuous and efficient delivery of quality services in the most effective manner’.¹³⁰

Von Hebel would continue to play on the juxtaposition between the now-familiar depictions of bureaucracy and management to promote a positive narrative. At the ASP’s 13th session, he stated that ‘[t]he results of a detailed analysis of Registry functions revealed fragmentation and inefficiency in several operational areas, leading to uneconomical use of resources, bureaucracy and sub-optimal operations’.¹³¹ After the process was completed in 2015, he affirmed that ‘the new structure seeks to streamline the recruitment and staff administration functions, leading to more efficient and less bureaucratic decision-making processes’.¹³²

Another important figure taking on a senior role was Fatou Bensouda, formerly Deputy Prosecutor under Luis Moreno Ocampo, and elected as Prosecutor in June 2012. Speaking to the ASP for the first time in her new capacity, Bensouda reinforced the narrative arc shaped by her predecessor. From Moreno Ocampo, she had ‘inherited a well-functioning Office, with streamlined systems and [an] internal regulatory framework consistently applied throughout the Office’.¹³³ Lauding the OTP’s cost-cutting skills, Bensouda noted that ‘[t]he Office has so far managed increased workload without additional resources. This has been possible thanks to the efficiencies that have been achieved in the past years and that have been maintained each year’.¹³⁴ The continuation of this managerial narrative challenges the *doxa* that Bensouda’s priorities were ‘completely different’ to Moreno Ocampo’s.¹³⁵

The embedding of managerial practices under Bensouda is exemplified by her Office’s updated Strategic Plan for 2012–2015. The updated Plan contained six strategic goals, at least

¹²⁵Fernández’s term as president expired on 10 March 2018, and was replaced by Chile Eboe-Osuji.

¹²⁶See, e.g., M. Bergsmo, et al., ‘A Prosecutor Falls, Time for the Court to Rise’, (2017) 86 *FICHL Policy Brief Series*.

¹²⁷Von Hebel lost his re-election bid in March 2018.

¹²⁸International Criminal Court, *supra* note 122, at ix.

¹²⁹Statement by Herman von Hebel, Presentation of the 2014 Proposed Programme Budget 12th Session of the Assembly of States Parties, 23 November 2013, at 2, available at asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ASP12-Statement-REG-ENG.pdf (accessed 12 March 2018).

¹³⁰*Ibid.*, at 6–7.

¹³¹Statement by Herman von Hebel, Remarks to the 13th Session of the Assembly of States Parties, 15 December 2014, at 6, available at asp.icc-cpi.int/iccdocs/asp_docs/ASP13/ASP13-BG-Statement-Registrar-ENG.pdf (accessed 12 March 2018).

¹³²International Criminal Court, Report of the Registry on the Outcome of the *ReVision* Process, ICC Doc. No. ICC-ASP/14/19 (2015), para. 28.

¹³³Statement by Fatou Bensouda, Address to the Eleventh Session of the Assembly of States Parties, 14 November 2012, at 2, available at asp.icc-cpi.int/NR/rdonlyres/3A2E6029-40FB-4BA8-B2D5-D1489953050C/0/ASP11OpeningOTPBensoudaENGFR.pdf (accessed 12 March 2018).

¹³⁴*Ibid.*, at 19.

¹³⁵A. Hirsch, ‘Fatou Bensouda: The Woman Who Could Redeem the International Criminal Court’, *Guardian*, 14 June 2012.

four of which had efficiency as their core aim.¹³⁶ The OTP proposed strategic changes to policy, resources and organizational performance. The Office would ‘systematically look to improve its efficiency and cost-effectiveness, in order to limit the request for more resources as much as possible’.¹³⁷ Such efficiencies were to be realized with the assistance of performance indicators and various financial planning tools.¹³⁸ The Court had ostensibly reached the most successful stage in its internal organization and, by extension, in its endeavours toward global justice.

The promotional role taken up by the Court’s senior figures is also visible in the work of Silvia Fernández de Gurmendi. Serving on the Argentinian delegation at the Rome Conference and instrumental in drafting the Rules of Procedure and Evidence, Fernández was elected to serve as a judge in the Pre-Trial Chamber in 2010, then as President from March 2015 until March 2018.¹³⁹ That Fernández would reinforce the message of the other organ heads was clear from her address to the ASP shortly after her election. She affirmed that the ‘main priority’ during her presidential mandate would be ‘to enhance the effectiveness and efficiency of the institution’.¹⁴⁰ Fernández represents a change of pace vis-à-vis her predecessor, Judge Song, as President. Fernández crafted the role into a more public-facing, promotional one. As expected, she appeared at plenary meetings of the ASP, at the UN General Assembly, other diplomatic side-events and academic discussion groups. But she also utilized her role to influence scholarly debate, writing articles and short essays which tended to toe the managerial line by focusing on the challenge of efficiency.¹⁴¹ A similar thread appeared in her media and public appearances. She has written for several news outlets with a significant global reach as well as appearing on radio shows, where she has promoted the need for an efficient and effective Court.¹⁴² Such extra-curial engagements have helped to disseminate the Court’s story and its priorities to a wider audience.

¹³⁶These were to ‘conduct impartial, independent, high quality, efficient and secure preliminary examinations, investigations and prosecutions’; ‘further improve the quality and efficiency of preliminary examinations, investigations, prosecutions’; ‘maintain a professional office with specific attention to . . . staff quality and motivation, performance management and measurement’; and ‘ensure good governance, accountability and transparency’: International Criminal Court Office of the Prosecutor, Strategic Plan 2012–2015, para. 32, available at www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf (accessed 12 March 2018).

¹³⁷*Ibid.*, at 6.

¹³⁸*Ibid.*, at 8.

¹³⁹International Criminal Court, Third Meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions (2015), at 2, available at www.legal-tools.org/doc/490d63/pdf/ (accessed 2 November 2018).

¹⁴⁰Statement by Silvia Fernández de Gurmendi, Presentation of the Court’s Annual Report to the Assembly of States Parties, 18 November 2015, at 1, available at asp.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ASP14-Opening-ST-PRE-ENG.pdf (accessed 12 March 2018). Of the various points made in this speech, it was the Court’s efficiency and effectiveness that featured prominently in the subsequent press release: see also International Criminal Court, ‘Enhancing the Court’s Efficiency and Effectiveness – a Top Priority for ICC Officials’, *International Criminal Court Press Release*, 24 November 2015, available at www.legal-tools.org/doc/b99fa5/pdf/ (accessed 12 March 2018).

¹⁴¹S. Fernández de Gurmendi, ‘International Criminal Law Procedures: The Process of Negotiation’, in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), 227; S. Fernández de Gurmendi, ‘Final Reflections: The Challenges of the International Criminal Court’, in H. Orlasolo (ed.), *Essays on International Criminal Justice* (2012), 197; S. Fernández de Gurmendi, ‘Introductions to the Third Edition’, in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes* (2016), xvi.

¹⁴²S. Fernández de Gurmendi, ‘International Criminal Court Is Here to Stay’, *Huffington Post*, 18 April 2016, available at www.huffingtonpost.com/silvia-fernandez-de-gurmendi/icc-president-on-opening_b_9718730.html (accessed 3 November 2018); S. Fernández de Gurmendi, ‘The World Must Oppose Genocide and Other Atrocities and Ensure Justice’, *Mail & Guardian*, 19 July 2016, available at mg.co.za/article/2016-07-19-00-the-world-must-oppose-genocide-and-other-atrocities-and-ensure-justice (accessed 3 November 2018); S. Fernández de Gurmendi, ‘15 Years of ICC: International Criminal Justice Is Working and Needs Strong Support’, *Huffington Post*, 30 June 2017, available at www.huffingtonpost.com/entry/15-years-of-icc-international-criminal-justice-is-us_59567058e4b0326c0a8d0fbb (accessed 3 November 2018); S. Fernández de Gurmendi, Interview on Radio New Zealand, 1 July 2012, available at player.fm/series/ictj-podcast/ten-years-on-reflections-on-the-impact-of-the-rome-statute (accessed 12 March 2018).

Each of these senior figures helped to create a consistent internal message.¹⁴³ They each committed to making the Court a well-managed organization focused on output and efficiency savings. Shortly after Fernández's election as President, the Registrar expressed his 'great trust in her vision for the Court' and was confident that 'together with the Prosecutor, we can take the ICC to a more efficient and effective stage in its operations'.¹⁴⁴ This common message was reinforced in 2015 with the updated ICC Strategic Plan. All organs of the Court were to work towards eight 'managerial goals' with the aim of delivering 'coherent governance and efficient, well-planned and cost-effective administration'.¹⁴⁵ Exerting their influence, all three figures helped to consolidate such practices internally while promoting their efforts and the Court's new and improved image before various external constituencies.

Yet as interventions on the *ReVision* exercise suggest, the Court's organs were anything but united in their managerial zeal. In January 2014, Judge Cuno Tarfusser sent an internal email to President Fernández and others suggesting that she had attempted to 'marginalize' those judges who had 'questioned the legality of the [*ReVision*] process, its methods and its cost'.¹⁴⁶ Since 2017, the Appeals Tribunal of the International Labour Organisation has issued at least eight judgments in favour of several ICC employees who were made redundant during *ReVision*.¹⁴⁷ Subsequently, when Von Hebel decided to recruit experts to analyze the judgments, Tarfusser deemed this 'a waste of public money' and publicly called on Von Hebel to resign. Von Hebel lost his bid for re-election in March 2018. However, the Court's continuing aspiration toward efficiency and effectiveness demonstrate the narrative's long shadow and its capacity to sustain itself while simultaneously downplaying the uncomfortable realities of managerialism.

Both the rise of the SGG and the work of these people with projects embedded the idea that the Court was now more successful than ever. Not only this, but the consolidation of the managerial narrative had come at the end of a much longer process that began even before the Court was seized of its first case. After responding to states' concerns about budgeting and finance, the Court was keen to promote its managerial efforts. Employing the bureaucracy/management dyad enabled it to focus minds on the desirable outcome as well as on the undesirable threat, recharacterize problems as problems of inefficiency, and distract critics from other complex issues. Drawing a thread from its early to its most recent managerial practices, the ICC was able to build a record of an ever-evolving institution whose prime problem was bureaucracy and who had succeeded in overcoming that problem through management techniques. I conclude by considering the wider ramifications (and detriments) of this narrative strategy for the Court.

5. Conclusion

This article has sought to reveal one institutional progress narrative at the ICC which has hitherto remained hidden. Yet despite operating under the radar, this narrative has many implications which warrant its further exposure and study. First, this narrative challenges the view that managerial

¹⁴³Other internal Court actors were equally committed: see, e.g., Ambach and Rackwitz, *supra* note 46; P. Ambach, 'A Look towards the Future—The ICC and "Lessons Learnt"', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015).

¹⁴⁴Statement by Herman von Hebel, Remarks to the Twenty-Fifth Diplomatic Briefing to the International Criminal Court, 26 March 2015, at 2, available at www.icc-cpi.int/iccdocs/db/25-DB-Reg-Eng.pdf (accessed 12 March 2018).

¹⁴⁵International Criminal Court, *Strategic Plan for the International Criminal Court 2013-2017*, 18 April 2013, at 3; International Criminal Court, Report of the Bureau on the Strategic Planning Process of the International Criminal Court, ICC Doc. No. ICC-ASP/11/30 (2012), at part D.

¹⁴⁶S. Maupas, 'ICC under fire for internal mismanagement', *JusticeInfo.net*, 26 February 2018, available at www.justiceinfo.net/en/justice-reconciliation/36556-icc-under-fire-for-internal-management.html?Itemid=102 (accessed 19 September 2018).

¹⁴⁷See, e.g., K.J. Heller, 'ICC Labor Woes Part II: What's Two Million Euros Between Friends?', *Opinio Juris*, 30 June 2018, available at opiniojuris.org/2018/06/30/the-iccs-labor-woes-part-ii/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29 (accessed 19 September 2018).

practices are merely objective techniques designed to enhance efficiency. Rather, they also use the positive connotations of management and the negative associations of bureaucracy as a legitimizing tool. They help portray the Court in a favourable light whatever their empirical effects and whatever other issues the Court may be facing. Their capacity to blur the line between expectation and reality should be a cause for concern for an institution where justice must be done, not only be seen to be done. Second, the state-based origins of the efficiency logic place a question mark over the universal nature of such claims. Much like the narrative's rhetorical function, its universalization of particularist interests is troubling for a court that claims to act in the interests, not just of states parties, but of victims' groups, NGOs, and the international community as a whole.

The final point harkens back to international lawyers' need to notice and appreciate the importance of their non-legal, managerial work. If the Court continues to impose a simplistic, uncritical view of managerial practices as an unqualified good, then nuanced debate will be prematurely closed off. Practitioners and scholars must be able to map and analyze managerial practices and their organizational, professional and political effects. Only by recognizing and contesting the bureaucracy/management narrative can the wider ramifications of managerial practices begin to be assessed and, possibly, challenged.